

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Fort Myers Division**

NATURAL RESOURCES DEFENSE COUNCIL,)
1152 15th Street NW, Suite 300)
Washington, DC 20005,)

CENTER FOR BIOLOGICAL DIVERSITY,)
P.O. Box 2155)
St. Petersburg, FL 33731,)

NATIONAL PARKS CONSERVATION)
ASSOCIATION,)
777 6th Street NW, Suite 700)
Washington, DC 20001,)

CONSERVANCY OF SOUTHWEST FLORIDA,)
1495 Smith Preserve Way)
Naples, FL 34102,)

EARTHWORKS,)
1612 K Street NW, Suite 808)
Washington, DC 20006,)

SOUTH FLORIDA WILDLANDS)
ASSOCIATION,)
1455 Tyler Street)
Hollywood, FL 33020,)

Plaintiffs,)

v.)

NATIONAL PARK SERVICE,)
1849 C Street NW)
Washington, DC 20240,)

SALLY JEWELL, in her official capacity as)
Secretary of the U.S. Department of the Interior,)
1849 C Street NW)
Washington, DC 20240,)

Civ. No.

JONATHAN B. JARVIS, in his official capacity)
as Director of the National Park Service,)
1849 C Street NW)
Washington, DC 20240,)
)
STAN AUSTIN, in his official capacity as)
Regional Director of the Southeast Region of the)
National Park Service,)
100 Alabama Street SW)
Atlanta, GA 30303,)
)
Defendants.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This suit challenges the National Park Service’s (Park Service) approval of an extensive 3-D seismic geophysical exploration survey for oil and gas deposits within the Big Cypress National Preserve (Big Cypress or the Preserve) in south Florida. The Park Service’s authorization of the survey was arbitrary and capricious, and violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and Park Service regulations by failing to analyze the full environmental impacts of the geophysical activities, failing to consider reasonable alternatives, and failing to comply with the agency’s own standards for approval of oil and gas operations. The scenic and wild public lands that encompass the seismic survey area will be significantly disturbed in ways that the Park Service has refused to evaluate fully and disclose to the public.

2. The Texas-based Burnett Oil Company, Inc. (Burnett) proposed the seismic survey. Burnett submitted a Plan of Operations to the Park Service seeking to use enormous “vibroseis” trucks, other off-road vehicles, and a helicopter to conduct 3-D seismic geophysical activities throughout 110 square miles (70,454 acres) of mostly

roadless wetlands in the backcountry of the Preserve (Plan of Operations). This approved Plan of Operations constitutes the first of four planned seismic exploration phases, which will, in total, ultimately encompass 366 square miles (234,000 acres), or about one-third of the Preserve. The total affected area is larger than many National Parks, including Shenandoah, Acadia, Crater Lake, Biscayne, and Zion National Parks. Phase I of the seismic survey alone rivals the largest seismic testing operations ever to occur in a National Park unit.

3. Big Cypress is an extraordinary and unique national treasure. It is an extension of the Everglades hydrologic system and provides nearly half of the water flowing into Everglades National Park. Water flows across the surface of the Preserve in marshes and sloughs and below the surface of the Preserve through porous aquifers. Big Cypress serves as a significant recharge area to aquifers, including portions of the Biscayne Aquifer, which provides most of the fresh water for public water supply and agriculture in southeast Florida. The Preserve is home to many rare and protected species of plants and animals, including the critically endangered Florida panther. Beloved for its many outdoor recreation opportunities, Big Cypress hosted almost 1.2 million visitors in 2015.

4. Plaintiffs are non-profit environmental and conservation organizations with strong interests in protecting the Preserve's ecosystems and wildlife from damage and in safeguarding the Preserve's integrity as a unit of the National Park system.

JURISDICTION AND VENUE

5. This action arises under NEPA, 42 U.S.C. §§ 4321-4370h, and the APA, 5 U.S.C. §§ 701-706. The Court has jurisdiction over this action pursuant to the APA, 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331 (federal question).

6. The Court has the authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 705-706. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

7. The requested relief would redress the actual, concrete injuries to Plaintiffs caused by the Park Service's failure to comply with duties mandated by the APA, NEPA and its implementing regulations, and Park Service regulations.

8. The challenged agency actions are final and subject to judicial review pursuant to 5 U.S.C. §§ 702, 704, and 706.

9. Plaintiffs commented on the Plan of Operations and both versions of the Park Service's Environmental Assessment and have exhausted all available administrative remedies.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because most of the Preserve, including the survey area that is the subject of this action, is located in Collier County, Florida, and a substantial part of the events giving rise to this action took place in Collier County, Florida.

PARTIES

11. Plaintiff Natural Resources Defense Council, Inc. (NRDC) is a non-profit membership corporation founded in 1970 and organized under the laws of the State of

New York. NRDC maintains offices in New York, NY; Washington, DC; Chicago, IL; Bozeman, MT; San Francisco, CA; Santa Monica, CA; and Beijing, China. NRDC uses law, science, and the support of more than 290,000 members throughout the United States, including over 13,200 members who reside in Florida, to protect wildlife and wild places and to ensure a safe and healthy environment for all living things. For over forty years, NRDC has engaged in scientific analysis, public education, advocacy, and litigation on a wide range of environmental and health issues. NRDC has had a longstanding and active interest in the protection of the nation's public lands. For many years, NRDC has worked with the National Park Service to enhance public participation in government decision making and to protect important lands and wildlife. NRDC also works to address climate change by promoting clean energy and reducing America's reliance on fossil fuels. NRDC brings this action on its own behalf and on behalf of its adversely affected members.

12. Plaintiff Center for Biological Diversity (Center) is a non-profit 501(c)(3) corporation headquartered in Tucson, Arizona, with offices in Florida, California, New Mexico, Washington, Oregon, Minnesota, and Washington, D.C. The Center for Biological Diversity works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including protection of plant and animal species from the impacts of global warming. In addition to more than 1,000,000 online supporters, the Center has more than 45,000 members throughout the United States and the world, including more than 1,000

members in Florida. The Center brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities regarding the Florida panther and other species in Big Cypress National Preserve harmed by the Park Service's decisions challenged in this case. The interests of the Center and its members in observing, studying, and otherwise enjoying the panther and the Preserve's vast diversity of plant and animal species are harmed by Defendants' actions. The Center has been involved in keeping off-road vehicle use out of sensitive areas of Big Cypress for nearly a decade.

13. Plaintiff National Parks Conservation Association (NPCA) is a non-profit organization that together with more than one million members and supporters, including more than 18,000 members in Florida, speaks for America's national parks. Since its founding in 1919, NPCA has been an independent, nonpartisan voice working to strengthen and protect America's national parks for present and future generations. NPCA is headquartered in Washington, DC and maintains an office in Hollywood, Florida. Among other things, NPCA has worked to protect Big Cypress National Preserve from the impacts of off-road vehicle use. NPCA brings this action on its own behalf and on behalf of its adversely affected members.

14. Plaintiff Earthworks is a non-profit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. With the support of 65,000 members nationwide, it documents and exposes threats, engages residents in advocacy, and pushes for the changes necessary to protect water, air, land, and health. Earthworks is actively

engaged in advancing both state and federal policies and regulations to protect public lands such as the Big Cypress National Preserve and to ensure that companies are held to stringent operational and accountability standards. Earthworks brings this action on its own behalf and on behalf of its adversely affected members.

15. Plaintiff Conservancy of Southwest Florida (Conservancy) is a regional environmental non-profit organization serving Hendry, Glades, Lee, Charlotte, and Collier counties in Florida. The Conservancy has over 4,400 members who enjoy the recreational opportunities and quality of life afforded by south Florida's natural resources. The Conservancy strives to protect land, water, and wildlife through programs in science and research, policy and advocacy, environmental education, and wildlife rehabilitation. The Conservancy brings this action on its own behalf and on behalf of its adversely affected members.

16. Plaintiff South Florida Wildlands Association (SFWA) is a non-profit environmental organization incorporated in the State of Florida to protect remaining wildlife habitat in the Greater Everglades. SFWA's focus is on protecting the large swaths of undeveloped land which still exist outside of south Florida's urban boundaries. It focuses on public and private lands alike. SFWA's conservation efforts are carried out through educational talks at various community venues, emailed action alerts, posts on social media, interviews and articles in the press and other media, communications during agency hearings and public comment periods, and, where necessary, litigation. Since its inception in 2010, SFWA has advocated on behalf of wildlife habitat and wilderness values in the Big Cypress National Preserve. It has provided oral testimony and letters

during public comment periods on numerous Preserve issues. SFWA has also participated in prior litigation related to the impacts of off-road vehicles on the preserve's natural resources and visitation. SFWA's members carry out field work and frequently recreate in the specific areas where the Burnett seismic survey is proposed to take place. SFWA brings this action on its own behalf and on behalf of its adversely affected members.

17. Plaintiffs' members use and enjoy the Preserve for a variety of purposes including hiking, camping, photography, birdwatching, wildlife viewing, aesthetic enjoyment, spiritual contemplation, escape from nearby urbanized environments, and other vocational, scientific, and recreational activities. Plaintiffs' members' use and enjoyment of Big Cypress for these purposes will be directly affected and irreparably harmed by the Park Service's decision to approve intrusive geophysical exploration in the Preserve, including off-road travel by enormous vibroseis trucks and other off-road vehicles (ORVs), and repetitive helicopter flyovers, which will cause sustained and prolonged damage to the environment and aesthetics in the Preserve. For example, the seismic survey will disturb and disperse wildlife, damage vegetation, soils, and wetlands, and disturb the natural solitude of the backcountry. Plaintiffs and their members also have a substantial interest in seeing that the Park Service complies with the requirements of NEPA.

18. Plaintiffs' members intend to continue to use and enjoy the Preserve frequently and on an ongoing basis in the future, including this year.

19. The aesthetic, recreational, scientific, educational, religious, and procedural interests of Plaintiffs and their members have been adversely affected and

irreparably injured by the process by which the Park Service approved the seismic exploration, and by the Park Service's decision itself. The adverse impacts that will result from the Park Service's process and decision will cause actual, imminent, concrete, and particularized harm to the interests of Plaintiffs and their members.

20. The relief sought by Plaintiffs would remedy the injuries suffered by Plaintiffs and their members.

21. Defendant Sally Jewell is sued in her official capacity as the Secretary of the U.S. Department of the Interior. As Secretary, Ms. Jewell is responsible for managing public lands and resources, including lands and resources in the Preserve, and, in her official capacity, is responsible for implementing and complying with federal law, including the federal laws implicated by this action.

22. Defendant Jonathan B. Jarvis is sued in his official capacity as Director of the National Park Service, an agency within the U.S. Department of the Interior. As Director, Mr. Jarvis oversees the agency's management of public lands and is responsible for managing public lands under Park Service authority, including lands and resources in the Preserve, in accordance with NEPA, other federal laws, and Park Service regulations.

23. Defendant Stan Austin is sued in his official capacity as Regional Director of the Southeast Region of the National Park Service, an agency within the U.S. Department of the Interior. Mr. Austin is responsible for managing public lands under Park Service authority in the Southeast Region, including lands and resources in the Preserve, in accordance with NEPA, other federal laws, and Park Service regulations. Mr.

Austin signed the Finding of No Significant Impact (FONSI) and the letter approving the proposed Plan of Operations at issue in this case.

24. Defendant National Park Service is an agency within the U.S. Department of the Interior, which is responsible for managing public lands under its authority, including the lands and resources in the Preserve, in accordance with NEPA, other federal laws, and Park Service regulations.

STATUTORY AND REGULATORY FRAMEWORK

The Big Cypress National Preserve Establishment Act, the Addition Act, and the National Park Service Organic Act

25. Big Cypress was established by Congress in 1974 in the Big Cypress National Preserve Establishment Act (Establishment Act) “[i]n order to assure the preservation, conservation, and protection of the natural, scenic, hydrologic, floral and faunal, and recreational values of the Big Cypress Watershed in the State of Florida and to provide for the enhancement and public enjoyment thereof.” 16 U.S.C. § 698f(a). The Park Service is required to administer the lands in the Preserve “in a manner which will assure their natural and ecological integrity in perpetuity in accordance with” the Establishment Act and the National Park Service Organic Act. *Id.* § 698i(a).

26. In establishing the Preserve, Congress stressed that “public uses and enjoyment would be limited to activities where, or periods when, such human visitation would not interfere with or disrupt the values which the area is created to preserve.” H.R. Rep. No. 93-502 at 7, 93rd Cong., 1st Sess. (Sept. 13, 1973). One of the House sponsors of the legislation explained that the “ecosystem of the Big Cypress area is fragile indeed and must be given every protection if we are to avert the elimination of the

wildlife forever.” 119 Cong. Rec. H32838 (Oct. 7, 1973) (Statement of Rep. Fuqua). Of particular pertinence here, the Establishment Act requires proper administration of the Preserve, including issuing such rules as the Secretary of the Interior “deems necessary and appropriate to limit or control the use of Federal lands and waters with respect to . . . exploration for and extraction of oil, gas, and other minerals.” 16 U.S.C. § 698i(b).

27. In 1988, Congress expanded the Preserve through the Big Cypress National Preserve Addition Act (Addition Act). 16 U.S.C. § 698f. It also required the Secretary of the Interior to issue rules “governing the exploration for and development and production of non-Federal interests in oil and gas . . . as are necessary and appropriate to provide reasonable use and enjoyment of privately owned oil and gas interests, and consistent with the purposes for which the Big Cypress National Preserve and the Addition were established.” *Id.* § 698m-4(a).

28. As a part of the National Park System, the Preserve must be managed in accordance with the National Park Service Organic Act (Organic Act), which requires the Park Service to “promote and regulate the use of the National Park System” in order to “conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 U.S.C. § 100101. The Organic Act empowers the Secretary of the Interior to “prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units.” *Id.* § 100751(a).

29. Collectively, these laws empower the Park Service to reject oil and gas exploration and development activities that conflict with the purposes for which the Preserve was established, which include the preservation, conservation, and protection of resources in the Preserve.

Executive Orders 11,644 and 11,989

30. In 1972, President Richard Nixon signed Executive Order 11,644, which set forth criteria for the designation of areas and trails for ORVs on federal lands. The Executive Order provided that ORV use on public lands must be “controlled and directed so as to protect the resources of those lands,” and that “[a]reas and trails [for ORV use] shall be located to minimize damage to soil, watershed, vegetation, or other resources . . . [and] minimize harassment to wildlife or significant disruption of wildlife habitats.” Exec. Order No. 11,644, §§ 1, 3(a), 37 Fed. Reg. 2877 (Feb. 8, 1972).

31. Reaffirming and strengthening Executive Order 11,644, President Jimmy Carter issued Executive Order 11,989, which directed agencies to close areas or trails to ORVs if they are causing or might cause “considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas or trails of public lands.” Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977).

32. The concerns expressed in these Executive Orders pertaining to the adverse effects of ORVs on federal lands also apply to off-road seismic exploration.

Regulation of Oil and Gas Activities in the Preserve

33. Pursuant to the rulemaking provisions of the Organic Act, the Big Cypress Establishment Act, and the Addition Act, non-federal oil and gas activities in the

Preserve are governed by regulations codified at 36 C.F.R. Part 9, Subpart B (9B rules). The 9B rules govern “all activities within any unit of the National Park System in the exercise of rights to oil and gas not owned by the United States where access is on, across or through federally owned or controlled lands or waters.” 36 C.F.R. § 9.30(a). They “are designed to insure that activities undertaken pursuant to these rights are conducted in a manner consistent with the purposes for which the National Park System and each unit thereof were created, to prevent or minimize damage to the environment and other resource values, and to insure to the extent feasible that all units of the National Park System are left unimpaired for the enjoyment of future generations.” *Id.*

34. The 9B rules require all proposed oil and gas plans of operations to contain various elements including, as appropriate, a description of “[a]ll reasonable technologically feasible alternative methods of operations, their costs, and their environmental effects.” *Id.* § 9.36(a)(16)(v).

35. The Park Service has broad authority to reject oil and gas activities in order to preserve, conserve, and protect the natural, scenic, hydrologic, floral and faunal, and recreational values of the Preserve. The Regional Director of the Park Service “shall not approve a plan of operations . . . [u]ntil the operator shows that the operations will be conducted in a manner which utilizes technologically feasible methods least damaging to the federally-owned or controlled lands, waters and resources of the unit while assuring the protection of public health and safety.” *Id.* § 9.37(a)(1).

36. In addition, the Regional Director “shall not approve a plan of operations . . . [w]here operations would substantially interfere with management of the

unit to ensure the preservation of its natural and ecological integrity in perpetuity, or would significantly injure the federally-owned or controlled lands or waters,” unless a denial “would, under applicable law, constitute a taking of a property interest rather than an appropriate exercise of regulatory authority,” in which case “the plan of operations may be approved if the operations would be conducted in accordance with paragraph (a)(1) of this section, unless a decision is made to acquire the mineral interest.” *Id.* § 9.37(a)(3).

37. In addition, the Regional Director “shall not approve a plan of operations . . . [w]here the plan of operations does not satisfy each of the requirements of § 9.36 applicable to the operations proposed.” *Id.* § 9.37(a)(4).

38. The Big Cypress National Preserve General Management Plan and Final Environmental Impact Statement dated January 27, 1992 also asserts that the Park Service has the authority to deny a plan of operations, stating:

A plan of operations could be denied approval if it would be detrimental to the purposes of the preserve (for example, the existing regulations could not provide the level of protection necessary) or if the levels of environmental impact resulting from such operations were unacceptable (for example, the 10 percent threshold was exceeded). If the denial was viewed as a potential for the taking of property, funds would be sought from Congress to acquire the affected mineral estate.

The Wilderness Act

39. The Wilderness Act expressed Congress’s intent to designate “wilderness areas” in federal lands that shall be “administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the

preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.” 16 U.S.C. § 1131(a).

40. Park Service management policies provide that wilderness areas in National Park units “shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.” Park Service Management Policies, 78 (2006). Park Service policies further direct the agency to “take no action that would diminish the wilderness eligibility of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed. Until that time, management decisions will be made in expectation of eventual wilderness designation.” *Id.* at 80. Therefore, “[l]ands that are determined to be eligible for wilderness will be managed to preserve their wilderness character.” National Park Service, Director’s Order No. 41: Wilderness Stewardship, 5 (2013).

41. Further, Park Service Management Policies state that “[t]he National Park Service will seek to remove or extinguish valid mining claims and nonfederal mineral interests in wilderness through authorized processes, including purchasing valid rights.” Park Service Management Policies, 88 (2006). Motorized access to mineral rights in wilderness is allowed only with an approved plan of operations for valid mineral claims and where there is no reasonable alternative. *Id.* Motorized access is allowed only on existing or approved roads, and road construction or improvement is only allowed if necessary for resource protection. *Id.* Any plan of operations that is approved for wilderness areas must include stipulations on operations and reclamation to ensure that long term effects on the wilderness area are substantially unnoticeable. *Id.*

The National Environmental Policy Act

42. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, is the nation's basic national charter for the protection of the environment and it contains action-forcing provisions to make sure that federal agencies comply with the Act. 40 C.F.R. § 1500.1. NEPA's purpose is to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. 40 C.F.R. § 1500.1(c).

43. NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

44. To determine whether an action's effects are "significant," agencies must consider both context and intensity. 40 C.F.R. § 1508.27.

45. A proposed action's effects "must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). The Park Service acknowledges in its NEPA Handbook that an impact's significance is influenced by "the importance of the resource or value being impacted, the geographic location and timing, and other relevant factors that provide context for more fully understanding the severity of the impact." Park Service NEPA Handbook, 20 (2015). Moreover, the relationship between an affected resource and a park unit's purpose and significance can be an important factor when considering context. *Id.*

46. The intensity part of the significance analysis refers to the severity of the anticipated impacts of the proposed action on the environment. 40 C.F.R. § 1508.27(b). To assess intensity, agencies should consider at least ten factors. *Id.* § 1508.27(b)(1)-(10). Among other factors, agencies should consider unique characteristics of the geographic area such as wetlands or ecologically critical areas, the degree to which effects are likely to be highly controversial, the degree to which impacts are uncertain or involve unknown risks, the degree to which the action may establish a precedent for future actions with significant effects, whether the action is related to other actions with individually insignificant but cumulatively significant impacts, and the degree to which the action may adversely affect an endangered or threatened species. *Id.*

47. With respect to related actions and cumulative impacts, “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” *Id.* § 1508.27(b)(7).

48. When a federal agency is not certain whether an EIS is required, it must prepare an Environmental Assessment (EA). *Id.* §§ 1501.3, 1501.4, 1508.9. If the EA concludes that the proposed project will have no significant impact on the human environment, the agency may issue a Finding of No Significant Impact (FONSI), and proceed with the proposed action. If the agency concludes that there may be significant impacts, then it must prepare an EIS. *Id.* § 1501.4.

49. “Segmentation” refers to breaking a large project into several smaller projects in order to avoid full NEPA review of the impacts of the project as a whole.

Federal agencies may not segment a project to avoid finding any significant impacts and avoid preparation of an EIS. *See id.* § 1508.27(b)(7).

50. Federal agencies may not rely on mitigation measures to eliminate significant environmental effects and avoid preparation of an EIS, unless the mitigation completely compensates for any possible adverse environmental impacts from the proposal or reduces the possibility to a minimum. Agencies may not rely on unproven mitigation measures to avoid finding significant impacts and preparing an EIS.

51. NEPA and its implementing regulations require agencies to take a hard look at mitigation measures and at the direct, indirect, and cumulative impacts of proposed actions. 42 U.S.C. § 4332(2)(C)(i)-(iii), (E); 40 C.F.R. §§ 1502.15(f), 1502.16, 1508.9(b), 1508.20, 1508.25(b)(3)-(c)(3).

52. To meet this “hard look” requirement in an EA, an agency must examine relevant data, articulate a satisfactory explanation for its action, and include a rational connection between the facts found and the choice made. If a FONSI is issued, an agency must make a convincing case for its finding of no significant impact.

53. “Direct effects” are those “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a).

54. “Indirect effects” are those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(b).

55. Cumulative impacts are impacts on the environment which result from a combination of the incremental impact of the proposed action, and other past, present, and reasonably foreseeable future actions whether taken by the federal government or

others. *Id.* § 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id.*

56. An EA or EIS should also consider reasonably foreseeable similar actions “when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” *Id.* § 1508.25(a)(3).

57. Federal agencies must also “study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b). This alternatives analysis is characterized as the “heart” of an EIS, 40 C.F.R. § 1502.14, and alternatives must be given full and meaningful consideration, whether the agency prepares an EA or an EIS.

58. The scope of an alternatives analysis derives from a project’s purpose and need. Agencies may not define a project’s purpose and need in unreasonably narrow terms that preordain the outcome of an alternatives analysis. The existence of a viable but unexamined alternative that would accomplish the general goal of the action renders an EA inadequate.

59. NEPA regulations also direct that agencies should, to the fullest extent possible, “encourage and facilitate public involvement” in the NEPA process. *Id.* § 1500.2(d)

The Administrative Procedure Act

60. The APA provides for judicial review of final agency actions. Under the APA, a reviewing court must “hold unlawful and set aside agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

FACTUAL AND PROCEDURAL BACKGROUND

Big Cypress National Preserve

61. Big Cypress is one of the first two national preserves in the national park system and originally consisted of about 582,000 acres. The Addition Act added about 147,000 acres, bringing the total size of the Preserve to about 729,000 acres.

62. Big Cypress is located in an environmentally sensitive region in South Florida and provides almost half of the water flowing into Everglades National Park. The Preserve’s vast hydrologic network is among the least altered remaining in South Florida. The landscape in the Preserve consists mostly of wetlands, including Cypress domes, swamp forest, various types of marsh, wet prairie, and other habitats that are inundated with water for part or all of the year. Even in areas that are seasonally dry, the water table remains near the surface year-round.

63. The Preserve contains vast undeveloped unique ecosystems, many of which are designated as “Important Resource Areas” that serve as habitat for wildlife and plants. Big Cypress provides some of the last intact habitat for many sensitive, rare, threatened, and endangered species of plants and animals, including the Florida panther, Florida bonneted bat, wood storks, red-cockaded woodpeckers, and others. As a result,

the Preserve is a popular destination for bird-watching, wildlife viewing, photography, and other recreational activities focused on the Preserve's flora and fauna.

64. In 2015, the Park Service concluded that over 188,000 acres of the Preserve could qualify as wilderness under the Wilderness Act.

65. Most of the lands that now make up Big Cypress were originally privately held, principally by the Collier family or corporate entities under its control. When the original Preserve and the Addition were established, the federal government purchased the surface estate but did not purchase the mineral estate. As a result, oil and gas rights within the Preserve are mostly privately held.

66. The Preserve overlies the Sunniland Trend, a geological formation containing oil and gas that spreads under the southwestern Everglades. There are several active oil fields within the Sunniland Trend, including Raccoon Point and Bear Island, which are located within the Preserve. Previous exploratory seismic surveys have taken place within the Preserve, but they were of a smaller scale and utilized different technology than Burnett intends to use in its survey.

Burnett's Proposed Seismic Survey

67. Collier Resource Company and other private mineral rights holders have contracted with Burnett to conduct exploratory activities for oil and gas in the Preserve.

68. Burnett's original proposed Plan of Operations requested approval from the Park Service to conduct a phased, four-year seismic survey over about 366 square miles in the northern portion of the Preserve. The four phases partially overlapped with each other and Phase I was completely surrounded by the three subsequent phases.

Existing access points from Interstate 75 are located in Phase I, so surface access to the subsequent phases would likely require crews and vehicles to traverse through the Phase I area to reach the other phases. Due to the geography, any helicopter operations in the subsequent phases would likely require flights over or near the Phase I area. In addition, helicopters cannot carry loads over Interstate 75, so operations in the subsequent phases would likely use existing underpasses in the Phase I area to move helicopter-borne supplies across Interstate 75.

69. Based on Park Service comments, Burnett submitted a revised proposed Plan of Operations that included only the first phase of the survey, which is the subject of this lawsuit, and will cover about 110 square miles (over 70,000 acres). Burnett intends to seek approval for the remaining three phases of exploration in future proposals.

70. Burnett's revised Plan of Operations for the first phase sought approval for a seismic survey in the north-central part of the Preserve both north and south of Interstate 75. The Phase I survey area is more than 80 percent wetlands (over 58,000 acres) and more than half of it is proposed or eligible for wilderness designation. Burnett proposed to conduct the survey during dry season conditions because it assumed that this would minimize damage to wetlands.

71. Burnett's Plan of Operations proposed a 3-D seismic geophysical survey using immense 67,100-pound vibroseis "thumper" trucks, other off-road vehicles (ORVs), and at least one helicopter.

72. The thumper trucks will operate in two groups of three vehicles and will create seismic signals by vibrating the ground surface with a hydraulic 8x4-foot, 7-inch

thick steel plate attached to each truck. The vibrating plate will be pressed against the ground, vibrated, raised, and then moved on to the next “source point.” Each thumper truck will apply over 61,000 pounds of peak force to vegetation, soils, and wildlife habitat at each source point. For context, the maximum legal weight for a standard loaded eighteen wheeler semi-truck is 80,000 pounds. The trucks will each apply this peak force at approximately 32,657 source points in the Preserve.

73. The thumper trucks will be supported by other ORVs, which will ferry survey crews to and from the thumper trucks each day, refuel the thumper trucks in the field, and accompany them throughout the survey. The thumper trucks and ORVs will travel largely off-road through wetlands along approximately 64 source lines oriented east to west and spaced about 1,155 feet apart. On each source line, the source points where the vibrations will occur are spaced at 82.5-foot intervals. Vegetation trimming and brush cutting will be necessary in order to allow for passage for the large thumper trucks and ORVs and, combined with the impacts from the vehicles themselves, could create hundreds of miles of new, de facto ORV trails in areas where trails do not currently exist and are not authorized by the Preserve’s management plans. The Park Service estimated that the total length of the source lines will be at least 510 miles.

74. To record data, geophone receivers will be placed in the ground at approximately 37,465 “receiver points.” The receiver points are spaced at 165-foot intervals along 168 receiver lines that will be about 495 feet apart. The receiver lines are oriented north-south, forming a grid with the source lines. Burnett’s plan calls for the geophone receivers to be placed by crews working primarily on foot and supported by a

helicopter, which will deliver and pick up the geophone receivers. The receiver lines may also be used by the thumper trucks and other ORVs to get from one source line to the next, which could also create new, de facto ORV trails. The Park Service estimated that the total length of the receiver lines will be at least 1,171 miles.

75. Burnett originally proposed to construct five staging areas within the Phase I survey area near existing access points from Interstate 75. However, in March 2016, Burnett modified its plan to use an off-site staging area at the Vulcan Mine site, just beyond the northwestern corner of the Preserve. Crews would still travel to the survey area from the access points along Interstate 75, and helicopter-borne supplies would have to be ferried across the highway on the ground using existing underpasses in the Phase I survey area to avoid flying loads over the highway.

76. Burnett plans to use at least one helicopter, particularly for delivering and retrieving the geophone receivers. The helicopter will be equipped with slings, long lines and quick disconnect systems to move and deploy equipment to the survey area.

77. Additionally, up to five crews will be deployed for surveying and layout operations using pick-up trucks or ORVs for daily crew mobilization and demobilization. Since there are virtually no existing roads or trails within the proposed survey area, these vehicles will need to be driven off-road through the wetlands in the survey area. The seismic survey equipment will also traverse a portion of the Florida National Scenic Trail to access the survey area.

Procedural History of the Park Service's Review and Approval of Burnett's Plan of Operations

78. Burnett submitted its revised Plan of Operations for the Phase I survey to the Park Service in December 2014. The Park Service released the plan for public comment in June 2015. Plaintiffs submitted timely comments on the Plan of Operations.

79. In November 2015, the Park Service issued its first EA in an attempt to evaluate the environmental impacts of the Plan of Operations. Plaintiffs submitted timely comments on the EA and requested that the Park Service prepare an EIS to fully evaluate the unprecedented and significant environmental impacts associated with the Plan of Operations.

80. Instead of preparing an EIS, the Park Service issued a revised EA in March 2016, which contained several changes but nevertheless favored Burnett's Plan of Operations. Plaintiffs submitted timely comments on the revised EA. Plaintiffs' comments included reports from experts in soil science, wetland hydrology, and ecology that disputed Burnett's and the Park Service's scientific conclusions regarding the likely effects from Burnett's survey on soils, wetlands, vegetation, wildlife, and other Preserve resources.

81. On May 6, 2016, the Park Service released a FONSI that selected Burnett's proposal as the preferred alternative and heavily relied on forty-seven untested and unsubstantiated mitigation measures to support its finding that the Plan of Operations would not have a significant impact on the Preserve.

82. On May 10, 2016, the Park Service sent Burnett a conditional approval letter approving the Plan of Operations, which serves as the agency's authorization for the seismic survey. There is no separate record of decision. *See* 36 C.F.R. § 9.37(b)(2).

83. The Park Service does not have an internal appeal process available for a challenge to a decision to approve a plan of operations. *See id.* § 9.39(a) (providing administrative appeals only for aggrieved oil and gas operators). Therefore, Plaintiffs' administrative remedies have been exhausted.

Environmental Impacts from Burnett's Seismic Survey

84. The Park Service's EAs failed to assess fully the impacts of Burnett's Plan of Operations on Preserve resources and failed to evaluate fully how long it would take impacted areas to recover. The Park Service did not provide any scientific evidence that impacts from the seismic survey can be reclaimed or mitigated in order to fully restore the Preserve's wetlands and habitats, or to maintain its wilderness designation eligibility.

85. Burnett's seismic survey will have significant impacts on Preserve resources. Survey crews and vehicles traversing the survey area will cause soil compaction and rutting. These soil changes can increase runoff of surface waters and accelerate soil erosion, ultimately degrading sensitive wetland habitats. Water quality could be impaired, and exotic plants could be introduced through contaminated equipment and ground disturbances. The vibroseis trucks and other ORVs will also crush or mat down vegetation as they drive off-road through the Preserve, and trees and shrubs will be damaged by vehicle passage and trimming.

86. Onshore seismic operations are known to impact wildlife by disrupting mating, nesting, spawning, and migration routes, and creating new travel corridors for predators. Effects from Burnett's survey operations on wildlife, including mammals, birds, fish, and invertebrates, may include increased displacement, increased risk of mortality, decreased reproductive success, and increased stress levels from the noise and disturbance associated with nearby seismic survey activities. These effects may result from crews traveling to access the survey area, from pedestrian travel along receiver lines, from helicopter overflights and equipment drops, as well as from the seismic operations themselves.

87. The presence of thumper trucks, ORVs, a helicopter, and other mechanized equipment will also degrade the undeveloped wilderness character in the Preserve. Opportunities for solitude and primitive recreation will be lost, as areas currently remote from the sights and sounds of human activity will be impacted by survey operations and left with lingering scars from the source and receiver lines. Survey activities may cause areas that have been proposed or determined to be eligible for wilderness designation to lose eligibility in the future.

88. In the revised EA and FONSI, the Park Service summarily and mistakenly asserted that the impacts of the thumper trucks on vegetation and habitats will be minimal, short-term, and similar to those caused by recreational ORVs that utilize the Preserve. However, the thumper trucks are more than twenty times heavier than a recreational ORV. Additionally, vibroseis truck tires are wider than ORV tires and will mat down wider strips of vegetation than typical ORVs.

89. Even if the impacts from the thumper trucks are similar to the impacts from recreational ORVs, the Park Service has documented numerous adverse impacts on soils, plants, hydrology, and wildlife from recreational ORV use. Very few of the impacts caused by recreational ORVs in the Preserve, including moderate to severe soil disturbance, had fully recovered when analyzed several years after the impacts first occurred.

90. Small cypress habitat is one of the habitat types most sensitive to vehicle disturbance because it consists of extremely wet soft soils, yet it accounts for more than twenty-six percent of the seismic survey area. Approximately eighty-three percent of the habitats proposed to be traversed by the thumper trucks are wetlands. By definition, wetlands have water at or near the surface, even during the dry season when the survey is proposed to occur. The weight of thumper trucks in predominantly wet, soft soils will result in severe soil disturbances, leading to long-term changes in vegetation composition and greatly increasing the risk of introducing invasive vegetation.

91. Studies on long-term vegetation impacts associated with on-shore seismic survey vehicles have found that trails with medium- to high-levels of initial disturbance recover slowly and that severe impacts to vegetation persist for two decades following disturbance. Studies have also reported significant differences in plant communities along seismic lines twenty to thirty years after the initial impacts. This is due, in part, to changes in soil conditions and nutrient availability arising from the disturbances that in turn cause changes in plant community succession over the long term.

92. In an attempt to better assess the impact of the thumper trucks on Preserve resources, Burnett's equipment operator, Dawson Geophysical, performed a test of a vibroseis truck at an undisclosed location in the Preserve on April 24, 2015. The test was documented by Park Service staff and was meant to simulate the survey techniques in the actual environment where it will take place.

93. Upon arrival at the test site at the scheduled time, Park Service staff observed that the vibroseis truck operator had already started the test and the truck had become stuck in a ditch. Attempts to pull it out with a 4x4 truck were unsuccessful. Ultimately, a tractor equipped with a back hoe had to be brought in to extricate the thumper truck. Agency staff noted that the area where the thumper truck was mired was significantly impacted from the vehicle and the attempts to free it, and that the operator's decision to proceed with the test run before Park Service staff arrived raised doubts as to the operator's openness and ability to follow agreed-upon procedures. Park Service staff also noted that the oil company truck operator's attempt to cross a ditch revealed the operator's unfamiliarity with the wetland environments in the Preserve.

94. As a result of time lost extracting the thumper truck from the ditch, the remainder of the test was located primarily along existing trails and there apparently was not enough time to test the equipment in more challenging off-road habitat. Although the equipment was not tested in challenging off-road habitat similar to that of the Phase I survey area, Park Service staff nonetheless noted soil rutting where the thumper truck could not turn as tightly as required and had to veer off the road. Agency staff also noted damage to cypress trees, tree saplings, and other vegetation.

95. The test site involved only a tiny portion of the 110-square-mile survey area. Park Service staff extrapolated from the test that the potential wetland impacts in the entire survey area could be significant, possibly warranting preparation of an EIS. Notably, agency staff stated that the vibroseis test clearly refuted the conclusion that there would be no impacts to wetlands or wilderness areas. Park Service staff ultimately concluded that the vibroseis truck test was “clearly a failure” and suggested that the use of smaller vibroseis trucks should be considered as an alternative to Burnett’s Plan of Operations.

96. In the initial and revised EAs, the Park Service mentioned that this test had taken place, but did not disclose, discuss, or rebut agency staff’s conclusion that the test was clearly a failure or their suggestion that the use of smaller vibroseis trucks should be considered. The EAs also omitted Park Service staff’s detailed descriptions of the damage they observed to Preserve resources during the test and included only two sets of photos that purported to show vegetative recovery six months after the test. In response to Plaintiffs’ comments that there was no report describing the soil conditions before and after the vibroseis field demonstration on April 24, 2015, the Park Service failed to disclose that a report did, in fact, exist. NPS responded to Plaintiffs’ comment by stating as follows:

The demonstration was not designed or required to be a scientific study. It was conducted in habitat typical of the survey area to give the applicant and the Park Service a sense of how the vehicles would perform and what environmental impacts could result. The Vibroseis operating crew learned a great deal, and observations and photographs taken during the demonstration and several months later were useful in documenting potential impact.

However, the Park Service failed to mention that agency staff had concluded that the vibroseis test was a failure and that the test refuted the operator's assertions that there would be no impacts to wetlands or wilderness areas. The Park Service failed to disclose the full environmental impacts caused by the vibroseis test in both the initial EA and the revised EA. Plaintiffs only learned of the failed vibroseis test upon receiving a copy of the report in response to a public records request a few days prior to the close of the public comment period on the revised EA.

97. Further, the Park Service's FONSI mischaracterized the vibroseis test, stating that the vibroseis test was conducted "to observe how a Vibroseis buggy would perform in wetlands typical of those expected to be encountered during the seismic survey." This analysis ignored the reality that the test had been conducted primarily on existing trails due to the time lost while extracting the vibroseis truck from the ditch, which did not allow for an evaluation of the vibroseis truck's performance in roadless wetlands typical of those throughout the survey area.

98. Burnett and Dawson also conducted a field demonstration of a vibroseis truck at a site about seven miles north of the Preserve in December 2013. Park Service staff were invited to this demonstration but did not attend. Photos taken during this demonstration and follow-up photos taken six months later show clearly visible vehicle tracks from the passage of a single vibroseis truck through wetland vegetation.

99. Based on past experience with recreational ORV impacts, seismic survey impacts in other locations, and the evidence available from the vibroseis truck tests in and near the Preserve, there is reason to believe that the thumper trucks will perform poorly in

off-road wetland conditions and will cause substantial, long-term damage to wetland soils and vegetation.

100. In addition to the direct and indirect effects of Burnett's Plan of Operations, the ecosystems and wildlife species affected by the seismic survey will experience cumulative impacts from other developments and activities in the region. For example, another seismic survey has been approved for 161 square miles of private and state lands just north of the Preserve, and at least eleven major development projects are proposed in Florida panther and other wildlife habitat. These projects will involve massive construction activities that will put increased pressure on Florida panthers and other wildlife, birds, and reptiles, potentially leading to loss of habitat, degradation of habitat, increased habitat fragmentation, significant increases in traffic, increased road crossings by Florida panthers and Florida black bears, and other potential impacts.

The Park Service's Mitigation Measures for Burnett's Seismic Survey

101. In concluding that Burnett's survey would not have significant impacts and that an EIS was not required, the Park Service relied on forty-seven mitigation measures to minimize or ameliorate potential significant effects. Many of these mitigation measures are untested, unproven, improbable, and unlikely to be successful.

102. For example, one mitigation measure required Burnett to use existing roads, trails, and disturbances to the extent feasible, and to avoid soft soils and standing water areas. But the vast majority of the survey is slated to occur in backcountry wetlands where there are no designated trails. It is also unspecified how Burnett will determine

whether soils are “soft” and how the Park Service will enforce these requirements throughout the remote survey area.

103. Another mitigation measure required that the survey be conducted during “dry season conditions, typically November through mid-May.” However, the Park Service did not specify any criteria that would be used to determine when dry season conditions exist and did not account for the length of time it takes for water levels in the Preserve to recede after the wet season. As a result, the survey could begin in November or even sooner if the Park Service determines that dry season conditions exist. Even if the Park Service and Burnett were to wait until as long as possible to begin the survey, the survey is scheduled to last eighteen weeks so, at the latest, Burnett would have to start field work by mid-January in order to finish by mid-May.

104. In another mitigation measure, the Park Service required that Burnett use a “one pass” survey design “in the majority of cases,” meaning that a group of vibroseis trucks and a support ORV would “traverse a given area only once.” However, multiple passes of the vibroseis trucks could be necessary to avoid Important Resource Areas or wildlife habitat, and to move the equipment throughout the survey area. In addition, the Park Service’s analysis ignored effects from ORVs that will be used to refuel the vibroseis trucks in the field and transport crews to and from them daily. These vehicles will either have to travel along the survey lines or will expand the project’s impacts by traveling off the survey lines. The Park Service’s analysis also failed to consider cumulative effects from all four phases of Burnett’s survey. Because the phases will

overlap, Burnett will need to re-survey portions of the Phase I area if later phases are approved, which would make a “one pass” design impossible in some areas.

105. Another mitigation measure required that any damage caused by vibroseis equipment must be restored immediately to minimize any impacts to wetlands, habitat, soils, and vegetation. To do so, the Park Service required the survey crew to use rakes and shovels to restore ruts, depressions, vehicle tracks, and soil compaction. However, the Park Service has not evaluated or tested whether raking and shoveling would be effective or whether it would instead result in even greater damage to wetland soils and vegetation. The Park Service has not evaluated whether or how such efforts will restore complex wetland soil characteristics or re-establish appropriate vegetative cover.

106. Although the Park Service acknowledged that the vibroseis truck got stuck during the April 2015 field test and had to be extricated by other equipment, the Park Service assumed that its mitigation measures would prevent similar problems and avoid significant damage to soils and vegetation during the actual survey. However, the Park Service has not tested the vibroseis equipment in off-road wetland conditions while implementing the listed mitigation measures to verify or refute this assumption.

107. The Park Service’s wetland restoration and maintenance and monitoring requirements are inconsistent with typical requirements for wetland restoration required by Florida state agencies for wetlands within their jurisdiction.

108. The Park Service also required monitoring of the survey site during, and for at least three years after, the survey. However, the Park Service failed to consider or address the challenges of ongoing inspections and proper management of a 110-square-

mile area, much of which is remote backcountry. This failure to adequately plan for the site-specific conditions undercuts the Park Service's assumption that monitoring will ensure the long-term success of the promised restoration.

109. Another Park Service mitigation measure requires Burnett to conduct a Geographic Information System (GIS) analysis of available data on the locations of protected wildlife species in the survey area, and to establish buffers around wildlife locations. However, GIS analysis alone without comprehensive field surveys or ground-truthing will not provide the necessary accuracy to identify and avoid impacts to species that may be nesting, roosting, or denning on or near the proposed survey routes.

110. In an attempt to identify and avoid previously undocumented wildlife and wildlife habitat, the Park Service required daily scouting ahead of the vibroseis trucks on the survey source lines. However, the Park Service did not explicitly require that the scouting be conducted far enough ahead of the vibroseis trucks to enforce the necessary buffer distances for various species, which are up to 1,640 feet. Also, the scouts will travel in ORVs, which may disturb protected species before they are identified.

111. The Park Service allowed Burnett to scout receiver lines primarily by helicopter, which does not ensure that necessary helicopter buffers will be observed for protected species, and will likely fail to identify some protected wildlife species and habitats that are difficult to spot from the air.

112. The Park Service did not require comprehensive scouting for protected wildlife, including in areas of the Preserve affected by the survey activities but outside the Phase I survey area. For example, areas northwest of the Phase I survey will not be

scouted, but will be subjected to multiple daily helicopter flights to and from the off-site staging area, and contain known Florida panther denning sites, wading bird sites, and other wildlife.

113. Documentation and avoidance of important habitats is necessary since much of the survey timeframe coincides with the breeding season for a large number of avian species. It is likely that some degree of disturbance to nesting and roosting species will result from the noise and air disturbance and drafts from the helicopter operating frequently during nesting season. The Florida panther, Florida black bear, several species of bats, and other mammals, as well as reptiles, also use habitats throughout the proposed survey area.

114. In all, the Park Service failed to analyze and demonstrate that its mitigation measures will be successful in preventing significant impacts to wetlands, soils, vegetation, wildlife, aesthetics, and other Preserve resources.

The Park Service's Analysis of Project Alternatives

115. Burnett's December 2014 Plan of Operations for the Phase I seismic survey did not include any discussion of possible project alternatives, their costs, or their environmental effects.

116. In the March 2016 Revised EA, the Park Service stated that "[t]he project purpose is to consider [Burnett's] request to exercise its private oil and gas exploration rights while protecting Preserve resources."

117. Also in the March 2016 Revised EA, the Park Service stated that "[t]he proposed geophysical exploration is needed to determine whether and where potentially

producing geological structures might be located so that the owners of those oil and gas interests may exercise their private property rights.”

118. Based on these purpose and need statements, the Park Service considered a limited number of alternatives to the project. It did not include any discussion, estimate, or analysis of costs for any of the alternatives.

119. In both EAs and in the FONSI, the Park Service failed to mention or discuss the agency staff’s recommendation, based on the failed vibroseis truck field test, to consider an alternative using smaller vibroseis trucks.

120. The Park Service summarily rejected a “no action” alternative because it “would not achieve the project purpose and need [and] is therefore not a reasonable alternative.” The Park Service analyzed this alternative as a formality to comply with NEPA regulations, but failed to fully evaluate viable versions of this alternative.

121. Specifically, the Park Service failed to evaluate fully the option of trading for or purchasing the private mineral rights. The Park Service acknowledged that acquiring the mineral rights would be “equivalent to the No Action alternative in terms of impacts.” But the agency rejected this alternative because “it would not meet the project purpose and need” as the Park Service had narrowly defined them. In doing so, the Park Service failed to acknowledge or discuss its own policies and the Preserve’s General Management Plan, which require the Park Service to consider acquiring private mineral rights if necessary to protect Preserve resources or in the event that private mineral rights are located in areas eligible for wilderness designation.

122. The Park Service also failed to evaluate fully alternatives of using previously collected seismic data, reducing the survey area, or using methods to avoid surface occupancy entirely, all on the basis that they would not meet the project purpose and need. These alternatives were summarily rejected and not analyzed in detail.

123. With respect to potential alternatives consisting of reductions in the survey area, such as exclusion of areas proposed or eligible for wilderness designation or Important Resource Areas, the Park Service rejected these alternatives in part because it assumed that Burnett would not be able to obtain the required data. However, the Park Service failed to define or justify the scope of the “required data” and failed to explain why a smaller survey area would be unable to produce a reasonable amount of useful data.

124. Ultimately, the Park Service considered only three alternatives in detail: (a) the no action alternative that it had already rejected, (b) Burnett’s proposed Plan of Operations, and (c) a worst case scenario alternative similar to Burnett’s proposal that would use explosives to generate seismic signals instead of using vibroseis trucks. The Park Service appeared to reject the worst case scenario alternative because it would take longer and have greater environmental effects than Burnett’s proposed Plan of Operations, but did not explain its rejection of this alternative in the Revised EA or the FONSI.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Failure to prepare an Environmental Impact Statement (APA and NEPA violation)

125. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs of this Complaint.

126. NEPA requires federal agencies to prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). To determine whether an action’s effects are “significant,” agencies must consider both context and intensity. 40 C.F.R. § 1508.27. Agencies may not segment a project into smaller pieces, *id.* § 1508.27(b)(7), or rely on unproven mitigation measures to avoid finding significant effects and dodge the requirement to prepare an EIS.

127. The context and intensity of Burnett’s proposed action make it a major Federal action significantly affecting the quality of the human environment under NEPA, which requires preparation of an EIS.

128. Big Cypress consists primarily of sensitive wetland habitats that support a multitude of rare and endangered flora and fauna, and is important locally, regionally, and nationally. In this context, and given the unprecedented nature and scale of Burnett’s seismic exploration, the impacts from the proposed action will be significant.

129. The intensity of the seismic survey, as assessed by the regulatory factors, also shows that impacts will be significant, severe, and adverse. *See id.* § 1508.27(b). For example, Burnett’s survey will occur almost entirely in roadless wetlands and other ecologically sensitive areas, the risks and impacts from the survey have been poorly

studied and have significant uncertainties, the Phase I survey may set a precedent for additional phases with greater impacts, and the survey will likely adversely affect threatened and endangered species. *See id.* § 1508.27(b)(3), (5)-(7), (9). In addition, the scientific reports attached to Plaintiffs' comments on the Revised EA demonstrate that the Plan of Operation's effects are "controversial" because "a substantial dispute exists as to the environmental consequences of the proposed action." 43 C.F.R. § 46.30 (defining "controversial"); 40 C.F.R. § 1508.27(b)(4).

130. Furthermore, the Park Service segmented Burnett's survey proposal by considering only Phase I and ignoring the reasonably foreseeable cumulative impacts from the subsequent three phases of seismic exploration. *See* 40 C.F.R. § 1508.27(b)(7); *see also id.* § 1508.7 (defining cumulative impacts). All four phases will have significant impacts, including impacts within the boundaries of the Phase I survey area, and the Park Service violated NEPA by failing to consider all of these impacts together in an EIS.

131. Additionally, the Park Service relied on forty-seven unsubstantiated mitigation measures in an attempt to eliminate the significant effects of the seismic survey and avoid preparation of an EIS. The agency failed to demonstrate that the mitigation measures would be effective or that they would completely compensate for, or reduce to a minimum, the significant adverse impacts from Burnett's seismic survey. As a result, the Park Service was required to analyze the survey's effects in an EIS.

132. The Park Service's failure to prepare an EIS was arbitrary, capricious, not in accordance with law, an abuse of discretion, and contrary to NEPA, 42 U.S.C.

§ 4332(2)(C)(ii), its implementing regulations, 40 C.F.R. Part 1502, and the APA, 5 U.S.C. § 706(2)(A).

SECOND CAUSE OF ACTION
Failure to take a “hard look” at the effectiveness of the mitigation measures
(APA and NEPA Violation)

133. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs of this Complaint.

134. NEPA and its implementing regulations require that federal agencies take a hard look at measures to mitigate environmental impacts. Agencies must develop, discuss in detail, and identify the likely environmental consequences of proposed mitigation measures. 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c); 1508.25(b)(3).

135. An agency may not merely state mitigation measures; it must also evaluate their effectiveness. The adequacy of mitigation measures that an agency relies on must be supported by substantial evidence. Agencies fail to take a hard look at mitigation measures when they rely on unsupported, optimistic assumptions that mitigation measures will succeed and ignore alternative, opposite assumptions.

136. Here, the Park Service required forty-seven mitigation measures and assumed that they would prevent lasting impacts and minimize the impacts of the seismic survey on Preserve resources. However, many of the mitigation measures are vague, untested, unrealistic, and heavily dependent upon policing in the field by Park Service staff or their surrogates. The Park Service lacked a basis to conclude that many of the mitigation measures would be effective and failed to consider the possibility that the mitigation measures may not prevent significant impacts to preserve resources.

137. The Park Service's failure to take a hard look at the effectiveness of the mitigation measures was arbitrary, capricious, not in accordance with law, an abuse of discretion, and contrary to NEPA, 42 U.S.C. § 4332(2)(C)(ii), its implementing regulations, 40 C.F.R. §§ 1508.25(b)(3), 1502.14(f), 1502.16(h), 1505.2(c), and the APA, 5 U.S.C. § 706(2)(A).

THIRD CAUSE OF ACTION

Failure to take a "hard look" at the adverse impacts of the proposed plan of operations, including direct, indirect, and cumulative impacts (APA and NEPA Violation)

138. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs of this Complaint.

139. Regardless of whether an EIS or an EA is prepared, NEPA requires a federal agency to consider "any adverse environmental effects which cannot be avoided," 42 U.S.C. § 4332(2)(C)(ii), and to take a hard look at direct, indirect, and cumulative impacts from proposed actions. 40 C.F.R. §§ 1502.16, 1508.9(b), 1508.25(c). An agency meets its hard look requirement if it has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.

140. The Park Service completely ignored numerous impacts from Burnett's seismic survey, such as the effects of daily survey crew travel in ORVs to access and refuel the thumper trucks and the effects from necessary travel by the thumper trucks to access all the survey locations and avoid Important Resource Areas and wildlife habitats. The agency also completely ignored impacts from Burnett's use of an off-site staging

area, such as multiple daily helicopter flights over areas of the Preserve between the staging area and the survey area.

141. The Park Service also failed to analyze cumulative impacts, in two ways. First, it failed to assess cumulative impacts to the Phase I survey area from the reasonably foreseeable future phases of Burnett's exploration. Additionally, it failed to evaluate the cumulative impacts of other projects affecting wildlife and habitat in the same region, including another seismic survey approved for 161 square miles of private and state lands just north of the Preserve, and at least eleven major development projects.

142. For many of the impacts that it did assess, the Park Service failed to articulate a rational connection between the facts and its conclusions. For example, the agency's conclusion that vibroseis trucks would have similar but lesser impacts than recreational ORVs is unfounded because the thumper trucks are larger and heavier than recreational ORVs, the Park Service's requirement that the vibroseis trucks use a "one pass" survey protocol is unlikely to be satisfied in practice, and a field test of a thumper truck resulted in significant damage to Preserve resources and was labeled a failure by agency staff.

143. The Park Service also failed to fully evaluate other direct and indirect impacts from Burnett's survey operations, including effects on wetlands, soils, vegetation, water quality, wildlife, wildlife habitat, other sensitive habitats, and the possible introduction of exotic vegetation.

144. The Park Service's failure to take a hard look at the adverse impacts of Burnett's survey, including all direct, indirect, and cumulative impacts, was arbitrary,

capricious, not in accordance with law, an abuse of discretion, and contrary to NEPA, 42 U.S.C. § 4332(2)(C)(ii), its implementing regulations, 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.9, 1508.25, and the APA, 5 U.S.C. § 706(2)(A).

FOURTH CAUSE OF ACTION
Failure to consider all reasonable alternatives to the plan of operations
(APA and NEPA Violation)

145. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs of this Complaint.

146. NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). Alternatives must be given full and meaningful consideration, whether the agency prepares an EA or an EIS. *See* 40 C.F.R. §§ 1502.14, 1508.9(b). The existence of a viable but unexamined alternative renders a NEPA analysis inadequate.

147. An EA or EIS must also discuss the purpose and need for the project. 40 C.F.R. §§ 1502.13, 1508.9(b). While agencies have discretion when defining the purpose and need of a project, their discretion is not unlimited and an agency cannot define its objectives in unreasonably narrow terms such that the outcome is preordained.

148. Here, the Park Service defined the project purpose too narrowly, which preordained the selection of Burnett’s proposed Plan of Operations as the preferred alternative. The Park Service failed to evaluate fully several viable alternatives to Burnett’s proposal on the basis that they would not fulfill the project’s unlawfully narrow purpose and need. For example, the Park Service summarily rejected the alternative of

purchasing or trading to acquire the private mineral rights, without even considering the potential costs of this option. It also summarily rejected the alternative of reducing the size of the Phase I survey area by removing designated Important Resource Areas or areas proposed or eligible for wilderness designation. It also summarily rejected options that would avoid surface occupancy altogether, such as alternative survey technologies, or the use of existing seismic survey data.

149. In addition, the Park Service completely failed to consider its own staff's recommendation to evaluate an alternative utilizing smaller vibroseis trucks.

150. The Park Service's failure to consider a reasonable range of alternatives other than Burnett's Plan of Operations was arbitrary, capricious, not in accordance with law, an abuse of discretion, and contrary to NEPA, 42 U.S.C. § 4332(2)(C)(iii), (E), its implementing regulations, 40 C.F.R. §§ 1502.14, 1508.9(b), and the APA, 5 U.S.C. § 706(2)(A).

FIFTH CAUSE OF ACTION
Violations of Park Service Regulations Governing the Approval of
Oil and Gas Operations
(APA and Park Service 9B Rules Violations)

151. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs of this Complaint.

152. The Park Service's 9B rules require all proposed oil and gas plans of operations to include, as appropriate, a description of "[a]ll reasonable technologically feasible alternative methods of operations, their costs, and their environmental effects." 36 C.F.R. § 9.36(a)(16)(v). The Regional Director of the Park Service "shall not approve

a plan of operations . . . [w]here the plan of operations does not satisfy each of the requirements of § 9.36 applicable to the operations proposed.” *Id.* § 9.37(a)(4).

153. Burnett’s proposed Plan of Operations did not contain any description of technologically feasible alternative methods of operations, their costs, or their environmental effects. The Park Service’s EAs, FONSI, and other environmental review documents did not contain any description of the costs for Burnett’s proposed Plan of Operations or the costs for technologically feasible alternatives. As a result, Burnett’s proposed Plan of Operations did not comply with 36 C.F.R. § 9.36(a)(16)(v).

154. The 9B rules also specify that the Regional Director “shall not approve a plan of operations . . . [u]ntil the operator shows that the operations will be conducted in a manner which utilizes technologically feasible methods least damaging to the federally-owned or controlled lands, waters and resources of the unit while assuring the protection of public health and safety.” *Id.* § 9.37(a)(1).

155. Burnett’s Plan of Operations and the Park Service’s revised EA and FONSI failed to evaluate numerous technologically feasible methods that might be less damaging to Preserve resources. These methods include alternative project designs, such as the use of smaller vibroseis trucks, the use of existing seismic data to minimize the area of the survey, the exclusion of Important Resource Areas or areas proposed or eligible for wilderness designation, or the acquisition of the private mineral rights. These methods also include more effective mitigation measures, such as comprehensive wildlife surveys in advance of seismic survey commencement in all areas affected by Burnett’s activities, and scientifically tested and verified techniques to remediate soil and

vegetation impacts. As a result, Burnett has not shown that its proposal uses the “technologically feasible methods least damaging” to Preserve resources. *Id.* § 9.37(a)(1).

156. Because Burnett’s proposed Plan of Operations did not comply with 36 C.F.R. § 9.36(a)(16)(v) and Burnett did not make the required showing pursuant to 36 C.F.R. § 9.37(a)(1), the Park Service’s approval of Burnett’s proposed seismic survey was arbitrary, capricious, not in accordance with law, an abuse of discretion, and contrary to the APA, 5 U.S.C. § 706(2)(A), and the Park Service’s 9B rules, 36 C.F.R. § 9.37(a)(1), (4).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

157. Declare that Defendants’ actions violated NEPA, its implementing regulations and policies, and the Park Service’s 9B rules;

158. Vacate and set aside Defendants’ actions;

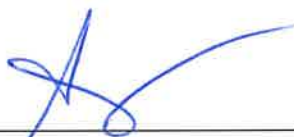
159. Enjoin Burnett’s proposed seismic exploration in the Preserve until Defendants have demonstrated compliance with NEPA and the APA;

160. Retain jurisdiction over this matter until Defendants fully remedy the violations of law described herein;

161. Award Plaintiffs their fees, costs, and other expenses as provided by applicable law; and

162. Issue such other relief as the Court may deem just, proper, and equitable.

Respectfully submitted this 27th day of July, 2016.



Alison L. Kelly
Florida Bar No.: 0016660
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
(202) 717-8297
akelly@nrdc.org
TRIAL COUNSEL

/s/ Jared J. Thompson
Jared J. Thompson
District of Columbia Bar No.: 1004120
(Special Admission Pending)
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
(202) 513-6249
jared.thompson@nrdc.org

/s/ Marcy I. LaHart
Marcy I. LaHart
Florida Bar No.: 967009
4804 SW 45th Street
Gainesville, FL 32608
(352) 224-5699
Marcy@floridaanimallawyer.com
LOCAL COUNSEL FOR JARED
THOMPSON

*Counsel for Plaintiffs Natural Resources
Defense Council, National Parks
Conservation Association, Earthworks,
Conservancy of Southwest Florida, and
South Florida Wildlands Association*

/s/ Jaclyn Lopez

Jaclyn Lopez

Florida Bar No.: 96445

Center for Biological Diversity

P.O. Box 2155

St. Petersburg, FL 33731

(727) 490-9190 telephone

(415) 436-9883 facsimile

jlopez@biologicaldiversity.org

TRIAL COUNSEL

*Counsel for Plaintiff Center for Biological
Diversity*