

THE EVERGLADES IN JEOPARDY: A DRAMA OF WATER MANAGEMENT AND ENDANGERED SPECIES

KEITH W. RIZZARDI*

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* Keith W. Rizzardi is an attorney for the South Florida Water Management District, practicing environmental law, and is also a certified eco-tour guide. Any opinions in this Article are exclusively the author's, and they do not necessarily reflect the views of his employer. The author thanks Laurie Dietz, Lorelei Cisne, and Kris Hughes, for their editing assistance, and his co-workers at the South Florida Water Management District, for their advice, assistance and support.

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I. PROLOGUE

The Cape Sable seaside sparrow (CSS sparrow) is just one of many endangered species in the Everglades.¹ Yet ever since the El Niño weather events of 1997 and 1998, the CSS sparrow has taken center stage, reaching fame on the front page of *The New York Times* as an endangered species in jeopardy of extinction.² Unfortunately, the efforts to save the CSS sparrow may be putting Everglades restoration efforts in jeopardy as well.

This case study explores the conflict between water management in the Everglades ecosystem and the implementation of the Endangered Species Act (ESA). The Everglades National Park (the Park), the U.S. Army Corps of Engineers (the Corps), and the U.S. Fish and Wildlife Service (FWS) have made good faith efforts to protect the CSS sparrow and to comply with the ESA. However, their efforts may be doing more harm than good. Although there is full recognition of the diversity of wildlife living in the Everglades, a single species—the CSS sparrow—is receiving an inordinate amount of attention. From the recent experiences discussed in this case study, these agencies, and even the nation, can learn lessons to improve the implementation of water management and endangered species protection laws. Future plans for restoring the Everglades, which will soon be developed by the United States Congress in the Water Resources Development Act of 2000, must address the problems of endangered species protection in the Everglades, especially the CSS sparrow.

Part II of this Article provides a brief history of the development of the Everglades and its laws; Part III describes the agencies and

1. See 50 C.F.R. § 17.11 (1999) (providing a list of all endangered species). The CSS sparrow, along with the Florida snail kite and the Florida panther, was added in 1967. See 32 Fed. Reg. 4001 (1967). Species added since then include the red-cockaded woodpecker (see 35 Fed. Reg. 16,047 (1970)), the American crocodile (see 40 Fed. Reg. 44,151 (1975) and 44 Fed. Reg. 75,076 (1979)), and the wood stork (see 49 Fed. Reg. 7,332 (1984)). See also Press Release from U.S. Dep't of Interior, Babbitt Unveils Pivotal Recovery Plan for 68 Species in the Everglades (May 18, 1999), available at <<http://www.fws.gov/r4eao/vbpdfs/nr.pdf>> (visited Mar. 4, 2000).

For geographical context, see maps, *infra* at Appendix.

2. See *Little Bird, Big Weapon*, Reuters, June 11, 1998, available at <http://204.202.137.114/sections/science/DailyNews/everglades_sparrow980611.html> (visited Mar. 4, 2000); James C. McKinley Jr., *Tiny Cape Sable Sparrow Is Test of Will to Restore the Everglades*, N.Y. TIMES, June 3, 1999, at A1.

creatures affected by that law; and Part IV briefly explains the requirements of the environmental laws impacting the Everglades, particularly the ESA. Part V explores recent events related to the Everglades restoration, and Part VI considers the lessons that can be learned from the experience. Finally, Part VII contains the author's conclusions on the fate of the CSS sparrow and the importance of upcoming Congressional legislation.

II. SETTING THE STAGE

With millions of people now living in areas that once were wetlands and part of the natural Everglades ecosystem, flood control is an essential government service in South Florida.³ The lush greenery and wildlife of the South Florida environment is also a key attraction for regional residents and has been another concern of the governmental agencies.⁴ These two governmental duties—flood control and environmental protection—have been engaged in a historic conflict.

A. *Save My Home! Flood Control in the 1940s, 1950s and 1960s*

When the Everglades was free to run its natural course, most of South Florida was under water, and mosquitoes were uncomfortably common for explorers and early settlers. The region earned a menacing nickname: "the Never Glade."⁵ As a result, development and drainage of the region were the primary concerns of many land speculators and Florida residents throughout the late nineteenth and early twentieth centuries.⁶ Nevertheless, the state's natural beauty was recognized. In 1903, President Theodore Roosevelt declared Pelican Island, on the Atlantic Coast, the nation's first national wildlife

3. See NELSON MANFRED BLAKE, *LAND INTO WATER—WATER INTO LAND: A HISTORY OF WATER MANAGEMENT IN FLORIDA* at vii-viii (1980). Blake's book is an excellent historical work on the settlement and alteration of the Florida landscape. For a description of the history of Florida's land and water resource management, see LUTHER J. CARTER, *THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWING STATE* 52 (1974).

4. For a general discussion of areas of concern to governmental agencies, see BLAKE, *supra* note 3, at 196.

5. *Id.* at 15-16.

6. Since the admission of Florida to statehood in 1845, swamp reclamation has been an important part of the state's history. Failed land speculation efforts dominated the late 1800s. William Gleason and Hamilton Disston, for example, were two wealthy investors who went broke trying to develop inland portions of Florida, while Dr. John Westcott proved more successful in his effort to create an intracoastal waterway along Florida's eastern coastline. In the early 1900s, more successful capitalists such as Barron Collier and Henry Flagler grew to prominence, while public officials including Governors Napoleon Bonaparte Broward and Albert Gilchrist, and U.S. Senator Duncan Fletcher, promoted policies to drain and develop Florida. Their efforts laid the foundation for the tensions between development and environmental protection in the late twentieth century. See BLAKE, *supra* note 3, at 45-48, 94-112.

refuge.⁷ Later, in 1947, President Harry Truman, who frequently vacationed in the Florida Keys, created the Park.⁸

The creation of the Park protected the southernmost part of the massive Everglades watershed. The watershed runs north to south across Florida from Lake Okeechobee, in the center of the state, to Florida Bay, the water body between the mainland peninsula of Florida and the Florida Keys.⁹ Ironically, while President Truman protected part of the Everglades with his action,¹⁰ he fundamentally altered the ecosystem with another. In 1948, with Congressional and Presidential authorization, the Corps began construction of the Central & Southern Florida Flood Control Project (C&SF Project).¹¹ The C&SF Project was developed in response to two hurricanes in 1947 that flooded millions of acres of Florida property for over six months.¹² Through the construction of earthen berms, or levees, and water control structures, the C&SF Project divided the previously unimpeded "river of grass"¹³ into an interconnected series of water conservation areas.

The Corps made important additions to the C&SF Project in the 1960s as part of the South Dade Conveyance System.¹⁴ That system increased flood control and water supply for agricultural landowners in southwestern Dade County, but it also fundamentally impacted the Park and the southern Everglades ecosystem.¹⁵ The new flood

7. See NATHANIEL P. REED & DENNIS DRABELLE, THE UNITED STATES FISH AND WILDLIFE SERVICE 7 (1984); U.S. FWS, *Pelican Island National Wildlife Refuge* (visited Nov. 1, 1999) <<http://www.fws.gov/r4eao/wildlife/nwrplcz1.html>>.

8. See Harry S. Truman, Address on Conservation at the Dedication of Everglades National Park, PUB. PAPERS 505 (Dec. 6, 1947); Deborah Nordeen, *South Florida's Watery Wilderness Park Nears 50* (last modified Jan. 6, 1999) <<http://www.nps.gov/ever/eco/nordeen.htm>>.

9. See Everglades Nat'l Park, *Everglades 101: An Introduction to the Ecosystem* (last modified Sept. 9, 1997) <www.nps.gov/ever/eco/ever101.htm>. For a map of the area, see *infra* Appendix.

10. Interestingly, Truman even acknowledged the Park's status as the end of the watershed in his 1947 speech creating the Park, saying "Here is land, tranquil in its quiet beauty, serving not as the source of water, but as the last receiver of it." See Nordeen, *supra* note 8.

11. See Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1171, 1175 (1948); see also U.S. ARMY CORPS OF ENG'RS, COMPREHENSIVE REPORT ON CENTRAL & SOUTHERN FLORIDA FOR FLOOD CONTROL PURPOSES, H.R. DOC. NO. 80-643 (1948); Jacksonville Dist., U.S. Army Corps of Eng'rs, *Development of the C&SF Project* (last modified Oct. 22, 1998) <<http://www.restudy.org/history.htm>>.

12. See Stephen S. Light & J. Walter Dineen, *Water Control in the Everglades: A Historical Perspective*, in EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 58-60 (Steve Davis & John Ogdan eds., 1994).

13. MARJORY STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS 10 (1947) (describing the Everglades as a "thick enormous curving river of grass").

14. See Flood Control Act of 1968, Pub. L. No. 90-483, § 203, 82 Stat. 731, 740-41 (1968).

15. See Light & Dineen, *supra* note 12, at 68.

control system provided the means for agriculture and development to creep westward, even closer to the heart of the Everglades.¹⁶

B. *Save the Earth! Environmental Protection in the 1970s*

By the late 1960s and 1970s, a new era of environmental concern began in the United States.¹⁷ State and national leaders adopted new and important laws such as Florida's Water Resources Act of 1972,¹⁸ the National Environmental Policy Act (NEPA),¹⁹ and the ESA.²⁰

Laws such as these were readily applied in the Everglades. In 1968, pursuant to the ESA's predecessor law, the Endangered Species Preservation Act of 1966, the CSS sparrow and Everglades snail kite were listed as endangered.²¹ Critical habitat for the birds was later designated in the Park and throughout the rest of the Everglades.²² In 1984, the wood stork—with habitat extending throughout Florida, Georgia, and South Carolina—also was listed as endangered.²³ As a result of these listing decisions, species protection would join flood control as an important aspect of water management in the Everglades.²⁴

C. *Save the Dusky! The Extinction of a Florida Bird in the 1980s*

Less than six inches tall and black and white in color, the Dusky seaside sparrow (Dusky sparrow) was another of the many endangered species living in Florida in the 1980s.²⁵ However, the Dusky sparrow's habitat was in an unfortunate location—the coastal marshes of Florida within NASA's John F. Kennedy Space Center.²⁶ Although NASA set aside a portion of this land to create the Merritt Island Wildlife Refuge as a Dusky sparrow habitat, the refuge could not save the endangered bird.

16. See *id.*

17. See BLAKE, *supra* note 3, at 195-97; CARTER, *supra* note 3, at 50-54.

18. Act effective July 1, 1973, ch. 72-299, 1972 Fla. Laws 1126 (establishing water management districts and permitting programs to protect water resources).

19. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4247 (1994 & Supp. III 1997)) (requiring thoughtful consideration of the environmental impacts of federal projects).

20. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)) (protecting rare species from harm and extinction).

21. See 32 Fed. Reg. 4001 (1967) (codified at 50 C.F.R. § 17.11 (1999)).

22. Habitat for both species was designated in 1977. See 50 C.F.R. § 17.95(b) (1999).

23. See 49 Fed. Reg. 7332 (1984) (codified at 50 C.F.R. § 17.11 (1999)); see also U.S. FWS, *Endangered and Threatened Species of the Southeastern United States: FWS Region 4* (last modified Jan. 1996) <<http://www.fws.gov/r9endspp/i/b/sab5z.html>>.

24. See Everglades Nat'l Park, *Threatened & Endangered Species* (last modified Oct. 29, 1999) <<http://www.nps.gov/ever/eco/toofew.htm>> (listing endangered species).

25. See MARK JEROME WALTERS, *A SHADOW AND A SONG: THE STRUGGLE TO SAVE AN ENDANGERED SPECIES* 166 (1992).

26. For a map of the sparrow's habitat, see *id.* at 1.

Mosquito control activities, including the construction of freshwater canals, had made the area bearable for humans in the 1950s.²⁷ Unfortunately, human needs conflicted with the needs of the bird. Large land areas dried out,²⁸ and in 1974 and 1975, fires swept through critical Dusky sparrow habitat.²⁹ Other habitats were destroyed by excessive flooding and construction of a new highway connecting the spaceport to Orlando.³⁰ By 1981, no female Dusky sparrows remained.³¹ Despite a captive cross-breeding program at Walt Disney World's Discovery Island,³² the last Dusky sparrow died in 1987.³³

D. *Save Everything! Water Policy in the 1980s and 1990s*

During the 1980s—the same period that the Dusky sparrow was falling into extinction—the Park began to show the cumulative scars of the historical modifications to its ecosystem. Shark River Slough and Taylor Slough, the two dominant open-water pathways in the Park leading to Florida Bay, had been substantially affected, as comparison with their historical hydropatterns reveals.³⁴ Routine water levels had dropped substantially in Taylor Slough and other southeastern areas of the Park,³⁵ although the controlled releases of water through flood control structures occasionally caused unusually high deliveries of waters during the dry season.³⁶ These alterations were impacting Park habitat—as well as the salinity and clarity of the downstream waters of Florida Bay.³⁷

In recognition of these concerns, the agencies initiated an effort to balance the flood control needs of landowners with the environmental needs of the Park and Florida Bay. The Park, the Corps, and the local sponsor for the C&SF Project, the South Florida Water Management District (Water Management District), obtained Congressional authorization in 1983 to begin an experimental program

27. See *id.* at 31-52.

28. See *id.*

29. See *id.* at 102-107.

30. See *id.* at 82-88, 110-11.

31. See *id.* at 156-57.

32. See WALTERS, *supra* note 25, at 160-73.

33. See Richard Hannan, U.S. FWS, *A Closer Look at Recovery* (visited July 8, 1998) <<http://www.fws.gov/r9endspp/recover2.html>>.

34. See SOUTH FLA. WATER MGMT. DIST., '97 EVERGLADES ANNUAL REPORT 32-33 (1997).

35. See THOMAS VAN LENT ET AL., SOUTH FLA. RESEARCH CTR., WATER MANAGEMENT IN TAYLOR SLOUGH AND EFFECTS ON FLORIDA BAY at v (Report No. SFRC 93-03, 1993).

36. See *id.* at 12.

37. For a simulated comparison of historical hydrology in the Everglades with current hydrology in the managed system, see *Hydroperiod Comparison for a Low Rainfall Year 1989* (visited July 27, 1998) <http://www.eng.fiu.edu/evrglads/save_enp/sm_hydro.gif>.

for the delivery of water into the Park, with the goal of restoring the natural hydrology of the region.³⁸

Although the Experimental Deliveries Program, as it became known, continued throughout the 1980s and 1990s, it often was challenged by angry residents. Fearing impacts to water supply and flood control, regional farmers in southern Dade County initially opposed the program.³⁹ Residents in western Dade County frequently expressed similar concerns about the potential impacts of the program on their homes.⁴⁰ Thus, a balancing act between the needs of Dade County for flood control and water supply and the environmental needs of the Park dominated water management in Florida throughout the 1980s and 1990s. The inherent tensions between these two needs and the disappearance of the Dusky sparrow established the backdrop for the coming interagency conflicts in the Everglades relating to the CSS sparrow.

III. THE ACTORS

A. *Creatures of Law*

Three federal agencies—FWS, the Park, and the Corps—work with Everglades issues on a daily basis. Their efforts are occasionally guided by the advice of a fourth entity: the White House Council on Environmental Quality (CEQ). Together, these federal organizations work with many state and local entities in an attempt to meet the water needs of Everglades species and habitats, as well as the needs of the humans and their homes in nearby regions.

Congress created FWS to conserve, protect, and enhance fish and wildlife resources and their habitats for the continuing benefit of the American people.⁴¹ As a result, implementing the ESA is a primary concern of the agency. Similarly, the Park, which promotes itself as a subtropical wilderness threatened with extinction, is dedicated to the protection of its rare and endangered flora and fauna.⁴² Given the

38. See Supplemental Appropriations Act, Pub. L. No. 98-181, § 1302, 97 Stat. 1153, 1292-93 (1983).

39. See, e.g., *South Dade Land Corp. v. Sullivan*, 853 F. Supp. 404 (S.D. Fla. 1993).

40. See, e.g., Videotape: South Florida Water Management District Governing Board Meeting (May 11, 1995) (on file with author); see also *infra* Part III.C.

41. See Fish and Wildlife Act of 1956, ch. 1036, 70 Stat. 1119 (1956) (codified as amended at 16 U.S.C. §§ 742a-742j (1994 & Supp. IV 1998)); National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (1997); see also U.S. FWS, *Homepage* (visited June 16, 1999) <<http://www.fws.gov>>.

42. See 16 U.S.C. § 410c (1994); see also Everglades Nat'l Park, *Can the Everglades Survive?* (visited June 16, 1999) <<http://www.nps.gov/ever/home.htm>>.

overlapping goals and the fact that both agencies belong to the U.S. Department of Interior, there is a natural alliance between the two.⁴³

By contrast, the Corps has a broader mission. While the Corps is concerned with South Florida's natural resources, it also is responsible for operating numerous flood control structures throughout the state.⁴⁴ Those structures include parts of the C&SF Project. Together with the Water Management District, the Corps must ensure that the C&SF Project is operated in accordance with numerous federal laws. These laws reflect not only environmental concerns, but also flood control, water management and navigation concerns.⁴⁵ Thus, the ESA—a critical law for both FWS and the Park—is just one of many laws affecting the actions of the Corps, and by extension, the Water Management District.

On rare occasions, when significant policy issues are at stake, the White House becomes involved, through the CEQ.⁴⁶ During emergency situations, CEQ plays an especially important role, in accordance with NEPA,⁴⁷ helping governmental agencies to evaluate the environmental consequences of their actions.⁴⁸ However, CEQ is merely an advisory body, although its regulations are binding,⁴⁹ and its recommendations are entitled to substantial deference by the courts.⁵⁰

43. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 155 (1978) (stating that Congress in the ESA made it clear that "endangered species are to be accorded the highest priorities").

44. See Water Resources Development Act of 1992, Pub. L. No. 102-580 § 309(2), 106 Stat. 4797, 4843 (1992); COMPREHENSIVE REPORT ON CENTRAL & SOUTHERN FLORIDA FOR FLOOD CONTROL PURPOSES, H.R. DOC. NO. 80-643 (1948).

45. See Water Resources Development Act; H.R. Doc. No. 80-643; see also Jacksonville Dist., U.S. Army Corps of Eng'rs, *Jacksonville District Home Page* (visited June 16, 1999) <<http://www.saj.usace.army.mil/>>.

46. See 42 U.S.C. §§ 4341-4344 (1994) (discussing administrative evaluation of the efforts and coordination of various governmental agencies).

47. See *id.*

48. See *id.*; see also Council on Env'tl. Quality, *Overview of CEQ* (visited June 16, 1999) <<http://www.whitehouse.gov/CEQ/About.html>>; discussion *infra* Parts III.A, IV.B.1.

49. See Scott C. Whitney, *The Role of the President's Council on Environmental Quality in the 1990s and Beyond*, 6 J. ENVTL. L. & LIT. 81, 85-87 (1991) (explaining that NEPA did not give CEQ authority to promulgate binding regulations, although some courts have treated them as binding under Executive Order 11,991, 42 Fed. Reg. 26,967 (1977), which attempted to make them so); see also *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 424 (5th Cir. 1973) (noting, in an opinion issued prior to Executive Order 11,991, that CEQ guidelines are merely advisory). *But see* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 100 n.12 (1983) ("[W]e do not decide whether [the CEQ guidelines] have binding effect on an independent agency . . .").

50. See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (noting that the CEQ's statutory interpretations are entitled to great deference); *County of Trinity v. Andrus*, 438 F. Supp 1368, 1379-80 (E.D. Cal. 1977) (noting that the scope of judicial review of CEQ action is limited).

B. *Creatures of Nature*

To properly manage the Everglades ecosystem, these agencies must wrestle with the effects of their actions upon dozens of species. Unfortunately, many of these species share a common trait—they become jeopardized or adversely impacted when water levels become too high in the Everglades.

1. *The Leading Role: Cape Sable Seaside Sparrows*

The CSS sparrow is a small, olive and gray bird with habitat in the southern portions of Florida, including the Park.⁵¹ One of eight subspecies of seaside sparrows with habitat ranging from Massachusetts to Florida,⁵² the CSS sparrow has habitat only in the southernmost portions of Florida.⁵³

The CSS sparrows in Florida rely upon vegetative communities dominated by short, sparse sawgrass and muhly grass without permanent water cover.⁵⁴ Since the birds nest close to the ground in these areas, they are particularly vulnerable to changing water levels and hydropatterns.⁵⁵ As a result, their breeding activity declines with increased surface water depths.⁵⁶

Numerous subpopulations of CSS sparrows live in the Park, with a critical subpopulation located northwest of Shark River Slough.⁵⁷ Since many of the sparrow populations are threatened by fire, flooding, and vegetative shifts, FWS has focused upon protecting the western population, which it considers essential to the continued existence of the species.⁵⁸ As a result, FWS has focused upon protecting the western population.

2. *Supporting Actors*

The CSS sparrow has many other endangered and threatened friends in the Everglades, including wood storks, snail kites, wading

51. See U.S. FWS, MULTI-SPECIES RECOVERY PLAN FOR THE ENDANGERED AND THREATENED SPECIES OF SOUTH FLORIDA 4-349 to 4-373 (1998) [hereinafter MULTI-SPECIES RECOVERY PLAN].

52. See *id.* at 4-350.

53. See *id.* at 4-350 to 4-353.

54. See U.S. FWS, FINAL BIOLOGICAL OPINION FOR THE U.S. ARMY CORPS OF ENGINEERS: MODIFIED WATER DELIVERIES TO EVERGLADES NATIONAL PARK, EXPERIMENTAL WATER DELIVERIES PROGRAM, CANAL 111 PROJECT 23 (Feb. 19, 1999) [hereinafter 1999 BIOLOGICAL OPINION]; Letter from Noreen K. Clough, U.S. FWS, to A.J. Salem, Planning Div., Jacksonville Dist., U.S. Army Corps of Eng'rs 9 (Oct. 25, 1995) (regarding Test Iteration 7 of the Experimental Program of Water Deliveries to the Park) [hereinafter 1995 BIOLOGICAL OPINION] (on file with author).

55. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51, at 4-360 to 4-362; 1999 BIOLOGICAL OPINION, *supra* note 54, at 23, 25-27.

56. See 1999 BIOLOGICAL OPINION, *supra* note 54, at 25.

57. See *id.* at 26.

58. See *id.* at 26-27.

birds, and even crocodiles. All of them are significantly influenced by water management in the Everglades ecosystem.

Wood storks are large, long-legged, black and white wading birds with habitat in the Park. They search for food by passing their open beaks through the water and quickly closing them when they touch their prey.⁵⁹ During breeding, water conditions in the nesting habitat must remain low enough in the dry season to concentrate prey and support this feeding technique; otherwise, the storks will abandon their nests in search of improved feeding habitat.⁶⁰ Thus, like the CSS sparrow, the wood stork depends upon reduced water levels within its Everglades habitat.

The eating habits of the snail kite, identifiable by its white-tipped tail feathers and curved beak,⁶¹ are also influenced by water management in the Everglades. A picky eater, the kite has a beak—and diet—uniquely adapted to the almost exclusive consumption of freshwater apple snails.⁶² The kite, therefore, depends upon habitat with extensive, shallow open water, where snails can be readily found.⁶³ Low water levels can dry out the surface, killing the apple snails;⁶⁴ high levels, however, make snails harder to find and can introduce new, densely growing vegetation.⁶⁵

Severe storms, and accompanying high waters, can damage numerous habitats in the Everglades, subsequently impacting these birds and many other species.⁶⁶ The tree islands in Everglades areas north of the Park provide habitat for upland wildlife.⁶⁷ Similarly, the lower willow heads—which are actually only a few inches lower in the vast, flat expanse of the Everglades—provide nesting habitat for wading birds, including the tri-colored heron, the little blue heron,

59. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51, 4-403 to 4-404.

60. See *id.* at 4-401 to 4-404.

61. See U.S. FWS, *Endangered and Threatened Species of the Southeastern United States: FWS Region 4* (last modified Feb. 1991) <<http://www.fws.gov/r9endspp/i/b/sab0v.htm>>.

62. See 1999 BIOLOGICAL OPINION, *supra* note 54, at 36.

63. See *id.* at 34.

64. See *id.*

65. See *id.*

66. See Letter from Bradley J. Hartman, Dir., Fla. Game and Fresh Water Fish Comm'n, to Jon Moulding, Planning Div., U.S. Army Corps of Eng'rs (Jan. 14, 1998) (regarding current high-water event in Palm Beach, Broward, and Dade Counties) [hereinafter 1998 GFC Letter] (on file with author), *reprinted in* U.S. ARMY CORPS OF ENG'RS, DRAFT ENVIRONMENTAL ASSESSMENT: EMERGENCY DEVIATION FROM TEST 7 OF THE EXPERIMENTAL PROGRAM OF WATER DELIVERIES TO EVERGLADES NATIONAL PARK TO PROTECT THE CAPE SABLE SEASIDE SPARROW app. A at 15-18 (Jan. 28, 1998) [hereinafter DRAFT ENVIRONMENTAL ASSESSMENT], *available at* <http://www.saj.usace.army.mil/h2o/lib/documents/ea_css/eacss.htm> (visited Mar. 6, 2000).

67. See *id.*

and the white ibis.⁶⁸ All of these wading birds are listed as species of special concern under Florida law.⁶⁹

Finally, water management in the Everglades also affects wildlife along Florida's coastlines, because waters not flowing through the Everglades must go somewhere—typically to the ocean through the C&SF Project canals. However, a series of estuaries that blend fresh and salt water can be found along Florida's coastline. These estuaries require a proper salinity balance to support their complex ecosystems. Large discharges of fresh water from the C&SF Project canals can impact the salinity balance and the overall quality of the waters, harming flora and fauna, including rare seagrasses⁷⁰ and the American crocodile.⁷¹

C. *Creatures of Concrete*

Although critical to the agencies and wildlife, the water management systems and structures in South Florida were created for the benefit of the region's human residents. The canals drained water and allowed people to live in once-flooded lands.⁷² Roads like Tamiami Trail, built in the 1920s to connect Tampa and Miami, fundamentally altered the flow of water into the Park.⁷³

The region near the Park known as "the 8½ Square Mile Area" (8½ Square Mile) has proven particularly controversial. During the 1950s, 1960s and 1970s, agricultural and residential developments appeared adjacent to Shark River Slough, one of the historic watersheds in the southern Everglades. Raising waters in Shark River Slough can lead to raised water levels in the Area.⁷⁴ Since residents and landowners in that region remain unprotected by flood control systems, they also remain exposed to the occasionally fluctuating water levels from the adjacent Park.⁷⁵ This looming potential for rain-

68. See *id.*

69. See Florida Game & Fresh Water Fish Comm'n, *Florida's Endangered Species, Threatened Species, and Species of Special Concern: Official Lists* (last modified Aug. 1, 1997) <<http://fcn.state.fl.us/gfc/pubs/endanger.html>>.

70. See Florida Marine Research Inst., *Seagrass Disease* (last modified June 23, 1999) <<http://www.fmri.usf.edu/seagrass/disease.htm>>.

71. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51, at 4-10 to 4-13.

72. See COMPREHENSIVE REPORT ON CENTRAL & SOUTHERN FLORIDA FOR FLOOD CONTROL PURPOSES, H.R. DOC. NO. 80-643 (1948).

73. See BLAKE, *supra* note 3, at 187.

74. According to the Corps, raising water levels in Shark River Slough increases groundwater levels, thereby reducing the available water storage in adjacent lands, including the Area. See JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, MODIFIED WATER DELIVERIES TO EVERGLADES NATIONAL PARK 41 (1992). Anticipated flood damages from such increased water levels can include unimproved road deterioration, septic tank damage, damage to potable wells, residential damages, agricultural crop losses, and overall unacceptable living conditions. See *id.* at 41-42.

75. See EAST EVERGLADES 8.5 SQUARE MILE AREA STUDY COMMITTEE, A REPORT TO GOVERNOR LAWTON CHILES 5-7 (1995).

water to impact private property demonstrates that the Everglades restoration is about much more than just wildlife.⁷⁶

IV. THE SCRIPT

Given the number of agencies and species involved, restoring the Everglades is a difficult task. Achieving restoration, while simultaneously complying with all applicable laws, seems to approach the impossible.

A. *The Plot: The Endangered Species Act*

1. *Just the Facts: Best Available Science*

The ESA is deeply rooted in scientific principles, expressly stating that the “best scientific and commercial data available” shall be the basis for determining whether to list a species as endangered.⁷⁷ This requirement was recently evaluated and reaffirmed by a federal task force.⁷⁸ Thus, despite the frequent claims that the ESA inhibits uses of private property, FWS properly makes scientific knowledge, and not property rights or economic considerations, the basis for protecting endangered and threatened species and their ecosystems.

2. *Do No Harm: Takings*

Once the best available scientific information is used to designate a species as threatened or endangered,⁷⁹ section 9 of the ESA prohibits the “taking” of that species.⁸⁰ According to the definitions in the ESA, to “take” means to “harass, harm, pursue, hunt, shoot, wound,

76. See, e.g., Stephen Polasky & Holly Doremus, *When the Truth Hurts: Endangered Species Policy on Private Land with Imperfect Information*, 35 J. ENVTL. ECON. & MGMT. 22, 24-25 (1998).

77. 16 U.S.C. § 1533(b) (1994). Although the U.S. Supreme Court concluded that economic issues can be considered under the ESA, that decision was limited to the issue of whether a party had standing to challenge an ESA action based upon economic grounds. See *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

78. See NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 4 (1995). Of course, the ESA has its detractors, whose claims include: (1) that the Act protects only high-profile individual species, (2) that the Act lacks thresholds to delineate the severity of a species condition, (3) that the Act insufficiently protects species populations, (4) that decisions are made with insufficient documentation, (5) that the Act does not protect sufficient habitat for species once recovered, and (6) that the decisions under the Act are only made in the face of a crisis. See Daniel J. Rohlf, *Six Biological Reasons Why the Endangered Species Act Doesn't Work—And What to Do About It*, in ENVIRONMENTAL POLICY AND BIODIVERSITY 181-94 (R. Edward Grumbine ed., 1994). Other critics have emphasized the failures of administrative agencies in their implementation of the Act and inadequate funding by Congress. See Michael O'Connell, *Response to "Six Biological Reasons Why the Endangered Species Act Doesn't Work—And What to Do About It,"* in ENVIRONMENTAL POLICY AND BIODIVERSITY, *supra* note 78, at 202.

79. 16 U.S.C. § 1533(b) (1994).

80. *Id.* § 1538.

kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁸¹ Regulations define the concept of harm to include harm to habitat.⁸² Further exemplifying the controversies created by the ESA, recent cases have challenged the very constitutionality of these critical provisions. None has succeeded⁸³—yet.

3. *Look Before You Leap: Consultation and Conservation*

In order to avoid takings and similar harms to species, section 7 of the ESA requires federal agencies to consult with FWS to ensure that federal actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat.”⁸⁴ Through the consultation process, FWS may conclude, in a preliminary analysis known as the biological assessment, that no adverse species impacts will result.⁸⁵ However, if the biological assessment concludes that species impacts may occur, FWS must complete a more thorough analysis, referred to as a biological opinion, through a process known as formal consultation.⁸⁶

After FWS completes its formal consultation, if the biological opinion concludes that “jeopardy” to the species will occur as a result of the proposed action, FWS must offer the consulting agency (the “action agency”) “reasonable and prudent alternatives” to the action.⁸⁷ If the action may cause adverse impacts or takings of a species, but will not create jeopardy, FWS may authorize a limited number of takings of the species as “incidental” and provide “reasonable and prudent measures” necessary to minimize those incidental tak-

81. *Id.* § 1532.

82. 50 C.F.R. § 17.2 (1999).

83. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the definition of a taking was challenged by a group of Oregon loggers, which was prevented from clearing the forest habitat of two listed endangered species, the red cockaded woodpecker and the spotted owl. The U.S. Supreme Court approved FWS regulations that defined harm and harass to include destroying or adversely impacting the habitat of an endangered species. *See id.* at 708. Another recent case even went a step beyond the *Sweet Home* decision, challenging the constitutionality of the ESA. However, the United States Court of Appeals for the District of Columbia Circuit ruled that the prevention of species extinction was within Congressional power under the commerce clause. *See National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997).

84. 16 U.S.C. § 1536(a)(2) (1994).

85. *See* 50 C.F.R. § 402.12 (1999).

86. *See id.* § 402.14.

87. *Id.* § 402.14(h)(3). Interestingly, while federal regulations require reasonable and prudent alternatives to be provided, they also state that if the FWS “is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.” *Id.* While this provision would appear to acknowledge that acts of God and other circumstances may create impossible situations, the regulation does not resolve the more fundamental question of whether or not the proposed action will be allowed. A reasonable interpretation is that the issue must be referred to the Endangered Species Committee, as discussed *infra* in notes 95-96 and accompanying text.

ings.⁸⁸ Generally, conformance with the provided alternatives or measures will be sufficient to provide a safe harbor from liability under the ESA.⁸⁹

Incidental takings of species can be authorized under the ESA through a habitat conservation planning process, available to private landowners through section 10 and to federal agencies through section 7 consultation.⁹⁰ This planning process looks at an entire region and develops conditions governing the management of that region for all species, instead of just a single endangered species.⁹¹ These conditions become part of an "incidental takings" authorization, which can allow specific, limited impacts to an endangered species.⁹² Compliance with the authorization generally protects the private landowner or federal agency from further liability under the ESA.⁹³ While federal agencies are not required to develop formal habitat conservation plans, the ESA does place upon them an affirmative duty to preserve and protect species habitat.⁹⁴

Recognizing that formal consultation is time-consuming, federal regulations also provide for an informal process for expedited emergency consultations.⁹⁵ During an informal consultation, FWS provides guidance to the affected agencies; however, FWS will return to formal consultation as soon as the emergency is under control.⁹⁶ The ESA also creates a process for obtaining exemptions in extreme situations from the Endangered Species Committee.⁹⁷ The Committee membership includes, among others, the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency,

88. 50 C.F.R. § 402.14(i) (1999).

89. See *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

90. See 16 U.S.C. § 1539 (1994); Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859 (1998) (codified at 50 C.F.R. pts. 17, 222); U.S. FWS & NATIONAL MARINE FISHERIES SERVS., ENDANGERED SPECIES HABITAT CONSERVATION PLANNING HANDBOOK (1996).

91. See 16 U.S.C. § 1539(a)(2)(A) (1994); Division of Endangered Species, U.S. FWS, *Habitat Conservation Planning* (visited July 16, 1998) <<http://www.fws.gov/r9endspp/hcp/hcpplan.html>>; City of San Diego, *Multiple Species Conservation Program Plan* (last modified Aug. 1996) <<http://www.sannet.gov/mwwd/mscp>>.

92. See 16 U.S.C. § 1539(a) (1994).

93. See Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. at 8870-71; Amy C. Derry, *No Surprises After Winstar: Contractual Certainty and Habitat Conservation Planning Under the Endangered Species Act*, 17 VA. ENVTL. L.J. 357, 367 (1998).

94. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978); *Pyramid Lake Paiute Tribe of Indians*, 898 F.2d at 1417; *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984); *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1237 (S.D. Fla. 1994) (all noting the substantive obligations of federal agencies to protect endangered and threatened species).

95. See 50 C.F.R. § 402.05(a) (1999).

96. See *id.* § 402.05(b).

97. See 16 U.S.C. § 1536(e) (1994).

and the Secretary of the Interior.⁹⁸ This group of public senior officials, sometimes referred to as the “God Squad,”⁹⁹ was empowered by Congress to award exemptions from the ESA if:

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action, and such action is in the public interest;
- (iii) the action is of regional or national significance; and
- (iv) no irretrievable commitment[s] of resources [were made in violation of the ESA].¹⁰⁰

In granting an exemption, the Endangered Species Committee must also provide “reasonable mitigation and enhancement measures,” such as captive breeding or relocation.¹⁰¹ Obtaining this exemption from section 7’s consultation requirements provides an exemption from section 9’s takings prohibitions as well,¹⁰² and can ultimately lead to the extinction of the species. “God Squad” officials have therefore rarely met,¹⁰³ and the mere existence of the committee has spawned controversy.¹⁰⁴

4. *No Room for Error: Enforcement*

All of these ESA requirements are enforced pursuant to section 11, which creates civil and even criminal liability for “knowingly violating” any provision of the ESA.¹⁰⁵ While criminal actions may only be pursued by the U.S. Department of Justice, civil cases may be brought by “any person.”¹⁰⁶ For example, environmental organizations interested in species protection may use this citizen suit provision to seek injunctive relief preventing an action.¹⁰⁷ Thus, citizens can challenge both federal and nonfederal actions, based upon al-

98. See *id.* § 1536(e)(3).

99. See Jared des Rosiers, *The Exemption Process Under the Endangered Species Act: How the “God Squad” Works and Why*, 66 NOTRE DAME L. REV. 825, 833 (1991); U.S. Pub. Interest Research Group & Sierra Club, *Wildlife Need Wild Places: The State of Disappearing Species and Their Habitat* (last modified Jan. 11, 1998) <<http://www.pirg.org/enviro/esa/wildlife/page5.htm>>.

100. 16 U.S.C. § 1536(h)(1)(A) (1994).

101. *Id.* § 1536(h)(1)(B).

102. See *id.* § 1536(o).

103. See des Rosiers, *supra* note 99, at 855; see also WILLIAM H. RODGERS, ENVIRONMENTAL LAW 1015 (2d ed. 1994).

104. See *EDF Challenges Exemption Process for Endangered Species*, EDF NEWSL. (Envtl. Defense Fund, New York, N.Y.), Sept. 1979, available at <http://www.edf.org/pubs/EDF-letter/1979/Sep/d_species.html> (visited Mar. 6, 2000).

105. See 16 U.S.C. § 1540 (1994).

106. *Id.* § 1540(g).

107. See *id.* § 1540(g)(1)(A).

leged violations of the consultation requirements in section 7 or the takings prohibitions in section 9.¹⁰⁸

B. The Subplots: Environmental Restoration and Property Rights

Agencies working in the Everglades must consider numerous laws in addition to the ESA. The Everglades Expansion Act requires the Corps to consider whether its actions in the Everglades adversely impact the 8½ Square Mile. Further, the Takings Clause of the Federal Constitution, and the Florida Constitution as well, creates a body of “inverse condemnation” law that could require the government to pay landowners for the flooding of private property.

1. The Everglades Expansion Act

Pursuant to federal law, the the 8½ Square Mile and adjacent lands have specific guidelines for floodplain management. In the Everglades National Park Protection and Expansion Act of 1989,¹⁰⁹ Congress authorized the addition of new lands to the Park, moving its eastern boundary closer to the coast—and closer to the agricultural and residential areas.¹¹⁰ The law was an outgrowth of ongoing efforts in the region, including a 1983 supplemental appropriations act that directed the Secretary of the Army to “conduct an experimental program for the delivery of water” to the Park.¹¹¹

Fearing the potential consequences of the Park’s expansion and the changes in hydrology, Congress directed the Corps in 1993 to complete a study of the region to determine whether increasing water levels in the Park would adversely affect the area’s residents.¹¹² Congress authorized the Corps, if adverse effects were found, either to construct a flood mitigation system or to alter the water deliveries to avoid the effects.¹¹³

2. Constitutional Law and Inverse Condemnation

Perhaps most significantly, the Takings Clause of the U.S. Constitution has implications for water management in the Everglades. If a government action causes physical taking of a person’s property, an inverse-condemnation lawsuit can be brought, and the government

108. See *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121 (8th Cir. 1990); *Defenders of Wildlife v. Administrator, Env'tl. Protection Agency*, 882 F.2d 1294, 1299-1300 (8th Cir. 1989).

109. Pub. L. No. 101-229, 103 Stat. 1946 (1989) (codified as amended at 16 U.S.C. §§ 410r-5 to 410r-8 (1994)).

110. See *id.* § 104, 103 Stat. 1946, 1949 (codified as amended at 16 U.S.C. § 410r-8).

111. Supplemental Appropriations Act, Pub. L. No. 98-181, § 1302, 97 Stat. 1153, 1292-93 (1983).

112. See 16 U.S.C. § 410r-8(b) (1994).

113. See *id.* § 410r-8(c), (d).

agency may be required to pay just compensation and cease the action.¹¹⁴ Under federal law, even a temporary taking of property could require the government to pay for the rental value of the property for the duration of the taking.¹¹⁵

The Corps, however, has some immunity for its flood control operations. Flooding resulting from the lawful exercise of federal powers, such as the raising of stream levels to support navigation within the ordinary high-water mark, may not qualify as an inverse condemnation requiring compensation.¹¹⁶ Furthermore, in some circumstances the flooding of property that results from the operation of a flood control system may not be a taking, if the relative benefits of the system for a parcel of property exceed the damage the system causes to that property.¹¹⁷ Scholars have even suggested that if flooding results from shutting down a flood-control system, such as occurs when a dam is removed, it cannot be considered a taking at all.¹¹⁸ Nevertheless, water managers in the Everglades must be wary of these constitutional issues. Even if the Corps is immune from liability, the Water Management District, responsible for operating and maintaining the system at the local level, may not be.¹¹⁹

114. See *United States v. Clarke*, 445 U.S. 253, 257 (1980); NICHOLS' LAW OF EMINENT DOMAIN § 25.41 (Julius L. Sackman ed., 3d ed. 1984).

115. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 319 (1987); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949).

116. See 33 U.S.C. § 702c (1994); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 805 (1950); *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 595-97 (1941).

117. See *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939); *Laughlin v. United States*, 22 Cl. Ct. 85, 114 (Cl. Ct. 1990).

118. See Sharon S. Tisher, *Everglades Restoration: A Constitutional Takings Analysis*, 10 J. LAND USE & ENVTL. L. 1, 27-29 (1994). According to Tisher, where the government creates a flood control system for public benefit, and it later concludes that the public benefit land no longer exists, the "reversionary engineering" designed to return the environment and the land to its previous state should not be considered a taking. *Id.* at 43-44.

119. First, no judicial ruling has been made as to whether the Corps' immunity applies to the Water Management District as local sponsor of the federal project. However, this concept of shared immunity has been broadly recognized by federal courts. See *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20-21 (1940); *Portis v. Folk Constr. Co., Inc.*, 694 F.2d 520, 524 (8th Cir. 1982). Second, even if the Water Management District had federal immunity, it still could remain exposed under Florida law if operation of flood control structures resulted in the flooding of private property. Under the Florida Constitution, an inverse condemnation may exist where flooding occurs and is reasonably expected to continue. See *Thompson v. Nassau County*, 343 So. 2d 965, 966 (Fla. 1st DCA 1977); *Elliot v. Hernando County*, 281 So. 2d 395, 396 (Fla. 2d DCA 1973). Destruction of personal property due to flooding may also require compensation. See *Flatt v. City of Brooksville*, 368 So. 2d 631, 632 (Fla. 2d DCA 1979). Also, temporary takings claims are becoming increasingly common. See *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994); *Associates of Meadow Lake, Inc. v. City of Edgewater*, 706 So. 2d 50, 52 (Fla. 5th DCA 1998).

Recently, a Florida court even ruled that a temporary, non-recurring flooding of a lettuce farm due to Water Management District flood control operations constituted a taking, requiring payment for personal property destroyed by the event. In *Basore of Florida, Inc. v.*

The Everglades Expansion Act, as discussed above, further complicates application of the takings clause.¹²⁰ And of course, if an inverse condemnation claim succeeds, establishing a violation of constitutional principles, sovereign immunity would not apply, and compensation for the taking would be due to the landowner.¹²¹

Finally, impacting private property also has potential non-monetary consequences for federal agencies. Knowingly exposing the federal government to financial obligations for a taking can be construed as a violation of the Anti-Deficiency Act.¹²² That law makes it illegal for a federal governmental official to involve an agency in an obligation to pay money exceeding Congressional appropriations.¹²³ Although the law is generally applied to contractual obligations, the predecessor statute to the Anti-Deficiency Act was construed to apply to condemnation awards as well.¹²⁴ Exposing a federal agency to condemnation claims, without having ensured the availability of funding, could ultimately result in criminal penalties for the federal employee.¹²⁵

V. THE PERFORMANCE

A. *Anticipation: Seeking Guidance, but Ruffling Feathers*

In the summer of 1997, the Corps, in conjunction with the Water Management District, attempted to convene a special workshop for eight regional bird experts to develop alternatives for avoiding future conflicts between the Experimental Deliveries Program, restoration construction, and threatened and endangered species.¹²⁶ Already, the Corps had expressed frustrations with its inability to complete some of its restoration work in the Everglades because of ESA considera-

South Florida Water Management District, No. 94-2334 AE (Fla. 11th Cir. Ct. Oct. 8, 1997), the trial court ruled that the Water Management District was liable for an inverse condemnation and had taken personal property because its management of the flood control systems permitted an extended flooding of Basore's lettuce crop. That decision was later reversed, see 723 So. 2d 287 (Fla. 4th DCA 1998), and review was denied by the Florida Supreme Court, 740 So. 2d 527 (Fla. 1999). Although the appellate court exonerating the Water Management District from takings liability, noting that the flooding was an accidental and temporary result of a 1-in-50-year storm event, the case demonstrates the challenges that inverse condemnation laws can create for flood control agencies in Florida.

120. See *supra* Part III.B.1.

121. See *Monogahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); *Turner v. United States*, 17 Cl. Ct. 832, 834 (Cl. Ct. 1989).

122. See 31 U.S.C. § 1341 (1994).

123. See *id.* § 1341(a)(1).

124. See 54 Comp. Gen. 799 (1975).

125. See 31 U.S.C. § 1350 (1994).

126. See Letter from Craig Johnson, Supervisor, South Fla. Ecosystem Restoration, U.S. FWS, to Col. Terrence Rice, Jacksonville Dist. Eng'r, U.S. Army Corps of Eng'rs (July 11, 1997) (on file with author); Listed Species Workshop Draft Agenda Outline (Aug. 5-6, 1997) (on file with author).

tions, such as concerns for nesting wood storks and snail kites.¹²⁷ The workshop was intended to address the impact of the predicted 1997-1998 El Niño event upon the CSS sparrow and other endangered Everglades species.

FWS objected to the effort. In a letter, the agency said it would not “subsume [its] authorities or mandates” to an interagency workshop. The agency added “[We] resent the suggestion that we need a workshop to develop a way to avoid future conflicts between restoration projects and threatened or endangered species.”¹²⁸ Instead, FWS said, any ESA conflicts that arose were a product of actions by the Corps:

[W]e have to demand certainty for the species that are on the brink of extinction . . . if you change a project in a way that eliminates protection for a threatened or endangered species, after agreeing to protective conditions or restrictions, you should not blame listed species for creating a “conflict” with the project.¹²⁹

As a result of the FWS letter, the workshop was cancelled and replaced by a FWS promise to independently work with the Corps as necessary.¹³⁰

B. Triangulation: Sparrows and Wood Storks and Kites, Oh My!

By December 1997, the effects of El Niño upon the Everglades were becoming apparent. El Niño was causing excessive rain events, and waters flowing through the Everglades and into the Park were significantly above normal.¹³¹

Given the conditions, the Corps was busy. While many of the water management structures throughout the Everglades and the C&SF Project are operated and maintained by the Water Management District, a few critical structures remained in the control of the Corps.¹³² Among those structures were four structures built along Tamiami Trail. The structures, known as the S-12A, S-12B, S-12C and S-12D structures, are gated structures that operate akin to a

127. See Cyril T. Zaneski, *Conflict in the Glades: Scientists, Engineers at Odds over Restoration*, MIAMI HERALD, Jan. 4, 1998, at L1.

128. Letter from Johnson, *supra* note 126, at 2-3.

129. *Id.* at 3.

130. *See id.*

131. *See* SOUTH FLA. WATER MGMT. DIST., SURFACE WATER CONDITIONS REPORT (Dec. 1997 and Jan. 1998); Florida Div. of Emergency Mgmt., El Niño Weather Events: Situation Report No. 16 (Mar. 9, 1998), available at <<http://www.dca.state.fl.us/fdem/DEM/EOC/SITREPS/sr16.htm>> (visited Mar. 6, 2000).

132. *See* Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist., 721 So. 2d 389, 390 (Fla. 3d DCA 1998) (distinguishing structures operated, maintained and controlled by the Corps and Water Management District); Bruce Tappmeyer, Jacksonville Dist., U.S. Army Corps of Eng'rs, *Flood Control Structures* (last modified June 23, 1999) <<http://www.saj.usace.army.mil/conops/structures/fl-nav.htm>>.

guillotine and allow water to pass under the open gap when lifted.¹³³ Typically, the Corps operates the structures using a series of regulation schedules that set forth ideal operating conditions. According to the regulation schedules, El Niño conditions required the structures to open and drain water southward to the Park.¹³⁴

Unfortunately, opening the S-12 structures would send larger-than-usual amounts of water into the Park during the otherwise dry winter season and would threaten the breeding habitat of the western CSS sparrow populations just south of the structures. On December 24, 1997, FWS and the Park reacted with a warning letter to the Corps:

At this time, continued regulatory releases would exacerbate the current flood conditions and would likely preclude the possibility of a successful 1998 nesting season. . . . [F]aced with the sixth consecutive nesting season with little to no breeding by birds in the western core population, the Cape Sable seaside sparrow faces extinction. The western population of the Cape Sable seaside sparrow faces local extirpation, with extirpation of the western population comes an elevated and, in the opinion of [FWS and the Park], an unacceptable risk of extinction.

. . . .

[FWS and the Park] cannot concur with actions that increase the risk of an unsuccessful nesting season We support actions that distribute consequences equally among all C&SF Project [water conservation areas].¹³⁵

In response to the letter, the Corps kept the four S-12 structures closed.¹³⁶ The consequences were predictable. Water levels were already high in the water conservation areas north of the Park's boundaries, which include the important tree islands and lower willow heads. Closing the S-12 structures turned Tamiami Trail into a dam across the Everglades. By trying to protect the CSS sparrow, the Corps created new problems.

In January 1998, the Florida Game and Fresh Water Fish Commission sent a letter to the Corps complaining about the adverse impacts of the high water levels upon the habitat of the other Ever-

133. See Milbra A. Billings, South Fla. Water Mgmt. Dist., Structures 12A, B, C, and D (n.d.) (on file with author).

134. See Interview with Tommy Strowd, Dir. of Operations, South Fla. Water Mgmt. Dist. (July 7, 1999).

135. Letter from Stephen W. Forsythe, State Supervisor, U.S. FWS, & Richard G. Ring, Superintendent, Everglades Nat'l Park, to Col. Joe Miller, Dist. Commander, U.S. Army Corps of Eng'rs (Dec. 24, 1997), in DRAFT ENVIRONMENTAL ASSESSMENT, *supra* note 66, app. A at 10, 11-12.

136. More precisely, the structures were kept in their current position, with the western S-12 A and B structures fully closed, and the eastern S-12 C and D structures open only to a minimal degree. See Interview with Strowd, *supra* note 134.

glades wading birds.¹³⁷ FWS agreed, sending a similar letter to the Corps, alleging that the high water levels would adversely impact the endangered wood stork and snail kite.¹³⁸ The letter also noted that moving those waters to the east coast canals and eventually into the downstream estuaries would adversely affect the vegetation and fish along the coastline.¹³⁹

We have never recommended actions that protect the endangered Cape Sable seaside sparrow at the expense of other portions of the historic Everglades ecosystem. Despite suggestions to the contrary, we have consistently maintained that *all* beneficiaries of the C&SF project, including private lands, should share the adversity created by high water levels in South Florida. We believe your agency currently has options to share the adversity that are not being used, such as using the S-333 structure to deliver flows to northeast Shark River Slough.¹⁴⁰

While FWS was taking appropriate measures to meet its duty of protecting wildlife, this "option" of sending waters into Shark River Slough through the S-333 structure came with another potential consequence: flooding private property. The S-333 structure is a small structure located east of the S-12 series structures, atop the northeast Shark River Slough. Raising waters in that Slough could impact the landowners in the 8½ Square Mile Area downstream. It was an option the Corps, given its flood control responsibilities and respect for property rights laws, was reluctant to pursue.

C. *Desperation: Please, Mr. Secretary?*

As a result of El Niño and the letters from the Florida Game & Fresh Water Fish Commission and FWS, the Corps considered itself faced with emergency circumstances. Recognizing that the emergency required the Corps to deviate from the previously approved version of the Experimental Deliveries Program, the Corps began preparing an emergency environmental assessment in accordance with NEPA.¹⁴¹ The Corps even knocked a 1,000-foot gap in a levee north of the Park, allowing the diversion of waters around the CSS sparrow habitat. Creation of the gap proved extremely sensitive and difficult due to its proximity to the site of the tragic ValueJet air-

137. See 1998 GFC Letter, *supra* note 66; see also *Effort to Save Sparrow Imperils Other Wildlife*, PALM BCH. POST, Jan. 30, 1998, at A13; Robert P. King, *Plan to Save Sparrows Could Hurt Other Everglades Wildlife*, PALM BCH. POST, Jan. 7, 1998, at B3.

138. See Letter from Stephen W. Forsythe, State Supervisor, U.S. FWS, to Col. Joe Miller, Dist. Commander, U.S. Army Corps of Eng'rs (Jan. 15, 1998) (on file with author); Martha Musgrove, *Restoring the Everglades Generates Tough Trade-Offs*, MIAMI HERALD, Jan. 21, 1998, at A11.

139. See Letter from Forsythe, *supra* note 138.

140. *Id.*

141. See DRAFT ENVIRONMENTAL ASSESSMENT, *supra* note 66.

plane crash of 1996.¹⁴² But the very fact that the Corps was willing to undertake such a difficult effort proved its determination to find solutions. Still, the diversion was relatively small and hardly sufficient to end the threat to the CSS sparrow or the flooding of the water conservation areas north of the Park. The informal dialogue between the Corps and FWS continued.¹⁴³

While the Corps continued to debate alternatives with FWS, the Water Management District became increasingly concerned. As the operator of the federal C&SF Project, required to follow the instructions of the Corps, the Water Management District began to worry about its own potential for ESA liability. To clarify the requirements of the ESA and obtain additional guidance regarding its responsibilities, the Water Management District sent a letter to U.S. Department of the Interior Secretary Bruce Babbitt.

The Water Management District's January 28, 1998, letter cited the concerns shared by all federal and state agencies for the endangered CSS sparrow and explained the emergency actions being taken on its behalf.¹⁴⁴ But the Water Management District also set forth the potential consequences of the emergency measures, such as flooding private lands. A worst-case scenario projected that accumulating water levels in the Everglades could cause "wave action" in the typically slow-moving Everglades, compromising the structural integrity of the levee system and potentially causing catastrophic flooding of areas of the Everglades and western portions of South Florida near the Everglades levees.¹⁴⁵

The letter to Secretary Babbitt also framed the legal constraints which faced the Corps and, by extension, the Water Management District, by asking some difficult questions:

Can an alternative which causes a constitutional taking of private property be reasonable and prudent under the ESA? Can an alternative which violates other congressional authorizations be reasonable and prudent?¹⁴⁶

The questions would never be directly answered.¹⁴⁷

142. See *Briefly*, PALM BCH. POST, Jan. 1, 1998, at B2.

143. See Interview with Strowd, *supra* note 134.

144. See Letter from Samuel E. Poole III, Exec. Dir., South Fla. Water Mgmt. Dist., to Bruce Babbitt, Sec'y, U.S. Dep't of Interior (Jan. 28, 1998) (regarding the CSS sparrow and compliance with the ESA) (on file with author).

145. See *id.* at app. A.

146. *Id.* at app. B.

147. Instead, FWS sent a letter explaining that "in some cases, no alternatives are available to preclude a jeopardy determination." Letter from Stephen W. Forsythe, State Supervisor, U.S. FWS, to Samuel E. Poole III, Exec. Dir., South Fla. Water Mgmt. Dist. (Mar. 27, 1998) (regarding the CSS sparrow and compliance with the ESA) (on file with author).

On the same day that the Water Management District sent the letter to Secretary Babbitt, the Corps completed its draft emergency environmental assessment.¹⁴⁸ That document, prepared in accordance with the emergency provisions of NEPA and sent to the CEQ, evaluated the problems and alternatives, concluding that “no good alternative was available, and that every alternative was likely to have a significant impact on property or natural resources.”¹⁴⁹

D. Preparation: Bracing for Litigation

Not surprisingly, the plight of the CSS sparrow and other Everglades wildlife caught the attention of many public interest groups. Litigation appeared inevitable. Citing concern for the CSS sparrow, the Natural Resources Defense Council and the Biodiversity Legal Foundation each filed notice of intent to sue on behalf of the endangered CSS sparrow, alleging violations of the section 9 takings prohibitions in the ESA.¹⁵⁰

Meanwhile, the Miccosukee Tribe of Indians of Florida (the Tribe) provided the most tangible proof of the no-win scenario that El Niño had created. Concerned about the impact the high waters in the northern Everglades were having upon lands historically used for cultural and religious practices,¹⁵¹ the Tribe notified CEQ of its concerns.¹⁵² That notice was accompanied by the Tribe’s notice of intent to sue on behalf of the endangered wood storks and snail kites that shared lands with the Tribe.¹⁵³ In addition, the Tribe was supported by a distinguished ornithologist who fundamentally disagreed with the Department of Interior biologist over whether the CSS sparrow was in jeopardy of extinction.¹⁵⁴

148. See DRAFT ENVIRONMENTAL ASSESSMENT, *supra* note 66.

149. *Id.* at 4.

150. See Letter from John H. Adams, Exec. Dir., National Resources Defense Council, to Bruce Babbitt, Sec’y, U.S. Dep’t of Interior (Feb. 13, 1998) (regarding the emergency with the CSS sparrow) (on file with author); Letter from Sidney B. Maddock, Env’tl. Analyst & Att’y, Biodiversity Legal Found., to Togo D. West, Jr., Sec’y of the Army, et al. (Apr. 7, 1998) (giving 60-day notice of intent to sue regarding violations of the ESA) (on file with author).

151. See Robert P. King, *El Niño Rains Creating Everglades Mess*, PALM BCH. POST, Feb. 22, 1998, at 1A.

152. See Letter from Dione C. Carroll, Att’y for the Miccosukee Tribe of Indians, to Council on Env’tl. Quality (Feb. 12, 1998) (on file with author).

153. See Letter from Dexter W. Lehtinen, Att’y for the Miccosukee Tribe of Indians, to Bruce Babbitt, Sec’y, U.S. Dep’t of Interior (Mar. 16, 1998) (giving notice of intent to sue under the ESA) (on file with author).

154. See William Post, *Biology of the Seaside Sparrow in the Everglades Region of Florida* (n.d.) (white paper submitted to the independent review panel convened by the Science Coordination Team of the South Florida Ecosystem Restoration Task Force, on file with the author). A copy of Dr. Post’s paper is also available for download from <<http://www.sfrestore.org/sct/sparrow/sparrow.htm>> (visited Mar. 6, 2000) (MS Word and WordPerfect formats).

The letters from the third parties foreshadowed legal troubles for the Corps, but two letters from FWS were equally serious. FWS notified the Corps that opening the S-333 structure, which would deliver waters into Shark River Slough, was “an essential step” under the section 7 ESA consultation process.¹⁵⁵ On April 7, 1998, when the Corps again rejected FWS’s advice, FWS responded to the Corps’ refusals:

[T]he Corps has not implemented any of the actions recommended by [FWS] to reduce adverse impacts to listed species resulting from the Corps’ emergency actions. When, during an emergency consultation under section 7 of the ESA, an action agency (the Corps in this case) does not implement [FWS]’s recommended measures for minimizing adverse effects of emergency actions, or partially implements [FWS]’s recommended measures, [FWS] is obliged to advise the action agency that any take resulting from such incomplete implementation does not meet the requirements for exemption from the taking provisions of Section 9 of the ESA. We believe such advice is pertinent to the sparrow situation.¹⁵⁶

Actually, the Corps had already implemented at least one recommended action through a cooperative agreement regarding the South Dade Conveyance System.¹⁵⁷ The agreement, signed by the Corps, FWS, the Water Management District, and the Park, established new emergency operational schedules for the structures in the area and allowed more water to be sent away from the CSS sparrow towards the Atlantic coastline.¹⁵⁸ The agreement also specifically acknowledged that the actions were consistent with the ESA.¹⁵⁹ Nevertheless, the April 7, 1998, letter clearly established that FWS believed more measures were necessary to protect endangered species—even if those measures meant the flooding of private property.

155. Letter from Stephen W. Forsythe, State Supervisor, U.S. FWS, to Col. Joe Miller, Jacksonville Dist. Commander, U.S. Army Corps of Eng’rs (Mar. 24, 1998) (regarding emergency section 7 consultation for the CSS sparrow) (on file with author).

156. Letter from Stephen W. Forsythe, State Supervisor, U.S. FWS, to Col. Joe Miller, Jacksonville Dist. Commander, U.S. Army Corps of Eng’rs (Apr. 7, 1998) (on file with author) (emphasis added). In response to the two letters to Secretary Babbitt, a similar letter was sent to the Water Management District, which stated:

[T]o the extent that the action agency implements those [agreed upon] measures in its response to the emergency, the requirements for exemption from the taking provisions of Section 9 have been met. Any take resulting from incomplete compliance with measures provided by the Service is not covered by the exemption.

Letter from Forsythe, *supra* note 147.

157. See COOPERATIVE AGREEMENT BETWEEN SOUTH FLORIDA WATER MANAGEMENT DISTRICT, U.S. ARMY CORPS OF ENGINEERS, UNITED STATES FISH AND WILDLIFE SERVICE, AND EVERGLADES NATIONAL PARK (1998).

158. See *id.* at 1.

159. See *id.*

As painful as the situation was for the Corps, it was about to get worse.

In April 1998, a potent microorganism, known as cryptoperidiniosis, or crypto, which breaks down the mucus membrane coating fish, was discovered in the coastal estuaries of southeast Florida.¹⁶⁰ The emergence of the organism was attributed to massive discharges of high-nutrient waters away from the Everglades and the CSS sparrow.¹⁶¹ During the coming weeks, hundreds of fish were discovered dead or dying from lesions, and the local fishing and tourist economies, especially at the mouth of the St. Lucie River, were significantly affected.¹⁶²

In a special public hearing held that month to address the concerns of St. Lucie area residents, Corps and Water Management District officials attempted to explain the difficulties of operating the C&SF Project.¹⁶³ At the meeting, the FWS representative made an even stronger push for the protection of the CSS sparrow, telling the Corps:

[W]e believe that the adversity should have been better shared . . . [W]e believe that there were other options for the water, such as the Everglades Agricultural Area and the 8½ Square Mile Area.¹⁶⁴

It seemed once again that FWS was supporting the flooding of private property in order to save the CSS sparrow. Notably, that position was also supported by dozens of cheering residents attending the meeting.¹⁶⁵

E. Resolution: Muddling Through, Still in the Swamp

When the unusually wet winter months of 1997-1998 finally passed, Lake Okeechobee levels dropped, releases to the coastal estuaries ended, and the Corps avoided impacts to the the 8½ Square Mile.¹⁶⁶ Mother Nature granted the agencies a reprieve. But El Niño's passage did not mark the end of the CSS sparrow's problems.

160. See Chuck McGinness, *Growing Fish Kill Blamed on Tiny Algae*, PALM BCH. POST, Mar. 20, 1998, at A1; Mark Pollio, *Scientists Find Lesions' Source*, FT. PIERCE/PORT ST. LUCIE TRIB., Apr. 5, 1998, available at <<http://www.portsaintlucie.com/news/1998/0405/story4.htm>> (visited Mar. 6, 2000).

161. See sources cited *supra* note 160.

162. See Pollio, *supra* note 160.

163. See Glenn Henderson, *Endangered Bird, Officials, Wind Up Losers*, PALM BCH. POST, Apr. 12, 1998, at B1.

164. Videotape: Martin County Administration Town Meeting: Healthy Rivers Forum (South Fla. Water Mgmt. Dist. Media Services, Video No. 712, 1998) (on file with author).

165. See *id.*; Interview with Strowd, *supra* note 134.

166. See Robert P. King, *South Florida Flood Woes Drying Up*, PALM BCH. POST, Apr. 15, 1998, at B1.

1. *Independently: The Scientific Peer Review Panel*

By January 1999, FWS and the Park were again writing letters to the Corps warning of the plight of the CSS sparrow.¹⁶⁷ This time, the agencies cooperated with each other, convening an independent scientific panel of experts, with the assistance of the American Ornithological Union, to review the status of the CSS sparrow.¹⁶⁸ In a final report, the panel agreed with FWS that there was significant cause for concern.¹⁶⁹ CSS sparrow populations, they said, were falling because of water management practices and declining habitat.¹⁷⁰ On the other hand, the panel also acknowledged the problems of estimating CSS sparrow populations¹⁷¹ and concluded that the long-term Everglades restoration strategies, including restoring natural flows to Shark River Slough, would successfully reduce the CSS sparrow's risk of extinction.¹⁷²

2. *Controversially: (Almost) Buying Out Private Lands*

The scientific committee's recommendations did not address the controversial policy questions of how increased waters would reach Shark River Slough and how they might impact the residents of the 8½ Square Mile. Instead, those issues were tackled by the governing board of the Water Management District, which voted for full acquisition of the region in November 1998.¹⁷³ The decision represented a modification of the recommendations made to Florida Governor Lawton Chiles in a 1995 report, which called for a flow way in the westernmost region, while providing flood protection for the remainder of the 8½ Square Mile.¹⁷⁴

Two months after the governing board's decision, the Miccosukee Tribe filed suit against the Water Management District alleging that

167. See Letter from Richard G. Ring, Superintendent, Everglades Nat'l Park & Stephen W. Forsythe, State Supervisor, U.S. FWS, to Col. Joe R. Miller, Jacksonville Dist. Eng'r, U.S. Army Corps of Eng'rs (Jan. 14, 1999) (on file with author).

168. See Science Coordination Team, South Fla. Ecosystem Restoration Task Force, *Cape Sable Seaside Sparrow Review/Workshop* (visited Sept. 27, 1999) <<http://www.sfstore.org/sct/sparrow/0csssann.htm>>.

169. See Jeffrey R. Walters et al., *Cape Sable Seaside Sparrow Panel Review: Final Report* (n.d.), available at <http://everglades.fiu.edu/BRD/progress_reports/sparrow/sparrow2.pdf> (visited Mar. 6, 2000) [hereinafter *Sparrow Panel Report*].

170. See *id.* at 59.

171. In particular, the panel noted the need for better methods to count female birds, because reliance upon singing male birds was problematic. See *id.* at 21.

172. See *id.* at 47-48.

173. See Governing Bd., South Fla. Water Mgmt. Dist., minutes of a workshop/meeting at 1 (Nov. 12, 1998) (on file with author). For a view from an area landowner, see Madeleine Fortin, *Pariah, Florida* (visited Mar. 6, 2000) <<http://www.sfaa.net/eap/fortin/fortin.html>>.

174. See EAST EVERGLADES 8.5 SQUARE MILE AREA STUDY COMMITTEE, *supra* note 75.

a staff subcommittee made the decision,¹⁷⁵ violating Florida's Government in the Sunshine Law.¹⁷⁶ In June 1999, seven months after the governing board had voted for acquisition, a new governing board appointed by Governor Jeb Bush voted to review the decision as part of a settlement agreement with the Miccosukee Tribe.¹⁷⁷ The previous decision was vacated, and a decision whether or not to purchase the 8½ Square Mile will be made—again—only after the Corps completes a new Environmental Impact Statement, analyzing all the options in the region.¹⁷⁸

3. Presently: The 1999 Biological Opinion

For the Corps, delays in the acquisition effort simply meant that problems would continue. In January 1999, the Department of Interior agencies were writing the Corps to “stress the urgency of action needed to assure a successful 1999 breeding season” for the CSS sparrow.¹⁷⁹ One month later, FWS issued a final biological opinion on the Corps' water management programs in the Park, concluding that current water management efforts, including the Experimental Deliveries Program, were causing jeopardy to the sparrow¹⁸⁰ and adverse impacts to wood storks and snail kites.¹⁸¹ However, FWS provided a single “reasonable and prudent” alternative—to increase flows to Shark River Slough by May 1, 1999,¹⁸² and to fully implement by December 2003 a modified water deliveries project that would deliver significantly greater flows into Shark River Slough.¹⁸³

When compared to the previous differences of opinion between the Corps and FWS during the El Niño storms, the new, phased approach in the biological opinion represented progress toward a solution. Nevertheless, the Corps concluded that it had neither the authority nor the budgetary appropriations to implement the FWS

175. See Complaint for Declaratory and Injunctive Relief, Miccosukee Tribe of Indians of Fla. v. South Fla. Water Mgmt. Dist. (Fla. 11th Cir. Ct. 1999) (No. 99-03243 CA 01); Robert P. King, *Water Managers May Cancel Buyout Plan*, PALM BCH. POST, June 12, 1999, at B1.

176. FLA. STAT. § 286.011 (1997).

177. See *8½-Square Mile Redux*, MIAMI HERALD, June 21, 1999, at A10.

178. See Press Release from South Fla. Water Mgmt. Dist., Board Settles 'Sunshine' Lawsuit in Vote to Buy Out 8.5 Square Mile Area (June 23, 1999), available at <http://141.232.1.11/newsr/11_newsrel.html> (visited Mar. 19, 2000). *But cf.* Terry L. Rice, *Bypass, Not Buyout, Will Save the Everglades*, MIAMI HERALD, June 22, 1999, at A9.

179. Letter from Ring & Forsythe, *supra* note 167.

180. See 1999 BIOLOGICAL OPINION, *supra* note 54, at 2-3.

181. See *id.*

182. See Letter from Edward E. Middleton, Chief, Eng'g Div., Jacksonville Dist., U.S. Army Corps of Eng'rs, to Jeanne K. Hall, Dir., Operations and Maintenance Dep't, South Fla. Water Mgmt. Dist. (Mar. 12, 1999) (describing the Shark River Slough water delivery system) (on file with author).

183. See *id.*

proposal.¹⁸⁴ Rather than renewing negotiations or risking ESA liability by continuing the existing experimental deliveries program, the Corps announced emergency water management actions to save the CSS sparrow.¹⁸⁵ Even though it was designed to increase water deliveries throughout the Park and simulate natural hydropatterns, the experimental deliveries program needed to be changed.¹⁸⁶ Instead, based upon emergency authority,¹⁸⁷ the Corps developed a program focused upon bringing water levels down in CSS sparrow habitat.¹⁸⁸

Within days of the Corps' decision to change the Experimental Deliveries Program, the Superintendent of the Park sent a new letter warning that the new actions were insufficient for the CSS sparrow and would adversely affect wood storks and wading birds.¹⁸⁹ FWS officials also rejected the Corps proposed actions, stating that the actions could have been implemented more than three years earlier and therefore could not be considered an emergency.¹⁹⁰ Instead, FWS argued, the Corps was required to engage in "formal consultation" with the agency before implementing the new changes.¹⁹¹

The Corps implemented the new operational program over the objections of FWS and the Park,¹⁹² although Corps officials frequently use the operational guidelines of the Experimental Deliveries Program.¹⁹³ Thus far, the Corps actions have successfully protected crucial CSS sparrow habitat.¹⁹⁴ But the fate of the CSS sparrow, and the other creatures in the Everglades, remains uncertain. Despite two

184. See Letter from Col. Joe R. Miller, Jacksonville Dist. Eng'r, U.S. Army Corps of Eng'rs, to Richard G. Ring, Superintendent, Everglades Nat'l Park (June 29, 1999) (on file with author).

185. See Press Release from Jacksonville Dist., U.S. Army Corps of Eng'rs, Army Corps Takes Emergency Measures to Protect Cape Sable Nesting Area (Mar. 9, 1999), available at <<http://www.saj.usace.army.mil/pao/NR9904.html>> (visited Mar. 5, 2000); Letter from Middleton, *supra* note 182 (directing the Water Management District to implement emergency operational modifications to structure operations for the protection of the CSS sparrow).

186. See Letter from Middleton, *supra* note 182.

187. See 33 C.F.R. § 230.8 (1998); 50 C.F.R. § 402.05 (1999).

188. See JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, FACT SHEET: EMERGENCY OPERATIONS FOR THE 1999 CAPE SABLE SEASIDE SPARROW BREEDING SEASON (Mar. 8, 1999).

189. See Letter from Richard G. Ring, Superintendent, Everglades Nat'l Park, to Col. Joe R. Miller, Jacksonville Dist. Eng'r, U.S. Army Corps of Eng'rs (Mar. 12, 1999) (on file with author).

190. See Letter from Stephen W. Forsythe, State Supervisor, U.S. FWS, to Col. Joe Miller, Jacksonville Dist. Commander, U.S. Army Corps of Eng'rs (Mar. 10, 1999) (on file with author).

191. See *id.*

192. See *In re* Emergency Authorization for Modified Operation of the S-12 Water Control Structures, No. 99-0257, 99 E.R. F.A.L.R. 153, 1999 WL 436391 (Fla. Dep't of Env'tl. Prot. 1999); Letter from Middleton, *supra* note 182.

193. See Interview with Strowd, *supra* note 134.

194. See Letter from Miller, *supra* note 184.

years of negotiations over the very same issues, the Corps, Park and FWS are still no closer to a solution.

4. *Eventually: The Comprehensive Everglades Restoration Plan*

A longer-term solution is currently being explored through the Central & Southern Florida Project Comprehensive Review Study, known locally as the Comprehensive Everglades Restoration Plan (Comprehensive Plan).¹⁹⁵ Through the Water Resources Development Act of 1996,¹⁹⁶ Congress authorized the Corps to develop the Comprehensive Plan as a comprehensive plan for restoring, preserving and protecting the South Florida ecosystem, addressing issues such as flood control, water quality, and drinking water supply.¹⁹⁷

The Corps presented its proposal to Congress in July 1999 for further legislative action,¹⁹⁸ and Florida passed legislation relating to authorization of the Comprehensive Plan in April 1999.¹⁹⁹ Two elements of the massive re-engineering of flow patterns and water storage throughout the ecosystem included the improvement of water deliveries to Shark River Slough and the Park.²⁰⁰

Projects proposed in the Comprehensive Plan are expected to benefit the endangered and threatened species in the Everglades, including the CSS sparrow.²⁰¹ However, significant uncertainties remain. According to FWS's March 1999 review of the Comprehensive Plan, some proposals may make limited or no difference for the endangered CSS sparrows, wood storks, and snail kites, while other proposals should make the endangered species more secure.²⁰² Notably, however, the Comprehensive Plan simply assumes that problems in the 8½ Square Mile will be resolved.²⁰³ And, even if the Comprehensive Plan included solutions to every problem in the Everglades,

195. See JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS & SOUTH FLA. WATER MGMT. DIST., CENTRAL AND SOUTHERN FLORIDA PROJECT COMPREHENSIVE REVIEW STUDY: FINAL INTEGRATED FEASIBILITY REPORT AND PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (1999) [hereinafter COMPREHENSIVE PLAN FINAL REPORT].

196. Pub. L. No. 104-303, 110 Stat. 3658 (1996).

197. See *id.* § 528(b)(1)(A)(i), 110 Stat at 3767.

198. See *id.* § 528(b)(1)(B)(ii), 110 Stat at 3768 (requiring submission of the plan to Congress); see also Larry Lipman, *Gore Urges \$7.8 Billion for Everglades*, PALM BCH. POST, July 2, 1999, at B1; Rafael Lorente, *Pitfalls Await Bill to Restore 'Glades*, FT. LAUD. SUN SENT., July 5, 1999, at A1.

199. See Act effective Apr. 30, 1999, ch. 99-143, 1999 Fla. Laws 820 (codified at FLA. STAT. § 373.1501 (1999)).

200. See COMPREHENSIVE PLAN FINAL REPORT, *supra* note 195, at 10-16 to 10-26, 10-31 to 10-33, 10-41 to 10-45; JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS, CENTRAL AND SOUTHERN FLORIDA PROJECT COMPREHENSIVE REVIEW STUDY: OVERVIEW 16 (1998) [hereinafter COMPREHENSIVE PLAN OVERVIEW].

201. See COMPREHENSIVE PLAN FINAL REPORT, *supra* note 195, at 10-13.

202. See *id.*

203. See *id.* at N-88 to N-89.

it would still be less than satisfactory since many of the projects will not be fully implemented for decades.²⁰⁴

VI. THE REVIEWS

In retrospect, the conflicts between water management and endangered species protection provide just another example of how public agencies can work tirelessly to achieve uncertain results.²⁰⁵ While new water management techniques may eventually be found for South Florida, recent experiences suggest a need for changes in how the ESA is implemented. Agencies working in the Everglades have made enormous efforts to meet their statutory requirements. Nevertheless, to improve implementation of species protection laws and to avoid similar chaos in the future, four major improvements should be made.

First, FWS must ensure that it considers all the best available science to provide the regulated agencies with reasonable and prudent alternatives, even in difficult emergency situations. When developing those alternatives, FWS also must take into account laws other than the ESA to ensure that the alternatives can be implemented. Second, public administrators working with the ESA must realize the value of communication and anticipation. In particular, FWS and the Corps must work together more productively in their efforts to protect endangered species. Third, changes should be made to existing laws. The ESA and its regulations should empower CEQ, as part of the consultation process, to recognize and regulate takings of endangered or threatened species that occur because of emergency circumstances. Forthcoming federal legislation on the Everglades Comprehensive Plan also should specifically address endangered species concerns. Fourth and finally, solutions to a number of lingering policy issues in the region must be found, and the agencies must expand their current focus beyond the CSS sparrow to consider the Everglades ecosystem as a whole.

A. Poor Execution: Faithfully Implementing Statutory Directives

Like any statute, the ESA requires interpretation by FWS when implemented. However, the agency must be sure to meet two basic requirements of the law: it must use the best available science, and it must provide reasonable and prudent alternatives.

204. Many Comprehensive Plan projects will not be completed until 2010, or even 2050. *See id.* at 11-12.

205. *See* Charles Lindblom, *The Science of Muddling Through*, 19 *PUB. ADMIN. REV.* 79, 88 (1959); Charles Lindblom, *Still Muddling, Not Yet Through*, 39 *PUB. ADMIN. REV.* 517, 518 (1979).

1. *Remember, Just the Facts: All Best Available Science*

The ESA requirement to use best available scientific data²⁰⁶ gives FWS the implicit authority to determine what exactly is the best available science. Any determination and recommendation by FWS inherently requires an assessment of the information and ultimately gives some information more weight than others.²⁰⁷ Sifting through the occasionally conflicting information presents a difficult task, although total scientific agreement is unnecessary for FWS to make an ESA determination.²⁰⁸ This exercise of discretion is essential to the proper implementation of the ESA. In the case of the CSS sparrow, however, the agency's initial insistence upon the validity of one scientist's conclusions,²⁰⁹ without placing value upon the opposing theories of other scientists²¹⁰ and without explaining the reason for rejecting them,²¹¹ seemed to violate the spirit of the "best available information" requirements in the ESA.²¹²

At a minimum, FWS could have attended the workshop as requested by the Corps and Water Management District in 1997, where it could have heard the opinions of eight different regional bird experts.²¹³ In the ideal case, all information would be evaluated

206. See 16 U.S.C. § 1533(b) (1994).

207. See ELMER E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE* 33 (1960) (stating that the organization is itself a "mobilization of bias").

208. See *United States v. Guthrie*, 50 F.3d 936, 946 (11th Cir. 1995) (holding that the Secretary of Interior did not act arbitrarily and capriciously when he listed the Alabama red-bellied turtle as endangered, despite the absence of total agreement in scientific community).

209. The biologist providing data to the Park and FWS, Dr. Stuart Pimm, reported that managed water flows dramatically reduced the sparrow population west of Shark River Slough by changing vegetation and altering fire cycles in the region, leaving remaining populations vulnerable. See Stuart L. Pimm et al., *Response to the AOU Review Committee on the Cape Sable Seaside Sparrow* (Nov. 14, 1998) (white paper submitted to the independent review panel convened by the Science Coordination Team of the South Florida Ecosystem Restoration Task Force, on file with the author). A copy of Dr. Pimm's paper is also available for download from <http://www.sfrestore.org/sct/sparrow/sparrow.htm> (visited Mar. 6, 2000) (Rich Text Format); see also Craig Pittman, *One Man's Eye on the Sparrow*, ST. PETE. TIMES, June 3, 1999, at B1.

210. In his paper submitted to the independent scientific review panel, Dr. Will Post, serving as a consultant for the Miccosukee Tribe, argued that Dr. Pimm's survey data was based upon untested methods showing wide fluctuations and contradicting the known biology of the bird. See Post, *supra* note 154, at 8-10. Dr. Pimm and Dr. Post also differed greatly over reproduction rates and mortality, a key factor in determining the status and prospects of an endangered species. See *id.*

211. FWS has shown a trend towards decreasing documentation. For example, while the number of consultations increases, the number of biological opinions has decreased. See Rohlf, *supra* note 78, at 190.

212. See DEBORAH STONE, *POLICY PARADOX AND POLITICAL REASON* 185-94 (1988) (describing an ideal model of rational political decision-making in which all available information is weighed in determining the costs and benefits of alternatives); Claire Felbinger, *Lying with Statistics*, in 3 *INTERNATIONAL ENCYCLOPEDIA OF PUBLIC POLICY AND ADMINISTRATION* 1320-22 (Jay M. Shafritz ed., 1998).

213. See *supra* Part V.A.

and considered,²¹⁴ with the agencies working together. The more recent efforts of the independent, scientific peer review panel in 1999 were an excellent example of this cooperative approach.²¹⁵ Still, many more interagency efforts are needed in order to achieve the panel's recommended objective: developing short- and long-term water management solutions for the CSS sparrow and the rest of the Everglades ecosystem.

2. *Wouldn't Be Prudent? Providing Realistic Alternatives*

The ESA states that if FWS, during consultation with an agency, determines in a biological opinion that an action is likely to jeopardize the continued existence of a species, FWS (through the Secretary of the Interior) "*shall* suggest reasonable and prudent alternatives."²¹⁶ Unfortunately, during the El Niño events of 1997-1998, FWS failed to provide any alternatives for months. Not until April 1998, near the end of the crisis, were any options listed.²¹⁷ Moreover, some of the options listed, such as sending more water into Shark River Slough,²¹⁸ could not be implemented by the Corps because of other flood control laws.²¹⁹ Given those constraints, the Corps could argue that FWS had violated its statutory duties under the ESA, because the alternatives suggested were neither "reasonable" nor "prudent" and were not actions that could be implemented. The unambiguous language of the ESA requires reasonable and prudent alternatives to be options that will not violate the ESA and that "*can be taken* by the federal agency or applicant in implementing the agency action."²²⁰ Similarly, FWS and the Corps could be legally exposed under the Anti-Deficiency Act if the implementation of the proposed

214. Despite disagreement in the scientific community, FWS has not altered its scientific positions. In the months after the sparrow crisis had passed, an independent scientific peer review panel was convened to review the data related to the CSS sparrow. Pending that review, the Corps requested that FWS delay the issuance of a final biological opinion on projects in the Park affecting the sparrow. See Letter from Col. Joe R. Miller, Jacksonville Dist. Eng'r, U.S. Army Corps of Eng'rs, to Sam D. Hamilton, Regional Dir., U.S. FWS (Oct. 22, 1998) (on file with author). The very next day, the Natural Resources Defense Council sent a letter urging FWS to deny the request. See Letter from Sara Chasis, Senior Att'y, & Bradford H. Sewell, Project Att'y, National Resources Defense Council, to Don Barry, Ass't Sec'y, Fish, Wildlife & Parks Section, U.S. Dep't of Interior (Oct. 23, 1998) (on file with author). FWS denied the Corps' request, concluding that "no significant new information is likely to become available." Letter from Sam D. Hamilton, Regional Dir., U.S. FWS, to Col. Joe R. Miller, Jacksonville Dist. Eng'r, U.S. Army Corps of Eng'rs (Oct. 26, 1998) (on file with author).

215. See *supra* Part V.E.1.

216. 16 U.S.C. § 1536(b)(3)(A) (1994) (emphasis added).

217. See *supra* note 182 and accompanying text.

218. See *supra* note 155 and accompanying text.

219. See *supra* Part IV.B.

220. 16 U.S.C. § 1536(b)(3)(A) (1994) (emphasis added).

reasonable and prudent alternative resulted in unbudgeted and unappropriated expenses to the federal agencies.²²¹

Instead of providing unrealistic alternatives, in cases where FWS cannot provide any reasonable and prudent alternatives, a much more direct approach is available: immediate referral to the Endangered Species Committee.²²²

B. *Fair Treatment: Replacing Command and Control*

In its enforcement of the ESA, FWS is given substantial powers. However, this regulatory power must be used in a balanced manner, because under the ESA, FWS opinions are only advisory.²²³ The action agency can reject FWS's recommendations or reasonable and prudent alternatives—but could thereby be risking the consequences of an ESA violation.²²⁴ Thus, when providing expert advice to other federal agencies, FWS should strive to obtain the “consent of the governed.”²²⁵ During the CSS sparrow crisis, consent of the Corps was never obtained.

By stating in its April 7, 1998, letter that failure to follow FWS instructions risked ESA exposure, the agency communicated a clear message—do it our way or else. Management theorists might characterize this approach as “command and control”²²⁶ or an effort to achieve domination by winning.²²⁷ Integrated, cooperative solutions are more effective.²²⁸ In the future, FWS and the other federal agencies must do more to work together, instead of against each other²²⁹—

221. See *supra* note 122 and accompanying text.

222. See 16 U.S.C. § 1536(e) and (h); see also *supra* note 97 and accompanying text; *infra* Part VII.C.1.

223. See *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976).

224. See *id.*

225. Mary Parker Follett, *The Giving of Orders* (1926), reprinted in CLASSICS OF PUBLIC ADMINISTRATION 66 (Jay M. Shafritz & Albert C. Hyde eds., 3d ed. 1992).

226. See NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY 31-36 (Stephen Holmes & Charles Larmore trans., 1982); Giandomenico Majone, *Analyzing the Public Sector: Shortcomings of Current Approaches, Part A: Policy Science*, in GUIDANCE, CONTROL AND EVALUATION IN THE PUBLIC SECTOR 61-70 (Franz-Xaver Kaufman et al. eds., 1986).

227. See MARY PARKER FOLLETT, CREATIVE EXPERIENCE 45-46 (1924) (characterizing domination as a relatively ineffective way of dealing with conflict).

228. See BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS 21-23 (1989) (enumerating and describing several advantages to collaboration as an agency approach to regulation).

229. Nationally, command and control approaches to environmental regulation are giving way to cooperative efforts. See J.B. Ruhl, *While the Cat's Asleep: The Making of the "New" ESA*, 12 NAT. RESOURCES & ENV'T 187, 187-90, 224 (1998) (describing ESA reform approaches); Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859 (1998) (codified at 50 C.F.R. §§ 17.22(b)(5)-(6), 17.32(b)(5)-(6), 222.3, 222.22(g)-(h) (1999)) (establishing a program assuring landowners that agreement to and compliance with a habitat conservation plan will not result in the imposition of additional requirements barring unforeseen circumstances); Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717 (1999) (announcing a policy under which landowners may improve habitat for endangered species with assurances that future land use changes causing incidental

especially in the implementation of the massive Everglades Comprehensive Plan effort.²³⁰

C. Good Laws: Amending Existing Laws to Expect the Unexpected

1. More Sense: Exercising Emergency Authority

In 1997, Congress studied the tension between flood control and species protection during emergencies as part of the Flood Prevention and Family Protection Act of 1997.²³¹ The bill, which never left its sponsoring committee, proposed to grant an exemption from the ESA for flood control projects that address a catastrophic natural event or a critical, imminent threat to public health or safety.²³²

In this instance, had such a law been enacted, it might have avoided ESA problems for the Corps. At the same time, it might have sacrificed the CSS sparrow. Rather than completely exempting flood control from the ESA, an alternative solution could improve the balance between the two objectives by ensuring that agencies and public administrators exercise discretion reasonably.²³³

Currently, the Endangered Species Committee, with seven high-level officials, including cabinet members, is required to convene in order to authorize any agency action that may jeopardize an endangered species.²³⁴ But in traditional consultation situations, federal agencies are not allowed to balance the interests of the species against the public interest in the project; rather, the agencies must do everything possible to protect the endangered species in each of its decisions.²³⁵ The problems come when nothing else is "possible."

Under NEPA, emergency circumstances already require an emergency environmental assessment to be conducted under the supervision of the CEQ. By comparison, the ESA exemption process does not

takings will not be prohibited), *implemented by* 64 Fed. Reg. 32,706 (1999) (amended Sept. 1999) (codified at 50 pts.13, 17 (1999)).

230. See *supra* Part V.E.4.

231. See H.R. 478, 105th Congress (1997).

232. See *id.*

233. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 113-14 (1992) (advocating a flexible, innovative form of government rather than rule-driven governmental organizations); Raymond W. Cox III, *Administrative Discretion*, in 1 *INTERNATIONAL ENCYCLOPEDIA OF PUBLIC POLICY AND ADMINISTRATION* 37, 40 (Jay M. Shafritz ed., 1998) (stating that trends in public administration recognize that "discretion is necessary to the creation of the kind of flexible, responsive, and dynamic organizations that we have come to believe should be the norm").

234. See 16 U.S.C. § 1536(e) (1994).

235. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174-84 (1978); *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 373 (5th Cir. 1976); Jared des Rosiers, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 *NOTRE DAME L. REV.* 825, 838 n.84 (1991) (discussing the removal of "practicability" requirements from the ESA).

provide for CEQ input; instead, the “God Squad” is left to make the decision, and any past experience that CEQ personnel may have had with the issue is lost.²³⁶ Increased CEQ review should, therefore, be considered as an alternative to the current ESA exemption process during emergency circumstances.²³⁷

During the El Niño event, the Corps and Water Management District were nearly forced to make the fateful decision between impacting the CSS sparrow by opening the S-12 structures and potentially flooding the 8½ Square Mile by sending more water into Shark River Slough.²³⁸ Had the rains continued, the only solution would have been to convene an Endangered Species Committee meeting—a difficult proposition given the emergency conditions and the lack of time for thoughtful review of the issues.

Expanded CEQ discretion could have provided the additional flexibility and discretion needed to find reasonable and prudent alternatives that could have been implemented by the Corps. For example, had the Corps been allowed to divert more water through the eastern S-12 structures, farthest from the CSS sparrow, this action might have slightly impacted the bird’s habitat, but it could also have significantly reduced the severity of the problems experienced in the northern Everglades and perhaps even the coastal estuaries. Unfortunately, the inflexibility of the ESA’s requirements, and the difficulty of obtaining an exemption from the “God Squad,” made that practical approach almost impossible.

President Woodrow Wilson once argued that the open and responsible exercise of administrative discretion was essential to effective governance,²³⁹ a theme echoed by a recent author bemoaning the death of common sense.²⁴⁰ Consistent with that philosophy, allowing the CEQ, in consultation with the state governor’s office, to issue ESA exemptions during emergencies would remove the burden of convening the Endangered Species Committee, while creating clear lines of accountability within the executive branches of both the fed-

236. See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 3 (1980) (encouraging the use of public service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work).

237. See 16 U.S.C. § 1536(h) (1994). Revision of the Endangered Species Committee has also been advocated by interest groups such as the foresters and conservationists. See, e.g., Oregon Soc’y of Am. Foresters, *Re-authorization and Amendment of the Endangered Species Act* (visited Aug. 17, 1998) <<http://www.forestry.org/policy/policy.html#esa>>; *EDF Challenges Exemption Process for Endangered Species*, *supra* note 104.

238. See Interview with Strowd, *supra* note 134.

239. See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 213 (1887).

240. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 68-83 (1994).

eral and state governments.²⁴¹ Granting the CEQ this authority would also accord with precedent, given the CEQ's existing role as an arbiter of intergovernmental environmental conflicts²⁴² and the state governor's role as a participant in the decision-making process.²⁴³

2. *Less Conflict: Reaching Consensus in the Comprehensive Plan*

Underlying all of the problems with water management and endangered species protection in the Park is the inability of the Corps and Water Management District to operate the flood control system in a manner simulating the natural system. Fortunately, that is what the Everglades Comprehensive Plan effort is intended to achieve.²⁴⁴ Congress is expected to review that Comprehensive Plan this year. Through legislation related to the Everglades Comprehensive Plan, Congress has an opportunity to address the problems of protecting the CSS sparrow.

FWS has declared the CSS sparrow to be in jeopardy and insisted upon immediate increases in discharges to Shark River Slough.²⁴⁵ Clearly, there is need for short-term water management agreements²⁴⁶ and continued progress toward the long-term solution of ecosystem restoration in the Everglades.²⁴⁷

Ironically, even environmental restoration activities can be harmful. Actions to improve habitats for some endangered species can have adverse impacts on other endangered species for whom the altered ecosystem may still be providing useful habitat.²⁴⁸ A balancing of interspecies conflicts, therefore, must be incorporated into the Comprehensive Plan effort; this could be achieved by including a

241. See Herman Finer, *Administrative Responsibility in Democratic Government*, 1 PUB. ADMIN. REV. 335, 350 (1941).

242. See *supra* Part III.A.

243. See 50 C.F.R. § 451.03(b) (1999) (requiring appointment of a state member to the Endangered Species Committee).

244. See COMPREHENSIVE PLAN FINAL REPORT, *supra* note 195, at ii-iv, x-xiii; JACKSONVILLE DIST., U.S. ARMY CORPS OF ENG'RS & SOUTH FLA. WATER MGMT. DIST., CENTRAL AND SOUTHERN FLORIDA PROJECT COMPREHENSIVE REVIEW STUDY: PROJECT STUDY PLAN FOR THE COMPREHENSIVE PLAN, WATER PRESERVE AREAS, AND L-28 FEASIBILITY STUDY 4 (1997) (describing the purpose of the comprehensive plan as "restoring, preserving, and protecting the South Florida ecosystem").

245. See *supra* note 155 and accompanying text.

246. See *supra* Part V.E.1.; *Sparrow Panel Report*, *supra* note 169 and accompanying text.

247. See *id.*

248. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51. Volume I of the Multi-Species Recovery Plan includes information on all of the endangered species of South Florida, and identifies the actions necessary to ensure the survival of each species. Volume II describes the appropriate environmental conditions needed in the regions of the Everglades to protect those species.

“habitat conservation plan” in the Everglades Comprehensive Plan effort.²⁴⁹

In recent years, habitat conservation planning has emerged as a flexible and practical approach to, and an important part of, species protection programs for FWS in their dealings with private entities. It has helped solve otherwise intractable problems and find compromises between environmentalists and opposing interests on issues all across the country.²⁵⁰ Further, it is consistent with the affirmative duty of federal agencies to protect species habitats.²⁵¹

Of course, developing a habitat conservation plan for the Everglades will not be easy. But difficult projects are not new in South Florida. Already, the Water Management District is implementing an \$820 million program to restore water quality.²⁵² Even the Comprehensive Plan has been controversial at times, spawning disagreements among the federal agencies.²⁵³ Controversies and difficulties did not prevent FWS from completing a multi-species recovery plan for South Florida,²⁵⁴ with over 2,000 pages of analysis on endangered and threatened species and their habitat.

Unfortunately, that plan still looks at species individually, and does not enable the Corps or the Water Management District to determine how to control waters as they flow through an entire ecosystem.²⁵⁵ For example, the document explains that high water levels in the water conservation areas can flood wood stork habitat²⁵⁶ and that high water levels in the Park can interfere with CSS sparrow habi-

249. The Comprehensive Plan will evolve through a series of documents. The document presented to Congress in July 1999 is the “feasibility study,” which will be followed by Congressional authorization, pre-construction engineering and design, and a project cooperation agreement. See COMPREHENSIVE PLAN OVERVIEW 22, *supra* note 200.

250. See U.S. FWS & NAT’L MARINE FISHERIES SERV., ENDANGERED SPECIES HABITAT CONSERVATION PLANNING HANDBOOK i-ii (1996); Ranae A. Buscher, *HCPs Seek a Balance Between People, Nature*, SEATTLE DAILY J. OF COMMERCE, Aug. 22, 1996, Special Section: Protecting the Environment, available at <<http://www.djc.com/special/enviro96/10014090.htm>> (visited Mar. 6, 2000); Timothy Beatley, *Habitat Conservation Plans: A New Tool to Resolve Land Use Conflicts*, LAND LINES (Lincoln Inst. of Land Policy, Cambridge, Mass.), Sept. 1995, available at <<http://www.lincolnst.edu/landline/1995/septembr/beatley.html>> (visited Mar. 6, 2000); Press Release from Env’tl. Defense Fund, Unique Habitat Plan For Red-Cockaded Woodpecker Applauded by EDF (Mar. 1, 1995), available at <http://www.edf.org/pubs/NewsReleases/1995/Mar/a_peck.html> (visited Mar. 6, 2000); Weyerhaeuser Company, *Threatened and Endangered Species* (visited Mar. 6, 2000) <<http://www.weyerhaeuser.com/facts/tande.htm>>.

251. See *supra* note 94 and accompanying text.

252. See FLA. STAT. § 373.4592 (1999); SOUTH FLA. WATER MGMT. DIST., ‘98 EVERGLADES ANNUAL REPORT 30 (1998).

253. See Neil Santaniello, *Everglades Restoration Has Backing, Babbitt Says*, FT. LAUD. SUN SENT., May 19, 1999, at B2.

254. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51.

255. Department of the Interior Secretary Bruce Babbitt has promoted the South Florida Multi-Species Recovery Plan as a guide to ESA compliance. See Santaniello, *supra* note 253.

256. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51, at 4-399 to 4-400.

tat.²⁵⁷ The document, however, presents separate recovery plans for the two species and does not provide an integrated strategy for solving the water management needs of the entire ecosystem. Accordingly, the next step would be for Congress to direct FWS and the Corps to transform that document into a habitat conservation plan for the Everglades.²⁵⁸ To be successful, the plan must address routine as well as emergency requirements for water management in the short and long term.

If such a plan were completed, compliance with its terms could then provide federal and state agencies with protection from liability under the ESA, just as compliance with a habitat conservation plan would protect a private entity.²⁵⁹ Similarly, any takings of endangered species that occur during the implementation of the water management program should be deemed incidental to an otherwise lawful activity, with no ESA liability.²⁶⁰

Precedent exists for the passage of special legislation to solve the ESA problems created by a single species. In 1986, Congress specifically authorized a program for the translocation of California sea otters, confining the protection of the otters to a specified region and authorizing incidental takes outside that region.²⁶¹ The legislation sought to strike a balance among the need to protect the sea otters, the detrimental impacts upon the shellfisheries upon which the otters fed, and the ultimate adverse impacts on the fishing industry.²⁶² Although the legislation has been controversial, the lessons learned from this legislation can provide a basis for future efforts in developing water management plans to resolve problems related to the

257. See *id.* at 4-350 to 4-351.

258. See Endangered Species Act § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B) (1994); 50 C.F.R. § 17.22 (1999). However, any habitat conservation planning process established by Congressional legislation need not follow verbatim the existing rules and should be specifically tailored to the Comprehensive Plan. For recommendations to improve habitat conservation planning, see Albert C. Lin, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 *ECOLOGY L.Q.* 369, 411-32 (1996).

259. See *supra* note 90 and accompanying text.

260. See *supra* Part IV.A.3.; see also 16 U.S.C. §§ 1540-41 (1994); 50 C.F.R. § 402.14(i) (1999); Christopher H.M. Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 *B.C. ENVTL. AFF. L. REV.* 135, 170-71 (1991) (arguing that federal consultation procedures are insufficiently protective of endangered species and that application of a habitat conservation planning approach would be more effective).

261. Act of Nov. 7, 1986, Pub. L. No. 99-625, § 1, 100 Stat. 3500, 3500-3502.

262. See *Balance Sought in Sea Otter Conflict*, *ENN DAILY NEWS*, Mar. 24, 1999, available at <http://www.enn.com/enn-news_archive/1999/03/032499/otters_2297.asp> (visited Mar. 6, 2000) see also California Seafood Council, *Sea Otters and Zonal Management in California*, available at <<http://www.ca-seafood.org/news/seaotters.html>> (last modified 1997). *But cf.* Letter from Jim Curland, Science Dir., & Jeffrey Calder, Exec. Dir., Friends of the Sea Otter, to Steve Alcorn, U.S. FWS (Apr. 30, 1999) (regarding FWS draft report on the southern sea otter translocation program and biological opinion), available at <<http://www.seaotters.org/pdf/alcorn-letter.pdf>> (visited Mar. 6, 2000).

CSS sparrow. In fact, FWS has already acknowledged the potential need for species-specific solutions in the Everglades' Multi-Species Recovery Plan, which identifies translocation and controlled propagation of CSS sparrow populations as available policy options.²⁶³

D. *Great Debates: Resolving Lingering Policy Problems*

Finally, and perhaps most significantly, the problems with the CSS sparrow during El Niño reflect the continuing debates over public policy issues, including the acquisition or protection of the 8½ Square Mile, the authority of federal agencies regarding water policy, and the importance of a single species compared to an entire ecosystem.

1. *Buy It or Dike It? End the Property Rights Debate*

The policy debate over the 8½ Square Mile has been long and difficult. If new and expensive flood control improvements are made to protect private property, the changes could further compartmentalize the Everglades ecosystem and continue the pattern of controversial drainage activities that caused many of the Everglades' problems in the first place.²⁶⁴ Alternatively, if no flood control is provided, continued flooding of private lands may occur. Land acquisition efforts or eminent domain proceedings are equally controversial.²⁶⁵

Thus far, neither the Corps nor the Water Management District has been able to agree upon, fund, and implement a final solution to this difficult issue.²⁶⁶ Property rights and endangered species protection remain on a collision course in the Everglades.²⁶⁷ The lands exposed to flooding must be acquired or they must be protected—either way, a decision must be made.²⁶⁸ Otherwise, history may repeat itself when the next massive rainfall threatens the Park's famous—or perhaps infamous—endangered bird.

263. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51, at 4-365 to 4-366.

264. See EAST EVERGLADES 8.5 SQUARE MILE AREA STUDY COMMITTEE, *supra* note 75, at 20-23.

265. See *id.* at 16-18; *supra* Parts III.C, IV.B.3.

266. See Editorial, *Stick with Buyout Plan*, PALM BCH. POST, June 19, 1999, at 12A, available in LEXIS, News Library, Pbpst File.

267. See ROBERT MELTZ, CONGRESSIONAL RESEARCH SERV., THE ENDANGERED SPECIES ACT AND PRIVATE PROPERTY: A LEGAL PRIMER (Report No. 93-346A, 1993), available at <<http://www.cnie.org/nle/biodv-8a.html>> (visited Mar. 6, 2000); Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 989-93 (1997) (concluding that ad hoc analysis and deference to the political process provide the best way to deal with conflicts between constitutional takings and ecosystem preservation).

268. Inverse condemnation claims continue to threaten the implementation of the ESA, and resolving the debate over the Area may help overcome this prickly issue. See Robert B. Keiter, *Ecosystems and the Law: Toward an Integrated Approach*, 8 ECOLOGICAL APPLICATIONS 332 (1998).

2. *Who Runs the Flow? Establish the Federal Roles*

A second major policy debate is emerging in South Florida. Given the importance of water to the regional ecosystems, agencies with authority to control water possess substantial powers. The federal agencies, however, are divided in the exercise of water management authority.

The Corps possesses primary responsibility for many flood control systems.²⁶⁹ However, the water management authority vested in the Corps reflects a quirk of history. After initially creating the Corps to develop expertise in siegecraft during times of war,²⁷⁰ Congress continued to grant the agency new civil works authority,²⁷¹ including navigational waterway construction and flood control. Later, the Corps' authorities were expanded to include water quality and wetland protection, because the Corps already had dredge-and-fill expertise.²⁷²

Nevertheless, the water authority of the Corps is hardly absolute. The U.S. Environmental Protection Agency (EPA), for example, has veto authority over the Corps' permitting program.²⁷³ The tension between the Corps and the U.S. Department of Interior, demonstrated by the disagreements over protecting the CSS sparrow, is just another example of the complex system of checks and balances and division of power at work in the federal government.

In the past, the Bureau of Reclamation, an agency within the U.S. Department of Interior, was responsible for many water management projects in the western United States, such as dam construction.²⁷⁴ Recently, the Bureau of Reclamation has been reinventing itself, and today it promotes itself as dedicated to river restoration, water conservation, water quality, wetland protection, and endangered species preservation.²⁷⁵ Meanwhile, the "greening of the Corps" through its involvement in environmental issues has become increasingly controversial.²⁷⁶ Shifting the Corps' responsibilities to an

269. See U.S. ARMY CORPS OF ENG'RS, *THE HISTORY OF THE U.S. ARMY CORPS OF ENGINEERS* 47-51 (1998).

270. See *id.* at 17-23.

271. Examples of the Corps' expanded authorities include surveying, national road building, and hydroelectric power development. See *id.* at 29, 33, 53.

272. See *id.* at 57-59.

273. See Clean Water Act § 404(c), 33 U.S.C. § 1344(c) (1994); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 903 n.12 (5th Cir. 1983); Memorandum of Understanding Between the Department of the Army and the Environmental Protection Agency on the Geographic Jurisdiction of the Section 404 Program, 45 Fed. Reg. 45,018 (1980).

274. See BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, *DESIGN OF SMALL DAMS* v-vi (1977).

275. See Bureau of Reclamation, U.S. Dep't of Interior, *Written in Water* (visited July 28, 1998) <<http://www.usbr.gov/main/written/contents.html>>.

276. See Jennifer Maddox, *Budget Would Mire Corps of Engineers' Projects*, STUART NEWS/PORT ST. LUCIE NEWS, Mar. 29, 1998, available at <<http://www.tcpalm.com/fish/>>

Interior agency, such as the Bureau of Reclamation—which could be renamed the Bureau of Restoration—would be supported by these historical and recent trends. However, such a radical legislative action would not provide any easy solutions to the problems in the Everglades, because the new Bureau of Restoration would still be required to comply with all the laws governing water management, including, but certainly not limited to, the ESA.

3. *All for One, or One for All? Ask the God Squad*

Fundamentally, the biggest problem with the efforts to save the CSS sparrow is that they focused upon a single species, as opposed to finding solutions to benefit all species in the Everglades. After the El Niño events of 1997-1998, biologists working with FWS quickly declared victory, issuing press releases announcing increases in the CSS sparrow population.²⁷⁷ Other scientists criticized that conclusion as unsupportable.²⁷⁸ But even if the CSS sparrow was saved from extinction, the outcome was costly.

If CSS sparrow numbers increased, many other birds of the Everglades, the estuaries, and even South Florida residents appeared to suffer. Wading bird populations decreased dramatically from 1997 to 1998, falling eighty-three percent compared to the previous year.²⁷⁹ Coastal estuaries suffered long-term damage to seagrasses and plankton because of excessive freshwater discharges.²⁸⁰ Furthermore, St. Lucie's fishing industry was devastated by the *crypto* organism,

fish3.html> (visited Mar. 6, 2000); Jennifer Maddox, *Environment Floods Army Corps Plans*, PRESS J., Mar. 28, 1998, at A1. U.S. Congressman Larry Craig (R-Idaho), for example, has been an outspoken critic of the Corps' involvement in environmental issues, saying that "[t]he only green I can accept about the Army Corps of Engineers is its uniforms." *Id.*

277. See Stuart L. Pimm, Statement on the Current Status of the Cape Sable Sparrow (unpublished statement prepared for Richard G. Ring, Superintendent of the Park, late May 1998) (on file with author); *UT Scientists Study Saves Endangered Everglades Bird*, CONTEXT ON-LINE (Univ. of Tenn., Knoxville, TN), June-July 1998, available at <<http://ur.utenn.edu/context/june-july98context/features/pimm.html>> (visited Mar. 6, 2000).

278. Critical scientists noted three major problems with claims that CSS sparrow populations were rising. First, the increase in 1998 may have been a result of improvements made over a year ago, and the results of the El Niño event would not be apparent until 1999, after the new hatchlings have grown into singing males that could be counted. Second, the increase may be attributable to survey errors, and bird counts from previous years may have underestimated the actual numbers by as many as 1,500 birds. Third, some scientists believe that the birds migrate between populations, and fly to improved habitat, therefore making bird counts unreliable and overstating the importance of the western population. See Interview with John Odgen, Senior Ecologist, South Fla. Water Mgmt. Dist. (Oct. 30, 1998); Sparrow Panel Report, *supra* note 169.

279. See Robert P. King, *Everglades Wading-Bird Population Dangerously Low*, PALM BCH. POST, Apr. 13, 1998, at B1.

280. See King, *supra* note 166, at B1.

which spread through the coastal estuaries. Local activists and reporters from around the country warned of economic ruin.²⁸¹

FWS acknowledged these conflicts in one of its letters, noting that recommendations to save the CSS sparrow should not come “at the expense of other portions of the historic Everglades ecosystem.”²⁸² Unfortunately, the only alternative given by FWS was to have private landowners “share the adversity.”²⁸³ That trade-off between impacting human habitat or endangered species is as unwelcome as having to choose whether to impact sparrows, wood storks, or snail kites. FWS’s insistence upon “shared adversity” exemplifies the very reason that the ESA is so controversial.

To FWS, extinction is understandably not an option. The small population of CSS sparrows in the Everglades has become synecdochical, representative of all the endangered birds in the nation.²⁸⁴ Saving the CSS sparrow is a way to prove that the ESA still works and a way to make up for the previous mistakes made with the Dusky sparrow.²⁸⁵ The deeper and more difficult question is whether saving the CSS sparrow is actually making things worse by harming other wildlife in the Everglades ecosystem.

Once again, the Comprehensive Plan provides an opportunity to find solutions. If a habitat conservation plan or other water management plan is developed for the region, as suggested above, it could produce a plan that satisfactorily balances the needs of all species in the Everglades, adequately protecting the CSS sparrow and enabling its return to stable population levels.²⁸⁶ Congress should not stop there.

The ecosystem restoration efforts in the Comprehensive Plan benefit many species, not just one. The mere potential for adverse

281. See Heather Dewar, *Fish Lesions Spark Concern in Central Florida*, BALTIMORE SUN, Mar. 20, 1998, at A1; Andrew Conte, *Decades of Abuse Flow On*, STUART NEWS/PORT ST. LUCIE NEWS, Mar. 29, 1998, available at <<http://www.tcpalm.com/fish/fish1.html>> (visited Mar. 6, 2000).

282. Letter from Forsythe, *supra* note 138.

283. *Id.*

284. Deborah Stone defines and describes “synecdoche” as when a single instance becomes representative of a large scale problem. For example, when a President makes a plea for an organ donation, people across the country are pleased when the match is found—but the single instance makes invisible the many other people who need similar transplants. See STONE, *supra* note 212, at 117 (1988).

285. See MULTI-SPECIES RECOVERY PLAN, *supra* note 51, at 3-141. The plan states: We need to be certain that we react differently for the Cape Sable seaside sparrow or we will suffer similar consequences Flood control for agriculture and urban dwellings has taken precedence over re-establishing more natural hydropatterns in Cape Sable seaside sparrow habitat. If we do not begin to implement recovery objectives that restore natural hydrologic conditions, thus allowing native vegetative communities to exist, we will be forced to accept that once again, we have failed.

Id. Notably, this language is absent from the final recovery plan.

286. See *supra* Part VI.C.3.

impacts to a single, opportunistic endangered species that relocates its habitat to a previously impacted area should not provide a barrier to the greater overall benefit that the Comprehensive Plan could yield to the Everglades' many endangered species.²⁸⁷ Instead, Congress should expressly exempt the Comprehensive Plan from takings of endangered species that result from its implementation, provided that the Comprehensive Plan projects can be demonstrated to have an overall beneficial impact upon the habitat of endangered and threatened species. Furthermore, if individual species such as the CSS sparrow require special programs, including relocation or breeding programs, then Congress should authorize those programs as well.

Absent such legislation, a worst-case scenario could emerge in which the CSS sparrow, or some other individual endangered species on the brink of extinction, could endanger the entire Everglades ecosystem restoration effort. In that case, a decision will need to be made whether to save the individual endangered species—by not implementing portions of the Comprehensive Plan and therefore not helping other endangered species—or whether to allow the individual species to become extinct. If Congress does not provide an ESA exemption for the Comprehensive Plan, then the Endangered Species Committee will be left with the decision—and the litigation that will inevitably follow.²⁸⁸

VII. CURTAIN CALLS

Unlike the Dusky sparrow, which was sent to extinction by lack of attention and the insufficiency of governmental actions,²⁸⁹ the CSS sparrow has been a virtual superstar in the Everglades, receiving overwhelming consideration. Still, the complexities of the Everglades restoration leave the fate of the CSS sparrow uncertain. Ironically, most of the problems in the Everglades are a result of the C&SF Project performing exactly as it was designed to work. The real problem, it can be argued, is the development of South Florida, and the need for new water storage and water management options.²⁹⁰ After all, the governmental agencies cannot stop the rainfall, and the resulting storm water must go somewhere.

Managing that storm water, as this case study has shown, causes serious problems under the ESA. Even though the ESA is generally

287. See *supra* note 248 and accompanying text.

288. "If the Federal agency determines that it cannot comply with the requirements of Section 7(a)(2) [the prohibition against taking by federal agencies] after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 C.F.R. part 451." 50 C.F.R. § 402.15(c) (1999).

289. See *supra* Part II.C.

290. See *id.*

an effective tool for protecting ecological diversity, in the Everglades it is becoming a tool for pointing fingers, instead of finding solutions. The agencies are arguing over liability instead of viability. The situation is unnecessary and unfortunate, especially in light of rising opposition to the ESA among Congressional leaders.²⁹¹

In some ways, the finger-pointing is understandable. FWS and the Park officials advocate for the interests of the CSS sparrow and other wildlife, consistent with their responsibilities. Similarly, the Corps guards its own flood control responsibilities, balancing the hydrologic needs of an ecosystem with the often conflicting needs of the nearby homeowners.

While these agencies may be destined to be in conflict, the Everglades Comprehensive Plan provides an opportunity to find viable solutions to these conflicts. Common sense must prevail. FWS and the Park may need to accept and agree upon some short-term adverse consequences—such as incidental takes to the CSS sparrow—during an initial period while new Everglades restoration efforts are implemented. Meanwhile, additional efforts to minimize the harm caused to the CSS sparrow, such as accelerating the implementation of land acquisition and water management modifications, must also be considered by the Corps. Some portions of the Comprehensive Plan may even be delayed while methods to minimize impacts on endangered or threatened species are investigated. Still, the fundamental point is that the success of the Comprehensive Plan demands increased interagency cooperation. The alternative is to continue the conflicts between federal agencies, and the result will be another sad song of extinction for another endangered sparrow.

VIII. EPILOGUE

As this Article was being finalized, the inevitable happened. In October 1999, a lawsuit was filed on behalf of the CSS sparrow.²⁹² In fact, the CSS sparrow was a named plaintiff. Accompanied by substantial publicity,²⁹³ the lawsuit accused the Corps and the Water Management District of operating the regional canal systems in a way that jeopardized the continued existence of the sparrow.²⁹⁴ Pre-

291. See Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 357 (1994); M. LYNNE CORN, CONGRESSIONAL RESEARCH SERV., ENDANGERED SPECIES: CONTINUING CONTROVERSY (Issue Brief No. 97046, 1998).

292. See Complaint for Declaratory and Injunctive Relief, Natural Resources Defense Council, Inc. v. U.S. Army Corps of Eng'rs (S.D. Fla. 1999) (No. 99-CV-2899).

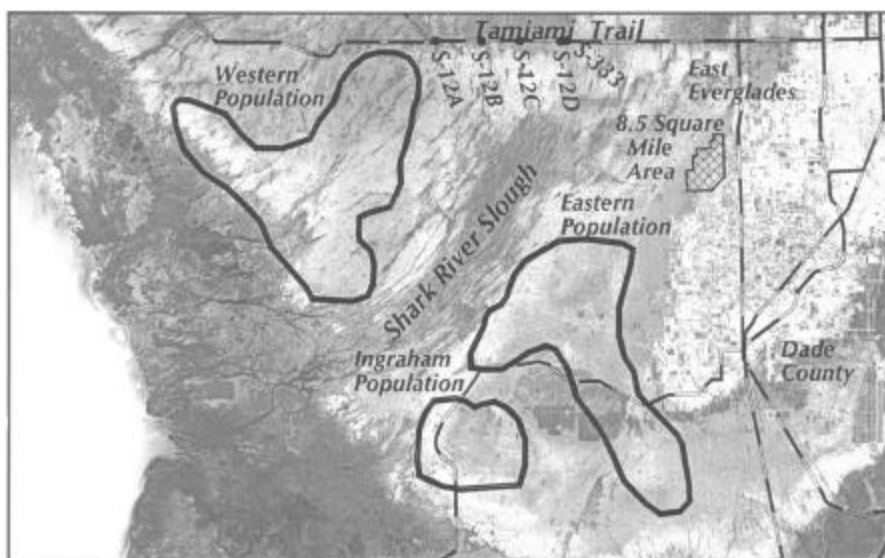
293. See, e.g., Robert P. King, *Sparrow Sues Engineers for Draining Home*, PALM BCH. POST, Oct. 28, 1999, at A5; Neil Santaniello & David Flesher, *Water Managers Facing Suit over Glades Bird*, FT. LAUD. SUN SENT., Oct. 28, 1999, at B1.

294. See Complaint for Declaratory and Injunctive Relief at 7, Natural Resources Defense Council, Inc. v. U.S. Army Corps of Eng'rs (S.D. Fla. 1999) (No. 99-CV-2899).

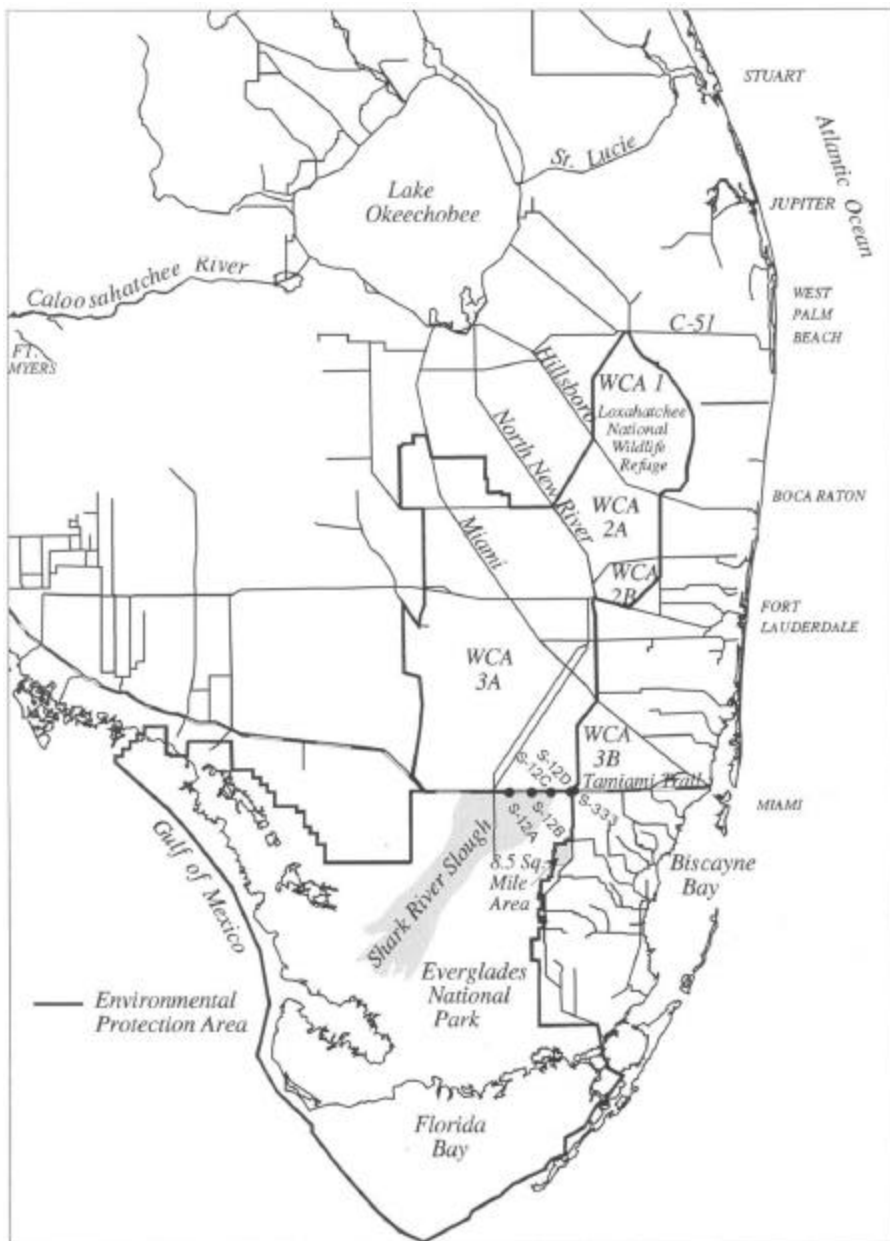
dictably, the lawsuit ignored the potential adverse consequences for regional flooding of homeowners.

Without a settlement agreement, an exemption from the Endangered Species Committee, or a legislative solution, the agencies and environmental groups concerned about the fate of the CSS sparrows are likely to spend months, or even years, arguing in court over the proper course of action. In the meantime, the fate of the endangered bird, and perhaps even the entire Everglades restoration effort, will remain in jeopardy.

APPENDIX



Source: Everglades National Park and SFWMD GIS database



Source: SFWMD GIS database