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March 22, 2019

Rachel Silverstein, Ph.D.
Executive Director and Waterkeeper
Miami Waterkeeper
2103 Coral Way, 2nd Floor
Miami, Florida 33145

Re: Comments on Environmental Management and Remediation Plan For Ultra Music Festival

Dear Dr. Silverstein:

The following responds to the March 14, 2019 letter from Miami Waterkeeper to Ultra Music Festival Organizers regarding the Ultra Music Festival and the Environmental Management and Remediation Plan produced by Cardno (dated January 28, 2019). We believe that the letter from Miami Waterkeeper mischaracterizes both the law and the facts. Overall, the critique provided by Miami Waterkeeper does not raise any substantive issues warranting further response by the Event Organizers. That being said, the Event Organizers remain committed to environmental protection and will implement numerous environmental mitigation measures as well as a sustainability plan that will ensure the protection of Virginia Key.

The Environmental Plan Demonstrates that No Protected Species Will Be Harmed, Consistent with the Species Protection Laws

First, Miami Waterkeeper asserts that the Environmental Plan “makes unwarranted, unfounded, and/or inaccurate conclusions about the impacts of the festival on ecological habitats and wildlife in the area.” The assertion there will be harm to protected species is made without a scintilla of evidence and by mischaracterizing the relevant environmental statutes.

As noted by Miami Waterkeeper, the relevant species protection laws are the Endangered Species Act, the Marine Mammal Protection Act, Florida’s Marine Turtle Protection Act, Florida Manatee Sanctuary Act, and the Migratory Bird Treaty Act. While parroting back certain relevant provisions of these laws, Miami Waterkeeper mischaracterizes their requirements.

The Federal Endangered Species Act (ESA)¹ makes it unlawful for any person to “take” an endangered species without a permit.² “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” a listed species.³ The Services⁴ regulations have further defined “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁵ In turn, “harass” is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”⁶ “Harass” requires some degree of fault (deliberate or negligent) by the person whose activities impacted the species.

These two definitions have different elements and standards in terms of proof that an activity is leading to a “take”. However, under both in order for a “take” to be triggered, there is a requirement that the Service demonstrate a relatively high level of injury to the species as well as a direct causal relationship between that injury and the activity that is alleged to cause the “take.”

On April 26, 2018, the Service issued a memorandum from the Principal Deputy Director to all Regional Directors titled “Guidance on trigger for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified” (Guidance Memo).⁷ The Guidance Memo notes that Service Field and Regional personnel often provide critical technical assistance to private parties that may seek a Section 10 permit and that it is “vital that Service staff apply correct and consistent interpretations of ESA statutory and regulatory provisions.” Hence, the Guidance Memo provides guidance on how one determines whether a project is likely to result in “take” of a listed species as it relates to habitat modification. The Memo discusses the definitions of “harass” and “harm”, stressing the fact that “harm” relates to activities that are likely to result in the actual death or injury of listed species. Thus, to trigger “take”, the modification of habitat has to (1) be significant; (2) significantly impair an essential behavior pattern of a listed species; and (3) result in a significant impairment of an essential behavior pattern, likely to result in the actual killing or injury of wildlife.

¹ 16 U.S.C. §§ 1531 *et seq.*

² 16 U.S.C. § 1538.

³ 16 U.S.C. § 1532(19).

⁴ Terrestrial species are overseen by the United States Fish and Wildlife Service (USFWS) and marine species are overseen by the National Marine Fisheries Service (NMFS), as delegated by the Secretary of the Department of the Interior.

⁵ 50 C.F.R. § 17.3.

⁶ 50 C.F.R. § 17.3.

⁷ <https://www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf>

The Guidance Memo states that the threshold determination of whether there will be a “take” rests with the project proponent (who may seek the input of the Service). Depending on the circumstances, the property owner “may proceed (at their own risk) as planned without a permit, modify their project and proceed without a permit, or prepare and submit a permit application. The biological, legal, and economic risk assessment regarding whether to seek a permit belongs with the private party determining how to proceed.” The analysis set forth in Guidance Memo is consistent with judicial interpretations of the ESA, which make clear that in order for there to be a regulated “take” of a species, there must be actual, as opposed to hypothetical or speculative, death or injury to identifiable protected species; and (2) that harm must be foreseeable and proximately caused by the activities.⁸ The interpretation of “take” advanced by Miami Waterkeeper (more of a dictionary definition of “disturb”) is inconsistent with the law.

Moreover, contrary to the position of the Miami Waterkeeper, the courts have addressed the distinction between permanent and temporary impacts, specifically the temporary impacts of noise. In *Fund for Animals v. Florida Game and Fresh Water Fish Commission*,⁹ the court rejected claims that noise from airboats related to a deer hunt might cause stress on any endangered species found in the area leading to a take as the effect was not “significant.” The court held that no “taking” of an endangered species would occur as a result of the four extra days’ use of airboats and other all-terrain vehicles in connection with the proposed deer hunt. “Assuming that the Florida Panther, the Everglades Kite, and the Indigo Snake presently exist in Conservation Area 3A, there exists in the record an insufficient basis for a finding that use of airboats in this instance will ‘significantly disrupt normal behavior patterns of the endangered animal.’ 50 C.F.R. Section 17.3(c). As stated earlier, to the extent that noise from the airboat engine causes stress, it is very temporary and no more stressful than aircraft overhead, and flight is possible to two adjacent National Parks. To the extent that airboat paths created during the four-day period of this emergency hunt have the potential for disrupting normal behavior patterns or degrading the environment, this Court simply does not find it to be ‘significant’ under the circumstances peculiar to this area, especially in light of the fact that this area is crisscrossed by airboats every year when this water conservation area becomes a public hunting ground.”¹⁰ Courts have made similar findings with regard to localized impacts on endangered species’ feeding patterns who are habituated to the presence of man.¹¹

⁸ See e.g. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) (providing detailed analysis of “harm” definition); *Defenders of Wildlife v. Bernal* 204 F.3d 920, 925-27 (9th Cir. 2000) (Plaintiff had the burden of proving by a preponderance of the evidence that the proposed construction would harm a pygmy-owl by killing or injuring it, or would more likely than not harass a pygmy-owl by annoying it to such an extent as to disrupt its normal behavioral patterns); *Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992) (the harm must be so extreme as to lead to population decline and possible extinction); *Water Keeper Alliance v. DOI*, 271 F.3d 21, 34 (1st Cir. 2001) (upholding district court’s finding that “assertions concerning irreparable harm stemming from the ‘death of even a single member of an endangered species’ were insufficient to justify granting injunctive relief”).

⁹ 550 F. Supp. 1206 (S.D. Fla. 1982).

¹⁰ *Id.* at 1210.

¹¹ *Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1513 (9th Cir 1994) (finding no justification for an injunction based on “take” because the area of actual grizzly bear habitat affected by a railway grain

Hence, for there to be a regulated take, the impacts of the event would have to proximately cause an actual death or severe injury to a protected species. It is not enough that certain species may temporarily leave the area. Given its location in a densely populated area and the frequency of events at Historic Virginia Key Beach Park and Miami Marine Stadium, it can hardly be said that the local population of species are not used to the presence of people and boats. The temporary noise from the event is not likely to lead to “take” of species. If the position of Miami Waterkeeper were correct, then every concert or loud event held anywhere near the water would require “take” authorization. So too, every firework show, air horn or other loud sound that causes a species to flee the area. This is not, however, how the ESA has been interpreted.

The Marine Mammal Protection Act¹² similarly prohibits the unauthorized “take” of protected species. The term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal. The MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

In *United States v. Hayashi*,¹³ the court held that the act of firing a rifle at a group of porpoises did not “harass” the species pursuant to the MMPA because it was not a direct, serious diversion of the species from its natural routine. The court concluded that the term “harassment” under the MMPA requires a direct and significant intrusion and a serious diversion of the mammal from its natural routine.¹⁴

The Migratory Bird Treaty Act¹⁵ makes it criminally unlawful to “kill” or “take” a migratory bird, nest or egg, except as permitted under regulations.¹⁶ On Dec. 22, 2017, The U.S. Department of the Interior (DOI) Solicitor's Office, issued a legal opinion concluding that that the MBTA applies only to intentional actions (such as hunting and poaching) that kill migratory birds and does not apply to incidental take (accidental deaths from otherwise lawful activities such as energy production). Thus, the memo concludes, the MBTA does not criminalize “incidental take,” which is defined as “both takings and/or killings that directly and foreseeably result from, but are not the purpose of, an activity.” While we are confident that no birds will be harmed by the Event, we note that there certainly will not be any intentional harm.

spill was localized and the grain spill in question “did not significantly impact the feeding habits of grizzlies”).

¹² 16 U.S.C. §§ 1361 *et. seq.*

¹³ 22 F.3d 859 (9th Cir. 1994).

¹⁴ *Id.* at 864. While brought under the MMPA, the court looked at the ESA definition of “harass” for guidance, noting that the statute groups “harass” with “hunt,” “capture,” and “kill” as forms of prohibited “taking.” The latter three each involve direct and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state. Consistent with these other terms, “harassment,” to constitute a “taking” under the MMPA, must entail a similar level of direct intrusion.

¹⁵ 16 U.S.C. §§ 703 *et. seq.*

¹⁶ 16 U.S.C. §703

To conclude, under all of the species protection statutes, a “take” is triggered only in situations where the activities are substantially likely to kill or injure protected species. The MBTA requires actual intent. As discussed below, the Environmental Management and Remediation Plan reasonably concludes that the Event will not lead to any “take” of species or other significant environmental harm. The temporary displacement and negligible annoyance to species does not rise to the level such that a federal permit is required or that a federal law has will be violated.

The Environmental Plan Is Based on the Best Available Science, Including a Detailed Analysis of Occurrence of Federally and State Protected Species and their Habitat

Miami Waterkeeper asserts that the “biological surveys carried out were completely insufficient to accurately account for the abundance and occurrence of federally and state protected species.” While requesting that Cardno conduct “significantly more surveys”, Miami Waterkeeper does not provide any evidence to demonstrate that the report is inaccurate or that some specific study was required but not undertaken.

The Environmental Management and Remediation Plan was prepared by Cardno, a multifaceted consulting firm with subject matter experts covering various issues. The work was overseen by Steve Godley, who has over 35 years of environmental consulting experience and is a nationally recognized expert on endangered and threatened species. Mr. Godley has performed countless wildlife studies, ecological and environmental assessments, and has extensive experience with permitting and mitigation design for large-scale projects. He served on the U.S. Fish and Wildlife Society's Bald Eagle Recovery Team for the Southeastern U.S. and has served as an expert witness in 14 cases involving the development impact on various species. He is supported by a team of professionals with extensive experience.

The Plan is further backed by the Environmental Monitoring Field Guide, which provides for a qualified environmental monitor (QEM) with pertinent information regarding sensitive wildlife and plant species that may occur on or near the Event, applicable permit requirements or protections, contact information for regulatory personnel as necessary, as well as a way in which to document occurrences or potential incidents associated with sensitive species onsite.

Section 1, Project Overview provides a detailed description of the proposed event and current condition of Virginia Key. Among other issues, this section addresses the following:

- A discussion of the history of the music festival and a description of the controlling License Agreement.
- The history of Virginia Key.
- A description of the Florida Land Use, Cover and Forms Classification System that was used to develop a map of the habitat of the entire island, the existing land uses and soil types.

- An analysis of applicable federal, state and local regulations including lighting regulations for turtle protection, manatee protection plans and protection areas, and protection of protected plants and animals.

Section 2, Description of the Proposed Action provides a detailed discussion of the event schedule and venue. Among other issues, this section addresses the following:

- The proposed use of the stadium and park (including stage location, pedestrian access, transportation, and amenities).
- The construction and deconstruction plan (including general conservation measures, a detailed fencing plan, access control, cleanup and a memorandum of understanding with local environmental organizations.

Section 3, Affected Environment Analysis provides a detailed analysis of the ecological resources on Virginia Key and in the area that may be effected by the Event. Among other issues, this section addresses the following:

- An ecological characterization of Virginia Key with detailed discussions of the various habitat types and potential risks to those habitats.
- A description of biological resources including species of concern, species status, and activity.
- Analysis of the best available science concerning the area, including a review of relevant databases, an aerial survey and pedestrian survey.
- Species-specific measures for avoidance and mitigation.
- Analysis of boat usage.
- Analysis of potential noise impacts on species across various distances and sub-surface. The noise analysis based on an expert engineering firm's modeling of likely sound outputs from site plans and identification of noise-sensitive areas.
- Litter control and environmental stewardship including a "Leave No Trace" policy and waste reduction and diversion programs
- A discussion of sustainability management goals and details.

Section 4, Risk Assessment and Remediation, evaluates the potential risk to the various resources and proposes mitigation measures to ameliorate or remediate any such harm. This analysis presents a sufficient level of detail to demonstrate that the festival organizers will meet their obligations under all laws and the License Agreement.

Contrary to Miami Waterkeeper, the Report is based on far more than one helicopter survey and two visits. Among other data, the report includes the Florida Land Use, Cover and Forms Classification System mapping, complete agency lists of species that are known or believed to occur within Miami-Dade County, all known records of tracked species within a one-mile radius of the location, a literature review, species surveys, and listed plant reviews. Cardo and other experts have been onsite several other times. Notably, Miami Waterkeeper does not provide any contrary information or data that would call into question the expert conclusions of Cardo.

The Report addresses all potential impacts of noise across all potential receptors, including those raised by Miami Waterkeeper.¹⁷ The noise analysis is based on acoustic modeling and noise contours. Moreover, the analysis is conservative given that it assumes maximum noise levels from all stages simultaneously and represents atmospheric conditions that promote propagation of sound from source to receiver. Other than stating that “the scientific literature generally finds wildlife begins reacting to noise at 40 decibels,” Miami Waterkeeper lacks any evidence that the event will harm species or habitat. Since the report was prepared, Trinity consultants has placed several noise barriers near various stages. They will be conducting on-site monitoring.

The Environmental Mitigation Methods are Based on Detailed Analysis of Risk and are Sufficient to Ensure No Harm to Any of the Resources

Finally, Miami Waterkeeper asserts that the environmental mitigation methods proposed are insufficient to protect important habitats and species in the area. For the most part, this comment ignores the details found in the Report itself. As indicated in the Report, the Event Organizer intends to mitigate environmental impacts by excluding sensitive habitats from patron access by constructing temporary stages, fences, and event-based structures. Onsite best management practices will also be employed to educate event staff, vendors and crew on how to potentially minimize or eliminate potential impacts. For example, fencing along the coastal habitats will be erected on the inland side to avoid potential habitat or species impacts. Other conservation measures include restricting access to environmentally sensitive areas, prohibiting beach access and access to mangroves or wetlands, banning the use of certain single use plastics, implementing a waste reduction and diversion program and enacting a spillage and runoff mitigation plan as well as a “leave no trace” policy. Security for the Event will, in part, be managed and controlled by the construction of fencing and event-based structures at regulated access points.

To conclude, we have little doubt that the Environmental Plan is sufficient to meet the Event Organizer’s responsibilities under state and federal law as well as the License Agreement. The Plan is based on sound science and the best available information concerning the species and habitat of the area. No species or habitat will be harmed by the event. In addition, staff will be on site during the event to identify environmental issues and to ensure that the security measures are followed. Finally, sound levels will be monitored throughout the event and additional physical barriers have been constructed.

¹⁷ For example, Section 3.6.4.4 discusses sub-surface impacts.

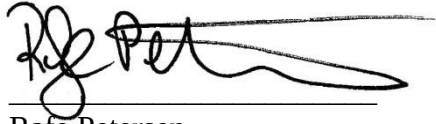
Rachel Silverstein, Ph.D.

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Very truly yours,

HOLLAND & KNIGHT LLP

A handwritten signature in dark ink, appearing to read "Rafe Petersen", written over a horizontal line.

Rafe Petersen