

## **CHAPTER 14 – CHANGED/UNFORESEEN CIRCUMSTANCES**

During preparation of an HCP, an ITP applicant is required to consider events, conditions, or situations that could foreseeably change over the term of the ITP, as well as those that cannot reasonably be anticipated. These are respectively termed changed and unforeseen circumstances, either of which could increase the scope and/or severity of impacts to covered species within the Plan Area should they occur. Responses to changed and unforeseen circumstances are different from the contingency plans that have been developed as part of the Adaptive Management strategy of the FBHCP (Chapter 13) to be implemented if proposed minimization and mitigation measures fail to meet the Plan’s biological goal. As described below, the FDEP’s response to changed and unforeseen circumstances will be developed in consultation with the USFWS at the time the circumstances arise.

### **Changed Circumstances**

Changed circumstances include the following:

- Changes in the protected status of covered species;
- Actions or conditions that may alter the basis of the USFWS’s “no jeopardy” opinion leading to issuance of the ITP;
- Reorganization and/or reassignment of FBHCP responsibilities within the FDEP;
- Expansion/abridgement of the CCCL program or delegation of regulatory authority from the FDEP to other departments within state government or to local government(s);
- Changes in state statutes that affect covered species and/or the ability of the FDEP to effectively implement the FBHCP; and
- Substantive changes in the metrics used to estimate take.

### **Delisting and/or Listing of New Species**

The FBHCP includes 11 federally-listed species, 1 candidate species for federal listing and 7 species likely to become candidates for federal listing over the term of the ITP (Chapter 5). Minimization (Chapter 10) and mitigation measures (Chapter 11) have been developed for all 19 of these species. Mitigation for the 11 currently listed species will be implemented in accordance with the schedules prescribed in Chapter 12. Those mitigation measures are also sufficient to cover take of the red knot (a current candidate species that overwinters in the Plan Area and benefits from the mitigation proposed for the piping plover) should it become listed. Mitigation for the Santa Rosa Beach mouse, gopher tortoise, and five species of nesting shorebirds/seabirds will be implemented, as prescribed below.

The USFWS will notify the FDEP whenever a candidate species covered under this FBHCP is advertised for listing through the Federal Register. The FBHCP Coordinator will then review applicable mitigation measures with the USFWS and collectively develop an implementation schedule. The USFWS will notify the FDEP of the species official listing, and mitigation measures will be initiated in accordance with the established implementation schedule. The FBHCP will be amended to reflect the new listing and mitigation implementation schedule during the next regularly scheduled Plan update (see Chapter 15, Changes to the FBHCP & ITP) or within one year of the species' official listing, whichever is later.

If a species occurring within the Plan Area that is not currently covered under the FBHCP becomes federally listed during the term of the ITP, the FBHCP Coordinator will at the time the proposed listing is advertised in the Federal Register convene an Intergovernmental Panel (IGP). The IGP, consisting of the FDEP, FWC, and the USFWS, will consider needed amendments to the FBHCP and ITP. Questions to be resolved include, but are not limited to, the following:

1. Are activities regulated under the CCCL program likely to cause take of the newly listed species?
2. If take is likely, are existing protective measures prescribed by the FBHCP for other species sufficient to minimize impacts to the newly listed species?
3. If take is likely, are existing conservation measures prescribed by the FBHCP for other species sufficient to mitigate unavoidable impacts to the newly listed species?
4. What changes, if any, to minimization and mitigation measures are needed?
5. What is a reasonable timeline for amending the FBHCP and implementing the new conservation measures?

Using best available data, if it is determined that take of the newly listed species is likely, the IGP will develop interim minimization and mitigation measures. The FDEP will disseminate those measures for public review and comment. The IGP will review public comments and revise the interim measures, as appropriate. Within 30 days of the species official listing, the FDEP will make formal application to the USFWS to amend its ITP to include the newly listed species as a covered species under the FBHCP. The USFWS will refrain from any enforcement action against the FDEP should take occur during the period in which the ITP amendment application is being prepared and processed, provided the avoidance and minimization measures developed by the IGP and agreed to by the USFWS have been implemented. Upon a finding of "no jeopardy" and in conformance with other ESA and NEPA requirements, including a public comment period, the USFWS will amend the ITP to authorize take of the newly listed species and list any minimization and mitigation measures mutually agreed upon by the FDEP and the USFWS. Revisions to the FBHCP to include general and site-specific information for the newly listed species and related minimization and mitigation measures, as applicable, will be provided to the USFWS during the next regularly scheduled Plan update (see Chapter 15, Changes to the FBHCP & ITP) or within one year of the species' listing, whichever is later.

Should a covered species be delisted at any time during the term of the ITP, the FBHCP Coordinator, with the approval of the FDEP Secretary, will meet with the USFWS to determine if amendments to the FBHCP and/or ITP are warranted. In some instances, minimization and mitigation measures for the delisted species may be eliminated. However, in other instances minimization and/or mitigation measures were developed to benefit a suite of covered species, and thus continuation of those measures is required for the remaining listed species. The USFWS will consider, in consultation with the IGP, the extent to which existing minimization and mitigation measures can be curtailed in response to the delisting of the species and will advise the FDEP of any needed changes to the FBHCP. The ITP will be amended accordingly.

### **Changes in Species Status Affecting “No Jeopardy” Opinion**

One of the criteria for issuance of an ITP is the USFWS’s determination that the applicant’s proposed actions will not appreciably reduce the likelihood of survival and recovery of the species in the wild. If a proposed action is likely to jeopardize the continued existence of a species or its designated critical habitat, the ITP cannot be issued.

During the term of the ITP, the FDEP has committed to minimizing and mitigating impacts to covered species to the maximum extent practicable and to perform monitoring to ensure that the conservation strategy prescribed by the FBHCP is achieving its biological goal and related objectives. In the event that monitoring demonstrates that the conservation strategy is not achieving its intended results, contingency plans will be implemented under the Adaptive Management strategy set forth in Chapter 13 of this FBHCP.

The FDEP will provide the USFWS with an Annual Report (see Chapter 15) each year the ITP is in effect assessing progress to date in implementing the FBHCP and tracking responses of species to its overarching conservation strategy. The first Annual Report will be due no later than March 31 of the second full calendar year following ITP issuance, with each subsequent report due March 31. Following submittal and review of the first five Annual Reports, the FDEP will formally meet with the USFWS to review Plan results. Thereafter, formal reviews will occur once every five years, unless the USFWS determines that more frequent meetings are required. Should data evaluated during those meetings, or brought to the attention of the USFWS at any time independent of the FBHCP reporting process, indicate that the existence of a covered species is in jeopardy, the USFWS will implement the following steps:

- Notify the FDEP by certified correspondence that its original “no jeopardy” opinion for the affected species is under review;
- Provide a timeline for completing the species status review;
- Describe the geographical extent of the Plan Area potentially affected by the species review; and

- Make recommendations to the FDEP, to temporarily modify CCCL permitting activities for that portion(s) of the Plan Area utilized by the affected species until the jeopardy review has been completed.

If after review of the available information, the USFWS determines that the continued existence of a covered species is in jeopardy due in part to activities covered under the FBHCP, the USFWS will meet with the FDEP to determine needed changes to the FBHCP to allow the FDEP to continue to fulfill its CCCL permitting responsibilities in conformance with the ESA. This may require adjusting minimization and mitigation strategies to address the jeopardy determination. Should a jeopardy opinion preclude the USFWS from continuing to authorize incidental take of the affected species, it will notify the Secretary in writing.

### **FBHCP Implementation**

The ability of the FDEP to implement the programs and policies prescribed by the FBHCP in their entirety is predicated on legal authority from the Florida legislature (Chapter 161.053, F.S.). In the absence of such authority, the FDEP cannot initiate rule changes needed to put the Plan into action. Requisite legislative authority and related rule changes are identified in Chapter 12 (Implementation Strategy, Plan Management, Funding, and Schedule) of this HCP. Once the necessary rules and regulations are in place, funding will be essential to the effective and timely implementation of the Plan.

### **Statutory Authority**

***NOTE: Strategies for addressing the uncertainty inherent in the legislative process are currently under investigation. Once an approach satisfactory to the USFWS has been developed, this section will be updated accordingly.***

### **Funding**

The FDEP will provide the USFWS with an annual budget for FBHCP implementation, as prescribed in Chapter 15 of the FBHCP. Every two years for the first six years following ITP issuance, the FDEP will compare FBHCP revenues against projected expenses. Thereafter, budget reviews will be conducted every five years. In the event that requisite activities and programs are substantially or persistently underfunded, the FDEP will convene the IGP to reevaluate and adjust funding strategies, as necessary, and set interim implementation priorities until the deficit has been resolved. The resulting plan of action will be provided to the USFWS for approval prior to implementation.

### **FBHCP Implementation Responsibilities**

Chapter 15 of this FBHCP describes the roles and responsibilities of the various FDEP governmental units and external parties involved in FBHCP implementation. At present those responsibilities rest within the DWRM. The Secretary may from time to time reassign responsibilities and/or personnel among departmental units to ensure that FBHCP program management is properly integrated into the FDEP's overall organizational structure and that available fiscal and personnel resources are most effectively utilized. Similarly, persons and/or other agencies with implementation responsibilities outside the FDEP may be periodically added, removed or replaced. Changes to positions/functions specified in the FBHCP occurring over the term of the ITP will be documented and reported to the USFWS via the Annual Reports. The Annual Report will include sufficient detail to allow the USFWS to determine if the change will materially affect the conservation programs prescribed by the FBHCP, the efficiency with which FBHCP component programs are implemented, and/or the FDEP's ability to comply with the terms and conditions of the ITP. Based on that evaluation, the USFWS will notify the FDEP if administrative or formal changes to the ITP are required. Any required changes to the Plan will be incorporated during the next regularly scheduled Plan update (see Chapter 15, Changes to the FBHCP & ITP).

### **Abridgement, Expansion, or Delegation of CCCL Regulatory Authority**

If, during the term of the ITP, the State of Florida should abridge or expand the FDEP's current CCCL regulatory authority or delegate all or a portion of such authority to another governmental entity, the FDEP will notify the USFWS in writing within five business days. Within 30 days following notification, the FDEP and USFWS will meet to determine the effect of such changes on FBHCP implementation and discuss appropriate changes to the FBHCP and ITP, as described below.

### **Abridgement of CCCL Permitted Activities**

Minimization measures specific to activities no longer regulated under the CCCL program may be eliminated, provided that they do not provide substantial umbrella conservation benefits to other covered species and upon consent of the USFWS. The extent to which mitigation requirements for deregulated activities may be reduced for impacts to covered species will be predicated on the number and type of activities removed from the FDEP's regulatory authority, the extent to which those activities were projected to impact covered species over the term of the ITP at the time of FBHCP preparation, the length of time the ITP has been in effect when the changes occur, and the performance of the FBHCP in meeting its biological goal and related objectives. If changes to the FBHCP are warranted, as mutually agreed to by the USFWS, they will be incorporated during the next regularly scheduled Plan update (see Chapter 15, Changes to the FBHCP & ITP). The FDEP may seek public comment on substantive changes to the Plan. No changes to FBHCP programs may be implemented without explicit written consent of the USFWS.

## Expansion of CCCL Permitted Activities

The FDEP and USFWS will cooperatively assess the nature and magnitude of potential impacts to covered species resulting from new activities or areas regulated under the CCCL program and will determine the extent to which existing minimization and mitigation measures adequately address those impacts. The extent to which additional minimization and/or mitigation requirements may be required will be predicated on the number and type of activities added to the FDEP’s regulatory authority, the extent to which those activities are likely to impact covered species above and beyond projected impacts from other covered activities, the length of time the ITP has been in effect when the changes occur, and the performance of the FBHCP in meeting its biological goal and related objectives. If the USFWS determines that the new activities or areas will not increase the amount of take authorized under the ITP and do not materially affect the basis for ITP issuance, it may authorize an administrative change to the ITP. Corresponding changes to the FBHCP, as mutually agreed to by the FDEP and USFWS, will be incorporated during the next regularly scheduled Plan update (see Chapter 15, Changes to the FBHCP & ITP). If on the other hand, the new activities or areas are likely to increase the scope of take currently authorized or materially alter the basis upon which the ITP was issued, a formal amendment to the ITP will be required. Until such time as the ITP is amended to cover the new activities or areas, no take causally related to those activities will be authorized. The FDEP will amend its FBHCP and provide other supporting information, as may be needed, to support the USFWS’s review of the ITP amendment application.

## Delegation of Regulatory Authority

The Code of Federal Regulations allows for the succession of incidental take permits from one person/entity to another, provided the successor is able to effectively continue with implementation of the FBHCP in full compliance with the terms and conditions of the ITP. If, through legislative action or other means, the State of Florida transfers CCCL permitting authority from the FDEP to another entity within state or local government, the USFWS may request whatever additional information it may need to assess the effect of such changes on FBHCP implementation. Based on that assessment, the USFWS may revoke the ITP or allow it to remain in force while a revised FBHCP is prepared. For the ITP to remain in force, the new management entity will agree in writing to fully assume those responsibilities previously carried out by the FDEP under the existing FBHCP.

## **Climate Change, Sea Level Rise, and Coastal Erosion**

As noted in Chapter 6 of the FBHCP (Plan Area), climate change may result in sea level rise and an increase in the frequency and/or magnitude of storms impacting the Plan Area. Worst- and best-case scenarios were incorporated into models for predicting take over the term of the ITP. If it is determined that sea level rise is exceeding the worst-case scenario used in the model, thereby significantly impacting covered species habitat and precluding the FDEP’s ability to achieve the biological goal and

related objectives set forth in the FBHCP, it will meet with the USFWS to determine an appropriate course of action. Similarly, should climate change affect the basis for assessing threats to, and related minimization measures for, covered species (e.g., shifts in seasonal abundances, breeding patterns, etc.), or should rates of erosion grossly affect baseline projections of shoreline retreat used to estimate future shoreline armoring, the FDEP will meet with the USFWS to assess an appropriate response.

Calibration of long-term baseline projections to actual measured conditions within the Plan Area will occur as follows:

1. Estimates of sea level rise will be based on predictions promulgated by the Intergovernmental Panel on Climate Change. IPCC estimates will be reviewed every 10 years during the formal IPG review of the FBHCP (see Chapter 15, Changes to the HCP and ITP).
2. Assessments on the effects of climate change on the periodicity of covered species occurrences within the Plan Area will be reviewed every 10 years during the formal IPG review of the FBHCP. Any documented changes will be assessed in relation to the adequacy of existing minimization measures.
3. Rates of shoreline erosion will be estimated by the FDEP every 10 years using the same methodologies employed for determining shoreline retreat, as described in Chapter 8 of the FBHCP. Results will be reviewed during the corresponding 5-year review of the FBHCP by the IGP.

Should climate change, sea level rise, and/or shoreline erosion significantly alter estimates of take, as presented in Chapter 8 of the FBHCP, the FDEP may continue to issue CCCL permits until such time as the USFWS has reassessed its original “no jeopardy” opinion. If the changed circumstance threatens the continued existence and recovery of any covered species within the Plan Area, the USFWS will advise the FDEP accordingly and will implement the process described above for addressing changes in a species’ status affecting the “no jeopardy” opinion.

### **Unforeseen Circumstances**

If, during the implementation of the FBHCP, an unforeseen circumstance occurs that could have a significant negative impact on covered species within the Plan Area, or affect the ability of the FDEP to effectively manage activities prescribed by the FBHCP and/or comply with the terms and conditions of the ITP, the following procedures will be followed:

Within thirty (30) business days of the date the FDEP becomes aware of the unforeseen circumstance, the FBHCP Coordinator will advise the USFWS Vero Beach, Florida Field Office (1339 20<sup>th</sup> St., Vero Beach, Florida 32960) by certified letter of the following:

- The nature of the circumstance;

- The geographic and temporal extent to which the Plan Area will be affected by the circumstance; and
- The potential impact of the circumstance on covered species within in the Plan Area.

Within ten (10) business days of receipt of the written notification described above, the USFWS will discuss the unforeseen circumstance in greater detail with the FDEP to better understand its potential affect on the FBHCP. If it is determined that the changed circumstance is unlikely to substantively affect covered species or the FDEP’s ability to effectively implement the FBHCP, the USFWS will notify the FDEP in writing that no further action is required. However, if the USFWS is unable to reach an unlikely to affect determination, a formal meeting involving the IGP and affected stakeholders, as applicable, will be convened within the next 30 days. During that meeting, an appropriate response to the situation, such as modifying the FBHCP and/or ITP, will be developed and implemented upon approval of the USFWS. The IGP will determine the extent to which additional information is needed to assess the impact of the unforeseen circumstance on covered species in the Plan Area, the Plan’s ability to achieve its biological goal, the FDEP’s ability to effectively administer the FBHCP, and/or the FDEP’s ability to comply with the terms and conditions of the ITP. If necessary, and as mutually agreed to by the FDEP and USFWS, a special monitoring plan may be formulated to obtain data and information requisite to this assessment. The plan, if needed, will be prepared within 90 days of the IGP meeting and will contain the following:

- A description of the data and/or information to be collected;
- Procedures for collecting the data/information;
- Data/information collection responsibilities;
- A schedule for implementing the monitoring plan; and
- Reporting requirements.

Upon obtaining all necessary information, the USFWS, FDEP, and any affected third parties, as applicable, will meet to analyze and review the data and develop an action plan to successfully resolve issues associated with the unforeseen circumstance.