

**Center for Biological Diversity • Natural Resources Defense Council
Conservancy of Southwest Florida • South Florida Wildlands Association
National Parks Conservation Association • Earthworks**

Sent via Email and Certified Mail Return Receipt Requested

July 22, 2016

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Re: Sixty-Day Notice of Endangered Species Act Violations Concerning Threatened and Endangered Species on the Big Cypress National Preserve

Dear Secretary Jewell and Directors Ashe, Jarvis, and Austin,

The U.S. Fish and Wildlife Service (“FWS”) and National Park Service (“NPS”) are hereby notified that the Center for Biological Diversity, Natural Resources Defense Council, National Parks Conservation Association, South Florida Wildlands Association, Conservancy of Southwest Florida, and Earthworks intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 702, 706, to challenge (1) FWS’ February 25, 2015 concurrence letter concerning Burnett Oil Co., Inc.’s (“Applicant’s”) proposed Nobles Grade 3D Seismic Survey’s impacts on listed species in Big Cypress National Preserve (“Preserve”); (2) NPS’ reliance on FWS’ February 25, 2015 concurrence letter to satisfy its ESA Section 7(a)(2) obligations; (3) NPS’ and FWS’ failure to properly consider direct, indirect, and cumulative impacts across the entire action area during consultation on the proposed Noble Grade 3D Seismic Survey; (4) NPS’ and FWS’ failure to reinitiate consultation on the proposed Noble Grade 3D Seismic Survey after substantial changes were made to the proposal in March 2016; (5) NPS’ and FWS’ failure to reinitiate formal consultation on the 1992 Big Cypress General Management Plan (“GMP”); (6) NPS’ and FWS’ failure to reinitiate formal consultation on the 2011 Big Cypress Addition GMP; (7) NPS’ continued authorization and approval of projects and activities on the Preserve that may affect listed species prior to the reinitiation and completion of consultation on the 1992 GMP and 2011 Addition GMP; and (8) NPS’ unlawful take of listed species on the Preserve, in violation of ESA Section 9.

FWS and the NPS have sixty days to remedy the violations identified herein.

I. Identity of the Organizations Giving Notice

The names, addresses, and phone numbers of the organizations giving notice of intent to sue under the ESA are:

Center for Biological Diversity
P.O. Box 2155
St Petersburg, FL, 33731
(727) 490-9190

Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 289-6868

National Parks Conservation Association
777 6th Street NW, Suite 700
Washington, DC 20001
(202) 454-3915

South Florida Wildlands Association
P.O. Box 30211
Fort Lauderdale, FL 33303
(954) 993-5351

Conservancy of Southwest Florida
1495 Smith Preserve Way
Naples, FL 34102
(239) 262-0304

Earthworks
1612 K Street NW, Suite 808
Washington, DC 20006
(202) 887-1872

II. Requirements of the ESA

Congress enacted the ESA to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and to implement] a program for the conservation of such endangered species and threatened species.”¹ The ESA defines “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the] Act are no longer necessary.”² Section 7(a)(1) of the ESA requires the NPS, and other federal agencies, to utilize its authorities and programs to conserve endangered and threatened species.³ At its core, the ESA prohibits any person from taking any listed species, which includes all manner of harm or harassment to protected species, including both direct injury or mortality and also acts and omissions which disrupt or impair significant behavioral patterns.⁴ To fulfill the substantive purpose of the ESA, federal agencies are required to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [the critical] habitat of such species.”⁵

¹ 16 U.S.C. § 1531(b).

² 16 U.S.C. § 1532(3).

³ 16 U.S.C. § 1536(a)(1).

⁴ 16 U.S.C. §§ 1538(a)(1); 1533(d); 50 C.F.R. § 222.101. “Take” is defined by the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19); 50 C.F.R. § 222.102.

⁵ 16 U.S.C. § 1536(a)(2).

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.”⁶ If the action agency determines its action “may affect” a listed species, the agency must initiate formal consultation with an expert agency (in this case, FWS), unless certain exceptions are satisfied.⁷ Once the action agency has initiated formal consultation, FWS is required to complete a biological opinion for that proposed action.⁸ The biological opinion summarizes FWS’ findings and determines whether the proposed agency action will jeopardize the continued existence of any species or result in adverse modification of critical habitat.⁹ If FWS determines the agency action is likely to jeopardize the continued existence of a listed species or result in adverse modification of critical habitat, the biological opinion must suggest “reasonable and prudent alternatives” (“RPAs”), which would reduce action-related impacts such that the agency action may avoid jeopardizing listed species.¹⁰ If FWS determines the agency action is not likely to jeopardize listed species or adversely modify their habitat, it issues an incidental take statement authorizing take that is consistent with the terms and conditions of the biological opinion.

Pervading the Section 7 consultation process is the mandate for “each agency [to] use the best scientific and commercial data available.”¹¹ Importantly, each federal agency has an independent duty to “use the best scientific and commercial data available” to ensure any action it authorizes “is not likely to jeopardize the continued existence . . . or result in the destruction or adverse modification of [the critical] habitat” of any listed species.¹² Federal agencies have an independent and substantive obligation to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or adversely modify critical habitat.¹³ Indeed, a “no jeopardy” biological opinion or concurrence letter does not absolve the action agency of its duty to insure that its actions comply with the ESA.¹⁴

Compliance with the biological opinion and its incidental take statement protects federal agencies, and others acting under the biological opinion from enforcement action under Section 9’s prohibition against take.¹⁵ However, take not in compliance with a biological opinion or absent a take statement or take permit is in violation of Section 9 of the ESA.

Furthermore, because an agency’s duty to avoid jeopardy is continuing, “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must reinitiate formal consultation in certain circumstances, including:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;

⁶ 50 C.F.R. § 402.14(a).

⁷ 50 C.F.R. § 402.14(a)-(b); JOINT CONSULTATION HANDBOOK at 2-6.

⁸ 16 U.S.C. § 1536(b)(3)(A).

⁹ 50 C.F.R. § 402.14(h).

¹⁰ 16 U.S.C. § 1536(b)(3)(A).

¹¹ *Id.*

¹² 16 U.S.C. § 1536(a)(2).

¹³ 16 U.S.C. § 1536(a)(2); *see Pyramid Lake Paiute Tribe of Indians v. United States Dep’t of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

¹⁴ *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

¹⁵ 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31(a).

- (b) If new information reveals effects on the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.¹⁶

During reinitiation of consultation, an agency also must comply with the mandate under Section 7(d) of the ESA that the agency, as well as any applicant for a federal permit, “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”¹⁷ Congress enacted Section 7(d) “to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.”¹⁸

III. Factual Background

A. Big Cypress National Preserve and Addition Lands

Located just northwest of Everglades National Park, Big Cypress National Preserve was created “to assure the preservation, conservation, and protection of the natural, scenic, hydrologic, floral and faunal, and recreational values of the Big Cypress Watershed.”¹⁹ As a unit of the National Park System, the Preserve must be managed to achieve the fundamental purpose of the National Park Service Organic Act of 1916 (“Organic Act”), which requires NPS 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.”²⁰ In explaining its view of the Organic Act—as well as how courts have interpreted the statute’s provisions—NPS has explained that “[i]n the Organic Act, Congress speaks of but a single purpose, namely conservation.”²¹

Big Cypress National Preserve is generally flat and dominated by shallow water table conditions and surface water, with wetland vegetation and poorly drained soil. The soil is wet most of the year, and only during the late winter does the water recede to the center of the cypress domes. Big Cypress National Preserve is home to dozens of rare species including:

¹⁶ 50 C.F.R. § 402.16.

¹⁷ 16 U.S.C. § 1536(d),

¹⁸ *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005).

¹⁹ P.L. 93-440, 88 Stat. 1255.

²⁰ 16 U.S.C. § 100101.

²¹ NPS Reference Manual 41: Legislative Guidance Applicable to NPS Wilderness Preservation and Management, 3 (2013).

Listed Endangered (E) or Threatened (T) Species:

American alligator (T)
Audubon's crested caracara (T)
Eastern indigo snake (T)
Everglade snail kite (E)
Florida bonneted bat (E)
Florida panther (E)
Red-cockaded woodpecker (E)
Wood stork (T)

Candidate Species:

Florida pineland crabgrass
Florida prairie-clover
Gopher tortoise

Other Sensitive Species:

Bald eagle
Big Cypress fox squirrel
Everglades mink
Florida black bear
Florida burrowing owl
Florida sandhill crane
Florida tree snail
Limpkin
Little blue heron
Roseate spoonbill
Snowy egret
Tri-colored heron
White ibis

B. Burnett 3D Seismic Survey

On May 10, 2016, NPS approved the Applicant, Burnett Oil Company's Plan of Operations ("POP") to conduct seismic exploration activities for oil and gas using Vibroseis trucks on approximately 110 square miles (70,454 acres) of lands within the north-central part of Big Cypress National Preserve and Addition Lands.²² The POP covers Phase I of four planned phases within a broader 366 square mile program area.²³ The seismic survey would employ two groups of three off-road, 12-foot wide Vibroseis trucks equipped with 8x4 foot, 7-inch thick, vibrating plates to propagate seismic energy via sound waves into the earth over 12-24 seconds. The Applicant originally proposed to construct five equipment staging areas, but subsequently modified the proposal to use an off-site staging area at the Vulcan Mine site. A grid of approximately 64 source lines transecting 168 receiver lines at right angles represents the surface vibrating points and placements of geophone recording devices across the survey area, resulting in over 1,000 miles of new disturbances. The Applicant anticipates surveying two and half square miles a day, with daily helicopter use. The Applicant anticipates that it will complete the first phase of the seismic survey within one dry season.²⁴

At least eight federally listed threatened and endangered species are found within or nearby the project area for the Burnett seismic survey proposal. The wood stork, red-cockaded woodpecker,

²² May 10, 2016, letter from NPS to Burnett, approving plan subject to acceptance of conditions.

²³ *Environmental Assessment for A Proposed Oil and Gas Plan of Operation: Nobles Grade 3-D Seismic Survey within Big Cypress National Preserve proposed by Burnett Oil Company, Inc.*, at 3 (Nov. 2015) (hereinafter, "Environmental Assessment"); *Nobles Grade 3-D Seismic Survey, Big Cypress National Preserve and Big Cypress National Preserve Addition, Biological Assessment*, at 1 (Nov. 2014) (hereinafter, "Biological Assessment").

²⁴ NPS in "Selected Comments and NPS Responses on the Noble Grade 3-D Seismic Survey Revised EA" describes the dry season as typically November through mid-May, clarifies that Burnett may operate in "dry season conditions," and that it extends survey activities one month earlier or later than the typical dry season if dry conditions prevail. See *Finding of No Significant Impact for Environmental Assessment Burnett Oil Company, Inc. Oil and Gas Operations Nobles Grade 3-D Seismic Survey, Big Cypress National Preserve, Florida*, at 9 (May 6, 2016) (hereinafter, "FONSI"). The FWS' Feb. 25, 2015 concurrence letter describes the dry season as December-May.

and Florida panther have all been documented in the proposed seismic survey area.²⁵ Notably, the proposed seismic survey area is located in the FWS' Panther Focus Area, specifically the Primary Zone.²⁶ The presence of the Florida bonneted bat is also anticipated within the proposed action area.²⁷ The proposed seismic survey area includes lands that have also been identified as the federally endangered Florida bonneted bat Focal Area.²⁸ In addition, the American alligator, Florida prairie clover, and Florida pineland crabgrass have been documented throughout Big Cypress, and the eastern indigo snake, gopher tortoise, Audubon's crested caracara, and Everglade snail kite could occur in the proposed seismic survey area.²⁹

Big Cypress National Preserve provides some of the last intact habitat for some of these imperiled species. For example, while the project area is mostly wet, it provides 11,300 acres of suitable, relatively undisturbed habitat for the eastern indigo snake,³⁰ and 11,360 acres for the red-cockaded woodpecker.³¹ It also provides 58,860 acres of habitat suitable for the Everglade snail kite³² and wood stork.³³

A private contractor prepared a biological assessment for Phase I of the seismic survey on behalf of the Applicant, which concedes that “[t]he nature and level of the disturbance to wildlife anticipated by seismic survey activities (i.e., survey and equipment placement crews, data acquisition (vibration) operations, helicopters, and vehicle use) can be expected to elicit avoidance behaviors from wildlife.”³⁴ The biological assessment concludes, however, that the survey may affect, but is not likely to adversely affect 10 of the 11 affected listed or candidate species, and that the survey “may affect” the Florida panther.³⁵

The Applicant used FWS' programmatic species “keys” to determine in the biological assessment that the project “may affect” the eastern indigo snake and Florida panther. For the eastern indigo snake, however, the Applicant changed this determination to “may affect, not likely to adversely affect,” claiming that no permanent impacts are proposed and that no loss of habitat would occur. For the Florida panther, the Applicant suggested to NPS that it initiate formal consultation with FWS regarding the proposed plan of operations.

In its “letter of concurrence” dated February 25, 2015, FWS disagreed with the Applicant, and found that the seismic survey is not likely to adversely affect any threatened or endangered species. FWS recommended in the concurrence that NPS change its “may affect” determination for the Florida panther to “may affect, not likely to adversely affect,” and concluded consultation

²⁵ The Everglade snail kite has been documented within the larger 366 square mile program area, and one mile east of the survey area. Biological Assessment at 20-21, Ex. 7.

²⁶ Environmental Assessment at 66; *Revised Environmental Assessment for A Proposed Oil and Gas Plan of Operation: Nobles Grade 3-D Seismic Survey within Big Cypress National Preserve proposed by Burnett Oil Company, Inc.*, at 75 (Mar. 2016) (hereinafter, “Revised Environmental Assessment”).

²⁷ Revised Environmental Assessment at 88; Environmental Assessment at 68.

²⁸ Revised Environmental Assessment at 88; Environmental Assessment at 68.

²⁹ Ebird.org reports that there have been three sightings of Everglade snail kites in the project area since 2013.

³⁰ Biological Assessment at 17.

³¹ *Id.* at 22.

³² *Id.* at 21.

³³ *Id.* at 24.

³⁴ *Id.* at 5.

³⁵ *Id.* at 61-71.

without a biological opinion. This is despite the fact that NPS and the Applicant compare the proposed activities to ORV use in the Preserve.³⁶ FWS concluded in 2000 that ORV use in the Preserve “may affect” the Florida panther and that incidental take in the form of harassment was expected, and FWS made the same determination for ORV use in the Addition lands in 2010.³⁷

NPS requested to reinitiate informal consultation on Applicant’s survey in November 2015 and sought FWS’ concurrence with NPS’ conclusions in a November 2015 Environmental Assessment regarding impacts to listed species from the proposed project and its alternatives.³⁸ In an email dated January 27, 2016, FWS stated that “unless the project changes, the concurrence we provided in [the February 25, 2015] letter is still valid.”³⁹ In March 2016, in a Revised Environmental Assessment, NPS and the Applicant changed the Plan of Operations in various ways, including the modification to use the Vulcan Mine site as an off-site staging area.⁴⁰ This change expanded the “action area” for purposes of the ESA,⁴¹ and will result in different and additional impacts compared to the original Plan of Operations. For example, there will be multiple daily helicopter flights over areas of the Preserve between the Vulcan Mine site and project area, which include known Florida panther denning sites and wading bird sites.⁴² These impacts were not analyzed in the biological assessment or in FWS’ February 25, 2015 concurrence letter. Despite these changes, the Revised Environmental Assessment continued to rely on FWS’ February 25, 2015 concurrence letter.⁴³

C. The 1992 Big Cypress GMP and the 2011 Big Cypress Addition GMP

NPS prepared a General Management Plan (“GMP”) for the Big Cypress National Preserve that was adopted in 1992.⁴⁴ FWS issued a biological opinion in 1991 for the draft GMP (“1991 Biological Opinion”). In the 1991 Biological Opinion, FWS determined that implementation of the GMP was not likely to adversely affect the red-cockaded woodpecker, Cape Sable seaside sparrow, Everglade snail kite, eastern indigo snake, manatee, and that implementation of the

³⁶ FONSI at 11.

³⁷ U.S. Fish and Wildlife Service, *Biological Opinion for Final General Management Plan – Addition*, at 7, 44-45 (Nov. 17, 2010); *Devs. of Wildlife v. Salazar*, 877 F. Supp. 2d 1271, 1305 (M.D. Fla. 2012) (finding that FWS’ 2000 biological opinion concluded that implementation of the ORV management plan “may cause an ‘incidental take’ of the panther in the form of harassment”).

³⁸ Memorandum from Tammy Whittington, Superintendent, Big Cypress National Preserve, to U.S. Fish and Wildlife Service, South Florida Ecological Services Office, Attn: Bob Progulske, Everglades Program Supervisor (Nov. 25, 2015).

³⁹ Email from Timothy Breen, U.S. Fish and Wildlife Service, to Don Hargrove, Big Cypress National Preserve (Jan. 27, 2016).

⁴⁰ Revised Environmental Assessment at 20-21, Appendix E.

⁴¹ See 50 C.F.R. § 402.02 (defining the “action area” to include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action”).

⁴² Revised Environmental Assessment at 20-22 & Fig. 2-5 (stating that the Vulcan Mine site will be used for “receiver drop bag assembly for helicopter transport, and a helicopter landing zone with support trailers and refueling capability” and mapping the Vulcan Mine site); Biological Assessment Exhibit 4 (showing multiple wading bird locations between the survey area and the Vulcan Mine site) & Exhibit 12 (showing at least six panther denning sites between the survey area and the Vulcan Mine site).

⁴³ Revised Environmental Assessment Appendix C.

⁴⁴ Environmental Assessment at 9.

GMP may adversely affect the Florida panther. FWS did not authorize any incidental take of the Florida panther or any species in the 1991 Biological Opinion.⁴⁵

In 2011, NPS completed a GMP for the Big Cypress National Preserve Addition Lands (hereinafter, “Addition GMP”). FWS issued a biological opinion on the Addition GMP in 2010 (“2010 Biological Opinion”). In the 2010 Biological Opinion, FWS determined that implementation of the Addition GMP was not likely to adversely affect the Everglade snail kite, wood stork, red-cockaded woodpecker, eastern indigo snake, and American crocodile; and that implementation of the Addition GMP was likely to adversely affect the Florida panther.⁴⁶ The 2010 Biological Opinion includes an incidental take statement for the Florida panther, based on harassment of panthers resulting primarily from ORV and hunting uses of trails in the Addition.⁴⁷ The 2010 Biological Opinion also explicitly requires NPS to reinitiate consultation if “a new species is listed . . . that may be affected by the action.”⁴⁸

In its revised Environmental Assessment (EA) and FONSI for Phase I of the seismic survey, NPS incorporates by reference the 1992 Big Cypress National Preserve GMP and 2010 Big Cypress National Preserve Additional Lands GMP, which it states considered oil and gas and ORV activities in the Preserve.⁴⁹ Subsequent to the 1991 Biological Opinion, new information now reveals that the effects of the activities described in the Big Cypress GMP may affect listed species in a manner or to an extent not previously considered by FWS or NPS during the ESA consultation on the GMP. This information includes the May 18, 1999 South Florida Multi-Species Recovery Plan; the January 27, 2003 Red-Cockaded Woodpecker Recovery Plan, Second Revision; the January 27, 1997 Wood Stork Revised Recovery Plan; and the November 1, 2008, Third Revision of the Florida Panther Recovery Plan.

The agencies also have new information on seismic exploration activity. NPS acknowledges in draft Environmental Impact Statement for its proposed 9B rule revisions governing non-federal oil and gas activities in NPS units that during the geophysical exploration phase, adverse impacts on special-status species and their habitats could occur.⁵⁰ Localized trampling of vegetation for surveying and increased vehicular traffic associated with nearby seismic investigations could lead to injury or destruction of sensitive species and their habitats. Potential effects from exploration operations could 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.⁵¹ These effects could be caused by seismic crews traveling to access the area to be surveyed and by pedestrian travel along receiver lines, as

⁴⁵ U.S. Fish and Wildlife Service, *Biological Opinion re: Big Cypress General Management Plan*, at 8 (Feb. 11, 1991).

⁴⁶ U.S. Fish and Wildlife Service, *Biological Opinion for Final General Management Plan – Addition*, at 5-7 (Nov. 17, 2010)

⁴⁷ *Id.* at 44-45.

⁴⁸ *Id.* at 46-47.

⁴⁹ Revised Environmental Assessment at 7; FONSI at 22-23.

⁵⁰ U.S. Department of Interior, National Park Service, *Revision of 9B Regulations Governing Non-Federal Oil and Gas Activities: Draft Environmental Impact Statement*, at 262 (2015) (hereinafter, “DEIS for Proposed 9B Rule Revisions”).

⁵¹ See generally Hall Sawyer, et al., *Potential Effects of Oil and Gas Development on Mule Deer and Pronghorn Populations in Western Wyoming*, Transactions of the 67th N. Am. Wildlife & Natural Res. Conf., 351 (2002), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1004&context=usblmpub>.

well as the vibrations from the seismic operations, trimming vegetation, and using vehicles on existing roads. Surface disturbance from vehicles could also cause localized soil compaction which can increase runoff of surface waters and accelerate soil erosion,⁵² ultimately degrading sensitive habitats. Listed species could be particularly impacted by the noise associated with seismic survey work, especially vehicle noise.⁵³ Onshore seismic operations are also known to impact wildlife by disrupting mating, nesting, spawning and migration routes, and creating new and long-term use travel corridors for predators.⁵⁴

In addition to new information, there have been new species listed subsequent to the 1991 Biological Opinion that may be affected by the GMP, and subsequent to the 2011 Biological Opinion that may be affected by the GMP-Addition. On November 1, 2013, FWS listed the Florida bonneted bat as an endangered species under the ESA. The Florida bonneted bat is in the Big Cypress National Preserve and Addition Lands and may be affected by the GMPs.

Additionally, the amount and extent of taking that is specified in the Incidental Take Statement of the 1991 Biological Opinion has been exceeded. The 1991 Biological Opinion does not authorize any take of the Florida panther. Since 1991, however, there have been takings of the Florida panther on the Big Cypress National Preserve as result of projects and activities that are authorized and allowed by the 1991 GMP. This includes, but is not limited to, panther deaths caused by vehicle collisions on the Preserve, and harm and harassment caused by habitat destruction, ORV use, hunting, and the expansion of oil wells on the Preserve.

IV. Violations of the Endangered Species Act and the Administrative Procedure Act

A. FWS' February 25, 2015 Concurrence Letter is Arbitrary and Capricious and Violates the APA and the ESA

FWS' February 25, 2015 concurrence letter is arbitrary and capricious and violates the ESA, 16 U.S.C. § 1536, and the APA, 5 U.S.C. § 706, for a number of reasons including, but not limited to:

- 1) FWS failed to consider the entire scope of the Burnett Plan of Operations, including all direct, indirect, and cumulative impacts of the seismic survey, and including all phases of Burnett's proposal. For example, FWS did not consider impacts including, but not limited to: impacts on listed species in areas outside the Phase I survey area resulting from repeated helicopter and surface vehicle trips to and from the off-site

⁵² See generally Sjoerd Duiker, *Avoiding and Mitigating Soil Compaction Associated with Natural Gas Development* (2004), http://extension.psu.edu/natural-resources/natural-gas/issues/environmental/avoiding-and-mitigating-soil-compaction-associated-with-natural-gas-development/extension_publication_file; Pennsylvania State University, *Effects of Soils Compaction* (2009), http://extension.psu.edu/plants/crops/soil-management/soil-compaction/effects-of-soil-compaction/extension_publication_file.

⁵³ DEIS for Proposed 9B Rule Revisions, at 262.

⁵⁴ Harvey Consulting, LLC, *Onshore Seismic Exploration Best Practice and Model Permit Requirements: Report to Sierra Club and Natural Resources Defense Council*, at 7 (Jan. 20, 2011).

Vulcan Mine staging area;⁵⁵ impacts from daily crew travel between I-75 and the vibroseis trucks; impacts to listed species outside the survey area but within the effects range of the survey activities; and cumulative impacts within the Phase I survey area from foreseeable future phases of the survey.

- 2) FWS failed to articulate a rational connection between the facts found and the choice made for many of the listed species, particularly for species that are expected to exhibit “avoidance behavior” as a result of the seismic survey. NPS acknowledged in the revised environmental assessment (EA) for the Plan of Operations that “[w]ildlife could display avoidance behaviors as a result of the seismic survey activities, similar to avoidance by Florida panthers of ORV activity,” that “[s]ome species could be subjected to short-term stress during their breeding season,” and that “[a]lthough not anticipated, mortality/injury to wildlife could also occur.”⁵⁶ FWS has recognized in the past that wildlife avoidance behaviors during oil and gas activities, including seismic exploration, could ultimately result in lower feeding and reproductive success.⁵⁷ Studies have shown variability in disturbance-avoidance patterns among species, but with clear effects on some populations and communities.⁵⁸ FWS has not explained why “avoidance behaviors” resulting from the seismic survey would not result in a “take” due to harassment, despite finding in 2000 and 2010 that Florida panther avoidance behaviors triggered by ORV use and hunting in the preserve did constitute a “take” by harassment. FWS has also not explained why “avoidance behaviors” would not increase the likelihood of intraspecies conflict, which can occur when panthers enter other panthers’ territories and is a leading cause of panther fatalities. Similarly, FWS has not sufficiently explained how the proposed action is not likely to adversely affect any listed species, despite the resulting and acknowledged “avoidance behaviors” of listed species and other impacts.
- 3) FWS improperly relied on vague and unproven mitigation measures, such as consultation to determine optimum access routes to off-trail locations in environmentally sensitive areas, scouting to identify and avoid sensitive species, and generic reclamation actions. For example, neither NPS nor FWS are requiring wildlife surveys in advance of the commencement of the seismic survey in order to identify protected species and their dens, nests, and burrows across the entire “action area,” which includes areas outside the boundaries of the Phase I survey area. Wildlife surveys are essential so that FWS can accurately determine, in advance of seismic survey commencement, whether a “take”⁵⁹ of a protected species is likely to occur as a result of the proposed action. The Applicant states that it will scout the survey lines for evidence of wildlife, yet neither the Applicant nor NPS has identified

⁵⁵ Both the Applicant’s Biological Assessment and the FWS concurrence letter preceded the modification of the proposed seismic survey to utilize the Vulcan Mine site as a staging area, so neither document evaluated the effects resulting from the use of this staging area.

⁵⁶ Revised Environmental Assessment at 85.

⁵⁷ U.S. Department of Interior, Fish & Wildlife Service, *Kodiak National Wildlife Refuge draft comprehensive conservation plan, wilderness review, and environmental impact statement*, at 436 (1985).

⁵⁸ See generally Alejandro Frid & Lawrence Dill, *Human-caused disturbance stimuli as a form of predation risk*, 6 *Conservation Ecology* 11 (2002), available at <http://www.ecologyandsociety.org/vol6/iss1/art11/print.pdf>.

⁵⁹ 50 C.F.R. § 17.3.

what “qualified ecologist” will perform scouting of the survey lines, what credentials will be required,⁶⁰ whether the “qualified ecologist” would accompany the field crew each day during the proposed action, or whether it would be left to unqualified field crew to make crucial species identifications and accommodations for those species during surveying.⁶¹ It is also unclear whether seismic survey operations would immediately stop once a protected species, or a den, nest, or burrow is observed, and whether a FWS biologist would be immediately contacted and required to go out to the survey location to verify species identifications and habitats, and to approve the steps taken by field crew to avoid any further disturbance. Additionally, there is no mention of speed limits for the Vibroseis trucks, which is necessary to evaluate whether any wildlife, particularly burrowing or invertebrate species, would be impacted or injured by the trucks or the vibrating plates attached to the trucks. FWS lacks a reasonable basis to conclude that the mitigation measures will be successful and prevent any “adverse affects” or “take” of any listed species.

- 4) FWS failed to consider or address the potential impacts of the proposed Plan of Operations on the recovery of the affected listed species;
- 5) FWS failed to consider the cumulative impacts of the Plan of Operations along with non-federal projects and proposals in the action area including, but not limited to, the future phases of Applicant’s seismic study that are “reasonably certain to occur within the action area”;⁶² and
- 6) FWS improperly limited the “action area” for purposes of its ESA analysis to the borders of the Phase I survey area. Pursuant to 50 C.F.R. § 402.02, the “action area” must include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” FWS failed to consider areas outside the Phase I survey area that will be directly and indirectly impacted by the Applicant’s seismic survey, such as the areas of Big Cypress National Preserve between the Vulcan Mine site and the Phase I survey area that will be directly impacted by helicopter overflights, and other areas bordering or in the vicinity of the Phase I survey area that are close enough to be directly or indirectly affected by survey activities.

B. NPS’ Reliance on FWS’ Concurrence Letter is Arbitrary and Capricious in Violation of the APA and the ESA

NPS has an independent, substantive duty under Section 7 of the ESA to ensure that its actions are not likely to jeopardize listed species or adversely modify their critical habitat.⁶³ FWS’ concurrence letter for the proposed Burnett seismic survey violates the ESA and the APA and is unlawful, and therefore NPS’ reliance on FWS’ concurrence letter to fulfill its Section 7

⁶⁰ Revised Environmental Assessment at 30, 32.

⁶¹ *Id.*

⁶² 50 C.F.R. § 402.02 (definition of “Cumulative effects”).

⁶³ 16 U.S.C. § 1536(a)(2).

procedural and substantive obligations is also arbitrary, capricious, and in violation of the ESA.⁶⁴ Furthermore, without a biological opinion from FWS and accompanying “incidental take statement” including “reasonable and prudent measures” and “terms and conditions” to minimize impacts and incidental take, NPS does not have incidental take authorization, and both NPS and the Applicant are in violation of Section 9 of the ESA if any take occurs in the course of Applicant’s 3D survey activities.⁶⁵

C. NPS’ and FWS’ Failure to Reinitiate Consultation Regarding the Revised Seismic Survey Violates the ESA

NPS and FWS were required to reinitiate consultation when the Applicant and NPS modified the proposed Plan of Operations for the seismic survey in the March 2016 Revised Environmental Assessment “in a manner that causes an effect to the listed species or critical habitat that was not considered” in the biological assessment or in FWS’ concurrence letter. 50 C.F.R. § 402.16(c).⁶⁶ NPS’ and FWS’ failure to do so violates Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.16(c).

The Applicant’s November 2014 biological assessment and FWS’ February 25, 2015 concurrence letter were both based on the Applicant’s seismic survey design as described in the December 2014 Plan of Operations. For example, both the biological assessment and the concurrence letter considered the use of five temporary staging areas within the Preserve, and did not consider any impacts from the use of an off-site staging area.⁶⁷ In the March 2016 Revised Environmental Assessment, NPS and the Applicant changed the project in various ways, including the modification to use the Vulcan Mine site as an off-site staging area.⁶⁸ These changes expanded the “action area” for purposes of the ESA,⁶⁹ and will result in different and additional impacts compared to the original Plan of Operations. For example, there will be multiple daily helicopter flights over areas of the Preserve between the Vulcan Mine site and project area, which include known Florida panther denning sites and wading bird sites.⁷⁰ There also may be additional impacts from moving helicopter loads across I-75, which will require loads to be deposited on one side of the highway, driven across I-75, and then reloaded onto the helicopter on the other side.⁷¹ There will also be additional surface vehicle travel between the

⁶⁴ *Id.*; see, e.g., *Center for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1010 (D. Ariz. 2011) (an action agency’s reliance on a legally flawed biological opinion is arbitrary and capricious).

⁶⁵ 16 U.S.C. § 1536(b)(4); 16 U.S.C. § 1538.

⁶⁶ The requirement to reinitiate consultation pursuant to 50 C.F.R. § 401.16 “applies to both formal and informal consultation.” *Conservation Cong. v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014).

⁶⁷ Biological Assessment at 4; Concurrence Letter at 2.

⁶⁸ Revised Environmental Assessment at 20-21, Appendix E.

⁶⁹ See 50 C.F.R. § 402.02 (defining the “action area” to include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action”).

⁷⁰ Revised Environmental Assessment at 20-22 & Fig. 2-5 (stating that the Vulcan Mine site will be used for “receiver drop bag assembly for helicopter transport, and a helicopter landing zone with support trailers and refueling capability” and mapping the Vulcan Mine site); Biological Assessment Exhibit 4 (showing multiple wading bird locations between the survey area and the Vulcan Mine site) & Exhibit 12 (showing at least six panther denning sites between the survey area and the Vulcan Mine site).

⁷¹ See Revised Environmental Assessment at 20-21 (noting that helicopter pickup and drop-off points are required both north and south of I-75 because the FAA prohibits helicopters from transporting materials over interstate highways).

survey area and the staging area. These and other additional impacts to listed species were not analyzed in the biological assessment or in FWS' concurrence letter. In January 2016, FWS itself stated that the February 25, 2015 concurrence letter would be valid "unless the project changes."⁷² Because the project's design and impacts changed after the November 2014 biological assessment and after FWS issued its concurrence letter, NPS and FWS were required to reinitiate consultation before NPS approved the revised Plan of Operations.

D. NPS' and FWS' Failure to Reinitiate Formal Consultation on the 1992 GMP and the 2011 Addition GMP Violates the ESA

NPS and FWS are required to reinitiate formal consultation regarding the 1992 GMP and the 2011 Addition GMP (and the 2000 ORV management plan) because FWS listed the Florida bonneted bat as an endangered species under the ESA on November 1, 2013. The Florida bonneted bat can be found in the Big Cypress National Preserve and Addition Lands and may be affected by the activities described in these plans, including ORV activities. NPS' and FWS' failure to re-initiate consultation violates 50 C.F.R. § 402.16(d).

Additionally, pursuant to 50 C.F.R. § 402.16(a), NPS and FWS are required to reinitiate consultation on the 1992 GMP because the amount and extent of take that was specified in the Incidental Take Statement of the 1991 Biological Opinion has been exceeded. The 1991 Biological Opinion does not authorize any take of the Florida panther. Since 1991, however, there have been takings of the Florida panther in the Big Cypress National Preserve as result of projects and activities that are authorized and allowed by the 1992 GMP. This includes, but is not limited to, panther deaths caused by vehicle collisions on the Preserve, the shooting of a panther during hunting season in 2013, and harm and harassment caused by habitat destruction, ORV use, hunting, and the expansion of oil wells on the Preserve.⁷³

FWS and NPS are also required to reinitiate consultation on the basis of new information subsequent to the 1991 Biological Opinion, including the 1999 South Florida Multi-Species Recovery Plan; the 2003 Red-Cockaded Woodpecker Recovery Plan, Second Revision; the 1997 Wood Stork Revised Recovery Plan; and the 2008, Third Revision of the Florida Panther Recovery Plan, as well as new information on the effects of seismic surveying activities on wildlife.

NPS' continued authorization and approval of projects and activities (including Phase I of the Applicant's seismic survey) in the Preserve that may affect listed species prior to the reinitiation

⁷² Email from Timothy Breen, U.S. Fish and Wildlife Service, to Don Hargrove, Big Cypress National Preserve (Jan. 27, 2016).

⁷³ For example, Figure 10 and Table 4 in the 2010 Biological Opinion show numerous panther deaths within the Big Cypress National Preserve resulting from vehicle collisions. More recent data also show numerous human-related panther deaths in Big Cypress National Preserve, such as the death of panther UCFP243 from a vehicle collision on June 11, 2015 near Kirby Storter Wayside Park, the death of panther UCFP227 from a vehicle collision on December 19, 2014 about 3.8 km west of the Oasis Visitor Center, and the death of panther K368 from a gunshot on December 7, 2013. *See* Florida Fish and Wildlife Conservation Commission, Panther Pulse, <http://www.floridapanther.net.org/index.php/pulse/#.V1C1fPkrLDc>.

and completion of consultation on the 1992 GMP and 2011 Addition GMP violates the ESA.⁷⁴ NPS' continued authorization and approval of projects and activities in the Preserve that may irreversibly and irretrievably commit resources which may foreclose the formulation or implementation of reasonable and prudent alternatives prior to completing the reinitiation of consultation on the impacts of implementation of the 1992 GMP and 2011 Addition GMP on listed species violates Section 7(d) of the ESA.⁷⁵ Because the 1991 Biological Opinion does not authorize any take of the Florida panther on the Big Cypress National Preserve, NPS is in ongoing violation of Section 9 of the ESA for authorizing and allowing projects and activities that are reasonably certain to result in the take of panthers.⁷⁶

V. Additional Violations

In addition to the violations of the ESA and APA listed above, the approval of Phase I of the Applicant's Nobles Grade 3D Seismic Survey violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* Unless NPS voluntarily rescinds its approval for Applicant's Plan of Operations and undertakes a comprehensive Environmental Impact Statement to evaluate the full effects of the project, the undersigned organizations giving notice in this letter may file suit under NEPA and may seek a preliminary injunction to prevent the seismic survey from going ahead. NEPA does not require notice of intent to sue and the undersigned organizations may seek relief under NEPA before the ESA claims described in this letter become ripe.

Furthermore, Phase I of Applicant's seismic survey is slated to take place in wetlands and will likely result in dredging or filling of wetlands regulated under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. If field work commences without a valid Section 404 permit from the U.S. Army Corps of Engineers, the undersigned organizations may file suit under the Clean Water Act to enjoin the project's illegal dredge and fill of wetlands.

VI. Conclusion

For the above stated reasons, the FWS and the NPS have violated and remain in ongoing violation of Sections 7 and 9 the ESA. If these violations are not cured within sixty days, the Center for Biological Diversity, Natural Resources Defense Council, National Parks Conservation Association, South Florida Wildlands Association, Conservancy of Southwest Florida, and Earthworks intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

⁷⁴ 16 U.S.C. § 1536(a)(2); *see Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (holding that Section 7(d) of the ESA "does not serve as a basis for any governmental action unless and until consultation has been initiated").

⁷⁵ 16 U.S.C. § 1536(d).

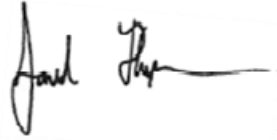
⁷⁶ 16 U.S.C. § 1538.

Sincerely,



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