



UNITED STATES DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

NATIONAL MARINE FISHERIES SERVICE

Southeast Regional Office

263 13th Avenue South

St. Petersburg, Florida 33701-5505

<http://sero.nmfs.noaa.gov>

F/SER31:KL
SER-2011-00029

Jason Spinning
U.S. Army Corps of Engineers
Jacksonville District
701 San Marco Boulevard
Jacksonville, Florida 32207

MAY 14 2015

Re: Miami Harbor

Dear Mr. Spinning:

This letter is in response to your memorandum dated April 10, 2015 submitted via email regarding the ongoing reinitiation of consultation under Section 7 of the Endangered Species Act (ESA) between the U.S. Army Corps of Engineers (USACE) and the National Marine Fisheries Service (NMFS) for the Miami Harbor dredging and expansion project.

Your memo states that the USACE believes that the Biological Opinion (BO) dated September 8, 2011, discussed and evaluated all identified effects caused by the deepening and widening of Miami Harbor, except for the additional *Acropora cervicornis* colonies discovered in the pre-construction survey of September/October 2013. However, your September 14, 2014, letter requesting reinitiation of consultation acknowledged that *Acroporid* corals were being subjected to sedimentation impacts beyond the extent considered in the opinion. NMFS unequivocally reiterates that the sedimentation actually experienced at the Port of Miami greatly exceeds the amount that we predicted in our BO, both in area affected and environmental consequences, and that reinitiation of consultation was required to consider these unanticipated sedimentation effects. Our BO only considered possible sedimentation impacts within the 150 meter "indirect" impact zone adjacent to the federal channel and predicted that those impacts would be temporary and insignificant.

Your April 10, 2015, memo seems to be based on a misinterpretation of the term "insignificant." That term is very clearly defined in the context of ESA section 7 analysis. Insignificant effects relate to the size or severity of the impact and include those effects that are undetectable, not measurable, or so minor that they cannot be meaningfully evaluated. Insignificant is the appropriate effect conclusion when plausible effects are going to happen, but will not rise to the level of constituting an adverse effect. That means the ESA-listed species may be expected to be affected, but not "taken" (e.g., injured or killed). The partial and total mortality of coral colonies caused by the dredging-induced sedimentation at Miami Harbor is not an insignificant effect, it is take, and it was not predicted in our 2011 BO and not included in the incidental take statement. In the case of designated critical habitat, insignificant effects are when the effect to the essential feature(s) is temporary, minor, or both, so that there is no discernible impact on the

Exhibit B



conservation function of that essential feature (s) in that designated critical habitat unit¹. The sedimentation effects which have occurred during the Port of Miami expansion far exceed this definition in geographical extent and severity. The impact zone is significantly larger than the 150 meters that we predicted in our BO, ranging well over 400 meters and potentially up to 1,000 meters or more from the federal channel according to observations made by the Florida Department of Environmental Protection (DEP), Miami-Dade County, and NOAA divers. The sedimentation is clearly detectable and measureable and has clearly adversely impacted ESA listed corals such that they had to be relocated under emergency conditions or face imminent mortality (which constitutes take). The sedimentation has also resulted in reduced function of the designated critical habitat surrounding the project area over a considerable length of time, and there is no indication that the sedimentation effects will be temporary.

In regards to our most recent request for additional information, including a request for a full delineation of the extent of the impacts zone, the USACE referred us to the information on the 4projects website. NMFS is aware of the data available on the website; however the data does not provide the complete assessment that we need to continue with revising the BO. For example, the sediment and coral stress reports available through the 4projects site do not contain a delineation of the impact area and do not supply the types of sediment measurements we are requesting. Moreover, some of the information is inconsistent with reports we have received from other sources, including DEP and NOAA divers.

As part of our consultation process we evaluate each proposed action in its entirety, including any proposed mitigative measures which may reduce the negative effects of the action. In this case, the effects of any mitigation action would likely be beneficial and could potentially help to offset some of the injury in our overall jeopardy and adverse modification analyses. Therefore, any information that the USACE can provide regarding actions which may correct some of the damages caused at the project site would be useful to the consultation process and it would be to the USACE's benefit to provide such information. The USACE mentions the relocated *Acropora* fragments as a minimization effort and indicates that they could potentially generate thousands of new colonies which would far exceed the total number of colonies currently inhabiting the action area. NMFS agrees that the fragments could possibly be used as part of future mitigative efforts, but the USACE has not provided any information on those efforts. Moreover, without a sediment delineation survey to define the impacted area and corals, it is impossible to evaluate those potential benefits against the project's environmental damage.

We appreciate the USACE coordinating the impact delineation dives with NMFS staff to allow a NOAA diver to participate. During recent phone conversations with Eric Bush it was suggested that the USACE could set up a webinar meeting to further discuss the project and NMFS' information requests given that travel is not feasible for some staff members at this time. We believe that a webinar would be beneficial. It appears that the week of June 1, 2015, would be a good time for NMFS staff to participate in a webinar meeting. Please advise if that week would also work for USACE staff. We look forward to cooperating with you on the Port of Miami deepening project to ensure the conservation of our marine resources. If you have any questions

¹ Endangered Species Act Section 7 Effects Determination Guidance National Marine Fisheries Service Southeast Regional Office, Protected Resources Division March 2014

regarding the ESA consultation, please contact Kelly Logan by phone at 727-460-9258 or by email at Kel.Logan@noaa.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Bernhart".

David Bernhart
Assistant Regional Administrator
for Protected Resources

File: 1514-22.f.4

cc: F/SER4 – Fay, Wilber, Karaszia