

**FLORIDA BEACHES HCP  
CCAA ISSUES ANALYSIS****PREPARED BY:** FBHCP Working Group**DRAFT VERSION:** EAI Draft 2.2 (RGE) – 06/25/10**STEERING COMMITTEE MEETING DATE:** 09/08/10

**HCP OBJECTIVE(S):** An incidental take permit (ITP) will allow the FDEP to fulfill its CCCL permitting responsibilities in compliance with the U.S. Endangered Species Act (ESA) and applicable state laws by implementing appropriate minimization and mitigation strategies. The FDEP's Bureau of Beaches and Coastal Systems is developing a statewide Habitat Conservation Plan (HCP) to support the ITP application. To ensure that incidental take of covered species is adequately quantified, as well as minimized and mitigated to the maximum extent practical, sufficient biological data must be acquired to conduct a reliable threat assessment for each species included in the Florida Beaches Habitat Conservation Plan (FBHCP).

**ISSUE UNDER CONSIDERATION:** *Inclusion of non-federally listed, "at-risk" species in the FBHCP.* As a working definition, at-risk species are those whose populations are low, in decline, or particularly vulnerable to disturbances associated with coastal development and whose continued survival is questionable in the absence of effective conservation measures. Examples include state listed species, Species of Greatest Conservation Need according to Florida's Comprehensive Wildlife Conservation Strategy, and species identified by the research of universities or NGO's as being vulnerable to population declines, but currently possessing no formal protection.

**DESCRIPTION OF ISSUE:** There are two primary issues that should be considered by the Steering Committee in determining whether or not non-federally listed, at-risk species should be included in the FBHCP. The first relates to the likelihood of an at-risk species becoming federally listed over the term of the ITP, as this could require subsequent amendments to the HCP. The second deals with adoption of conservation measures that will likely preclude at-risk species from becoming federally listed over the term of the ITP. On a parallel track, the State has developed a number of conservation initiatives to protect at-risk species and their habitat. Ideally, the FBHCP should support these conservation efforts, and at a minimum FDEP's CCCL permitting activities should not conflict with these efforts.

**BACKGROUND INFORMATION:**

- **CCAA** – Initially, the Candidate Conservation Agreement with Assurances (CCAA) Program was viewed as one possible mechanism for addressing non-federally listed, at-risk species in the FBHCP. A briefing document was prepared previously by the Working Group to review the benefits and drawbacks of a CCAA. In summary, a CCAA offers non-federal property owners the opportunity to voluntarily engage in proactive

conservation measures for at-risk species on their properties that might otherwise be harmed by current or future land use activities. The intent of these proactive measures is to prevent species covered under the Agreement from having to be listed in the future. The benefit to landowners is that, should the species subsequently be listed under the ESA, no additional restrictions beyond those agreed to in the CCAA would be imposed by the federal government (i.e. assurances), and any incidental take of the newly listed species would be federally authorized.

Since the CCAA briefing document was prepared, new information on the CCAA process and utility has been provided by the Service. Their guidance is that the CCAA program should not be used when a related HCP is in development. The CCAA should only be utilized in lieu of an HCP, as the proactive conservation measures that otherwise would have been prescribed by the CCAA can be incorporated into the HCP. Although the assurances afforded under a CCAA are absent in an HCP, there is another mechanism (described under Option 3 below) for achieving essentially the same results should the Steering Committee elect to include non-federally listed species in the FBHCP.

- **ITP Issuance Criteria** – One of the criteria for issuance of an ITP is that the activity for which take authorization is being requested is otherwise lawful. Furthermore, the authorized actions (in this case CCCL permitted activities) must be conducted in “strict observance of applicable foreign, state, local or other federal law.” The Migratory Bird Treaty Act (MBTA) is one such consideration (see below).
- **MBTA** –Migratory shorebirds potentially impacted by CCCL activities must be addressed in the HCP, regardless of whether or not non-federally listed shorebirds are individually included in the FBHCP (see attached summary of MBTA). It should be noted, that many of the benefits derived from conservation measures developed for federally listed species and non-listed shorebirds (MBTA compliance measures) will extend to many of the non-federally listed, at-risk species being considered for inclusion in the FBHCP. Best Management Practices developed for minimizing impacts to shorebirds are likely to use a resource group or guild (group of species in a community that exploit the same set of resources in a similar manner) approach. In general, shorebirds use the beach/dune system for breeding, foraging, resting, and/or loafing. Impact minimization measures will be implemented for each resource group without reference to any particular species (see Conceptual Minimization Measures for MBTA compliance). In this manner, measures developed to protect the wrack line as foraging habitat for one species will benefit all other species that forage in the wrack line. Similarly, measures developed to protect open beach nesting habitat for one species will benefit all shorebirds that nest on the open beach.
- **Species Under Consideration** – The Working Group has proposed five species of sea turtles, five sub-species of beach mouse, and two species of shorebirds for inclusion in the HCP (see attached species summary). All but one (red knot) of these 12 taxa are currently listed as either threatened or endangered under the ESA; the red knot is currently a candidate species for federal listing. All are potentially vulnerable to impacts related to activities permitted under FDEP’s CCCL program. One additional species, the

roseate tern, is also a federally listed species and could be vulnerable to impacts should the Plan Area be expanded to include critically eroded sandy beaches in non-CCCL counties (particularly Monroe) where the FDEP permits activities similar to those in the CCCL program (e.g., beach cleaning) under authority of FS 161.052.

The Working Group originally listed an additional 13 species of shorebirds and another sub-species of beach mouse as candidates for inclusion in a CCAA. Three of those species (black-bellied plover, ruddy turnstone, and willet) have subsequently been removed from consideration and another species (gopher tortoise) has been added. The accompanying table shows the international, federal, and state listing status of each of the 12 non-listed, at-risk species currently being considered.

- Four shorebirds (American oystercatcher, snowy plover, least tern, and black skimmer) are listed at the state level. Both the American oystercatcher (species of concern) and the snowy plover (under review) are also on the federal radar screen, and thus are potential candidates for future listing under the ESA.
- Two non-shorebird species are also potential candidates for future ESA listing. The gopher tortoise, is listed at the state level, is under review at the federal level, and is listed as vulnerable at the international level. The Santa Rosa beach mouse, is a species of concern at the federal level and is considered near threatened at the international level, although it is not listed at the state level.

Thus, at present, six non-federally listed species are either listed at the state level and/or are on the federal horizon as potential candidates for future listing. In addition to those six species, six other shorebirds are listed as Species of Greatest Conservation Need (SGCN) under the Florida Wildlife Legacy Initiative: Wilson's plover, Caspian tern, gull-billed tern, royal tern, sandwich tern, and sanderling.

**OPTION 1:** Only specifically address federally-listed and current candidate species in the FBHCP (12 species), generally address non-federally listed, at-risk shorebird species through MBTA compliance measures, and amend the HCP each time a species vulnerable to impacts from CCCL activities becomes federally listed over the term of the ITP. *If this option is selected, the Working Group will not undertake any efforts to acquire general and site-specific information on non-federally listed species or conduct related threats analyses.*

**Rationale for Selecting Option 1:** There is no certainty that any of the non-listed, at-risk species will become federally listed over the term of the ITP. Thus, only dealing with current federally listed or candidate species will avoid unnecessary delay and expense during development and implementation of the HCP. The impact minimization measures developed to comply with the MBTA will extend to other non-federally listed, at-risk shorebird species. There are already sufficient state conservation measures to adequately protect the gopher tortoise.

**Rationale against Selecting Option 1:** The lack of specific conservation measures for non-federally listed, at-risk species does not fully support, and may conflict with, other

state conservation initiatives. Six species (four shorebirds, the gopher tortoise, and the Santa Rosa beach mouse) are potential candidates for future federal listing, and six other shorebirds are Species of Greatest Conservation Need in Florida. ***All may potentially be impacted by CCCL activities.*** Although the gopher tortoise is adequately protected under current state law, any take associated with CCCL activities (e.g., tortoise relocation) would not be federally authorized should the species later be listed under the ESA.

In the event a species within the Plan Area becomes listed over the term of the ITP, FDEP will have to decide if it wants ESA take coverage for that species. If so, it will have to amend its HCP and ITP to obtain federal authorization. When new species are added, additional minimization and mitigation measures beyond those agreed to at the time of initial ITP issuance may be required. This could occur multiple times over the term of the ITP, depending on the number of new species that are listed. The time and expense involved in one or multiple HCP/ITP amendments may exceed that required to initially include at-risk species in the HCP. During the interim between the time an at-risk species is federally listed and the time the additional take authorization is obtained, FDEP would not be in compliance with the ESA. In the event the FDEP decides not to include newly listed species in the HCP, the Department is placed in a situation similar to the one that prompted pursuit of an ITP in the first place (i.e. potential non-compliance with the ESA and related exposure to third-party lawsuits).

**OPTION 2:** Only specifically address federally-listed and current candidate species in the FBHCP (12 species), generally address non-federally listed, at-risk shorebird species through MBTA compliance measures, and utilize Adaptive Management to prescribe a process by which to entrain at-risk species into the HCP as they are petitioned for federal listing over the term of the ITP. ***If this option is selected, the Working Group will not undertake any efforts to acquire general and site-specific information on non-federally listed species or conduct related threats analyses, but will identify mechanisms for incorporating new species over the term of the ITP.***

**Rationale for Selecting Option 2:** Benefits of this option are similar to those for Option 1, except the Adaptive Management approach would incorporate non-federally listed, at-risk species into the HCP as they are petitioned for federal listing rather than waiting for them to be listed. The period between when a species is petitioned for listing and when it's actually listed should provide sufficient time to amend the HCP and ITP to avoid the gap in federal take authorization identified under Option 1. Requisite general and site-specific biological information for certain at-risk species may be lacking or difficult to obtain. Rather than having to incorporate that information into the HCP at the time of its development, the information can be gleaned directly from the petitioning documents. Thus, the time and effort required to incorporate at-risk species into the HCP may be reduced relative to Options 3 and 4 below. Although minimization measures incorporated into the HCP for petitioned species would become effective at the time the ITP is amended, new mitigation measures would only have to be implemented once the species is officially listed.

**Rationale against Selecting Option 2:** A process for incorporating at-risk species into the HCP at the time they are petitioned for listing still falls short of supporting related state conservation initiatives. The HCP may have to be amended multiple times over the term of the ITP and additional minimization and mitigation measures beyond those agreed to at the time of initial ITP issuance may be required each time. The time and expense involved with each amendment may exceed that required to initially include at-risk species in the HCP.

**OPTION 3:** In addition to those species currently listed or current candidates for listing under the ESA (12 species), generally address non-federally listed, at-risk shorebird species through MBTA compliance measures, and specifically address non-federally listed, at-risk species likely to become candidates for federal listing over the term of the ITP (six species: American oystercatcher, snowy plover, least tern, and black skimmer, gopher tortoise and Santa Rosa beach mouse). If all of the potential candidate species for future listing were included along with currently listed or current candidate species, a total of 18 species would be captured under the HCP. *If this option is selected, the Working Group will acquire general and site-specific information on the six species listed above and conduct related threats analyses. This information will then be presented to the Steering Committee who will determine which, if any of the six species, should be included in the HCP.*

**Rationale for Selecting Option 3:** Although the Service cannot offer assurances that no additional minimization and mitigation measures would be required for non-listed species at the time of their listing (as afforded under a CCAA), they could require “other measures as necessary and appropriate” be included within the HCP and then use those measures as the basis for providing conditional take coverage of at-risk species should they be listed in the future (i.e., no additional minimization or mitigation measures would be required). This would be done through a “Conference Opinion (CO)” rather than the traditional Biological Opinion (BO) developed in support of ITP issuance. At the time an at-risk species included in the HCP becomes federally listed, the ITP would simply be amended through a much more abbreviated process than would be required under Options 1 and 2 to provide take authorization for that species. Similarly, even though the Service is unable to place prosecutorial discretion language in the ITP, it would be highly unlikely that federal law enforcement would pursue incidental take violations for newly listed species in the interim between the time of listing and the time the ITP is amended. This would be discussed in their “Set of Findings” for ITP issuance. Thus, the assurances and take coverage afforded under a CCAA could in essence be achieved by including potential candidate species for future listing within the HCP. Regardless of whether a non-listed species becomes federally listed over the term of the ITP, this option would support state conservation initiatives for some at-risk species. There would be no need to amend the HCP each time a species is listed or petitioned for listing over the term of the ITP.

The minimization measures prescribed for listed species and the requisite minimization measures developed for non-federally listed shorebirds to ensure MBTA compliance would largely extend to the additional non-federally listed, at-risk species included in the

HCP, particularly shorebirds. In other words, the inclusion of four additional at-risk shorebird species will not result in four times the effort to develop and/or implement related conservation measures. The expense associated with implementation of minimization measures for the additional at-risk species in the HCP would likely be minimal. Although minimization measures incorporated into the HCP for non-federally listed species would become effective at the time of ITP issuance, mitigation measures for those species would only have to be implemented once those species are officially listed.

Although the minimization measures developed for at-risk shorebird species would not extend to the gopher tortoise, the state currently has a rigorous set of conditions for gopher tortoise protection during coastal projects (i.e., pre-construction surveys, marking for avoidance, and/or relocation). Those same conditions could be included in the FBHCP, and thus no additional effort would be required to develop minimization measures for this species.

The habitat of the Santa Rosa beach mouse (SRBM) fills the gap between the distributions of the Perdido Key and Choctawhatchee beach mice. Its inclusion in the FBHCP would lead to more uniform minimization measures throughout the panhandle. Although most of the documented population of SRBM is on federal lands, it does occur on non-federal lands, and these properties have not been extensively censused. Furthermore, CCCL activities on non-federal lands can cause indirect impacts to beach mice on federal lands (e.g., increased human uses, introduction of free roaming cats, introduction of competing house mice, etc.). Properly protected, non-federal lands could provide opportunities for habitat restoration, acquisition, and enhancement that would allow for expansion or reintroduction of beach mice as mitigation for impacts to currently listed sub-species. Minimization and mitigation measures developed for the other sub-species of beach mice would extend to the SRBM, and thus no additional time would be required to develop conservation measures for this species.

**Rationale against Selecting Option 3:** For each species included in the HCP, both general and site-specific (Florida) biological and ecological data must be presented along with a threat analysis, which is used to estimate the amount of take likely to occur over the term of the ITP. As noted for Option 2, requisite general and site-specific information for those at-risk species considered likely candidates for future federal listing may be lacking or difficult to obtain, thus increasing the timeline for HCP development. Although minimization measures developed for currently listed species and MBTA compliance would largely extend to non-listed, at-risk shorebirds, some additional mitigation would probably be required. Mitigation developed for the piping plover and red knot (currently listed or candidate species) would compensate for disturbances to resting and foraging birds and their habitat. However, neither of those species nest in Florida, while all of the potential candidates for future listing do. Thus, additional mitigation would be needed to compensate for disturbances to nesting birds and their nesting habitat. Additional mitigation would also be required for the gopher tortoise. Increasing the number of species contained within the HCP may also extend the HCP review process, as the Service is required to assess the adequacy of information presented

for each species and must determine if proposed minimization and mitigation measures are adequate for at-risk species should they become federally listed over the term of the ITP.

**OPTION 4:** This option is similar to Option #3, but the list of at-risk species included in the HCP is more exhaustive. In addition to those species currently listed or current candidates for listing under the ESA (12 species), generally address non-federally listed, at-risk shorebird species through MBTA compliance measures, specifically address non-federally listed, at-risk species likely to become candidates for federal listing over the term of the ITP (six species), and also include other non-federally listed, at-risk species designated as SGCN in Florida (six species: Wilson's plover, Caspian tern, gull-billed tern, royal tern, sandwich tern, and sanderling). If all of the SGCN were included along with currently listed and current or potential candidate species, a total of 24 species would be captured under the HCP. *If this option is selected, the Working Group will acquire general and site-specific information on the 12 non-listed species and conduct related threats analyses. This information will then be presented to the Steering Committee who will determine which, if any of the 12 species, should be included in the HCP.*

**Rationale for Selecting Option 4:** The same advantages presented for Option 3 apply here. This option most fully embraces related state conservation initiatives.

**Rationale against Selecting Option 4:** The disadvantages presented for Option 3 may be exacerbated with an expanded list of species to be included in the HCP. The combination of measures developed for currently listed shorebirds, migratory shorebirds, and at-risk shorebird species captured under Option 3 will cascade down to the six at-risk species listed under Option 4, thereby obviating the need for additional protective measures. Legislative authority required to impose terms and conditions in CCCL permits for species that are neither federally nor state listed, as well as stakeholder buy-in, may be difficult to obtain.

**ANALYSIS REVIEWED BY SCIENTIFIC COMMITTEE (SciCom): NO**

**RECOMMENDATION:** The Working Group unanimously recommends Option 3 with inclusion of all six at-risk species. Option 3 is proactive in dealing with species that are likely to become federally listed over the term of the ITP. Furthermore, the inclusion of all four at-risk shorebirds will create a suite of conservation measures that will cascade down to all of the six additional at-risk species included under Option 4. The combination of minimization measures that will be developed for the piping plover (winter resident), red knot (winter resident), American oyster catcher (year-round resident and occasional solitary beach nester), black skimmer (year-round resident and late season colonial beach nester), least tern (summer resident and regular colonial beach nester throughout the state), and snowy plover (year-round resident and obligate solitary beach nester in the Gulf and panhandle regions), as well as MBTA compliance measures, will capture the full range of shorebird nesting behavior and habitat utilization on Florida's beaches. The suite of species and related conservation measures will protect: winter,

summer, and year-round residents; both shorebirds and seabirds with their distinctive nesting strategies; species with both regional and state-wide distributions; and foraging, nesting, and resting/roosting habitat.

**ATTACHMENTS:**

- Listing Status of At-Risk Species Potentially Affected By CCCL Activities
- MBTA Analysis
- Conceptual Minimization Measures for MBTA Compliance
- Supporting Information for Non-federally Listed, At-risk Shorebirds