

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

September 18, 2015

Tunis W. McElwain
Chief, Fort Myers Section
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Jacksonville District Corps of Engineers
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1520 Royal Palm Square Boulevard
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Via U.S. Mail and electronic mail to: tunis.w.mcelwain@usace.army.mil

Re: Nobles Grade 3-D Seismic Survey/Plan of Operations in Big Cypress National Preserve

Dear Chief McElwain,

The undersigned organizations have reviewed the proposed Plan of Operations (“POP”) for the Nobles Grade 3-D seismic survey submitted to the National Park Service by the Burnett Oil Company (“Burnett”).¹ We write to request that your office require Burnett to apply for an individual permit under Section 404 of the Clean Water Act (“CWA”) for the activities described in the POP.

A. Background

Burnett proposes to conduct seismic surveying of 110 square miles within the Big Cypress National Preserve (“Big Cypress” or “Preserve”). Burnett’s proposed seismic surveying requires the construction of staging areas and the passage of heavy 67,100-pound trucks equipped with vibroseis equipment, and other off-road vehicles, through wetlands in the Preserve. It also appears that Burnett proposes to construct a composite interlocking mat system in wetlands to accommodate the passage of heavy trucks and other off-road vehicles.² However, the extent of Burnett’s proposed mat construction is unclear. What is clear is that Burnett’s proposed seismic surveying activities will adversely impact the Preserve, including wetlands. These activities require a Section 404 permit.

In the POP, Burnett included an e-mail dated January 30, 2014, from the Army Corps of Engineers (“Corps”) indicating that Burnett’s project does not require a Section 404 permit

¹ See Burnett Oil Co., Inc., et al., Nobles Grade 3-D Seismic Survey, Big Cypress National Preserve and Big Cypress National Preserve Addition Plan of Operations (Dec. 2014) (hereafter, “POP”). The POP can be located at the following website: <https://parkplanning.nps.gov/documentsList.cfm?projectID=53498>.

² *Id.* at p. 60 (“Should improvements be needed for either access or at the staging areas, the Applicant may utilize a composite mat system similar to that shown in Exhibit 9.”); Appendix B, p. 300, par. 6-7.

because it will result in neither fill nor mechanical clearing in waters of the United States.³ The email does not include the Corps' underlying reasoning for this determination; nor does it mention the potential use of a composite interlocking mat system in wetlands. The proposed seismic surveying activities, including the operation of heavy equipment, staging of equipment, and construction of a composite interlocking mat system in wetlands, require Section 404 permit authorization for the reasons stated herein.

B. The activities proposed by Burnett require an individual Section 404 permit.

Under the CWA, the discharge of dredge or fill material into waters of the United States is unlawful, unless the Corps issues a Section 404 permit for the discharge. *See* 33 U.S.C. §§ 1311(a), 1344. The applicable regulations define "fill" as material placed in waters of the United States that has the effect of: (1) "Replacing any portion of a water of the United States with dry land"; or (2) "Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1). Fill can occur even when the materials deposited into a wetland originated in the same wetland. For example, the Fifth Circuit found that filling occurred when a defendant leveled an area by bulldozing vegetation and then burying the vegetation in the wetland. During the vegetation-clearing process, small sloughs were filled in and larger ones were partially filled, thereby leveling the land. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-25 (5th Cir. 1983).

Burnett's operation of heavy vibroseis trucks and off-road vehicles, the construction of a composite interlocking mat system, and staging of equipment in wetlands in the Preserve require a Section 404 permit. It appears that Burnett proposes to operate heavy equipment and locate staging areas in wetlands on top of a composite interlocking mat system.⁴ The staging of equipment and placement of composite mats in wetlands constitute fill because the equipment and mats will change the bottom elevation of the wetlands in the Preserve. *See* C.F.R. § 323.2(e)(1)(ii). The placement of equipment and mats in wetlands will also flatten wetland vegetation and compact soils underneath the equipment and mats. There is also a potential for the discharge of fill material when heavy vibroseis trucks and off-road vehicles drive through wetlands, both with, and without, the use of mats. Additionally, there is a high potential for significant disturbance of hydrology in the Preserve due to the shallow nature of the geology, which includes karsted limestone.⁵ Specific impacts include a loss of perched wetland conditions and impacts to wetland hydroperiods.⁶ Although Burnett proposes to conduct the seismic surveying activities during the dry season,⁷ the discharges of fill require a Section 404 permit even if the wetlands in which material are deposited will, at the time, be dry. *See, e.g.*, *United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007) ("Common sense tells us that . . . the mere fact that pollutants are deposited while this part of Teton Creek is dry cannot make a significant

³ *Id.* at Exhibit 15.

⁴ *Id.* at Exhibit 9; *see also* DEP Environmental Resource Permit number 11-0323836-002 issued to Burnett Oil Co., Inc. on July 15, 2015, which can be located at the following website: http://www.dep.state.fl.us/south/SD_Projects.htm.

⁵ *See* Noah Kugler, P.G., Opinion and Recommendation: Nobles Grade 3-D Seismic Survey Application dated May 16, 2014, attached hereto as Exhibit A.

⁶ *Id.* at 2.

⁷ Burnett Oil Co., Inc., et al., Nobles Grade 3-D Seismic Survey, Big Cypress National Preserve and Big Cypress National Preserve Addition Plan of Operations (POP), pg. 63.

difference. To hold otherwise would countenance significant pollution of the waters of the United States as long as the polluter dumped the materials at a place where no water was actually touching them at the time.” (internal citation omitted)).

C. There is precedent for requiring a Section 404 permit for seismic exploratory operations.

Pursuant to Section 404(e) of the CWA, the Corps can issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects. The Corps has promulgated a general permit—Nationwide Permit Number 6—that expressly authorizes survey activities, such as seismic exploratory operations. Nationwide Permit Number 6 also authorizes the construction of temporary pads, provided discharge does not exceed 1/10th of an acre in waters of the United States.

There is precedent for requiring a Section 404 permit for the construction of temporary pads in wetlands. In 2012, the U.S. Environmental Protection Agency initiated an enforcement action against the Florida Fish and Wildlife Conservation Commission (“FWC”), for the unauthorized discharge of dredged or fill material into waters of the United States for the purpose of excavating a channel within Cowbone Marsh in Glades County, Florida.⁸ The Corps subsequently authorized the restoration work necessary to resolve the enforcement action through Nationwide Permit Number 32.⁹ The restoration work proposed by FWC, and authorized by the Corps through the Nationwide Permit, included the creation of a 14-foot wide temporary access road and a temporary 10,000 square foot staging area through wetlands by placing composite interlocking mats along 1.164 miles of an existing firebreak and trail, and borrow pit access.¹⁰ The project included temporary direct impacts to 2.2 acres of freshwater marsh and temporary secondary impacts to approximately 84 acres of freshwater marsh. Although Nationwide Permit Number 32 pertains to enforcement actions, the activities described in Burnett’s POP are far more extensive than the activities that were authorized under a Nationwide Permit in the FWC case. The Burnett POP will have even greater wetland impacts than those proposed by the FWC because the operations are proposed throughout 110 square miles of the Preserve.

We understand that the Corps is currently processing an application for a Nationwide Permit Number 6 for Tocala, LLC (“Tocala”) that would authorize seismic surveying activities within 161 square miles on private and public lands located to the north of the Preserve.¹¹ Like Burnett, Tocala proposes to conduct seismic surveying within wetlands. However, unlike Burnett, Tocala proposes to locate all of its staging areas within uplands.¹² Notably, the Corps requested

⁸ See U.S. Environmental Protection Agency Administrative Compliance Order on Consent (AOC), Docket no. CWA-04-2012-5771 dated September 05, 2012.

⁹ See Corps Permit Number SAJ-2008-04055 (NW-CDO) dated September 11, 2012, issued to the FWC for the Cowbone Marsh Restoration Temporary Access Road.

¹⁰ *Id.*

¹¹ See E-mail correspondence from Muriel Blaisdell to Cheryl Rolph dated October 11, 2013, requesting additional information on Corps Permit Application no. SAJ-2013-02404 for Tocala, LLC seismic survey activities, attached hereto as Exhibit B.

¹² See DEP Environmental Resource Permit number 26-0320889-001 issued to Tocala, LLC, on January 24, 2014, which can be located on the following website: <http://www.dep.state.fl.us/Water/wetlands/erp/find-permit.htm>.

additional information from Tocala to confirm whether any temporary pads for field staging areas or other activities would result in the placement of fill in wetlands.¹³ Tocala subsequently responded that staging areas will be placed in uplands and will not result in the placement of fill in wetlands.¹⁴ Tocala's proposed activities are distinguishable from Burnett's because Burnett proposes to locate staging areas and to construct a composite interlocking mat system in wetlands. Nonetheless, a review of the activities undertaken by FWC and Tocala indicate that there is precedent for requiring a Section 404 permit for the construction of temporary pads in wetlands.

Importantly, the Florida Department of Environmental Protection ("DEP") has issued an individual environmental resource permit ("ERP") to Burnett, in order to address the wetland impacts associated with Burnett's proposed seismic surveying in the Preserve¹⁵. Specific Condition number 4 of the ERP requires that all staging areas within wetlands shall use a composite mat system. Therefore, it is clear that Burnett must construct at least some mats in order to comply with the ERP. Specific Condition number 6 of the ERP acknowledges that temporary surface impacts associated with the seismic surveying are expected to occur, including habitat "layover" of vegetation as a result of vehicle traffic in an off-road situation, or due to utilization of a mat system. It also acknowledges that potential additional impacts may include vegetation defoliation, ruts, depressions, and vehicle tracks (i.e., potential depressions in the soil left by a vehicle that contains uprooted vegetation, soil displacement, and/or soil compactations which is visibly identifiable or greater than 3 inches). Consequently, Special Condition number 6 of the ERP requires Burnett to restore these impacts, and to re-grade and re-stabilize the soils immediately via silt fences and subsequent planting of appropriate native vegetation within a time certain to prevent turbidity in adjacent wetlands. The Corps should require similar and necessary environmental conditions and corrective actions in an individual Section 404 permit.

Here, Burnett's proposed operations do not meet the criteria for authorization under Nationwide Permit Number 6, because Burnett has not demonstrated that the discharge of fill material resulting from the proposed construction of a composite interlocking mat system, will not exceed the threshold of 1/10th of an acre in waters of the United States. It is unclear how many temporary mats Burnett will construct, much less the resulting acreage of such construction throughout the 110 square miles of the proposed activities. Therefore, it is imperative that the Corps require Burnett to submit an individual Section 404 permit application to provide more detailed information pertaining to the staging of equipment, the construction of a composite interlocking mat system, and the operation of heavy trucks and off-road vehicles, in wetlands.

D. There are no Section 404 permit exemptions that apply.

¹³ See E-mail correspondence from Muriel Blaisdell to Cheryl Rolph dated October 11, 2013, requesting additional information on Corps Permit Application no. SAJ-2013-02404 for Tocala, LLC seismic survey activities, attached hereto as Exhibit B.

¹⁴ See Correspondence from Passarella & Associates to the Corps dated December 20, 2013, attached hereto as Exhibit C.

¹⁵ See DEP Environmental Resource Permit number 11-0323836-002 issued to Burnett Oil Co., Inc. on July 15, 2015, which can be located at the following website: http://www.dep.state.fl.us/south/SD_Projects.htm.

We are unaware of any exemptions to Section 404 of the CWA that would apply to the seismic surveying proposed by Burnett. While Section 404 permits are not required for the discharge of dredged or fill material from numerous enumerated activities, *see* 33 U.S.C. § 1344(f), Burnett's proposed activities do not fall under any of those exemptions. Notably, Section 404 does not include an exemption for "temporary" activities associated with seismic surveying, such as the construction of staging areas and a composite mat system, and heavy machinery operation in wetlands. *See id.*

E. Conclusion

Based on the foregoing, we respectfully request that the Corps require Burnett to submit an application for an individual Section 404 permit prior to commencement of any seismic survey activities within the Preserve. The submission of an individual Section 404 permit application will remove any confusion as to the proposed activities and impacts to wetlands in the Preserve. Additionally, the issuance of an individual Section 404 permit for Burnett's activities will ensure that both Burnett and the Corps have a clear understanding of Burnett's proposed activities and its obligations under the CWA, thereby reducing the potential for a future enforcement action once the seismic surveying begins.

Thank you in advance for your consideration of our comments. Please feel free to contact us with any questions.

Sincerely,

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Attachments