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Environmental Update

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FWC Draft Recommendations for Imperiled Species

Contact: Amelia Savage

The Florida Fish and Wildlife Conservation Commission (FWC) staff is in the process of implementing the new imperiled species rules adopted by the Commission on September 1, 2010. After adoption of the rules, FWC immediately began the biological status review process for all the species on Florida’s threatened, endangered, and species of special concern lists. The

draft reviews were done last fall and are currently out for peer review. FWC staff's current timeline is to present its recommendations for each species to the FWC Commission at its June 2011 meeting.

FWC's draft recommendations propose delisting 19 out of 61 species. These recommendations are subject to change, and final recommendations will be available in early April. Management plans will need to be completed before any species are delisted; any delisting is estimated to be a year and a half away. The species currently proposed to be delisted include: Lake Eustis pupfish, rivulus, Florida tree snail, gopher frog, pine barrens tree frog, alligator snapping turtle, Florida pine snake, Florida ribbon snake (Lower Keys population), red rat snake (Lower Keys population), striped mud turtle (Lower Keys population), Suwannee cooter, brown pelican, limpkin, snowy egret, white ibis, Eastern chipmunk, Florida black bear, Florida mouse, and Homosassa shrew.

FWC is currently seeking information for many of the species that are currently on the Florida lists. FWC is requesting input on "the conservation needs of these species, and economic and social factors that should be considered in managing these species in Florida." The notice requesting such input and listing these 60 species is available at https://www.flrules.org/Gateway/View_notice.asp?id=9606509. The notice provides details on where to send such information. The comment period closes on March 13, 2011.

4th Circuit Discusses "Significant Nexus" Test

Contact: Amelia Savage

On January 25, 2011, the United States Court of Appeals, Fourth Circuit, remanded a case to the Corps for it to further evaluate if the wetlands in question had a significant nexus with navigable waters, as the information the Corps initially provided was insignificant. *Precon Dev. Corp. Inc. v. U.S. Army Corps of Engineers*, 2011 WL 213052. The wetlands proposed to be impacted included 4.8 acres adjacent to a 2,500-foot, seasonal ditch and were located approximately seven miles from a navigable water. Both parties agreed Justice Kennedy's significant nexus test from *Rapanos v. United States*, 547 U.S. 715 (2006), was the applicable test to apply.

The 4th Circuit held the Corps' administrative record did not have sufficient information to document why the wetlands significantly affected the integrity of navigable waters. The Court agreed with the 6th Circuit's determination that "the significant nexus test does not require laboratory tests or any particular quantitative measurements . . . however . . . [Kennedy] clearly intended for some evidence of both a nexus and its significance to be presented." This standard was not met here. For example, the Corps did not provide any measurements of actual flow in the wetlands or ditch, and instead included water storage capacity and potential flow without an indication of how often the capacity is reached or how much flow is typical. For these reasons, the Court found the Corps' findings to be inadequate and remanded the matter back to the Corps for further consideration.

EPA Approves Florida's Plan for Large Municipal Waste Combustors

Contact: Paula Cobb

In a direct final rule, the U.S. Environmental Protection Agency (EPA) approved Florida's Clean Air Act section 111(d)/129 State Plan (Plan) for implementing and enforcing Emissions Guidelines (EGs) for existing Large Municipal Waste Combustors, codified in 40 CFR part 60, subpart Cb, with the capacity to combust more than 250 tons per day of municipal solid waste. *75 Fed. Reg.* 82269 (Dec. 30, 2010). This action, which reflects existing federal requirements that Florida adopted by reference in 2007, will likely affect around ten facilities in Florida. *See 75 Fed. Reg.* 82270 for a list of the facilities.

EPA Establishes Greenhouse Gas Permitting FIP for Florida

Contact: Paula Cobb

EPA established a federal implementation plan (FIP) for seven states, including Florida, that failed to submit a revised state implementation plan (SIP) to apply each state's CAA Prevention of Significant Deterioration (PSD) permitting program to stationary sources emitting threshold levels of greenhouse gas (GHG) emissions. *75 Fed. Reg.* 82246 (Dec. 30, 2010). As a result, on January 2, 2011, in Florida, EPA—rather than the Florida Department of Environmental Protection (DEP)—became the permitting authority for *GHG portions* of PSD permits. DEP continues to be responsible for all other portions of PSD permits. For the most part, the FIP mirrors the federal PSD regulations codified in 40 CFR 52.21.

EPA has indicated that the agency is working to quickly develop recommended approaches for EPA regions and states to address their shared permitting responsibilities. EPA has also indicated that it intends for the FIP to only remain in place as long as necessary—until a state's SIP revision is approved. Four of the seven states (Arizona, Idaho, Kansas, and Oregon) have expressed to EPA their intention to seek a permitting delegation from EPA so that the states will be responsible for issuing both the GHG and non-GHG part of the PSD permit.

EPA Narrows its Approval of Some State PSD and Title V Programs to Preclude Application to Smaller Stationary Sources of GHGs

Contact: Paula Cobb

EPA narrowed its previous approvals of many state PSD and title V operating permit programs that apply to GHG-emitting sources so that only those sources that equal or exceed the GHG thresholds in EPA's Tailoring Rule would be subject to PSD or title V requirements for their GHG emissions. *75 Fed. Reg.* 82254 (title v) and *75 Fed. Reg.* 82536 (PSD) (Dec. 30, 2010). EPA did not narrow its approval for Florida's PSD and title v programs, because the State's programs do not apply at all to GHG emissions and therefore will not apply to GHG sources with emissions below the Tailoring Rule thresholds.

EPA Plans to Establish GHG NSPS for Fossil Fuel Power Plants and Petroleum Refineries

Contact: Paula L. Cobb

In recently executed consent decrees with several states and environmental groups, EPA committed to proposing GHG performance standards for power plants and refineries this year. EPA plans to propose power plant regulations by July 26, 2011, finalizing them by May 26, 2012, and petroleum refinery regulations by Dec. 15, 2011, finalizing them by Nov. 15, 2012. EPA indicated that existing facilities likely will not be required to implement GHG reductions under the standards before the 2015-2016 time frame.

EPA Defers GHG Permitting Requirements for Industries Using Biomass

Contact: Paula L. Cobb

EPA announced plans to defer, for three years, permitting requirements for carbon dioxide emissions from biomass-fired and other biogenic sources. EPA plans to complete a rulemaking by July 2011 to implement the deferral. During the three year period, EPA will seek comment on scientific issues and will also reconsider many of the comments the agency received from its July 2010 Call for Information. In the meantime, EPA plans to issue guidance to provide a basis that states and local permitting authorities may use to conclude that the use of biomass as a fuel is the best available control technology for GHG emissions.

EPA Amends the NESHAP and NSPS for Portland Cement Plants

Contact: Brian Accardo

EPA is taking direct final action to amend the recently adopted NESHAP for the Portland Cement Manufacturing Industry and the recently adopted NSPS for Portland Cement Plants. 76 *Fed. Reg.* 2832, 2860 (Jan. 18, 2011). These amendments are to the final rules published on September 9, 2010, and clarify that all new standards for existing sources have a compliance date of three years from promulgation. In addition, EPA is restoring the kiln, clinker cooler, and raw material dryer emissions limits as they existed prior to the September rule amendments because these provisions were inadvertently deleted.

EPA views the amendments as noncontroversial; if EPA does not receive significant adverse written comment by February 17, 2011, the direct final rule will become effective on March 21, 2011.