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December 20, 2012

**By Email and U.S. Mail**

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**Re: Notice Of Violations Of The Endangered Species Act, National Environmental Policy Act, And National Park Service Organic Act In Connection With The National Park Service's Designation Of The Secondary Trail Network In Big Cypress National Preserve**

On behalf of the Sierra Club, the Center for Biological Diversity, South Florida Wildlands Association, Wildlands CPR, and Brian Scherf, we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), that the National Park Service ("NPS") has violated and is continuing to contravene various provisions of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and the Act's implementing regulations, by failing to reinitiate consultation with the U.S. Fish and Wildlife Service ("FWS") concerning FWS's July 14, 2000 biological opinion for the Big Cypress National Preserve's ("Preserve") *Final Recreational Off-Road Vehicle Management Plan* ("ORV Plan"), in connection with NPS's recent designation of a secondary ORV trail network that is at variance with, and not authorized by, the ORV Plan or the July 14, 2000 biological opinion.



While this letter satisfies the requirements of 16 U.S.C. § 1540(g) to provide notice to NPS of its ESA violations, we also explain below other legal violations inherent in NPS's designation of the Preserve's secondary trail network, including that NPS's significant deviation from the ORV Plan's directives is a violation of the National Environmental Policy Act, the National Park Service Organic Act, the Big Cypress Establishment, and Executive Orders 11,644 and 11,989. These clearcut legal violations are only bolstered by a recent ruling by a federal judge, which interpreted the meaning of pertinent provisions of the ORV Plan, and which expressly forecloses NPS from designating the secondary trail system in the way that it has in the Corn Dance Unit and Turner River Unit, as described in more detail below. Thus, while we believe we would prevail if this matter has to be litigated, our intention is that by sending this letter NPS will seriously consider our concerns and respond within sixty days to discuss the steps the agency may take to remedy these legal violations, in order to avoid needless litigation.

## **BACKGROUND**

### **A. Statutory and Regulatory Framework**

#### **1. Endangered Species Act**

The ESA “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits any “person” from “taking” any member of an endangered or threatened species. 16 U.S.C. § 1538(a).<sup>1</sup> Where federal action is involved that is likely to take or otherwise impact listed species, the action agency must engage in consultation with FWS. 16 U.S.C. § 1536.

Specifically, the action agency must ensure that the action at issue “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” *Id.* § 1536(a)(2). An action will cause jeopardy if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Any agency must evaluate the effect of a proposed project to determine the effect of the project on the

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<sup>1</sup> The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” *Id.* § 1532(19). FWS has further defined “harass” to include “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

species' chances of survival and recovery. This evaluation must use "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

At the end of the consultation process, FWS issues a biological opinion with effects analyses and conclusions on jeopardy, as well as any reasonable and prudent alternatives that might exist (if a jeopardy determination is made), or reasonable and prudent measures to minimize and mitigate take (if a non-jeopardy determination is made). *Id.* § 1536(b). FWS must also provide an incidental take statement that specifies the maximum allowable take from the action at issue. When preparing a biological opinion, FWS must (1) "review all relevant information," (2) "evaluate the current status of the listed species," and (3) "evaluate the effects of the action and cumulative effects on the listed species," 50 C.F.R. § 402.14, using "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2).

Where a biological opinion has been issued, the action agency is required to reinitiate consultation with FWS at any time "[i]f the amount or extent of taking specified in the incidental take statement is exceeded" or "[i]f 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." 50 C.F.R. § 402.16. If an action agency fails to reinitiate consultation when either of those conditions is triggered, it is a violation of section 7, 16 U.S.C. § 1536, and also a violation of section 9, 16 U.S.C. § 1538, because any takes exceeding a pre-existing incidental take authorization are *per se* unlawful.

## **2. National Environmental Policy Act**

The National Environmental Policy Act ("NEPA") was enacted more than four decades ago "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . ." 42 U.S.C. § 4321. In light of this mandate, the Supreme Court has reasoned that NEPA is "intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

In achieving NEPA's substantive goals, Congress created two specific mechanisms whereby federal agencies must evaluate the environmental and related impacts of a particular federal action – an environmental assessment ("EA") and an environmental impact statement ("EIS"). *See* 42 U.S.C. § 4332(c). These procedural mechanisms are designed to inject environmental considerations "in the agency decisionmaking process itself," and to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Pub. Citizen*, 541 U.S. at 768-69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)). Therefore, "NEPA's core focus [is] on improving agency decisionmaking," *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a "hard look" at potential environmental impacts and environmentally enhancing alternatives "as part of the agency's process of deciding whether to

pursue a particular federal action.” *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983). NEPA compliance must take place *before* decisions are made in order to ensure that those decisions take environmental consequences into account. *See, e.g., Wilderness Watch v. Mainella*, 375 F.3d 1085, 1096 (11th Cir. 2004)

An EIS must be prepared by an agency for every “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). Under the Council on Environmental Quality’s (“CEQ”) regulations that implement NEPA, “significance” requires consideration of both context and intensity. Where an EA or EIS has been previously prepared, NEPA’s regulations require an agency to supplement its prior NEPA review if “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c).

### **3. Executive Orders 11,644 and 11,989**

In 1972, President Nixon signed Executive Order 11,644, which sets forth the criteria to be employed in the designation of areas and trails for the use or non-use of ORVs on federal lands. The Order provides that ORV use 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. 2,877 (Feb. 8, 1972) (“EO 11,644”). Courts have routinely held that this requirement obligates agencies, in designating ORV trails, to expressly apply these “minimization criteria” to particular trails to determine whether such resource damage would in fact be minimized for a given trail.

Reaffirming and strengthening EO 11,644, President Carter issued EO 11,989, directing agencies to immediately close areas or trails to ORV use when such vehicles 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.” Executive Order 11,989, 42 Fed. Reg. 26,959 (May 24, 1977) (“EO 11,989”).

### **4. Big Cypress National Preserve Establishment Act**

Big Cypress National Preserve was established by Congress in 1974 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 . . . .” 16 U.S.C. § 698f(a). 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. No. 502, 93rd Cong., 1st Sess. 7 (1973). One of the House sponsors 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).

Congress further directed the Secretary of the Interior to administer the Preserve lands “as a unit of the National Park System in a manner which will assure their natural and ecological integrity in perpetuity.” 16 U.S.C. § 698i(a). Of particular pertinence here, the statute directs the Secretary to develop “rules and regulations” which are “necessary and appropriate to limit or control” potentially destructive practices in the Preserve, specifically including the use of “motorized vehicles” and “hunting, fishing, and trapping.” 16 U.S.C. § 698i(b). As a part 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”). The Organic Act requires NPS to “conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations,” 16 U.S.C. §§ 1, 1a-1, which is also referred to as NPS’s “non-impairment” mandate.

## **B. Factual Background**

### **1. Creation of the Preserve, the 1991 GMP, and the 1995 Lawsuit**

The Preserve is located to the north and west of the Everglades in southwest Florida. NPS has divided the Preserve into six planning or management units: Bear Island, Deep Lake, Turner River, Corn Dance, Loop, and Stairsteps. *See* ORV Plan at 8.<sup>2</sup> The Preserve is a mosaic of extensive prairies and marshes, forested swamps, and shallow sloughs on exceptionally flat terrain. The Preserve is an important watershed located upstream of Everglades National Park and is an important and fragile area. Due to soft soils and fragile vegetation, the marshes and prairies are highly sensitive to ORV use, which can cause severe and irreparable damage to the Preserve’s ecosystems.

The Preserve is home to a variety of plant life. Of the hundreds of plant species known to exist in the Preserve, 96 are listed by the State of Florida as threatened or endangered. *See* Muss, Austin, & Snyder, *Plants of the Big Cypress National Preserve* (2003), available at <http://www.briarcliff.edu/departments/biol/BIOL%2052IR/Plants%20of%20the%20Big%20Cypress%20National%20Preserve.pdf>. One of the major problems associated with ORV use in the Preserve is that ORVs not only permanently destroy soils, but also spread exotic, invasive plant species which outcompete native plants.

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<sup>2</sup> The complete 2000 ORV Plan (which includes the accompanying SEIS prepared by NPS and the Biological Opinion prepared by FWS) is too large to provide as an exhibit, at 171MB, but can be accessed here: <http://www.nps.gov/bicy/parkmgmt/upload/BICY-ORV-Management-Plan-2012-Scan.pdf>.

The Preserve is also home to abundant animal biodiversity, including thirty animal species that receive special protection or are recognized by the State of Florida, the federal government, or international treaties. For example, the Preserve and nearby public land provide approximately half of the habitat for the Florida Panther (*Felis concolor coryi*), which was listed as an endangered species in 1967 and has remained on the Endangered Species List. *See* 32 Fed. Reg. 4,001 (Mar. 11, 1967). There are currently approximately 100-120 adult and immature Florida panthers remaining, many of which use the Preserve. At least six other listed species reside in the Preserve: Cape sable seaside sparrow, Everglades snail kite, Wood stork, West Indian manatee, Red-cockaded woodpecker, and Eastern indigo snake.

Since the 1930s, people have accessed what is now Preserve property using motorized ORVs, including swamp buggies, tracked vehicles, smaller all-terrain vehicles, and airboats. Historically, ORVs were allowed to go virtually anywhere, usually leaving visible tracks on the ground. While NPS has identified ORV use as a popular activity in the Preserve – primarily with hunters and recreational ORV users – the majority of visitors to the Preserve are non-ORV users who engage in birdwatching, wildlife viewing, hiking, experiencing wilderness, and other non-motorized activities.

In October 1991, NPS issued a General Management Plan (“1991 GMP”) and a Final Environmental Impact Statement (“FEIS”) for the Preserve. The GMP and FEIS addressed all aspects of management of the Preserve, including ORV management. At that time, ORVs could access the Preserve at almost any location and travel almost anywhere on trails crisscrossing much of the land. Only the Loop Unit and two designated trails were closed to ORV use under the 1991 GMP. NPS further reported that the network of ORV trails, totaling nearly 23,000 miles of trails, had developed haphazardly over the years, with many trails following active and abandoned mineral access roads, former logging trams, and major prairies and marshes.

The more detailed ORV management plan promised in the 1991 GMP was not forthcoming. In 1995, several environmental groups and individuals, including those on whose behalf this letter is submitted, sued NPS and other federal agencies over ORV management in the Preserve. *See Fla. Biodiversity Project v. Kennedy*, Case No. 95- 50-Civ-FtM-24D (M.D. Fla.). The lawsuit asserted that NPS failed to circumscribe or manage ORVs in the Preserve in any meaningful way, resulting in an overall dispersed trail network of approximately 23,000 miles which severely damaged the Preserve’s natural resources. The lawsuit was settled by an October 25, 1995 Settlement Agreement, in which NPS agreed to prepare the ORV management plan contemplated by the 1991 GMP and to prepare a Supplemental Environmental Impact Statement (“SEIS”).

## **2. The 2000 ORV Plan and the 2000 Biological Opinion**

In August, 2000, NPS announced the availability of the ORV Plan and SEIS. *See* 65 Fed. Reg. 49593-01 (Aug. 14, 2000). On September 28, 2000, NPS issued a Record of Decision, adopting the final version of the 2000 ORV Plan. Based upon legislative mandates and special

commitments, NPS stated that “ORV use can occur only to the extent that it does not significantly adversely affect the preserve and its natural and cultural resources. Appropriate use of ORVs within this context, and the means for achieving that use, are provided in this plan.” ORV Plan at 9. Due to its “scope and complexity,” *id.* at 7, NPS contemplated a three-phase implementation process with all aspects of the plan being implemented within ten years. *Id.* at 59. Under the ORV Plan, NPS would apply a “precautionary principle, which would favor resource protection over resource use” in its management of motorized recreational ORVs. *Id.* at 27. The plan “emphasizes protection of natural and cultural resources in a manner that would leave the resources unimpaired for future users, while allowing ORV access for resource-related recreational opportunities.” *Id.* at 28.

The ORV Plan allowed for an “adaptive management approach” which included continual review and modification of the plan as needed to ensure effectiveness and compliance with mandates and policies, and “adaptive management techniques” which would “apply lessons learned from research and field experience to improving ORV management . . .” *Id.* at 27. Management actions would be adopted that “assure the highest protection of the preserve’s resources.” *Id.* at vii. Any modifications to the plan would comply with all appropriate laws and regulations, including, but not limited to, NEPA, the Executive Orders, and the ESA. *Id.* at 7. Modifications to the plan would also include appropriate public involvement. *Id.*

Some of the key features of the ORV Plan included the prohibition of ORV trails in all prairies, *see id.* at vi; the requirement that all ORV use must be restricted to designated trails, *id.*; and the limitation of no more than 400 miles of designated primary trails in the Preserve, *id.* at 29. As to particular management units of the Preserve, NPS closed the Deep Lake Unit and the Loop Unit to all ORV use; NPS limited ORV use to “approximately 30 miles of designated primary trails” in the Bear Island Unit; NPS limited ORV use to “approximately 140 miles of designated primary trails” in the Turner River Unit; NPS limited ORV use to “approximately 60 miles of designated primary trails” in the Corn Dance Unit; and NPS closed Zone 1 of the Stairsteps Unit to all ORV use, limited Zone 2 of the Stairsteps Unit to “approximately 10 miles of designated primary trails,” limited Zone 3 of the Stairsteps Unit to “approximately 25 miles of designated primary trails,” and limited Zone 4 of the Stairsteps Unit to airboat use only on designated trails. *Id.* at 76, 34.

The ORV Plan made clear the distinction between “primary” trails and “secondary” trails:

*Primary trails* would be those trails emanating from the designated access points and providing recreational access within the preserve. These trails would be the principal ORV routes. *Secondary trails* would be identified to provide access to private property or specific destinations such as campsites. Like the primary network, secondary trail alignments would be based on field surveys and GIS analyses. *Secondary trails* would branch off of the primary trails and would receive less use. Trails accessing a private property would be limited to use by

*that landowner if no other destination existed along that route. Secondary trails for public recreational use accessing features such as designated campsites would extend for a short distance from the primary trail.*

*Id.* at 34 (emphases added). Therefore, as the ORV Plan explained, secondary trails are essentially for ingress or egress to private property or a designated campground, but are not for general recreational driving. *Id.* Also, secondary trails must be short individually and cumulatively within a unit, in order to comply with the Plan's directives.

Before finalizing the ORV Plan, NPS engaged in formal consultation with FWS, pursuant to section 7 of the ESA, concerning the ORV Plan's primary trail network of no more than 400 miles of trails in addition to short secondary trails satisfying the ORV Plan's criteria. At the end of that consultation process, FWS issued a biological opinion on July 14, 2000, which NPS attached as Appendix C to the ORV Plan. *See* ORV Plan at 545-91. Inherent in FWS's authorization of the project pursuant to the biological opinion was NPS's commitment to the "application of the precautionary princip[le] [sic]" in managing ORV use in the Preserve. *Id.* at 547.

While both the ORV Plan and biological opinion focused on the Bear Island Unit with respect to the Florida panther, they also acknowledged the regular and routine use of other units – including the Corn Dance and Turner River Units – by panthers. *See* ORV Plan at 105 (map documenting panther telemetry locations in the Preserve); AR 573 (same). FWS noted that "[t]he effect of the proposed action will be to reduce the extent of trails that panthers may move away from during periods of high use." ORV Plan at 574. Despite that, FWS determined that the "continuation of ORV activities in areas occupied by panthers . . . will result in a continuation of the avoidance behavior observed" by scientists in the past. *Id.* at 575. Therefore, FWS concluded that ORV use, even at those levels, "could alter normal breeding, feeding, and sheltering behavior," leading FWS to issue an incidental take statement for harassment of panthers due to ORV use. *Id.* at 575-82. FWS required, as "reasonable and prudent measures," that "NPS will reduce the extent of trails in" the Preserve, and that NPS will determine "[a]ppropriate levels of [ORV] use compatible with the Florida panther . . . [in] all areas of BICY." *Id.* at 582. FWS further required, as terms and conditions of section 7 authorization, that NPS "will implement studies described in Table 3 of the proposed action to preserve panthers and determine ORV carrying capacity for management units within BICY." *Id.*

In that opinion, FWS also consulted with NPS concerning Wood storks (which had approximately 45 colonies in the Preserve at that time), Red-cockaded woodpeckers (which had 53 clusters in the Preserve at that time), and Everglades snail kites (which nest and forage in various units of the Preserve). *See* ORV Plan at 569-71. For all three species, FWS concluded that adverse effects would be avoided only if NPS applied appropriate setback distances from ORV trails, based on the best available scientific evidence. *See* ORV Plan at 574-75 (requiring NPS to use "setbacks for ORV trails from [wood stork] colony sites [that] are consistent with the recommendations" in the species' habitat management guidelines); *id.* (requiring that "ORV

trails near active [woodpecker] clusters will be designed to either avoid the cluster, or be placed at least 200 feet from the aggregate of cavity trees that comprise the cluster site”); *id.* (requiring “appropriate set-back distances” “to determine the placement of designated trails in sensitive areas” for snail kites).

As to all species, FWS explained that “[t]he placement of designated trails . . . may require further consultation *once more specific details are developed for the activity*. NPS will continue to coordinate these activities with the Service to ensure consultation, if necessary, is completed for these activities.” ORV Plan at 571. Citing its own regulations, FWS explained that “reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained and if . . . the amount or extent of taking specified in the incidental take statement is exceeded” or “the agency 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.” *Id.* at 583.

In 2001, ORV users filed a lawsuit in federal court challenging the 2000 ORV Management Plan and SEIS. *Wildlife Conservation Fund of Am. v. Norton*, Case No. 2:01-cv-25-FtM-29DNF (arguing that “[t]he new anti-access edicts in Big Cypress reflect one Administration’s political agenda and disregard of on-the-ground facts and the law related to the Preserve.”). On February 22, 2005, the court ruled that NPS had taken the required “hard look” at its options and that the ORV Plan and SEIS were not arbitrary or capricious, an abuse of discretion, or otherwise contrary to law.

### **3. The 2007 Bear Island Unit Lawsuit**

In February 2007, at the request of ORV users, NPS issued a decision reopening various ORV trails in the Bear Island Unit of the Preserve – trails which the agency had closed as part of the 2000 ORV Plan because of serious adverse impacts to prairies, soil, hydrology, and wildlife (particularly panthers). Although the ORV Plan limited ORV use to “approximately 30 miles of designated primary trails” in the Bear Island Unit, *see* ORV Plan at 76, NPS’s 2007 decision brought the primary trail mileage in the Bear Island Unit to 34.95 miles and the secondary trail mileage in the unit to 9.41, or a total of 44.36 miles of ORV trails in the unit. NPS did not conduct any NEPA review whatsoever, and only sought to comply with the ESA after it was notified of legal violations by members of the public.<sup>3</sup>

In December 2007, environmental organizations and interested individuals, including co-signers to this letter, brought suit challenging NPS’s 2007 decision as violating various laws,

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<sup>3</sup> As a result of NPS’s 2007 decision, the secondary trail mileage in the Bear Island Unit went from 0.34 miles to 9.41 miles – an approximately 2,000% increase, and in any event the decision took the secondary trail mileage in the unit from 1% to 31% as compared to the authorized primary trail mileage in the unit (30 miles).

including NEPA, the ESA, and the ORV Executive Orders. NPS's primary argument was that NEPA review and other legal compliance was not necessary because the designation of the primary and secondary trails in the Bear Island Unit was implementation of, and consistent with, the 2000 ORV Plan and SEIS, and therefore no additional legal obligations existed in 2007.

In July 2012, the Honorable John Steele of the Middle District of Florida emphatically rejected NPS's position and ruled for the environmental groups on all of their claims. In particular, Judge Steele emphasized that NPS could not – under the plain terms of the ORV Plan – open “approximately 44 miles” of ORV trails when the Plan only contemplated “approximately 30 miles,” without preparing a supplemental NEPA document. *See Defenders of Wildlife v. Salazar*, No. 08-237, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 2812309, at \*25-26 (M.D. Fla. July 10, 2012). As to secondary trails, Judge Steele rejected the notion that the ORV Plan “placed no limit on secondary trails and, therefore, increasing these trails 30-fold was within the contemplation of the plan.” *Id.* Judge Steele also ruled that, under the ORV Plan, secondary trails cannot be used for “recreational ORV use” but rather only for “limited ingress and egress,” their endpoints must be “specific destinations” such as private property and designated campgrounds, “locations used for hunting” and other recreation are not appropriate destinations for secondary trails, and secondary trails must be short both individually and cumulatively within a management unit. *Id.* The court also made clear that NPS has the burden in a supplemental NEPA document to identify and document the “specific destination” to which a proposed secondary trail runs, and to accept public comment on the propriety of that trail, *before* NPS can designate the trail for use. *Defenders of Wildlife*, 2012 WL 2812309, at \*25 (faulting NPS for “not identify[ing] the ‘specific destinations’” and admonishing NPS for ending secondary trails in hunting locations).<sup>4</sup>

In addition to finding that NPS had violated NEPA in opening 44 miles of trails in the unit where only approximately 30 miles had been authorized by the ORV Plan, the court found that NPS violated the NPS Organic Act and the Big Cypress Establishment Act, “[b]ecause the Court finds that the administrative record does not reflect a rational basis for NPS’s 2007 decision to reopen trails in the BIU.” *Defenders of Wildlife*, 2012 WL 2812309, at \*27. Judge

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<sup>4</sup> In providing sworn testimony during the discovery phase of the lawsuit, former Preserve Superintendent John Donahue – who was the “main architect” and the “principal author” of the ORV Plan – testified that secondary trails were meant to be “small” and “de minimis” cumulatively, and that it is inconsistent with the ORV Plan to have secondary trails covering 30% of the mileage of primary trails in a given management unit, as was the case after NPS’s 2007 Bear Island Unit trail opening decision. *See* Attachment A (Donahue Deposition) at 109-12. He explained that, in the ORV Plan, NPS “never intended for the secondary trail system to have anything more than a small, cumulative amount of trails.” *Id.* at 109. Superintendent Donahue – who is still a high-ranking NPS official – also testified that hunting sites cannot serve as “specific destinations” for purposes of secondary trail locations, as they may only access designated campgrounds and private property. *Id.* at 113-17.

Steele also found NPS in violation of the ORV Executive Orders because “NPS has failed to articulate whether or how it applied the minimization criteria to the 2007 decision” and “the decision to reopen the trails was therefore arbitrary and capricious.” *Id.* at \*28.

Finally, Judge Steele found NPS and FWS in violation of the ESA. As the court explained, nothing had changed since the 2000 biological opinion when FWS consulted with NPS concerning only 30 miles of primary trails and short secondary trails in the Bear Island Unit, meaning that FWS’s concurrence to NPS’s reopening of an additional 14 miles of trails in the unit in 2007 was “the very definition of ‘arbitrary and capricious.’” *Id.* at \*31. In particular, the court admonished the agencies because NPS’s decision “involved the addition of approximately 9.4 miles of ‘secondary’ trails . . . but FWS’s Amended Opinion does not include an analysis of the locations of these trails and whether their placement and anticipated level of use would affect the endangered panther” or other listed species. *Id.* at \*32.

Accordingly, the court set aside NPS’s 2007 decision, as well as FWS’s amended biological opinion, and closed the trails to ORV use.

#### **4. NPS’s Designation of the Secondary Trail Network in the Corn Dance Unit and the Turner River Unit**

In implementing the 2000 ORV Plan, NPS has final authority to designate primary and secondary ORV trails, although it often solicits recommendations from the Big Cypress Off-Road Vehicle Advisory Committee (“ORVAC”) before making final decisions. *See* ORVAC Charter, ¶ 3, available at [http://www.nps.gov/bicy/parkmgmt/upload/Signed\\_2011\\_Big\\_Cypress\\_Charter\\_\\_10\\_03\\_11-1.pdf](http://www.nps.gov/bicy/parkmgmt/upload/Signed_2011_Big_Cypress_Charter__10_03_11-1.pdf). While authorized by the 2000 ORV Plan, the ORVAC was not formally established until 2007, *see* 72 Fed. Reg. 42108-02 (Aug. 1, 2007), and it convened its first meeting on November 29, 2007, *see* 72 Fed. Reg. 62492-502 (Nov. 5, 2007). Therefore, while the litigation challenging the Bear Island Unit trail reopening was proceeding, the ORVAC was providing NPS with recommendations for primary and secondary trail locations, and NPS was making final decisions about the location, layout, and mileage of the ORV trail network in the other management units where ORV use is allowed.<sup>5</sup>

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<sup>5</sup> The ORVAC has long been criticized for being imbalanced, as a majority of committee members have expressed interests in maximizing recreational ORV use in the Preserve, while few members have backgrounds in biology, conservation, and/or resource protection. Thus, the committee as whole seldom advocates for limited and sustainable ORV use in the Preserve. So long as this imbalance is maintained, and NPS allows itself to be influenced by a committee that is plainly biased in favor of maximum ORV use, it is highly likely that NPS’s management decisions will continue to be in tension with the agency’s conservation mandates and legal obligations.

On July 22, 2011, NPS announced that “all backcountry access via off-road vehicle is along designated primary and secondary trails only,” meaning that one major component of the ORV Plan had been achieved (i.e., eliminating dispersed use). At that time, NPS also issued maps formally designating primary and secondary trails in the Corn Dance Unit and the Turner River Unit. NPS also posted preliminary ORV trail maps for the Stairsteps Unit, although additional trail designations are forthcoming at this time.

As to the Corn Dance Unit – where the ORV Plan limited ORV use to “approximately 60 miles of designated primary trails,” *see* ORV Plan at 76 – NPS designated 65 miles of primary trails and 62 miles of secondary trails. *See* NPS, Corn Dance Unit Designated Trail Map, Attachment, B, also available at <http://www.nps.gov/bicy/planyourvisit/upload/20120726-CDU-Designated-Trails.pdf>. Thus, NPS has designated 127 miles of ORV trails in this unit, which is more than double what the ORV Plan authorized, and significantly larger than the trail system FWS analyzed in its biological opinion. Moreover, many of the secondary trails appear to be longer than anticipated by the ORV Plan, *see* ORV Plan at 34 (secondary trails may only “extend for a short distance from the primary trail”), and in some cases secondary trails even have other secondary trails branching off from them. *Id.* (secondary trails must “branch off of primary trails”). Not only do many of the secondary trails fail to end at a narrow subset of “specific destinations” allowed by the ORV Plan (e.g., private property or designated campground), but many of the trails simply form loops to connect primary trails – in violation of the requirement that such trails must be only for ingress and egress to private property and designated campgrounds. *Id.*

The Turner River Unit is no different. In that unit – where the ORV Plan limited ORV use to “approximately 140 miles of designated primary trails,” *see* ORV Plan at 76 – NPS designated 126.5 miles of primary trails and 82.5 miles of secondary trails. *See* NPS, Turner River Unit Designated Trail Map, Attachment C, also available at <http://www.nps.gov/bicy/planyourvisit/upload/20120726-TRU-Designated-Trails.pdf>. Thus, NPS has designated 209 miles of ORV trails in this unit, which is more than 49% larger than what the ORV Plan authorized, and, again, significantly larger than the trail system FWS analyzed in its biological opinion. The secondary trails in this unit suffer from the same defects seen in the Corn Dance Unit: trails longer than appropriate on an individual and cumulative basis, secondary trails branching off of secondary trails, lack of private property or designated campground as a trail endpoint, and creation of recreational ORV loops clearly intended to be used for expanded recreational riding. These features are contrary to the ORV Plan.<sup>6</sup>

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<sup>6</sup> At this time, NPS has only designated 6 miles of primary trails and 0.5 miles of secondary trails in Zone 2 of the Stairsteps Unit, and 3 miles of primary trails and 0.5 miles of secondary trails in Zone 3 of the Stairsteps Unit. *See* NPS, Stairsteps Unit Map, Attachment D, also available at <http://www.nps.gov/bicy/planyourvisit/upload/07272011-SSU-Map.pdf>. While those numbers are qualitatively within the ORV Plan’s authorization at this time, NPS is considering, at present, designating many additional miles of both primary and secondary trails

## DISCUSSION

### **A. NPS's July 2011 Decision Designating Trails In The Corn Dance And Turner River Units Violates The ORV Plan.**

Under the plain terms of the ORV Plan – and as affirmed by a federal judge reviewing the Plan's language – NPS cannot designate a secondary trail unless NPS has verified that (1) it has, as an endpoint, private property or a designated campground, and is, therefore, not a loop; (2) the trail will only be used for ingress and egress by the property owner, if designated for private property access, and not for public recreational use; (3) the trail must branch off of a primary trail, and not another secondary trail; (4) the trail itself is short; and (5) the cumulative mileage of secondary trails in a given management unit must be a fraction of the authorized primary trail mileage so as not to exceed the Plan's authority. Here, in designating trails in the Corn Dance and Turner River Units, NPS has violated *all* of these key directives.

At the outset, there is no public record on NPS's website or elsewhere documenting that NPS has assured itself, as it must, that every single secondary trail in the Corn Dance and Turner River Units ends at a defined private property or designated campground. Before allowing ORV use on a trail, NPS is obligated, by the ORV Plan and the legal mandates upon which the Plan is based, to make that fact-specific determination and apprise the public of the outcome. *See* ORV Plan at 7 (explaining that “[m]odifications to the plan would also include appropriate public involvement”). Moreover, even if such documentation existed, there is no legal justification under the ORV Plan for allowing secondary trail loops that do nothing more than connect primary trails for recreational ORV use – something expressly prohibited by the Plan's mandate that a secondary trail serve as a means of ingress and egress to private property or a campground. Nor, for that matter, is there any legal rationale for allowing secondary trails to branch off of secondary trails, which is in direct contravention of the plain terms of the ORV Plan. *See* ORV Plan at 34 (requiring that “[s]econdary trails would branch off of the primary trails”).<sup>7</sup>

Moreover, many secondary trails in these units appear to have no specific purpose other than to access hunting locations – something which the ORV Plan prohibits, and which Judge Steele expressly forbid. *Defenders of Wildlife*, 2012 WL 2812309, at \*25-26. In any event, the

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in the Stairsteps Unit that would exceed the respective mileages of Zones 2 and 3 of this unit contemplated by the ORV Plan. *See* Attachment E (ORVAC recommendations for primary and secondary trails in the Stairsteps Unit). If NPS proceeds with designating those trails, they too will be in violation of the Plan as described herein with respect to the Corn Dance and Turner River Units.

<sup>7</sup> NPS has also failed to ensure that no secondary trails traverse prairies – the most sensitive vegetative resource in the Preserve – which is an express requirement of the ORV Plan. Nor does NPS appear to be applying the precautionary principle to trail designation decisions, as required by the ORV Plan.

ratio of the secondary trail network in each of these units as compared to the primary trail network in those units (Corn Dance Unit: 62 miles secondary compared to 65 miles primary; Turner River Unit: 82.5 miles secondary compared to 126.5 miles primary) is well outside of what the Plan contemplated. Particularly since the ORV Plan limited primary trails to 60 miles in the Corn Dance Unit and 140 in the Turner River Unit, NPS's decision to designate a combined 127 miles and 209 miles, respectively, is patently unlawful under the Plan.<sup>8</sup>

**B. NPS's Failure To Reinitiate Consultation Is A Violation Of Sections 7 And 9 Of The ESA.**

In designating a secondary trail network in the Corn Dance and Turner River Units that far exceeds what was contemplated by the ORV Plan in both size and scope, NPS has placed greater strain on the protected wildlife that inhabits the Preserve than was anticipated in the Plan. In so doing, NPS has also substantially modified the ORV Plan in a manner that causes effects to listed species and their habitats that FWS never considered in the 2000 biological opinion, and, as a result, exceeds the incidental take authorized by that opinion. For both of those reasons, NPS was required by the plain language of 50 C.F.R. § 402.16 and by the 2000 biological opinion to reinitiate consultation *before* designating the massive secondary trail network in the Corn Dance and Turner River Units. *See* 50 C.F.R. § 402.16 (reinitiation of consultation is required “[i]f the amount or extent of taking specified in the incidental take statement is exceeded” or “[i]f 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”); *see also* ORV Plan at 583.

Indeed, FWS's 2000 biological opinion expressly noted that “[t]he placement of designated trails . . . may require further consultation *once more specific details are developed for the activity*. NPS will continue to coordinate these activities with the Service to ensure consultation, if necessary, is completed for these activities.” ORV Plan at 571. Yet, NPS plowed forward in 2011 not only with the placement of designated primary trails, but with an

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<sup>8</sup> NPS has also violated the ORV Plan's directives limiting the secondary trail mileage to a de minimis fraction of the primary trail mileage in a management unit. As former Preserve Superintendent Donahue testified, the ORV Plan requires secondary trails be “small” and “de minimis” cumulatively and also prohibits secondary trails from covering, in the aggregate, even 30% of the mileage of authorized primary trails in a given management unit. *See* Attachment A (Donahue Deposition) at 109-12. Here, NPS has allowed secondary trails (62 miles) in the Corn Dance Unit at 103% of the authorized primary trail mileage (60 miles) in that unit, and NPS has allowed secondary trails (82.5 miles) in the Turner River Unit at 59% of the authorized primary trail mileage (140 miles) in that unit. In both units, that *far exceeds* the 30% ratio in the Bear Island Unit (9.41 miles of secondary trails compared to an authorization of 30 miles of primary trails) which Superintendent Donahue – the NPS official who wrote the ORV Plan – testified under oath was inconsistent with the ORV Plan and which Judge Steele found to violate the ORV Plan in overturning NPS's Bear Island Unit decision.

immense secondary trail network far exceeding anything FWS has previously reviewed in connection with ORV management in the Preserve. However, NPS did not seek reinitiation of consultation with FWS concerning that action. Moreover, as Judge Steele made clear in his Bear Island Unit ruling, NPS may not designate trails in excess of what was contemplated in the ORV Plan until and unless FWS has, in a biological opinion, “include[d] an analysis of the locations of these trails and [determined] whether their *placement and anticipated level of use* would affect the endangered panther” and other listed species, *Defenders of Wildlife*, 2012 WL 2812309, at \*32 (emphasis added) – something which FWS has not done here.<sup>9</sup>

Therefore, because NPS has failed to reinitiate consultation with FWS despite designating a trail system that far exceeds the authorization previously granted by FWS, and because that immense trail system has almost certainly resulted in unauthorized takes of panthers, wood storks, red-cockaded woodpeckers, and snail kites, NPS is in violation of sections 7 and 9 of the ESA.<sup>10</sup>

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<sup>9</sup> The adverse effects to panthers and other listed species from a substantially larger ORV network than NPS contemplated in the ORV Plan result both from ORV use itself (habitat fragmentation, displacement, flushing, and other disruption of normal biological patterns due to ORV riding and noise) and also from increased hunting of panther prey (deer and hogs) due to greater hunter access to remote locations via numerous secondary trails ending at hunting locations. *Defenders of Wildlife*, 2012 WL 2812309, at \*31-32 (rejecting the argument that “the overall effect of hunting under the 2007 designation remains the same as the 2000 designation” because NPS had opened 9.4 miles of secondary trails that “simply lead to hunting areas”).

<sup>10</sup> In addition, there is no indication that NPS ever conducted the studies on ORV use and panther compatibility – which were required as mandatory terms and conditions of the 2000 biological opinion – to “determine ORV carrying capacity for management units within BICY” *before* designating the primary and secondary trail networks in the Corn Dance and Turner River Units. That, too, is a violation of section 7, and also a failure to rely on the best available scientific evidence, 16 U.S.C. § 1536(a)(2). *See Defenders of Wildlife*, 2012 WL 2812309, at \*31 (“In 2000, FWS concluded that an approximate limit of 30 miles of primary trails and *short* secondary trails in the BIU would cause some incidental take of the Florida panther. This ‘take’ *was allowed only if NPS completed several studies related to ORV use and its impacts* [on panthers].”). Nor, for that matter, does it appear that NPS ensured, via consultation with FWS, that the appropriate setback distances – as dictated by the best available scientific evidence – were applied to each and every designated trail near known wood stork, red-cockaded woodpecker, and snail kite habitat, as required by the 2000 biological opinion – yet another section 7 violation. *See Defenders of Wildlife*, 2012 WL 2812309, at \*32 (requiring FWS analysis of “the locations of these trails and whether their placement and anticipated level of use would affect the endangered panther” or other listed species, *before* NPS designates trails in excess of the ORV Plan).

**C. NPS's Decision Also Violates NEPA, The Enabling Act, And The ORV Executive Orders.**

As was the case when NPS modified the ORV Plan by designating a total of 44.36 miles of ORV trails in the Bear Island Unit (34.95 miles primary and 9.41 miles secondary) – despite the ORV Plan's limit of “approximately 30 miles of designated primary trails” in that unit – such modification may not occur without supplemental NEPA review. *Defenders of Wildlife*, 2012 WL 2812309, at \*25-26. Indeed, NPS's actions here are *more* egregious than NPS's Bear Island Unit trail decision where NPS exceeded the authorized trail mileage in that unit by 47.9%; here, NPS has exceeded the authorized trail mileage in the Corn Dance Unit by 111.7% and in the Turner River Unit by 49.3%. NPS's actions here are also more likely to have significant adverse environmental impacts than the Bear Island Unit decision because there are simply more trails authorized in these units, and thus the magnitude of resource impacts is much greater due to the sheer mileage of trails and the resources (soil, vegetation, hydrology, wildlife) affected by them.

Accordingly, NPS was required, at minimum, to prepare a supplemental EIS or EA, subject to notice and public comment, *before* modifying the ORV Plan in this manner. Because NPS has failed to do so, its decision is a flagrant NEPA violation.

Likewise, NPS has circumvented the NPS Organic Act and the Big Cypress Establishment Act – which formed the basis of the ORV Plan – by failing to conduct an impairment analysis to determine whether a secondary trail network of this immense size, and the secondary trails on an individual basis, satisfy the non-impairment mandate of the Organic Act. Nor has NPS even attempted to reconcile its decision with the enabling statute's mandate that NPS administer the Preserve “in a manner which will assure [its] natural and ecological integrity in perpetuity” by developing “rules and regulations” which are “necessary and appropriate to limit or control” potentially destructive practices on the preserve, specifically including the use of “motorized vehicles” and “hunting.” 16 U.S.C. §§ 698i(a)-(b).

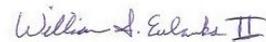
Finally, NPS has not demonstrated that it considered, much less applied, the minimization criteria as required by the ORV Executive Orders. *See* Exec. Order No. 11,644 §§ 1, 3 (requiring that “[a]reas and trails [for ORV use] shall be located to minimize damage to soil, watershed, vegetation, or other resources . . . [and] minimize harassment to wildlife or significant disruption of wildlife habitats”). Thus, as Judge Steele ruled on essentially identical facts, “NPS has failed to articulate whether or how it applied the minimization criteria to th[is] . . . decision” and “the decision to reopen the trails was therefore arbitrary and capricious.” *Defenders of Wildlife*, 2012 WL 2812309, at \*28. For all of these reasons, NPS's decision is unlawful.

## CONCLUSION

As described above, NPS's July 2011 decision to designate the secondary trail network in the Corn Dance and Turner River Units is in violation of various statutes, executive orders, and the ORV Plan itself, and cannot pass the statutory and regulatory muster of the ESA. Therefore, we urge NPS to immediately close all secondary trails in these units, conduct a legally appropriate analysis of these trails both individually and cumulatively, and solicit public comment to NPS – not the ORVAC – on that process. During that time, we also urge NPS to defer any decisions as to additional secondary trails in the Stairsteps Unit, until and unless NPS can undertake a legally appropriate and transparent analysis in that unit to account for the concerns identified above.

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. If we do not hear from you, we will assume that no changes will be made and will consider all available avenues, including litigation, to conserve the Preserve's resources, including the Florida panther and other listed species, in accordance with the requirements of the ESA and other governing legal mandates.

Sincerely,



William S. Eubanks II  
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