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By Certified Mail

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RE: NOTICE OF VIOLATIONS OF THE ENDANGERED SPECIES ACT, THE NATIONAL ENVIRONMENTAL POLICY ACT, AND THE CLEAN WATER ACT IN CONNECTION WITH THE U.S. ARMY CORPS OF ENGINEERS' PIECEMEAL APPROVAL OF THE EXTENSION OF WILLIAMSON BOULEVARD AND ASSOCIATED DEVELOPMENT PROJECTS IN VOLUSIA AND BREVARD COUNTIES (SAJ-2103-01250; SAJ-2009-01219; SAJ-1998-1836; etc.)

On behalf of the Friends of Spruce Creek Preserve, Inc., Volusia-Flagler Sierra Club, Florida Sierra, 1,000 Friends of Florida, the Democratic Club of Northwest Volusia County, IDEAS For Us (IDEAS), and the Sweetwater Coalition of Volusia County, this letter provides notice that the United States Army Corps of Engineers ("the Corps") has violated and continues to violate various provisions of the Clean Water Act ("CWA"), the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA"), as well as these statutes' implementing regulations, by failing to prepare an Environmental Impact Statement ("EIS") that



considers all direct, indirect, and cumulative impacts from a suite of related projects in Volusia and Brevard Counties in Florida, and by failing to enter into formal consultation with the United States Fish and Wildlife Service (“FWS” or “the Service”) regarding these projects’ impacts on federally threatened and endangered species.

Several related projects in Volusia County aim to open a swath of undisturbed, ecologically valuable land to development and urban sprawl from cities along Florida’s eastern coast. These projects include the extension of Williamson Boulevard from its current terminus near Airport Road south to SR 5A near the unincorporated community of Farmton, Florida; the addition of a new interchange from Interstate 95 to Pioneer Trail; the widening of Interstate 95 in the vicinity of Pioneer Trail; the residential and commercial “Woodhaven” development; the Ocean Gate Commerce Center; the Restoration Development of Regional Importance; and the Farmton Local Plan, which includes residential and commercial development in the nation’s largest wetlands mitigation bank. Collectively, this letter refers to this suite of projects as the “Volusia County Development Projects.”¹

The extension of Williamson Boulevard and the Volusia County Development Projects require a comprehensive, integrated evaluation by the Corps and FWS. However, to date, the Corps has never analyzed these projects together, depriving both the agency and the public of the thorough analysis of environmental impacts that the Corps has a statutory duty to provide. Instead, the Corps has proceeded by authorizing projects in a piecemeal fashion, having prepared only a single inadequate environmental analysis that willfully ignored the significance of these interrelated projects. As described in detail below, this pattern of piecemeal approval and cursory environmental analysis violates several federal environmental laws.

This letter provides formal notice to the Corps of its violations of the Endangered Species Act and the Clean Water Act. In addition, this letter describes how the Corps’ piecemeal approach to permitting these various projects has violated, and continues to violate, the National Environmental Policy Act. The Corps’ piecemeal approval of individual projects, and its deliberate disregard for obvious indirect and cumulative impacts, constitute clear legal violations.

While we believe that we would prevail if this matter must be litigated, our intention is that this letter will lead the Corps to seriously consider these concerns, to prepare a comprehensive EIS and enter into the formal section 7 consultation process with FWS that the ESA requires, and to respond within sixty days to discuss the concrete steps the agency will take to remedy these violations in order to avoid litigation.

¹ Two projects described below have impacts in Brevard County: the Farmton Local Plan and the southernmost extension of Williamson Boulevard (there called Deering Parkway). However, because the vast majority of these projects and their impacts will occur in Volusia County, this letter collectively refers to all projects as “Volusia County Development Projects.”

I. STATUTORY AND REGULATORY FRAMEWORK

A. *The Clean Water Act*

Congress designed the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a). Generally, the CWA prevents the discharge of pollutants into the waters of the United States, including the discharge of dredged or fill materials into jurisdictional wetlands. *Id.* § 1362(6). Under Section 404 of the Act, the U.S. Army Corps of Engineers has the authority to issue permits, “after notice and opportunity for public hearings for the discharge of dredged or fill materials” into wetlands under limited, specific circumstances. *Id.* § 1344.

When deciding whether to grant a permit to fill wetlands, the Corps must follow a certain procedure spelled out in the agency’s implementing regulations. First, if a project is not water dependent, the Corps must presume that practicable alternatives exist that do not require damage to wetlands, unless the permit applicant clearly demonstrates otherwise. 40 C.F.R. § 230.10(a)(3). The Corps must not issue a permit to fill wetlands if a less environmentally damaging practicable alternative exists. *Id.* § 230.10(a).

Granting a permit for a project to fill wetlands requires the Corps to engage in a thorough analysis of the project’s impacts on the “complete and interrelated wetland area” in addition to the project’s more general environmental impacts. 33 C.F.R. § 320.4(b)(3). In addition to the more general environmental analysis that NEPA requires (described below), the Corps’ own regulations require the agency to recognize and analyze the extent to which “the cumulative effects of numerous piecemeal changes can result in a major impairment of wetland resources.” *Id.* To that end, “the particular wetland site for which an application is made *will be evaluated* with the recognition that it may be part of a complete and interrelated wetland area.” *Id.* (emphasis added).

The Corps must also ensure that any application to fill wetlands will comply with the Environmental Protection Agency’s (“EPA’s”) regulatory “Guidelines” for section 404(b)(1) of the CWA. 33 C.F.R. § 323.6(a); 40 C.F.R. pt. 230. These regulations make clear that “filling operations in wetlands” are “among the most severe environmental impacts” covered by CWA regulations. 40 C.F.R. § 230.1(d). The regulations’ “guiding principle should be that degradation or destruction of special sites,” such as wetlands, “may represent an irreversible loss of valuable aquatic resources.” *Id.* Thus, “[f]undamental to [EPA’s] Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually *or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.*” *Id.* § 230.1(c) (emphasis added).

The EPA’s Guidelines further require the Corps to address a project’s cumulative impacts. As the Guidelines define the term, “[c]umulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material.” 40 C.F.R. § 230.11(g). The Corps must consider these cumulative

impacts “to the extent reasonable and practical.” *Id.* § 230.11(g)(2). Further, the Corps “shall collect information and solicit information from other sources [than the permit applicant] about the cumulative impacts on the aquatic ecosystem.” *Id.* (emphasis added). The Corps must “document[] and consider[]” all this information about cumulative impacts “during the decision-making process concerning the evaluation of individual permit applications.” *Id.* Thus, when considering an application for a permit to fill wetlands, the Corps must collect and consider information about the cumulative impacts to the aquatic ecosystem from that project and others.

Under the EPA’s regulatory Guidelines, “[n]o discharge of dredged or fill material shall be permitted if it . . . jeopardizes the continued existence of species listed as endangered or threatened under the [ESA] or results in the likelihood of destruction or adverse modification of [critical habitat].” 40 C.F.R. § 230.11(b)(3).

B. *The Endangered Species Act*

The ESA “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits any “person” from “taking” any member of an endangered or threatened species. 16 U.S.C. § 1538(a). Where federal action is involved, including federal funding or approval for a project that is likely to take or otherwise impact listed species, the action agency must engage in consultation under section 7 of the ESA. 16 U.S.C. § 1536.

If a federal agency’s action may affect a threatened or endangered species or its critical habitat, the agency taking that action (“the action agency”) must enter into consultation with either the U.S. Fish & Wildlife Service (“FWS” or “the Service”) or the National Marine Fisheries Service (“NMFS”). *Id.*² To determine the necessary level of input from the FWS or NMFS, the action agency may elect to undergo “informal consultation,” which is defined as “an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation or a conference is required.” 50 C.F.R. § 402.13. If the action agency determines that a project is not likely to adversely affect a protected species “with the written concurrence of the Service,” then informal consultation concludes. *Id.* (emphasis added). However, if an action is likely to adversely affect a protected species, then the action agency must enter into the more rigorous process of formal section 7 consultation. *Id.* § 402.14(a). Formal consultation requires extensive participation by FWS or NMFS and culminates in a biological opinion as to whether the project will likely jeopardize the continued existence of a protected species or destroy or adversely modify its critical habitat. *Id.* § 402.14.

C. *The National Environmental Policy Act*

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1 NEPA’s “national policy” is to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the

² The FWS is the appropriate agency to consult regarding freshwater or land-based species, while the NMFS is the appropriate agency to consult regarding marine or anadromous species. *See* 50 C.F.R. § 402.01.

environment . . . [and] enrich the understanding of the ecological systems and natural resources important to the nation . . .” 42 U.S.C. § 4321. In enacting NEPA, Congress expressly recognized “the profound influences of population growth [and] high-density urbanization . . .” *Id.* § 4331(a). To guard against environmental damage, Congress required all federal agencies to prepare a “detailed statement” for each “major federal action significantly affecting the quality of the human environment” that includes “the environmental impact of the proposed action” as well as a thorough consideration of alternatives to the proposed action. *Id.* § 4332(c).

In light of NEPA’s mandates, the Supreme Court has reasoned that NEPA is “intended to reduce or eliminate environmental damage and to promote ‘the understanding of the ecological systems and natural resources important to’ the United States.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

To achieve NEPA’s goals, federal agencies may employ two mechanisms to evaluate the environmental impacts of federal actions—an Environmental Assessment (“EA”) and an EIS. *See* 42 U.S.C. § 4332(c); 40 C.F.R. §§ 1508.9, 1508.11. These procedural mechanisms are designed to inject environmental considerations “in the agency decision making process itself,” and to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Pub. Citizen*, 541 U.S. at 768-69 (quoting 40 C.F.R. § 1500.1(c)). Therefore, “NEPA’s core focus [is] on improving agency decisionmaking,” *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a “hard look” at potential environmental impacts and environmentally enhancing alternatives “as part of the agency’s process of deciding whether to pursue a particular federal action,” *Balt. Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983).

The alternatives analysis “is the heart” of an EIS or EA. 40 C.F.R. § 1502.14. NEPA’s implementing regulations require that the decision making agency “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.” *Id.* Importantly, the NEPA process “shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made.*” 40 C.F.R. § 1502.2(g) (emphasis added); *see also id.* § 1502.5 (requiring that NEPA review “shall be prepared early enough *so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made*”) (emphasis added).

An agency must prepare an EIS for every “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). Under NEPA’s implementing regulations, “significance” requires consideration of both context and intensity. 40 C.F.R. § 1508.27. “Context” considerations include the affected region, interests, and locality, varying with the setting of the action, and include both short and long-term effects. *Id.* § 1508.27(a). “Intensity” refers to the severity of impact, including impacts that may be both beneficial and adverse; unique characteristics of the geographic area, such as proximity to wetlands, wild and scenic rivers, or ecologically critical areas; the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may

establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act; and whether the action threatens a violation of federal law imposed for the protection of the environment. *See* 40 C.F.R. § 1508.27(b). Where an action is not expected to result in a significant environmental impact, the agency must still prepare an EA and make a finding of no significant impact (“FONSI”). *Id.* §§ 1508.9, 1501.3.

Under NEPA, to determine the proper scope of an EIS, an agency “shall consider 3 types of actions,” including connected actions, cumulative actions, and similar actions. *Id.* § 1508.25. Connected actions are those that “[a]utomatically trigger other actions which may require environmental impact statements . . . [,] cannot or will not proceed unless other actions are taken previously or simultaneously . . . [,] or are interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* § 1508.25(a)(1). Cumulative actions are those that “with other proposed actions have cumulatively significant impacts.” *Id.* 1508.25(a)(2). And similar actions “when viewed with other reasonably foreseeable or proposed agency actions have similarities that provide a basis for evaluating their environmental consequences together.” *Id.* § 1508.25(a)(3). An agency should analyze similar actions together “when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” *Id.*

To comply with NEPA, a federal agency must also consider all direct and indirect impacts associated with a federal action. 40 C.F.R. § 1508.8. Direct effects “are caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). Indirect effects “are caused by the action and are later in time, but are still reasonably foreseeable.” *Id.* § 1508.8(b). As particularly relevant here, “[i]ndirect effects may include *growth inducing effects* and other effects related to induced changes in the patterns of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Id.* (emphasis added).

A federal agency must also consider all of a federal action’s cumulative impacts. A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

II. DEVELOPMENT IN VOLUSIA COUNTY

A. *The Affected Environment*

The Volusia County Development Projects will take place on a swath of currently rural, undeveloped land roughly twenty miles long.³ The land consists of a mixture of wetlands and upland parcels, which currently provide valuable habitat for an array of species, including some protected under the Endangered Species Act. According to Volusia County's Comprehensive Plan, the area "contains expanses of relatively uninterrupted environmentally sensitive areas which need to be managed as part of a system."⁴ The area threatened with development is just such an expanse of undisturbed environmentally sensitive land. Additionally, this swath of land has particular environmental value because of its connection with lands preserved for conservation.⁵ These lands include the Doris Leeper Spruce Creek Preserve, the Longleaf Pine Preserve, the Wiregrass Prairie Preserve, the Buck Lake Conservation Area, and the Merritt Island National Wildlife Refuge.⁶ Development of lands that are environmentally valuable in part for their connection to conserved lands has the negative effects of both direct environmental destruction and degradation of existing conservation lands, which suffer from erosion of their environmental value as they become surrounded by human development.

Additionally, the swath of land threatened with development is ecologically and hydrologically connected to Spruce Creek. Despite being listed as an Outstanding Florida Water, Spruce Creek currently suffers from pollution from fecal coliform, mercury, and copper.⁷ Additionally, Spruce Creek is managed under a Total Maximum Daily Load ("TMDL") for Dissolved Oxygen and Nutrients, and another TMDL for fecal coliform.⁸ The extension of Williamson Boulevard from Airport Road to Pioneer Trail and the neighboring Woodhaven

³ See Ex. 1 (depicting the undeveloped, wooded action area for the extension of Williamson Boulevard and the Volusia County Development Projects).

⁴ GROWTH & RES. MGMT. DEP'T, COMPREHENSIVE PLANNING DIV., VOLUSIA COUNTY COMPREHENSIVE PLAN 4 (2014) [hereinafter VOLUSIA CNTY. COMPREHENSIVE PLAN], available at <http://www.volusia.org/core/fileparse.php/5561/urlt/Chapter-1-Future-Land-Use-Element.pdf>.

⁵ See, e.g., Memorandum from Lee Kissick, Sr. Regulatory Scientist, St. Johns River Water Mgmt. Dist., to Pioneer CDD 4 (June 5, 2013) [hereinafter SJRWMD Memo] (noting that "[m]uch of the ecological value that on-site habitats now have can be attributed to their connection to expansive natural habitats beyond the project") (attached as Ex. 2).

⁶ See Volusia County, *Conservation Lands Map*, VOLUSIA CNTY, FLA., <http://www.volusia.org/services/growth-and-resource-management/environmental-management/land-management/conservation-lands-map/> (last visited Jan. 12, 2016).

⁷ See *Statewide Comprehensive Verified List of Impaired Waters*, FLA. DEP'T OF ENVTL. PROT. (Jan. 7, 2016), available at <http://www.dep.state.fl.us/water/watersheds/assessment/a-lists.htm> (confirming that as of 2014, Spruce Creek suffered from these forms of pollution).

⁸ See *Final TMDL Documents*, FLA. DEP'T OF ENVTL. PROT. (Jan. 8, 2016), available at http://www.dep.state.fl.us/water/tmdl/final_tmdl.htm.

development are located in the drainage basin for Spruce Creek, the majority of which is already developed.⁹ Additionally, Spruce Creek has hydrological connections as far south as the Farmton Tract, which means that the entire swath of land to be developed under all the projects at issue here is within Spruce Creek's drainage basin.¹⁰

Similarly, the land threatened with development includes portions of the Farmton Tract, which is where the Farmton Mitigation Bank is located. The Farmton Mitigation Bank is the nation's largest wetlands mitigation bank, including 24,323 acres divided into three sites.¹¹ This mitigation bank is "expected to be a very long-term bank" that "provide[s] restoration, enhancement, and preservation of wetlands and uplands."¹² The Farmton Mitigation Bank's enabling instrument reflects an agreement between the landowner and the Army Corps, the EPA, and the FWS—i.e., agencies that help comprise the Mitigation Bank Review Team responsible for oversight of the Bank's operations.¹³ The enabling instrument describes the environmental value of the Bank as follows:

In addition to the self-contained ecological value of the Farmton Mitigation Bank, the bank is a valuable component of the natural corridor system that is being established along the St. Johns River. It is significant to the regional ecosystem not only because of its large size, but also because it is adjacent to other conservation lands It consists of a major network of wildlife corridors extending from the east side of the St. Johns River to Crane Swamp and Spruce Creek Swamp (the headwaters of Spruce Creek). Numerous Listed Species (endangered and threatened) have been identified within each of the Bank sites. Much of the value of the bank lies in this fact: without the bank, most of the land could be used in perpetuity for either forestry or development.¹⁴

⁹ See SJRWMD Memo., *supra* note 5 **Error! Bookmark not defined.**, at 3 (noting that "[t]he proposed project is located within Spruce Creek special basin") (Ex. 2); ENGLAND-THIMS & MILLER, INC., S. WILLIAMSON BLVD. EXTENSION ENVIRONMENTAL RESOURCE PERMIT APPLICATION 5 (May 2013) (noting that both western and eastern basins on the development site eventually drain to Spruce Creek) (relevant portions attached as Ex. 3); *see also* *Final TMDL Documents*, *supra* n. 8, at 16 fig. 4.3.

¹⁰ MIAMI CORP. & FARMTON CONSERVATION TASK FORCE, FARMTON CONSERVATION MANAGEMENT PLAN 71 (2013) [hereinafter FARMTON CONSERV. MGMT. PLAN], *available at* <http://www.volusia.org/core/fileparse.php/5034/urlt/farmtonconservationmanagementplanfinal.pdf> (noting that the headwaters for Spruce Creek is within the North Bank of the Farmton Mitigation Bank).

¹¹ RIBITS, U.S. ARMY CORPS OF ENG'RS, https://ribits.usace.army.mil/ribits_apex/f?p=107:10:15913036616956::NO::P10_BANK_ID:132 (last visited Jan. 12, 2016).

¹² MIAMI CORP., FARMTON MITIGATION BANK ENABLING INSTRUMENT 2, 4 (June 7, 2000) [hereinafter FARMTON ENABLING INSTRUMENT] (relevant portions attached as Ex. 4).

¹³ *Id.* at tit. p.

¹⁴ *Id.* at 3.

Despite having designed the bank to persist over the long-term and despite noting that its value includes connections to other conserved lands, the Farmton Mitigation Bank is now threatened with development. The Farmton Tract that includes the Bank consists of roughly 59,000 acres.¹⁵ Of the larger Farmton Tract, over 15,000 acres are slated for residential and commercial development—including some lands that are currently protected within the Bank itself.¹⁶

The ecosystem imperiled by the Volusia County Development Projects also includes habitat for numerous listed species. For example, the FWS has indicated that development in the Farmton Tract will require consultation under section 7 of the ESA.¹⁷ The Farmton Mitigation Bank’s enabling instrument similarly acknowledged the presence of “numerous Listed Species.”¹⁸ The FWS has also indicated that as many as 18 ESA-listed species could be affected by the Volusia County Development Projects.¹⁹

Finally, the ecosystem at issue also includes wetlands with very significant environmental values. In addition to including the largest wetlands mitigation bank and much of the watershed for the Outstanding Florida Water of Spruce Creek, the ecosystem also contains Aquatic Resources of National Importance. After reviewing the 5,187 acre site of Restoration project, the EPA stated that “over two thirds of the proposed impact area is comprised of functional and high quality wetlands.”²⁰ These wetlands “perform many valuable ecological functions, including providing fish and wildlife habitat, food chain support, natural water quality improvement, and flood storage.”²¹ This area includes 329 acres of cypress-forested wetlands that “[t]he EPA considers . . . to be of sufficient quantity . . . and quality to be considered Aquatic Resources of National Importance (ARNI) because they provide nesting, roosting, and feeding sites for a wide variety of wildlife species, as well as filtering upland runoff and providing groundwater recharge of the aquifer when the adjacent water table drops during drought periods.”²² Thus, the ecosystem at issue includes wetlands that have unique traits making them significant at a national level.

¹⁵ See FARMTON CONSERV. MGMT. PLAN, *supra* note 10, at 3 (depicting the larger Farmton Tract, the three parcels of the Farmton Mitigation Bank, and the proposed developments).

¹⁶ VOLUSIA CNTY. COMPREHENSIVE PLAN, *supra* note 4, at 106.

¹⁷ FARMTON CONSERV. MGMT. PLAN, *supra* note 10, at 32–33 (noting and depicting that all or much of the Farmton Tract is within a consultation area for the Florida Scrub Jay, the Crested caracara, and the Everglades Snail Kite) (relevant portions attached as Ex. 5).

¹⁸ FARMTON ENABLING INSTRUMENT, *supra* note 12, at 3 (Ex. 4).

¹⁹ U.S. FISH & WILDLIFE SERV., LIST OF THREATENED AND ENDANGERED SPECIES THAT MAY OCCUR IN YOUR PROPOSED PROJECT LOCATION, AND/OR MAY BE AFFECTED BY YOUR PROPOSED PROJECT 3 (Dec. 17, 2015) [hereinafter AFFECTED SPECIES LIST] (attached as Ex. 6).

²⁰ Letter from James D. Giattina, Director, Water Prot. Div., U.S. EPA, to Col. Alan M. Dodd, U.S. Army Corps of Eng’rs 2 (Nov. 9, 2012) (attached as Ex. 7).

²¹ *Id.*

²² *Id.*

B. The Volusia County Development Projects

1. The Extension of Williamson Boulevard

Currently, Williamson Boulevard begins at West Granada Boulevard (SR 40) in Ormond Beach, Florida and runs to its current terminus near Airport Road in Port Orange, Florida. However, plans exist to extend Williamson Boulevard more than twenty miles south into Brevard County to reach the existing interchange between Interstate 95 and State Road (“SR”) 5A.²³ The entire length of the proposed extension is all part of a larger set of plans to enable development west of Interstate 95, as documented by the fact that the proposed length of Williamson Boulevard will pass directly through or alongside major development projects, described below. Without the extension of Williamson Boulevard, these development projects will not take place. The Corps has acknowledged this, noting that the extension of Williamson Boulevard is “a key component of [a] future transportation network” that will enable “future development and population growth.”²⁴

The Corps has never undertaken any comprehensive environmental review of the entire extension of Williamson Boulevard, but it has issued piecemeal approvals for critical components of that extension. In particular, the Corps has issued a permit to fill wetlands during the construction of a publicly funded 2.3-mile extension of Williamson Boulevard between Airport Road and Pioneer Trail, which is the northernmost extension of the road. Construction of this 2.3-mile extension is now underway. Similarly, the Corps issued an administrative approval for development activities in the unincorporated community of Farnton, Florida, where the southernmost portion of Williamson Boulevard will be built.²⁵ In short, the Corps has approved the northern and southern portions of the planned extension of Williamson Boulevard without ever examining the extension in its entirety.

2. New Interchange at I-95 and Pioneer Trail and Widening of Interstate 95

Volusia County is currently working with the Florida Department of Transportation to obtain necessary federal permits to develop a new interchange between Interstate 95 and Pioneer

²³ See *Farnton Spine Network Map*, VOLUSIA CNTY., FLA. (July 9, 2014 11:15 AM), <http://www.volusia.org/services/growth-and-resource-management/planning-and-development/long-range-planning/upcoming-items/farnton/index-farnton.stml> (attached as Ex. 8) (containing maps prepared by the Florida Department of Transportation and Volusia County that depict the proposed route for Williamson Boulevard along with associated development).

²⁴ U.S. ARMY CORPS OF ENG’RS, DEPARTMENT OF THE ARMY ENVIRONMENTAL ASSESSMENT AND STATEMENT OF FINDING FOR PERMIT APPLICATION SAJ-2013-01250 (SP-JCP) § 5.2 (2015) [hereinafter ENVTL. ASSMT.].

²⁵ See Ex. 9 (containing the Corps’ approval of a modification of the Farnton Mitigation Bank Enabling Instrument necessary to allow the Farnton Local Plan to proceed); VOLUSIA CNTY. COUNCIL, INTERCHANGE JUSTIFICATION REPORT (IJR): INTERSTATE-95 AND PIONEER TRAIL 1-2 (Sept. 2015) [hereinafter INTERCHANGE JUSTIFICATION REPORT] (attached as Ex. 10) (containing a motion by the Corps in ongoing litigation about the approval in Exhibit 9 revealing the Corps’ intent to move for a voluntary remand to allow the agency to come into compliance with NEPA).

Trail.²⁶ The construction of this new interchange is inextricably linked with the extension of Williamson Boulevard and the other Volusia County Development Projects. As the Daytona Beach News-Journal aptly summarized, “Volusia County and Port Orange want a new interchange on Interstate 95 *that would complement a sprawling new development planned around a new extension of Williamson Boulevard.*”²⁷ Indeed, the new interchange relies for its justification on extension of Williamson Boulevard and the planned Woodhaven development. In the words of Volusia County Councilman Pat Patterson, “[a] development that size, you need that interchange there.”²⁸ Similarly, Volusia County has stated that the “continuation of Williamson Boulevard . . . will also support efforts for a future I-95 interchange at Pioneer Trail.”²⁹ Additionally, the Interchange Justification Report for the new interchange relies on “a significant amount of development plans” and states that the interchange will enhance the potential for local economic development.³⁰ In other words, the interchange makes sense only in the context of the Volusia County Development Projects and aims to facilitate that development. The Florida Department of Transportation recently received comments from the Federal Highway Administration indicating that a NEPA review is necessary before this process may proceed.³¹

Additionally, the Florida Department of Transportation reports that projects to widen Interstate 95 from Daytona Beach to Titusville are currently underway.³² Because these interstate-widening projects will enhance regional transportation options, they call into question the need for any extensions of Williamson Boulevard.

3. *The Woodhaven Development*

Woodhaven is a proposed mixed-use development of roughly 1,400 residential units and 650,000 square feet of commercial property. Woodhaven is located directly adjacent to the extension of Williamson Boulevard between Airport Road and Pioneer Trail and depends upon

²⁶ See Email from Martha Hodgson, Fla. Dep’t of Transp., to Nick Lawton, Meyer Glitzenstein & Eubanks (Jan. 11, 2015) (confirming that FHWA received and issued comments on a proposal for developing a new interchange at Interstate 95 and Pioneer Trail) (attached as Ex. 11).

²⁷ *Volusia County Wants New I-95 Interchange at Pioneer Trail*, DAYTONA BEACH NEWS-JOURNAL, Mar. 14, 2013, <http://www.news-journalonline.com/article/20130314/news/130319890> (emphasis added).

²⁸ *Id.*

²⁹ Volusia Cnty. Council Res. 29A (Fla. Mar. 21, 2013) (Pioneer Trail Interchange Resolution) (attached as Ex. 12).

³⁰ INTERCHANGE JUSTIFICATION REPORT, *supra* note 25, at 1-2 (Ex. 10).

³¹ *Supra* note 26.

³² Fla. Dep’t of Transp., *242715-2 I-95 Widening and Systems Interchange Reconstruction Design-Build from North of SR 44 to North of US 92*, Cent. Fla. Roads (Jan. 8, 2016), http://www.cflroads.com/project/242715-2/I-95_Widening_and_Systems_Interchange_Reconstruction_Design-Build_from_North_of_SR_44_to_North_of_US_92; Fla. Dep’t of Transp., *406869-8 I-95 Widening from South of SR 406 to North of SR 44*, Cent. Fla. Roads (Jan 13, 2016), http://www.cflroads.com/project/406869-8/I-95_Widening_from_South_of_SR_406_to_North_of_SR_44.

the construction of the road for its viability. The extended Williamson Boulevard will provide the main access to the Woodhaven development.³³ Indeed, Volusia County has described the extension of Williamson Boulevard from Airport Road to Pioneer Trail as a “road through the Woodhaven development.”³⁴ Moreover, the developer itself confirmed that “development of [Woodhaven] . . . will necessitate the reconstruction and extension of Williamson Boulevard.”³⁵ As the Daytona Beach News Journal summarized, the extended Williamson Boulevard “will open the door for development of the Woodhaven subdivision.”³⁶ Indeed, Woodhaven’s developer is timing the project to “be ready for construction when the road is complete.”³⁷ Thus, the Woodhaven development would not proceed but for the extension of Williamson Boulevard.

4. *Ocean Gate Commerce Center*

The Ocean Gate Commerce Center is a planned development of 188 acres at the southwestern corner of the intersection between Interstate 95 and State Road 44 that will include roughly 975,000 square feet of commercial and industrial development.³⁸ The City of New Smyrna Beach has reviewed and approved the site plan for this development,³⁹ which indicates that the extended Williamson Boulevard will pass directly through the Commerce Center, providing the primary access point for the development.⁴⁰ Thus, the Commerce Center’s own development plan indicates that the extended Williamson Boulevard is essential to provide access to the proposed commercial and industrial development, revealing that the development would not proceed without the extension of Williamson Boulevard.

³³ Cmty. Dev. Dep’t, Port Orange Cnty., Port Orange Comprehensive Plan 1-28 (2010), available at https://www.port-orange.org/community_development/planning/proposedear/policy/Chapter%201%20-%20Future%20Land%20Use%20Element.pdf (Policy 3.2.3); see also Ex. 13 (Stanaki Property Proposed Future Land Use Map) (depicting the Woodhaven development containing residential development accessible *only* from the Williamson Boulevard extension).

³⁴ See Volusia Cnty. Council Res. 29A (Fla. Mar. 21, 2013), at 1 (Ex. 12).

³⁵ Volusia Cnty. Council Budget Resolution VC-1328036581865-A (Fla. Feb. 9, 2012), at 03-3 (attached as Ex. 14).

³⁶ Chris Graham, *Williamson Extension Could Open Up Southeast Volusia Development*, DAYTONA BEACH NEWS-JOURNAL, Aug. 18, 2015, <http://www.news-journalonline.com/article/20150818/news/150819571>.

³⁷ Chris Graham, *\$15.8 million Williamson Boulevard extension between Port Orange and New Smyrna Beach moves forward*, DAYTONA BEACH NEWS-JOURNAL, Aug. 20, 2015, <http://www.news-journalonline.com/article/20150820/NEWS/150829939>.

³⁸ CITY OF NEW SMYRNA, BEACH DEVELOPMENT ACTIVITY REPORT 2, 6 (Dec. 2015), available at <http://cityofnbs.com/ArchiveCenter/ViewFile/Item/2079>.

³⁹ *Id.*

⁴⁰ See OCEAN GATE COMMERCE CTR., GENERAL DEVELOPMENT PLAN Exhibit B (depicting how Williamson Boulevard will provide primary access to the development) (attached as Ex. 15).

5. *The Restoration Development of Regional Impact*

“Restoration” is a very large proposed “Development of Regional Impact” that will include between 3,185 and 8,500 residential units, as well as between 1,250,000 square feet and 3,300,000 square feet of commercial development.⁴¹ As do the other projects described above, Restoration’s development relies on the extension of Williamson Boulevard. In fact, “Williamson Boulevard is to be the primary north-south transportation corridor within the Restoration” development.⁴² The City of Edgewater intends for Williamson Boulevard’s extension to be designed to facilitate the development of Restoration: “The design, dimensions, and alignment of Williamson Boulevard shall be driven by the requirement that it support the overall need for continuous, direct, and efficient vehicular movement from surrounding areas of the City and County through the Restoration” development.⁴³ Thus, the Restoration Development of Regional Impact will not proceed without the extension of Williamson Boulevard.

6. *The Farmton Local Plan*

Farmton is the largest of the proposed Volusia County Development Projects. With roughly 15,000 acres slated for development, the Farmton Local Plan (the master plan for this development) notes that it will feature up to 23,100 residential units and 4,700,000 square feet of commercial development.⁴⁴ The planned development will abut each of the three sections of the Farmton Mitigation Bank.⁴⁵ As with the other Volusia County Development Projects, Williamson Boulevard is indispensable to the development of the Farmton Local Plan. In fact, a map prepared by the Volusia County Growth and Resource Management Department depicts an extended Williamson Boulevard passing directly through most of the Farmton Local Plan’s proposed development, providing the main component of the development’s transportation network. Thus, the Farmton Local Plan will not proceed without the extension of Williamson Boulevard.

⁴¹ CITY OF EDGEWATER, COMPREHENSIVE PLAN: FUTURE LAND USE, RESTORATION SUSTAINABLE COMMUNITY DEVELOPMENT DISTRICT SUB-ELEMENT 7–10 (describing the minimum and maximum development levels in the various land use designations within Restoration, which “shall be required”), available at <http://www.cityofedgewater.org/attachments/article/341/Chpt%201%20-%20Future%20Land%20Use%20GOPS.pdf>.

⁴² *Id.* at 27.

⁴³ *Id.*

⁴⁴ VOLUSIA CNTY. COMPREHENSIVE PLAN, *supra* note 4, at 128 (detailing the Farmton Local Plan).

⁴⁵ FARMTON CONSERV. MGMT. PLAN, *supra* note 10, at 3 (depicting the developments in relation to the Farmton Mitigation Bank parcels) (Ex. 5).

C. Numerous Comments on the Volusia County Development Projects

The Army Corps has received numerous comments regarding the projects described above calling for the agency to prepare an EIS for the entirety of the Williamson Boulevard extension that includes analysis of the road extension's cumulative impacts and direct and indirect impacts, including enabling the Volusia County Development Projects:

- April 8, 2012: The Volusia-Flagler Group of the Sierra Club (“Sierra Club”) and the Edgewater Citizens Alliance for Responsible Development (“ECARD”) submitted comments to the Corps questioning the scientific quality of modeling for the Restoration project (at the time called Hammock Creek Green), offering a professional environmental engineer’s analysis of impacts and practicable alternatives, and calling for the Corps to analyze all cumulative impacts and direct and indirect effects.
- November 9, 2012: ECARD and the Sierra Club submitted comments on the Restoration project, calling for the Corps to develop an EIS for the project and noting likely impacts on the Farnton Mitigation Bank and the headwaters of Spruce Creek.
- January 22, 2013: ECARD and the Sierra Club submitted comments regarding a proposal to remove 374.77 acres of wetlands from the North Bank of the Farnton Mitigation Bank, as well as a pending application to fill roughly 574 acres of wetlands in the Restoration project site. These comments noted that the Farnton and Restoration development plans both depend on the extension of Williamson Boulevard and called for the Corps to develop a full-blown EIS for these projects.
- March 7, 2013: The National Marine Fisheries Service submitted comments on the proposed modification of the Farnton Mitigation Bank Enabling Instrument. NMFS noted that the planned development included an extension of Williamson Boulevard as a “north-south, four-lane divided roadway,” which would connect the Farnton Development to the Restoration development and “likely diminish the value of the bank’s credits.” For this reason, NMFS opposed the proposed modification to the enabling instrument.
- July 11, 2013: ECARD and the Sierra Club submitted comments on the extension of Williamson Boulevard between Airport Road and Pioneer Trail, noting that the extension would facilitate the Woodhaven development and a new interchange at Interstate 95 and Pioneer Trail, describing plans to extend Williamson Boulevard all the way south through Farnton to State Road 5A, chronicling numerous prior comments, and reiterating the call for the Corps to develop an EIS for the full extension of Williamson Boulevard.
- July 12, 2013: The Sweetwater Coalition of Volusia County submitted comments calling into question the width and necessity of the extension of Williamson

Boulevard between Airport Road and Pioneer Trail, noting likely degradation of Spruce Creek, and laying out potential practicable alternatives.

- August 1, 2013: ECARD and the Sierra Club submitted additional comments on the Restoration development project, objecting to the proposal to fill roughly 600 acres of wetlands, noting that housing developments are not water dependent, describing likely negative environmental impacts, and alleging deficiencies in the public notice for the application.
- August 12, 2013: ECARD and the Sierra Club submitted comments documenting “deep citizen opposition” to the Restoration development and its likely negative environmental impacts.
- October 22, 2013: ECARD and the Sierra Club submitted comments on the extension of Williamson Boulevard, the development of the Ocean Gate Commerce Center, the Restoration project, and the Farnton Local Plan, again calling for the Corps to develop an EIS for the entire extension of Williamson Boulevard, along with “the residential and commercial development it will unleash” and describing practicable alternatives to Williamson Boulevard’s extension.
- April 20, 2015: ECARD and the Sierra Club submitted comments documenting the connection between the extension of Williamson Boulevard between Airport Road and Pioneer Trail and numerous other Volusia County Development Projects, including the Restoration and Farnton developments. These comments also urged the Corps to prepare an EIS.

III. ANALYSIS

A. The Corps must prepare an Environmental Impact Statement for any extension of Williamson Boulevard.

NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for any “major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). To determine whether an action has an effect significant enough to require an EIS, agencies must consider factors regarding the project’s “context” and “intensity.” 40 C.F.R. § 1508.27. “[T]he presence of one or more of these factors should result in an agency decision to prepare an EIS.” *E.g., Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81, 99 (D.D.C. 2014). Here, several factors show that the extension of Williamson Boulevard will have significant environmental effects, requiring the Corps to prepare an EIS.

1. Context

NEPA’s implementing regulations require an agency to consider a project’s “context,” including “the affected region” and any “long-term effects.” 40 C.F.R. § 1508.27(a). In brief, “[c]ontext refers to the setting in which the proposed action takes place.” *Ocean Advocates v.*

U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2004). As described above, the extension of Williamson Boulevard will encroach on more than twenty miles of undeveloped land. By opening this land for development, the extension of Williamson Boulevard will fundamentally alter the rural, undeveloped nature of this area. This development will both cause environmental degradation and damage many local residents' interests in preserving the area's current rural, "old Florida" aesthetic. Similarly, the extension of Williamson Boulevard all the way to its proposed terminus in the Farnton Tract will certainly require the further filling of jurisdictional wetlands, including Aquatic Resources of National Importance. Additionally, this roadway extension will likely encroach on habitat for numerous listed species. Thus, the context for the extension of Williamson Boulevard makes clear that the project will have significant impacts.

2. Intensity

NEPA's implementing regulations also require an agency to consider ten factors related to a project's "intensity." 40 C.F.R. § 1508.27(b). Several of these factors reveal that the extension of Williamson Boulevard will have significant impacts. For example, one factor for a project's intensity is the "[u]nique characteristics of the geographic area, *such as proximity to . . . wetlands . . . or ecologically critical areas.*" *Id.* § 1508.27(b)(3) (emphasis added). As documented above, the extension of Williamson Boulevard will pass through more than twenty miles of undisturbed area containing undeveloped, high-quality wetlands. In fact, Williamson Boulevard's path will take it through both the nation's largest wetlands mitigation bank and through wetlands that the Environmental Protection Agency considers "Aquatic Resources of National Importance" because of their value to wildlife and the ecosystem services these wetlands provide.⁴⁶ The proposed path for Williamson Boulevard makes clear that its geographic area does include wetlands and ecologically critical areas. Accordingly, this factor reveals that Williamson Boulevard's extension will have significant impacts.

Similarly, the degree of controversy surrounding the extension of Williamson Boulevard reveals that the project will have significant impacts. Under 40 C.F.R. § 1508.27(b)(4), an agency must prepare an EIS when there is "a substantial dispute concerning the size, nature, or effect of the proposed action; if so, the agency must consider the dispute and address the concerns in its final decision." *Georgia River Network v. U.S. Army Corps of Eng'rs*, 334 F. Supp. 2d 1329, 1338 (N.D. Ga. 2003). As documented above, the Corps has received numerous, detailed comments regarding the effects of the extension of Williamson Boulevard for at least three years. These comments have provided information about the many developments that the extension of Williamson Boulevard will enable, and have repeatedly called on the Corps to prepare an EIS. As the Corps reviewed the most recent application for the extension of Williamson Boulevard between Airport Road and Pioneer Trail, it received numerous additional comments explaining that this road extension does not stand alone, but instead is part of a much larger project that will enable further development. These comments reveal a substantial dispute concerning the size, nature, and effect of the extension of Williamson Boulevard. Accordingly, these comments reveal that "the effects on the quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(b)(4), requiring the Corps to prepare an EIS.

⁴⁶ See Letter from James D. Giattina to Col. Alan M. Dodd, *supra* note 20, at 2 (Ex. 7).

Additionally, the Corps must consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” *Id.* § 1508.27(b)(7). “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” *Id.* As described above, the extension of Williamson Boulevard will not only involve the construction of more than 20 miles of roadway, but will also enable the construction of tens of thousands of new homes as well as millions of square feet of new commercial space. Moreover, these new developments will be built in an area that now contains valuable wetlands prized as Aquatic Resources of National Importance for the habitat they create and the ecosystem services they provide. These new developments and their environmental impacts are all reasonably foreseeable, being amply documented in the comprehensive plans of several cities, the resolutions of Volusia County, numerous comments to the Corps, and newspaper coverage of the proposed developments. Accordingly, from the extension of Williamson Boulevard, “it is reasonable to anticipate a cumulatively significant impact on the environment,” *id.*, revealing that this factor also indicates that the Corps must prepare an EIS.

The Corps must also consider whether the action may adversely affect any species protected by the Endangered Species Act or whether the action threatens a violation of any federal, state, or local law that aims to protect the environment. *Id.* 1508.27(b)(9)–(10). As documented below, the extension of Williamson Boulevard and the development that it will enable may adversely affect numerous species protected by the ESA and threatens to violate the Clean Water Act. Thus, these factors also demonstrate that the Corps must prepare an EIS.

B. Any EIS for the Williamson Boulevard extension must include analysis of the Volusia County Development Projects it will enable.

Under NEPA’s implementing regulations, an agency preparing an EIS must consider several types of actions along with the primary action at issue, as well as cumulative impacts and indirect impacts from the primary project. Similarly, the Corps’ own implementing regulations for the CWA require the agency to consider a project’s cumulative actions. Moreover, EPA’s Guidelines for implementing section 404 of the CWA, which are binding on the Corps, impose a similar obligation. The effect of each of these regulations is to require the Corps to prepare an EIS for any extension of Williamson Boulevard that includes a thorough analysis of the development the extended roadway will enable.

1. The Volusia County Development Projects meet the definitions of connected actions, cumulative actions, and similar actions that the Corps must include in an EIS.

An EIS must include analysis of “connected actions,” “cumulative actions,” and “similar actions.” 40 C.F.R. § 1508.25(a). “Actions are connected if they . . . [c]annot or will not proceed unless other actions are taken previously or simultaneously.” *Id.* § 1508.25(a)(1)(ii). As described above, each of the Volusia County Development Projects depends on the extension of Williamson Boulevard and the critical access that the extended road would provide. Indeed, the Woodhaven, Ocean Gate Commerce Center, Restoration, and Farnton projects include plans for

Williamson Boulevard to pass directly through major residential and commercial centers, providing accessibility essential to the projects' viability, revealing that the Volusia County Development Projects "cannot or will not proceed" unless Williamson Boulevard is extended. Thus, these projects fall squarely within the definition of "connected actions," *id.*, and the Corps must include analysis of these projects, including projects recently approved or already underway, within any EIS it prepares for any extension of Williamson Boulevard.

Similarly, the Volusia County Development Projects meet the definition of "cumulative actions" as well. Cumulative actions "when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.* § 1508.25(a)(2). The extension of Williamson Boulevard, when viewed along with the other Volusia County Development Projects, will have cumulatively significant impacts, including the fill of numerous acres of wetlands and likely adverse impacts to federally protected species. Thus, the Volusia County Development Projects constitute cumulative actions, and the Corps must include analysis of these projects within any EIS for any extension of Williamson Boulevard.

The Volusia County Development Projects also meet the definition of "similar actions." Similar actions are those that "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography" *Id.* § 1508.25(a)(3). An agency should consider similar actions in an EIS "when the best way to assess adequately the combined impacts . . . is to treat them in a single impact statement." *Id.* The Volusia County Development Projects each center on the extension of Williamson Boulevard, meaning that they all share a common geography. Certain projects also share common timing. For example, the Woodhaven project is designed to proceed as soon as Williamson Boulevard is extended from Airport Road to Pioneer Trail. Similarly, the Corps has already issued an administrative approval necessary for the commencement of the Farmton Local Plan, and is currently considering a permit for the southernmost portion of the Williamson Boulevard extension. Accordingly, because of both common geography and common timing, the Volusia County Development Projects meet the definition of "similar actions." The Corps should thus include them in any EIS it prepares for any extension of Williamson Boulevard.

2. *The Corps must analyze impacts from the Volusia County Development Projects under its duties to consider cumulative impacts associated with the extension of Williamson Boulevard.*

An EIS must include a discussion of a project's cumulative impacts. 40 C.F.R. § 1508.25(c). A cumulative impact "is the impact which results from the incremental impact of the action when added to other past, present, *and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.*" *Id.* § 1508.7 (emphasis added). As described above, the Volusia County Development Projects are all reasonably foreseeable, being documented in the comprehensive plans of several cities, the resolutions of Volusia County, numerous comments to the Corps, and newspaper coverage of the proposed developments. Additionally, the Volusia County Development Projects will have significant environmental impacts, such as the fill of additional wetlands, which add

incrementally to the impacts from the extension of Williamson Boulevard. Accordingly, the Corps must consider impacts from the Volusia County Development Projects in its analysis of cumulative impacts in any EIS prepared for the extension of Williamson Boulevard.

Regulations implementing the Clean Water Act confirm this duty. The Corps' own CWA regulations obligate the agency to evaluate a project's impacts on the "complete and interrelated wetland area" because "cumulative effects of numerous piecemeal changes can result in a major impairment of wetland resources." 33 C.F.R. § 320.4(b)(3). The extension of Williamson Boulevard and the other Volusia County Development Projects will have significant impacts on an interrelated wetland area that is more than 20 miles in length and includes the nation's largest wetlands mitigation bank, habitat for numerous listed species, Aquatic Resources of National Importance, and the headwaters of Spruce Creek, an Outstanding Florida Water. Accordingly, the Corps' own regulations obligate it to consider impacts on this "complete and interrelated wetland area," including all cumulative impacts associated with the Volusia County Development Projects.

The EPA's Guidelines for implementing section 404 of the CWA again confirm the Corps' duty to consider cumulative impacts associated with the Volusia County Development Projects. The EPA's Guidelines state that the Corps must not permit the fill of wetlands unless "it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually *or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.*" 40 C.F.R. § 230.1(c) (emphasis added). To determine whether such an unacceptable adverse impact may occur, the Corps must consider cumulative wetlands impacts, which the EPA's guidelines define as "changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." 40 C.F.R. § 230.11(g). Again, the ecosystem of concern includes hundreds of acres of wetlands, the nation's largest wetlands mitigation bank, habitat for numerous listed species, Aquatic Resources of National Importance, and the headwaters of an Outstanding Florida Water. The known or probable impacts of other activities impacting this ecosystem include all impacts from each of the Volusia County Development Projects. To comply with the EPA's CWA Guidelines, the Corps must consider whether all of these impacts *in combination* may have an unacceptably adverse effect on the ecosystem.

3. *The Corps must consider the indirect, growth-inducing impacts of the extension of Williamson Boulevard, including the Volusia County Development Projects.*

NEPA's implementing regulations require an agency preparing an EIS to consider a project's indirect effects, "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Critically, these regulations note that indirect effects "may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." *Id.* This definition easily encompasses the vast amount of development that the extension of Williamson Boulevard will enable in Volusia County. As described above, the Volusia County Development Projects will include tens of thousands of homes and millions of square feet of commercial development, all made possible by the extension of Williamson Boulevard. In other words, the

extension of Williamson Boulevard will have significant indirect, growth-inducing effects. The Corps must include analysis of these growth-inducing effects in any EIS the agency prepares for any extension of Williamson Boulevard.

4. *The Corps must consider impacts from the extension of Williamson Boulevard and the Volusia County Development projects on the Farmton Mitigation Bank.*

As described above, the Farmton Mitigation Bank is the nation's largest wetlands mitigation bank and includes high-quality wetlands, links in important ecological corridors, and habitat for numerous listed species. The Corps regularly relies on credits from the Bank to provide mitigation for permits to fill wetlands, having done so more than 100 times in the last 13 years.⁴⁷ In fact, the Corps relied on credits from the Bank to mitigate impacts from the extension of Williamson Boulevard between Airport Road and Pioneer Trail and indicated that it would likely continue to do so for other projects in the region.⁴⁸ Ironically, however, the Corps is relying on credits from this Mitigation Bank in order to *approve* projects that pose threats to that very Mitigation Bank. Whether it construes these threats as cumulative impacts or indirect, growth-inducing impacts (the threats to the Mitigation Bank meet both definitions), the Corps has a statutory obligation under NEPA to consider these threats in the EIS that NEPA requires it to prepare for the Williamson Boulevard extension and the Volusia County Development Projects.

5. *The Corps must address substantive comments it has received.*

As described above, the Corps has received numerous public comments regarding the extension of Williamson Boulevard and the Volusia County Development Projects.⁴⁹ Similarly, as the Corps was preparing its EA for the 2.3-mile extension of Williamson Boulevard between Airport Road and Pioneer Trail, it received numerous additional comments.⁵⁰ The Corps has failed to respond to these comments in a manner that demonstrates reasoned decision-making. *E.g., Del. Dept. of Natural Res. v. EPA*, 785 F.3d 1, 14-15 (D.C. Cir. 2015) (“refus[ing] to engage with the commenters” arguments renders an action “arbitrary and capricious on that ground alone”). For example, commenters on the 2.3-mile extension of Williamson Boulevard raised numerous issues that the Corps refused to consider, such as this project's growth-inducing effects generally and its role in facilitating the Woodhaven and I-95 interchange developments specifically, as well as the project's impacts on scrub-jays.⁵¹ The Corps, however, stated that there were “no new issues” from these comments and offered only legally and logically flawed

⁴⁷ *RIBITS: Credit Ledger for Farmton*, U.S. ARMY CORPS OF ENG'RS, https://ribits.usace.army.mil/ribits_apex/f?p=107:6:7017895452505:ledger:NO:RP,6:P6_HOLDWHERE,P6_HOLDGET,P6_BANK_ID:,,132 (last visited Jan. 13, 2016).

⁴⁸ ENVTL. ASSMT., *supra* note 24, §§ 4.7, 8.3.9 (“Future wetland impacts will be mitigated in the watershed, resulting in ‘no net loss’ of wetland function and value.”).

⁴⁹ *Supra* pp. 12–13.

⁵⁰ ENVTL. ASSMT., *supra* note 24, § 4.

⁵¹ *Id.*

responses.⁵² Similarly, commenters noted that the 2.3-mile extension of Williamson Boulevard should be limited to **two** lanes rather than **four**, but the Corps did not meaningfully consider whether a two-lane road could accomplish the project’s overall goals.⁵³ Finally, several commenters suggested practicable alternatives—including the use of two lanes rather than four, the possibility of raising the road on pilings, or employing a narrower right of way—but the Corps never addressed these or explained why it rejected them. These failures to meaningfully engage with public comments were unlawful. Similarly, the Corps has never provided any meaningful response to the many comments that ECARD and the Sierra Club submitted over the course of several years. As the Corps prepares an EIS for the extension of Williamson Boulevard, it has an ongoing duty to engage in a meaningful consideration of the public comments it receives. *Id.*; 40 C.F.R. § 1503.4.

C. *The Corps must consult with the Fish & Wildlife Service.*

Section 7 of the ESA requires federal agencies to insure that their actions are not likely to jeopardize the continued existence of a species listed under the ESA or result in the destruction or adverse modification of a listed species’ critical habitat. 16 U.S.C. § 1536(a)(2). To that end, if a project “may affect” a listed species or its critical habitat, federal agencies must consult with the Fish & Wildlife Service. 50 C.F.R. § 402.14(a). An agency may consult informally with the Service, in which case consultation ends only if the agency receives “*the written concurrence of the Service* that the action is not likely to adversely affect listed species.” *Id.* §§ 402.13(a), 402.14(b)(1) (emphasis added). Otherwise, the agency must proceed to formal consultation with the Service, in which the Service prepares a Biological Opinion as to the project’s impacts on listed species and critical habitat. *Id.* § 402.14.

The Corps has never consulted with the Service, formally or informally, regarding impacts to listed species from the extension of Williamson Boulevard or the Volusia County Development Projects it will enable. The only consideration the Corps has given to listed species occurred in the Environmental Assessment it prepared under NEPA for the extension of Williamson Boulevard between Airport Road and Pioneer Trail. There, the Corps expressly refused to analyze the full extension of Williamson Boulevard or any development it will enable, inappropriately limiting its focus to the road’s direct footprint. Within the narrow habitat range the Corps considered, it failed to apply the best available science in determining that the project would have no effect on the threatened Florida scrub-jay and unlawfully applied two “effect determination keys” to arrive at the conclusion that the project was not likely to adversely affect the threatened Eastern indigo snake or the endangered Wood stork. The Corps never received any written concurrence in any of these determinations from the Service.

The Corps has also never consulted with the Service about impacts to listed species from other portions of the Williamson Boulevard extension or from any of the Volusia County Development Projects. Nevertheless, the Corps did provide an administrative approval for the modification of the Farnton Mitigation Bank to allow a large amount of development without

⁵² *Id.*

⁵³ *Id.* § 4.7

any attention whatsoever to listed species or any consultation with the Service, despite the fact that the Mitigation Bank’s enabling instrument confirms that “[n]umerous Listed Species (endangered and threatened) have been identified within each of the bank sites[,]”⁵⁴ and the fact that the Service has indicated that consultation is necessary for modification of the Bank.⁵⁵ Additionally, the Service is currently considering an application for the southernmost portion of the extension of Williamson Boulevard.⁵⁶ An assessment of the site for that portion of Williamson Boulevard indicates “anticipated utilization” by the Florida panther and the Wood stork, both of which are endangered species. Because these projects may affect listed species, the Corps must enter into consultation with the Service.

The Corps’ scanty attention to the ESA’s requirements is inadequate for several reasons. First, the Corps has artificially restricted its scope of analysis to a very small area, turning a blind eye to the fact that the extension of Williamson Boulevard will proceed past Pioneer Trail and will enable a host of development projects with much more significant impacts than the Corps has acknowledged. In addition to unlawfully segmenting its analysis of environmental impacts under NEPA (as described below), the Corps’ artificially narrow focus has led it to ignore likely adverse effects to listed species in violation of the ESA.

Under the ESA, a project’s “action area [includes] all areas to be affected directly *or indirectly* by the Federal action *and not merely the immediate area involved in the action.*” 50 C.F.R. § 402.02 (emphasis added). The ESA’s implementing regulations further define “indirect effects” as “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.* As described above, the extension of Williamson Boulevard will have reasonably foreseeable indirect effects, including facilitating the Volusia County Development Projects, on a swath of land more than twenty miles long that includes the nation’s largest wetlands mitigation bank, habitat for numerous listed species, and aquatic resources of national importance. Accordingly, the action area for any extension of Williamson Boulevard includes the full length of the roadway’s extension as well as the sites of each of the Volusia County Development Projects. The Service’s list of species that may occur in the project’s action area indicates that this area may contain 18 listed species.⁵⁷ “Species on this list should be considered in an effects analysis for [the] project and may include species that exist in another geographic area” because the project may affect species in other locations, such as fish that reside downstream.⁵⁸ The Service’s limited attention to only three listed species in an analysis of

⁵⁴ FARMTON ENABLING INSTRUMENT, *supra* note 12, at 3 (Ex. 4).

⁵⁵ FARMTON CONSERV. MGMT. PLAN, *supra* note 10, 32-33 (explaining that the Farmton Mitigation Bank is within the consultation area for several listed species).

⁵⁶ See BREVARD CNTY. PUB. WORKS DEP’T & SWALLOWTAIL LLC, DEERING PARKWAY JOINT APPLICATION FOR INDIVIDUAL ENVIRONMENTAL RESOURCE PERMIT/AUTHORIZATION TO USE STATE-OWNED SUBMERGED LANDS/FEDERAL DREDGE AND FILL PERMIT (Oct. 1, 2013) [hereinafter DEERING PARKWAY APPLICATION], available at <https://permitting.sjrwmd.com/epermitting/jsp/Search.do?theAction=searchDetail&permitNumber=143909> (attached as Ex. 16).

⁵⁷ See AFFECTED SPECIES LIST, *supra* note 19, at 3 (Ex. 6).

⁵⁸ *Id.*

only one small portion of the Williamson Boulevard extension falls far short of the analysis the ESA requires. To remedy this legal shortcoming, the Corps must engage in consultation with the Service on the impacts of the extension of Williamson Boulevard and the Volusia County Development Projects throughout the project's entire action area.

The Corps' purported justification for its position that the extension of Williamson Boulevard between Airport Road and Pioneer Trail would have no effect on the scrub-jay is a good example of the agency's legally inadequate analysis under the ESA. The Corps' EA for that extension acknowledged that scrub-jays have habitat less than a mile away, but opined that these birds would be unlikely to "traverse the additional property and I-95" to reach the project site, which the Corps stated feature "flatwoods, pine plantation and wetlands (no scrub habitat suitable for Scrub Jays)."⁵⁹ This analysis is faulty in several regards.

First, the distinction between "flatwoods, pine plantation," and scrub habitats ignores the fact that the Service states that the scrub-jay lives in "scrubby *flatwoods habitats* of Florida"⁶⁰ and does not comport with the Service's guidance on surveying sites for scrub-jays, which indicates that these birds dwell in "pine *flat woods*" and "sand *pine plantations*" and which indicates the best methods for surveys (which the Corps did not use).⁶¹ The Corps itself indicates that "[t]he Pine Flatwoods community is the predominant upland cover type on the project,"⁶² yet fails to consider that this *predominant* ecosystem is viable scrub-jay habitat according to the federal agency that has expertise on this issue. Indeed, this oversight offers a good example of why the Service's greater biological expertise is valuable. Additionally, the Corps overlooked the fact that the very site of the Corps' limited analysis is well within the mean dispersal range of scrub-jays, which is between 1 and 1.7 miles, because acknowledged scrub-jay habitat occurs less than a mile to the east.⁶³ Similarly, the Corps' analysis of scrub-jay impacts focused solely on habitat east of Interstate 95 and wholly ignored its own later statement that scrub-jay habitat also occurs "to the west, largely within existing state-owned lands."⁶⁴ The ESA requires the Corps to make any findings related to listed species on the basis of the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). By ignoring readily available scientific information about the scrub-jay's habitat and dispersal patterns, as well as information the Corps itself includes in other portions of the EA, the Corps violated the ESA. However, by consulting with the Service on all impacts from the extension of Williamson Boulevard and the

⁵⁹ ENVTL. ASSMT., *supra* note 24, § 10.1.5.

⁶⁰ N. Fla. Ecological Servs. Office, *Florida Scrub-Jay*, U.S. FISH & WILDLIFE SERV. (Jan. 2015), <http://www.fws.gov/northflorida/Species-Accounts/Fla-Scrub-Jay-2005.htm>.

⁶¹ N. Fla. Ecological Servs. Office, *Florida Scrub-Jay General Survey Guidelines and Protocols*, U.S. FISH & WILDLIFE SERV. (Aug. 24, 2007), <http://www.fws.gov/northflorida/Scrub-Jays/general-survey-guide-082407.htm>.

⁶² ENVTL. ASSMT., *supra* note 24 **Error! Bookmark not defined.**, § 1.3.

⁶³ Rachelle Meyer, *Aphelocoma coerulescens*, U.S. FOREST SERV. (2012), <http://www.fs.fed.us/database/feis/animals/bird/apco/all.html#Territory>.

⁶⁴ ENVTL. ASSMT., *supra* note 24, § 9.4(e).

Volusia County Development Projects, the Corps can help ensure that this legal violation does not recur.

The Corps' determination that the extension of Williamson Boulevard between Airport Road and Pioneer Trail is not likely to adversely affect the Wood stork and the Eastern indigo snake is likewise legally flawed. The Corps made these determinations by applying "effect determination keys" prepared by the Service. As an initial matter, these keys are facially unlawful. The ESA's implementing regulations require the Service's written concurrence on *each determination* that a project is not likely to adversely affect a listed species, because that determination is highly fact-specific, requiring expert consideration of each specific project and action area, as well as cumulative and indirect impacts—all of which are fact-specific considerations that keys, by their very nature, cannot provide. *See* 50 C.F.R. §§ 402.13(a), 402.14(b)(1). However, these keys obviate the need for such written concurrence on each such determination, violating the ESA's implementing regulations.

Additionally, even if the keys were themselves lawful, the Corps misapplied them in an unlawful manner. First, the Corps applied a version of the key for the Wood stork from September 2008 despite the fact that the Service issued a revised version of that key in May 2010 because "new information"—i.e., the best available science—indicated that the keys needed revision.⁶⁵ Second, the artificially constrained scope of the Corps' analysis led the agency to ignore the fact that Wood storks *do* occupy the action area for the entire extension of Williamson Boulevard. For example, the Farmton Mitigation Bank enabling instrument specifically noted that Wood storks "are among the Listed Species observed" at the Bank.⁶⁶ Similarly, the application materials for the southernmost extension of Williamson Boulevard indicates "anticipated utilization" of that project's site by Wood storks, including foraging and roosting.⁶⁷ Thus, the Corps' determination of no likely adverse impacts to Wood storks is legally defective, a problem the Corps should cure by entering into formal consultation with the Service.

The Corps' treatment of impacts to the Eastern indigo snake is similarly legally flawed. This determination relied on a finding that the project would "impact less than 25 acres of xeric habitat . . . or less than 25 active and inactive gopher tortoise burrows,"⁶⁸ which are important because the snake often uses tortoise burrows. However, the key actually establishes a significantly different standard, allowing a determination that a project is not likely to adversely affect the snake only where the project "will impact less than 25 acres of xeric habitat *supporting less than 25* active and inactive gopher tortoise burrows."⁶⁹ In contrast, the key requires

⁶⁵ Letter from Paul Souza, Field Supervisor, S. Fla. Ecological Servs. Office, U.S. Fish & Wildlife Serv., to Donnie Kinard, Chief, Regulatory Div., Jacksonville Dist. Corps of Eng'rs (May 18, 2010), *available at* <https://www.fws.gov/verobeach/BirdsPDFs/20100518LetterServicetoCorpsFLProgrammaticStorkRevised1.pdf>.

⁶⁶ *See* FARMTON ENABLING INSTRUMENT, *supra* note 12, at 13 (Ex. 4).

⁶⁷ DEERING PARKWAY APPLICATION, at pt. I (Ex. 16).

⁶⁸ ENVTL. ASSMT., *supra* note 24, § 10.1.15 (emphasis added).

⁶⁹ Letter from Dawn Jennings, Acting Field Supervisor, U.S. Dep't of the Interior, U.S. Fish & Wildlife Serv., to Col. Alan M. Dodd, Dist. Eng'r, Dep't of the Army, Jacksonville Dist. Corps of Eng'rs (Aug. 13, 2013), *available at* http://www.fws.gov/northflorida/indigosnakes/20130813_ltr_Update_addendum_2010_COE_Programmatic_EIS_K

consultation where a project will impact “more than 25 acres of xeric habitat *or* more than 25 active and inactive gopher tortoise burrows.”⁷⁰ By misplacing the word “or,” the Corps made it easier to reach the conclusion that the project would not likely adversely affect the snake; under the Corps’ mistaken approach, the agency could find that a project would not likely adversely affect the snake where a project impacted less than 25 acres of habitat regardless of the number of gopher tortoise burrows present. In contrast, the FWS’s key would find that a project may affect the snake where it impacted more than 25 burrows regardless of the amount of impacted habitat. By inappropriately changing the standard in the FWS’ key, the Corps misapplied the document and thus compounded its violations of the ESA.⁷¹

Additionally, the Corps’ analysis of impacts to the snake is unlawful because it failed to consider the full action area of the project. As described above, the action area for the extension of Williamson Boulevard is far larger than the artificially limited area the Corps considered. Without taking into account the appropriate action area, the Corps cannot rationally conclude that the project would affect less than 25 acres of habitat or 25 tortoise burrows. In fact, given the vast size of the action area for the entire extension of Williamson Boulevard and the Volusia County Development Projects, adverse impacts to the snake are extremely likely. Similarly, the Corps’ analysis of impacts to the Eastern Indigo Snake wholly failed to consider habitat fragmentation as a threat to the species. The failure to consider the impact of habitat fragmentation on this species is unlawful. *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1156–57 (D.C. Cir. 2011). Accordingly, the Corps must enter into consultation with the Service regarding this species as well.

Additionally, this action area contains numerous federally listed species to which the Corps has never provided any attention at all. The FWS has indicated that this area contains 18 listed species,⁷² but the Corps has considered only 3. The Corps has thus violated the ESA by failing to consider the full array of species that may be affected by the extension of Williamson Boulevard and the Volusia County Development Projects.

In sum, the Corps has violated the Endangered Species Act in several regards. To remedy the various legal defects described above, the Corps must enter into consultation with the Fish & Wildlife Service regarding the impacts from the entire extension of Williamson Boulevard and all the Volusia County Development Projects it will enable.

[ey.pdf](#); Letter from Paul Souza, Field Supervisor, S. Fla. Ecological Servs. Office, and David L. Hankla, Field Supervisor, N. Fla. Ecological Servs. Office, to David S. Hobbie, Chief, Regulatory Div., U.S. Army Corps of Eng’rs (Jan. 25, 2010), *available at* http://www.fws.gov/northflorida/indigosnakes/20130813_ltr_Update_addendum_2010_COE_Programmatic_EIS_Key.pdf (emphasis added).

⁷⁰ *Id.*

⁷¹ Additionally, the Corps has never considered any impacts to the gopher tortoise itself. Although not federally protected under the ESA in Florida, the gopher tortoise is a candidate for ESA protection in Florida, as well as being listed as a Threatened species under state law by the Florida Fish & Wildlife Conservation Commission. As such, effects to this species should receive consideration.

⁷² See AFFECTED SPECIES LIST, *supra* note 19, at 3 (Ex. 6).

D. The Corps must not continue to issue piecemeal approvals for segments of Williamson Boulevard or for any of the Volusia County Development Projects, which would violate both NEPA and the EPA's Guidelines for section 404 of the CWA.

- 1. The Corps' narrow analysis of the extension of Williamson Boulevard has violated NEPA by unlawfully segmenting a large project for piecemeal approvals.*

“The anti-segmentation rule is generally that an agency cannot evade its responsibilities under the National Environmental Policy Act by artificially dividing a major federal action into smaller components, each without a ‘significant’ impact.” *Fla. Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005) (internal quotations omitted). This rule exists “to prevent agencies from dividing one project into multiple individual actions each of which individually has an insignificant impact, but which collectively have a substantial impact.” *Id.*

Courts may “prohibit segmentation or require a comprehensive EIS for [multiple] projects, even when one is not yet proposed, if an agency has egregiously or arbitrarily violated the underlying purpose of NEPA.” *Id.* at 1314. NEPA has “twin aims” of “plac[ing] upon an agency the obligation to consider *every* significant aspect of the environmental impact of a proposed action” and of “ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decision making process.” *Balt. Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (emphasis added).

Where “planned road extensions raise a number of important environmental concerns” and “[b]y permitting the first step toward road expansion now without considering those effects, the Corps has arbitrarily and capriciously determined that the proposed project will not have any significant environmental impact,” the Corps’ action “is sufficiently contrary to the underlying policy of NEPA to warrant review of the planned extensions even though not formally proposed.” *Florida Wildlife Federation*, 401 F. Supp. 3d at 1316.

In determining whether an agency has improperly segmented its NEPA analysis, courts apply the Council on Environmental Quality’s regulations implementing NEPA, particularly those regulations describing the connected actions, cumulative actions, and similar actions. *E.g. id.* at 1313–1314. This letter has already explained that the Volusia County Development Projects meet the definitions of each of those three types of actions in order to explain what an EIS for this project must include.⁷³ For the same reason—i.e. because the Volusia County Development Projects qualify as connected actions, cumulative actions, and similar actions—the Corps has acted arbitrarily and capriciously by unlawfully segmenting its NEPA analysis of the extension of Williamson Boulevard.

Indeed, the Corps’ environmental assessment and finding of no significant impact (“EA/FONSI”) from the extension of Williamson Boulevard between Airport Road and Pioneer Trail suffers from numerous defects that render it unlawful. These defects offer an excellent example of the type of cursory, artificially narrow analysis that the Corps must not continue to

⁷³ See *supra* pp. 13–14

employ as it considers further extensions of Williamson Boulevard or any of the Volusia County Development Projects.

The most notable defect in the Corps' EA/FONSI is its unlawful segmentation of the extension of Williamson Boulevard between Airport Road and Pioneer Trail from the rest of the planned Williamson Boulevard extension and from the Volusia County Development Projects. Numerous comments documented the fact that this 2.3-mile extension is part of a much larger planned transportation network and that it will enable and facilitate the construction of numerous large developments, but the Corps repeatedly refused to consider the larger project, asserting that this 2.3-mile extension "is a stand alone project."⁷⁴ However, despite repeating this assertion 12 times, the Corps never offered any coherent explanation for its position. This failure to offer a reasoned explanation is itself unlawful, not to mention a flagrant NEPA violation.

The Corps offered only a single, cursory justification for its determination that the 2.3-mile extension of Williamson Boulevard is a "stand alone project." When determining the scope of its analysis, the Corps examined four factors to determine the degree of its "control and responsibility" over the project. There, the Corps stated as follows:

a. Whether or not the regulated activity comprises "merely a link" in a corridor type project.

Rationale: This project is a stand alone project with independent utility. This project is not associated with any other plan of development. The proposed work is not part of or integrated into any other project.⁷⁵

This "rationale" is patently inaccurate. Clear evidence shows that the extension of Williamson Boulevard is associated with numerous other plans of development. In fact, each of the Volusia County Development Projects *depends* on the extension of Williamson Boulevard, as documented in numerous filings by developers and official city and county development plans. Most notably, the proposed interchange between Interstate 95 and Pioneer Trail expressly relies on this 2.3-mile extension of Williamson Boulevard, and the developers of the Woodhaven project plan for construction to begin as soon as this 2.3-mile extension is complete.

Moreover, the Corps' own EA contains clear evidence that this 2.3-mile extension of Williamson Boulevard is associated with other plans of development. For example, the EA confirms that the permit applicant selected the proposed road alignment over other alternatives "*due to the proposed I-95 interchange with Pioneer Trail.*"⁷⁶ The fact that the applicant selected this road configuration to conform with the proposed interchange clearly shows that this 2.3-mile extension is at least closely associated with that proposed interchange. Moreover, the fact that the Corps cited this description by the project applicant clearly indicates that the agency knew that

⁷⁴ ENVTL. ASSMT., *supra* note 24, §§ 3.1.1(a), 4.7 (reiterating phrase repeatedly in response to each group's comments).

⁷⁵ ENVTL. ASSMT., *supra* note 24, § 3.1.1(a).

⁷⁶ *Id.* § 1.5 (emphasis added).

this 2.3-mile extension is, in fact, associated with other plans of development. Thus, the Corps' contrary statement was unreasonable, arbitrary, and unlawful.

Similarly, the Corps' statement that the project is not "merely a link" in a regional transportation corridor is in clear conflict with the Corps' later statements in the same EA. In fact, the Corps states that "[t]he proposed project *provides an important link in [a] much-needed regional transportation network.*"⁷⁷ Additionally, the Corps characterizes the project as "a critical part of the County's regional roadway system, connecting the existing section of Williamson Boulevard to the north with a section of the County's *proposed Thoroughfare Roadway System* to the south."⁷⁸ Finally, the EA confirms that the purpose of this roadway extension is to accommodate future development, noting that the applicants "designed the project as *a key component* of their future transportation network, which seeks to provide the public with adequate transportation service levels *based on estimates of future development and population growth.*"⁷⁹ Thus, the Corps' own EA amply demonstrates that the agency knows that this 2.3-mile extension of Williamson Boulevard is in fact part of a much larger roadway extension project that aims to enable future development. In other words, despite asserting that the project "is a stand alone project with independent utility," the Corps later acknowledges that the project's purpose is to provide a link in a regional transportation corridor and to enable significant residential and commercial development through the specific development projects that are discussed herein. In light of the Corps' own acknowledgment of this purpose, its repeated assertion that this roadway extension is a "stand alone" project, and its repeated refusals to analyze associated Volusia County Development Projects, are both unlawful and contravene the letter and spirit of NEPA.

The Corps' cumulative impacts analysis is likewise deeply flawed. The Corps claimed that it would analyze reasonably foreseeable actions "from the current time through approximately 2040" and within an assessment area of 38,361 acres (or roughly 60 square miles).⁸⁰ Moreover, the Corps acknowledged that it anticipated significant future development to occur both within the "approximately 691 acre area" surrounding this 2.3-mile extension of Williamson Boulevard and within the "larger assessment area."⁸¹ Within the smaller area, the Corps anticipated a "[m]ix of traditional single-family home development north and southwest of I-95."⁸² Within the larger assessment area, the Corps foresaw that "[b]ased on past development trends in the area, single-family ranchettes will give way to higher density subdivisions."⁸³ In

⁷⁷ *Id.* § 5.2 (emphasis added).

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Id.* §§ 9.1, 9.2.

⁸¹ *Id.* § 9.6.

⁸² *Id.*

⁸³ *Id.*

sum, the Corps could not avoid acknowledging that significant amounts of development are reasonably foreseeable.

Nevertheless, the Corps expressly and repeatedly refused to consider the Volusia County Development Projects that various commenters identified as requiring analysis in this EA. In fact, comments provided to the Corps specifically identified the following as reasonably foreseeable projects within the assessment area: the addition of a new interchange between Interstate 95 and Pioneer Trail; the Woodhaven Development; the Restoration Development; and the Farmton Local Plan.⁸⁴ Yet despite being presented with information that these developments would occur within the assessment area, and developed as a result of this project, and despite the Corps' statement that it would analyze development within a 60-square-mile area until 2040, the Corps not only failed, but *refused*, to consider these developments in its NEPA review. The result was a cumulative impacts analysis that wholly failed to actually analyze reasonably foreseeable future developments, thus violating NEPA.

Taken together, these defects amply demonstrate that the Corps has “egregiously or arbitrarily violated the underlying purpose of NEPA,” *Fla. Wildlife Fed'n*, 401 F. Supp. 3d at 1314, by issuing a finding of no significant impact that relies on an artificially narrow scope of analysis and is riddled with legal and logical errors. Accordingly, NEPA would obligate a court reviewing the Corps' actions to require the agency to prepare an Environmental Impact Statement that remedies these shortcomings by including a comprehensive analysis of the entire extension of Williamson Boulevard and each of the Volusia County Development Projects. However, we hope that it will not be necessary to resort to litigation to compel the Corps to prepare the comprehensive EIS that NEPA requires in this situation.

2. *Piecemeal approvals of Volusia County Development Projects violate the EPA's Guidelines for implementing section 404 of the CWA.*

The EPA's Guidelines for section 404 of the Clean Water Act—which are binding on the Corps, 33 C.F.R. § 323.6(a); 40 C.F.R. § 230.10—set forth several requirements that the Corps has failed to satisfy in its piecemealed, artificially narrow analysis for the extension of Williamson Boulevard between Airport Road and Pioneer Trail. In particular, the Guidelines require the Corps to collect, solicit, document, and consider information related to a project's cumulative impacts and to refuse to issue a permit that could adversely affect listed species. 40 C.F.R. § 230.11(b),(g). As documented above, the Corps has failed to consider relevant information about the cumulative impacts associated with the extension of Williamson Boulevard. Instead, the Corps has expressly refused to do so. Similarly, the Corps has issued a permit with only a cursory analysis of impacts to listed species that is logically and legally flawed. For both these reasons, the Corps' approval of the extension of Williamson Boulevard has violated the EPA's Guidelines.

Similarly, the Corps has violated the EPA's Guidelines and NEPA by failing to provide a meaningful analysis of alternatives. Because road extensions and residential and commercial development are not water dependent, the Corps must assume that practicable alternatives exist. 40 C.F.R. § 230.10(a). “An alternative is practicable if it is available and capable of being done

⁸⁴ *Id.* § 4.7.

after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* In its EA for the 2.3-mile extension of Williamson Boulevard, the Corps relied on an extremely narrow statement of the project’s purpose to argue that no practicable alternatives exist, despite several being offered in public comments.⁸⁵ This artificially constrained analysis of practicable alternatives is a good example of the damage that improper project segmentation can cause; by artificially narrowing its focus to this relatively small stretch of road and disregarding associated development, the Corps effectively blinded itself to meaningful practicable alternatives, thus violating the EPA’s Guidelines and the CWA. This artificially narrow analysis of alternatives is also a violation of NEPA. The analysis of alternatives under NEPA “shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made.*” 40 C.F.R. § 1502.2(g) (emphasis added). The Corps’ artificially narrow focus reveals that it had already made the decision to allow this project: in effect, the Corps defined the project so narrowly that it considered no alternatives to exist, which is a violation of NEPA’s goal of forcing agencies to consider environmental impacts and less damaging alternatives.

Additionally, EPA’s Guidelines forbid issuing a permit that will “cause or contribute to significant degradation” of the nation’s waters. 40 C.F.R. § 230.11(c). As explained above, Spruce Creek is managed under a TMDL for various pollutants, because existing development in the region has already caused significant levels of pollution in this Outstanding Florida Water. To prevent further degradation, these TMDLs state that a Basin Management Action Plan should be prepared in order to restrain further pollution of this waterway. However, to date, no such Plan has yet been promulgated. Until a Basin Management Action Plan exists, the Corps cannot confirm that further development will not contribute to a significant degradation of Spruce Creek. As such, it should not issue any further permits for projects that may discharge into this Outstanding Florida Water.

Any similar, piecemealed administrative approval for extensions of Williamson Boulevard or for any of the Volusia County Development Projects would likewise violate the EPA’s Guidelines. In order to come into compliance with those Guidelines, the Corps must adequately consider the cumulative impacts associated with the entire extension of Williamson Boulevard and all of the Volusia County Development Projects, including impacts on Spruce Creek and on the Farnton Mitigation Bank. Similarly, it must enter into consultation with the FWS in order to ensure that the project will not adversely affect listed species. The EPA has the authority to veto the Corps’ permit where a project may negatively affect Aquatic Resources of National Importance, which the EPA has already indicated is the case for the ecosystem of concern here. If the Corps continues to issue piecemealed approvals for Volusia County Development Projects, the EPA should use this authority to ensure that these projects do not proceed without the proper environmental analysis.

⁸⁵ *Id.* § 1.5

E. The Corps currently has two opportunities to come into compliance with federal law by preparing a comprehensive EIS and consulting with the FWS.

The Corps is currently considering two applications for administrative approvals, either of which provides the agency with an opportunity to prepare a comprehensive EIS for the entire extension of Williamson Boulevard and the Volusia County Development Projects. First, the Corps is currently reviewing an application for the extension of County Road 5A.⁸⁶ Although styled as “Deering Parkway” in the application, this roadway extension is in fact the southernmost end of the proposed extension of Williamson Boulevard, as the Farmton Local Plan’s spine transport map depicts.⁸⁷ This project will require an Environmental Impact Statement for all the same reasons described above; as an extension of Williamson Boulevard, this project aims to enable and facilitate substantial development which will entail significant environmental impacts including adverse effects to listed species. Thus, this application provides a good opportunity for the Corps to come into compliance with federal law by preparing a comprehensive EIS and consulting with the Fish and Wildlife Service.

Similarly, current litigation over the Corps’ approval of a modification to the Farmton Mitigation Bank’s enabling instrument to allow for development under the Farmton Local Plan (which the Corps had issued without *any* NEPA analysis) has led the Corps to move for a remand of its approval in order to analyze its decision under the National Environmental Policy Act.⁸⁸ The Corps has thus indicated that it intends to undertake NEPA review for the Farmton Local Plan, which is one of the Volusia County Development Projects. Thus, the Corps’ voluntary remand to conduct this NEPA process presents an opportunity for the Corps to come into compliance with federal law.

The Corps should be especially eager to take advantage of these opportunities to come into compliance with federal law because the failure to do so would itself constitute another legal violation. The Farmton Local Plan and the Deering Parkway extension constitute the southern end of the extension of Williamson Boulevard. The Corps recently approved the northern end of that extension in August 2015, based on an unlawful and incomplete environmental analysis. Because the Corps is thus on its way to approving both ends of the Williamson Boulevard extension, its NEPA process must include analysis of the entire extension of Williamson Boulevard and all the Volusia County Development Projects it will enable. *E.g.*, *Named Individual Members of San Antonio Conservation Soc’y v. Texas Highway Dept.*, 446 F.2d 1013, 1024–25 (5th Cir. 1971) (holding that an agency violated NEPA by approving two end segments of a road without any consideration of impacts related to the middle segment). Thus, the Corps now has two distinct opportunities to prepare the comprehensive EIS that NEPA requires and to engage in the consultation with the FWS that the ESA requires. As part of that analysis, the Corps must also ensure that any it abides by the express requirements of the Clean Water Act

⁸⁶ DEERING PARKWAY APPLICATION, (Ex. 16).

⁸⁷ *Farmton Spine Network Map*, (Ex. 8).

⁸⁸ See *Sierra Club v. St. Johns River Water Management District, et al.*, No. 6:14-CV-01877, *Joint Motion to Modify Scheduling Order*, Dec. 4, 2015, at 1–2 (Ex. 17).

and its regulations, and that any outcome of that process does not run afoul of the EPA's Clean Water Act Guidelines.

IV. CONCLUSION

The Corps has violated NEPA, the CWA, and the ESA by failing to prepare a thorough analysis of environmental impacts associated with the extension of Williamson Boulevard and the Volusia County Development Projects, and by failing to consult with the FWS on impacts to listed species. Any further approval of any extension of Williamson Boulevard, or any of the Volusia County Development Projects, will require the Corps to prepare an EIS that furnishes a thorough consideration of all cumulative impacts and indirect, growth-inducing impacts. Crucially, the Corps' NEPA analysis must not only consider the impacts to various fragile natural resources in the area, but must also propose reasonable alternatives to these actions that could reduce the environmental footprint of these interrelated projects. Additionally, any further consideration of these projects will require consultation with the FWS. The failure to undertake these environmental review processes would constitute further violations of NEPA, the CWA, the ESA, and the EPA's Guidelines for the implementation of section 404 of the CWA. Because the affected area includes Aquatic Resources of National Importance, any further consideration of these projects will also require review by the EPA.

Please respond to this letter within sixty days to provide information on how the Corps intends to remedy its violations of federal law. Because the Corps has at least two opportunities to come into compliance with these legal mandates by preparing the necessary environmental impact statement and by entering into consultation with FWS, we hope that the Corps will take advantage of these opportunities in order to avoid litigation. Please do not hesitate to contact me if you have any questions regarding this letter.

Sincerely,

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