



*Via Electronic and Certified Mail*

August 17, 2022

Debra Haaland  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240  
[exsec@ios.doi.gov](mailto:exsec@ios.doi.gov)

Charles F. Sams III  
Director  
National Park Service  
1849 C Street NW  
Washington, DC 20240  
[Charles\\_Sams@nps.gov](mailto:Charles_Sams@nps.gov)

Martha Williams  
Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240  
[Martha\\_Williams@fws.gov](mailto:Martha_Williams@fws.gov)

Larry Williams  
State Supervisor, Florida Ecological Services  
U.S. Fish and Wildlife Service  
1339 20th Street  
Vero Beach, FL 32960  
[Larry\\_Williams@fws.gov](mailto:Larry_Williams@fws.gov)

Daniella Levine Cava  
Mayor  
Miami-Dade County  
Stephen P. Clark Center  
111 N.W. 1st Street, 29th Floor  
Miami, Florida 33128  
[mayor@miamidade.gov](mailto:mayor@miamidade.gov)

Paul M. Lambert  
Manager & Registered Agent  
Miami Wilds LLC  
100 Biscayne Blvd.  
Suite 2510  
Miami, FL 33132  
[plambert@lambertadvisory.com](mailto:plambert@lambertadvisory.com)

Bernard Zyscovich  
Manager  
Miami Wilds LLC  
100 N. Biscayne Blvd.  
27th Floor  
Miami, FL 33132  
[jack@miamiwilds.com](mailto:jack@miamiwilds.com)

Michael Diaz, Jr.  
Manager  
Miami Wilds LLC  
100 SE 2nd St.  
Suite 3400  
Miami, FL 33132  
[jack@miamiwilds.com](mailto:jack@miamiwilds.com)

**Re: Notice of Violations of Endangered Species Act Section 7 and 9, and Implementing Regulations, Relating to National Park Service's Amendment to Release Land for the Miami Wilds Development and Its Effects on Endangered and Threatened Species**

Dear Secretary Haaland, Director Sams, Director Williams, Supervisor Williams, Mayor Levine Cava, Mr. Lambert, Mr. Zyscovich, and Mr. Diaz,

On behalf of the Center for Biological Diversity, Bat Conservation International, the Miami Blue Chapter of the North American Butterfly Association, Tropical Audubon Society (collectively, Conservation Organizations), we provide notice pursuant to Section 11(g) of the Endangered

Species Act (ESA)<sup>1</sup> that the National Park Service (NPS) and U.S. Fish and Wildlife Service (FWS) are in violation of Section 7 of the ESA and the ESA's implementing regulations,<sup>2</sup> for failing to consult over NPS's release of restrictions on land proposed for the Miami Wilds development, and the action's effects on ESA-listed species including the endangered Florida bonneted bat, endangered Miami tiger beetle, endangered Bartram's scrub-hairstreak, endangered Florida leafwing, threatened eastern indigo snake, and federally listed plants. By entering a contractual agreement with Miami-Dade County to release restrictions on the property and taking other actions on the Miami Wilds project before completing consultation, NPS, Miami-Dade County, Miami Wilds, and associated entities have also made unlawful irreversible or irretrievable commitments of resources that foreclose the formulation or implementation of any reasonable and prudent alternative measures, in violation of ESA Section 7(d). Finally, because NPS and FWS have failed to complete consultation, there is no valid take coverage for the Miami Wilds project, meaning, to the extent the actions of NPS, Miami-Dade County, Miami Wilds LLC, or other associated entities take listed species, they may be held liable for unauthorized take under ESA Section 9.

We also note that, based on publicly available records, it appears NPS has also violated the National Environmental Policy Act by entering the release agreement without first preparing an environmental assessment or environmental impact statement.<sup>3</sup>

NPS and FWS have sixty days to remedy the violations identified in this letter. If these violations are not cured within the sixty-day notice period, the Conservation Organizations intend to file suit in federal court.

### **ENTITIES GIVING NOTICE**

The Center for Biological Diversity (Center) is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and the habitat and climate they need to survive. The Center and its members are concerned with the conservation of imperiled species, like the Florida bonneted bat, Miami tiger beetle, Bartram's scrub-hairstreak, and Florida brickell-bush, and effective implementation of the ESA.

Bat Conservation International is a science-based non-profit organization whose mission is to conserve the world's bats and their ecosystems to ensure a healthy planet. Founded in 1982, we are committed to working with local organizations, key stakeholders, and members of the public to advance scientific knowledge and preserve bats critical habitat. The Florida bonneted bat has been a focal species of our organization for nearly 20 years. In recognition of the severity of threats facing the Florida bonneted bat in Miami-Dade County, BCI has focused its attention on protecting this urban-based population of endangered bats.

The Miami Blue Chapter of the North American Butterfly Association (Miami Blue), is a nonprofit organization dedicated to lepidopteran (butterflies and moths) conservation, research,

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<sup>1</sup> 16 U.S.C. § 1540(g).

<sup>2</sup> *Id.* § 1536; 50 C.F.R. Part 402. FWS's violations of the ESA are also arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

<sup>3</sup> 42 U.S.C. §§ 4321 *et seq.*

and educational outreach. Miami Blue is located in Southeast Florida, a unique region in the continental United States harboring the globally imperiled pine rockland ecosystem with high biodiversity and endemism. Miami Blue strives to preserve biodiversity of pine rockland ecosystems and prevent catastrophic ecosystem service failures beneficial to people and wildlife like Bartram’s scrub-hairstreak and the Florida leafwing.

Tropical Audubon Society (“TAS”) is a nonprofit 501(c)(3) organization incorporated in the State of Florida and headquartered in Miami, Florida. TAS is a science-and solutions-based nonprofit conservation organization driven by its grassroots community and principles of equity, diversity, and inclusion. TAS’ legacy is to protect, conserve, and restore South Florida ecosystems by working closely with local governments and other stakeholders, and by fostering wise stewardship of native habitats, birds, and other indigenous wildlife. TAS has more than 1,000 active members, including members who appreciate and have ethical, recreational, and aesthetic interests in the Florida bonneted bat, Miami tiger beetle, Bartram’s scrub-hairstreak, Florida brickell-bush, their habitats and Pine Rocklands ecosystems.

### **THE ENDANGERED SPECIES ACT**

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” with the vital objective to “halt and reverse the trend toward species extinction, whatever the cost.”<sup>4</sup> To that end, the purpose of the ESA is “to provide a program for the conservation of . . . endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>5</sup> The Secretary of the Interior administers the ESA through FWS for terrestrial, non-marine aquatic species, and certain marine species while on land.

The heart of the ESA is the federal consultation requirement. Section 7(a)(2) sets forth a substantive duty for federal agencies to ensure the actions they authorize or carry out are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for those species.<sup>6</sup> Agency action is broadly defined to include “any action authorized, funded, or carried out by such agency.”<sup>7</sup> Negotiating and executing contacts constitutes agency action under the ESA.<sup>8</sup>

“In no uncertain terms, the ESA mandates that every federal agency ‘shall’ engage in consultation *before* taking ‘any action’ that could ‘jeopardize the continued existence of any endangered species or threatened species.’”<sup>9</sup> And federal agencies must review their actions “at the earliest possible time” to determine whether the actions may affect listed species or critical

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<sup>4</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

<sup>5</sup> 16 U.S.C. § 1531(b).

<sup>6</sup> *Id.* § 1536(a)(2).

<sup>7</sup> *Id.* (emphasis added); 50 C.F.R. § 402.03 (stating that Section 7 applies “to all actions in which there is discretionary Federal involvement or control.”); *see, e.g., Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (holding that the Federal Emergency Management Agency’s administration of the National Flood Insurance Program is an agency action requiring ESA consultation).

<sup>8</sup> *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. United States DOE*, 232 F.3d 1300, 2000 (9th Cir. 2000); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998).

<sup>9</sup> *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 188 n. 10 (D.C. Cir. 2017) (quoting 16 U.S.C. § 1536(a)(2)) (emphasis added).

habitat and thus require consultation.<sup>10</sup> Absent a formal exemption under Section 7(h), agencies “may not duck [the] consultation requirement, whether based on limited resources, agency priorities or otherwise.”<sup>11</sup>

Federal “action agencies” must fulfill their substantive obligation through a consultation procedure with the “expert agency”—in this case, FWS—using the “best scientific and commercial data available.”<sup>12</sup> For each federal action, the agency must ask the FWS whether any listed or proposed species may be present in the area of the agency action.<sup>13</sup> If listed or proposed species may be present, the agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action.<sup>14</sup> The biological assessment must generally be completed within 180 days.<sup>15</sup>

If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, it may complete “informal consultation,” during which FWS must concur in writing with the agency’s determination.<sup>16</sup> If the agency determines that its action is “likely to adversely affect” a listed species or critical habitat, or if FWS does not concur with the agency’s “not likely to adversely affect” determination, the agency must engage in “formal consultation.”<sup>17</sup> An agency is relieved of the obligation to consult on its actions only where the action will have “no effect” on listed species or designated critical habitat.

Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions.<sup>18</sup> Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.<sup>19</sup>

To complete formal consultation process, FWS must issue a “biological opinion” that “detail[s] how the agency action affects the species,”<sup>20</sup> and sets forth FWS’s opinion as to whether the action is “likely to jeopardize” the continued existence of a listed species.<sup>21</sup> If FWS determines the project is unlikely to cause jeopardy to the species or adverse modification of critical habitat, the agency must provide a statement specifying the impact of the incidental take on the listed species, outlining “reasonable and prudent measures” (RPMs) to minimize the impact from

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<sup>10</sup> 50 C.F.R. § 402.14(a).

<sup>11</sup> *Ctr. for Biological Diversity*, 861 F.3d at 188 n. 10; *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988) (explaining that Section 7 does not say “that a comprehensive biological opinion is not required before the initiation of agency action so long as there is no irreversible or irretrievable commitment of resources.”); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (holding, pre-ESA section 7(h) enactment, that section 7(a)(2) “admit[ted] of no exception”).

<sup>12</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(b).

<sup>13</sup> 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

<sup>14</sup> *Id.*

<sup>15</sup> 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

<sup>16</sup> 50 C.F.R. § 402.14(a)-(b).

<sup>17</sup> *Id.* §§ 402.02, 402.14(a).

<sup>18</sup> *Id.* § 402.02.

<sup>19</sup> *Id.*

<sup>20</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>21</sup> 50 C.F.R. § 402.14(h)(1)–(3).

incidental take, and setting forth any conditions the agency and applicant must follow.<sup>22</sup> If FWS determines the agency action is likely to jeopardize the continued existence of a listed species or result in adverse modification of critical habitat, the biological opinion must suggest “reasonable and prudent alternatives” that would reduce action-related impacts such that the agency action may avoid jeopardizing listed species.<sup>23</sup>

If the agency action is expected to cause “take,” defined as to “harass, harm, pursue, hunt, shoot, wound kill, trap, capture, or collect, or to attempt to engage in any such conduct,”<sup>24</sup> FWS must also include an incidental take statement (ITS) in its biological opinion.<sup>25</sup> The ITS must, wherever practicable, quantify the amount of take allowed for each species, thereby creating a meaningful “trigger” to reinitiate consultation when an allowable level of take is exceeded.<sup>26</sup>

Compliance with a valid biological opinion and its incidental take statement protects federal agencies, and others acting under the biological opinion from enforcement action under ESA Section 9’s prohibition against unauthorized take.<sup>27</sup> However, take not in compliance with a valid biological opinion or absent a valid take statement or take permit violates Section 9 of the ESA.

Until consultation is complete, federal agencies are prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures.<sup>28</sup> This prohibition exists to maintain the status quo pending the completion of consultation and remains in effect throughout the consultation period and until the action agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

Federal agencies have additional responsibilities under Section 7(a)(1) of the ESA, including a requirement that they “utilize their authorities in furtherance of the purposes of [the Act]” and to “carry[ ] out programs for the conservation of” listed species.<sup>29</sup> The ESA defines “conservation” to mean the use of “all methods and procedures” that are necessary to recover a listed species to the point where protections under the act are no longer necessary.<sup>30</sup> Thus, section 7(a)(1) requires each federal agency to ensure that its actions are consistent with the recovery of listed species.<sup>31</sup>

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<sup>22</sup> 16 U.S.C. § 1536(b)(4)(A)–(C).

<sup>23</sup> *Id.* § 1536(b)(3)(A).

<sup>24</sup> *Id.* § 1532(19). Harm means “an act which actually kills or injures wildlife” and “may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. Harass means “means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.*

<sup>25</sup> *Id.* § 402.14(i).

<sup>26</sup> *Id.* § 402.14(i)(1)(i).

<sup>27</sup> 16 U.S.C. §§ 1536(o)(2); 1538(a); 50 C.F.R. § 17.31(a).

<sup>28</sup> 16 U.S.C. § 1536(d).

<sup>29</sup> *Id.* § 1536(a)(1).

<sup>30</sup> *Id.* § 1532(3).

<sup>31</sup> See 50 C.F.R. § 402.15(a) (explaining that it is each agency’s continuing obligation to “determine whether and in what manner to proceed with the action in light of its section 7 obligations” to protect and recover listed species).

In sum, the substantive and procedural requirements of ESA Section 7, and implementing regulations, assure that federal action agencies do not take action until they have ensured the action will not harm a species' survival and recovery or result in destruction or adverse modification of protected critical habitat. Lawful compliance with ESA Section 7 can also shield federal agencies and private entities from ESA Section 9 take liability.

## **BACKGROUND**

### **The Richmond Pine Rocklands**

Pine Rocklands are a globally critically imperiled ecosystem limited to the southern tip of Florida and nearby islands.<sup>32</sup> Characterized by limestone outcrops, a canopy consisting of only Florida slash pine, and a diverse understory of shrubs and herbs, they are known to support approximately 440 native plant species, which in turn support high animal diversity.<sup>33</sup>

The Richmond Pine Rocklands (also called the Richmond Tract) contain the largest and most biodiverse fragment of critically endangered pine rocklands outside Everglades National Park, sheltering more than 350 native plant species.<sup>34</sup> There are eight federally listed plant species in the Richmond Tract, including most of the world's populations of deltoid spurge (*Euphorbia deltoidea ssp. deltoidea*), tiny polygala (*Polygala smallii*), and Florida brickell-bush (*Brickellia mosieri*).<sup>35</sup> The Richmond Tract also provides significant habitat, including federally designated and proposed critical habitat, for imperiled wildlife and insects, including but not limited to the endangered Florida bonneted bat (*Eumops floridanus*), threatened eastern indigo snake (*Drymarchon couperi*), endangered Miami tiger beetle (*Cicindelidia floridana*), endangered Bartram's scrub-hairstreak (*Strymon acis bartrami*), and endangered Florida leafwing (*Anaea troglodyte floridalis*).<sup>36</sup>

The rich biodiversity supported by the Richmond Tract is entirely hemmed in by urban development and has been subject to development plans both within and directly adjacent to these rare and sensitive ecosystems.<sup>37</sup> The surrounding development creates competing interests that threaten the management of pine rocklands, such as suppressing the natural or prescribed

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<sup>32</sup> Possley, J., J. Duncan, J. Gil, and C. Grossenbacher. 2020. Too Precious To Lose: Managing and Protecting the Richmond Pine Rockland Tract (Richmond) in Miami Dade County, South Florida, Cities and the Environment (CATE): Vol. 13: Iss. 1, Article 4 [hereinafter Possley et al. (2020)].

<sup>33</sup> Gann, G.D., Stocking, C.G., and collaborators. 2001-2018. The Floristic Inventory of South Florida Database Online. [<http://regionalconservation.org/ircs/database/database.asp>]. The Institute for Regional Conservation. Delray Beach, Florida USA.

<sup>34</sup> Possley, J., J. Duncan, J. Klein, and J. Maguire. 2018. Miami-Dade County's management plan for the Richmond pine rocklands, 2nd Edition. Prepared by Fairchild Tropical Botanic Garden for Miami-Dade County, Department of Parks, Recreation and Open Spaces and Zoo Miami. 136 Pages, available at [https://www.fairchildgarden.org/Portals/0/2018%20RICHMOND%20PLAN%202ND%20ED%20FINAL\\_1.pdf](https://www.fairchildgarden.org/Portals/0/2018%20RICHMOND%20PLAN%202ND%20ED%20FINAL_1.pdf) [hereinafter Possley et al. (2018)].

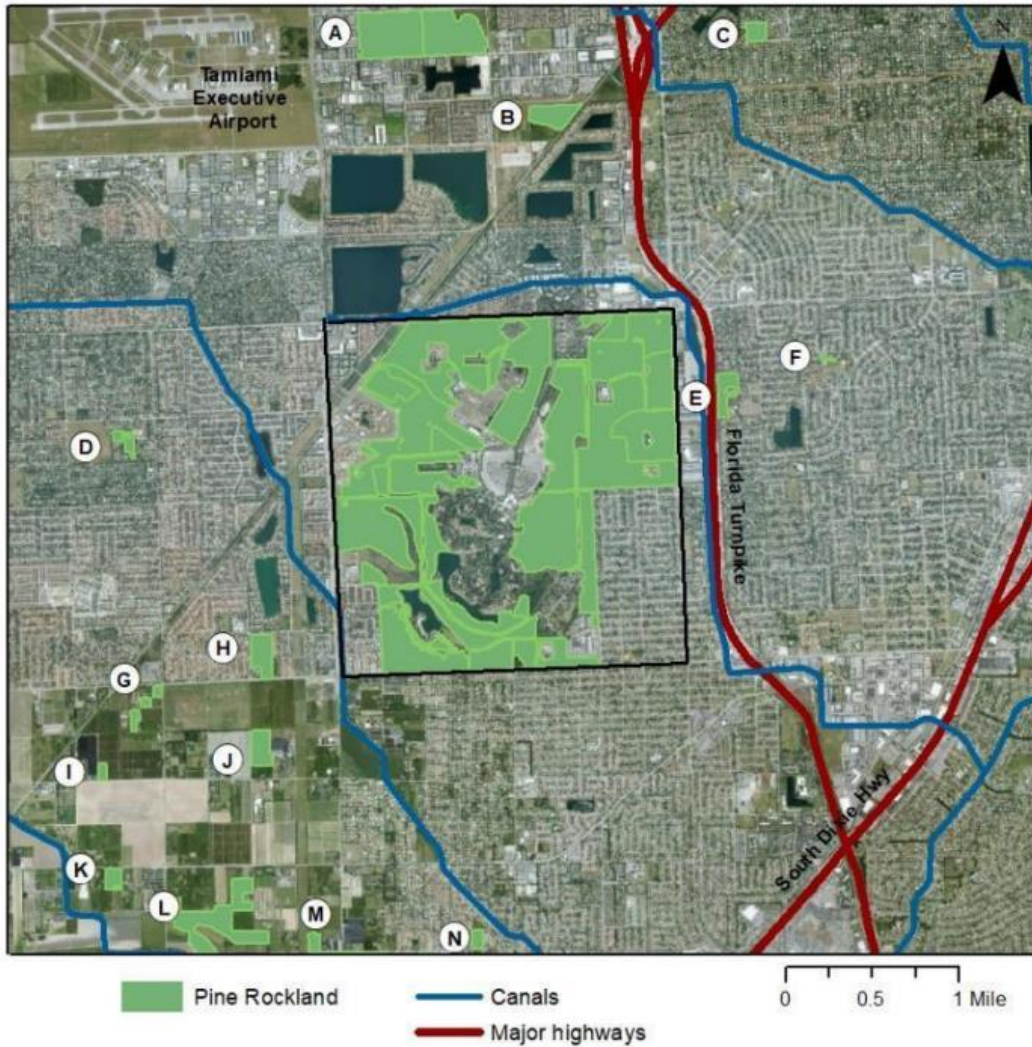
<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.*

<sup>37</sup> Possley et al. (2020) at 1.

fire needed to maintain the ecosystem.<sup>38</sup> Development also fragments the pine rocklands, isolating species populations and exposing them to increased human impacts.<sup>39</sup>

Figure 1: Map of Richmond Pine Rocklands in Context<sup>40</sup>



### Miami Wilds Development

Miami Wilds is a proposed development within the Richmond Tract in southwest Miami-Dade County. The development would include a 27.5-acre water park, a 15,000–20,000 square foot retail area, a hotel, and more than 40 acres of associated parking lots.<sup>41</sup> The project is proposed within three parcels near ZooMiami: the current Zoo Miami parking area and two tracts within the Gold Coast Railroad Museum parcel (conveyed to Miami-Dade County via the Federal Land

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2.

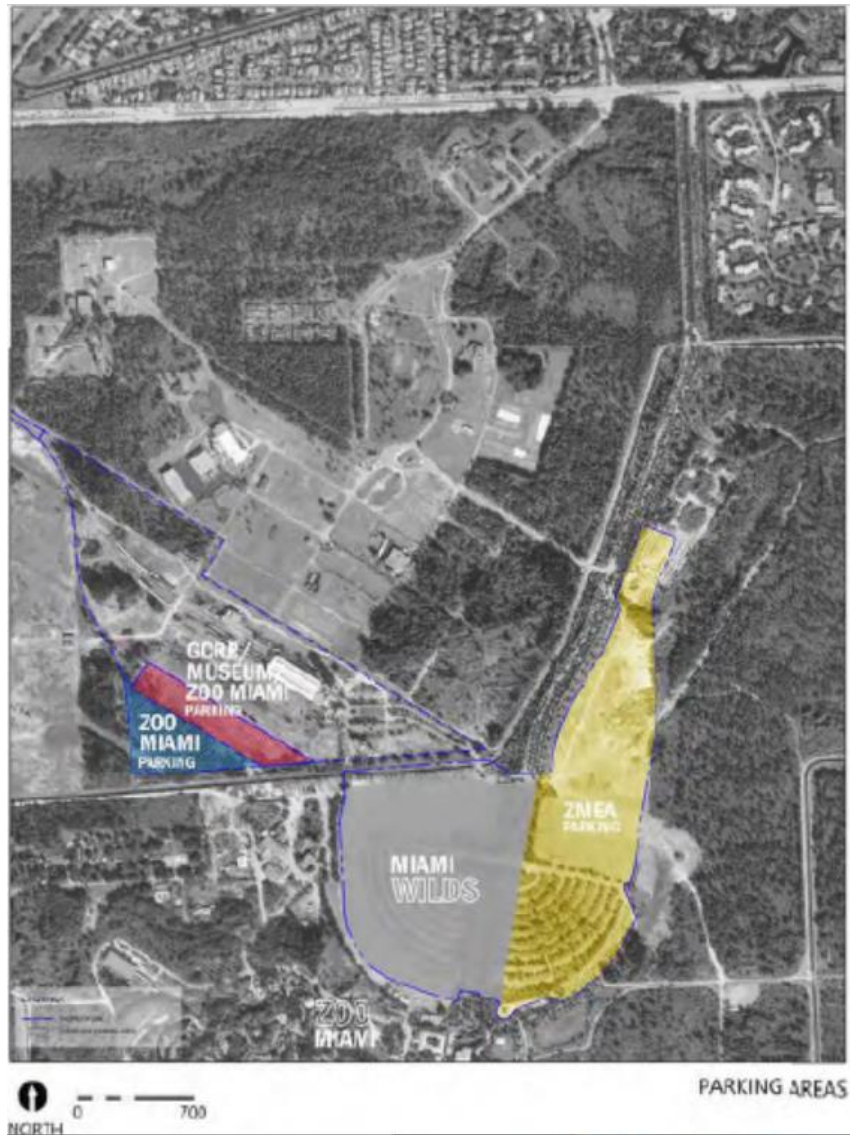
<sup>40</sup> *Id.* at 1.

<sup>41</sup> Miami Wilds, *About*, <http://www.miamiwilds.com/aboutproject/> (last visited July 14, 2022).



to Parks program). The latter two parcels are intended to be used as overflow parking for Miami Wilds, as well as parking for ZooMiami, the Gold Coast Railroad Museum, and the Gold Coast Military Museum. A parcel known as the U.S. Coast Guard Southern Anchor Property is an option parcel that will eventually be developed as part of the Miami Wilds project in the future.<sup>42</sup>

Figure 2: Proposed Miami Wilds Development (Option Parcel Not Labeled)<sup>43</sup>



<sup>42</sup> Miami-Dade County Natural Areas Management et al. 2022. Plant and Wildlife Surveys at Zoo Miami and Gold Coast Railroad Museum for the Miami Wilds Project Within the Zoo Miami Entertainment Area, at 14–15. [hereinafter Miami Wilds Survey Report] (Attachment 1).

<sup>43</sup> Map from Parking Concession Agreement at Zoo Miami Entertainment Area, Exhibit J to Development Lease Agreement Between Miami-Dade County, Florida, as Landlord, and Miami Wilds, LLC, a Florida Limited Liability Company, as Tenant (June 22, 2022) (available upon request).



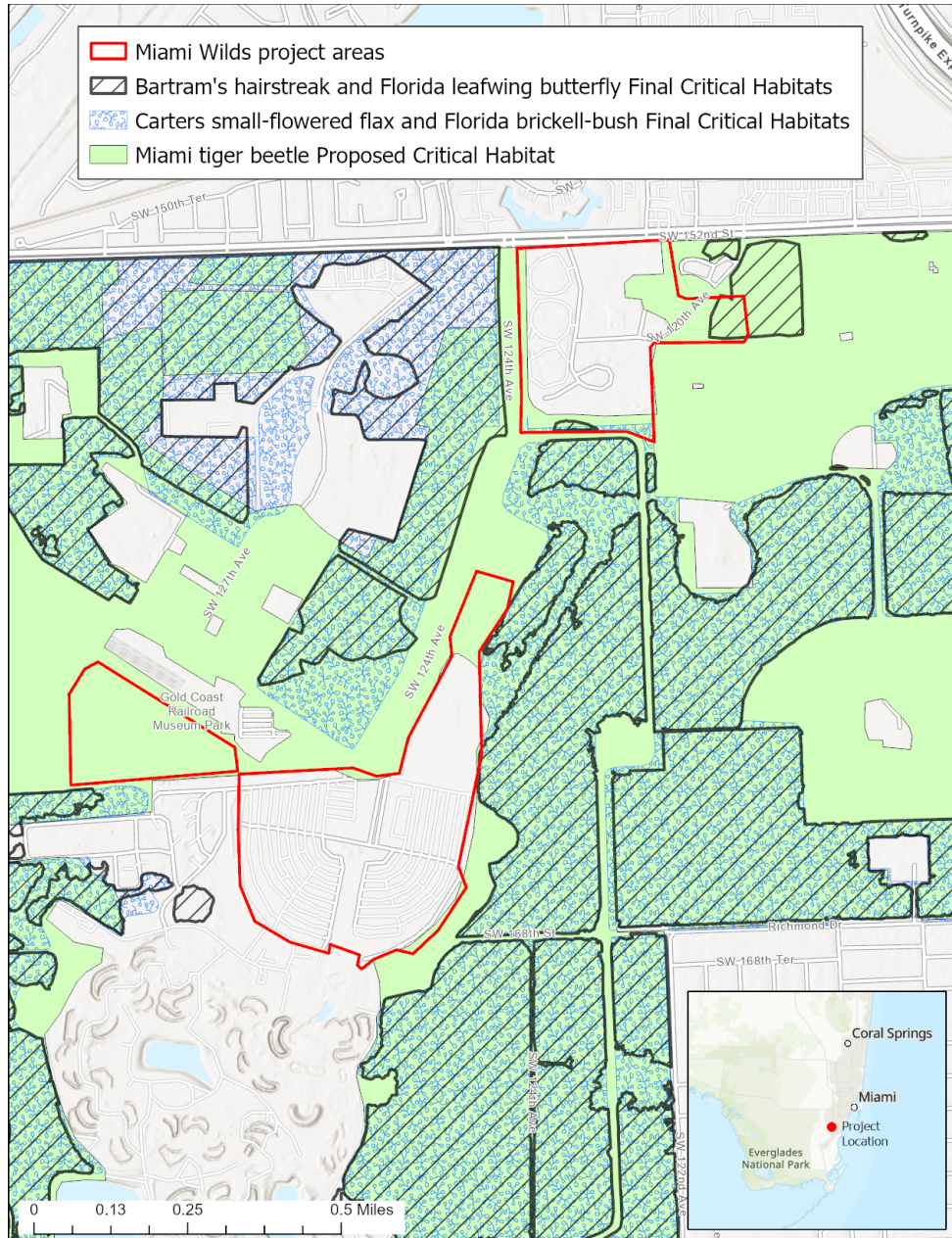
According to FWS’s Information for Planning and Consultation (IPAC) system, the following list of species could potentially be affected by the development. According to records from Miami-Dade County, FWS identified the species in bold as those that are known to occur within the adjacent Richmond pine rocklands and “may be present within the proposed project area”<sup>44</sup>:

Table 1: Species Identified by the Information for Planning and Consultation System		
Common Name	Scientific Name	Status
<b>Florida bonneted bat</b>	<i>Eumops floridanus</i>	<b>Endangered</b>
Bachman’s warbler	<i>Vermivora bachmanii</i>	Endangered
Eastern black rail	<i>Laterallus jamaicensis jamaicensis</i>	Threatened
<b>Eastern indigo snake</b>	<i>Drymarchon couperi</i>	<b>Threatened</b>
<b>Bartram’s scrub-hairstreak</b>	<i>Strymon acis bartrami</i>	<b>Endangered</b>
<b>Florida leafwing</b>	<i>Anaea troglodyta floridalis</i>	<b>Endangered</b>
Miami blue butterfly	<i>Cyclargus thomasi bethunebakeri</i>	Endangered
<b>Miami tiger beetle</b>	<i>Cicindelidia floridana</i>	<b>Endangered</b>
Monarch butterfly	<i>Danaus plexippus</i>	Candidate
Beach jacquemontia	<i>Jacquemontia reclinata</i>	Endangered
<b>Blodgett’s Silverbush</b>	<i>Argythamnia blodgetti</i>	<b>Threatened</b>
Cape Sable thoroughwort	<i>Chromolaena frustrata</i>	Endangered
Carter’s mustard	<i>Warea carteri</i>	Endangered
<b>Carter’s small-flowered flax</b>	<i>Linum carteri carteri</i>	<b>Endangered</b>
<b>Crenulate lead-plant</b>	<i>Amorpha crenulate</i>	<b>Endangered</b>
<b>Deltoid spurge</b>	<i>Chamaesyce deltoidei deltoidei</i>	<b>Endangered</b>
<b>Everglades bully</b>	<i>Sideroxylon reclinatum austrofloridense</i>	<b>Threatened</b>
<b>Florida brickell-bush</b>	<i>Brickellia mosieri</i>	<b>Endangered</b>
<b>Florida pineland crabgrass</b>	<i>Digitaria pauciflorida</i>	<b>Threatened</b>
<b>Florida prairie-clover</b>	<i>Dalea carthagenensis floridana</i>	<b>Endangered</b>
Florida semaphore cactus	<i>Consolea coralicola</i>	Endangered
<b>Garber’s spurge</b>	<i>Chamaesyce garberi</i>	<b>Threatened</b>
Pineland sandmat	<i>Chamaesyce deltoidei pinetorum</i>	Threatened
<b>Sand flax</b>	<i>Linum Arenicola</i>	<b>Endangered</b>
<b>Small’s milkpea</b>	<i>Galactia smallii</i>	<b>Endangered</b>
<b>Tiny polygala</b>	<i>Polygala smallii</i>	<b>Endangered</b>
Florida bristle fern	<i>Trichomanes punctatum floridanum</i>	Endangered

<sup>44</sup> Miami Wilds Survey Report at 2–3.

Additionally, the proposed or final critical habitats for federally endangered Bartram’s scrub-hairstreak, Florida leafwing, Miami tiger beetle, Carter’s small-flowered flax, and Florida brickell-bush appear to be within or adjacent to the Miami Wilds site (see Figure 3, below).

**Figure 3: Miami Wilds Project Site in the Context of Proposed and Final Critical Habitat for Listed Species<sup>45</sup>**



Surveys and available information indicate that the construction and operation of the Miami Wilds project, enabled by NPS’s release of land restrictions, are likely to affect federally listed

<sup>45</sup> Curt Bradley, Center for Biological Diversity. Figure based on maps of the Miami Wilds project in public records and critical habitat shapefiles from FWS’s Environmental Conservation Online System.

species and their critical habitat on the site. Miami Wilds is also likely to impact listed species adjacent to the site, even if the species do not occupy the actual footprint of the project. For example, this new development will likely inhibit or wholly prevent requisite prescribed fire needed to properly manage adjacent habitat and the rare species that depend on frequent fires to persist and thrive.<sup>46</sup> Additionally, it will further fragment and isolate existing species populations in the Richmond Tract. Many of these small, isolated populations are vulnerable to extirpation due to limited gene flow, reduced genetic diversity, and inbreeding depression.<sup>47</sup> Population isolation also increases the risk of extinction from stochastic genetic and environmental events including drought, flooding, and toxic spills. Habitat modification and cumulative habitat degradation are also major threats for species that exist in isolated populations. Due to blocked avenues of dispersal or limited dispersal ability, isolated populations “gradually and quietly perish” as habitat conditions deteriorate.<sup>48</sup>

All listed species present within or adjacent to the Miami Wilds site are likely to be impacted by the development, including the Florida bonneted bat, eastern indigo snake, Bartram’s scrub-hairstreak, Florida leafwing, Miami tiger beetle, and several federally listed plants, described in detail below.

### ***Florida Bonneted Bat***

The Florida bonneted bat is a federally endangered species native to southern Florida.<sup>49</sup> The species has one of the smallest range distributions of any bat species in the United States, increasing its susceptibility to climate change, particularly the impacts of major storms.<sup>50</sup> In natural areas, the species roost primarily in the cavities of old pine trees. In contrast, they use different structures in urban areas, including Spanish tiles roofs and bat houses.<sup>51</sup> Currently, the roosting and foraging habitat for urban based Florida bonneted bat populations is under threat from land use conversion as part of development (renovation and urban sprawl) and expansion of agricultural areas.<sup>52</sup> FWS anticipates that climate change and sea level rise will both negatively impact the species, which is already suffering from destruction and degradation of suitable habitat.<sup>53</sup> Specifically, FWS anticipates “significant losses of occupied and potential occupied habitat in coastal areas due to climate change.”<sup>54</sup> The Florida bonneted bat does not currently have designated critical habitat, but it is our understanding that FWS intends to issue a revised proposed critical habitat rule this year.<sup>55</sup>

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<sup>46</sup> Miami Wilds Survey Report at 23 (Appendix 1); *see also* Possley et al. (2018).

<sup>47</sup> Lynch, M. 1996. A quantitative-genetic perspective on conservation issues. In: Avise, J.C. and J.L. Hambrick (eds.). Conservation genetics: case histories from nature. Chapman and Hall, New York. pp. 493–494.

<sup>48</sup> U.S. Fish and Wildlife Service. 2000. Mobile River Basin Aquatic Ecosystem Recovery Plan. Atlanta, GA. 128 pp., available at [https://ecos.fws.gov/docs/recovery\\_plans/2000/001117.pdf](https://ecos.fws.gov/docs/recovery_plans/2000/001117.pdf).

<sup>49</sup> 78 Fed. Reg. 61,004 (Oct. 2, 2013).

<sup>50</sup> *Id.* at 61,004, 61,016.

<sup>51</sup> 77 Fed. Reg. 60,750, 60,754–56 (Oct 4, 2012).

<sup>52</sup> Everglades Nat’l Park, *Florida Bonneted Bat*, <http://www.nps.gov/ever/learn/nature/flbonnetedbat.htm> (last visited July 14, 2022).

<sup>53</sup> *Id.*

<sup>54</sup> 78 Fed. Reg. 61,004, 61,022 (Oct 2, 2013).

<sup>55</sup> U.S. Fish and Wildlife Serv., National Domestic Listing Workplan: FY22 Workplan 4 (Mar. 2022), available at <https://www.fws.gov/sites/default/files/documents/domestic-listing-workload-2022.pdf>.

Although, to our knowledge, formal surveys of the Miami Wilds site have not yet occurred, the site has been documented to be the most important site for the Florida bonneted bat in Miami-Dade County, used by the Florida bonneted bat for social and foraging activities.<sup>56</sup> In 2012, Zoo Miami acoustic monitoring identified the site as a critical foraging area for this federally endangered species. In partnership with Zoo Miami, Bat Conservation International expanded the acoustic monitoring to 10 sites within the urban boundary of the county in 2019.<sup>57</sup> The acoustic data shows the open space at the Miami Wilds footprint as the most active location for foraging and Florida bonneted bat social interactions across all the sites.<sup>58</sup> In 2021 this acoustic monitoring was expanded to 22 sites within the county, showing the same results. The mosaic of habitats (pine rockland forest and open areas) hosts the second largest population of Florida bonneted bats across their range, with more than 90 individuals roosting in 12 specially designed artificial roosts on Zoo Miami grounds.<sup>59</sup> The bats roosting and using the Zoo Miami grounds represent the core population in the Southeast range of the species. Fine-scale genetic analysis of Florida bonneted bat has shown that the Miami population is genetically distinct from individuals across the rest of the species range.<sup>60</sup> These new findings provide even more reason for protecting this core Florida bonneted bat population at Zoo Miami as the loss of this population will mark a loss of genetic diversity for the species as a whole.<sup>61</sup>

### ***Eastern Indigo Snake***

The Service listed the eastern indigo snake as threatened under the ESA in 1978 due to threats from habitat modification, collection for the pet trade, and gassing of gopher tortoise burrows where the snake takes shelter.<sup>62</sup> The eastern indigo snake's habitat consists of a wide range of upland and lowland habitats, and the most important factors limiting habitat suitability are their quantity and quality (i.e., low fragmentation, road density and urban land cover).<sup>63</sup> Since listing, the snake's range has continuously contracted—particularly in the Florida panhandle because of declines in gopher tortoise populations and in the Florida peninsula because of habitat loss and

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<sup>56</sup> Bat Conservation International, Florida Bonneted Bat Acoustic Monitoring Project: Identifying critical habitat within Miami-Dade County in order to protect the rarest bat in the United States, available at <https://www.batcon.org/wp-content/uploads/2020/10/Bat-Conservation-International-Preliminary-2019-Acoustic-Monitoring-Report.pdf> [hereinafter BCI (2020)] (Attachment 2); Email from James G. Duncan, Miami-Dade County, to Lisa Spadafina, Lazaro Quintino, John Joyner, Christina Stocking, Michael Spinelli, and Craig Gorsenbacher, Miami-Dade County, *Miami Wilds Plant and Species survey report* (Mar. 31, 2022) (Attachment 3).

<sup>57</sup> BCI (2020) at 1.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> FPL Bat Lab at Zoo Miami, Florida Bonneted Bat Urban Ecology and Conservation, Report Research Authorization #311 (2020) (Attachment 4).

<sup>60</sup> Austin, J.D., Gore, J.A., Hargrove, J.S. *et al.* 2022. Strong population genetic structure and cryptic diversity in the Florida bonneted bat (*Eumops floridanus*). *Conserv Genet* 23, 495–512. <https://doi.org/10.1007/s10592-022-01432-y> (Attachment 5).

<sup>61</sup> In addition to on-site use, there are nine occupied Florida bonneted bat houses and four previously occupied roosts in the Richmond Tract, adjacent to the Miami Wilds site. Miami Wilds Survey Report at 14. The bat has also been detected on nearby parcels in the Richmond Tract, including directly north in an area recently developed for the Coral Reef Commons project. U.S. Fish and Wildlife Serv., Environmental Assessment for the Coral Reef Commons Project Incidental Take Permit Application 22 (Nov. 2017) [hereinafter USFWS (2017)].

<sup>62</sup> U.S. Fish & Wildlife Serv., Recovery Plan for the Eastern Indigo Snake, First Revision 3 (Sept. 26, 2019), available at [https://ecos.fws.gov/docs/recovery\\_plan/Eastern%20Indigo%20Snake%20Recovery%20Plan%20Revision.pdf](https://ecos.fws.gov/docs/recovery_plan/Eastern%20Indigo%20Snake%20Recovery%20Plan%20Revision.pdf) [hereinafter USFWS 2019].

<sup>63</sup> *Id.* at 3–4.

degradation.<sup>64</sup> In addition to habitat loss, degradation, and fragmentation, direct mortality by people and their domestic pets and from vehicle strikes on roads is an increasing risk.<sup>65</sup>

FWS has a record of an indigo snake observation from 2000 within the Martinez Pinelands, west of the Miami Wilds site in the Richmond Tract, which has served as the basis for requiring an incidental take permit for the species.<sup>66</sup>

### ***Bartram's Scrub-Hairstreak and Florida Leafwing***

Bartram's scrub-hairstreak and Florida leafwing, two butterflies, are entirely dependent on pine rockland habitat. This habitat has experienced "substantial destruction, modification, and curtailment" and is now regarded as critically imperiled globally, reduced by economic development by 90% on mainland south Florida.<sup>67</sup> FWS listed both species as endangered in 2014 due to loss of pineland habitat, mismanagement of existing habitat, and pesticides. Future threats include loss of genetic diversity and climate change.<sup>68</sup> FWS also designated critical habitat for the Bartram's scrub-hairstreak and Florida leafwing in 2014. FWS designated 1,082 acres of critical habitat in the Richmond Tract for Bartram's scrub-hairstreak, 881 acres of which are privately owned.<sup>69</sup> And FWS designated 889 acres of critical habitat in the Richmond Tract for the Florida leafwing, 767 acres of which are privately owned.<sup>70</sup>

Recent surveys of the proposed Miami Wilds site identified 126 pineland croton (*Croton cascarilla*), the host plant for the federally endangered Bartram's scrub-hairstreak and Florida leafwing, in the project footprint.<sup>71</sup> The easternmost portion of the Option Parcel overlaps with federal designated critical habitat for the Bartram's scrub-hairstreak.<sup>72</sup> And the site is amidst designated critical habitat for the Bartram's scrub-hairstreak (see Figure 3, above).

While it is our understanding the Bartram's scrub-hairstreak was not observed in a recent survey of the project area, "the species is common throughout Richmond pine rocklands and small patches of appropriate habitat for the species was present within the proposed project footprint."<sup>73</sup> Observations were made in 2008 and 2014 on land within and directly adjacent to the Miami Wilds site. Bartram's scrub-hairstreak "is rarely encountered more than 5 m (16.4 ft) from its host plant and may have limited dispersal abilities."<sup>74</sup>

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<sup>64</sup> *Id.* at 3.

<sup>65</sup> *Id.*

<sup>66</sup> USFWS (2017) at 21; *see* Possley et al. (2018) at 75 (map of Martinez Pineland and Zoo Miami tracts).

<sup>67</sup> 79 Fed. Reg. 47,222, 47,230 (Aug. 12, 2014). "Destruction of pine rocklands for economic development has reduced this habitat in Miami-Dade County . . . to about 11 percent of its natural extent, from approximately 183,000 acres to 20,100 acres." *Id.* at 47,228.

<sup>68</sup> 79 Fed. Reg. 47,222.

<sup>69</sup> 79 Fed. Reg. 47,180, 47,204–05 (Aug. 12, 2014).

<sup>70</sup> *Id.* at 47,216–17.

<sup>71</sup> Miami Wilds Survey Report at 4, 15, 20 & 22 (Appendix 1).

<sup>72</sup> *Id.* at 15, 22 (Appendix 1).

<sup>73</sup> *Id.* at 18 (Appendix 1).

<sup>74</sup> 79 Fed. Reg. at 47,227.



Unlike the Bartram’s scrub-hairstreak, the Florida leafwing is thought to be a strong flyer capable of dispersal over large areas,<sup>75</sup> yet it only has one known hostplant, the pineland croton. It has adapted for life in pine rocklands, and with its wings closed, looks like a dead leaf or bark of South Florida slash pine tree.<sup>76</sup> While no Florida leafwing has been documented on the project site, the site is surrounded by and contains critical habitat for the Florida leafwing, with potential for restoration for the species (see Figure 3, above).

Destruction of portions of the site containing pineland croton risks destroying the butterflies’ host plant, killing or injuring immature butterflies occurring on the site, and destroying an important nectar source for adult butterflies. Furthermore, “[f]ragmentation of pine rockland habitat is a concern for species with low mobility, such as the [Bartram’s scrub-hairstreak], and could result in the isolation of populations leading to reduced gene flow between sites, localized population declines, and potentially localized extirpation” and that the project would further fragment habitat.<sup>77</sup> Bartram’s scrub-hairstreak and Florida leafwing are vulnerable to extinction due to their severely reduced range, reduced population size, lack of metapopulation structure, few remaining populations, and relative isolation. While abundance of Bartram’s scrub-hairstreak and Florida leafwing is not known, each butterfly is estimated to number in the hundreds, and at times, possibly much lower.<sup>78</sup> For Bartram’s scrub-hairstreak to recover, further habitat loss from development and fire suppression must be stemmed.<sup>79</sup>

### ***Miami Tiger Beetle***

FWS listed the Miami tiger beetle as endangered in 2016.<sup>80</sup> The Miami tiger beetle is found only in pine rockland habitat along the Miami Rock Ridge and Richmond area.<sup>81</sup> It has not been recently documented on the project site but has been documented on nearby properties in the Richmond Tract, including at Zoo Miami, the University of Miami Richmond Campus, U.S. Coast Guard land, and Larry and Penny Thompson Park.<sup>82</sup>

Areas within the proposed Miami Wilds site show potential to support the Miami tiger beetle, though it appears from available records that none have been observed to date.<sup>83</sup> Portions of the site overlap with proposed critical habitat for the Miami Tiger beetle (see Figure 3, above). Notably, Miami tiger beetles have been documented on properties adjacent to the proposed Miami Wilds site, even on degraded habitat and paved roads.<sup>84</sup> FWS has found that “[f]ragmentation of pine rockland habitat is especially a concern for species with low mobility,

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<sup>75</sup> *Id.*

<sup>76</sup> 79 Fed. Reg. at 47,226.

<sup>77</sup> USFWS (2017) at 76.

<sup>78</sup> 79 Fed. Reg. at 47,237.

<sup>79</sup> URS Corporation Southern. 2007. EEL Program, Management Plan, Part II – Pine Rockland (DRAFT) Chapter 1: The Pine Rockland Habitat, [http://regionalconservation.org/ircs/pdf/publications/2007\\_09.pdf](http://regionalconservation.org/ircs/pdf/publications/2007_09.pdf); FNAI – Guide to the Natural Communities of Florida: 2010 Edition, [http://www.fnai.org/PDF/NC/Pine\\_Rockland\\_Final\\_2010.pdf](http://www.fnai.org/PDF/NC/Pine_Rockland_Final_2010.pdf) at 35.

<sup>80</sup> 81 Fed. Reg. 68,985 (Oct. 5, 2016).

<sup>81</sup> 80 Fed. Reg. 79,533, 79,536–37 (Dec. 22, 2015).

<sup>82</sup> USFWS (2017) at 24.

<sup>83</sup> Miami Wilds Survey Report at 22 (Appendix 1).

<sup>84</sup> See USFWS (2017) at 97; Knisley, C.B. 2008. Current Status of the “Miami” Tiger Beetle (*Cicindela “Miamiensis”*) Final Report 13 (Attachment 6).



such as the [beetle], and could result in the isolation of populations leading to reduced gene flow between sites, localized population declines, and potentially localized extirpation.”<sup>85</sup>

**Figure 4:** Map of Miami tiger beetle observations near proposed Miami Wilds site<sup>86</sup>



***Federally Listed Plants***

The following federally listed plants are known to exist in the Richmond pine rocklands: Carter’s small-flowered flax, crenulate lead-plant, deltoid spurge, Everglades bully, Florida brickell-bush, Florida pineland crabgrass, Florida prairie-clover, Garber’s spurge, sand flax, small’s milkpea, tiny polygala. FWS listed the Florida brickell-bush and Carter’s small-flowered flax as endangered in 2014 and designated 104.06 acres of critical habitat.<sup>87</sup> The plants are only found in Miami-Dade pine rocklands in open, well-lit subcanopy with exposed limestone and minimal organic material.<sup>88</sup> FWS listed the tiny polygala and deltoid spurge as endangered in 1985 but

<sup>85</sup> USFWS (2017) at 99.

<sup>86</sup> Melquisedec Gamba-Rios, Ph.D., Bat Conservation International. Figure based on coordinates provided by Miami tiger beetle expert Chris Wirth.

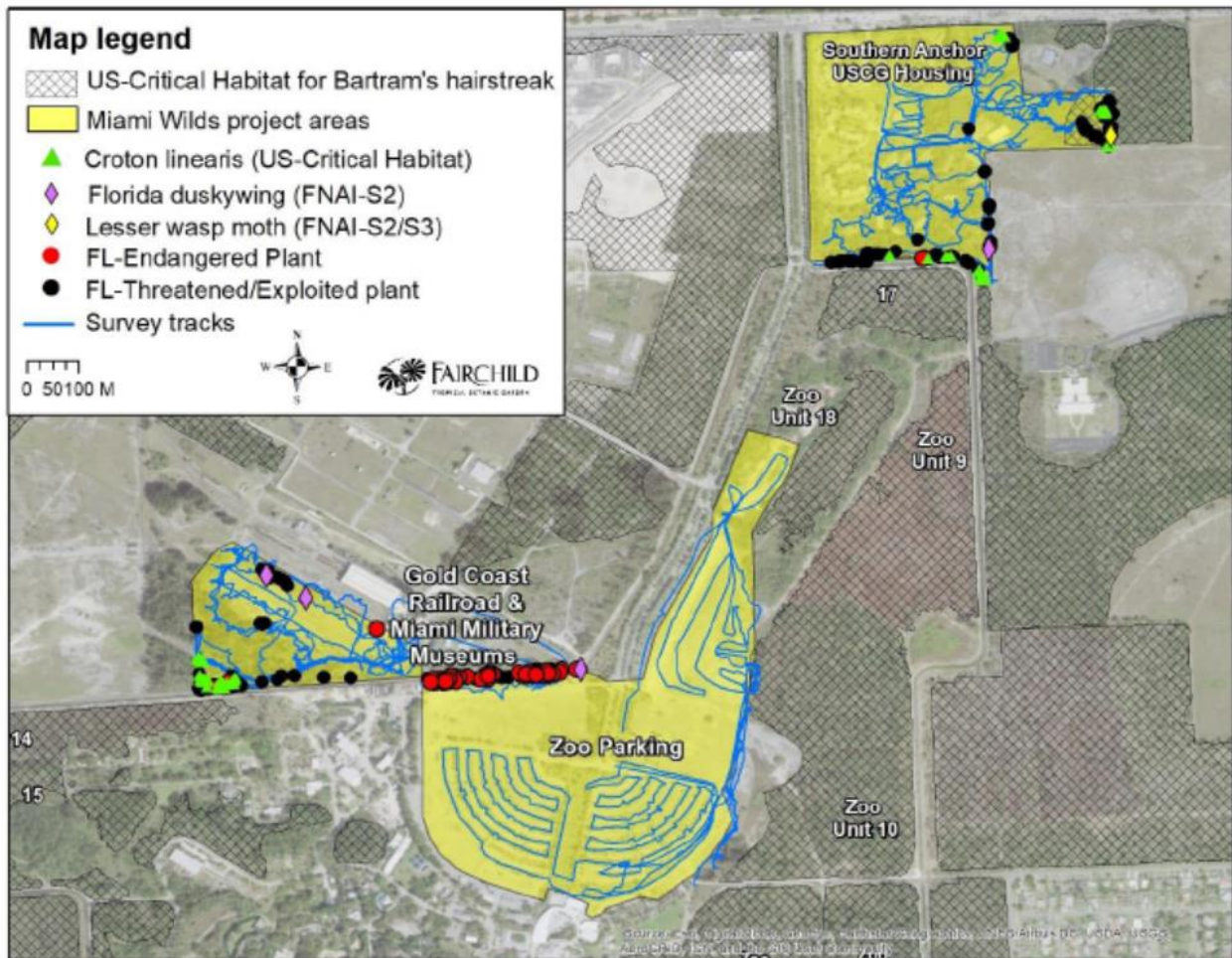
<sup>87</sup> 79 Fed. Reg. 52,567 (Sept. 4, 2014); 80 Fed. Reg. 49,846 (Aug. 17, 2015).

<sup>88</sup> 78 Fed. Reg. 61,273, 61,274–6 (Oct. 3, 2013).

has never designated critical habitat for them. Populations of deltoid spurge have been surveyed within the Richmond Tract, including north of the proposed Miami Wilds site.<sup>89</sup>

The Miami Wilds site is surrounded by and appears to potentially overlap with designated critical habitat for Carter's small-flower flax and Florida brickell-bush (see Figure 3, above). Although federally listed plant species were not reported as detected on the proposed Miami Wilds site during recent surveys, there are four federally listed plant species present on parcels immediately adjacent to the proposed Miami Wilds project footprint: Florida brickell bush, deltoid spurge, sand flax, and tiny polygala.<sup>90</sup>

Figure 5: Map of Miami-Dade Survey of Miami Wilds Project Areas<sup>91</sup>



<sup>89</sup> USFWS (2017).

<sup>90</sup> Miami Wilds Survey Report at 23 (Appendix 1); *see also* Possley et al. (2018); Fairchild Tropical Botanic Garden, Report to USFWS South Florida Ecological Services Field Office: Biotic Surveys in Project area for Zoo Miami Service Road Paving Project South off SW 168th St. (Attachment 7).

<sup>91</sup> Miami Wilds Survey Report at 20, Appendix 1.



## NPS's Release of Land for the Miami Wilds Development

On June 23, 2022,<sup>92</sup> NPS, acting on behalf of the United States, and Miami-Dade County agreed to amend a 2011 agreement that released terms, conditions, covenants and restrictions imposed by the United States on three parcels of land in and around Zoo Miami, consisting of approximately 67 acres, and imposed those same and other terms, conditions, covenants and restrictions on different parcels of land.<sup>93</sup> The 2022 Agreement replaces the legal descriptions and parcel maps for the original 67 acre of land with a revised 67 acres of land in and around Zoo Miami.<sup>94</sup>

Pursuant to the 2022 Agreement, NPS executed a Release and Termination of Restrictions stating, “The United States hereby cancels, removes from, terminates, and releases the Zoo Entertainment Area property . . . from all of the terms, conditions, covenants, and restrictions enumerated in the 1974 and 1987 conveyances of land within the Zoo Entertainment Area, including the requirement to maintain the Zoo Entertainment Area for public park or public recreational purposes and such terms, conditions, covenants and restrictions shall have no further force or effect.”<sup>95</sup>

The 2022 Agreement and subsequent Release were necessary condition precedents to Miami-Dade County's approval of a lease agreement necessary for the development of Miami Wilds and associated parking to proceed.<sup>96</sup>

Available records indicate that NPS has not initiated and completed formal ESA consultation on the effects its agreement and associated release will have on federally listed species on and around the prospective Miami Wilds site. Indeed, a letter from Miami Wilds to Miami-Dade County dated December 22, 2021, “provides assurances as it relates to the Miami Wilds Development . . . and Miami Wilds’ *intention to consult* with the U.S. Fish & Wildlife Service”<sup>97</sup>

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<sup>92</sup> The National Park Service signed the agreement on February 4, 2022, but Miami-Dade County did not sign until June 23, 2022. See Gabriela Henriquez Stoikow, Miami Wilds water park nearer to construction, Miami Today (May 12, 2022) (available at <https://www.miamitodaynews.com/breaking/miami-wilds-water-park-flows-nearer-to-construction/>) (reporting that John Barrett, Program Manager of NPS's Federal Lands to Parks office confirmed the signing of the amendment to the release of 67 acres of land where the Miami Wilds water park is slated for development).

<sup>93</sup> See Amendment No. 1 to the Release and Transfer of Terms, Conditions, Covenants and Restrictions 1 (June 23, 2022) (Attachment 8). In 1974, the U.S. Department of the Interior conveyed by quitclaim deed approximately 1,009.83 acres (known as the “Zoo Property”) to Miami-Dade County. *Id.* In 1987, the National Park Service (Department of Interior) conveyed via quitclaim deed approximately 49.67 acres (known as the “Gold Coast Property”) to Miami-Dade County. *Id.* at 1–2. The conveyances required the Zoo Property and Gold Coast Property to be used and maintained for public park or public recreational purposes and imposed other terms, covenants, and restrictions. *Id.* at 2. In 2011, the National Park Service agreed to remove the terms, conditions, covenants, and restrictions from three tracts totaling 67.29 acres of the Zoo Property and transfer them to a different 164.28 acres (known as the “Replacement Park”). *Id.*

<sup>94</sup> *Id.* at 1.

<sup>95</sup> See Release and Termination of Restrictions (Attachment 9)

<sup>96</sup> See Memorandum from Carlos A. Gimenez, Mayor of Miami-Dade County, to Honorable Chairwoman Audrey M. Edmonson and Members, Board of County Commissioners, *Resolution Approving: A Development Lease Agreement Between Miami-Dade County and Miami Wilds, LLC to Develop the Zoo Miami Entertainment Area 2* (Oct. 20, 2020) (Attachment 10).

<sup>97</sup> We note that consultation is a requirement imposed on federal agencies, so NPS—not Miami Wilds—must carry out the consultation obligation with FWS. See 16 U.S.C. § 1536(a)(2) (requiring that “each Federal agency shall, in

including assurances that Miami Wilds will begin surveying for federally endangered Florida bonneted bats “[w]ithin 60 days of the ground lease between the County and Miami Wilds for the Development becoming effective.”<sup>98</sup> Given that surveys necessary to complete consultation will not be completed until *after* Miami-Dade County executes the lease agreement, which could only occur *after* NPS entered the 2022 Agreement and executed the subsequent Release, available records indicate NPS and FWS have not even begun—let alone completed—necessary ESA consultation.

## **VIOLATIONS OF FEDERAL ENVIRONMENTAL LAW**

Based on our review of publicly available information, NPS and FWS have failed to initiate and complete formal consultation over NPS’s agency action, the entry of a contract with Miami-Dade County to amend and revise terms, conditions, covenants and restrictions on land that is the intended site for Miami Wilds, which may affect—and is indeed likely to adversely affect—species listed under the Endangered Species Act.<sup>99</sup> Indeed, NPS acknowledges that “Section 7 consultation with FWS [is] necessary on the Miami Wilds project.”<sup>100</sup>

These actions have resulted in several violations of ESA Section 7. First, NPS and FWS are committing a procedural violation of ESA Section 7(a)(2) by failing to complete consultation before federal action is undertaken.<sup>101</sup> Second, NPS and FWS are committing a substantive violation of ESA Section 7(a)(2) because, by failing to complete consultation before embarking on the action, they have failed to ensure the action will not jeopardize the continued existence of species or adversely modify critical habitat.<sup>102</sup>

Third, by entering an agreement with Miami-Dade County to modify restrictions on lands proposed for the Miami Wilds site *before* completing consultation and adopting reasonable and prudent measures, NPS made an “irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” or alternatives in violation of ESA Section 7(d).<sup>103</sup> Section 7(d) is meant to preserve the status quo during conservation,<sup>104</sup>

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consultation with and with the assistance of the Secretary insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat”).

<sup>98</sup> See Letter from Paul Lambert, Miami Wilds, to Christina Salinas-Cotter, Miami-Dade Parks, Recreation & Open Space, *Commitment by Miami Wilds to Undergo Consultation with the U. S Fish and Wildlife Service, per Section 7 of the Endangered Species Act (“ESA”)*, 16 U.S.C. § 1536 (Dec. 14, 2021) [hereinafter Assurance Letter] (Attachment 11) (emphasis added). Note that a nearly identical letter dated December 22, 2021, also exists.

<sup>99</sup> 16 U.S.C. § 1536(a)(2); see *Tinoqui-Chalola Council*, 232 F.3d at 2000 (holding that negotiating and executing contacts constitutes agency action under the ESA); *Natural Resources Defense Council*, 146 F.3d at 1125 (same).

<sup>100</sup> Email from John Barrett, National Park Service, to Christina Salinas-Cotter, Miami-Dade Parks, Recreation & Open Spaces, *Miami Wilds Project and ESA* (Sept. 24, 2021) (Attachment 12).

<sup>101</sup> 16 U.S.C. § 1536(a)(2).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* § 1536(d); see *Pac. Coast Fed’n of Fishermen’s Ass’n v. Gutierrez*, 606 F. Supp. 2d 1122, 1192 (E.D. Cal. 2008) (citing parties’ concession “that it would be inappropriate for the Bureau [of Reclamation] to enter into any long-term water delivery contracts until” reinitiated consultation was completed and a biological opinion was issued).

<sup>104</sup> *Conner*, 848 F.2d at 1455 n.34; *Defs. of Wildlife v. Bureau of Ocean Energy Mgmt*, 871 F. Supp. 2d 1312, 1327 (S.D. Ala. 2012) (citing *Conner*).

and NPS failed to do this when it issued the necessary releases to develop Miami Wilds without first determining and incorporating essential measures and alternatives to prevent jeopardizing listed species. In short, NPS has “commit[ted] resources in a way that ties its hands for future actions.”<sup>105</sup> Likewise, in taking action toward the development of the Miami Wilds project, Miami-Dade County, Miami Wilds, and associated entities have also made irreversible or irretrievable commitments of resources in violation of ESA Section 7(d).

Fourth, in failing to consult over the species and critical habitat impacts of NPS’s action, NPS and FWS have also violated ESA Section 7(a)(1), which obligates federal agencies to use their authorities in furtherance of the ESA.<sup>106</sup>

The failure to initiate and complete consultation means there is no valid take coverage, jeopardy determination, or adverse modification determination for NPS’s agency action or the associated Miami Wilds development. Consequently, should the project proceed before the developers and those authorizing<sup>107</sup> the project obtain appropriate incidental take coverage, either through an incidental take statement or incidental take permit, and cause take of listed species, they will be proceeding in violation of ESA Section 9. Any informal “approval” from FWS is legally meaningless to avoid Section 9 liability. The only way take can be authorized consistent with the ESA is through an ESA Section 10 habitat conservation plan and incidental take permit or an ESA Section 7 biological opinion with an incidental take statement.<sup>108</sup>

Miami Wilds’ non-binding assurance letters to Miami-Dade County and NPS stating that the company “consider[s] completion of the Section 7 consultation process with the FWS as a condition precedent for starting construction”<sup>109</sup> does not remedy the ESA violations. The ESA obligates NPS and FWS to complete ESA consultation *before NPS authorizes funds, or carries out any agency action*, and therefore only NPS and FWS can remedy the failure to complete consultation. Furthermore, the assurance letters do not preserve reasonable and prudent measures or alternatives such that violations of ESA 7(d) are resolved. To remedy the ESA violations, NPS must withdraw from or revoke the release, and NPS and FWS must immediately initiate and complete formal consultation *before* NPS carries out the action.

Finally, based on publicly available records, it appears NPS is violating the National Environmental Policy Act (NEPA) by failing to prepare an environmental assessment or environmental impact statement *before* entering the release agreement, despite likely significant negative effects on federally listed species and surrounding critically endangered pine rockland

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<sup>105</sup> *Pac. Coast Fed’n of Fishermen’s Ass’n v. Gutierrez*, 606 F. Supp. 2d 1122, 1192 (E.D. Cal. 2008).

<sup>106</sup> 16 U.S.C. § 1536(a)(1); *Ctr. for Biological Diversity*, 861 F.3d at 188 n. 10; *Conner*, 848 F.2d at 1455 n.34.

<sup>107</sup> See *Strahan v. Coxe*, 127 F.3d 155, 158 (1st Cir. Mass. 1997) (explaining that the ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking”); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding Forest Service’s management of timber stands was a taking of the red-cockaded woodpecker in violation of the ESA); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995) (holding that county’s authorization of vehicular beach access during turtle mating season exacted a taking of the turtles in violation of the ESA).

<sup>108</sup> 16 U.S.C. §§ 1536 (b)(4)(C)(i), 1539(a)(1)(B).

<sup>109</sup> See Assurance Letter at 1–2.

forest.<sup>110</sup> Given that NPS's agreement permits the construction and operation of the Miami Wilds project, which is in close proximity to critically endangered pine rocklands, is likely to adversely affect endangered and threatened species and critical habitat, is likely to establish precedent for future actions in pine rocklands with significant effects on the environment, is likely to be highly controversial because of these species and environmental impacts, and threatens a violation of laws imposed for the protection of the environment in the absence of consultation and other required environmental analyses, an environmental impact statement is required.<sup>111</sup>

### CONCLUSION

For the foregoing reasons, NPS and FWS are violating ESA Section 7. Furthermore, to the extent any take occurs in connection with NPS's release of the land, NPS, Miami-Dade County, Miami Wilds LLC, and/or other entities associated with the Miami Wilds development may be liable for unauthorized take under ESA Section 9. To remedy current ESA violations and curtail other potential or actual associated violations, NPS and FWS must promptly initiate and complete formal consultation over the release of restrictions on land proposed for the Miami Wilds project. In addition, NPS must also fulfill its environmental review obligations to comply with NEPA.

If you have any questions or wish to discuss the matter, please contact me at (727) 755-6950 or [ebennett@biologicaldiversity.org](mailto:ebennett@biologicaldiversity.org).

Sincerely,



Elise Pautler Bennett  
Florida Director & Senior Attorney  
Center for Biological Diversity  
P.O. Box 2155  
St. Petersburg, Florida 33731  
(727) 755-6950  
[ebennett@biologicaldiversity.org](mailto:ebennett@biologicaldiversity.org)

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<sup>110</sup> 42 U.S.C. § 4332(2) (requiring an environmental impact statement for all “major federal actions significantly affecting the quality of the human environment”); *see Metcalf v. Daley*, 214 F.3d 1135, 1137 (9th Cir. 2000) (holding federal agencies prepared an environmental assessment too late in the decision-making process when they engaged in the NEPA process only after signing a contract with a Native American Tribe). Indeed, by failing

<sup>111</sup> 40 C.F.R. § 1508.27 (defining “significantly” for the purpose of determining whether a federal action significantly affects the quality of the human environment such that it necessitates an environmental impact statement).



Cc:

John Barrett  
Program Manager  
Federal Lands to Parks  
National Park Service  
100 Alabama St., SW  
Atlanta, GA 30303  
[john\\_barrett@nps.gov](mailto:john_barrett@nps.gov)

Roxanna Hinzman  
Fish and Wildlife Administrator  
South Florida Ecological Services  
U.S. Fish and Wildlife Service  
1339 20th Street  
Vero Beach, Florida 32960-3559  
[roxanna\\_hinzman@fws.gov](mailto:roxanna_hinzman@fws.gov)