

AGENDA

PLANNING COMMISSION
MONROE COUNTY
April 25, 2012
10:00 A.M.

MARATHON GOV'T CENTER
2798 OVERSEAS HIGHWAY
MARATHON, FL 33050

CALL TO ORDER

PLEDGE OF ALLEGIANCE

ROLL CALL

COMMISSION:

Denise Werling, Chairman
Randy Wall, Vice Chairman
Jeb Hale
Elizabeth Lustberg
William Wiatt

STAFF:

Townsley Schwab, Senior Director of Planning and Environmental Resources
Susan Grimsley, Ass't County Attorney
John Wolfe, Planning Commission Counsel
Mayte Santamaria, Assistant Director of Planning and Environmental Resources
Joe Haberman, Planning & Development Review Manager
Mitch Harvey, Comp Plan Manager
Steven Biel, Sr. Planner
Rey Ortiz, Planner
Kathy Grasser, Planner
Barbara Bauman, Planner
Timothy Finn, Planner
Gail Creech, Planning Commission Coordinator

COUNTY RESOLUTION 131-92 APPELLANT TO PROVIDE RECORD FOR APPEAL

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SUBMISSION OF PROPERTY POSTING AFFIDAVITS AND PHOTOGRAPHS

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SWEARING OF COUNTY STAFF

CHANGES TO THE AGENDA

-

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APPROVAL OF MINUTES
MEETING

Continued Item:

1. AN ORDINANCE BY THE MONROE COUNTY BOARD OF COUNTY COMMISSIONERS AMENDING MONROE COUNTY CODE CHAPTER 122 FLOODPLAIN REGULATIONS, CREATING SECTION 122-10; PROVIDING INCLUSION OF UNITED STATES FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) AND UNITED STATES FISH AND WILDLIFE SERVICE (FWS) REQUIREMENTS IN FINAL PERMIT DETERMINATIONS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF CONFLICTING PROVISIONS; PROVIDING FOR TRANSMITTAL TO THE STATE LAND PLANNING AGENCY AND THE SECRETARY OF STATE; PROVIDING FOR CODIFICATION; PROVIDING FOR AN EFFECTIVE DATE.

(File 2012-024)

[2012-024 SR PC 04.25.12 WITH addressing HB 503.PDF](#)

[2012-024 SR PC 04.25.12 WITHOUT addressing HB 503.PDF](#)

[2012-024 Draft Ordinance WITH addressing state bill.PDF](#)

[2012-024 Draft Ordinance WITHOUT addressing state bill.PDF](#)

[2012-024 Memo to BOCC.PDF](#)

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New Item:

2. James Prell, 21857 Disturbed Pine, Cudjoe Key, Mile Marker 21: An appeal to the Planning Commission concerning an administrative decision of the Senior Director of Planning & Environmental Resources dated September 22, 2011 denying a request for an exemption from the Rate of Growth Ordinance (ROGO) permit allocation system. The subject property is legally described as a parcel of land in Section 20, Township 66 South, Range 28 East, on Cudjoe Key, Real Estate No. 00115510.002200.

(File 2011-123)

[2011-123 SR PC 04.25.12.PDF](#)

[2011-123 FILE.PDF](#)

[2011-123 Affidavit-Sinclair.PDF](#)

[2011-123 Affidavit-Wachob.PDF](#)

Pursuant to Section 286.0105 Florida Statutes and Monroe County Resolution 131-1992, if a person decides to appeal any decision of the Planning Commission, he or she shall provide a transcript of the hearing before the Planning Commission, prepared by a certified court reporter at the appellant's expense. For such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

ADA ASSISTANCE: If you are a person with a disability who needs special accommodations in order to participate in this proceeding, please contact the County Administrator's Office, by phoning (305) 292-4441, between the hours of 8:30 a.m. - 5:00 p.m., no later than five (5) calendar days prior to the scheduled meeting; if you are hearing or voice impaired, call "711".

BOARD DISCUSSION

-
GROWTH MANAGEMENT COMMENTS

- Update from Mayte Santamaria on Keith & Schnars progress

-
RESOLUTIONS FOR SIGNATURE

ADJOURNMENT



MEMORANDUM

MONROE COUNTY PLANNING & ENVIRONMENTAL RESOURCES DEPARTMENT
We strive to be caring, professional and fair

To: Monroe County Planning Commission
From: Townsley Schwab, Senior Director of Planning & Environmental Resources
Michael Roberts, CEP; PWS; Sr. Administrator/Environmental Resources
Date: April 13, 2012

Subject: AN ORDINANCE BY THE MONROE COUNTY BOARD OF COUNTY COMMISSIONERS AMENDING CHAPTER 122 FLOODPLAIN REGULATIONS, CREATING SECTION 122-10 PROVIDING FOR INCLUSION OF UNITED STATES FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) AND UNITED STATES FISH AND WILDLIFE SERVICE (FWS) REQUIREMENTS IN PERMIT REFERRAL PROCESS IMPLEMENTATION AND DETERMINATIONS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF CONFLICTING PROVISIONS; PROVIDING FOR TRANSMITTAL TO THE STATE LAND PLANNING AGENCY AND THE SECRETARY OF STATE; PROVIDING FOR CODIFICATION; PROVIDING FOR AN EFFECTIVE DATE.

Meeting: April 25, 2012

1
2 **I REQUEST**
3

4 The Planning & Environmental Resources Department is proposing amendments to the text
5 of the Monroe County Floodplain Ordinance by adding §122-10 of the Monroe County Code
6 (MCC) in order to revise the regulations pertaining to the review of applications for
7 floodplain development permits to address the April 2010 U.S. Fish & Wildlife Services
8 Biological Opinion and the Reasonable & Prudent Alternatives (RPA's) related to the
9 Federal Emergency Management Agency's (FEMA) administration of the National Flood
10 Insurance Program in Monroe County.
11

12 **II RELEVANT PRIOR COUNTY ACTIONS AND BACKGROUND INFORMATION:**
13

14 In 1997 the Service completed a Biological Opinion (BO) for the effects of the NFIP on
15 Federally protected species in the Florida Keys. The 1997 BO found the NFIP jeopardized
16 nine species in the Keys and then in 2003 the Service re-initiated consultation and amended
17 the 1997 BO and concluded that the effect of the NFIP would result in jeopardy on eight of
18 10 species evaluated in the BO. Then, a second amended complaint in 2003 was filed by the
19 plaintiffs against FEMA and the Service pursuant to the Endangered Species Act and the

1 Administrative Procedures Act. The plaintiffs won a Summary Judgment and on March 29,
2 2005 the United States District Court, Southern District of Florida (Court) issued an Order
3 ruling the Service and FEMA violated the Endangered Species Act and the Administrative
4 Procedures Act.

5
6 On September 9, 2005, the Court granted the plaintiffs' motion for an injunction against
7 FEMA issuing flood insurance on any new residential or commercial developments in
8 suitable habitats of federally listed species in the Keys. The Court also ordered the Service to
9 submit a new BO by August 9, 2006. The Service issued a new BO on August 8, 2006. On
10 April 1, 2008, FEMA and the Service filed an appeal with the United States Court of Appeals
11 for the Eleventh Circuit arguing that section 7(a)(2) of the Act did not apply to FEMA's
12 provision of flood insurance and that FEMA had fully complied with the Court's March 29,
13 2005, ruling. On February 26, 2009, the Court ordered the Service to submit a new BO by
14 March 31, 2010 and on March 28, 2010, the Court granted a 30 day extension of this
15 deadline. On April 1, 2009, the United States Court of Appeals for the Eleventh Circuit
16 affirmed the judgment of the District Court. On April 30, 2010, the Service published the
17 revised BO for FEMA's administration of the NFIP in Monroe County.

18
19 The BO contains Reasonable and Prudent Alternatives (RPA's) that require Monroe County
20 and other participating communities in the Florida Keys to revise their Flood Damage
21 Prevention Ordinance(s) to reference and use an updated real estate list (referenced in RPA
22 paragraph 1) within 120 days of acceptance of this BO by the Court. Then, on December 3,
23 2010 the Court filed a Settlement Agreement between the Plaintiffs and the Federal
24 Defendants in which the Federal Defendants agreed to notify the Court and the parties when
25 Monroe County and the other "participating communities" in the Florida Keys have: 1)
26 revised their Flood Damage Prevention Ordinance(s); and 2) implemented procedures to
27 reference and use the updated real estate list and Species Focus Area Maps (referenced in
28 reasonable and prudent alternative ("RPA") paragraph 1) in compliance with paragraphs 2, 3,
29 4, and 5 of the RPA.

30
31 On November 12, 2010 the Board of County Commissioners held a public workshop to
32 discuss the RPA's and directed the County Attorney to intervene in Court and directed the
33 County Administrator to task the lobbyists with this issue.

34
35 On February 16, 2011 the BOCC directed the County Attorney to file an appeal in the
36 matter of Florida Key Deer, National Wildlife Federation, et. Al. v. FEMA and USFWS.

37
38 On March 16, 2011, the BOCC authorized the County Attorney to file a motion for a Stay
39 and to obtain the services of Hogan Lovells to assist the County in the appeal process.

40
41 On December 2, 2011, FEMA notified Monroe County that if the County decides not to
42 implement the RPA's then Monroe County will be placed on probation.

43
44 In March, 2012 the Florida Legislature adopted Chapter 2012-XX Laws of Florida, effective
45 July 1, 2012, which states:
46

1 *“For any development permit application filed with the county after July 1, 2012, a*
2 *county may not require as a condition of processing or issuing a development permit that*
3 *an applicant obtain a permit or approval from any state or federal agency unless the*
4 *agency has issued a final agency action that denies the federal or state permit before the*
5 *county action on the local development permit. Issuance of a development permit by a*
6 *county does not in any way create any rights on the part of the applicant to obtain a*
7 *permit from a state or federal agency and does not create any liability on the part of the*
8 *county for issuance of the permit if the applicant fails to obtain requisite approvals or*
9 *fulfill the obligations imposed by a state or federal agency or undertakes actions that*
10 *result in a violation of state or federal law. A county may attach such a disclaimer to the*
11 *issuance of a development permit and may include a permit condition that all other*
12 *applicable state or federal permits be obtained before commencement of the*
13 *development. This section does not prohibit a county from providing information to an*
14 *applicant regarding what other state or federal permits may apply.”*
15

16 The County Attorney, outside counsel, and the Growth Management Director have proposed
17 an ordinance with alternative language to meet the RPAS, which is consistent with Federal
18 law, addresses Chapter 2012-XX, Laws of Florida, and adequately protects the County
19 taxpayers against accepting that additional liability;
20

21 III REVIEW

22
23 The Growth Management Division, the County Attorney and the County’s outside Counsel
24 have been working closely with FEMA and the USFWS following the BOCC meeting of
25 March 16, 2011 to reach agreement on the implementation of the RPA’s and the language for
26 the required Ordinances.
27

28 FEMA provided a draft of items for adoption to Monroe County on June 15, 2011 and
29 provided further recommendations via e-mail on October 3, 2011 (Appendix I). These
30 Ordinance recommendations were developed by FEMA to meet the requirements of the
31 RPA’s and would require the County to make permit determinations based on the Species
32 Assessment Guides (SAGs), and in the event the impact limits of Table 18 were exceeded,
33 ultimately deny a building permit. The FWS provided draft SAG’s that would require
34 Monroe County to review each floodplain development permit application to determine if the
35 parcel was on the list of RE #s that are within the species focus areas or buffers, and to
36 confirm this by reviewing the Species Focus Area Maps provided by FEMA. If the parcel is
37 on the list, then Monroe County staff evaluates the application in accordance with the SAGs
38 and make the permit determination. In the event that the proposed development results in a
39 “may affect” determination, then the applicant is required to consult directly with the
40 USFWS, otherwise, Monroe County is authorized by the RPA’s to issue the building permit.
41

42 On February 16, 2012 the USFWS provided draft revisions to the Species Assessment Guide
43 (SAG) for the Lower Keys marsh rabbit that would allow the County to pre-determine that
44 the development of certain parcels within canal subdivisions and substantially developed
45 subdivisions would “Not Likely Adversely Affect” (NLAA) the lower Keys marsh rabbit
46 (Appendix II). In addition, the USFWS stated that a similar revision would be made to the

1 SAG's for the Key Largo cotton mouse, the Key Largo wood rat and the silver rice rat.
2 These provisions substantially reduce the County's potential exposure for liability for inverse
3 condemnation or takings claims.
4

5 Due to the Florida Legislature adopted Chapter 2012-XX Laws of Florida, Monroe County
6 will be precluded from requiring building permit applicants to consult with the USFWS prior
7 to issuance of a building permit. Instead, if an applicant for a Monroe County building
8 permit meets all applicable County codes but proposes development activities that result in a
9 "May Affect" determination under Permit Review Process, the County will issue the building
10 permit with a condition that the applicant consult with the USFWS prior construction.
11 Further, the County will not issue a Notice to Proceed for the project until such time as the
12 applicant receives approval from the USFWS.
13

14 Therefore, staff recommends the following addition to Section 122 Floodplain Management:

15
16 Section 1. The Monroe County Land Development Code shall be amended as follows:

17
18 Sec. 122-2. General provisions.

19 (b) Basis for Establishing Special Flood Hazard maps; Species Focus Area Maps
20 (SFAMs) and Real Estate (RE) List; and Species Assessment Guides (SAGs).

21 1. Special Flood Hazard Maps. The areas of special flood hazard identified by the Federal
22 Emergency Management Agency (FEMA) in its October 17, 1989 Flood Insurance Study and
23 Wave Height Analysis for Monroe County, Florida, Unincorporated Areas, as amended February
24 18, 2005, with accompanying supporting data, are adopted by reference and declared to be a part
25 of this chapter, and shall be kept on file, available to the public, in the offices of the county
26 Building Department. Letters of Map Amendment, Letters of Map Revision, Letters of Map
27 Revision Based on Fill, and Conditional Letters of Map Revision approved by FEMA are
28 acceptable for implementation of this regulation.

29 2. Species Focus Area Maps (SFAMs) and Real Estate (RE) List. FEMA and FWS have
30 provided the Species Focus Area Maps (SFAMs) mailed to Monroe County and dated April 30,
31 2011, and a listing of real estate numbers of parcels (RE list) emailed to Monroe County and
32 dated November 18, 2011, that are within the SFAMs and that have been identified by FWS.
33 The SFAMs and the RE List that are within the SFAMs identified by the FWS in accordance
34 with the Biological Opinion, dated April 30, 2010, as amended December 14, 2010, are hereby
35 declared to be a part of this ordinance. The SFAMs and RE list are on file at the Monroe County
36 Clerk's office and the Monroe County Growth Management Division Office.

37 3. Species Assessment Guides (SAGs). FEMA and FWS have provided the Species
38 Assessment Guides (SAGs) mailed to Monroe County and dated XX, 2012 are declared to be a
39 part of this ordinance. The SAGs are on file at the Monroe County Clerk's office and the
40 Monroe County Growth Management Division Office.

41 **Section 2.** The Monroe County Land Development Code is amended by adding Section
42 122-10 as follows:
43

1 Sec. 122-10. Inclusion of United States Federal Emergency Management Agency
2 (FEMA) and United States Fish and Wildlife Service (FWS) Permit Referral Process (PRP)
3 Requirements in Final Permit Determinations
4

5 (a) Purpose and intent. It is the purpose of Section 122-10 to implement regulations
6 that will assure, consistent with the 10th Amendment to the U.S. Constitution, state and County
7 regulations, proper record retention, coordination, and notification of FEMA and FWS regarding
8 permit applications filed with or issued by Monroe County, inclusive of FEMA/FWS
9 requirements agreed to by the applicant.
10

11 (b) Lands to which this Section apply. See Section 122-2 (2) and (3)
12

13 (c) Rules for interpreting SFAMs. The boundaries of the flood hazard areas shown on
14 the FEMA SFAMs may be determined by scaling distances. Required interpretations of those
15 maps for precise locations of such boundaries shall be made by the County Planning Director or
16 his/her designee, in consultation with the building official.
17

18 (d) Administration of Development Approval in Species Focus Areas.
19

20 a. SFA Review Required. For parcels or lots shown within the SFAMs in which an
21 application for development permit has been made, if the SFAM indicates the parcel or lot
22 contains only unsuitable habitat for any of the following species: Key Largo Cotton Mouse, Key
23 Largo woodrat, Key tree-cactus, Lower Keys marsh rabbit, Eastern indigo snake, Key deer,
24 Schaus swallowtail butterfly, silver rice rat, and Stock Island tree snail, and the parcel or lot is
25 not listed on the RE list, the Planning Director or his/her designee shall provide for a notation in
26 the development application permit files that indicates:

- 27 i. The name of the official that made the determination;
- 28
- 29 ii. The date of the determination;
- 30
- 31 iii. The date of the SFAM and RE list used to make the determination.
32

33 Once the determination has been made that a parcel or lot contains unsuitable habitat,
34 action may be taken on the permit application by Monroe County staff.
35

36 b. FWS Permit Conditions. For parcels or lots shown within the SFAMs in which
37 an application for development permit that 1) expands the footprint of a structure; or 2) expands
38 associated clearing of; or 3) includes placement of fencing into native habitat, has been made, if
39 the SFAM indicates the parcel or lot contains suitable habitat for any of the following species:
40 Key Largo Cotton Mouse, Key Largo wood rat, Key tree-cactus, Lower Keys marsh rabbit,
41 Eastern indigo snake, Key deer, Schaus swallowtail butterfly, silver rice rat, and/or Stock Island
42 tree snail, and the parcel or lot is listed on the RE list, the Planning Director or his/her designee
43 shall use the SAGs to determine whether a floodplain development permit application requires:
44

- 45 i. incorporation of FWS SAG conditions into the Monroe County permit and the
46 County may issue the permit, pursuant to all applicable codes; or

1
2 ii. if, according to the SAGs, the proposed development needs technical assistance
3 by the Service, the County shall issue the permit with a condition that:
4

- 5 1. the applicant seek and obtain technical assistance from the Service; and
6 2. the permit shall expire after 180 days; and
7 3. the applicant obtain all applicable state or federal permits or approvals prior to
8 commencement of development. If the permit expires after 180 days, prior to
9 the applicant receiving applicable state or federal permits or approvals, the
10 applicant shall be required to reapply.
11

12 iii. For a floodplain development permit application that requires the Services'
13 technical assistance, Monroe County shall provide the application to the Service weekly.
14 Based on the Services technical assistance, the applicant shall submit the state or federal
15 technical assistance or state or federal permit or other approval to the County. If the
16 applicant agrees to the Services conditions, in writing, Monroe County may then issue a
17 NOTICE TO PROCEED with conditions provided by the state or federal agency to avoid
18 possible impacts on federally-protected endangered species. The County shall maintain
19 an applicant acceptance form, of the Service recommendations, in the permit file.
20

21 iv. If the parcel is within an area previously covered by a Habitat Conservation
22 Plan, and where that Habitat Conservation Plan has expired at the time of development
23 permit application, the County shall apply this Permit Referral Process.
24

25 v. If the property owner does not agree to the FWS conditions, the County
26 shall not issue the notice to proceed.
27

28 c. Provision for Flood Hazard Reduction and Avoiding impacts on federally listed species
29 Enforcement. All proposed development shall meet the conditions established on the floodplain
30 development permit based on the Service recommendations to avoid possible impacts on
31 federally-protected endangered species. Violation of this Chapter, including any development
32 constructed not in accordance with the FWS conditions derived through use of the SAGs or
33 through technical assistance by FWS, are hereby deemed to be violations of the County Code
34 and may be enforced as follows:
35

36 i. The County may utilize the administrative enforcement procedures set
37 forth in Chapter 8, Monroe County Code of Ordinances;
38

39 ii. The County's Growth Management Director may make a formal
40 complaint to the U.S. FWS Office of Law Enforcement;
41

42 iii. The County may file an action in a court of competent jurisdiction seeking
43 damages as well as injunctive and/or equitable relief;
44

1 iv. The County Floodplain Administrator may notify FEMA that the property
2 is in violation of this ordinance and should be considered for treatment under § 1316 of
3 the National Flood Insurance Act; and/or
4

5 v. Knowing violations of this section may be prosecuted in the same manner
6 as misdemeanors are prosecuted in the name of the State in a court having jurisdiction of
7 misdemeanors by the prosecuting attorney thereof and upon conviction shall be punished
8 by a fine not to exceed \$500 and/or imprisonment in the county jail not to exceed 60
9 days. Each day a violation exists shall constitute a separate offense.
10

11 d. Permit issuance for previously tolled Rate of Growth Ordinance (ROGO) allocations or
12 building permits. Building permits and allocations have been tolled under authority of Monroe
13 County Resolutions 420-2005, 166-2006, 185-2007 & 219-2008 and 282-2011 as a result of the
14 injunction against FEMA for the issuance of flood insurance policies under the National Flood
15 Insurance Program in the case of *Florida Key Deer et. al.,v. Fugate et. al.*, 90-10037-CIV-
16 Moore. For those allocations or building permits that were tolled:
17

- 18 i. Owners who do not need coordination with FWS after they are processed through the
19 FEMA and FWS Permit Referral Process have 180 days from the date of the judge’s
20 order to lift the injunction, and from the date of a County issued written notice, to
21 pick up their building permits, whichever is greater.
- 22 ii. Owners who do not need coordination with FWS after they are processed through the
23 FEMA and FWS Permit Referral Process and who need to re-design their on-site
24 wastewater treatment system and receive a permit from Department of Health (DOH)
25 have 300 days from the date of the judge’s order to lift the injunction, and from the
26 date of a County issued written notice, to pick up their building permit, whichever is
27 greater.
- 28 iii. Flood Plain Development Permit applications processed through the FEMA and FWS
29 Permit Referral Process that result in a “may affect determination” for the proposed
30 development through the application of the Species Assessment Guides which require
31 the permittee to consult with FWS shall have 360 days to conclude the required
32 coordination with FWS and pick up the building permit from Monroe County . This
33 timeframe may be extended by the Planning Director if the applicant can
34 affirmatively demonstrate that he has timely and actively sought coordination.
35

36 **Section 3.** Severability.

37 If any section, paragraph, subdivision, clause, sentence or provision of this Ordinance shall
38 be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not
39 affect, impair, invalidate, or nullify the remainder of this Ordinance, but the effect thereof
40 shall be confined to the section, paragraph, subdivision, clause, sentence or provision
41 immediately involved in the controversy in which such judgment or decree shall be rendered.
42
43

1 **Section 4.** Conflicting Provisions.

2 In the case of direct conflict between any provision of this ordinance and a portion or
3 provision of any appropriate federal, state or county law, rule, code or regulation, the more
4 restrictive shall apply.

5 **Section 5.** Filing, Transmittal, and Effective Date.

6 This ordinance shall be filed in the Office of the Secretary of State of the State of Florida,
7 and transmitted to the State Land Planning Agency, but shall not become effective until a
8 notice is issued by the State Land Planning Agency or Administrative Commission approving
9 the ordinance pursuant to Chapter 380, Florida Statutes, and after any appeal period has
10 expired.

11 **Section 6.** Codification

12 The provisions of this ordinance shall be included and incorporated into the Code of
13 Ordinances of the County of Monroe, Florida, as an addition or amendment thereto and shall
14 be appropriately numbered to conform to the uniform numbering system of the Code.

15
16 IV **RECOMMENDATION**

17
18 Staff has found that the proposed text amendment would be consistent with the provisions of
19 §102-158(d)(5)(b): 1. Changed projections (e.g., regarding public service needs) from those
20 on which the text or boundary was based; 2. Changed assumptions (e.g., regarding
21 demographic trends); 3. Data errors, including errors in mapping, vegetative types and
22 natural features described in volume I of the plan; 4. New issues; 5. Recognition of a need for
23 additional detail or comprehensiveness; or 6. Data updates.

24
25 Specifically, staff has found that the proposed text amendments are necessary due to new
26 issues associated with FEMA's administration of the NFIP.

27
28 Staff recommends that the Board of County Commissioners amend the Monroe County Code
29 as stated in the text of this staff report.

Appendix I

FEMA

Draft Items for Adoption

Draft - Items for Adoption

Each community must provide the citation and ordinance language used to implement 44 CFR 60.3(a)(2). This is not in the RPA's, but FEMA will confirm again that the provision related to communities reviewing proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal and State law. If this provision has not been adopted or needs to be revised to reflect this provision, the NFIP communities Monroe County, FL shall adopt this provision.

From RPA #2 - part 1

“The Species Focus Area Maps (SFAMs) and the real estate numbers of parcels (RE List) that are within the SFAMs identified by the U.S. Fish and Wildlife Service (Service) in accordance with the Biological Opinion, dated April 30, 2010, as amended, for {name of community}, and any subsequent revisions there to, are hereby declared to be a part of this ordinance. The SFAMs and RE list are on file at {indicate location}.”

NOTE: This ordinance language is written as if your community has automatic adoption. Please confirm with FEMA and the Service whether your community has automatic adoption or you need to adopt the SFAMS and RE list each time they are updated.

From RPA #3

“For a floodplain development permit application that is shown on the SFAMs as containing unsuitable habitat, {insert name of community} shall place a letter in the floodplain development permit file that indicates:

- a. The individual that made the determination;
- b. The date of the determination; and
- c. The date of the SFAM and real estate parcel list used to make the determination.

The {insert name of community} may take action on the floodplain development permit application without further concern for threatened and endangered species (or their critical habitat).”

From RPA #4 – paragraph 1

“The Species Assessment Guide provided by the Service, dated {insert date}, and any subsequent revisions there to, for {name of community}, are hereby declared to be a part of this ordinance. The Assessment Guide is on file at {indicate location}.”

NOTE: Please confirm with FEMA and the Service whether your community has automatic adoption or you need to adopt the Species Assessment Guide each time it is updated.

“The {insert name of community} shall use the Species Assessment Guide to determine whether a floodplain development permit application needs technical assistance by the Service. For a floodplain development permit application that requires the Service technical assistance, {insert name of community} shall provide the application to the Service weekly.”

From RPA#4(a) and (b)

“Based on the Service technical assistance, {insert name of community} shall condition the floodplain development permit to incorporate the Service recommendations to avoid possible impacts on species.”

RPA #4(a):

“The {insert name of community} shall maintain an Acceptance Form of the Service recommendations in the permit file. The Acceptance Form shall be signed by the permit applicant and the {insert name of community}.”

From RPA #4(c)

“The {insert name of community} shall use the Species Assessment Guide for properties within an expired Habitat Conservation Plan within the SAFMs and RE List to determine if the permit application must be provided to the Service for technical assistance in accordance with Section {insert appropriate community section of ordinance for RPA #4 ordinance provisions provided above} and shall meet the requirements of the applicable sections of this Ordinance.”

Draft – Procedures, Notices, and Brochures

Below is a list of items (written procedures, written notice, brochures, or other materials) that will be needed to support implementation of the Biological Opinion’s Reasonable and Prudent Alternative.

RPA #3: A draft ordinance provision has been developed for RPA #3 (See above). The Service and FEMA will work with the communities in developing the required form letter for the permit file for areas mapped as unsuitable habitat. A copy of the form letter must be made a part of the procedures.

RPA #4(c)

Each community shall provide a written notice to FEMA and the Service of any proposed changes to the Rate-of-Growth Ordinance. This notice can be provided to FEMA and the Service at the time that the proposed changes are presented to the staff of the participating community.

Monroe County shall provide a written notice to FEMA and the Services any proposed changes to the Tier Classifications at the time the proposed changes are presented to staff of the participating community.

RPA #5 – Paragraph 1:

Each community shall establish written procedures within 14 months from the date of the Biological Opinion for referring floodplain development permit applicants to the Service for technical assistance, for including any conditions as part of the floodplain development permit, and for enforcing the recommendations as outlined in RPA #4.

RPA #5 – Paragraph 2:

Each community shall confirm in writing to FEMA and the Service that it will exercise its enforcement authority to require the permittee to comply with the Service's recommendations to the development proposal by making the recommendations a condition of the floodplain development permit. The letter should identify the enforcement provisions in your Flood Damage Prevention Ordinance to ensure compliance with the ordinance provisions identified above. In addition, with respect to Section 1316 Denial of Flood Insurance, the communities shall confirm in writing that they will take this action in the event of non-compliance.

RPA #6: FEMA will coordinate with each community and the Service in developing brochures and other materials for addressing domestic and feral cats. Each community shall provide these materials to floodplain development permit applicants. The materials must be ready for permit use by March 11, 2012 or earlier.

RPA #11: FEMA will work with each community to develop a brochure addressing the floodplain development permit referral process. The Monroe County communities will post the information on the website and shall provide the brochure to permit applicants. This brochure must be ready for permit use by March 11, 2012 or earlier.

October 3, 2011 e-mail

Please see further information below, regarding your required Flood Damage Prevention Ordinance revisions. This language and the location of the language is based upon the Florida State Model Flood Damage Prevention Ordinance. Please remember that these revisions to your flood damage prevention ordinance must be made by January 12, 2012, in order to remain a participant in good standing in the NFIP. Please let me know if you have any questions or need any assistance. My phone numbers are 770-220-5366 (MWF), 770-509-9383 (TTh), or cell, 404-909-1673.

RPA 2, Part 1: Locate the Species Focus Areas Maps (SFAMs) and the real estate numbers of parcels (RE list) in Article 3 in a new Section B. 2. Suggest it read:

"The Species Focus Area Maps (SFAMs) and the real estate numbers of parcels (RE list) that are within the SFAMs identified by the U.S. Fish and Wildlife Service (Service) in accordance with the Biological Opinion, dated April 30, 2010, as amended, and any subsequent revisions thereto, are hereby declared to be a part of this ordinance. The SFAMs and RE list are on file at {community inserts name of the location where the SFAMs are maintained}."

Article 3 is titled "Basis for Establishing the Area of Special Flood Hazard". The title will need to be revised. Suggest it be changed to: "Basis for Establishing the Area of Special Flood Hazard and the Species Focus Area Maps and RE list".

RPA #3, This RPA should go into Article 4, Section B, for duties of the Floodplain Administrator. The suggested wording for a new subsection should be:

"For development permit applications that are shown on the SFAMs and the RE list as containing unsuitable habitat, place a letter in the floodplain development permit file that indicates:

- 1) The name of the official that made the determination;
- 2) The date of the determination; and
- 3) The date of the SFAM and real estate list used to make the determination.

Once the determination has been made, action may be taken on the permit application without further concern for threatened and endangered species or their critical habitat.”

RPA 4, Paragraph 1-A: Include Article 3, but make it Section B.3. since it is a different provision from the topic in B.2. above. Suggested language for B.3:

“The Species Assessment Guide provided by the Service, dated {insert date}, and any subsequent revisions there to, are hereby declared to be a part of this ordinance. The Assessment Guide is on file {insert location}.”

RPA #4, paragraph 1-B: The following should go into Article 4, Section B. for Duties of the Floodplain Administrator. Suggested wording for new subsection:

“Determine whether a permit application needs technical assistance by the Service using the Species Assessment Guide. Provide Development Permit applications to the Service weekly that require the Service’s technical assistance.”

RPA #4(a), (b), and (c): Locate these subsections is in Article 4, Section B. for Duties of the Floodplain Administrator. Suggested language:

“Based on the Service’s technical assistance, condition Development Permits to incorporate the Service recommendations to minimize and/ or avoid possible impacts on Federally Listed Species.”

“Sign and obtain the signature of the permit applicant on the Acceptance Form of the Service’s recommendations and maintain the Acceptance Form in the permit file.”

“Use the Species Assessment Guide for properties within an expired Habitat Conservation Plan within the SAFMs and RE list to determine if the Development Permit application must be provided to the Service for technical assistance in accordance with Article 4, Section B(insert number).

RPA#4(a) and (b): With respect to the permit conditions, include this provision in the ordinance as enforceable conditions in conjunction of the duties of the Administrator. Locate this provision in Article 5, Provisions for Flood Hazard Reduction, Section A. General Standards. Change title to: “Provisions for Flood Hazard Reduction and Avoiding Impacts on Federally Listed Species”. Create a new provision in Section A by making it number 12 to read as follows:

“All proposed development shall meet the conditions established on the floodplain development permit based on Service recommendations to avoid possible impacts on Federally Listed Species.”

Mary Rountree, CFM

Appendix II

U.S. Fish & Wildlife Service

February 16, 2012 Correspondence

Amending the Species Assessment Guides



United States Department of the Interior

FISH AND WILDLIFE SERVICE
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960



February 16, 2012

Christine Hurley
Director, Division of Growth Management
Monroe County Government
2798 Overseas Highway, Suite 400
Marathon, Florida 33050

Dear Ms. Hurley:

Thank you for meeting with us on February 1, 2012, to discuss implementation of the Reasonable and Prudent Alternatives referenced in the U.S. Fish and Wildlife Service's (Service) December 2010 Biological Opinion (BiOp) on the potential effects of the Federal Emergency Management Agency's (FEMA) implementation of the National Flood Insurance Program (NFIP) on federally listed species in Monroe County, Florida. We are also in receipt of your email dated February 14, 2012, which summarized the items discussed in the February 1, 2012, meeting and highlighted many of Monroe County's (County) concerns. The Service is committed to working with you to resolve these issues.

The BiOp and associated January 11, 2011, Settlement Agreement ended a 20-year lawsuit filed against FEMA and the Service by the National Wildlife Federation and others. In accordance with the terms of the Settlement Agreement and BiOp, building permit applications for new construction in Monroe County are to be reviewed by participating communities using Species Assessment Guides (SAGs) and Species Focus Area Maps (SFAMs) produced by the Service. These tools are designed to provide a determination for permit applications, streamline the permit review process and eliminate permit delays, while simultaneously minimizing or avoiding impacts to listed species. Using the guidelines in the SAGs, most permit applications will require no further review by the Service; the remaining ones will be forwarded to the Service for further review.

The SAGs provide a mechanism whereby the participating community can evaluate, using our determinations, whether incidental take will occur as a result of a proposed project given the actual site conditions and proposed conservation measures. We anticipate that listed species issues can be addressed through the determinations in the SAGs in the vast majority of applications. For projects that we have determined will have "No Effect" or are "Not Likely to Adversely Affect (NLAA)" in the SAGs, no incidental take will occur. All other projects that "may affect" listed species, as determined through SAGs, should be forwarded to the Service and FEMA for further review. FEMA and the Service will determine if additional conservation measures above and beyond the communities' existing conservation measures should be

recommended to minimize or avoid incidental take or if the incidental take is authorized in the BiOp. If the Service and FEMA determine that incidental take would occur, it will be subtracted from the authorized limit. In any case, habitat loss due to incidental take is limited to the size of actual habitat cleared on the property.

Confusion has been expressed about the incidental take anticipated and authorized in the BiOp and what would happen if the authorized take was exceeded. Incidental take authorized through the BiOp was generally expressed as loss of potential suitable habitat acres, with two exceptions discussed below. The acreage was calculated based on the number of building permits issued in Monroe County and average lot size in the Upper, Middle, and Lower Keys. In our analysis, we assumed that all construction allocated through the Rate of Growth Ordinance (ROGO) would occur in habitat suitable for listed species and that all of the habitat would be removed. Therefore, the amount of incidental take calculated represents a worst-case scenario. Also, upon further review, the Service determined that, in many cases, take is not likely to occur due to the specifics of either the parcel or the project. These cases are outlined in the SAGs. Only a small subset of the projects evaluated using the SAGs are expected to result in incidental take and, therefore, count towards the take limit.

Two exceptions to estimating potential take of listed species in terms of acreage exist: incidental take due to increased traffic for the Key deer and incidental take due to an increase in cat predation on the Key Largo woodrat, Key Largo cotton mouse, silver rice rat, and lower Keys marsh rabbit. The increase in cat predation is based on the projected ROGO allotments for new residences over the 13-year period and is expressed in number of new residences on parcels that can be developed. If the limit of authorized habitat loss or residences with cats is being approached in a community, the Service and FEMA are required to reinitiate consultation on the issuance of flood insurance and potentially issue a new biological opinion. Reinitiation of consultation would most likely occur due to either a substantial increase in ROGO permits in the community, expiration of the BiOp, or new information regarding the potential effects of the NFIP on listed species.

We also understand the participating communities' concerns that certain properties may have been misclassified in the SFAMs. The SFAMs represent the species' baselines in the BiOp. Therefore, until the RPAs are adopted and the injunction has been lifted, the baseline SFAMs must remain. While we used the best available data to conduct our analysis in the time frame available, we realized that misclassification would occur due to the habitat classification groups, lack of available ground truthing and mapping and scale anomalies. The Service constructed the SAGs to address these inconsistencies until more reliable information was available. For example, if a parcel was improperly mapped as habitat and, upon closer inspection is not, the SAGs will provide a determination of NLAA and the permit can be issued with no further Service coordination. As referenced in the BiOp, FEMA and the Service will update the maps as needed. We are committed to working with the communities to begin this review and update process as soon as the RPAs have been adopted and the injunction has been lifted.

In the interim, we have evaluated the concerns expressed during the February 1, 2012, meeting and in your email. Firstly, we have determined we are able to revise the SAGs. We are providing two draft revised SAGs with this letter as examples of our proposed revisions to address your concerns. These can be carried forward to other species SAGs, where applicable, once the language is finalized. The other concerns outlined in your email (in italics) were:

- a. *The land designated “undeveloped land” on the base maps FWS used to make these determinations is problematic and should be further evaluated for the inclusion in the Focus areas or buffer areas.*

The reason that the Service included the “undeveloped land” mapping unit in certain SFAMs is due to the inclusion of tracts of native habitat within the mapped unit. For those species where this map unit is problematic (Key Largo woodrat, Key Largo cotton mouse, eastern indigo snake, Schaus swallowtail butterfly, and Key deer), the SAGs typically provide a couplet under which parcels mapped as “undeveloped land” are predetermined to be NLAA provided appropriate materials are given to an applicant (e.g., an eastern indigo snake brochure). However, parcels within the buffer area are assessed not for their existing habitat, but for the potential for a new residence to result in increased predation effects from free-roaming cats (see response under c, below). Therefore, “undeveloped land” parcels cannot be excluded from the buffer based solely on their habitat designation.

- b. *Under the SAGs, acceptable mitigation for habitat removed from the focus area includes the type of mitigation Monroe County requires in the current land development code. The SAGs are unclear on whether those funds dedicated to the County for habitat mitigation can be used for restoration, as well as acquisition.*

Please see the revised text under “Habitat Compensation” in the attached SAGs.

- c. *Under the SAGs, for focus areas, canals that cut off connectivity are used to predetermine whether the habitat is subtracted from Table 18 (impact acres). However, the SAGs do not take into account canals cutting off buffer area from the habitat. If you can predetermine that certain RE#s are cut off from connectivity to habitat within focus areas and buffer areas via the SAGs, that could alleviate the RE#s that have to be evaluated administratively [see (d) below].*

In our BiOp, we outlined a linear buffer of 500 meters (1,641 feet) as the distance domestic cats will travel from their homes. This buffer was mapped for each of the four species affected by cats and any new residences within this buffer distance were considered to have an indirect adverse effect to the listed species from cat predation. However, the December 2011 SAGs did not address the ability of free-roaming cats to overcome barriers (e.g., canals) when navigating to potentially suitable habitat for the four species that have predation buffers.

We reviewed this question and are proposing a new couplet in the affected SAGs. Please see Couplet G in the attached Lower Keys marsh rabbit SAG. Proposed Couplet G provides a NLAA determination with the provision of a cat brochure to the applicant for those parcels that are separated from contiguous habitat in the species focus area by a waterbody or major highway. This has been an exclusion criteria accepted by both the Service and the Plaintiffs for removal of parcels from the Court's injunction list, as physical barriers to cats would prevent them from reaching suitable habitat to prey on listed species. We believe that a new residence on this type of parcel would not contribute to increased cat predation on listed species and, therefore, would not be subtracted from the allotment of parcels exempted in the BiOp.

- d. As outlined to FEMA on June 20, 2011: Tier III properties within the County are those the county has purposefully adopted to direct growth TOWARDS. To that end, FWS has designated...7,537 parcels (in the species focus areas or buffer areas) that cause an extreme administrative burden to the County, when, in the County Biologist opinion, most of them should not be included in the buffer areas.*

Noted: Upon closer review, GIS shows that many parcels contain both potential suitable habitat and buffer area due to mapping inclusions. We are proposing a revision on the attached Lower Keys Marsh Rabbit guide to ensure that a parcel (or a proposed residence on a parcel for species affected by cats) is not counted twice (see Couplet A).

- e. Relative to the issue identified in (c) and (d) above: Can FWS amend the SAGs to predetermine whether the focus area parcels and the buffer area parcels can be eliminated via the SAGs. Especially those that are cut off by canals from connectivity to the actual habitat in the focus areas?*

Yes, please see our response in "c" above. Based on the criteria in Couplet G, the potential exists for a list of excluded parcels to be developed. During future map review, opportunities may also exist to further assess parcels that contain isolated native habitat, parcels with only fringe habitat, and similar habitat issues. Additionally, we are proposing a revised couplet that addresses the level of development and presence of scarified lots surrounding a mapped native habitat unit (isolated parcels). Please see Couplet C in the attached eastern indigo snake SAG as an example. For the eastern indigo snake, we not only revised this couplet, but moved it up so that properties meeting this criteria are excluded early in the evaluation process.

- f. What is the small mammal protocol that FWS will require in conjunction with the SAFs? Your existing protocol takes 2 years of trapping.*

The SAGs that note the need for the small mammal survey are specific to the South Key Largo woodrat and cotton mouse focus area, the silver rice rat focus area, and the lower Keys marsh rabbit focus area. The intent of these surveys is to assess the likelihood of the presence of the species of concern. A 5-consecutive night small mammal trapping protocol is available that is applicable for this couplet for the Key Largo woodrat and cotton mouse. The marsh rabbit

survey is a meandering transit survey to visually observe the presence of rabbit fecal pellets. Both survey protocols will be available on the Service's web site.

- g. FWS has indicated they used ROGO allocations to develop the amount of habitat impact permitted. As discussed, ROGO allocations could change, especially by sub-area, based on hurricane evacuation modeling. This could be problematic for certain areas.*

The BiOp notes this possibility and RPA 4(c) provide specific guidance. In our assessment of potential adverse effects to listed species, we provided not-to-exceed acreages of habitat that may be developed and not result in jeopardy to affected species or exceed exempted take of suitable habitat. Changes in the ROGO allotments do not affect the not-to-exceed acreages, but could reduce the projected 13-year duration of BiOp if a sufficient number of permits are issued that result in take of listed species habitat. If it becomes apparent that the amount of take authorized in the BiOp is about to be met, reinitiation of formal consultation would be needed. A similar reinitiation sequence could occur with the permitting of new residences (indirect effects from cat predation) for development in both the focus areas and the companion buffer lands for those species affected by cat predation. The SAGs are designed to assess and track these parameters and continued coordination between the Service, FEMA, and affected communities to monitor these parameters is paramount. Further, as discussed earlier, through use of our determinations in the SAGs, many of the proposed projects will likely not count against the not-to-exceed acreages or residential thresholds for cats.

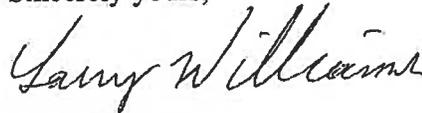
- h. Mike Roberts provided a table indicating the number of parcels within various tier designations (2nd attachment) that do not match what FWS has related to each species and the total number of permits that could be issued.*

In the referenced table, Mr. Roberts noted differences in the number of parcels that may be developed in various Tier designations and that these values do not match the Service's number of parcels and the total number of permits that could be issued. The BiOp provided the detailed breakdown of how the Service generated the number of parcels and the number of permits that could be issued. As referenced above, we are aware that parcel misclassification would occur and the SAGs are constructed to address these inconsistencies until we are able to review and revise our maps with new data. The differences noted in the number of permits that can be issued in a particular Tier designation is also subject to parcel misclassifications, although the maximum amount referenced in the BiOp of permits is based on the projected ROGO allotments over the 13-year review. As previously discussed, if the ROGO allotments are changed, RPA 4 (c) provides guidance on assessing the changes.

In summary, the Service believes the new review process outlined in the 2010 BiOp streamlines and simplifies the review process that was in place in the Keys for over 10 years, while strengthening conservation measures to minimize and avoid impacts to federally listed species. We have enclosed two draft revised SAGs. Please review and provide comments on them; all other applicable SAGs will be similarly revised once we have agreed upon final language. We

are available at any time to answer questions and clarify the review process and its implications. We look forward to working with the communities to resolve issues and conserve the unique environment of the Florida Keys.

Sincerely yours,



Larry Williams
Field Supervisor
South Florida Ecological Services Field Office

Enclosures

cc: electronic only

City of Islamorada, Islamorada, Florida (Kevin Bond)
City of Key Colony Beach, Key Colony Beach, Florida (Ron Sutton)
City of Key West, Key West, Florida (Donald Craig)
City of Layton, Layton, Florida (Norman S. Anderson)
City of Marathon, Marathon, Florida (George Garrett)
DOI, SOL, Atlanta, Georgia (Holly Deal)
DOJ, Washington, D.C. (Mark Brown)
FEMA, Washington, D.C. (Amy Weinhouse)

Eastern Indigo Snake Species Assessment Guide

~~December 2011~~

February 2012

The U.S. Fish and Wildlife Service's (Service) FEMA Biological Opinion (BO) dated April 30, 2010, and modified on December 14, 2010, identified 14,413 at-risk parcels, representing 14,960 acres, intersecting habitats that may occasionally be used by the eastern indigo snake (indigo snake; *Drymarchon corais couperi*) in Monroe County. There are at-risk 10,921 acres and 10,711 parcels in unincorporated Monroe County; 1,406 acres and 1,433 parcels in Islamorada; 20 acres and 112 parcels in Key Colony Beach; 703 acres and 433 parcels in Key West; 1 acre and 6 parcels in Layton; and 1,910 acres and 1,718 parcels in Marathon. The BO also identified an additional 8,580 acres of at-risk lands outside Monroe County's parcel layer not subject to the Rate of Growth Ordinance program.

The at-risk properties were determined by overlaying the County's property parcel layer onto the County's 2009 land cover boundary maps (Monroe County 2009). The County's land cover boundary maps included 13 land cover types. Developed land, undeveloped land, impervious surface, and exotic are considered non-native land cover types. Hammock, pineland, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, and beach berm are considered native land cover types. The water classification is also considered a native cover type. The minimum mapping unit for land cover polygons was 0.35 acre for hammock and 0.5 acre for all other cover types.

The County's boundary map land cover types containing suitable habitat for the indigo snake include undeveloped land, hammock, pineland, exotic, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, and beach berm.

Species Profile: The Florida Keys are on the extreme southern end of the indigo snake's range. The indigo snake population in the Florida Keys is very small (Cox and Kautz 2000). Verified observations are rare and scattered; the latest was in 2009 on Little Knockemdown Key (Service 2010). In the last several years, three unsubstantiated observations of the indigo snake were reported, two on Grassy Key (City of Marathon) and one in the Village of Islamorada (Sheahan 2006). Indigo snake surveys were conducted on Big Pine and No Name Key in 2006 and 2007 (Schmidt et.al. 2008) and, although 27 species of reptiles were noted (973 total observations), the indigo snake was not observed.

The Service issued a Section 10(a)(1)(B) Incidental Take Permit (ITP) to Monroe County, Florida Department of Transportation, and Florida Department of Community Affairs (applicants) in June 2006 for adverse effects from development on Big Pine and No Name Keys. The ITP authorizes take of 168 acres of suitable indigo snake habitat. The take will be incidental to land clearing for development and recreational improvements. The Service issued the ITP to the applicants based upon their development of a Habitat Conservation Plan (HCP) that sets guidelines for development activities on Big Pine and No Name Keys to occur progressively over the permit period (20 years). The HCP provides avoidance, minimization, and mitigation measures to offset impacts to covered

species, including the indigo snake. Mitigation includes the protection of three mitigation units for each development unit of suitable habitat within the plan area.

Threats: Although the species may occur in all referenced habitats, it is suspected that they prefer hammocks and pine forest, because most observations occur in these habitats disproportionately to their presence in the landscape (Steiner et al. 1983). In the Florida Keys, the primary threat to the indigo snake is native habitat loss and fragmentation due to development. Residential housing is also a threat because it increases the likelihood of indigo snakes being killed by property owners.

Assessment Guide: In order to provide assistance in assessing threats to the indigo snake from a given project, the Service has developed the following guidance and recommendations that, if implemented, will minimize adverse effects to the indigo snake. If the use of this guide results in a determination of “no effect” for a particular project, the Service supports this determination. If the use of this guide results in a determination of “not likely to adversely affect” (NLAA), the Service concurs with this determination and no additional correspondence is necessary. If the use of this guide results in a “may affect” determination, then additional coordination with the Service is necessary prior to permit issuance. This guide is subject to revision as necessary.

- A. Parcel is not in the species focus area and/or on the Real Estate (RE) parcel list*no effect*
 Parcel is in the species focus area or on the RE parcel list.....*go to B*
- B. Parcel is on Big Pine Key or No Name Key.....*may affect (refer to HCP)*
 Parcel is not on Big Pine Key or No Name Key.....*go to C*
- C. The property is within a developed subdivision or canal subdivision and adjacent lots and properties within 500 feet are greater than 60 percent developed or scarified. Provide indigo snake protection measures brochure..... NLAA
Not as Above.....go to D
- D. Parcel is mapped as containing the indigo snake’s native habitat (*i.e.*, hammock, pineland, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, or beach berm)*go to DE*
 Parcel is mapped as containing only non-native habitat (undeveloped land or exotic)*go to G*
- DE. The proposed action will not remove or modify the indigo snake’s native habitat.....*go to G*
 The proposed action will remove or modify the indigo snake’s native habitat. A vegetation survey is required to document the native plant species and size present on the property and a general description of the surrounding properties within 500 feet is also required. Once complete.....*go to FE*

~~E. The property is within a canal subdivision and adjacent lots and properties within 500 feet are greater than~~

Not as above *go to F*

F. The applicant has proposed either on-site or off-site habitat compensation* commensurate with the amount of native habitat lost[#], has received a copy of the Service's indigo snake protection measures (attached), and has agreed to implement the measures; and ~~to~~ post the information brochure on-site. ~~Applicant's~~The signed ~~verification of Assessment Form verifying~~ this is in the permit file maintained by the NFIP participant community. Permit with indigo snake protection measures and habitat compensation *NLAA*

The applicant will not agree to the indigo snake protection measures, is not proposing habitat compensation or the proposed habitat compensation does not meet minimum compensation requirements *may affect*

G. The applicant has received a copy of the Service's indigo snake protection measures; and has agreed to implement the measures; and ~~to~~ post the information brochure on-site. ~~Applicant's~~The signed ~~verification of Assessment Form verifying~~ this is in the permit file maintained by the NFIP participant community. Permit with indigo snake protection measures *NLAA*

Not as above *may affect*

***Habitat Compensation**

The minimum recommended habitat compensation is replacement of lost vegetation ~~either through land acquisition, protection or habitat restoration or preservation of habitat, and/or monetary contributions to accomplish the aforementioned activities for land acquisition,~~ according to the participating community's land development regulations. A vegetation survey is required to document species and size present prior to construction impact. The Service considers the compensation as like-for-like replacement of habitat and the loss is not a deduction from the not-to-exceed habitat acreage losses referenced in the BO.

If habitat compensation is being provided in excess of the minimum recommended, the Service may consider the additional compensation as a credit to the not to exceed habitat acreage losses referenced in the BO. To be considered for credit, the compensation must be like for like habitat compensation and credit will be granted at half value. For example, if 4 acres of additional compensation are provided, the credit granted would be 2 acres. This partial credit is considered appropriate as existing vegetation currently provides benefit and the credit vegetation may not provide the same habitat benefit until later in time.

Monitoring and Reporting Effects

For the Service to monitor cumulative effects and to track incidental take exempted for the indigo snake, it is important for FEMA and the NFIP participants to monitor the number of permits and

provide information to the Service regarding the number of permits issued. In order to meet the reporting requirements in the BO, we request that FEMA and/or the NFIP participants send to the Service an annual database summary consisting of: project date, permit number, project acreage, native impact acreage, amount of acres and/or number of trees/plants replaced as habitat compensation, and project location in latitude and longitude in decimal degrees.

Literature Cited

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- Duquesnel, J. 1998. Keys invasion by alien lizards continues. Florida Department of Environmental Protection, Florida Park Service, Resource Management Notes 10(1):9.
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- Sheahan, B. 2006. Personal communication. Senior planner. Village of Islamorada, Florida.
- Steiner, T.M., O.L. Bass, Jr., and J.A. Kushlan. 1983. Status of the eastern indigo snake in southern Florida National Parks and vicinity. South Florida Research Center Report SFRC-83i0 1, Everglades National Park; Homestead, Florida.
- U.S. Fish and Wildlife Service. 2010. Eastern indigo snake observation; Little Knockemdown Key. Email and photo provided to KDNWR, Big Pine Key, Florida.

Eastern Indigo Snake Protection Measures

It appears that harm to the eastern indigo snake occurs primarily through construction accidents, vehicular strikes, and habitat loss and/or degradation. These adverse effects can be minimized by maintaining a careful watch during construction and when traveling onsite to avoid killing snakes. In addition, protecting burrows and leaving native vegetation as refugia onsite for indigo snakes displaced by construction activity can benefit this species.

The eastern indigo snake is not likely to be adversely affected if the following measures are implemented for the project.

- 1) Burrows and onsite native vegetation should be protected. If such habitat must be disturbed, limit disturbance to a minimum and improve remaining habitat through exotic vegetation removal. Maintain native vegetation onsite as refuges for the snake.
- 2) Clearing and grading activities should be performed outside high activity months (June to November). Winter months (January to March) provide the best opportunity to initiate and complete construction activities that will not impact this species.
- 3) Post informational signs containing the following information throughout the construction site and along any proposed access road:
 - a) A description and picture of the eastern indigo snake, its habits, and protection under Federal Law;
 - b) Instructions not to injure, harass, or kill this species;
 - c) Directions to cease clearing activities and allow the eastern indigo snake sufficient time to move away from the site on its own before resuming clearing; and,
 - d) Telephone numbers of pertinent agencies to be contacted if a dead eastern indigo snake is encountered.

Other useful educational materials may consist of a combination of posters, videos, pamphlets, and lectures (*e.g.*, an observer trained to identify eastern indigo snakes could instruct construction personnel before any clearing activities occur).

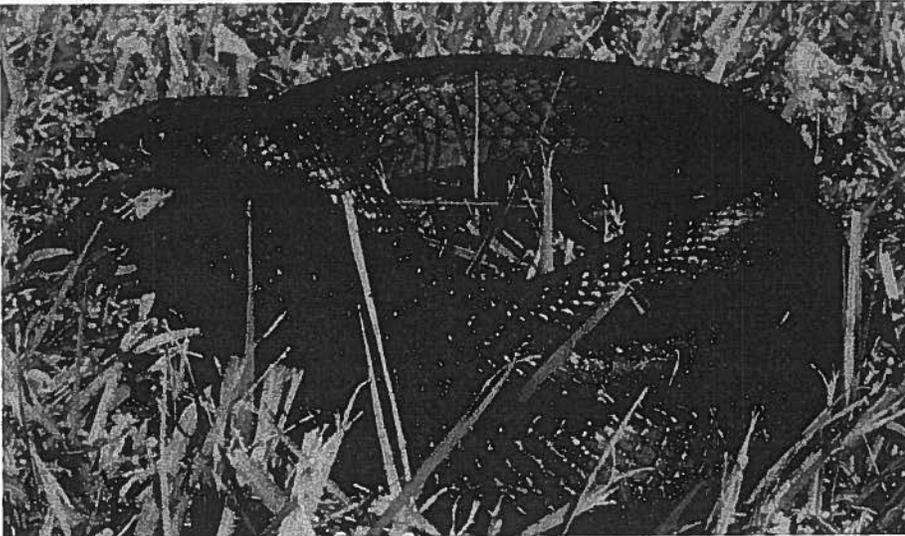
- 4) Monitor eastern indigo snake activity onsite. Report any eastern indigo snake observations that occur during project activities (see monitoring report below). Document with photograph, if possible. If large snake skins are found, they may belong to an eastern indigo snake. Skins can be collected and sent to the Service's South Florida Ecological Services Office (attention: Monroe County FEMA Biologist, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, Florida 32960) for positive identification. Provide information on the date and location collected.

Monitoring Report: A monitoring report should contain the following information: location, dates, and times for any sightings of eastern indigo snakes. Also include the results any of burrow searches and observations. If a snake is encountered during a burrow search, then a description of the outcome for the snake is needed. Document by photograph, if possible. Was the snake left in an intact burrow? Was the burrow excavated? If so, did the snake leave and where did it go? A site map with sighting locations marked would be helpful. If an indigo snake is observed onsite a copy of the report is to be sent to the Service at the address listed above within 60 days of the conclusion of the project.

Dead, injured, or sick animals: If a dead, injured, or sick eastern indigo snake is found onsite, notification should be made to the Service at the address listed above. Secondary notification should be made to the Florida Fish and Wildlife Conservation Commission; South Region; 3900 Drane Field Road; Lakeland, FL 33811; Wildlife Alert Number 1-800-404-3922.

Example Eastern indigo snake informational sign.

WATCH OUT FOR THE EASTERN INDIGO SNAKE



The Eastern Indigo Snake is the largest nonpoisonous snake in North America, growing up to 8 feet in length. The color of both adults and young is shiny bluish-black with some red or cream coloring on the chin or sides of the head. The indigo snake is usually found in high, dry, well-drained sandy soils, but may also be found in hammocks, swamps, and flatwoods habitats in south Florida. Burrows are used by many prey animals that are easily captured by the indigo snake in the burrow. Indigo snakes also use the burrows as dens for cover, and laying eggs. Other

potential dens are stumps of trees, cavities in the soil, and under piles of debris.

The decline in the population of indigo snakes is attributed to habitat loss due to development and overcollecting for the pet trade. Fragmentation of habitat by roads results in many indigo snakes killed by vehicle traffic.

Every effort should be undertaken to avoid harming any snake observed during work on this construction site. Any indigo snakes encountered during construction activity should be allowed to crawl off on its own before continuing construction activities. If it appears that the construction activities will cause harm to the snake, construction must be stopped until the proper action can be determined.

These rare snakes are protected by the U.S. Endangered Species Act (ESA) of 1973 makes it a violation to "harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect endangered or threatened species." Violations can result in fines of up to \$20,000 and/or up to one year in prison. Only permitted personnel are allowed to handle the snakes.

Contact the following agencies if indigo snakes are observed:

U.S. Fish and Wildlife Service 772-562-3909

**Florida Fish and Wildlife Conservation Commission
800-282-8002**

Lower Keys Marsh Rabbit Assessment Guide

December 2011

February 2012

The U.S. Fish and Wildlife Service's (Service) FEMA Biological Opinion (BO) dated April 30, 2010, and modified on December 14, 2010, identified 3,710 at-risk parcels, representing 4,331 acres, intersecting habitats that may occasionally be used by the endangered Lower Keys marsh rabbit (*Sylvilagus palustris hefneri*) in Monroe County. The BO also identified an additional 1,427 acres of at-risk lands outside Monroe County's parcel layer not subject to the Rate of Growth Ordinance (ROGO) program. In addition, the BO noted that the ROGO program would allow for the construction of 871 new residences (with a potential for 787 associated cats); 296 residences (268 cats) in potentially suitable Lower Keys marsh rabbit habitat and 575 residences (520 cats) in adjacent buffer lands. New residences in the buffer areas may have an indirect effect on predation of the Lower Keys marsh rabbit due to associated free-roaming cats (see Tables 19, EA-11a and EA-11b in the BO).

The at-risk properties were determined by overlaying the County's property parcel layer onto the County's 2009 land cover boundary maps (Monroe County 2009). The County's land cover boundary maps included 13 land cover types. Developed land, undeveloped land, impervious surface, and exotic are considered non-native land cover types. Hammock, pineland, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, and beach berm are considered native land cover types. The water classification is also considered a native cover type. The minimum mapping unit for land cover polygons was 0.35 acre for hammock and 0.5 acre for all other cover types.

The County's boundary map land cover types containing suitable habitat for the Lower Keys marsh rabbit included pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm. We also noted that potential habitat is present only in unincorporated Monroe County (Lower Keys only).

Species Profile: The Lower Keys marsh rabbit's historic range extended from Big Pine Key to Key West, encompassing a linear distance of about 30 miles. It occurs on some of the larger keys from Boca Chica, just north of Key West, to Big Pine Key. The Lower Keys marsh rabbit is habitat specific, depending upon a transition zone of grasses and sedges for feeding, shelter, and nesting. The majority of potential suitable habitat areas lie in transitional zones between marine environments and uplands. The current population estimate is about 500 rabbits in the Lower Florida Keys (Perry, personal communication, 2006). Although habitat loss is responsible for the original decline of the Lower Keys marsh rabbit, high mortality from predation from feral cats has also occurred and may be the greatest current threat. Feral cat control is an ongoing operation on Naval Air Station Key West (NASKW) and lands within the National Key Deer Refuge (NKDR). However, feral cat control activities outside NASKW and the NKDR are unknown.

Typical Lower Keys marsh rabbit habitat includes wetlands with a dense herbaceous cover that is dominated by a mixture of grasses, sedges, and forbs. This community is considered a transitional plant community that is similar in form and species composition to comparable communities interspersed among the mangrove forests of mainland Florida (Forys and Humphrey 1994). Forys (1995) concluded that marsh rabbits spend most of their time in the mid-marsh (seaside oxeye) and high-marsh (cordgrasses and marsh fimbry) and avoid areas with mature buttonwoods and high canopy cover.

Marsh rabbits have been documented to feed on at least 19 different plant species (Forys 1995). However, the most abundant species in the rabbit's diet is seashore dropseed, glassworts, cordgrass, seaside oxeye, red mangrove, and white mangrove.

Marsh rabbits are sexually mature at about 9 months of age. During this time, the majority of the males disperse. Sexually maturing females are not as likely as males to disperse. Like other marsh rabbit subspecies, Lower Keys marsh rabbits are polygamous, and generally breed throughout the year (Holler and Conway 1979). Although Lower Keys marsh rabbits do not display an apparent seasonal breeding pattern (Service 1994), the highest proportion of females with litters occurs in March and September; the lowest proportion occurs in April and December.

The Service issued a Section 10(a)(1)(B) Incidental Take Permit (ITP) to Monroe County, Florida Department of Transportation, and Florida Department of Community Affairs (applicants) in June 2006 for adverse effects from development on Big Pine and No Name Keys. The ITP was issued to the applicants based upon their development of a Habitat Conservation Plan (HCP) that sets guidelines for development activities on Big Pine and No Name Keys to occur progressively over the permit period (20 years). The take will be incidental to land clearing for development and recreational improvements. The HCP provides avoidance, minimization, and mitigation measures to offset impacts to covered species. Mitigation includes the protection of three mitigation units for each development unit of suitable habitat within the plan area.

The HCP includes specific development restrictions in Lower Keys marsh rabbit habitat and within a 1,640-foot (500 meter) buffer surrounding this habitat. The distance of 1,640-feet is based on the use of upland areas by this species and the estimated distance domestic cats will travel from their homes (Frank, personal communication, 1996). The ITP does not authorize incidental take of suitable marsh rabbit habitat, but does authorize incidental take of up to 40 acres of buffer lands surrounding suitable marsh rabbit habitat. Since incidental take of suitable marsh rabbit habitat was not exempted in the Big Pine and No Name HCP, the potential direct, indirect, and cumulative effects of NFIP actions on at-risk marsh rabbit habitat were addressed in the 2010 FEMA BO.

Threats: The Lower Keys marsh rabbit is vulnerable to predation by free-roaming cats, habitat loss and degradation, fire suppression, vehicular traffic, hurricanes, sea level rise, fire ants, and exotic constrictor snakes. The greatest threats to the continued existence of the Lower Keys marsh rabbit are predation by cats, habitat loss and degradation, and hurricanes (Service 2007). These threats not only directly affect the viability of local subpopulations, but also reduce the probability of successful dispersal among the increasingly fragmented habitats. Connectivity

among suitable habitat patches is necessary for Lower Keys marsh rabbit dispersal among patches (Forys and Humphrey 1999), and dispersal is a necessary process if rabbit metapopulations are to remain self-sustainable.

Assessment Guide: In order to provide assistance in assessing threats to the Lower Keys marsh rabbit from a given project, the Service has developed the following guidance and recommendations that, if implemented, will minimize adverse effects to this species. If this guide results in a determination of “no effect,” the Service supports this determination. If this guide results in a determination of “not likely to adversely affect” (NLAA) for these species and a cat brochure is provided, then the Service concurs and no additional correspondence is necessary. If the use of this guide results in a “may affect” determination, then further coordination with the Service is necessary. This guide is subject to revision as necessary.

A. Parcel is located in the species focus area or on the Real Estate (RE) parcel list.....*go to B*

Parcel is located in the buffer area (a zone extending 500 meters [1,641 feet] from the focus area) If a parcel is mapped as being both within the species focus area and the buffer zone, it should be wholly considered as being in the species focus area.....*go to G*

Parcel is not in the species focus area, the buffer area, or on the RE parcel list.....*no effect*

B. Parcel is on Big Pine Key or No Name Key..... *may affect (refer to HCP)*

Parcel is not on Big Pine Key or No Name Key.....*go to C*

C. The applicant proposes no removal or modification of this species’ native habitat (pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm).....*go to GH*

The applicant proposes removal or modification of this species’ native habitat (pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm). A vegetation survey is required to document the native plant species and size present on the property and a general description of the surrounding properties within 500 feet is also required. Once these have been completed..... *go to D*

D. The property is within a canal subdivision or developed subdivision and adjacent lots and properties within 500 feet are greater than 60 percent developed or scarified..... *go to GH*

The property is not as above and contains and/or is adjacent to contiguous tracts of this species’ native habitat greater than 1 acre in size. A Lower Keys marsh rabbit survey (authorized by the Service) is required.....*go to E*

Native habitat (pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm) will be impacted but neither of the above apply to the property.....*go to F*

E. The Lower Keys marsh rabbit survey was negative.....*go to F*

The Lower Keys marsh rabbit survey was positive..... *may affect*

F. The applicant has proposed either on-site or off-site habitat compensation* commensurate with the amount of native habitat lost.....*go to GH*

The applicant is not proposing habitat compensation or habitat compensation does not meet minimum compensation requirements.....*may affect*

GG. Parcel is within a canal subdivision, and is separated by a canal, open water, or US-1 from native habitat in the focus area larger than 1 acre. Provide cat brochure.....NLAA

The parcel is not as above..... go to H

H. The applicant proposes the construction of a new residence.....*go to HI*

Proposal is for actions other than a new residence. Provide cat brochure.....NLAA

HI. The new residence is proposed in the species focus area and the total of new residential permits issued in the focus area lands has not exceeded 296. Provide cat brochure.....*take exempted in BO, additional consultation with the Service not required*

The new residence is proposed in the buffer area and the total number of new residential permits issued in buffer lands has not exceeded 575. Provide cat brochure.*take exempted in BO, additional consultation with the Service not required*

The proposed new residence exceeds the limits of take in the 2010 BO (296 residences in the focus area and 575 residences in buffer lands).....*may affect*

***Habitat Compensation**

The minimum recommended habitat compensation is replacement of lost vegetation either through ~~land acquisition, habitat protection or restoration or preservation of habitat, and/or monetary contributions to accomplish the aforementioned activities for land acquisition,~~ according to the participating community’s land development regulations. A vegetation survey is required to document species and size present prior to construction impact. The Service considers the compensation as like-for-like replacement of habitat and the loss is not a deduction from the not-to-exceed habitat acreage losses referenced in the BO.

If habitat compensation is being provided in excess of the minimum recommended, the Service may consider the additional compensation as a credit to the not to exceed habitat acreage losses referenced in the BO. To be considered for this credit, the compensation must be like for like habitat compensation and credit will be granted at half value. For example, if 4 acres of additional compensation are provided, the credit granted is 2 acres. This partial credit is

considered appropriate as existing vegetation currently provides benefit and the credit vegetation may not provide the same habitat benefit until later in time.

Monitoring and Reporting Effects

For the Service to monitor cumulative effects and to track incidental take exempted for the Lower Keys marsh rabbit, it is important for FEMA and the NFIP participants to monitor the number of permits and provide information to the Service regarding the number of permits issued. In order to meet the reporting requirements in the BO, we request that FEMA and/or the NFIP participants send to the Service an annual database summary consisting of: project date, permit number, project acreage, native impact acreage, amount of acres and/or number of trees/plants replaced as habitat compensation, and project location in latitude and longitude in decimal degrees.

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MEMORANDUM

MONROE COUNTY PLANNING & ENVIRONMENTAL RESOURCES DEPARTMENT
We strive to be caring, professional and fair

To: Monroe County Planning Commission
From: Townsley Schwab, Senior Director of Planning & Environmental Resources
Michael Roberts, CEP; PWS; Sr. Administrator/Environmental Resources
Date: April 11, 2012, 2012

Subject: AN ORDINANCE BY THE MONROE COUNTY BOARD OF COUNTY COMMISSIONERS AMENDING CHAPTER 122 FLOODPLAIN REGULATIONS, CREATING SECTION 122-10 PROVIDING FOR INCLUSION OF UNITED STATES FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) AND UNITED STATES FISH AND WILDLIFE SERVICE (FWS) REQUIREMENTS IN PERMIT REFERRAL PROCESS IMPLEMENTATION AND DETERMINATIONS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF CONFLICTING PROVISIONS; PROVIDING FOR TRANSMITTAL TO THE STATE LAND PLANNING AGENCY AND THE SECRETARY OF STATE; PROVIDING FOR CODIFICATION; PROVIDING FOR AN EFFECTIVE DATE.

Meeting: April 25, 2012

1
2 **I REQUEST**
3

4 The Planning & Environmental Resources Department is proposing amendments to the text
5 of the Monroe County Floodplain Ordinance by adding §122-10 of the Monroe County Code
6 (MCC) in order to revise the regulations pertaining to the review of applications for
7 floodplain development permits to address the April 2010 U.S. Fish & Wildlife Services
8 Biological Opinion and the Reasonable & Prudent Alternatives (RPA's) related to the
9 Federal Emergency Management Agency's (FEMA) administration of the National Flood
10 Insurance Program in Monroe County.
11

12 **II RELEVANT PRIOR COUNTY ACTIONS AND BACKGROUND INFORMATION:**
13

14 In 1997 the Service completed a Biological Opinion (BO) for the effects of the NFIP on
15 Federally protected species in the Florida Keys. The 1997 BO found the NFIP jeopardized
16 nine species in the Keys and then in 2003 the Service re-initiated consultation and amended
17 the 1997 BO and concluded that the effect of the NFIP would result in jeopardy on eight of
18 10 species evaluated in the BO. Then, a second amended complaint in 2003 was filed by the
19 plaintiffs against FEMA and the Service pursuant to the Endangered Species Act and the
20 Administrative Procedures Act. The plaintiffs won a Summary Judgment and on March 29,

1 2005 the United States District Court, Southern District of Florida (Court) issued an Order
2 ruling the Service and FEMA violated the Endangered Species Act and the Administrative
3 Procedures Act.

4
5 On September 9, 2005, the Court granted the plaintiffs' motion for an injunction against
6 FEMA issuing flood insurance on any new residential or commercial developments in
7 suitable habitats of federally listed species in the Keys. The Court also ordered the Service to
8 submit a new BO by August 9, 2006. The Service issued a new BO on August 8, 2006. On
9 April 1, 2008, FEMA and the Service filed an appeal with the United States Court of Appeals
10 for the Eleventh Circuit arguing that section 7(a)(2) of the Act did not apply to FEMA's
11 provision of flood insurance and that FEMA had fully complied with the Court's March 29,
12 2005, ruling. On February 26, 2009, the Court ordered the Service to submit a new BO by
13 March 31, 2010 and on March 28, 2010, the Court granted a 30 day extension of this
14 deadline. On April 1, 2009, the United States Court of Appeals for the Eleventh Circuit
15 affirmed the judgment of the District Court. On April 30, 2010, the Service published the
16 revised BO for FEMA's administration of the NFIP in Monroe County.

17
18 The BO contains Reasonable and Prudent Alternatives (RPA's) that require Monroe County
19 and other participating communities in the Florida Keys to revise their Flood Damage
20 Prevention Ordinance(s) to reference and use an updated real estate list (referenced in RPA
21 paragraph 1) within 120 days of acceptance of this BO by the Court. Then, on December 3,
22 2010 the Court filed a Settlement Agreement between the Plaintiffs and the Federal
23 Defendants in which the Federal Defendants agreed to notify the Court and the parties when
24 Monroe County and the other "participating communities" in the Florida Keys have: 1)
25 revised their Flood Damage Prevention Ordinance(s); and 2) implemented procedures to
26 reference and use the updated real estate list and Species Focus Area Maps (referenced in
27 reasonable and prudent alternative ("RPA") paragraph 1) in compliance with paragraphs 2, 3,
28 4, and 5 of the RPA.

29
30 On November 12, 2010 the Board of County Commissioners held a public workshop to
31 discuss the RPA's and directed the County Attorney to intervene in Court and directed the
32 County Administrator to task the lobbyists with this issue.

33
34 On February 16, 2011 the BOCC directed the County Attorney to file an appeal in the
35 matter of Florida Key Deer, National Wildlife Federation, et. Al. v. FEMA and USFWS.

36
37 On March 16, 2011, the BOCC authorized the County Attorney to file a motion for a Stay
38 and to obtain the services of Hogan Lovells to assist the County in the appeal process.

39
40 On December 2, 2011, FEMA notified Monroe County that if the County decides not to
41 implement the RPA's then Monroe County will be placed on probation.

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1 **III REVIEW**

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3 The Growth Management Division, the County Attorney and the County’s outside Counsel
4 have been working closely with FEMA and the USFWS following the BOCC meeting of
5 March 16, 2011 to reach agreement on the implementation of the RPA’s and the language for
6 the required Ordinances.
7

8 FEMA provided a draft of items for adoption to Monroe County on June 15, 2011 and
9 provided further recommendations via e-mail on October 3, 2011 (Appendix I). These
10 Ordinance recommendations were developed by FEMA to meet the requirements of the
11 RPA’s and would require the County to make permit determinations based on the Species
12 Assessment Guides (SAGs), and in the event the impact limits of Table 18 were exceeded,
13 ultimately deny a building permit. The FWS provided draft SAG’s that would require
14 Monroe County to review each floodplain development permit application to determine if the
15 parcel was on the list of RE #s that are within the species focus areas or buffers, and to
16 confirm this by reviewing the Species Focus Area Maps provided by FEMA. If the parcel is
17 on the list, then Monroe County staff evaluates the application in accordance with the SAGs
18 and make the permit determination. In the event that the proposed development results in a
19 “may affect” determination, then the applicant is required to consult directly with the
20 USFWS, otherwise, Monroe County is authorized by the RPA’s to issue the building permit.
21

22 The Growth Management Division asserted that the responsibility of determining the
23 potential effects of proposed development on the covered species ay with the USFWS and
24 not with Monroe County and prepared a draft Ordinance that would route building permit
25 applications that proposed impacts to parcels within the Species Focus Area Maps directly to
26 the USFWS. This draft Ordinance was provided to FEMA and FWS for their review relative
27 to compliance with the Settlement Agreement and RPAs. On February 16, 2012 the FWS
28 circulated updated guidance on the implementation of the RPA’s (Appendix II). This
29 guidance clarified in writing that only development that resulted in a “May Affect”
30 determination would impact Table 18. Furthermore, the guidance included revisions to the
31 SAG’s that would allow staff to pre-determine that the development of Tier III parcels that
32 were within canal subdivisions or substantially developed subdivisions would Not Likely
33 Adversely Affect (NLAA) any of the covered species. Further, after additional coordination
34 with the FWS and FEMA, it was determined that these “pre-determined parcels” would not
35 be required to be evaluated through the permit review process. These revisions to the SAGs
36 include provisions that substantially reduce the County’s potential exposure for liability for
37 inverse condemnation or takings claims.
38

39 Based on the guidance contained in the FWS letter and the revised SAG’s, Growth
40 Management Division staff recommends the following addition to Section 122 Floodplain
41 Management:
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1 Section 1. The Monroe County Land Development Code shall be amended as follows:

2
3 Sec. 122-2. General provisions.

4 (b) Basis for Establishing Special Flood Hazard maps; Species Focus Area Maps
5 (SFAMs) and Real Estate (RE) List; and Species Assessment Guides (SAGs).

6 1. Special Flood Hazard Maps. The areas of special flood hazard identified by the Federal
7 Emergency Management Agency (FEMA) in its October 17, 1989 Flood Insurance Study and
8 Wave Height Analysis for Monroe County, Florida, Unincorporated Areas, as amended February
9 18, 2005, with accompanying supporting data, are adopted by reference and declared to be a part
10 of this chapter, and shall be kept on file, available to the public, in the offices of the county
11 Building Department. Letters of Map Amendment, Letters of Map Revision, Letters of Map
12 Revision Based on Fill, and Conditional Letters of Map Revision approved by FEMA are
13 acceptable for implementation of this regulation.

14 2. Species Focus Area Maps (SFAMs) and Real Estate (RE) List. FEMA and FWS have
15 provided the Species Focus Area Maps (SFAMs) mailed to Monroe County and dated April 30,
16 2011, and a listing of real estate numbers of parcels (RE list) emailed to Monroe County and
17 dated November 18, 2011, that are within the SFAMs and that have been identified by FWS.
18 The SFAMs and the RE List that are within the SFAMs identified by the FWS in accordance
19 with the Biological Opinion, dated April 30, 2010, as amended December 14, 2010, are hereby
20 declared to be a part of this ordinance. The SFAMs and RE list are on file at the Monroe County
21 Clerk's office and the Monroe County Growth Management Division Office.
22

23 3. Species Assessment Guides (SAGs). FEMA and FWS have provided the Species
24 Assessment Guides (SAGs) mailed to Monroe County and dated XX, 2012 are declared to be a
25 part of this ordinance. The SAGs are on file at the Monroe County Clerk's office and the
26 Monroe County Growth Management Division Office.
27

28 Section 2. A new Section 122-10 of the Monroe County Land Development Code shall
29 be created as follows:

30
31 Sec. 122-10. Inclusion of United States Federal Emergency Management Agency
32 (FEMA) and United States Fish and Wildlife Service (FWS) Permit Referral Process (PRP)
33 Requirements in Final Permit Determinations
34

35 (a) Purpose and intent. It is the purpose of Section 122-10 to implement regulations
36 that will assure, consistent with the 10th Amendment to the U.S. Constitution, state and County
37 regulations, proper record retention, coordination, and notification of FEMA and FWS regarding
38 permit applications filed with or issued by Monroe County, inclusive of FEMA/FWS
39 requirements agreed to by the applicant.
40

41 (b) Lands to which this Section apply. See Section 122-2 (2) and (3)
42

1 (c) Rules for interpreting SFAMs. The boundaries of the flood hazard areas shown on
2 the FEMA SFAMs may be determined by scaling distances. Required interpretations of those
3 maps for precise locations of such boundaries shall be made by the County Planning Director or
4 his/her designee, in consultation with the building official.

5
6 (d) Administration of Development Approval in Species Focus Areas.

7 a. SFA Review Required. For parcels or lots shown within the SFAMs in which an
8 application for development permit has been made, if the SFAM indicates the parcel or lot
9 contains only unsuitable habitat for any of the following species: Key Largo Cotton Mouse, Key
10 Largo wood rat, Key tree-cactus, Lower Keys marsh rabbit, Eastern indigo snake, Key deer,
11 Schaus swallowtail butterfly, silver rice rat, and Stock Island tree snail, and the parcel or lot is
12 not listed on the RE list, the Planning Director or his/her designee shall provide for a notation in
13 the development application permit files that indicates:

- 14 i. The name of the official that made the determination;
- 15
- 16 ii. The date of the determination;
- 17
- 18 iii. The date of the SFAM and RE list used to make the determination.
- 19

20 Once the determination has been made that a parcel or lot contains unsuitable habitat,
21 action may be taken on the permit application by Monroe County staff.

22
23 b. FWS Permit Conditions. For parcels or lots shown within the SFAMs in which
24 an application for development permit that 1) expands the footprint of a structure; or 2) expands
25 associated clearing of; or 3) includes placement of fencing into native habitat has been made, if
26 the SFAM indicates the parcel or lot contains suitable habitat for any of the following species:
27 Key Largo Cotton Mouse, Key Largo wood rat, Key tree-cactus, Lower Keys marsh rabbit,
28 Eastern indigo snake, Key deer, Schaus swallowtail butterfly, silver rice rat, and/or Stock Island
29 tree snail, and the parcel or lot is listed on the RE list, the Planning Director or his/her designee
30 shall use the SAGs to determine whether a floodplain development permit application requires:

- 31
- 32 i. incorporation of FWS conditions into the Monroe County permit; or
- 33
- 34 ii. needs technical assistance by the service.
- 35

36 For a floodplain development permit application that requires the Services' technical
37 assistance, Monroe County shall provide the application to the service weekly. Based on the
38 Services technical assistance, Monroe County shall condition the floodplain development permit
39 to incorporate the Service recommendations to avoid possible impacts on federally-protected
40 endangered species. The County shall maintain an Acceptance Form of the Service
41 recommendations in the permit file.

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43 iii. If the parcel is within an area previously covered by a Habitat Conservation
44 Plan, and where that Habitat Conservation Plan has expired at the time of development
45 permit application, the County shall apply this Permit Referral Process.
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3 iii. Based on the requirements contained in the FWS letter, the County shall
4 require the owner of the property to sign a form acknowledging agreement to the FWS
5 conditions and the County shall maintain the acknowledgement form in the permit file.
6

7 iv. The County shall, based on the acknowledgement form from the property
8 owner, incorporate the FWS letter conditions into any final Monroe County development
9 permit.
10

11 v. If the property owner does not agree to the FWS conditions, the County
12 shall not accept the application for development permit.
13

14 c. Provision for Flood Hazard Reduction and Avoiding impacts on federally listed species
15 Enforcement. All proposed development shall meet the conditions established on the floodplain
16 development permit based on the Service recommendations to avoid possible impacts on
17 federally-protected endangered species. Violation of this Chapter, including any development
18 constructed not in accordance with the FWS conditions derived through use of the SAGs or
19 through technical assistance by FWS, are hereby deemed to be violations of the County Code
20 and may be enforced as follows:
21

22 i. The County may utilize the administrative enforcement procedures set
23 forth in Chapter 8, Monroe County Code of Ordinances;
24

25 ii. The County's Growth Management Director may make a formal
26 complaint to the U.S. FWS Office of Law Enforcement;
27

28 iii. The County may file an action in a court of competent jurisdiction seeking
29 damages as well as injunctive and/or equitable relief;
30

31 iv. The County Floodplain Administrator may notify FEMA that the property
32 is in violation of this ordinance and should be considered for treatment under § 1316 of
33 the National Flood Insurance Act; and/or
34

35 v. Knowing violations of this section may be prosecuted in the same manner
36 as misdemeanors are prosecuted in the name of the State in a court having jurisdiction of
37 misdemeanors by the prosecuting attorney thereof and upon conviction shall be punished
38 by a fine not to exceed \$500 and/or imprisonment in the county jail not to exceed 60
39 days. Each day a violation exists shall constitute a separate offense.
40

41 d. Permit issuance for previously tolled Rate of Growth Ordinance (ROGO) allocations or
42 building permits. Building permits and allocations have been tolled under authority of Monroe
43 County Resolutions 420-2005, 166-2006, 185-2007 & 219-2008 and 282-2011 as a result of the
44 injunction against FEMA for the issuance of flood insurance policies under the National Flood
45 Insurance Program in the case of *Florida Key Deer et. al., v. Fugate et. al.*, 90-10037-CIV-
46 Moore. For those allocations or building permits that were tolled:

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3 i. Owners who do not need coordination with FWS after they are processed through the
4 FEMA and FWS Permit Referral Process have 180 days from the date of the judge’s
5 order to lift the injunction, and from the date of a County issued written notice, to
6 pick up their building permits, whichever is greater.
7 ii. Owners who do not need coordination with FWS after they are processed through the
8 FEMA and FWS Permit Referral Process and who need to re-design their on-site
9 wastewater treatment system and receive a permit from Department of Health (DOH)
10 have 300 days from the date of the judge’s order to lift the injunction, and from the
11 date of a County issued written notice, to pick up their building permit, whichever is
12 greater.
13 iii. Flood Plain Development Permit applications processed through the FEMA and FWS
14 Permit Referral Process that result in a “may affect determination” for the proposed
15 development through the application of the Species Assessment Guides which require
16 the permittee to consult with FWS shall have 360 days to conclude the required
17 coordination with FWS and pick up the building permit from Monroe County . This
18 timeframe may be extended by the Planning Director if the applicant can
19 affirmatively demonstrate that he has timely and actively sought coordination.
20

21 **Section 3.** Severability.

22 If any section, paragraph, subdivision, clause, sentence or provision of this Ordinance
23 shall be adjudged by any court of competent jurisdiction to be invalid, such judgment
24 shall not affect, impair, invalidate, or nullify the remainder of this Ordinance, but the
25 effect thereof shall be confined to the section, paragraph, subdivision, clause, sentence or
26 provision immediately involved in the controversy in which such judgment or decree
27 shall be rendered.

28 **Section 4.** Conflicting Provisions.

29 In the case of direct conflict between any provision of this ordinance and a portion or
30 provision of any appropriate federal, state or county law, rule, code or regulation, the
31 more restrictive shall apply.

32 **Section 5.** Filing, Transmittal, and Effective Date.

33 This ordinance shall be filed in the Office of the Secretary of State of the State of Florida,
34 and transmitted to the State Land Planning Agency, but shall not become effective until a
35 notice is issued by the State Land Planning Agency or Administrative Commission
36 approving the ordinance pursuant to Chapter 380, Florida Statutes, and after any appeal
37 period has expired.

38 **Section 6.** Codification

39 The provisions of this ordinance shall be included and incorporated into the Code of
40 Ordinances of the County of Monroe, Florida, as an addition or amendment thereto and shall
41 be appropriately numbered to conform to the uniform numbering system of the Code.

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IV RECOMMENDATION

Staff has found that the proposed text amendment would be consistent with the provisions of §102-158(d)(5)(b): 1. Changed projections (e.g., regarding public service needs) from those on which the text or boundary was based; 2. Changed assumptions (e.g., regarding demographic trends); 3. Data errors, including errors in mapping, vegetative types and natural features described in volume I of the plan; 4. New issues; 5. Recognition of a need for additional detail or comprehensiveness; or 6. Data updates.

Specifically, staff has found that the proposed text amendments are necessary due to new issues associated with FEMA's administration of the NFIP.

Staff recommends that the Board of County Commissioners amend the Monroe County Code as stated in the text of this staff report.

Appendix I

FEMA

Draft Items for Adoption

Draft - Items for Adoption

Each community must provide the citation and ordinance language used to implement 44 CFR 60.3(a)(2). This is not in the RPA's, but FEMA will confirm again that the provision related to communities reviewing proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal and State law. If this provision has not been adopted or needs to be revised to reflect this provision, the NFIP communities Monroe County, FL shall adopt this provision.

From RPA #2 - part 1

“The Species Focus Area Maps (SFAMs) and the real estate numbers of parcels (RE List) that are within the SFAMs identified by the U.S. Fish and Wildlife Service (Service) in accordance with the Biological Opinion, dated April 30, 2010, as amended, for {name of community}, and any subsequent revisions there to, are hereby declared to be a part of this ordinance. The SFAMs and RE list are on file at {indicate location}.”

NOTE: This ordinance language is written as if your community has automatic adoption. Please confirm with FEMA and the Service whether your community has automatic adoption or you need to adopt the SFAMS and RE list each time they are updated.

From RPA #3

“For a floodplain development permit application that is shown on the SFAMs as containing unsuitable habitat, {insert name of community} shall place a letter in the floodplain development permit file that indicates:

- a. The individual that made the determination;
- b. The date of the determination; and
- c. The date of the SFAM and real estate parcel list used to make the determination.

The {insert name of community} may take action on the floodplain development permit application without further concern for threatened and endangered species (or their critical habitat).”

From RPA #4 – paragraph 1

“The Species Assessment Guide provided by the Service, dated {insert date}, and any subsequent revisions there to, for {name of community}, are hereby declared to be a part of this ordinance. The Assessment Guide is on file at {indicate location}.”

NOTE: Please confirm with FEMA and the Service whether your community has automatic adoption or you need to adopt the Species Assessment Guide each time it is updated.

“The {insert name of community} shall use the Species Assessment Guide to determine whether a floodplain development permit application needs technical assistance by the Service. For a floodplain development permit application that requires the Service technical assistance, {insert name of community} shall provide the application to the Service weekly.”

From RPA#4(a) and (b)

“Based on the Service technical assistance, {insert name of community} shall condition the floodplain development permit to incorporate the Service recommendations to avoid possible impacts on species.”

RPA #4(a):

“The {insert name of community} shall maintain an Acceptance Form of the Service recommendations in the permit file. The Acceptance Form shall be signed by the permit applicant and the {insert name of community}.”

From RPA #4(c)

“The {insert name of community} shall use the Species Assessment Guide for properties within an expired Habitat Conservation Plan within the SAFMs and RE List to determine if the permit application must be provided to the Service for technical assistance in accordance with Section {insert appropriate community section of ordinance for RPA #4 ordinance provisions provided above} and shall meet the requirements of the applicable sections of this Ordinance.”

Draft – Procedures, Notices, and Brochures

Below is a list of items (written procedures, written notice, brochures, or other materials) that will be needed to support implementation of the Biological Opinion’s Reasonable and Prudent Alternative.

RPA #3: A draft ordinance provision has been developed for RPA #3 (See above). The Service and FEMA will work with the communities in developing the required form letter for the permit file for areas mapped as unsuitable habitat. A copy of the form letter must be made a part of the procedures.

RPA #4(c)

Each community shall provide a written notice to FEMA and the Service of any proposed changes to the Rate-of-Growth Ordinance. This notice can be provided to FEMA and the Service at the time that the proposed changes are presented to the staff of the participating community.

Monroe County shall provide a written notice to FEMA and the Services any proposed changes to the Tier Classifications at the time the proposed changes are presented to staff of the participating community.

RPA #5 – Paragraph 1:

Each community shall establish written procedures within 14 months from the date of the Biological Opinion for referring floodplain development permit applicants to the Service for technical assistance, for including any conditions as part of the floodplain development permit, and for enforcing the recommendations as outlined in RPA #4.

RPA #5 – Paragraph 2:

Each community shall confirm in writing to FEMA and the Service that it will exercise its enforcement authority to require the permittee to comply with the Service's recommendations to the development proposal by making the recommendations a condition of the floodplain development permit. The letter should identify the enforcement provisions in your Flood Damage Prevention Ordinance to ensure compliance with the ordinance provisions identified above. In addition, with respect to Section 1316 Denial of Flood Insurance, the communities shall confirm in writing that they will take this action in the event of non-compliance.

RPA #6: FEMA will coordinate with each community and the Service in developing brochures and other materials for addressing domestic and feral cats. Each community shall provide these materials to floodplain development permit applicants. The materials must be ready for permit use by March 11, 2012 or earlier.

RPA #11: FEMA will work with each community to develop a brochure addressing the floodplain development permit referral process. The Monroe County communities will post the information on the website and shall provide the brochure to permit applicants. This brochure must be ready for permit use by March 11, 2012 or earlier.

October 3, 2011 e-mail

Please see further information below, regarding your required Flood Damage Prevention Ordinance revisions. This language and the location of the language is based upon the Florida State Model Flood Damage Prevention Ordinance. Please remember that these revisions to your flood damage prevention ordinance must be made by January 12, 2012, in order to remain a participant in good standing in the NFIP. Please let me know if you have any questions or need any assistance. My phone numbers are 770-220-5366 (MWF), 770-509-9383 (TTh), or cell, 404-909-1673.

RPA 2, Part 1: Locate the Species Focus Areas Maps (SFAMs) and the real estate numbers of parcels (RE list) in Article 3 in a new Section B. 2. Suggest it read:

"The Species Focus Area Maps (SFAMs) and the real estate numbers of parcels (RE list) that are within the SFAMs identified by the U.S. Fish and Wildlife Service (Service) in accordance with the Biological Opinion, dated April 30, 2010, as amended, and any subsequent revisions thereto, are hereby declared to be a part of this ordinance. The SFAMs and RE list are on file at {community inserts name of the location where the SFAMs are maintained}."

Article 3 is titled "Basis for Establishing the Area of Special Flood Hazard". The title will need to be revised. Suggest it be changed to: "Basis for Establishing the Area of Special Flood Hazard and the Species Focus Area Maps and RE list".

RPA #3, This RPA should go into Article 4, Section B, for duties of the Floodplain Administrator. The suggested wording for a new subsection should be:

"For development permit applications that are shown on the SFAMs and the RE list as containing unsuitable habitat, place a letter in the floodplain development permit file that indicates:

- 1) The name of the official that made the determination;
- 2) The date of the determination; and
- 3) The date of the SFAM and real estate list used to make the determination.

Once the determination has been made, action may be taken on the permit application without further concern for threatened and endangered species or their critical habitat.”

RPA 4, Paragraph 1-A: Include Article 3, but make it Section B.3. since it is a different provision from the topic in B.2. above. Suggested language for B.3:

“The Species Assessment Guide provided by the Service, dated {insert date}, and any subsequent revisions there to, are hereby declared to be a part of this ordinance. The Assessment Guide is on file {insert location}.”

RPA #4, paragraph 1-B: The following should go into Article 4, Section B. for Duties of the Floodplain Administrator. Suggested wording for new subsection:

“Determine whether a permit application needs technical assistance by the Service using the Species Assessment Guide. Provide Development Permit applications to the Service weekly that require the Service’s technical assistance.”

RPA #4(a), (b), and (c): Locate these subsections is in Article 4, Section B. for Duties of the Floodplain Administrator. Suggested language:

“Based on the Service’s technical assistance, condition Development Permits to incorporate the Service recommendations to minimize and/ or avoid possible impacts on Federally Listed Species.”

“Sign and obtain the signature of the permit applicant on the Acceptance Form of the Service’s recommendations and maintain the Acceptance Form in the permit file.”

“Use the Species Assessment Guide for properties within an expired Habitat Conservation Plan within the SAFMs and RE list to determine if the Development Permit application must be provided to the Service for technical assistance in accordance with Article 4, Section B(insert number).

RPA#4(a) and (b): With respect to the permit conditions, include this provision in the ordinance as enforceable conditions in conjunction of the duties of the Administrator. Locate this provision in Article 5, Provisions for Flood Hazard Reduction, Section A. General Standards. Change title to: “Provisions for Flood Hazard Reduction and Avoiding Impacts on Federally Listed Species”. Create a new provision in Section A by making it number 12 to read as follows:

“All proposed development shall meet the conditions established on the floodplain development permit based on Service recommendations to avoid possible impacts on Federally Listed Species.”

Mary Rountree, CFM

Appendix II

U.S. Fish & Wildlife Service

February 16, 2012 Correspondence

Amending the Species Assessment Guides



United States Department of the Interior

FISH AND WILDLIFE SERVICE
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960



February 16, 2012

Christine Hurley
Director, Division of Growth Management
Monroe County Government
2798 Overseas Highway, Suite 400
Marathon, Florida 33050

Dear Ms. Hurley:

Thank you for meeting with us on February 1, 2012, to discuss implementation of the Reasonable and Prudent Alternatives referenced in the U.S. Fish and Wildlife Service's (Service) December 2010 Biological Opinion (BiOp) on the potential effects of the Federal Emergency Management Agency's (FEMA) implementation of the National Flood Insurance Program (NFIP) on federally listed species in Monroe County, Florida. We are also in receipt of your email dated February 14, 2012, which summarized the items discussed in the February 1, 2012, meeting and highlighted many of Monroe County's (County) concerns. The Service is committed to working with you to resolve these issues.

The BiOp and associated January 11, 2011, Settlement Agreement ended a 20-year lawsuit filed against FEMA and the Service by the National Wildlife Federation and others. In accordance with the terms of the Settlement Agreement and BiOp, building permit applications for new construction in Monroe County are to be reviewed by participating communities using Species Assessment Guides (SAGs) and Species Focus Area Maps (SFAMs) produced by the Service. These tools are designed to provide a determination for permit applications, streamline the permit review process and eliminate permit delays, while simultaneously minimizing or avoiding impacts to listed species. Using the guidelines in the SAGs, most permit applications will require no further review by the Service; the remaining ones will be forwarded to the Service for further review.

The SAGs provide a mechanism whereby the participating community can evaluate, using our determinations, whether incidental take will occur as a result of a proposed project given the actual site conditions and proposed conservation measures. We anticipate that listed species issues can be addressed through the determinations in the SAGs in the vast majority of applications. For projects that we have determined will have "No Effect" or are "Not Likely to Adversely Affect (NLAA)" in the SAGs, no incidental take will occur. All other projects that "may affect" listed species, as determined through SAGs, should be forwarded to the Service and FEMA for further review. FEMA and the Service will determine if additional conservation measures above and beyond the communities' existing conservation measures should be

recommended to minimize or avoid incidental take or if the incidental take is authorized in the BiOp. If the Service and FEMA determine that incidental take would occur, it will be subtracted from the authorized limit. In any case, habitat loss due to incidental take is limited to the size of actual habitat cleared on the property.

Confusion has been expressed about the incidental take anticipated and authorized in the BiOp and what would happen if the authorized take was exceeded. Incidental take authorized through the BiOp was generally expressed as loss of potential suitable habitat acres, with two exceptions discussed below. The acreage was calculated based on the number of building permits issued in Monroe County and average lot size in the Upper, Middle, and Lower Keys. In our analysis, we assumed that all construction allocated through the Rate of Growth Ordinance (ROGO) would occur in habitat suitable for listed species and that all of the habitat would be removed.

Therefore, the amount of incidental take calculated represents a worst-case scenario. Also, upon further review, the Service determined that, in many cases, take is not likely to occur due to the specifics of either the parcel or the project. These cases are outlined in the SAGs. Only a small subset of the projects evaluated using the SAGs are expected to result in incidental take and, therefore, count towards the take limit.

Two exceptions to estimating potential take of listed species in terms of acreage exist: incidental take due to increased traffic for the Key deer and incidental take due to an increase in cat predation on the Key Largo woodrat, Key Largo cotton mouse, silver rice rat, and lower Keys marsh rabbit. The increase in cat predation is based on the projected ROGO allotments for new residences over the 13-year period and is expressed in number of new residences on parcels that can be developed. If the limit of authorized habitat loss or residences with cats is being approached in a community, the Service and FEMA are required to reinitiate consultation on the issuance of flood insurance and potentially issue a new biological opinion. Reinitiation of consultation would most likely occur due to either a substantial increase in ROGO permits in the community, expiration of the BiOp, or new information regarding the potential effects of the NFIP on listed species.

We also understand the participating communities' concerns that certain properties may have been misclassified in the SFAMs. The SFAMs represent the species' baselines in the BiOp. Therefore, until the RPAs are adopted and the injunction has been lifted, the baseline SFAMs must remain. While we used the best available data to conduct our analysis in the time frame available, we realized that misclassification would occur due to the habitat classification groups, lack of available ground truthing and mapping and scale anomalies. The Service constructed the SAGs to address these inconsistencies until more reliable information was available. For example, if a parcel was improperly mapped as habitat and, upon closer inspection is not, the SAGs will provide a determination of NLAA and the permit can be issued with no further Service coordination. As referenced in the BiOp, FEMA and the Service will update the maps as needed. We are committed to working with the communities to begin this review and update process as soon as the RPAs have been adopted and the injunction has been lifted.

In the interim, we have evaluated the concerns expressed during the February 1, 2012, meeting and in your email. Firstly, we have determined we are able to revise the SAGs. We are providing two draft revised SAGs with this letter as examples of our proposed revisions to address your concerns. These can be carried forward to other species SAGs, where applicable, once the language is finalized. The other concerns outlined in your email (in italics) were:

- a. *The land designated "undeveloped land" on the base maps FWS used to make these determinations is problematic and should be further evaluated for the inclusion in the Focus areas or buffer areas.*

The reason that the Service included the "undeveloped land" mapping unit in certain SFAMs is due to the inclusion of tracts of native habitat within the mapped unit. For those species where this map unit is problematic (Key Largo woodrat, Key Largo cotton mouse, eastern indigo snake, Schaus swallowtail butterfly, and Key deer), the SAGs typically provide a couplet under which parcels mapped as "undeveloped land" are predetermined to be NLAA provided appropriate materials are given to an applicant (e.g., an eastern indigo snake brochure). However, parcels within the buffer area are assessed not for their existing habitat, but for the potential for a new residence to result in increased predation effects from free-roaming cats (see response under c, below). Therefore, "undeveloped land" parcels cannot be excluded from the buffer based solely on their habitat designation.

- b. *Under the SAGs, acceptable mitigation for habitat removed from the focus area includes the type of mitigation Monroe County requires in the current land development code. The SAGs are unclear on whether those funds dedicated to the County for habitat mitigation can be used for restoration, as well as acquisition.*

Please see the revised text under "Habitat Compensation" in the attached SAGs.

- c. *Under the SAGs, for focus areas, canals that cut off connectivity are used to predetermine whether the habitat is subtracted from Table 18 (impact acres). However, the SAGs do not take into account canals cutting off buffer area from the habitat. If you can predetermine that certain RE#s are cut off from connectivity to habitat within focus areas and buffer areas via the SAGs, that could alleviate the RE#s that have to be evaluated administratively [see (d) below].*

In our BiOp, we outlined a linear buffer of 500 meters (1,641 feet) as the distance domestic cats will travel from their homes. This buffer was mapped for each of the four species affected by cats and any new residences within this buffer distance were considered to have an indirect adverse effect to the listed species from cat predation. However, the December 2011 SAGs did not address the ability of free-roaming cats to overcome barriers (e.g., canals) when navigating to potentially suitable habitat for the four species that have predation buffers.

We reviewed this question and are proposing a new couplet in the affected SAGs. Please see Couplet G in the attached Lower Keys marsh rabbit SAG. Proposed Couplet G provides a NLAA determination with the provision of a cat brochure to the applicant for those parcels that are separated from contiguous habitat in the species focus area by a waterbody or major highway. This has been an exclusion criteria accepted by both the Service and the Plaintiffs for removal of parcels from the Court's injunction list, as physical barriers to cats would prevent them from reaching suitable habitat to prey on listed species. We believe that a new residence on this type of parcel would not contribute to increased cat predation on listed species and, therefore, would not be subtracted from the allotment of parcels exempted in the BiOp.

- d. As outlined to FEMA on June 20, 2011: Tier III properties within the County are those the county has purposefully adopted to direct growth TOWARDS. To that end, FWS has designated...7,537 parcels (in the species focus areas or buffer areas) that cause an extreme administrative burden to the County, when, in the County Biologist opinion, most of them should not be included in the buffer areas.*

Noted: Upon closer review, GIS shows that many parcels contain both potential suitable habitat and buffer area due to mapping inclusions. We are proposing a revision on the attached Lower Keys Marsh Rabbit guide to ensure that a parcel (or a proposed residence on a parcel for species affected by cats) is not counted twice (see Couplet A).

- e. Relative to the issue identified in (c) and (d) above: Can FWS amend the SAGs to predetermine whether the focus area parcels and the buffer area parcels can be eliminated via the SAGs. Especially those that are cut off by canals from connectivity to the actual habitat in the focus areas?*

Yes, please see our response in "c" above. Based on the criteria in Couple G, the potential exists for a list of excluded parcels to be developed. During future map review, opportunities may also exist to further assess parcels that contain isolated native habitat, parcels with only fringe habitat, and similar habitat issues. Additionally, we are proposing a revised couplet that addresses the level of development and presence of scarified lots surrounding a mapped native habitat unit (isolated parcels). Please see Couplet C in the attached eastern indigo snake SAG is an example. For the eastern indigo snake, we not only revised this couplet, but moved it up so that properties meeting this criteria are excluded early in the evaluation process.

- f. What is the small mammal protocol that FWS will require in conjunction with the SAFs? Your existing protocol takes 2 years of trapping.*

The SAGs that note the need for the small mammal survey are specific to the South Key Largo woodrat and cotton mouse focus area, the silver rice rat focus area, and the lower Keys marsh rabbit focus area. The intent of these surveys is to assess the likelihood of the presence of the species of concern. A 5-consecutive night small mammal trapping protocol is available that is applicable for this couplet for the Key Largo woodrat and cotton mouse. The marsh rabbit

survey is a meandering transit survey to visually observe the presence of rabbit fecal pellets. Both survey protocols will be available on the Service's web site.

- g. FWS has indicated they used ROGO allocations to develop the amount of habitat impact permitted. As discussed, ROGO allocations could change, especially by sub-area, based on hurricane evacuation modeling. This could be problematic for certain areas.*

The BiOp notes this possibility and RPA 4(c) provide specific guidance. In our assessment of potential adverse effects to listed species, we provided not-to-exceed acreages of habitat that may be developed and not result in jeopardy to affected species or exceed exempted take of suitable habitat. Changes in the ROGO allotments do not affect the not-to-exceed acreages, but could reduce the projected 13-year duration of BiOp if a sufficient number of permits are issued that result in take of listed species habitat. If it becomes apparent that the amount of take authorized in the BiOp is about to be met, reinitiation of formal consultation would be needed. A similar reinitiation sequence could occur with the permitting of new residences (indirect effects from cat predation) for development in both the focus areas and the companion buffer lands for those species affected by cat predation. The SAGs are designed to assess and track these parameters and continued coordination between the Service, FEMA, and affected communities to monitor these parameters is paramount. Further, as discussed earlier, through use of our determinations in the SAGs, many of the proposed projects will likely not count against the not-to-exceed acreages or residential thresholds for cats.

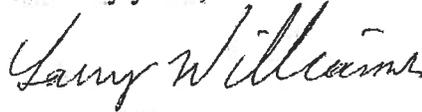
- h. Mike Roberts provided a table indicating the number of parcels within various tier designations (2nd attachment) that do not match what FWS has related to each species and the total number of permits that could be issued.*

In the referenced table, Mr. Roberts noted differences in the number of parcels that may be developed in various Tier designations and that these values do not match the Service's number of parcels and the total number of permits that could be issued. The BiOp provided the detailed breakdown of how the Service generated the number of parcels and the number of permits that could be issued. As referenced above, we are aware that parcel misclassification would occur and the SAGs are constructed to address these inconsistencies until we are able to review and revise our maps with new data. The differences noted in the number of permits that can be issued in a particular Tier designation is also subject to parcel misclassifications, although the maximum amount referenced in the BiOp of permits is based on the projected ROGO allotments over the 13-year review. As previously discussed, if the ROGO allotments are changed, RPA 4 (c) provides guidance on assessing the changes.

In summary, the Service believes the new review process outlined in the 2010 BiOp streamlines and simplifies the review process that was in place in the Keys for over 10 years, while strengthening conservation measures to minimize and avoid impacts to federally listed species. We have enclosed two draft revised SAGs. Please review and provide comments on them; all other applicable SAGs will be similarly revised once we have agreed upon final language. We

are available at any time to answer questions and clarify the review process and its implications. We look forward to working with the communities to resolve issues and conserve the unique environment of the Florida Keys.

Sincerely yours,



Larry Williams
Field Supervisor
South Florida Ecological Services Field Office

Enclosures

cc: electronic only

City of Islamorada, Islamorada, Florida (Kevin Bond)
City of Key Colony Beach, Key Colony Beach, Florida (Ron Sutton)
City of Key West, Key West, Florida (Donald Craig)
City of Layton, Layton, Florida (Norman S. Anderson)
City of Marathon, Marathon, Florida (George Garrett)
DOI, SOL, Atlanta, Georgia (Holly Deal)
DOJ, Washington, D.C. (Mark Brown)
FEMA, Washington, D.C. (Amy Weinhouse)

Eastern Indigo Snake Species Assessment Guide

December 2011

February 2012

The U.S. Fish and Wildlife Service's (Service) FEMA Biological Opinion (BO) dated April 30, 2010, and modified on December 14, 2010, identified 14,413 at-risk parcels, representing 14,960 acres, intersecting habitats that may occasionally be used by the eastern indigo snake (indigo snake; *Drymarchon corais couperi*) in Monroe County. There are at-risk 10,921 acres and 10,711 parcels in unincorporated Monroe County; 1,406 acres and 1,433 parcels in Islamorada; 20 acres and 112 parcels in Key Colony Beach; 703 acres and 433 parcels in Key West; 1 acre and 6 parcels in Layton; and 1,910 acres and 1,718 parcels in Marathon. The BO also identified an additional 8,580 acres of at-risk lands outside Monroe County's parcel layer not subject to the Rate of Growth Ordinance program.

The at-risk properties were determined by overlaying the County's property parcel layer onto the County's 2009 land cover boundary maps (Monroe County 2009). The County's land cover boundary maps included 13 land cover types. Developed land, undeveloped land, impervious surface, and exotic are considered non-native land cover types. Hammock, pineland, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, and beach berm are considered native land cover types. The water classification is also considered a native cover type. The minimum mapping unit for land cover polygons was 0.35 acre for hammock and 0.5 acre for all other cover types.

The County's boundary map land cover types containing suitable habitat for the indigo snake include undeveloped land, hammock, pineland, exotic, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, and beach berm.

Species Profile: The Florida Keys are on the extreme southern end of the indigo snake's range. The indigo snake population in the Florida Keys is very small (Cox and Kautz 2000). Verified observations are rare and scattered; the latest was in 2009 on Little Knockemdown Key (Service 2010). In the last several years, three unsubstantiated observations of the indigo snake were reported, two on Grassy Key (City of Marathon) and one in the Village of Islamorada (Sheahan 2006). Indigo snake surveys were conducted on Big Pine and No Name Key in 2006 and 2007 (Schmidt et al. 2008) and, although 27 species of reptiles were noted (973 total observations), the indigo snake was not observed.

The Service issued a Section 10(a)(1)(B) Incidental Take Permit (ITP) to Monroe County, Florida Department of Transportation, and Florida Department of Community Affairs (applicants) in June 2006 for adverse effects from development on Big Pine and No Name Keys. The ITP authorizes take of 168 acres of suitable indigo snake habitat. The take will be incidental to land clearing for development and recreational improvements. The Service issued the ITP to the applicants based upon their development of a Habitat Conservation Plan (HCP) that sets guidelines for development activities on Big Pine and No Name Keys to occur progressively over the permit period (20 years). The HCP provides avoidance, minimization, and mitigation measures to offset impacts to covered

species, including the indigo snake. Mitigation includes the protection of three mitigation units for each development unit of suitable habitat within the plan area.

Threats: Although the species may occur in all referenced habitats, it is suspected that they prefer hammocks and pine forest, because most observations occur in these habitats disproportionately to their presence in the landscape (Steiner et al. 1983). In the Florida Keys, the primary threat to the indigo snake is native habitat loss and fragmentation due to development. Residential housing is also a threat because it increases the likelihood of indigo snakes being killed by property owners.

Assessment Guide: In order to provide assistance in assessing threats to the indigo snake from a given project, the Service has developed the following guidance and recommendations that, if implemented, will minimize adverse effects to the indigo snake. If the use of this guide results in a determination of “no effect” for a particular project, the Service supports this determination. If the use of this guide results in a determination of “not likely to adversely affect” (NLAA), the Service concurs with this determination and no additional correspondence is necessary. If the use of this guide results in a “may affect” determination, then additional coordination with the Service is necessary prior to permit issuance. This guide is subject to revision as necessary.

- A. Parcel is not in the species focus area and/or on the Real Estate (RE) parcel list*no effect*
 Parcel is in the species focus area or on the RE parcel list.....*go to B*
- B. Parcel is on Big Pine Key or No Name Key.....*may affect (refer to HCP)*
 Parcel is not on Big Pine Key or No Name Key.....*go to C*
- CC. The property is within a developed subdivision or canal subdivision and adjacent lots and properties within 500 feet are greater than 60 percent developed or scarified.
 Provide indigo snake protection measures brochure..... NLAA
 Not as Above.....go to D
- D. Parcel is mapped as containing the indigo snake’s native habitat (*i.e.*, hammock, pineland, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, or beach berm)*go to DE*
 Parcel is mapped as containing only non-native habitat (undeveloped land or exotic)*go to G*
- DE. The proposed action will not remove or modify the indigo snake’s native habitat.....*go to G*
 The proposed action will remove or modify the indigo snake’s native habitat. A vegetation survey is required to document the native plant species and size present on the property and a general description of the surrounding properties within 500 feet is also required. Once complete.....*go to FE*

~~E. The property is within a canal subdivision and adjacent lots and properties within 500 feet are greater than~~

Not as above ~~go to F~~

F. The applicant has proposed either on-site or off-site habitat compensation* commensurate with the amount of native habitat lost[#], has received a copy of the Service's indigo snake protection measures (attached), and has agreed to implement the measures, and to post the information brochure on-site. Applicant's ~~The signed verification of Assessment Form verifying~~ this is in the permit file maintained by the NFIP participant community. Permit with indigo snake protection measures and habitat compensation *NLAA*

The applicant will not agree to the indigo snake protection measures, is not proposing habitat compensation or the proposed habitat compensation does not meet minimum compensation requirements *may affect*

G. The applicant has received a copy of the Service's indigo snake protection measures, and has agreed to implement the measures, and to post the information brochure on-site. Applicant's ~~The signed verification of Assessment Form verifying~~ this is in the permit file maintained by the NFIP participant community. Permit with indigo snake protection measures *NLAA*

Not as above *may affect*

***Habitat Compensation**

The minimum recommended habitat compensation is replacement of lost vegetation ~~either through land acquisition, protection or habitat restoration or preservation of habitat, and/or monetary contributions to accomplish the aforementioned activities for land acquisition,~~ according to the participating community's land development regulations. A vegetation survey is required to document species and size present prior to construction impact. The Service considers the compensation as like-for-like replacement of habitat and the loss is not a deduction from the not-to-exceed habitat acreage losses referenced in the BO.

If habitat compensation is being provided in excess of the minimum recommended, the Service may consider the additional compensation as a credit to the not to exceed habitat acreage losses referenced in the BO. To be considered for credit, the compensation must be like for like habitat compensation and credit will be granted at half value. For example, if 4 acres of additional compensation are provided, the credit granted would be 2 acres. This partial credit is considered appropriate as existing vegetation currently provides benefit and the credit vegetation may not provide the same habitat benefit until later in time.

Monitoring and Reporting Effects

For the Service to monitor cumulative effects and to track incidental take exempted for the indigo snake, it is important for FEMA and the NFIP participants to monitor the number of permits and

provide information to the Service regarding the number of permits issued. In order to meet the reporting requirements in the BO, we request that FEMA and/or the NFIP participants send to the Service an annual database summary consisting of: project date, permit number, project acreage, native impact acreage, amount of acres and/or number of trees/plants replaced as habitat compensation, and project location in latitude and longitude in decimal degrees.

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- U.S. Fish and Wildlife Service. 2010. Eastern indigo snake observation; Little Knockemdown Key. Email and photo provided to KDNWR, Big Pine Key, Florida.

Eastern Indigo Snake Protection Measures

It appears that harm to the eastern indigo snake occurs primarily through construction accidents, vehicular strikes, and habitat loss and/or degradation. These adverse effects can be minimized by maintaining a careful watch during construction and when traveling onsite to avoid killing snakes. In addition, protecting burrows and leaving native vegetation as refugia onsite for indigo snakes displaced by construction activity can benefit this species.

The eastern indigo snake is not likely to be adversely affected if the following measures are implemented for the project.

- 1) Burrows and onsite native vegetation should be protected. If such habitat must be disturbed, limit disturbance to a minimum and improve remaining habitat through exotic vegetation removal. Maintain native vegetation onsite as refuges for the snake.
- 2) Clearing and grading activities should be performed outside high activity months (June to November). Winter months (January to March) provide the best opportunity to initiate and complete construction activities that will not impact this species.
- 3) Post informational signs containing the following information throughout the construction site and along any proposed access road:
 - a) A description and picture of the eastern indigo snake, its habits, and protection under Federal Law;
 - b) Instructions not to injure, harass, or kill this species;
 - c) Directions to cease clearing activities and allow the eastern indigo snake sufficient time to move away from the site on its own before resuming clearing; and,
 - d) Telephone numbers of pertinent agencies to be contacted if a dead eastern indigo snake is encountered.

Other useful educational materials may consist of a combination of posters, videos, pamphlets, and lectures (e.g., an observer trained to identify eastern indigo snakes could instruct construction personnel before any clearing activities occur).

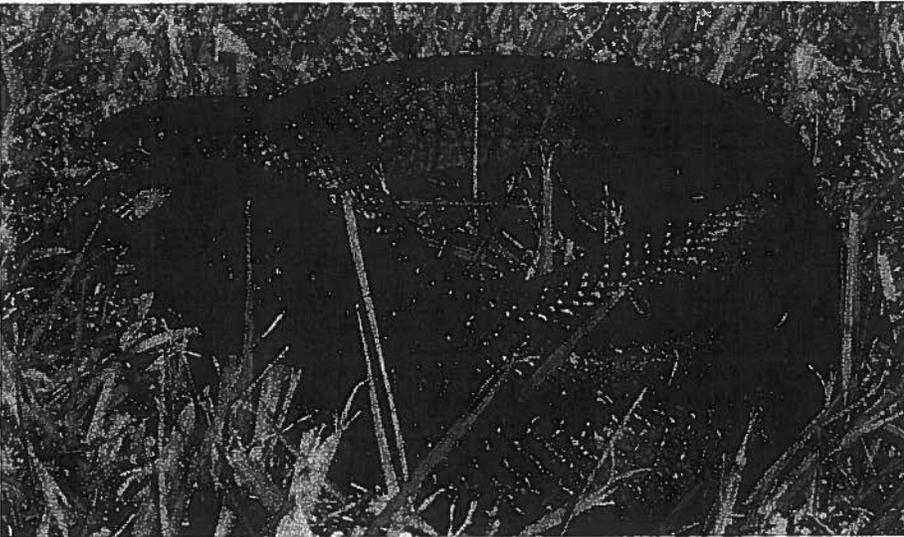
- 4) Monitor eastern indigo snake activity onsite. Report any eastern indigo snake observations that occur during project activities (see monitoring report below). Document with photograph, if possible. If large snake skins are found, they may belong to an eastern indigo snake. Skins can be collected and sent to the Service's South Florida Ecological Services Office (attention: Monroe County FEMA Biologist, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, Florida 32960) for positive identification. Provide information on the date and location collected.

Monitoring Report: A monitoring report should contain the following information: location, dates, and times for any sightings of eastern indigo snakes. Also include the results any of burrow searches and observations. If a snake is encountered during a burrow search, then a description of the outcome for the snake is needed. Document by photograph, if possible. Was the snake left in an intact burrow? Was the burrow excavated? If so, did the snake leave and where did it go? A site map with sighting locations marked would be helpful. If an indigo snake is observed onsite a copy of the report is to be sent to the Service at the address listed above within 60 days of the conclusion of the project.

Dead, injured, or sick animals: If a dead, injured, or sick eastern indigo snake is found onsite, notification should be made to the Service at the address listed above. Secondary notification should be made to the Florida Fish and Wildlife Conservation Commission; South Region; 3900 Drane Field Road; Lakeland, FL 33811; Wildlife Alert Number 1-800-404-3922.

Example Eastern indigo snake informational sign.

WATCH OUT FOR THE EASTERN INDIGO SNAKE



The Eastern Indigo Snake is the largest nonpoisonous snake in North America, growing up to 8 feet in length. The color of both adults and young is shiny bluish-black with some red or cream coloring on the chin or sides of the head. The indigo snake is usually found in high, dry, well-drained sandy soils, but may also be found in hammocks, swamps, and flatwoods habitats in south Florida. Burrows are used by many prey animals that are easily captured by the indigo snake in the burrow. Indigo snakes also use the burrows as dens for cover, and laying eggs. Other

potential dens are stumps of trees, cavities in the soil, and under piles of debris.

The decline in the population of indigo snakes is attributed to habitat loss due to development and overcollecting for the pet trade. Fragmentation of habitat by roads results in many indigo snakes killed by vehicle traffic.

Every effort should be undertaken to avoid harming any snake observed during work on this construction site. Any indigo snakes encountered during construction activity should be allowed to crawl off on its own before continuing construction activities. If it appears that the construction activities will cause harm to the snake, construction must be stopped until the proper action can be determined.

These rare snakes are protected by the U.S. Endangered Species Act (ESA) of 1973 makes it a violation to "harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect endangered or threatened species." Violations can result in fines of up to \$20,000 and/or up to one year in prison. Only permitted personnel are allowed to handle the snakes.

Contact the following agencies if indigo snakes are observed:
U.S. Fish and Wildlife Service 772-562-3909
Florida Fish and Wildlife Conservation Commission
800-282-8002

Lower Keys Marsh Rabbit Assessment Guide

~~December 2011~~

February 2012

The U.S. Fish and Wildlife Service's (Service) FEMA Biological Opinion (BO) dated April 30, 2010, and modified on December 14, 2010, identified 3,710 at-risk parcels, representing 4,331 acres, intersecting habitats that may occasionally be used by the endangered Lower Keys marsh rabbit (*Sylvilagus palustris hefneri*) in Monroe County. The BO also identified an additional 1,427 acres of at-risk lands outside Monroe County's parcel layer not subject to the Rate of Growth Ordinance (ROGO) program. In addition, the BO noted that the ROGO program would allow for the construction of 871 new residences (with a potential for 787 associated cats); 296 residences (268 cats) in potentially suitable Lower Keys marsh rabbit habitat and 575 residences (520 cats) in adjacent buffer lands. New residences in the buffer areas may have an indirect effect on predation of the Lower Keys marsh rabbit due to associated free-roaming cats (see Tables 19, EA-11a and EA-11b in the BO).

The at-risk properties were determined by overlaying the County's property parcel layer onto the County's 2009 land cover boundary maps (Monroe County 2009). The County's land cover boundary maps included 13 land cover types. Developed land, undeveloped land, impervious surface, and exotic are considered non-native land cover types. Hammock, pineland, scrub mangrove, freshwater wetland, salt marsh, buttonwood, mangrove, and beach berm are considered native land cover types. The water classification is also considered a native cover type. The minimum mapping unit for land cover polygons was 0.35 acre for hammock and 0.5 acre for all other cover types.

The County's boundary map land cover types containing suitable habitat for the Lower Keys marsh rabbit included pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm. We also noted that potential habitat is present only in unincorporated Monroe County (Lower Keys only).

Species Profile: The Lower Keys marsh rabbit's historic range extended from Big Pine Key to Key West, encompassing a linear distance of about 30 miles. It occurs on some of the larger keys from Boca Chica, just north of Key West, to Big Pine Key. The Lower Keys marsh rabbit is habitat specific, depending upon a transition zone of grasses and sedges for feeding, shelter, and nesting. The majority of potential suitable habitat areas lie in transitional zones between marine environments and uplands. The current population estimate is about 500 rabbits in the Lower Florida Keys (Perry, personal communication, 2006). Although habitat loss is responsible for the original decline of the Lower Keys marsh rabbit, high mortality from predation from feral cats has also occurred and may be the greatest current threat. Feral cat control is an ongoing operation on Naval Air Station Key West (NASKW) and lands within the National Key Deer Refuge (NKDR). However, feral cat control activities outside NASKW and the NKDR are unknown.

Typical Lower Keys marsh rabbit habitat includes wetlands with a dense herbaceous cover that is dominated by a mixture of grasses, sedges, and forbs. This community is considered a transitional plant community that is similar in form and species composition to comparable communities interspersed among the mangrove forests of mainland Florida (Forys and Humphrey 1994). Forys (1995) concluded that marsh rabbits spend most of their time in the mid-marsh (seaside oxeye) and high-marsh (cordgrasses and marsh fimbry) and avoid areas with mature buttonwoods and high canopy cover.

Marsh rabbits have been documented to feed on at least 19 different plant species (Forys 1995). However, the most abundant species in the rabbit's diet is seashore dropseed, glassworts, cordgrass, seaside oxeye, red mangrove, and white mangrove.

Marsh rabbits are sexually mature at about 9 months of age. During this time, the majority of the males disperse. Sexually maturing females are not as likely as males to disperse. Like other marsh rabbit subspecies, Lower Keys marsh rabbits are polygamous, and generally breed throughout the year (Holler and Conway 1979). Although Lower Keys marsh rabbits do not display an apparent seasonal breeding pattern (Service 1994), the highest proportion of females with litters occurs in March and September; the lowest proportion occurs in April and December.

The Service issued a Section 10(a)(1)(B) Incidental Take Permit (ITP) to Monroe County, Florida Department of Transportation, and Florida Department of Community Affairs (applicants) in June 2006 for adverse effects from development on Big Pine and No Name Keys. The ITP was issued to the applicants based upon their development of a Habitat Conservation Plan (HCP) that sets guidelines for development activities on Big Pine and No Name Keys to occur progressively over the permit period (20 years). The take will be incidental to land clearing for development and recreational improvements. The HCP provides avoidance, minimization, and mitigation measures to offset impacts to covered species. Mitigation includes the protection of three mitigation units for each development unit of suitable habitat within the plan area.

The HCP includes specific development restrictions in Lower Keys marsh rabbit habitat and within a 1,640-foot (500 meter) buffer surrounding this habitat. The distance of 1,640-feet is based on the use of upland areas by this species and the estimated distance domestic cats will travel from their homes (Frank, personal communication, 1996). The ITP does not authorize incidental take of suitable marsh rabbit habitat, but does authorize incidental take of up to 40 acres of buffer lands surrounding suitable marsh rabbit habitat. Since incidental take of suitable marsh rabbit habitat was not exempted in the Big Pine and No Name HCP, the potential direct, indirect, and cumulative effects of NFIP actions on at-risk marsh rabbit habitat were addressed in the 2010 FEMA BO.

Threats: The Lower Keys marsh rabbit is vulnerable to predation by free-roaming cats, habitat loss and degradation, fire suppression, vehicular traffic, hurricanes, sea level rise, fire ants, and exotic constrictor snakes. The greatest threats to the continued existence of the Lower Keys marsh rabbit are predation by cats, habitat loss and degradation, and hurricanes (Service 2007). These threats not only directly affect the viability of local subpopulations, but also reduce the probability of successful dispersal among the increasingly fragmented habitats. Connectivity

among suitable habitat patches is necessary for Lower Keys marsh rabbit dispersal among patches (Forys and Humphrey 1999), and dispersal is a necessary process if rabbit metapopulations are to remain self-sustainable.

Assessment Guide: In order to provide assistance in assessing threats to the Lower Keys marsh rabbit from a given project, the Service has developed the following guidance and recommendations that, if implemented, will minimize adverse effects to this species. If this guide results in a determination of “no effect,” the Service supports this determination. If this guide results in a determination of “not likely to adversely affect” (NLAA) for these species and a cat brochure is provided, then the Service concurs and no additional correspondence is necessary. If the use of this guide results in a “may affect” determination, then further coordination with the Service is necessary. This guide is subject to revision as necessary.

A. Parcel is located in the species focus area or on the Real Estate (RE) parcel list.....*go to B*

Parcel is located in the buffer area (a zone extending 500 meters [1,641 feet] from the focus area) If a parcel is mapped as being both within the species focus area and the buffer zone, it should be wholly considered as being in the species focus area.....*go to G*

Parcel is not in the species focus area, the buffer area, or on the RE parcel list.....*no effect*

B. Parcel is on Big Pine Key or No Name Key..... *may affect (refer to HCP)*

Parcel is not on Big Pine Key or No Name Key.....*go to C*

C. The applicant proposes no removal or modification of this species’ native habitat (pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm).....*go to GH*

The applicant proposes removal or modification of this species’ native habitat (pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm). A vegetation survey is required to document the native plant species and size present on the property and a general description of the surrounding properties within 500 feet is also required. Once these have been completed..... *go to D*

D. The property is within a canal subdivision or developed subdivision and adjacent lots and properties within 500 feet are greater than 60 percent developed or scarified..... *go to GH*

The property is not as above and contains and/or is adjacent to contiguous tracts of this species’ native habitat greater than 1 acre in size. A Lower Keys marsh rabbit survey (authorized by the Service) is required.....*go to E*

Native habitat (pinelands, scrub mangrove, freshwater wetland, salt marsh, buttonwood, and beach berm) will be impacted but neither of the above apply to the property.....*go to F*

- E. The Lower Keys marsh rabbit survey was negative.....*go to F*
 The Lower Keys marsh rabbit survey was positive..... *may affect*
- F. The applicant has proposed either on-site or off-site habitat compensation* commensurate with the amount of native habitat lost.....*go to GH*
 The applicant is not proposing habitat compensation or habitat compensation does not meet minimum compensation requirements.....*may affect*
- GG. Parcel is within a canal subdivision, and is separated by a canal, open water, or US-1 from native habitat in the focus area larger than 1 acre. Provide cat brochure.....NLAA
 The parcel is not as above..... *go to H*
- H. The applicant proposes the construction of a new residence.....*go to HI*
 Proposal is for actions other than a new residence. Provide cat brochure.....NLAA
- HI. The new residence is proposed in the species focus area and the total of new residential permits issued in the focus area lands has not exceeded 296. Provide cat brochure.....*take exempted in BO, additional consultation with the Service not required*
 The new residence is proposed in the buffer area and the total number of new residential permits issued in buffer lands has not exceeded 575. Provide cat brochure.*take exempted in BO, additional consultation with the Service not required*
 The proposed new residence exceeds the limits of take in the 2010 BO (296 residences in the focus area and 575 residences in buffer lands).....*may affect*

***Habitat Compensation**

The minimum recommended habitat compensation is replacement of lost vegetation either through ~~land acquisition, habitat protection or restoration or preservation of habitat, and/or monetary contributions to accomplish the aforementioned activities for land acquisition,~~ according to the participating community's land development regulations. A vegetation survey is required to document species and size present prior to construction impact. The Service considers the compensation as like-for-like replacement of habitat and the loss is not a deduction from the not-to-exceed habitat acreage losses referenced in the BO.

If habitat compensation is being provided in excess of the minimum recommended, the Service may consider the additional compensation as a credit to the not to exceed habitat acreage losses referenced in the BO. To be considered for this credit, the compensation must be like for like habitat compensation and credit will be granted at half value. For example, if 4 acres of additional compensation are provided, the credit granted is 2 acres. This partial credit is

considered appropriate as existing vegetation currently provides benefit and the credit vegetation may not provide the same habitat benefit until later in time.

Monitoring and Reporting Effects

For the Service to monitor cumulative effects and to track incidental take exempted for the Lower Keys marsh rabbit, it is important for FEMA and the NFIP participants to monitor the number of permits and provide information to the Service regarding the number of permits issued. In order to meet the reporting requirements in the BO, we request that FEMA and/or the NFIP participants send to the Service an annual database summary consisting of: project date, permit number, project acreage, native impact acreage, amount of acres and/or number of trees/plants replaced as habitat compensation, and project location in latitude and longitude in decimal degrees.

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- Forys, E.A. and S.R. Humphrey. 1994. Biology and status of the Lower Keys marsh rabbit. Final Report, Contract No. N62467-90-C-0766. Florida Game and Fresh Water Fish Commission, Tallahassee, Florida.
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- Perry, N.D. 2006. Personal communication. Texas A&M University. College Station.
- U.S. Fish and Wildlife Service. 1994. Recovery Plan for the Lower Keys marsh rabbit. U.S. Fish and Wildlife Service; Atlanta, Georgia.
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U.S. Fish and Wildlife Service. 2007. Lower Keys marsh rabbit, 5-year status review. Atlanta, Georgia.

49 **WHEREAS**, on September 9, 2005, the District Court entered an order enjoining FEMA from
50 issuing flood insurance under the NFIP on any new residential or commercial developments in suitable
51 habitats of federally listed species in the Keys; and

52
53 **WHEREAS**, the District Court also ordered the Service to submit a new BO by August 9, 2006.
54 The Service issued a new BO on August 8, 2006; and

55
56 **WHEREAS**, on April 1, 2008, the United States Court of Appeals for the Eleventh Circuit
57 affirmed the District Court's rulings of March 29, 2005 and September 9, 2005;; and

58
59 **WHEREAS**, On February 26, 2009, the District Court ordered the Service to submit a new BO
60 by March 31, 2010 and on March 28, 2010, the Court granted a 30 day extension of this deadline; and

61
62
63 **WHEREAS**, on April 30, 2010, the Service published the revised BO for FEMA's
64 administration of the NFIP in Monroe County; and

65
66 **WHEREAS**, the BO contains "Reasonable and Prudent Alternatives" (RPA's) that require
67 Monroe County and other participating communities in the Florida Keys to revise their Flood Damage
68 Prevention Ordinance(s) to reference and use the updated real estate list (referenced in RPA paragraph
69 1) within 120 days of acceptance of this BO by the Court, and;

70
71 **WHEREAS**, on January 11, 2011, the District Court approved a Settlement Agreement between
72 the Plaintiffs and the Federal Defendants in which the Federal Defendants agreed to notify the Court
73 and the parties when Monroe County and the other "participating communities" in the Florida Keys
74 have: 1) revised their Flood Damage Prevention Ordinance(s); and 2) implemented procedures to
75 reference and use the updated real estate list and Species Focus Area Maps (referenced in reasonable and
76 prudent alternative ("RPA") paragraph 1) in compliance with paragraphs 2, 3, 4, and 5 of the RPA; and

77
78 **WHEREAS**, on December 2, 2011, FEMA notified Monroe County that if the County ~~decides~~
79 ~~did not to~~ implement the RPA's by January 11, 2012, then Monroe County ~~will-would have been~~ placed
80 on probation on May 10, 2012. ~~A notice will be sent to the County on January 12, 2012 that probation~~
81 ~~will be effective on May 10, 2012~~ In response to the County's requested time extension, FEMA
82 requested and the Court granted an extension to June 30, 2012 for the ordinance revisions and permit
83 referral process implementation; and

84
85 **WHEREAS**, the County Attorney, outside counsel, and the Growth Management Director have
86 advised the Board that adoption of the RPA's; ~~and ordinance language; and originally drafted Species~~
87 Assessment Guides (SAGs) suggested by the Federal agencies would have resulted in increased
88 exposure to the County for liability for inverse condemnation or takings claims; and

89
90 **WHEREAS**, FEMA and the Service revised the SAGs to include provisions that substantially
91 reduce the County's potential exposure for liability for inverse condemnation or takings claims; and

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92
93 **WHEREAS**, On March 19, 2012, FEMA provided comments (attached as Exhibit XX) on the
94 County's DRAFT Ordinance, transmitted by the County to FEMA; and

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95
96 **WHEREAS**, because the Florida Constitution prohibits the County from incorporating future
97 federal statutes and regulations into its existing ordinances, the County is unable to adopt the

98 "subsequent revisions" to the Species Focus Area Maps (SFAMs) or Species Assessment Guides
99 (SAGs) into this ordinance as desired by FEMA, until the subsequent revisions are published and
100 adopted by the then sitting Board of County Commissioners pursuant to the process set forth in Florida
101 law; see, e.g., *Abbott Laboratories v. Mylan Pharmaceuticals*, 15 So.3d 642 (Fla. 1st DCA 2009); and

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102
103 **WHEREAS**, the County has revised said ordinance; and

104
105 **WHEREAS**, the Florida Legislature adopted Chapter 2012-XX Laws of Florida, effective July
106 1, 2012, which states:

107
108 *"For any development permit application filed with the county after July 1, 2012, a county may*
109 *not require as a condition of processing or issuing a development permit that an applicant*
110 *obtain a permit or approval from any state or federal agency unless the agency has issued a final*
111 *agency action that denies the federal or state permit before the county action on the local*
112 *development permit. Issuance of a development permit by a county does not in any way create*
113 *any rights on the part of the applicant to obtain a permit from a state or federal agency and does*
114 *not create any liability on the part of the county for issuance of the permit if the applicant fails to*
115 *obtain requisite approvals or fulfill the obligations imposed by a state or federal agency or*
116 *undertakes actions that result in a violation of state or federal law. A county may attach such a*
117 *disclaimer to the issuance of a development permit and may include a permit condition that all*
118 *other applicable state or federal permits be obtained before commencement of the development.*
119 *This section does not prohibit a county from providing information to an applicant regarding*
120 *what other state or federal permits may apply."*

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121
122 **WHEREAS**, the State definition of development permit in Chapter 163.3164 (16) Florida Statutes
123 is:

124 *"Development permit" includes any building permit, zoning permit, subdivision approval, rezoning,*
125 *certification, special exception, variance, or any other official action of local government having the*
126 *effect of permitting the development of land.'*

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127
128 **WHEREAS**, the County Attorney, outside counsel, and the Growth Management Director ~~that~~
129 ~~the following have proposed an ordinance with alternative language meets the spirit and overriding~~
130 ~~intent of the to meet the~~ RPAS, which is consistent with Federal law, addresses Chapter 2012-XX, Laws
131 of Florida, and adequately protects the County taxpayers against accepting that additional liability;

132
133
134 **NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY**
135 **COMMISSIONERS OF MONROE COUNTY, FLORIDA:**

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136
137
138
139 Section 1. The Monroe County Land Development Code shall be amended as follows:

140
141 Sec. 122-2. General provisions.

142 (b) ~~Adoption of Basis for Establishing Special Flood Hazard maps; Species Focus Area mMaps~~
143 ~~(SFAMs) and Real Estate (RE) List; and Species Assessment Guides (SAGs).~~

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144 1. Special Flood Hazard Maps. The areas of special flood hazard identified by the Federal
145 Emergency Management Agency (FEMA) in its October 17, 1989 Flood Insurance Study and Wave
146 Height Analysis for Monroe County, Florida, Unincorporated Areas, ~~dated October 17, 1989~~ as amended
147 February 18, 2005, with the ~~or the~~ most current official maps approved by FEMA, with accompanying
148 ~~maps and other~~ supporting data, and any revisions thereof, are adopted by reference and declared to be a
149 part of this chapter, and shall be kept on file, available to the public, in the offices of the county Building
150 Department. Letters of Map Amendment, Letters of Map Revision, Letters of Map Revision Based on
151 Fill, and Conditional Letters of Map Revision approved by FEMA are acceptable for implementation of
152 this regulation.

153 2. Species Focus Area Maps (SFAMs) and Real Estate (RE) List. FEMA and FWS have
154 provided the Species Focus Area Maps (SFAMs) mailed to Monroe County and dated April 30, 2011,
155 and a listing of real estate numbers of parcels (RE list) emailed to Monroe County and dated November
156 18, 2011, that are within the SFAMs and that have been identified by FWS. The SFAMs and the RE
157 List that are within the SFAMs identified by the FWS in accordance with the Biological Opinion, dated
158 April 30, 2010, as amended December 14, 2010, are hereby declared to be a part of this ordinance. The
159 SFAMs and RE list are on file at the Monroe County Clerk's office and the Monroe County Growth
160 Management Division Office.

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161
162 3. Species Assessment Guides (SAGs). FEMA and FWS have provided the Species Assessment
163 Guides (SAGs) mailed to Monroe County and dated XX, 2012 are declared to be a part of this
164 ordinance. The SAGs are on file at the Monroe County Clerk's office and the Monroe County Growth
165 Management Division Office.

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166
167 Section 2. The Monroe County Land Development Code is amended by adding Section 122-10
168 as follows:

169
170 Sec. 122-10. Inclusion of United States Federal Emergency Management Agency (FEMA) and
171 United States Fish and Wildlife Service (FWS) Permit Referral Process (PRP) Requirements in Final
172 Permit Determinations

173
174 (a) Purpose and intent. It is the purpose of Section 122-10 to implement regulations that will
175 assure, consistent with the 10th Amendment to the U.S. Constitution, state and County regulations,
176 proper record retention, coordination, and notification of FEMA and FWS regarding permit applications
177 filed with or issued by Monroe County, inclusive of FEMA/FWS requirements agreed to by the
178 applicant.

179
180 (b) Lands to which this Section apply. See Section 122-2 (2) and (3) FEMA and FWS have
181 provided the Species Focus Area Maps (SFAMs) mailed to Monroe County and dated XX, 2011, and a
182 listing of real estate numbers of parcels (RE list) mailed to Monroe County and dated XX, 2011, that are
183 within the SFAMs and that have been identified by FWS. The FWS and FEMA identified properties
184 are hereby declared to be a part of these regulations. The SFAMs and RE list are on file at the Monroe
185 County Clerk's office and the Monroe County Growth Management Division Office.

186
187 (c) Rules for interpreting SFAMs. The boundaries of the flood hazard areas shown on the
188 FEMA SFAMs may be determined by scaling distances. Required interpretations of those maps for
189 precise locations of such boundaries shall be made by the County Planning Director or his/her designee,
190 in consultation with the building official.

239 iv. If the parcel is within an area previously covered by a Habitat Conservation Plan, and where
240 that Habitat Conservation Plan has expired at the time of development permit application, the County
241 shall apply this Permit Referral Process.

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242
243
244
245 ~~require property owners to apply to FWS for any FWS required approval or FWS building~~
246 ~~conditions prior to issuing any development approval and shall require the following:~~

247
248 ~~i. Property owners shall request FWS review prior to applying for any Monroe County~~
249 ~~permit for new development.~~

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250
251 ~~ii. Once the property owner has received from the FWS a letter stating the results of the~~
252 ~~FWS review, the letter shall be submitted to the County, accompanied by a County form for a Monroe~~
253 ~~County Permit.~~

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254
255 ~~iii. Based on the requirements contained in the FWS letter, the County shall require~~
256 ~~the owner of the property to sign a form acknowledging agreement to the FWS conditions and~~
257 ~~the County shall maintain the acknowledgement form in the permit file.~~

258
259 ~~iv. The County shall, based on the acknowledgement form from the property owner,~~
260 ~~incorporate the FWS letter conditions into any final Monroe County development permit.~~

261
262 v. If the property owner does not agree to the FWS conditions, the County shall not
263 ~~accept the application for development permit, issue the notice to proceed.~~

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264
265 c. Provision for Flood Hazard Reduction and Avoiding impacts on federally listed species
266 Enforcement. All proposed development shall meet the conditions established on the floodplain
267 development permit based on the Service recommendations to avoid possible impacts on federally-
268 protected endangered species. Violation of this section Chapter, including any development constructed
269 not in accordance with the owner acknowledged FWS conditions derived through use of the SAGs or
270 through technical assistance by FWS, are hereby deemed to be violations of the County Code and may
271 be enforced as follows:

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272
273 i. The County may utilize the administrative enforcement procedures set forth in
274 Chapter 8, Monroe County Code of Ordinances;

275
276 ii. The County's Growth Management Director may make a formal complaint to the
277 U.S. FWS Office of Law Enforcement;

278
279 iii. The County may file an action in a court of competent jurisdiction seeking
280 damages as well as injunctive and/or equitable relief;

281
282 iv. The County Floodplain Administrator may notify FEMA that the property is in
283 violation of this ordinance and should be considered for treatment under § 1316 of the National
284 Flood Insurance Act; and/or

285
286 iv. Knowing violations of this section may be prosecuted in the same manner as
287 misdeanors are prosecuted in the name of the State in a court having jurisdiction of

331 by the State Land Planning Agency or Administrative Commission approving the ordinance
332 pursuant to Chapter 380, Florida Statutes, and after any appeal period has expired.

333 **Section 6. Codification**

334 The provisions of this ordinance shall be included and incorporated into the Code of Ordinances of
335 the County of Monroe, Florida, as an addition or amendment thereto and shall be appropriately
336 numbered to conform to the uniform numbering system of the Code.

337 ~~Section 2. Severability language to be inserted~~

339 ~~Section 3. Effective date language to be inserted~~

342 **PASSED AND ADOPTED** by the Board of County Commissioners of Monroe County, Florida
343 at a regular meeting held on the XXth day of XXXX, 2012.

346 Mayor David Rice _____
347 Mayor Pro Tem Kim Wigington _____
348 Commissioner Heather Carruthers _____
349 Commissioner George Neugent _____
350 Commissioner Sylvia Murphy _____

352 **BOARD OF COUNTY COMMISSIONERS OF MONROE**
353 **COUNTY, FLORIDA**

355 **BY** _____
356 Mayor David Rice

358 (SEAL)
359 ATTEST: DANNY L. KOLHAGE, CLERK

362 _____
363 DEPUTY CLERK

**Item #1 Amend Floodplain Regulations
Draft Ordinance *WITHOUT* addressing
State Bill**

ORDINANCE NO. _____-2012

AN ORDINANCE BY THE MONROE COUNTY BOARD OF COUNTY COMMISSIONERS AMENDING CHAPTER 122 FLOODPLAIN REGULATIONS, CREATING SECTION 122-10 PROVIDING FOR INCLUSION OF UNITED STATES FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) AND UNITED STATES FISH AND WILDLIFE SERVICE (FWS) REQUIREMENTS IN PERMIT REFERRAL PROCESS IMPLEMENTATION AND DETERMINATIONS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF CONFLICTING PROVISIONS; PROVIDING FOR TRANSMITTAL TO THE STATE LAND PLANNING AGENCY AND THE SECRETARY OF STATE; PROVIDING FOR CODIFICATION; PROVIDING FOR AN EFFECTIVE DATE.

~~AN ORDINANCE OF THE MONROE COUNTY BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA AMENDING ITS FLOODPLAIN MANAGEMENT ORDINANCE TO PROVIDE FOR ENHANCED PROTECTIONS FOR ENDANGERED SPECIES HABITAT.~~

WITHOUT ADDRESSING STATE BILL.

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WHEREAS, the National Flood Insurance Program (NFIP) is a Federal program enabling property owners in participating communities to purchase flood insurance in exchange for the community’s adoption of floodplain management regulations to reduce future flood damages; and

WHEREAS, in 1990 the National Wildlife Federation, Florida Wildlife Federation, and the Defenders of Wildlife filed suit against the Federal Emergency Management Agency (FEMA) claiming FEMA was not consulting with the U.S. Fish and Wildlife Service (Service) as required by the Endangered Species Act in their administration of the National Flood Insurance Program (NFIP) in Monroe County, Florida; and

WHEREAS, in 1997 the Service completed a Biological Opinion (BO) for the effects of the NFIP on Federally protected species in the Florida Keys; and

WHEREAS, the 1997 BO found the NFIP jeopardized nine species in the Keys; and

WHEREAS, in 2003 the Service re-initiated consultation and amended the 1997 BO and concluded that the effect of the NFIP would result in jeopardy on eight of 10 species evaluated in the BO; and

WHEREAS, in a second amended complaint in 2003 the plaintiffs filed suit against FEMA and the Service pursuant to the Endangered Species Act and the Administrative Procedures Act; and

WHEREAS, on March 29, 2005 the United States District Court, Southern District of Florida (District Court) granted summary judgment in favor of the Plaintiffs which found that the Service and FEMA violated the Endangered Species Act and the Administrative Procedures Act; and

49 **WHEREAS**, on September 9, 2005, the District Court entered an order enjoining FEMA from
50 issuing flood insurance under the NFIP on any new residential or commercial developments in suitable
51 habitats of federally listed species in the Keys; and

52 **WHEREAS**, the District Court also ordered the Service to submit a new BO by August 9, 2006.
53 The Service issued a new BO on August 8, 2006; and

54 **WHEREAS**, on April 1, 2008, the United States Court of Appeals for the Eleventh Circuit
55 affirmed the District Court’s rulings of March 29, 2005 and September 9, 2005;; and

56 **WHEREAS**, On February 26, 2009, the District Court ordered the Service to submit a new BO
57 by March 31, 2010 and on March 28, 2010, the Court granted a 30 day extension of this deadline; and

58 **WHEREAS**, on April 30, 2010, the Service published the revised BO for FEMA’s
59 administration of the NFIP in Monroe County; and

60 **WHEREAS**, the BO contains “Reasonable and Prudent Alternatives” (RPA’s) that require
61 Monroe County and other participating communities in the Florida Keys to revise their Flood Damage
62 Prevention Ordinance(s) to reference and use the updated real estate list (referenced in RPA paragraph
63 1) within 120 days of acceptance of this BO by the Court, and;

64 **WHEREAS**, on January 11, 2011, the District Court approved a Settlement Agreement between
65 the Plaintiffs and the Federal Defendants in which the Federal Defendants agreed to notify the Court
66 and the parties when Monroe County and the other “participating communities” in the Florida Keys
67 have: 1) revised their Flood Damage Prevention Ordinance(s); and 2) implemented procedures to
68 reference and use the updated real estate list and Species Focus Area Maps (referenced in reasonable and
69 prudent alternative (“RPA”) paragraph 1) in compliance with paragraphs 2, 3, 4, and 5 of the RPA; and

70 **WHEREAS**, on December 2, 2011, FEMA notified Monroe County that if the County ~~decides~~
71 ~~did not to~~ implement the RPA’s by January 11, 2012, then Monroe County ~~will-would have been~~ placed
72 on probation on May 10, 2012. ~~-A notice will be sent to the County on January 12, 2012 that probation~~
73 ~~will be effective on May 10, 2012~~ In response to the County’s requested time extension, FEMA
74 requested and the Court granted an extension to June 30, 2012 for the ordinance revisions and permit
75 referral process implementation; and

76 **WHEREAS**, the County Attorney, outside counsel, and the Growth Management Director have
77 advised the Board that adoption of the RPA’s, ~~and~~ ordinance language, and originally drafted Species
78 Assessment Guides (SAGs) suggested by the Federal agencies would have resulted in increased
79 exposure to the County for liability for inverse condemnation or takings claims; and

80 **WHEREAS**, FEMA and the Service revised the SAGs to include provisions that substantially
81 reduce the County’s potential exposure for liability for inverse condemnation or takings claims; and

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82 **WHEREAS**, On March 19, 2012, FEMA provided comments (attached as Exhibit XX) on the
83 County’s DRAFT Ordinance, transmitted by the County to FEMA; and

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84 **WHEREAS**, because the Florida Constitution prohibits the County from incorporating future
85 federal statutes and regulations into its existing ordinances, the County is unable to adopt the

98 “subsequent revisions” to the Species Focus Area Maps (SFAMs) or Species Assessment Guides
99 (SAGs) into this ordinance as desired by FEMA, until the subsequent revisions are published and
100 adopted by the then sitting Board of County Commissioners pursuant to the process set forth in Florida
101 law; see, e.g., *Abbott Laboratories v. Mylan Pharmaceuticals*, 15 So.3d 642 (Fla. 1st DCA 2009); and

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102
103 WHEREAS, the County has revised said ordinance; and

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105
106 **WHEREAS**, the County Attorney, outside counsel, and the Growth Management Director ~~that~~
107 ~~the following have~~ proposed an ordinance with alternative language ~~meets the spirit and overriding~~
108 ~~intent of the to meet the~~ RPAS, which is consistent with Federal law, and adequately protects the County
109 taxpayers against accepting that additional liability;

110
111
112 **NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY**
113 **COMMISSIONERS OF MONROE COUNTY, FLORIDA:**

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114
115 Section 1. The Monroe County Land Development Code shall be amended as follows:

116
117 Sec. 122-2. General provisions.

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118 (b) ~~Adoption of Basis for Establishing Special Flood Hazard maps; Species Focus Area mMaps~~
119 ~~(SFAMs) and Real Estate (RE) List; and Species Assessment Guides (SAGs).~~

120 1. Special Flood Hazard Maps. The areas of special flood hazard identified by the Federal
121 Emergency Management Agency (FEMA) in its October 17, 1989 Flood Insurance Study and Wave
122 Height Analysis for Monroe County, Florida, Unincorporated Areas, ~~dated October 17, 1989, or the with~~
123 the most current official maps approved by FEMA, with accompanying maps and other supporting data,
124 and any revisions thereof, are adopted by reference and declared to be a part of this chapter, and shall be
125 kept on file, available to the public, in the offices of the county ~~planning development~~ Building
126 Department Letters of Map Amendments, Letters of Map Revisions, Letters of Map Revision Based on
127 Fill, and Conditional Letters of Map Revisions approved by FEMA are acceptable for implementation of
128 this regulation.

129 2. Species Focus Area Maps (SFAMs) and Real Estate (RE) List. FEMA and FWS have
130 provided the Species Focus Area Maps (SFAMs) mailed to Monroe County and dated April 30, 2011,
131 and a listing of real estate numbers of parcels (RE list) emailed to Monroe County and dated November
132 18, 2011, that are within the SFAMs and that have been identified by FWS. The SFAMs and the RE
133 List that are within the SFAMs identified by the FWS in accordance with the Biological Opinion, dated
134 April 30, 2010, as amended December 14, 2010, are hereby declared to be a part of this ordinance. The
135 SFAMs and RE list are on file at the Monroe County Clerk’s office and the Monroe County Growth
136 Management Division Office.

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137
138 3. Species Assessment Guides (SAGs). FEMA and FWS have provided the Species Assessment
139 Guides (SAGs) mailed to Monroe County and dated XX, 2012 are declared to be a part of this
140 ordinance. The SAGs are on file at the Monroe County Clerk’s office and the Monroe County Growth
141 Management Division Office.

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144 | Section 2. The Monroe County Land Development Code is amended by adding Section 122-10
145 | as follows:Section 2. The Monroe County Land Development Code shall be amended as follows:

146 | Sec. 122-10.Inclusion of United States Federal Emergency Management Agency (FEMA) and
147 | United States Fish and Wildlife Service (FWS) Permit Referral Process (PRP) Requirements in Final
148 | Permit Determinations

149 |
150 | (a) Purpose and intent. It is the purpose of Section 122-10 to implement regulations that will
151 | assure, consistent with the 10th Amendment to the U.S. Constitution, state and County regulations,
152 | proper record retention, coordination, and notification of FEMA and FWS regarding permit applications
153 | filed with or issued by Monroe County, inclusive of FEMA/FWS requirements agreed to by the
154 | applicant.

155 |
156 | (b) Lands to which this Section apply. ~~See Section 122-2 (2) and (3) FEMA and FWS have~~
157 | ~~provided the Species Focus Area Maps (SFAMs) mailed to Monroe County and dated XX, 2011, and a~~
158 | ~~listing of real estate numbers of parcels (RE list) mailed to Monroe County and dated XX, 2011, that are~~
159 | ~~within the SFAMs and that have been identified by FWS. The FWS and FEMA identified properties~~
160 | ~~are hereby declared to be a part of these regulations. The SFAMs and RE list are on file at the Monroe~~
161 | ~~County Clerk's office and the Monroe County Growth Management Division Office.~~

162 |
163 | (c) Rules for interpreting SFAMs. The boundaries of the flood hazard areas shown on the
164 | FEMA SFAMs may be determined by scaling distances. Required interpretations of those maps for
165 | precise locations of such boundaries shall be made by the County Planning Director or his/her designee,
166 | in consultation with the building official.

167 |
168 | (d) Administration of Development Approval in Species Focus Areas.

169 |
170 | a. SFA Review Required. For parcels or lots shown within the SFAMs in which an
171 | application for development permit has been made, if the SFAM indicates the parcel or lot contains only
172 | unsuitable habitat for any of the following species: Key Largo Cotton Mouse, Key Largo woodrat, Key
173 | tree-cactus, Lower Keys marsh rabbit, Eastern indigo snake, Key deer, Schaus swallowtail butterfly,
174 | silver rice rate, and Stock Island tree snail, and the parcel or lot is not listed on the RE list, the Planning
175 | Director or his/her designee shall provide for a notation in the development application permit files that
176 | indicates:

- 177 | i. The name of the official that made the determination;
178 |
179 | ii. The date of the determination;
180 |
181 | iii. The date of the SFAM and RE list used to make the determination.

182 |
183 | Once the determination has been made that a parcel or lot contains unsuitable habitat, action may
184 | be taken on the permit application by Monroe County staff.

185 |
186 | b. ~~FWS Approval- Permit Conditions.~~ For parcels or lots shown within the SFAMs in which
187 | an application for development permit ~~that 1) expands the footprint of a structure; or 2) expands~~
188 | ~~associated clearing of; or 3) includes placement of fencing into native habitat~~ has been made, if the
189 | SFAM indicates the parcel or lot contains suitable habitat for any of the following species: Key Largo
190 | Cotton Mouse, Key Largo woodrat, Key tree-cactus, Lower Keys marsh rabbit, Eastern indigo snake,
191 | Key deer, Schaus swallowtail butterfly, silver rice rat, and/or Stock Island tree snail, and the parcel or lot

192 is listed on the RE list, the Planning Director or his/her designee shall use the SAGs to determine
193 whether a floodplain development permit application requires:

- 194 i. incorporation of FWS conditions into the Monroe County permit; or
- 195
- 196
- 197 ii. needs technical assistance by the service.
- 198

199 For a floodplain development permit application that requires the Services' technical assistance,
200 Monroe County shall provide the application to the service weekly. Based on the Services technical
201 assistance, Monroe County shall condition the floodplain development permit to incorporate the Service
202 recommendations to avoid possible impacts on federally-protected endangered species. The County
203 shall maintain an Acceptance Form of the Service recommendations in the permit file.

204

- 205 iii. If the parcel is within an area previously covered by a Habitat Conservation Plan, and where
206 that Habitat Conservation Plan has expired at the time of development permit application, the County
207 shall apply this Permit Referral Process.

208

209 ~~require property owners to apply to FWS for any FWS required approval or FWS building~~
210 ~~conditions prior to issuing any development approval and shall require the following:~~

211

- 212 ~~i. Property owners shall request FWS review prior to applying for any Monroe County~~
213 ~~permit for new development.~~

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214

- 215 ~~ii. Once the property owner has received from the FWS a letter stating the results of the~~
216 ~~FWS review, the letter shall be submitted to the County, accompanied by a County form for a Monroe~~
217 ~~County Permit.~~

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218

- 219 iii. Based on the requirements contained in the FWS letter, the County shall require
220 the owner of the property to sign a form acknowledging agreement to the FWS conditions and
221 the County shall maintain the acknowledgement form in the permit file.

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- 223 iv. The County shall, based on the acknowledgement form from the property owner,
224 incorporate the FWS letter conditions into any final Monroe County development permit.

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- 226 v. If the property owner does not agree to the FWS conditions, the County shall not
227 accept the application for development permit.

228

- 229 c. Provision for Flood Hazard Reduction and Avoiding impacts on federally listed species
230 Enforcement. All proposed development shall meet the conditions established on the floodplain
231 development permit based on the Service recommendations to avoid possible impacts on federally-
232 protected endangered species. Violation of this section Chapter, including any development constructed
233 not in accordance with the ~~owner acknowledged~~ FWS conditions derived through use of the SAGs or
234 through technical assistance by FWS, are hereby deemed to be violations of the County Code and may
235 be enforced as follows:

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- 237 i. The County may utilize the administrative enforcement procedures set forth in
238 Chapter 8, Monroe County Code of Ordinances;

239

240 ii. The County's Growth Management Director may make a formal complaint to the
241 U.S. FWS Office of Law Enforcement;

242
243 iii. The County may file an action in a court of competent jurisdiction seeking
244 damages as well as injunctive and/or equitable relief;

245
246 iv. The County Floodplain Administrator may notify FEMA that the property is in
247 violation of this ordinance and should be considered for treatment under § 1316 of the National
248 Flood Insurance Act; and/or

249
250 iv. Knowing violations of this section may be prosecuted in the same manner as
251 misdemeanors are prosecuted in the name of the State in a court having jurisdiction of
252 misdemeanors by the prosecuting attorney thereof and upon conviction shall be punished by a
253 fine not to exceed \$500 and/or imprisonment in the county jail not to exceed 60 days. Each day
254 a violation exists shall constitute a separate offense.

255
256 d. Permit issuance for previously tolled Rate of Growth Ordinance (ROGO) allocations or building
257 permits. Building permits and allocations have been tolled under authority of Monroe County
258 Resolutions 420-2005, 166-2006, 185-2007 & 219-2008 and 282-2011 as a result of the injunction
259 against FEMA for the issuance of flood insurance policies under the National Flood Insurance Program
260 in the case of Florida Key Deer et. al., v. Fugate et. al., 90-10037-CIV-Moore. For those allocations or
261 building permits that were tolled:

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263
264 i. Owners who do not need coordination with FWS after they are processed through the FEMA
265 and FWS Permit Referral Process have 180 days from the date of the judge's order to lift the
266 injunction, and from the date of a County issued written notice, to pick up their building
267 permits, whichever is greater.

268 ii. Owners who do not need coordination with FWS after they are processed through the FEMA
269 and FWS Permit Referral Process and who need to re-design their on-site wastewater
270 treatment system and receive a permit from Department of Health (DOH) have 300 days
271 from the date of the judge's order to lift the injunction, and from the date of a County issued
272 written notice, to pick up their building permit, whichever is greater.

273 iii. Flood Plain Development Permit applications processed through the FEMA and FWS Permit
274 Referral Process that result in a "may affect determination" for the proposed development
275 through the application of the Species Assessment Guides which require the permittee to
276 consult with FWS shall have 360 days to conclude the required coordination with FWS and
277 pick up the building permit from Monroe County. This timeframe may be extended by the
278 Planning Director if the applicant can affirmatively demonstrate that he has timely and
279 actively sought coordination.

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283 **Section 3. Severability.**

284 If any section, paragraph, subdivision, clause, sentence or provision of this Ordinance shall be adjudged
285 by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, invalidate, or
286 nullify the remainder of this Ordinance, but the effect thereof shall be confined to the section, paragraph,

287 subdivision, clause, sentence or provision immediately involved in the controversy in which such
288 judgment or decree shall be rendered.

289 ~~Section 2. Severability language to be inserted~~

290

291 Section 4. Conflicting Provisions.

292 In the case of direct conflict between any provision of this ordinance and a portion or provision of any
293 appropriate federal, state or county law, rule, code or regulation, the more restrictive shall apply.

294 ~~Section 3. Effective date language to be inserted~~

295 Section 5. Filing, Transmittal, and Effective Date.

296 This ordinance shall be filed in the Office of the Secretary of State of the State of Florida, and
297 transmitted to the State Land Planning Agency, but shall not become effective until a notice is issued by
298 the State Land Planning Agency or Administrative Commission approving the ordinance pursuant to
299 Chapter 380, Florida Statutes, and after any appeal period has expired.

300 Section 6. Codification

301 The provisions of this ordinance shall be included and incorporated into the Code of Ordinances of the
302 County of Monroe, Florida, as an addition or amendment thereto and shall be appropriately numbered to
303 conform to the uniform numbering system of the Code.

304

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307 **PASSED AND ADOPTED** by the Board of County Commissioners of Monroe County, Florida
308 at a regular meeting held on the XXth day of XXXX, 2012.

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Mayor David Rice _____
Mayor Pro Tem Kim Wigington _____
Commissioner Heather Carruthers _____
Commissioner George Neugent _____
Commissioner Sylvia Murphy _____

BOARD OF COUNTY COMMISSIONERS OF MONROE
COUNTY, FLORIDA

BY _____
Mayor David Rice

(SEAL)

ATTEST: DANNY L. KOLHAGE, CLERK

DEPUTY CLERK

County of Monroe
Growth Management Division

Planning & Environmental Resources
Department

2798 Overseas Highway, Suite 410
Marathon, FL 33050
Voice: (305) 289-2500
FAX: (305) 289-2536



Board of County Commissioners

Mayor Heather Carruthers, Dist. 3
Mayor Pro Tem David Rice, Dist. 4
Kim Wigington, Dist. 1
George Neugent, Dist. 2
Sylvia J. Murphy, Dist. 5

We strive to be caring, professional and fair

MEMORANDUM

DATE: MARCH 14, 2012

TO: BOARD OF COUNTY COMMISSIONERS

THROUGH: ROMAN GASTESI; COUNTY ADMINISTRATOR

FROM: CHRISTINE HURLEY, AICP; GROWTH MANAGEMENT DIVISION DIRECTOR

SUBJECT: UPDATE TO ADDITIONAL INFORMATION RELATIVE TO APRIL 18, 2012 BOARD OF COUNTY COMMISSION AGENDA ITEM - U.S. FISH & WILDLIFE SERVICE REASONABLE & PRUDENT ALTERNATIVES (RPA's)

This memorandum and associated, attached Table "Summary of Vacant, Privately Owned Parcels Potentially Affected by 2010 FWS-FEMA Biological Opinion" are being provided as supplemental information related to the February 16, 2011 Board of County Commission agenda item. This agenda item generally sought direction from the Board of County Commission on how to proceed with implementation of the U.S Fish & Wildlife Service (FWS) Biological Opinion and corresponding Reasonable and Prudent Alternatives (RPAs) for the administration of the National Flood Insurance Program in the Florida Keys. Following the Board discussion of this issue on November 12, 2010, FWS and the Plaintiff entered into a settlement agreement that contained amended RPA's. FWS and FEMA requested the County meet with them to begin implementation. The amended RPAs identified the actions that must be taken by FEMA, FWS and Monroe County. Growth Management Division staff and legal staff identified four potential options for the Board to consider at the February 16, 2011 meeting. At that time, the Board directed the County Attorney to again request to intervene in the case. Since the February 16, 2011 BOCC meeting, FWS has developed Species Assessment Guides (SAG's) designed to quickly determine the potential impact on the affected species. In addition to providing a simplified process for determining potential impacts to the covered species, the SAG's also clarified that only impacts to habitat that resulted in a "May Affect" determination would be counted towards the acreage and permit limits provided in Table 18 of the BO. The FWS has subsequently modified the SAG's to specify that development of canal lots and lots in substantially developed subdivisions are not likely to adversely affect the covered species. Using this limitation, Growth Management Division staff has analyzed the affect that this determination has on the number of parcels that would potentially require review under the RPA's. These parcels are depicted in the Table below as "Parcels predetermined to NLAA". This memo and table are provided to demonstrate the magnitude of the BO.

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The table below shows the **total** number of parcels countywide that are currently on the FEMA injunction list and the total number of parcels within the new Focus Area Maps:

	All County Parcels		FEMA Injunction		FWS Focus Area Maps		Parcels Predetermined to NLAA
	Public	Private	Public	Private	Public	Private	Tier III
Mainland	13,848	88	4,133	88	NA	NA	
Keys	12,108	31,128	10,979	21,388	12,048	13,750	5,595
	57,172		36,588		25,798		5,595

As stated previously, for parcels that are in a Focus Area or Buffer, but are in canal subdivisions or in substantially developed subdivisions and are more than 500 feet from native habitat, using the Species Assessment Guides results in a determination that development of that lot is not likely to adversely affect (NLAA) the covered species. Staff's analysis of the parcels within the Species Focus Area Maps that met this criteria shows the following:

Total Parcels meeting the "Pre-determined" Criteria	5,665
Total Pre-determined Parcels in the Tier III Overlay	5,595
Predetermined Tier III Parcels that are completely within a Focus Area	339
Predetermined Tier III Parcels that are only partially within a Focus Area*	1,497
Predetermined Tier III Parcels that are completely within a Buffer Area	731
Predetermined Tier III Parcels that are only partially within a Buffer Area*	4,722

* Parcels that are partially within a Focus Area or Buffer are those parcels that occur on the edge of the Focus Area or Buffer or are parcels that may include a fragment of potentially suitable habitat, development of which would still be pre-determined to not likely adversely affect.

Overall, the attached table demonstrates vacant, privately owned parcels. Those parcels are the most likely to be at risk for eventual permit denial under the BO after the allowed impact acres are absorbed. Therefore, this analysis focuses on those parcels. It should be noted that at the time of the February 16, 2011 BOCC meeting, it was apparent that all permits that included impacts to native habitat for the affected species would result in the acreage of that impact being subtracted from Table 18. However, FWS has specified in the revised SAG language that only those permit applications which result in a "May Affect" determination and the applicant declining to provide the appropriate mitigation would impact the limits in Table 18. This determination by the FWS greatly decreases the potential exposure to Monroe County from the liability issues discussed above.

There are 43,236 total parcels within unincorporated Monroe County (excluding the Mainland) containing 65,191 acres. Of these, 9,609 are privately owned, vacant parcels. For the privately owned, vacant parcels, 7,059 parcels (7876 acres) are on the FEMA injunction list from 2005; 7243 parcels (8886 acres) are within the new Focus Area Maps (the area subject to review under the BO). However, of these, only 2,008 parcels are in Tier III. Applying the SAG's, approximately 1,328 of these vacant residential Tier III parcels would be predetermined to NLAA and would not result in reductions to Table 18 and would not require Staff review under the proposed Ordinance. Of those parcels/acres within the Focus Area, staff further refined the parcels/acres based on the type of habitat that exists as of 2009 (most recent data). The habitat is classified as either 1) Hammock/Pineland parcels/Acreage or 2) Wetland Parcels/Acreage. Classifying the land into those categories is relevant to the BO and the way each species is classified for potential habitat. The BO (table 18) allows the County to issue permits that impact a certain amount of acreage for each type of species that are considered to be potentially jeopardized. The maximum impact acreage in the BO is far less than the amount of acreage that exists within the Focus Area, however the SAG's allow for impact to habitat to be compensated for in accordance with the County's mitigation requirements without that impact being debited to Table 18. Because the BO requires the County to deny permits after the "impact acres" are absorbed or impacted the staff believes the remainder parcels/acreage represent the risk for takings or Bert J. Harris claims, since the County would have to deny permits or use once exceeded. The changes in the determination of when Table 18 is debited significantly reduces the County's potential liability.

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Below are Growth Management and legal department responses to some of the questions that have been raised regarding the proposed Options: **What are the implications to the Community in terms of Pros and Cons in implementing vs. not implementing the RPA's?**

1. Implement the BO RPA (Option 1)

Pros

- Parcels or houses constructed while on the injunction list may be able to obtain Flood Insurance after consultation with the FWS.
- For most property owners, the permit process would be streamlined if they can meet the guidelines in the Species Keys. Some property owners would be able to utilize their property to some degree provided they complied with the above Keys, competed in ROGO and obtained building permits.
- Monroe County residents would continue to be eligible for insurance under the NFIP.

Cons

- Once the acreages provided in Table 18 of the BO have been reached, no further building permits could be issued, resulting in potential takings and Bert J. Harris Act potential liability for the County. Over the long term, potentially increasing taxes of Monroe County residents and draining Monroe County resources.
- For certain parcels, there is no guarantee that they will be able to meet the Keys guidelines or would receive a favorable determination from FWS, in which case Monroe County would be required to deny the permit. However under the revised SAG's, most applicants are expected to be able to meet the requirements for permit approval. In general, only development proposals that result in a "May Affect" determination are referred to FWS for approval.
- Costs associated with permitting, enforcement and reporting are significant and will require additional manpower and resources by Monroe County with no assistance from FWS or FEMA.

Do Not Implement RPA's

Pros:

- Monroe County does not expend resources (financial and manpower) in developing rules, procedures and increased permitting and reporting requirements
- Effectively puts FWS and FEMA on notice that the RPA's are not acceptable to Monroe County
- May force FWS and FEMA to consider the alternatives proposed by Monroe County as detailed at the November 12, 2010 Workshop, specifically:
 - require each private or public property owner seeking development approval to consult with the FWS and obtain (a) necessary Section 10 or other approvals and (b) certification of ESA compliance from FWS prior to the issuance of Monroe County building permit; and
 - require FWS to directly enforce the terms and conditions of Section 10 or other approvals granted by the agency to the property owner.
 - Recommend FEMA directly review individual requests for flood insurance and deny those requests where the new development would adversely affect endangered species.
 - Recommend that FEMA, by regulation, prohibit Federal Flood Insurance in the suitable or known habitat of all endangered species, except the eastern indigo snake.
 - Recommend expansion of Coastal Barrier Resource System to include focus areas, except the eastern indigo snake.
 - Others?

Cons:

- After 14 months (if not sooner) FEMA notifies Monroe County of non-compliance and initiates probation and suspension procedures
- FEMA may withdraw Monroe County's eligibility in the NFIP and subsequently cancel current policies, thereby creating substantial hardship for existing residents. This impact is illustrated in the NFIP report from 2010 summarized here:

Community	Number	Total	Total	Total Claims	Total Paid
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	Policies	Coverage	Premium	Since 1978	Since 1978
City of Key West	8,419	\$1,975,456,700	\$ 9,586,512	4,521	\$173,394,509
City of Layton	97	\$ 23,378,400	\$ 96,977	19	\$ 270,458
Village of Islamorada	2,934	\$ 674,255,300	\$ 2,574,885	217	\$ 5,156,824
City of Marathon	2,975	\$ 616,549,900	\$ 3,098,246	905	\$34,063,716
Key Colony Beach	1,217	\$ 250,140,800	\$ 951,865	323	\$ 3,658,505
Monroe County	17,936	\$3,923,780,100	\$17,056,489	12,393	\$171,389,908
County Total	33,578	\$7,463,561,200	\$33,364,994	18,375	\$387,933,920

- New construction (and potential buyers) cannot obtain Federally subsidized insurance or Federally backed mortgages
- Mortgagors may force place insurance on property owners who are no longer covered by NFIP. Based on the data above, as of May 6, 2010 FEMA had issued 17,936 NFIP policies to residents of unincorporated Monroe County with annual premiums of \$17,056,489.00; an average of \$950 annually per policy. According to an article published in the Citizen on November 28, 2010, the cost of private flood insurance to a resident on Big Pine Key was \$17,000 annually. Assuming the cost of forced place insurance per household who currently have flood insurance would increase to \$17,000/yr compared to \$950/yr (NFIP), with 17,936 insured households in Monroe County, the annual cost for all households would be \$287,872,800, compared to the estimated conservative takings risk (see Option 4 below) of \$61,180,190 is substantial.

2. What is the worst case scenario of the potential liability to the County if we do not implement the RPA's?

All property owners could lose flood insurance coverage under the NFIP. In addition, Monroe County could lose National Disaster assistance.

3. Based on the RPA's, what is the process if the Board chooses not to implement? What happens if we do not implement the RPA's?

The RPA's require the participating communities to establish written procedures for implementation within 14 months of acceptance of the BO by the Court. If the RPAs are not implemented, FEMA will notify the County in writing that substantial progress must be made to correct the program deficiencies or remedy any violation within 60 days. The community must provide FEMA with a written response within 60 days of FEMA's notice, of the actions being taken to correct the program deficiencies and any violation.

Staff believes that if Monroe County does not implement the RPA's, FEMA will initiate procedures for probation and suspension of the County's eligibility for Flood Insurance. If the County does not respond to FEMA or fails to make progress within 60 days of the initial notice, then FEMA may also initiate these procedures.

The above considered, if we do not implement then the current injunction list remains in place. It is not clear from the RPA's if FEMA could continue to issue Flood Insurance policies to parcels that are NOT on the injunction list and also not in a Focus Area.

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MEMORANDUM

MONROE COUNTY PLANNING & ENVIRONMENTAL RESOURCES DEPARTMENT

We strive to be caring, professional and fair

To: Monroe County Planning Commission

From: Reynaldo Ortiz Assoc. AIA, AICP, Planner

Through: Townsley Schwab, Senior Director of Planning & Environmental Resources

Date: April 3, 2012

Subject: *Administrative Appeal by James and Verna Prell, concerning property located at 21857 Disturbed Pine, Cudjoe Key, Mile Marker 21, Real Estate No. 00115510.002200*

Meeting: April 25, 2012

I DECISION BEING APPEALED:

The Appellant is appealing a decision by Townsley Schwab, Senior Director of Planning & Environmental Resources, which was set forth in a letter to the property owner, James Prell, on September 22, 2011. The precise decision being appealed is a determination that the existing structure on the subject property is not a lawfully-established dwelling unit and thereby any replacement shall not be exempt from the Residential Rate of Growth Ordinance (ROGO) permit allocation system. This decision was made in accordance with §138-22 of the Monroe County Code and Administrative Interpretation 03-108.



Subject Property, 21857 Disturbed Pine, Cudjoe Key (2006)

A. Location:

1
2 Address: 21857 Disturbed Pine, Cujoe Key, mile marker 21 (bay side)
3 Legal Description: a parcel of land in Section 20, Township 66 South, Range 28 East,
4 Real Estate Number: 00115510.002200
5

- 6 B. Appellant: James and Verna Prell
7 C. Property Owner: James Prell and Verna Powell
8

9 **II PROCESS:**
10

11 Pursuant to §102-20 of the Monroe County Code (MCC), the Planning Commission shall
12 have the authority to hear and decide appeals from any decision, determination or
13 interpretation by any administrative official with respect to the provisions of MCC
14 Chapter 102 and the standards and procedures set forth, except that the Board of County
15 Commissioners shall hear and decide appeals from administrative actions regarding the
16 floodplain management provisions of MCC Chapter 102.
17

18 An appeal may be initiated by an owner, applicant, adjacent property owner, any
19 aggrieved or adversely affected person, as defined by section 163.3215(2), Florida
20 Statutes, or any resident or real property owner from any order, decision, determination or
21 interpretation by any administrative official with respect to the provisions of MCC
22 Chapter 102.
23

24 The Planning Commission shall consider the appeal at a duly called public hearing
25 following receipt of all records concerning the subject matter of the appeal. Any person
26 entitled to initiate an appeal may have an opportunity to address the commission at that
27 meeting; and argument shall be restricted to the record below except that a party appealing
28 an administrative decision, determination or interpretation shall be entitled to present
29 evidence and create a record before the Planning Commission; any appeals before the
30 hearing officer shall be based upon and restricted to the record.
31

32 **III RELEVANT PRIOR COUNTY ACTIONS:**
33

34 On October 1, 2010, the Code Compliance Department opened case #CE10100020. The
35 cited violation pertains to several sections of code including the construction of a building
36 or construction or the installation of systems or components within the building having
37 been commenced or completed without a permit having been obtained or where the permit
38 has expired prior to appropriate inspections and completion and the issuance of a
39 certificate of occupancy or certificate of completion. As of the date of this report, the case
40 remains open as the improvements have not been removed or permitted.
41

42 On March 17, 2011, James Prell applied to the Planning & Environmental Resources
43 Department for an exemption from the ROGO permit allocation system.
44

45 On September 22, 2011, the Senior Director of Planning & Environmental Resources,
46 Townsley Schwab, issued a letter to James Prell denying the ROGO exemption request.

1
2 IV BACKGROUND INFORMATION:
3

- 4 A. Total Size of Site: Approximately 1.01 acres
5 B. Land Use District: Suburban Residential (SR) and Native Area (NA)
6 C. Future Land Use Map (FLUM) Designation: Residential Low (RL) and Residential
7 Conservation (RC)
8 D. Tier Designation: Tier 1
9 E. Existing Vegetation / Habitat: Pineland and incomplete development
10 F. Community Character of Immediate Vicinity: Conservation / low-density single-family
11 residential
12 G. Flood Zone: AE-EL 9
13

14 V REVIEW OF APPLICATION:
15

16 The decision being appealed is a determination that the existing structure on the subject
17 property is not a lawfully-established dwelling unit and thereby any replacement shall not
18 be exempt from the ROGO permit allocation system. This decision was set forth in a
19 letter September 22, 2011, and made in accordance with MCC §138-22 and
20 Administrative Interpretation 03-108.
21

22 As defined in MCC §101-1, a *dwelling unit* is one (1) or more rooms physically arranged
23 to create a housekeeping establishment for occupancy by one (1) family with separate
24 toilet facilities. Furthermore, as defined in MCC §101-1, a *permanent residential unit* is a
25 dwelling unit that is designed for, and capable of, serving as a residence for a full
26 housekeeping unit which includes a kitchen composed of at least a refrigerator and stove.
27

28 Pursuant to MCC §138-22(1), the ROGO shall not apply to the redevelopment,
29 rehabilitation or replacement of any lawfully-established residential dwelling unit which
30 does not increase the number of residential dwelling units above that which existed on the
31 site prior to the redevelopment, rehabilitation or replacement. Therefore, owners of land
32 containing residential dwelling units shall be entitled to one (1) unit for each such unit
33 lawfully-established. MCC §138-22(1) provides the criteria to be used by Staff to
34 determine whether or not a residential unit was lawfully-established. (Note: Ordinance
35 015-2011 amended MCC §138-22 subsequent to staff's initial determination of the
36 existing structure)
37

38 Pursuant to the updated MCC §138-22(1), The planning director shall review available
39 documents to determine if a body of evidence exists to support the existence of units on or
40 about July 13, 1992, the effective date of the original ROGO. Such evidence shall be
41 documented and submitted to the planning director on a form provided by the planning
42 department. The application shall include, at a minimum, at least two of the following
43 documents:
44

- 45 A. Any issued Monroe County building permit(s) supporting the existence of the
46 structure(s) and its use(s) on or about July 13, 1992;

- 1
2 B. Documentation from the Monroe County Property Appraiser's Office indicating
3 residential use on or about July 13, 1992;
4
5 C. Aerial photographs and original dated photographs showing the structure(s) existed on
6 or about July 13, 1992;
7
8 D. Residential county directory entries on or about July 13, 1992;
9
10 E. Rental, occupancy or lease records, on or about July 13, 1992, indicating the number,
11 type and term of the rental or occupancy;
12
13 F. State and/or county licenses, on or about July 13, 1992, indicating the number and
14 types of rental units;
15
16 G. Documentation from the utility providers indicating the type of service (commercial or
17 residential) provided and the number of meters in existence on or about July 13, 1992;
18 and
19
20 H. Similar supporting documentation not listed above as determined suitable by the
21 planning director.
22

23 The determination that the existing structure on the subject property was not a lawfully-
24 established dwelling unit was made in accordance with the previous version
25 of MCC §138-22 and Administrative Interpretation 03-108. Pursuant to Administrative
26 03-108, a property owner may receive an exemption from the ROGO permit allocation
27 system if the unit is found to have been:
28

- 29 • *Lawfully-established* – There is a permit or other official approval from the Division
30 of Growth Management for the dwelling unit; or
31
32 • *Counted in ROGO and the Year 2010 Comprehensive Plan* – If a permit or other
33 official approval from the Division of Growth Management is not available, the
34 following information may be used to establish that a residential unit was lawfully-
35 established: aerial photos showing the structure in existence prior to 1986; Monroe
36 County property record card showing the existence of the unit prior to 1986; utility
37 records that show the residential use being served prior to 1986; whether the
38 residential use could have been a permitted use under the pre-1986 zoning of the
39 property; occupational licenses showing the residential use being served prior to
40 1986; and other supporting information.
41

42 In the September 22, 2011 letter, based on the criteria at that time, Staff determined that
43 the existing structure was not a lawfully-established dwelling unit for the following
44 reasons (provided in *italic*):
45

- 1 a. *Pursuant to Monroe County Code §138-22 and Administrative Interpretation 03-108,*
2 *163, in order to be exempt from the Rate of Growth Ordinance (ROGO), one (1)*
3 *lawful dwelling unit must have been in existence on the effective date of the county's*
4 *land development regulations (September 15, 1986) or, if constructed after the*
5 *effective date, must have been permitted in accordance with the land development*
6 *regulations and the ROGO permit allocation system.*

7
8 No such documentation for a lawful unit has been located for our review.

- 9
10 b. *Staff did not locate any building permits on file for real estate number*
11 *00115510.002200 that approved the construction of the existing structures on site.*
12 *Furthermore, none of the building permits on file established or recognized any*
13 *existing dwelling units on the property.*

14
15 According to the Property Appraiser's records, the date built of the structure is
16 inconclusive by referencing dates ranging from as early as 1974 to as late as 1998.
17 As previously stated, staff did not locate a building permit authorizing the
18 construction of the structure at this time. Nevertheless, staff would not have been
19 able to permit a dwelling unit within the structure. The property is within an AE – EL
20 9 flood zone on the Federal Emergency Management Agency's flood insurance rate
21 map. A dwelling unit built after 1978 would have been required to have its lowest
22 floor built at or above the required base flood elevation in accordance with floodplain
23 management regulations. The structure does not appear to be elevated above the base
24 flood level (a boundary survey showing elevations and/or an elevation certificate for
25 the structure was not submitted for review).

- 26
27 c. *Building Permit A-14350 was issued in 1985 for a single-family residence on the*
28 *parcel. Evidence on site suggests that construction was begun for a residence*
29 *however the permitted structure was not completed. Subsequently on May 5, 1988*
30 *the Building Official had issued a letter stating that the permit lacked a receipt of*
31 *Certificate of Occupancy and pursuant to Monroe County Code would be voided.*
32 *Staff has not been able to locate any additional activity with this permit.*
33 *Furthermore, the letter had outlined an option to continue construction yet*
34 *recognition of this option by the permit holder was not found.*

- 35
36 d. *Prior to 1989, staff could not identify any permanent structures on the parcel.*
37 *Therefore, aerial photography does not support the existence of any structure prior to*
38 *2003. Furthermore, due to the nature of aerial photography, staff could not use the*
39 *available photography from 1989 to 2006 to determine if the structure was being*
40 *used as a residence at any given time it was visible.*

- 41
42 e. *Although the Property Appraiser's records indicate that a residential building was on*
43 *the tax roll from 2003 to 2010, from 1997 to 2002, a fence was the only improvement*
44 *assessed on site. Furthermore, prior to 1997, the property was assessed on the tax*
45 *roll as vacant. Based on these records, a 415 ft² structure was utilized as a*
46 *residential unit from 2003 to 2010.*

1
2 *f. The utility records submitted with the application indicate the provision of electric*
3 *and water service to the property. However, none of the utility records state that the*
4 *service was provided to a dwelling unit.*
5

6 In conclusion, the Director of Planning & Environmental Resources' decision to deny the
7 ROGO exemption request was based on several findings of fact and conclusions of law, as
8 provided in this staff report.
9

10 Staff has found that additional documentation was not provided to satisfy the minimum
11 requirements outlined in the recent revision of MCC §138-22(1).
12

13 **RECOMMENDATION:**
14

15 Using the records and criteria as set forth in Administrative Interpretation 03-108, Staff
16 has found that the existing structure was not lawfully-established and recommends that the
17 Planning Commission uphold the decision of the Director of Planning & Environmental
18 Resources and DENY the administrative appeal request.
19

Item #3 Prell – Appeal to PC
File

File #: **2011-123**

Owner's Name: Prell, James & Verna

Applicant: Prell, James & Verna

Agent: N/A

Type of Application: Appeal-PC

Key: Cudjoe Key

RE: 00115510-002200

Additional Information added to File 2011-123

Creech-Gail

From: Ortiz-Reynaldo
Sent: Friday, March 30, 2012 3:58 PM
To: 'jim.prell@insight.com'
Cc: Haberman-Joe; Creech-Gail
Subject: File 2011-123 Planning Commission Appeal

Follow Up Flag: Follow up
Flag Status: Flagged

Mr. Prell,

This is confirm our conversation today that you have agreed to have your appeal heard by the Planning Commission on April 25, 2012.

In addition you have stated that you no longer will be represented by Lee Rohe, Esq. and that you will be presenting your case to the Planning Commission yourself.

Thank you.

Rey Ortiz

Reynaldo Ortiz, Assoc. AIA, AICP
Planner
Monroe County | Planning & Environmental Resources Department
2798 Overseas Highway | Suite 400 | Marathon, Florida 33050
(305)289-2500

From: susan rohe [<mailto:slrlaw@bellsouth.net>]
Sent: Tuesday, January 31, 2012 3:01 PM
To: Creech-Gail; Grimsley-Susan
Cc: Granger-Lisa; Petrick-Nicole
Subject: PLanning Commission Appeal and Code Enforcement case for James and Verna Prell

Please be advised that Mr. Rohe is no longer representing James and Verna Prell in either their Planning Commission Appeal or Code Enforcement case with Monroe County. Please direct all future correspondence to the Prells at their home address. I do not believe they are any longer using a PO Box. Thank you.

Susan L. Rohe, Florida Registered Paralegal
Lee Robert Rohe, P.A.
25000 Overseas Highway, Suite 2
Summerland Key, Florida 33042
(305) 745-2254/(305) 745-4075 - Facsimile

CONFIDENTIALITY NOTICE

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County of Monroe
Growth Management Division

Office of the Director
2798 Overseas Highway
Suite #400
Marathon, FL 33050
Voice: (305) 289-2517
FAX: (305) 289-2854



Board of County Commissioners
Mayor Sylvia J. Murphy, Dist. 5
Mayor Pro Tem Heather Carruthers, Dist. 3
Kim Wigington, Dist. 1
George Neugent, Dist. 2
Mario Di Gennaro, Dist. 4

We strive to be caring, professional and fair

Date: 10.21.11
Time: AM

Dear Applicant:

This is to acknowledge submittal of your application for Administrative Appeal

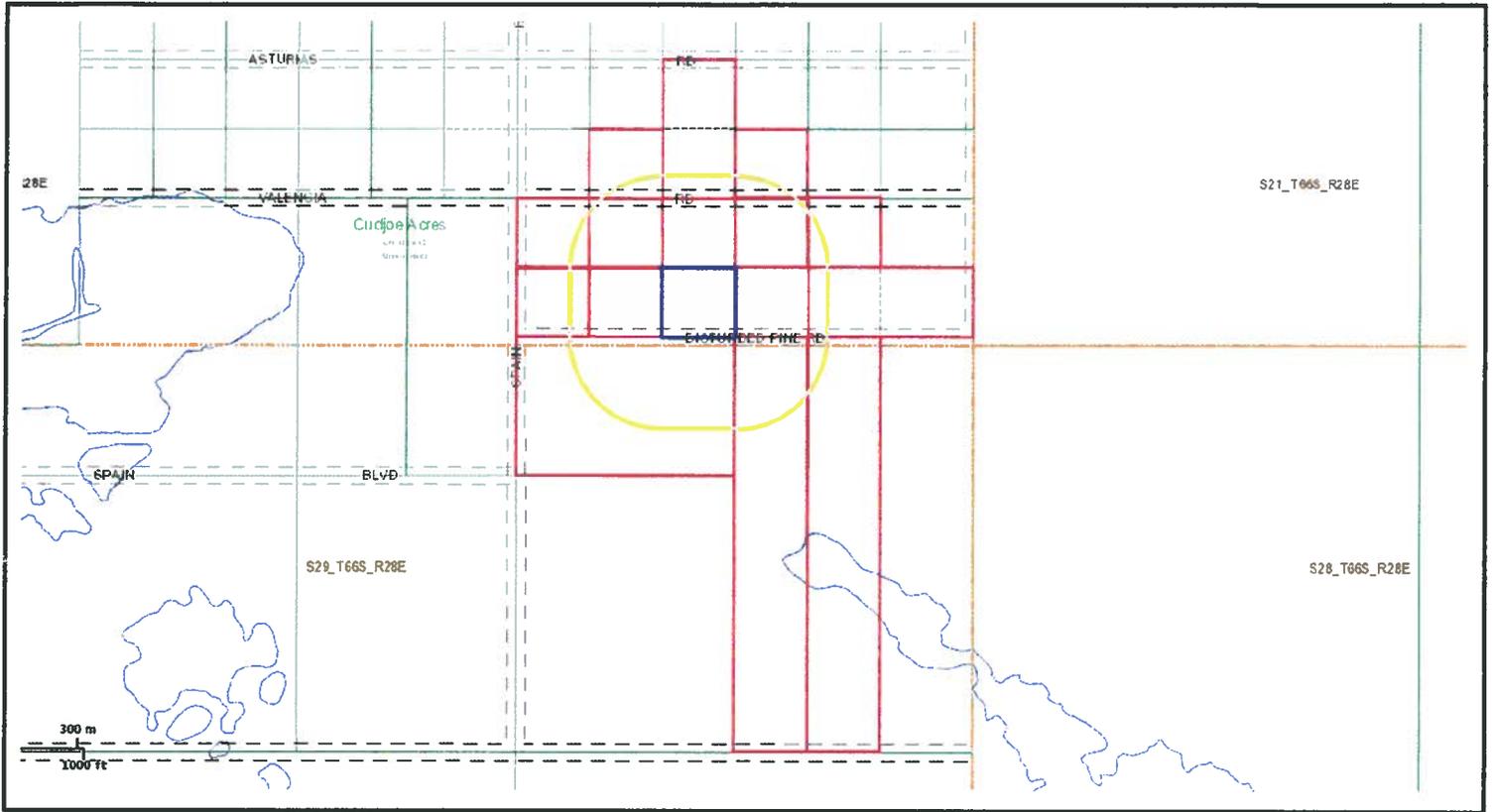
Type of application
ROGO Exemption

James & Verna Prett to the Monroe County Planning Department.
Project / Name

Thank you.

[Signature]

Planning Staff



Printed: Oct 21, 2011

Monroe County, Florida MCPA GIS Public Portal

DISCLAIMER: The Monroe County Property Appraiser's office maintains data on property within the County solely for the purpose of fulfilling its responsibility to secure a just valuation for ad valorem tax purposes of all property within the County. The Monroe County Property Appraiser's office cannot guarantee its accuracy for any other purpose. Likewise, data provided regarding one tax year may not be applicable in prior or subsequent years. By requesting such data, you hereby understand and agree that the data is intended for ad valorem tax purposes only and should not be relied on for any other purpose.



"CRANDALL JOHN FRANKLIN"
"5329 OLD POST RD"
"CHARLESTOWN", "RI" "02813"

"DOODY HILDA E"
"1028 BUTTONWOOD DR E"
"SUMMERLAND KEY", "FL" "33042"

"EMONT CAROL"
"70 LOWER CROSS RD"
"GREENWICH", "CT" "06831"

"FARRELL JAMES W"
"21850 VALENCIA RD"
"CUDJOE KEY", "FL" "33042"

"FREED MARTIN & VASKYS RUTA "
"P O BOX 73"
"DAMES QTR", "MD" "21820"

"GIL JANET"
"5801 SW 113TH PL"
"MIAMI", "FL" "33129"

"MERSON TERRI S"
"21859 DISTURBED PINE RD"
"CUDJOE KEY", "FL" "33042"

"MONROE COUNTY BOARD OF COUNTY
COMMISSIONERS "
"500 WHITEHEAD ST"
"KEY WEST", "FL" "33040"

"ORR FAMILY TRUST 12/1/95 "
"249 JUANITA WAY"
"PLACENTIA", "CA" "92670-2216"

"PRELL JAMES"
~~"21857 DISTURBED PINE RD"
"SUMMERLAND KEY", "FL" "33042-
4116"~~

"QUEHL FREDERICK H JR AND MARTHA
G"
"482 WOODS EDGE ROAD"
"ORANGE CITY", "FL" "32763"

"RIEKE LINDA A REV LIV TR 12/7/06"
"616 GREENE ST"
"KEY WEST", "FL" "33040-6625"

"SANCHEZ EUGENE R AND NANCY"
"8367 BANYAN BLVD"
"LOXAHATCHEE", "FL" "33470-2790"

"SOTO ALBERTO AND MONIKA C"
"17191 SE 101 AVE"
"SUMMERFIELD", "FL" "34491"

"STANHOUSE DORENE E "
"21792 ASTURIAS RD"
"CUDJOE KEY", "FL" "33042"

End of Additional File 2011-123

APPLICATION
MONROE COUNTY
PLANNING & ENVIRONMENTAL RESOURCES DEPARTMENT



Administrative Appeal to the Monroe County Planning Commission

Monroe County Code § 102-185

Appeals of administrative actions must be filed with the County Administrator and with the Planning & Environmental Resources Department within thirty (30) days of the date of the decision

Administrative Appeal Application Fee: \$1,500.00

In addition to the application fee, the following fees also apply:

Advertising Costs: \$245.00

Surrounding Property Owner Notification: \$3.00 for each property owner required to be noticed

Date of Submittal: 10 / 21 / 2011
Month Day Year

Decision being appealed: ROGO Exemption

Date of decision being appealed: 9 / 22 / 2011
Month Day Year

Appellant:

James and Verna Prell
Name

21857 Disturbed Pine
Mailing Address (Street, City, State, Zip Code)

Cudjoe Key, FL 33042
Daytime Phone

Email Address

Agent (if applicable):

Lee Rohe, Esq
Name

P.O. Box 420259, Summerland Key
Mailing Address (Street, City, State, Zip Code)

305-745-2254
Daytime Phone

lrrlaw@bellsouth.net
Email Address

Property Owner:

James and Verna Prell
Name

21857 Disturbed Pine Rd., Cudjoe Key, FL 33042
Mailing Address (Street, City, State, Zip Code)

Daytime Phone

APPLICATION

Legal Description of Property:

(If in metes and bounds, attach legal description on separate sheet)

Block - Lot - Cudjoe Acres Cudjoe Key
Subdivision Key
Real Estate (RE) Number 00115510002200 Alternate Key Number 1146595
Street Address 21857 Disturbed Pine Rd, Cudjoe Key 20 Approximate Mile Marker

Land Use District Designation(s): Suburban Residential / Native Area

Present Land Use of the Property: Residential

Are there any pending codes violations on the property? Yes: X No: _____

If yes, please provide case number: CE 10100020

A COPY OF THE BASIS FOR THE APPEAL IN THE NATURE OF AN INITIAL BRIEF AND ANY EVIDENCE INCLUDING TESTIMONY, AFFIDAVITS AND THE CURRICULUM VITAE OF ANY EXPERT WITNESS THAT WILL BE CALLED MUST BE ATTACHED TO THIS APPLICATION. The brief must at a minimum state all grounds for the appeal, including but not limited to, the law being appealed and any facts necessary for interpretation of those laws. (Attach additional sheets of paper)

All of the following must be submitted in order to have a complete application submittal: (Please check as you attach each required item to the application)

- Complete administrative appeal application (unaltered and unbound);
Correct fee (check or money order to Monroe County Planning & Environmental Resources);
Proof of ownership (i.e. Warranty Deed);
Current Property Record Card(s) from the Monroe County Property Appraiser;
A copy of the document(s), which comprise the administrative decision being appealed;
Any evidence and record which forms the basis for the appeal must be submitted with this application; (see note)
Names and addresses of all expert witnesses that you propose to call at the hearing; (N/A)
Photograph(s) of site from adjacent roadway(s);

If applicable, the following must be submitted in order to have a complete application submittal:

- Notarized Agent Authorization Letter (note: authorization is needed from all owner(s) of the subject property)
Boundary Survey - ten (10) sets (please contact Monroe County Environmental Resources prior to application submittal to determine if this documentation is necessary)

If deemed necessary to complete a full review of the application, the Planning & Environmental Resources Department reserves the right to request additional information.

APPLICATION

If new evidence, or the basis for appeal, is submitted at the Planning Commission hearing, Staff shall request that the hearing be continued to the next Planning Commission meeting nearest to the property (approximately six weeks) so that Staff has the opportunity to prepare a response to the new evidence.

If the applicant does not submit the basis for the appeal with the application, Staff will recommend denial of the appeal.

I certify that I am familiar with the information contained in this application, and that to the best of my knowledge such information is true, complete and accurate.

Signature of Applicant: X James Prull Date: October 21, 2011
Verma M. Prull

Sworn before me this 21st day of October

Susan L. Rohe
Notary Public
My Commission Expires

Please send the complete application package to:

Planning Commissioner Coordinator
Monroe County Planning & Environmental Resources Department
2798 Overseas Highway, Suite 400, Marathon, FL 33050



-AND-

Monroe County Administrator
The Gato Building
1100 Simonton Street, Key West, FL 33040

PURSUANT TO SECTION 286.0105, FLORIDA STATUTES, NOTICE IS GIVEN THAT IF A PERSON DECIDES TO APPEAL ANY DECISION MADE BY THE PLANNING COMMISSION WITH RESPECT TO ANY MATTER CONSIDERED AT SUCH HEARING OR MEETING, THAT PERSON WILL NEED A RECORD OF THE PROCEEDINGS, AND THAT, FOR SUCH PURPOSE THAT PERSON MAY NEED TO ENSURE THAT A VERBATIM RECORD OF THE PROCEEDINGS IS MADE, WHICH RECORD INCLUDES THE TESTIMONY AND EVIDENCE UPON WHICH THE APPEAL IS TO BE BASED. SUCH RECORD TO BE AT THE COST OF THE APPELLANT. ALSO, MONROE COUNTY RESOLUTION #131-1992 REQUIRES THAT "IF A PERSON DECIDES TO APPEAL ANY DECISION OF THE PLANNING COMMISSION, HE SHALL PROVIDE A TRANSCRIPT OF THE HEARING BEFORE THE PLANNING COMMISSION, PREPARED BY A COURT REPORTER AT THE APPLICANT'S EXPENSE, WHICH TRANSCRIPT SHALL BE FILED AS PART OF THE RECORD ON APPEAL WITHIN THE TIME PROVIDED IN SECTION 9.5-521(f), MONROE COUNTY CODE.

Please Note: A transcript made from recordings or other secondary means does not provide a sufficiently accurate record of all the speakers. Therefore, such "secondary" transcripts may not be accepted as a valid verbatim transcript.

10-21-2011
(Date)

I/we, James Prell and Verna Prell, hereby authorize
(Name of Owner(s) / Applicant)

Lee Robert Rohe, Esp. to be listed as the authorized agent for
(Name of Agent)

for Administrative Relief application submittal for property described as Lot(s): —, Block —,
Subdivision: Cudjoe Acres, Key (island): Cudjoe Key and
Real Estate number(s): 0 0115510002200. The Administrative Relief Application is for
Building Permit Application Number and ROGO Application Number _____.

This authorization becomes effective on the date this affidavit is notarized and shall remain in effect until terminated by the undersigned. This authorization acts as a durable power of attorney only for the purposes stated.

The undersigned understands the liabilities involved in the granting of this agency and accepts full responsibility (thus holding Monroe County harmless) for any and all of the actions of the agent named, related to the acquisition of permits for the aforementioned applicant.

Note: Authorization is needed from each owner of the subject property. Therefore, one or more authorization forms must be submitted with the application if there are multiple owners. Also, please attach contact information to the authorized agent (ie: mailing address and phone number).

James Prell
Owner(s) / Applicant Signature
Verna M Prell
JAMES PRELL
Printed Name of Owner(s) / Applicant

NOTARY:
STATE OF FLORIDA
COUNTY OF MONROE

VERNA M PRELL

The foregoing instrument was acknowledged before me this 21st day of October, 2011.

_____ is personally known _____ produced identification

(_____ Type of Identification) did / did not take an oath.

Susan L. Rohe
Notary



**ADMINISTRATIVE APPEAL TO THE MONROE COUNTY PLANNING
COMMISSION**

Note: Due to the fact that the undersigned, Lee Rohe, Esq. was retained on October 18, 2011, the Brief and all supporting documents will be submitted under separate cover.

Basis for Appeal:

The September 22, 2011 decision of the Planning Director is in error. A lawful dwelling was in existence on September 15, 1986.

County of Monroe Growth Management Division

Planning & Environmental Resources

Department

2798 Overseas Highway, Suite #410

Marathon, FL 33050

Voice: (305) 289-2500

FAX: (305) 289-2536



Board of County Commissioners

Mayor Heather Carruthers, Dist. 3

Mayor Pro Tem David Rice, Dist. 4

Kim Wigington, Dist. 1

George Neugent, Dist. 2

Sylvia J. Murphy, Dist. 5

We strive to be caring, professional and fair

September 22, 2011

James Prell
21857 Disturbed Pine
Cudjoe Key, Florida 33042

RE: ROGO Exemption Request for 21857 Disturbed Pine, Cudjoe Key, a parcel of land in Section 20, Township 66 South, Range 28 East, on Cudjoe Key, Real Estate No. 00115510.002200

Mr. Prell,

You requested a determination as to whether one (1) residential dwelling unit is exempt from the Residential Rate of Growth Ordinance (ROGO) on the above-described premises.

Pursuant to §138-22 of the Monroe County Code, the ROGO shall not apply to the redevelopment, rehabilitation or replacement of any lawfully-established residential dwelling unit that does not increase the number of dwelling units that existed on the site. Therefore, owners of land shall be entitled to one (1) dwelling unit allocation, exempt from the ROGO permit allocation system, for each dwelling unit lawfully-established on a given property. Administrative Interpretation 03-108 provides the criteria to be used by staff to determine whether or not a dwelling unit was lawfully-established:

(a) A permit or other official approval from the Division of Growth Management for the dwelling unit:

The following table organizes building permits by date issued:

<i>Permit No.</i>	<i>Date Issued</i>	<i>Description</i>
A-14350	11/26/1985	Single Family Residence (Note: Permit A-14350 was voided on May 5, 1988 and the approved residence was not built)
A-14351	11/26/1985	Land Clearing

(b) If a permit or other official approval from the Division of Growth Management is not available, the following information may be used to further support or establish that a dwelling unit was lawfully-established:

Site Visit: A site visit was conducted by Rey Ortiz on March 24, 2011. Two structures and a recreational vehicle were observed on the site. It is unclear if the structures are being utilized as residences at this time.

Land Use District: The property is located in a Suburban Residential (SR) District and Native Area (NA) District, in which a detached dwelling unit is a permitted use.

Aerial Photography: Aerial photography from 1982 to 2005 is inconclusive regarding the existence of a building or mobile home due to the scale of the images and the dense vegetation of the site. Aerial photography from 2006 and 2009 confirms the continuous existence of 2 structures and a recreational vehicle on the property. As a note, aerial photography can only confirm the number of structures, not the number of units, in existence at any given time.

Monroe County Property Record Card: The Property Appraiser currently assesses the property under a property classification code of 01 (Single Family) and their records indicate that a residential unit was on the tax roll from 2003 to 2010. One (1) building, with a year built date of 1975 is indicated. In addition, the property received a homestead exemption from 2003 to 2005, and in 2010.

Utility records: Keys Energy Service records indicate that electric service was provided from February 24, 1986 to present and Florida Keys Aqueduct Authority records indicate that water service was provided from April 19, 2001 to present. (Note: Water and or electric service may have been provided at other times, however records stating such were not provided.)

Whether the residential use could have been permitted under the pre-1986 zoning: Prior to 1986, the property was within GU district (General Use)

Following a review of the records and the evidence submitted, **the Planning & Environmental Resources Department is unable to approve your application for the following reasons:**

- a. Pursuant to Monroe County Code §138-22 and Administrative Interpretation 03-108, in order to be exempt, one (1) lawful dwelling unit must have been in existence on the effective date of the county's land development regulations (September 15, 1986) or, if constructed after the effective date, must have been permitted in accordance with the land development regulations and the ROGO permit allocation system. No such documentation for a lawful unit has been located for our review.
- b. Staff did not locate any building permits on file for real estate number 00115510.002200 that approved the construction of the existing structures on site. Furthermore, none of the building permits on file established or recognized any existing dwelling units on the property.

According to the Property Appraiser's records, the date built of the structure is inconclusive by referencing dates ranging from as early as 1974 to as late as 1998. As previously stated, staff did not locate a building permit authorizing the construction of the structure at this time. Nevertheless, staff would not have been able to permit a dwelling unit within the structure. The property is within an AE – EL 9 flood zone on the Federal Emergency Management Agency's flood insurance rate map. A dwelling unit built after 1978 would have been required to have its lowest floor built at or above the required base flood elevation in accordance with floodplain management regulations. The structure

does not appear to be elevated above the base flood level (a boundary survey showing elevations and/or an elevation certificate for the structure was not submitted for review).

- c. Building Permit A-14350 was issued in 1985 for a single-family residence on the parcel. Evidence on site suggests that construction was begun for a residence however the permitted structure was not completed. Subsequently on May 5, 1988 the Building Official had issued a letter stating that the permit lacked a receipt of Certificate of Occupancy and pursuant to Monroe County Code would be voided. Staff has not been able to locate any additional activity with this permit. Furthermore, the letter had outlined an option to continue construction yet recognition of this option by the permit holder was not found.
- d. Prior to 1989, staff could not identify any permanent structures on the parcel. Therefore, aerial photography does not support the existence of any structure prior to 2003. Furthermore, due to the nature of aerial photography, staff could not use the available photography from 1989 to 2006 to determine if the structure was being used as a residence at any given time it was visible.
- e. Although the Property Appraiser's records indicate that a residential building was on the tax roll from 2003 to 2010, from 1997 to 2002, a fence was the only improvement assessed on site. Furthermore, prior to 1997, the property was assessed on the tax roll as vacant. Based on these records, a 415 ft² structure was utilized as a residential unit from 2003 to 2010.
- f. The utility records submitted with the application indicate the provision of electric and water service to the property. However, none of the utility records state that the service was provided to a dwelling unit.

You may appeal this decision. If you choose to do so, please contact the Planning Commission Coordinator at (305) 289-2500 for the necessary forms and information. The appeal must be filed with the County Administrator, 1100 Simonton Street, Gato Building, Key West, FL 33040, within thirty (30) calendar days from the date of this letter. In addition, please submit a copy of your application to the Planning Commission Coordinator, Monroe County Planning Department, 2798 Overseas Hwy, Suite 410, Marathon, FL 33050-2227.

We trust that you find this information of assistance. You may contact the Planning & Environmental Resources Department at (305) 289-2500 if you have any questions.

Sincerely,



Townsley Schwab, Senior Director of Planning and Environmental Resources

Monroe County Property Record Card (133)

Alternate Key: 1146595 Roll Year 2011
 Effective Date: 10/20/2011 2:14:00 PM Run: 10/20/2011 02:15 PM

PRELL, JAMES
 21857 DISTURBED PINE RD
 SUMMERLAND KEY FL 33042-4116

Parcel 00115510-002200-20-66-28 Nbhhd 339
 Alt Key 1146595 Mill Group 100C
 Affordable Housing No PC 0100
 FEMA Injunction ALL
 Inspect Date Next Review
 Business Name
 Physical Addr 21857 DISTURBED PINE RD, CUDJOE KEY

Associated Names

Name	DBA	Role
PRELL, JAMES		Owner
PRELL, VERNA R/S		Owner

Legal Description

CUDJOE KEY CUDJOE ACRES PARCEL WWW OR528-929 OR817-2204 OR959-1596 OR959-1597 OR995-1950 OR1625-2281 OR1686-870/71 OR2142-2205/06 OR2260-2425/27C
 OR2423-1910C/T OR2447-1224/25R/S

Land Data 1.

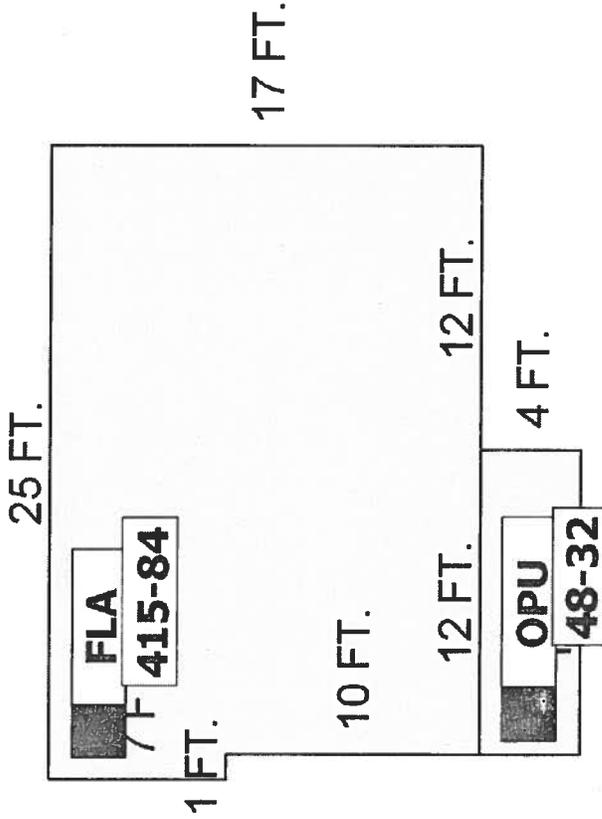
Line ID	Use	Front	Depth	Notes	# Units	Type	SOH %	Rate	Depth	Loc	Shp	Phys	Class	ROGO	Class Value	Just Value	
16248	010D	0	0	0 Yes	1.01	AC	100.00		1.00	1.00	1.00	1.15		N			

Total Just Value

Monroe County Property Record Card (133)

Alternate Key: 1146595
 Effective Date: 10/20/2011 2:14:00 PM
 Roll Year 2011
 Run: 10/20/2011 02:15 PM

Building Sketch 7624



Building Characteristics

Building Nbr	1	Building Type	R1	Perimeter	84	Functional Obs	0.00
Effective Age	56	Condition	P	Depreciation %	0.53	Economic Obs	0.00
Grnd Floor Area	415	Quality Grade	450	Year Built	1975	Special Arch	0

Inclusions: R1 includes 1 3-fixture bath and 1 kitchen.

Roof Type 3	Roof Cover 7	Heat 1	0	Heat Src 1	0	Heat Src 2	0	Bedrooms	1			
Extra Features:	2 Fix Bath	0	4 Fix Bath	0	Extra Fix	0	Vacuum	0	Security	0	Garbage Disposal	0
	3 Fix Bath	0	5 Fix Bath	0	7 Fix Bath	0	Dishwasher	0	Intercom	0	Fireplaces	0
									Compactor	0		

Sections

Type	Number	Exterior Wall Type	# Stories	Year Built	Attic	A/C	Basement %	Finished Bsmt %	Area	Sketch ID	SOH %
FLA	1	1:WD FRAME	1	1974	N	N	0.00	0.00	415	000	100.00
OPU	2	0:	1	1979	N	N	0.00	0.00	48	001	100.00

Monroe County Property Record Card (133)

Alternate Key: 1146595 Roll Year 2011
 Effective Date: 10/20/2011 2:14:00 PM Run: 10/20/2011 02:15 PM

Miscellaneous Improvements

Nbr	Impr Type	# Units	Type	SOH %	Length	Width	Year Built	Roll Year	Grade	Life	RCN	Depr Value
5	FN2:FENCES	1,080	SF	100.00	180	6	1997	1998	2	30		
4	CL2:CH LINK FENCE	440	SF	100.00	110	4	1974	1975	1	30		
3	CL2:CH LINK FENCE	70	SF	100.00	10	7	1974	1975	1	30		
1	UB2:UTILITY BLDG	130	SF	100.00	13	10	1974	1975	4	50		
Total Depreciated Value												

Appraiser Notes

2002-05-03 POSTED NO TRESPASSING CHANGED THE LAND USE FROM 990M O 9900 FOR THE 2002 TAX ROLL. SKIDMJ 2/7/2003 HOME ON LOT SINCE 1960, HAS WATER & ELC. D.M.J.

Monroe County Property Record Card (133)

Alternate Key: 1146595 Roll Year 2011
 Effective Date: 10/20/2011 2:14:00 PM Run: 10/20/2011 02:15 PM

Value History

Tax Year	Val Meth	Just Land	Class Land	Building	Misc	Just	Assessed Value	Exempt	Sr Ex	Tax Value
2011F	C	52,199	0	27,898	4,852	84,949	78,235	25,000	N	53,235
2010F	C	44,188	0	27,926	4,965	77,079	77,079	25,000	N	52,079
2009F	C	181,800	0	27,898	5,078	214,776	214,776	0	N	214,776
2008F	C	181,800	0	27,898	5,230	214,928	214,928	0	N	214,928
2007F	C	181,800	0	28,894	5,305	215,999	215,999	0	N	215,999
2006F	C	176,750	0	28,894	5,418	211,062	211,062	0	N	211,062
2005F	C	176,750	0	30,739	5,570	213,059	52,044	25,000	N	27,044
2004F	C	17,170	0	27,559	5,799	50,528	50,528	25,000	N	25,528
2003F	C	17,170	0	27,559	6,029	50,758	50,758	25,000	N	25,758
2002F	C	17,170	0	0	4,530	21,700	21,700	0	N	21,700
2001F	C	12,120	0	0	4,571	16,691	16,691	0	N	16,691
2000F	C	12,120	0	0	1,842	13,962	13,962	0	N	13,962
1999F	C	12,120	0	0	1,887	14,007	14,007	0	N	14,007
1998F	C	12,120	0	0	1,932	14,052	14,052	0	N	14,052
1997F	C	12,120	0	0	1,977	14,097	14,097	0	N	14,097
1996F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1995F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1994F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1993F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1992F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1991F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1990F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1989F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1988F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1987F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1986F	C	12,120	0	0	0	12,120	12,120	0	N	12,120
1985F	C	12,000	0	0	0	12,000	12,000	0	N	12,000
1984F	C	12,000	0	0	0	12,000	12,000	0	N	12,000
1983F	C	12,000	0	0	0	12,000	12,000	0	N	12,000
1982F	C	7,511	0	0	0	7,511	7,511	0	N	7,511

Monroe County Property Record Card (133)

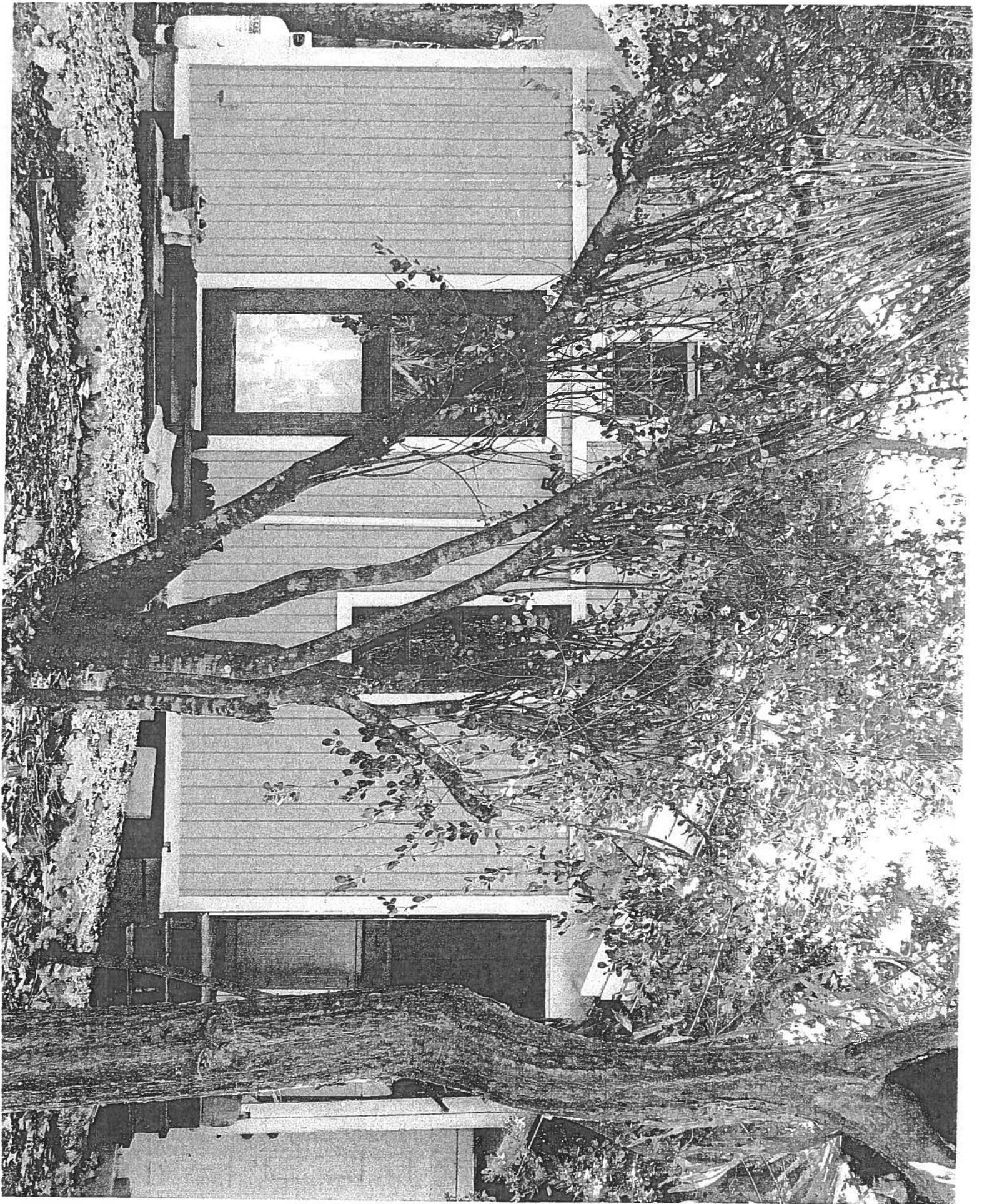
Alternate Key: 1146595
 Effective Date: 10/20/2011 2:14:00 PM
 Roll Year 2011
 Run: 10/20/2011 02:15 PM

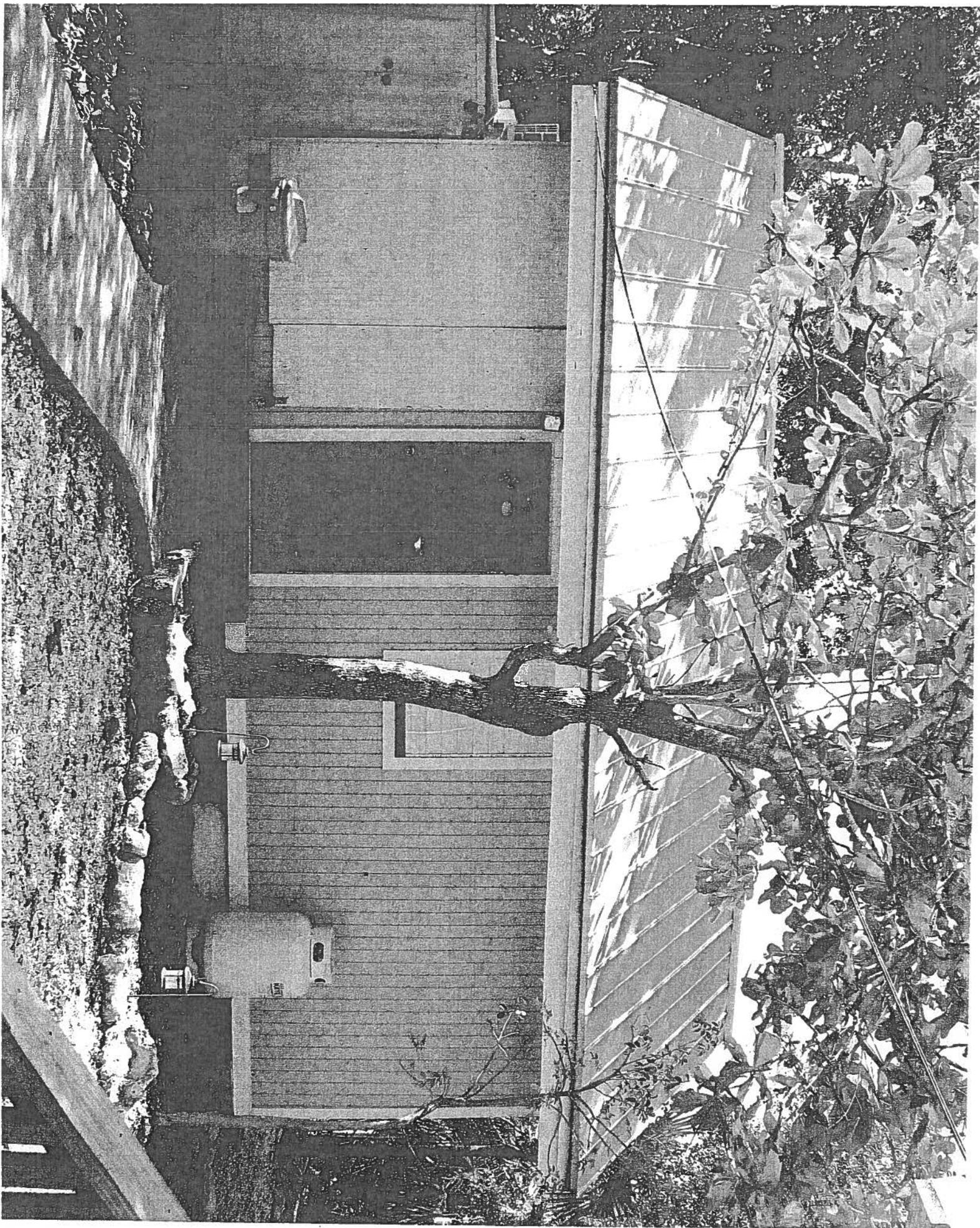
Sales History

Book	Page	Sale Date	Instrument	Transfer Code	Q/U	Vacant	Sale Price
528	929	2/1/1973	Conversion Code	0	Q	V	3,000
817	2204	9/1/1980	Warranty Deed	1	Q	V	8,000
959	1597	11/1/1985	Warranty Deed	0	Q	V	18,500
995	1950	12/1/1986	Warranty Deed	0	U	V	26,600
2142	2205	8/5/2005	Warranty Deed	0	W	I	200,000
2423	1910	7/20/2009	Certificate of Title	0	12	I	100
2447	1224	12/22/2009	Warranty Deed	0	01	I	100,000

Exemptions

Code	Description	Value	Year	Renewal	%	Amount Applied
38	HOMESTEAD R/S	25,000	2010	1	100.00	
44	ADDL HOMESTEAD	25,000	2010	1	100.00	





Doc# 1773039 01/05/2010 2:44PM
Filed & Recorded In Official Records of
MONROE COUNTY DANNY L. KOLHAGE

Prepared by and return to:

David R. Roy
Attorney at Law
David R. Roy, P.A.
4209 N. Federal Highway
Pompano Beach, FL 33064
954-784-2961
File Number: 09-DR-243
Will Call No.:

01/05/2010 2:44PM
DEED DOC STAMP CL: TRINA \$700.00

Doc# 1773039
Bk# 2447 Pg# 1224

[Space Above This Line For Recording Data]

Special Warranty Deed

This Special Warranty Deed made this ^{22nd} day of December, 2009 between Kenneth Pierce and Carole Pierce, husband and wife whose post office address is 1016 Grand Court, Highland Beach, FL 33487, grantor, and James Prell, a single man and Verna Powell, a single woman, as Joint Tenants With Rights of Survivorship whose post office address is P.O. Box 421026, Summerland Key, FL 33042, grantee:

(Whenever used herein the terms grantor and grantee include all the parties to this instrument and the heirs, legal representatives, and assigns of individuals, and the successors and assigns of corporations, trusts and trustees)

Witnesseth, that said grantor, for and in consideration of the sum TEN AND NO/100 DOLLARS (\$10.00) and other good and valuable considerations to said grantor in hand paid by said grantee, the receipt whereof is hereby acknowledged, has granted, bargained, and sold to the said grantee, and grantee's heirs and assigns forever, the following described land, situate, lying and being in **Monroe County, Florida**, to-wit:

A parcel of land in Section 20, T.66 S, R.28 E, on Cudjoe Key, Monroe County, Florida, and being more particularly described by metes and bounds as follows:

COMMENCING at the Southeast corner of Government Lot 7, Section 20, bear North 25 feet; thence bear West 920 feet to the Point of Beginning of the parcel of land hereinafter described; thence bear North 205 feet, thence bear East 215 feet; thence bear South 205 feet; thence bear West 21.5 feet back to the Point of Beginning.

c/k/a 21857 Disturbed Pine Road, Cudjoe Key, FL 33042

Parcel Identification Number: 00115510-002200

Subject to a purchase money first mortgage in favor of the Sellers in the principal amount of \$50,000.00 executed simultaneously herewith.

Together with all the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

To Have and to Hold, the same in fee simple forever.

And the grantor hereby covenants with said grantee that the grantor is lawfully seized of said land in fee simple; that the grantor has good right and lawful authority to sell and convey said land; that the grantor hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons claiming by, through or under grantors.

In Witness Whereof, grantor has hereunto set grantor's hand and seal the day and year first above written.

Signed, sealed and delivered in our presence:

Mary S. Roy
Witness Name: Mary S. Roy

Witness Name: Mary R Roy

Mary S. Roy
Witness Name: Mary S. Roy

Witness Name: Mary R Roy

Kenneth Pierce (Seal)
Kenneth Pierce

Carole Pierce (Seal)
Carole Pierce

State of Florida
County of Broward

The foregoing instrument was acknowledged before me this ^{22nd} 7th day of December, 2009 by Kenneth Pierce and Carole Pierce, who are personally known or have produced a driver's license as identification.

[Notary Seal]

Mary S. Roy
Notary Public

Printed Name: Mary S. Roy

My Commission Expires: _____



MONROE COUNTY
OFFICIAL RECORDS

**ADMINISTRATIVE APPEAL TO MONROE COUNTY PLANNING
COMMISSION**

AFFIDAVIT OF FINDLAY SINCLAIR



STATE OF FLORIDA
COUNTY OF MONROE

I, Findlay Sinclair, hereby state the following under oath:

1. I am over the age of 18.
2. I have been a resident of the Lower Keys, Monroe County, since 1985. I am presently employed as a vacation rental manager.
3. My address is 21875 Spain Boulevard, Cudjoe Acres, Cudjoe Key, FL.
4. I presently live in Cudjoe Acres and am acquainted with the property of James and Verna Prell at 21857 Disturbed Pine Road, Cudjoe Acres.
5. During the late 1980s, when I lived at Baypoint, I visited friends in Cudjoe Acres.
6. I can distinctly recall that the structures on what is now the Prell property were in existence in the late 1980s when I used to visit my friends at Cudjoe Acres.
7. To my knowledge and recollection, there has been no substantial change to the property since the late 1980s.

Under penalty of perjury, I declare that I have read the foregoing Affidavit and the facts stated in it are true and correct to the best of my knowledge.


Findlay Sinclair

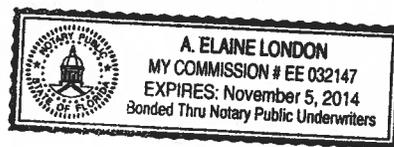
STATE OF FLORIDA
COUNTY OF MONROE

The foregoing instrument was acknowledged before me this 6th day of December, 2011, by Findlay Sinclair, who is personally known to me or who has produced driver's license as identification.



Notary Public – State of Florida

My Commission expires:



**ADMINISTRATIVE APPEAL TO MONROE COUNTY PLANNING
COMMISSION**

AFFIDAVIT OF HARVEY WACHOB

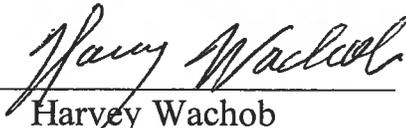
STATE OF FLORIDA
COUNTY OF MONROE



I, Harvey Wachob, hereby state the following under oath:

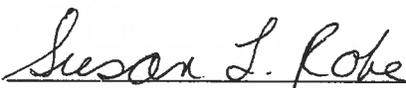
1. I am over the age of 18.
2. I have been a resident of the Lower Keys, Monroe County, since 1969. I am retired.
3. My address is 21940 Valencia Road, Cudjoe Acres, Cudjoe Key, FL.
4. I presently live in Cudjoe Acres on a year-round basis and am acquainted with the property of James and Verna Prell at 21857 Disturbed Pine Road, Cudjoe Acres. My property is approximately four lots away from the Prell property.
5. I have known the Prells for 1-2 years. I have been familiar with what is now the Prell property since 1984.
6. I can distinctly recall that, when I arrived in 1984, the Prell property had a cottage and boarded horses. From 1985 until the present someone has always lived in the above-mentioned cottage.
7. To my knowledge and recollection, there has been no substantial change to the property since 1984.

Under penalty of perjury, I declare that I have read the foregoing Affidavit and the facts stated in it are true and correct to the best of my knowledge.


Harvey Wachob

STATE OF FLORIDA
COUNTY OF MONROE

The foregoing instrument was acknowledged before me this 21st day of December, 2011, by Harvey Wachob, who is personally known to me or who has produced _____ as identification.


Notary Public – State of Florida

My Commission expires:

