

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 2:19-cv-14199-MIDDLEBROOKS

CENTER FOR BIOLOGICAL DIVERSITY;
CALUSA WATERKEEPER; and
WATERKEEPER ALLIANCE,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS; COL.
ANDREW KELLY, in his official capacity as
Commander and District Engineer of the U.S.
Army Corps of Engineers; U.S. DEPARTMENT
OF THE INTERIOR; DAVID BERNHARDT, in
his official capacity as Secretary of the U.S.
Department of Interior; NATIONAL MARINE
FISHERIES SERVICE; DR. ROY E.
CRABTREE, in his official capacity as Regional
Administrator of the Southeast Regional Office of
National Marine Fisheries Service; U.S. FISH
AND WILDLIFE SERVICE; and AURELIA
SKIPWITH, in her official capacity as Director of
U.S. Fish and Wildlife Service,

Defendants.

ORDER

THIS CAUSE comes before the Court on the Parties' Joint Motion for Entry of Proposed Order on Remedy and the attached Proposed Order, filed on October 23, 2020. (DE 91; DE 91-1). The Parties represent that they have conferred and reached an agreement regarding appropriate remedies in response to my Order on ESA Partial Summary Judgment ("Summary Judgment Order"). (DE 83).

Accordingly, having read and considered the Parties' Joint Motion and Proposed Order and finding good cause, it is hereby **ORDERED** and **ADJUDGED** that:

1. The U.S. Army Corps of Engineers (“Corps”) shall reinitiate formal consultation with the U.S. Fish and Wildlife Service (the “Service”), consistent with the Court’s Summary Judgment Order. The Corps will prepare a biological assessment to evaluate the effects of the action on listed and proposed species and designated and proposed critical habitat. The Corps will transmit the biological assessment to the Service within 90 days from the date of this Order.

2. The agencies shall conclude consultation within the statutory timeframes, and no later than one year from the date of this Order.

3. Consistent with the Court’s Summary Judgment Order, the scope of reinitiated consultation shall consider:

a. Effects of LORS operations on blue-green algae and red tide, and the effect of harmful algal blooms (HABs) in light of LORS operations, on the following species: manatees and their critical habitat, nesting sea turtles (Kemp’s ridley sea turtle, loggerhead sea turtle, leatherback sea turtle, green sea turtle, hawksbill sea turtle), piping plover, wood stork, and red knot. The biological assessment will consider the potential following effects to the extent they relate to the Corps’ action:

i. the effects of red tide and blue-green algae, including β -N-methylamino-L-alanine (BMAA), on manatees, nesting sea turtles, piping plover, wood stork, and red knot.

ii. the effects of seagrass die off on manatees and sea turtles, including how the loss of seagrass beds affects manatee behavior (i.e. foraging, movement, resting, migration, calving, and access to freshwater) and sea turtle nesting.

iii. the synergistic effects of red tide and blue-green algae on manatees, nesting sea turtles, piping plover, wood stork, and red knot.

iv. the effects of LORS water management releases, regardless of the presence of HABs, on manatees, nesting sea turtles, piping plover, wood stork, and red knot.

b. The Corps will consider the following geographic scope in its biological assessment: Caloosahatchee River Estuary and immediate outfall area north to and including Boca Grande and south to and including San Carlos Bay and Matanzas Pass (*see* Figure 1); Okeechobee water way; Lake Okeechobee; St. Lucie River Estuary and immediate outfall area in Southern Indian River Lagoon north to Hutchinson Island and south to Hobe Sound (*see* Figure 2).

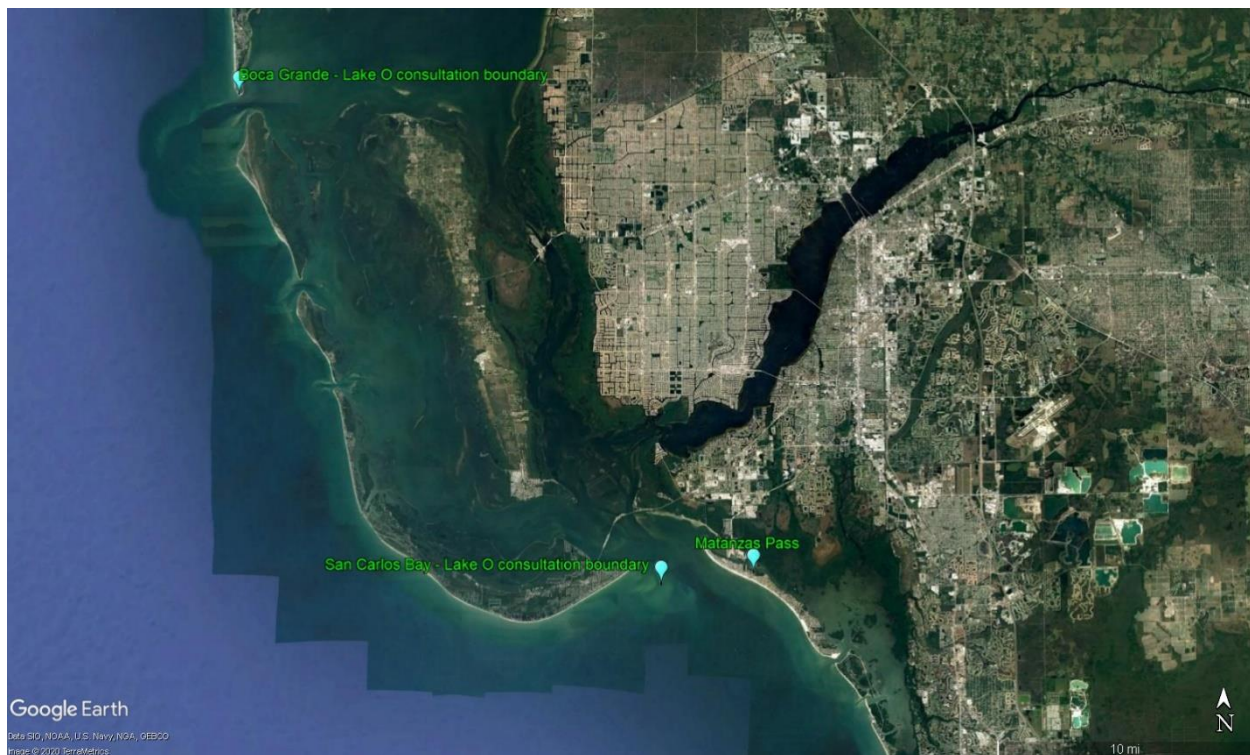


Figure 1: West coast representation of ESA consultation area for effects analysis for LORS 2008.

| Location | latitude | longitude |
|---|---------------|---------------|
| Caloosahatchee Estuary | | |
| Boca Grande - Lake O consultation boundary | 26°43'1.74"N | 82°15'40.96"W |
| San Carlos Bay - Lake O consultation boundary | 26°27'9.60"N | 81°59'43.16"W |
| Matanzas Pass @ SR 865 | 26°27'29.48"N | 81°57'23.61"W |

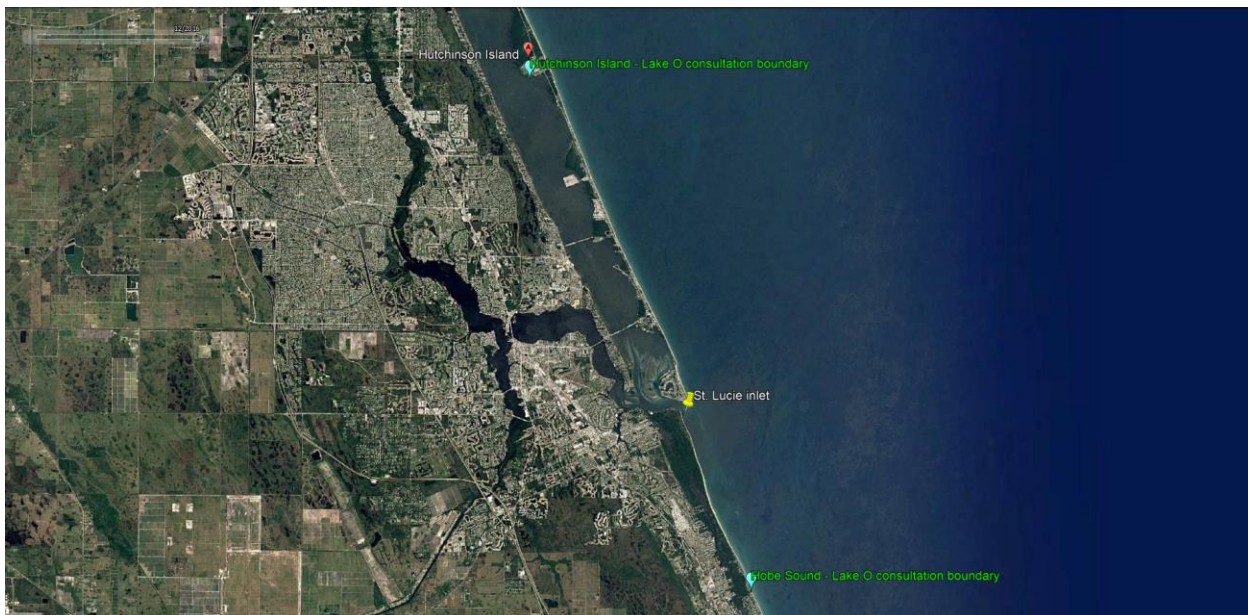


Figure 2: East coast representation of ESA consultation area for effects analysis for LORS 2008

| Location | latitude | longitude |
|--|---------------|---------------|
| St. Lucie Estuary | | |
| Hutchinson Island - Lake O consultation boundary | 27°20'20.85"N | 80°14'52.72"W |
| Hobe Sound - Lake O consultation boundary | 27° 4'1.71"N | 80° 6'56.28"W |

4. Nothing in this Order shall be deemed to preclude the Corps or the Service from exercising their discretion to determine what constitutes the “best scientific and commercial data available” for purposes of 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.14(a). Nothing in this Order shall be deemed to preclude the Corps or the Service from exercising their discretion in conducting the consultation or as to the substance or conclusions reached as a result of the consultation. Subject to the foregoing, and consistent with the Court’s Summary Judgment Order, the Corps shall:

a. Identify and analyze the best available data and information on the role of hydrology, nutrients, water management, and climate on harmful algal blooms in Lake Okeechobee and the Caloosahatchee and St. Lucie estuaries in developing its biological assessment. This includes,

but is not limited to the works cited in the Plaintiffs' December 19, 2018 and April 20, 2020 notices of intent to sue; Medina et al. (2020); Ma et al. (2020); Metcalf et al. (2020); Jang et al. (2020); information received during the LORS' 2019 and 2020 Deviation National Environmental Policy Act public comment periods; and seagrasses mapping from 2000-2020 in the consultation area from the U.S. Fish & Wildlife Service, National Marine Fisheries Service, National Agricultural Imagery Program of the U.S. Department of Agriculture, Florida Fish and Wildlife Conservation Commission, and South Florida Water Management District.

b. Identify and include in its biological assessment the relevant and completed "studies and research efforts underway to better understand the role of hydrology, nutrients, water management, and climate on HABs in Lake Okeechobee and the estuaries" referenced in the Corps' March 21, 2019 request for informal consultation, and provide Plaintiffs a copy of each of those studies and research efforts analyzed, or if such studies and research efforts are still underway, provide Plaintiffs a list of those efforts and, to the extent known, provide the anticipated completion date if it will occur on or before the day the Corps submits its biological assessment to U.S. Fish & Wildlife Service.

c. To the extent practicable and to the extent it is updated and available, weekly, and until consultation is concluded, the Corps will review the most recent water quality monitoring data for blue green algae and red tide in the consultation area from the Florida Department of Environmental Protection, South Florida Water Management District, and Florida Fish & Wildlife Conservation Commission. To the extent it is updated and available from those agencies, the Corps will link to that information on the Corps' <https://www.saj.usace.army.mil/Algae> website under the heading "Weekly Water Quality Monitoring Data."¹ If the Corps determines it is not practicable to perform any action identified in paragraph 4(c), the Corps will promptly provide Plaintiffs an explanation in writing specifying why it is not practicable. Plaintiffs may seek appropriate relief from the Court following the dispute resolution process set forth in paragraph 5 of this order.

d. To the extent practicable and to the extent it is updated and available, monthly, and until consultation is concluded, the Corps will review the most recent field monitoring data and information for seagrasses in the consultation area from U.S. Fish & Wildlife Service, National Marine Fisheries Service, Fish and Wildlife Conservation Commission, and South Florida Water Management District, including the date and location of the field monitoring, the sampling methodologies used (i.e., sampling points and/or transects; if point sampling, fixed or random), percentage of cover by species, the presence or absence of macroalgae, shoot counts and biomass per square meter (if available), and any water quality data collected, and any associated reports by these agencies that assess the status and trends of seagrass distribution, abundance, and health

¹ The Court is advised that the Corps agrees to the provisions in paragraphs 4c-e with the understanding that much of the requested information is already available to the public by the agencies identified herein. The Corps intends to request and review the information as indicated above; however, the Court is advised that the Corps does not control or have proprietary rights to the information provided by State agencies.

in the action area. To the extent it is updated and available from those agencies, the Corps will provide links to that information on the Corps' <https://www.saj.usace.army.mil/Algae/> website under the heading "Seagrass Monitoring Data and Information" or will provide copies to Plaintiffs. If the Corps determines it is not practicable to perform any action identified in paragraph 4(d), the Corps will promptly provide Plaintiffs an explanation in writing specifying why it is not practicable. Plaintiffs may seek appropriate relief from the Court following the dispute resolution process set forth in paragraph 5 of this order.

e. To the extent practicable and to the extent it is updated and available, monthly, and until consultation is concluded, the Corps will review the most recent monitoring data and information from the Florida Fish and Wildlife Conservation Commission and U.S. Fish & Wildlife Service regarding the abundance, distribution, and movement of manatees in the consultation area, including radio telemetry data for manatees and the tracking of manatee movements during periods of no discharges and discharges, and any associated reports by these agencies. To the extent it is updated and available from those agencies, the Corps will provide links to that information on the Corps' <https://www.saj.usace.army.mil/Algae/> website under the heading "Manatee Monitoring Data and Information" or will provide copies to Plaintiffs. If the Corps determines it is not practicable to perform any action identified in paragraph 4(e), the Corps will promptly provide Plaintiffs an explanation in writing specifying why it is not practicable. Plaintiffs may seek appropriate relief from the Court following the dispute resolution process set forth in paragraph 5 of this order.

5. The terms of this Order may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by the Court, or upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Order, or in the event of a dispute arising out of or relating to this Order, the party seeking the modification, raising the dispute, or seeking enforcement shall provide the other party with notice of the claim or modification. The parties agree that they will meet and confer (either telephonically or in person) at the earliest possible time in a good-faith effort to resolve the claim or modification before seeking relief from the Court. If the parties are unable to resolve the claim or modification themselves, either party may seek relief from the Court.

6. In the event that Plaintiffs believe that Defendants failed to meet the terms of this Order and have not sought to modify it, Plaintiffs' first remedy shall be a motion to enforce the

terms of this Agreement, after following the dispute resolution procedures described above, and shall not, in the first instance, be enforcement through a proceeding for contempt of court.

7. The obligations of the parties under this Order shall terminate upon completion of ESA consultation pursuant to paragraph 2 above.

8. I did not explicitly address the merits of Plaintiffs' Fifth Claim for Relief (DE 1 ¶¶ 266–73) in my Summary Judgment Order. In light of the foregoing and pursuant to Federal Rule of Civil Procedure 41(a)(2), Plaintiffs' Fifth Claim for Relief is **DISMISSED WITHOUT PREJUDICE** to Plaintiffs pursuing an ESA Section 7(a)(1) claim based on future circumstances occurring when the agencies conclude consultation outlined in paragraph 2.

9. Given that the Parties have finished conferring and agreed upon a remedy, their Joint Motion to Extend Time to Confer on Proposed Remedies (DE 89) is **DENIED AS MOOT**.

SIGNED in Chambers in West Palm Beach, Florida, this 26th day of October 2020.



Donald M. Middlebrooks
United States District Judge

cc: All Counsel of Record