Species Management
Everglades Restoration Efforts: Migratory Birds

USFWS is proposing to evaluate how Everglades restoration impacts birds covered under the Migratory Bird Treaty Act.

- **SFWMD submitted the following as part of its comments on the proposed USFWS evaluation:** "Wildlife habitat in the Everglades has been degraded over several decades. The Everglades restoration work that the SFWMD is engaged in has greatly enhanced wildlife habitat and is expected to continue to enhance that habitat as the District's restoration work continues. Based on the nature of District operations (i.e., moving, raising and lowering large volumes of water), however, the incidental take of MBTA species is likely, and in some cases, unavoidable. As such, given the current uncertainty associated with the FWS Office of Law Enforcement's discretion for incidental take prosecution …, the District requests that the Service consider including SFWMD projects and operations in one of the incidental take approaches set forth in the Notice."
- **USFWS responded with regard to two major SFWMD restoration projects.**
  - **Quote from USFWS June 11, 2015, email response to SFWMD draft operational guidance for the $72 million A-1 Flow Equalization Basin, a 15,000-acre stormwater impoundment built to improve Everglades water quality**: "There should be language regarding monitoring and reporting requirements when nesting is observed as well as in case of imminent, direct, or indirect take . . . Take must be reported. If take occurs, our Office of Law Enforcement (OLE) will need all of that information to indicate that all reasonable and practicable precautions were taken to avoid the take. However, as always it is up to their prosecutorial discretion as whether to investigate further.
  - **Quote from USFWS April 28, 2014, email regarding operation of FEBs:** "We do understand that the intent of the FEBs is to assist in Everglades restoration in the form of improved water quality. Therefore, we view the FEBs similarly as we view the STAs and at this time would advise that an Avian Protection Plan (APP)/Risk Assessment be produced for the FEBs. The USFWS is willing to assist in providing recommendations and review for this effort. Our Office of Law Enforcement (OLE) has prosecutorial discretion when investigating potential take of birds."

April 28, 2014, Email

From: Cindy Fury [mailto:cindy_fury@fws.gov]
Sent: Monday, April 28, 2014 4:38 PM
To: 'Collier, Jeffrey'; 'Morgan, Temperince'
Cc: Emily Jo Williams (emilyjo_williams@fws.gov); Brad Bortner; Carmen Simonton (Carmen_Simonton@fws.gov)
Subject: USFWS Response Regarding SFWMD Special Purpose Permit Inquiry

Hello Temperince and Jeff,

Following the telephone conversation between our two agencies on September 25, 2013, USFWS staff at the Regional and Washington DC Headquarters internally discussed the SFWMD's desire to submit a Migratory Bird Special Purpose Permit application for potential take of birds at the proposed Flow Equalization Basins/reservoirs (FEBs). As requested, we also sent material regarding previously implemented Special Purpose Permits to you via email on February, 18, 2014.

Based on our joint-agency conversation and as per your website, we understand that the FEBs are to *"capture and hold water to provide an available source of consistent flow to the Stormwater Treatment Areas to increase their year-round performance"* in order to improve water quality to the Everglades as per the Settlement Agreement (http://www.sfwmd.gov/portal/page/portal/xrepository/sfwmd_repository_pdf/lass_portfolio_everglades_febs.pdf). We also understand that the FEBs are not currently designed to have the flexibility of STAs to move water from one area to another in order to protect ground-nesting birds.

At this time there are no provisions for incidental take of birds protected under the MBTA. However, discussions as to whether incidental take permits should be instituted for birds and what processes and capacity would be required are currently occurring at executive levels within the USFWS. It is possible that within the next two years, a decision may be made to develop a process to allow permitted incidental take of migratory birds consistent with legal obligations for conservation of species. The regulatory process, including public input and actual changes to rules necessary to institute this type of permit, will take some time to accomplish.

Special Purpose Permits have been granted only to federal entities in the past and under strict guidelines that demonstrated the inability to meet a federal agency responsibility (e.g. issuance of fishing permits) and/or a federal activity that, while possibly resulting in limited incidental take, would result in a substantial benefit to birds (e.g. rat removal to allow recolonization by seabirds). The SFWMD is a state agency.

On our telephone call, you advised that the function of the FEBs are primarily to support water quality and Everglades restoration (including for birds), suggested that the FEBs should be considered as a "unique" case due to the restoration mission and federal Settlement Agreement, and thus should meet criteria to be considered for a Special Purpose Permit. However, we have

many inquiries from other entities for Special Purpose or incidental take permits that believe they are unique and exist for the greater good, such as other restoration and alternative energy projects. Special Purpose Permits are not being considered for any non-federal restoration-based, alternative energy, or other projects at this time. In addition, if these types of projects (or any non-federal projects) were to be considered in the future, a new mechanism and staff/funding capacity to work on the permits would need to first be established within the USFWS.

Therefore, we advise that the SFWMD not apply for a Special Purpose Permit at this time. Once decisions are made by the USFWS regarding whether we will allow incidental take permits for migratory birds, we could revisit whether an incidental take permit would be appropriate if they are authorized.

We do understand that the intent of the FEBS is to assist in Everglades restoration in the form of improved water quality. Therefore, we view the FEBs similarly as we view the STAs and at this time would advise that an Avian Protection Plan (APP)/Risk Assessment be produced for the FEBs. The USFWS is willing to assist in providing recommendations and review for this effort. Our Office of Law Enforcement (OLE) has prosecutorial discretion when investigating potential take of birds. If bird, egg, or nest take were to occur at an FEB, an APP with appropriate conservation measures would help demonstrate to OLE that attempts were made by the SFWMD to minimize or alleviate the take of avian species as a result of FEB construction and operation. Because much of the information and modeling you have discussed gathering and analyzing for a Special Purpose Permit could be used in developing an APP, the results may also be useful to you in the future when applying for an incidental take permit if they are authorized.

We hope this has been helpful and we thank you for your continued interest in restoration and bird protection,
Cindy

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June 11, 2015, Reply to May 18, 2015, Email

From: Cindy Fury [mailto:cindy_fury@fws.gov]
Sent: Thursday, June 11, 2015 1:20 PM
To: Collier, Jeffrey
Cc: Leeds, Jennifer
Subject: RE: USFWS Response Regarding SFWMD Special Purpose Permit Inquiry

Hi Jeff,
I received your phone message and just left a voicemail you can listen to at your leisure. I was on travel and sorry that I just did not have time to review and get back to you regarding the Protected Species Guidance before now.

Regarding the guidance, we can chat together if you want to call back, but initial thoughts from reading the MBTA section are:
- All specific species of interest or potential for ground or shrub nesting should be mentioned.
- Burrowing owls should specifically be addressed as there is likely potential for them to move in along the FEB embankment, and what will be done if so.
- Least terns and potential for impacts should be mentioned since there have been issues in STAs and on SFWMD construction sites.
- What will you do if there is active ground-nesting in the STAs and the FEB(s) at the same time? Where will water be directed? How will those decisions be made?
- Maintenance activities are addressed for the snake and kite but not in the MBTA section – maintenance activities that will result in take of nests, eggs, and/or chicks should be identified and addressed – if active nests are observed of any species, those nests should not be taken during maintenance activities (direct, disturbance, etc).
- Nesting on levees, adjacent spoil, and embankments should be addressed as far as what construction, maintenance, etc take minimization/avoidance measures will be taken.
- There should be language regarding monitoring and reporting requirements when nesting is observed as well as in case of imminent, direct, or indirect take; i.e., discuss how and when you will monitor, report the monitoring, report when there are nests, report what minimization measures will/are being taken, report flexibility of water movement to avoid take, and report when there is take, why the take was required, and the extent of the take. Take must be reported. If take occurs, our Office of Law Enforcement (OLE) will need all of that information to indicate that all reasonable and practicable precautions were taken to avoid the take. However, as always it is up to their prosecutorial discretion as whether to investigate further.
- Along those lines, as I mentioned previously on our calls and emails, I strongly recommend either updating the existing APP for STAs to include FEBs and discuss the various scenarios associated with water manipulation and bird impacts, or develop a separate APP for the FEBs with more information – I have no idea what the operations of these FEBs entail and a summary/synopsis of this is needed for myself or others to understand the situation and operational/legal constraints that you may have.

Regarding your comments for the NOI related to incidental take, I don't know that I would have that much insight into how best for you to comment. Just read the information and make the best case that you can. If you want to run that language by me, I'm happy to take a look at it. I also don't know if at this time they will entertain adding other circumstances to this first go-around of permittable incidental take activities, but restoration may be something they would tackle. After you comment, I could approach our Washington Office and talk with them, and perhaps they would discuss this directly with you once the situation is explained to them again.

That is another reason that you will need a good, easily read, understandable summary of what you are doing, what the FEBs and STAs are, constraints that you have, the legal ramifications, minimization measures, benefits to species in the Everglades, etc.

Hope this helps – feel free to call me with any questions/thoughts.
Cindy

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From: Collier, Jeffrey [mailto:jacollier@sfwmd.gov]
Sent: Monday, May 18, 2015 5:24 PM
To: 'Fury, Cindy'
Cc: Leeds, Jennifer
Subject: RE: USFWS Response Regarding SFWMD Special Purpose Permit Inquiry

Cindy,

Thank you for taking the time to discuss the A-1 FEB with Jennifer and I earlier today. Attached, please find the District's draft Operational Phase Protected Species Guidance for the A-1 FEB. As I mentioned, this draft guidance document combines ESA and MBTA protected species guidance. The guidance measures are species specific until the last page, which sets forth general MBTA guidance. The MBTA guidance is derived from principles set forth in the STA APP.

We look forward to discussing your feedback.

Best,

Jeff

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Sept. 1, 2015, Reply to July 27, 2015, Email

From: Cindy Fury [mailto:cindy_fury@fws.gov]
Sent: Tuesday, September 01, 2015 3:01 PM
To: Collier, Jeffrey <jacollier@sfwmd.gov>
Cc: Leeds, Jennifer <jleeds@sfwmd.gov>; McBryan, Jeremy <jmcbryan@sfwmd.gov>; Teets, Thomas <tteets@sfwmd.gov>; Laurel Barnhill <laurel_barnhill@fws.gov>
Subject: RE: Comments in Response to the FWS Notice of Intent re: PEIS for MBTA Incidental Take Rulemaking

Hello Jeff and team.
We have read through your comments and appreciate that they are thorough and explain the structures, history, and issues very well. Because this is an official NEPA process asking for any interested party to send in comments, and because the Draft Regulation and processes have not yet been formulated, at this time we will need to wait for the official response to the comments to come out and then see what the next steps may be.
Thanks so much,
Cindy

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From: Collier, Jeffrey [mailto:jacollier@sfwmd.gov]
Sent: Monday, July 27, 2015 4:16 PM
To: 'Cindy Fury'
Cc: Leeds, Jennifer; McBryan, Jeremy; Teets, Thomas
Subject: Comments in Response to the FWS Notice of Intent re: PEIS for MBTA Incidental Take Rulemaking

Cindy,

I hope all is well with you. As a follow-up to your comments below, I've attached a copy of the District's comments in response to the FWS NOI re: the PEIS for MBTA incidental take that we submitted today. As you suggested, we would greatly appreciate it if you could approach your Washington office and talk with them about our comments. We would also be happy to be involved in a conference call with your Washington office to discuss our comments and further describe the District's projects and operations as they relate to MBTA issues.

Thanks very much,

Jeff

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SFWMD's Comments in Response to USFWS Notice of Intent to Prepare a Programmatic EIS RE: MBTA Incidental Take

The South Florida Water Management District (SFWMD or District) supports the U.S. Fish and Wildlife Service's (FWS or Service) proposed rulemaking to authorize incidental take of migratory birds under the Migratory Bird Treaty Act (MBTA) as outlined in the May 26, 2015, Notice of Intent (Notice). The District requests that the Service consider the following:

- Under the General Conditional Authorization approach, include an additional industry sector for water management/resource protection entities.
- Issuing the SFWMD an individual incidental take permit because of District project/operational complexities that require project-specific considerations.
- Under the Memoranda of Understanding (MOU) with federal agencies approach, also consider a MOU with state agencies.

I. Background

In 1949, the Florida Legislature created the Central and Southern Florida (C&SF) Flood Control District, the predecessor to the SFWMD, to assist the U.S. Army Corps of Engineers (Corps) in managing the C&SF Project. In 1972, with the adoption of the Florida Water Resources Act, Chapter 373, Florida Statutes, the state created the existing five water management districts, each with broad responsibilities for regional water resource management.

The Legislature created Florida's water management districts to:

- Manage water resources, promote the conservation, replenishment, recapture, enhancement, development, and proper utilization of surface and ground water.
- Develop and regulate dams, impoundments, reservoirs, and other works, and to provide water storage for beneficial purposes.
- Promote the availability of sufficient water for all existing and future reasonable-beneficial uses and natural systems.
- Prevent damage from floods, soil erosion, and excessive drainage.
- Minimize degradation of water resources caused by the discharge of stormwater.
- Preserve natural resources, fish, and wildlife.

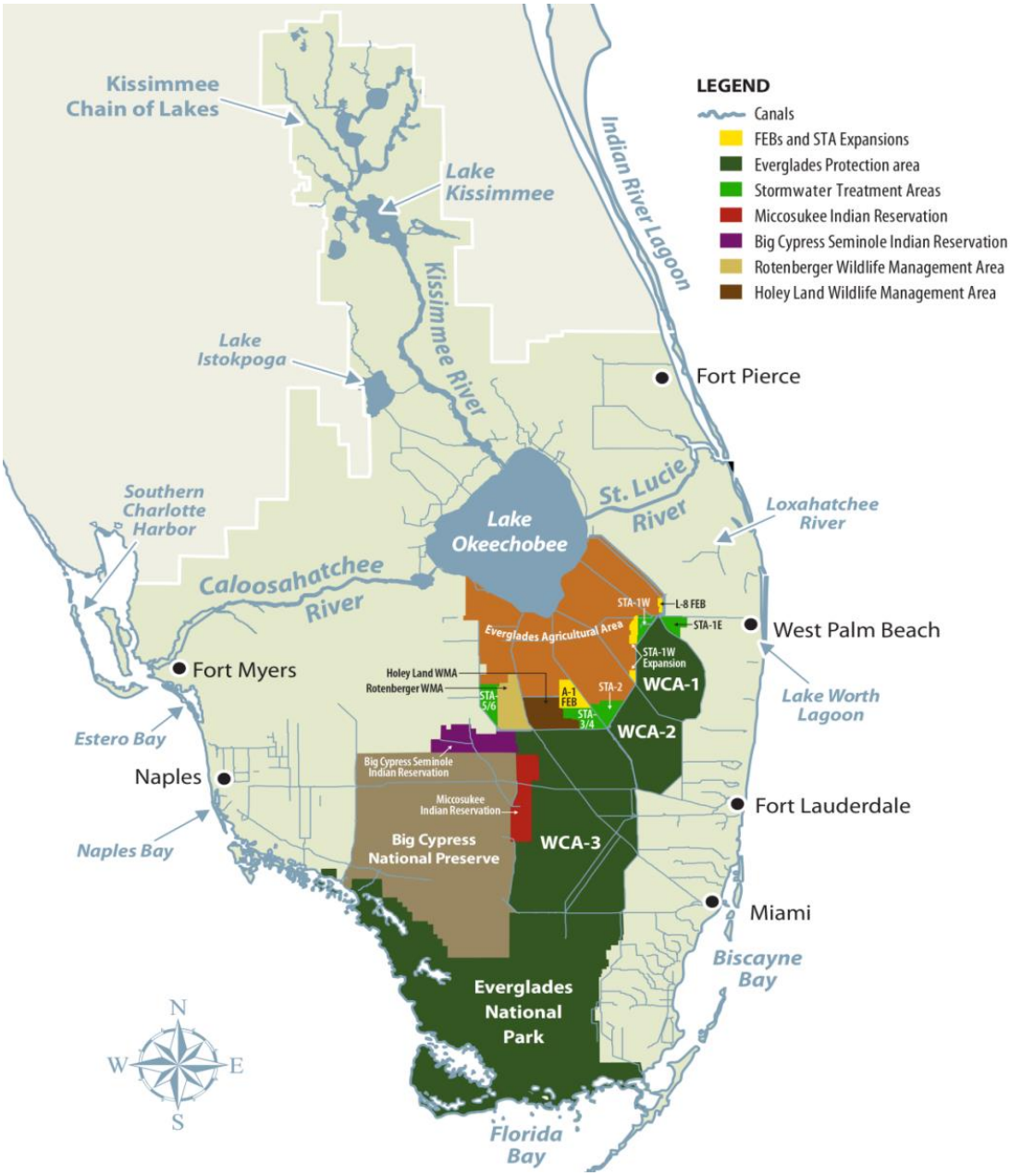
The District's mission is to operate and manage a complex water management system designed to protect water resources of the region by balancing and improving water quality, flood control, water supply, and environmental restoration. The regional water management system contains:

- 2,100 miles of canals and levees
- More than 600 water control structures
- 625 project culverts and 70 pump stations

The District operates water control structures in accordance with regulation schedules and permits reviewed by the Service, and these operations affect flows and water levels in river floodplains, Everglades wetlands, reservoirs, impoundments, lakes, and coastal estuaries, including:

- Dozens of lakes in the Kissimmee River watershed, approximately 20,000 acres of restored Kissimmee river floodplain, and 44 miles of historic river channel
- Lake Okeechobee and its associated wetlands (approximately 500,000 acres)
- Over 863,000 acres of Everglades habitat in Water Conservation Areas 1, 2, and 3
- Approximately 64,000 acres of remnant Everglades wetlands bounded by levees in the Holey Land and Rotenberger Wildlife Management Areas
- Approximately 57,000 acres of Stormwater Treatment Areas (STAs)
- Flow Equalization Basins (FEBs) designed to attenuate peak stormwater flows
- Shallow storage reservoirs

Figure 1. Overview of South Florida Water Management District



II. District Projects

District projects address the four primary functions of the District's mission: flood control, water supply, water quality, and environmental restoration. Environmental restoration projects target improvements in water quality and the timing and distribution of flows to improve hydrologic conditions in the Everglades ecosystem.

With regard to water entering the Everglades Protection Area (EPA), which is comprised of the water conservation areas and Everglades National Park, the state of Florida has established a water quality criteria in the form of a phosphorus concentration limit that, by state law, District facilities must meet prior to discharging flows into the EPA. As provided in Rule 62-302.540, Florida Administrative Code, this means that phosphorus concentrations in inflows must either meet Florida's phosphorus criterion of 10 parts per billion measured as a long term geometric mean or, if that is not feasible, must be as low as is achievable by use of the best available phosphorus reduction technology. Because the stormwater runoff that the District pumps into the Everglades in order to provide flood control and water supply contains elevated levels of phosphorus, this water must be treated. The District treats stormwater runoff before it enters the Everglades by passing it through more than 57,000 acres of constructed treatment wetlands known as STAs (discussed below).

In June 2012, the State of Florida and the U.S. Environmental Protection Agency (USEPA) reached consensus on a new Restoration Strategies (RS) Regional Water Quality Plan for further improving water quality in the Everglades. Based on months of scientific and technical discussions, these strategies will expand water quality improvement projects to achieve an ultra-low Total Phosphorous (TP) water quality standard established for the Everglades. Under these strategies, the District has implemented a technical plan, as documented in the State of Florida's $880 million RS Plan to complete six Consent-Order-mandated water treatment and storage projects between Lake Okeechobee and the Everglades – including more than 6,500 acres of new STAs. The technical plan also calls for 116,000 acre-feet of additional water storage through construction of FEBs (discussed below) to capture runoff during storm events and provide a more steady flow of water to the Everglades STAs, helping to maintain desired water levels needed to achieve optimal water quality performance. Collectively, these projects are part of a revised National Pollutant Discharge Elimination System (NPDES) watershed permit issued by the Florida Department of Environmental Protection (FDEP or Department) and approved by the USEPA for operation of the five existing Everglades STAs (STA-1E, STA-1W, STA-2, STA-3/4, and STA-5/6) (Figures 1 and 2). The NPDES permit, along with a new state-issued Everglades Forever Act watershed permit, established stringent TP limits, referred to as the Water Quality Based Effluent Limitation (WQBEL), for water discharged into the EPA.

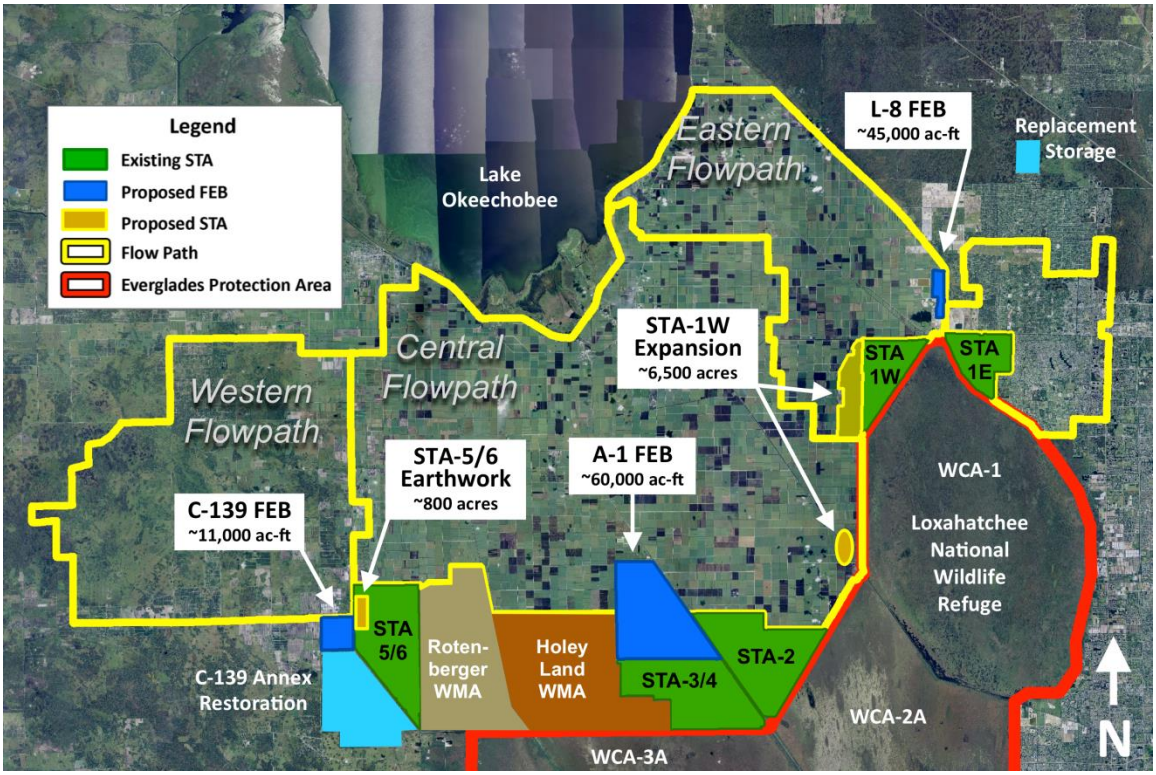
STAs

To meet the water quality criteria, the District constructed STAs, which are large, shallow earthen impoundments, each of which is divided by interior levees into a number of separate treatment cells (cells) that contain emergent or submerged aquatic vegetation communities. Phosphorus in inflows is removed by natural wetland processes and subsequent sediment accretion as the water flows through the STAs. STAs are operated within a 0 to 4 foot maximum stage with the optimum water level between 1.5 feet and 2.5 feet. The water level is affected by season (wet or dry) and is event

driven (e.g., typical wet season storms and rainfall to tropical events such as tropical storms and hurricanes). During these events, the potential to rapidly stage-up a STA exists. Water from storm events is staged-up in the STAs so that untreated or minimally treated water that does not meet the state water quality criteria is not discharged untreated into the Everglades, violating state law.

Because the STAs are constructed treatment wetlands located adjacent to the Everglades, they have had the unintended consequence of becoming nesting and foraging locations for ground nesting birds whose habitat in the Everglades had become degraded over time due to water quality impacts. Habitat creation was incidental and not part of the STA design. The STAs were constructed to improve water quality going into the downstream Everglades with the express purpose of restoring the greater ecosystem and improving downstream wildlife habitat conditions. The STAs, in conjunction with agricultural best management practices, have reduced phosphorus loads in waters leaving the Everglades Agricultural Area (see Figure 1) and entering the Everglades by an average of 80% at a cost of approximately $2 billion.

Figure 2



When the STAs were originally permitted, the Service had not anticipated that there would be impacts to MBTA species. Later, when black-necked stilts were observed nesting in certain STAs, an Avian Protection Plan (APP) was developed in cooperation with the Service. The APP identifies two ground nesting species, burrowing owls and black-necked stilts, to be indicators of other potential ground nesters. However, no burrowing owls have been found in operating STAs. Therefore, the emphasis has been on black-necked stilts which nest within the STAs from March through July. Their nests are relatively easy to see from the STA levees. The presence of black-necked stilt nests is considered indicative of the potential presence of other wetland dependent

MBTA species such as rails, grebes, gallinules, and swamp hens that might be nesting near the water surface. These nests are rarely seen because they are obscured from view within the wetland vegetation.

Black-necked stilt nests are generally located at the edge of the water or on wetland vegetation close to the water surface. If the District adds stormwater to STA cells containing nests, the nests could be inundated. The APP requires that the District avoid and minimize this impact which has limited the District's ability to use the STAs for several months each year. Therefore, the STAs are not being fully utilized to provide needed water quality treatment for the downstream Everglades. To avoid upstream flooding and/or the diversion of untreated stormwater into the Everglades, the District may, as a last resort, operate cells containing black-necked stilt nests. Nevertheless, implementation of the APP for MBTA species nesting in the STAs will affect the District's ability to achieve the mandated WQBEL established by FDEP and the USEPA for protection of downstream Everglades.

STAs are contributing to the restoration of the Everglades by improving water quality. The STAs also have provided a substantial measure of ecological lift to the region; they have benefited birds, fish and other wildlife by creating more than 57,000 acres of high-quality wetland habitat from lands that were previously farmed. The STAs also contribute to the greater restoration of the downstream Everglades, which creates additional habitat for MBTA species and other wildlife.

Currently, the STAs are in-line features as part of the District's flood control system. During a rain or tropical event, the fluctuations in hydrology can vary greatly which affects the STAs' phosphorus treatment performance. In the future, the FEBs, discussed below, will be the primary in-line features as part of the flood control system to alleviate the flashy nature of the stormwater inflows and their detrimental effect on the STAs' ability to uptake phosphorus.

FEBs

A FEB is a large constructed storage feature used to capture and store peak stormwater flows. Water managers can move water from FEBs into STAs at a steady rate to optimize STA performance and achieve water quality improvement targets. FEBs typically act as large one-cell surge tanks that take in event-based inflows upstream of STAs. There is very little to no operational flexibility to divert water around these features to avoid ground nesting birds. The District's first FEB, the A-1 FEB, is scheduled to come on-line this year.

Avoidance & Minimization

The District employs avoidance and minimization practices to the greatest extent practicable to avoid incidental take by following the STA APP. The STAs have slightly more operational flexibility than FEBs as they are multi-celled, allowing for certain cells and flow-ways to operate under restricted stages. The FEBs are single cells and therefore do not have this flexibility. The District developed APPs for migratory birds with a tiered operational approach to avoid and minimize taking nesting birds. Under certain circumstances, however, the District is faced with utilizing an STA with nesting birds to treat stormwater runoff to meet required state water quality laws and potentially taking nests, or avoiding taking nests by sending untreated water directly to the Everglades. In 2025, the water discharging from the STAs must meet the WQBEL. Operations of the FEBs and STAs will be primarily focused on meeting the water quality criteria and optimizing

treatment performance. The flexibility in the STAs to limit stages and flow-ways where birds are nesting will be diminished as those cells and flow-ways will be needed to take in inflows and treat water to the legally required water quality criteria.

MBTA species such as the black-necked stilt have been nesting within the District's STAs for years. Although not the intended purpose of the STAs, these treatment wetlands support many species of birds, fish, and reptiles. However, the District emphasizes that wildlife benefits derived from the STAs do not take precedence over the other elements of its mission, notably the obligation to operate these facilities to provide flood control, water supply and water quality protection to the region. The potential for incidental take exists and under certain circumstances is unavoidable.

III. General Conditional Authorization for Incidental Take Associated with Particular Industry Sectors

Under the General Conditional Authorization set forth in the Notice, the District requests that the Service consider including an additional industry sector for water management/resource protection entities. These industry sectors could include state and local governmental agencies or non-governmental organizations. The resource protection and management by these entities provides or improves the natural habitat and ecosystem of many species including migratory birds. However, at times, even though avoidance and minimization measures are taken, there is the potential for incidental take. For example, because of flood control measures and state water quality requirements, the drowning of MBTA protected nests due to rising stage levels associated with STA and FEB operations is likely. The state water quality standards for the Everglades specifically target improvement in the ecosystem to provide better habitat for bird nesting and foraging on a much larger scale than can be found in the small treatment wetlands. Without the water quality improvements in the Everglades, restoration efforts will not be realized and nesting and foraging habitat will continue to decline.

IV. Individual Permit

In the alternative, the District requests that the Service consider issuing the SFWMD an individual incidental take permit under the approach described in the Notice. Because of the unique nature and complexities of the District's projects and operations, as described above, the Service may conclude that project-specific considerations are required and that an individual incidental take permit is more appropriate than a general, conditional authorization. Further, an individual incidental take permit may be more appropriate for the District given that, although MBTA species usage of District projects is well documented, there is limited information regarding adverse effects.

V. Memorandum of Understanding with Federal Agencies

The District requests that the Service consider expanding the MOU approach set forth in the Notice to include MOU's between the Service and state agencies. In addition, the District specifically requests that the Service consider an MOU between the Service and the District which would authorize incidental take. As a resource protection and management agency, a MOU between the District and the Service could outline certain terms and conditions to be followed, and provide incidental take coverage under MBTA without the need for specific incidental take permits.

VI. Conclusion

Wildlife habitat in the Everglades has been degraded over several decades. The Everglades restoration work that the SFWMD is engaged in has greatly enhanced wildlife habitat and is expected to continue to enhance that habitat as the District's restoration work continues. Based on the nature of District operations (i.e., moving, raising and lowering large volumes of water), however, the incidental take of MBTA species is likely, and in some cases, unavoidable. As such, given the current uncertainty associated with the FWS Office of Law Enforcement's discretion for incidental take prosecution under an APP, the District requests that the Service consider including SFWMD projects and operations in one of the incidental take approaches set forth in the Notice.