

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

February 7, 2018

Tamara Whittington
Superintendent
Big Cypress National Preserve
33100 Tamiami Trail East
Ochopee, FL 34141

Via electronic mail and Federal Express Overnight Delivery

RE: Burnett Oil Company, Inc.'s 2017 Geophysical Exploration in the Big Cypress National Preserve

Dear Superintendent Whittington:

The undersigned Conservation Organizations write concerning Burnett Oil Company, Inc.'s (hereinafter, "Burnett Oil") 2017 geophysical exploration activities for the Nobles Grade 3-D Geophysical Seismic Survey in the Big Cypress National Preserve (hereinafter, "Preserve" or "Big Cypress"). The first phase of this seismic exploration has already caused significant damage to sensitive environments, including wetlands. Burnett Oil demonstrated a failure to adhere to the Minimization and Mitigation Measures required by the National Park Service's (hereinafter, "NPS") Finding of No Significant Impact (hereinafter, "FONSI")¹ and conditional approval, which serves as Burnett Oil's access permit.²

We respectfully request the NPS to prohibit any further oil exploration in the Preserve, particularly in sensitive wetland ecosystems, based on Burnett Oil's failure to comply with the Minimization and Mitigation Measures and the considerable damage that occurred during the 2017 seismic activities. In the event NPS determines that the first phase of Burnett Oil's seismic activities can proceed, we request that NPS conduct a supplemental environmental review under the National Environmental Policy Act (hereinafter, "NEPA"), to reevaluate the impacts to the Preserve and determine whether the existing Minimization and Mitigation Measures required by the FONSI and conditional approval are adequate to prevent further damage. We also ask that NPS enforce the existing Minimization and Mitigation Measures and require Burnett Oil to restore the impacts

¹ U.S. Dep't of the Interior, National Park Service, *Finding of No Significant Impact, Nobles Grade 3-D Seismic Survey Big Cypress National Preserve*, 1, 5-13 (May 2016) (hereinafter, "FONSI"), available at: <https://parkplanning.nps.gov/document.cfm?parkID=352&projectID=53498&documentID=72619> (last visited January 29, 2018).

² U.S. Dep't of the Interior, National Park Service, *Conditional Approval of Burnett Oil Company, Inc. Nobles Grade 3-D Seismic Survey Plan of Operations, Big Cypress National Preserve, Florida*, (May 2016) (hereinafter, "Conditional Approval"), available at: <https://parkplanning.nps.gov/document.cfm?parkID=352&projectID=53498&documentID=72745> (last visited February 1, 2018).

immediately. Finally, we respectfully request a meeting with Superintendent Whittington to discuss the concerns raised herein.

I. Background on the Big Cypress National Preserve and Phase I of Burnett Oil's seismic activities.

Big Cypress was established by Congress “[i]n order to assure the preservation, conservation, and protection of the natural, scenic, hydrologic, floral and faunal, and recreational values of the Big Cypress Watershed.”³ The NPS “envisions the preserve as a nationally significant ecological resource” and “a primitive area where ecological processes are restored and maintained and where cultural sites are protected from unlawful disturbance.”⁴ Big Cypress was one of the first national preserves incorporated into the National Park Service.⁵ The Preserve covers 720,567 acres of a water-dependent ecosystem in southwestern Florida, and it includes much of the western Everglades.⁶ The Big Cypress Swamp is an extension of the Everglades hydrologic system. The Big Cypress basin provides approximately 42% of the water flowing into Everglades National Park and is a vast hydrologic network—among the least altered remaining in South Florida.⁷ It is also home to several federally listed species recognized under the Endangered Species Act, including the critically endangered Florida panther.⁸ There are also thirteen state-listed or otherwise state protected species in the Preserve.⁹

The NPS is required to administer the Preserve “in a manner which will assure [its] natural and ecological integrity in perpetuity.”¹⁰ Proper administration of the Preserve includes issuing such rules “as [the Secretary of the Interior] deems necessary and appropriate to limit or control the use of Federal lands and waters with respect to . . . exploration for and extraction of oil, gas, and other minerals . . .”¹¹ Non-federal oil and gas activities in NPS units are generally governed by the rules contained in 36 C.F.R. Part 9, Subpart B (hereinafter, “9B rules”). The purpose of these rules is to ensure that operators exercising non-federal oil and gas rights within a national park unit use the technologically feasible, least damaging methods to protect federally owned or administered lands, waters, or resources of these units; protect NPS visitor uses or experiences, and protect park resources and values under the National Park Service Organic Act.¹² NPS therefore has broad

³ 16 U.S.C. § 698f(a) (2015).

⁴ U.S. Dep’t of the Interior, National Park Service, *Big Cypress National Preserve, General Management Plan and Final Environmental Impact Statement*, Volume I at iii (January 27, 1992).

⁵ 16 U.S.C. § 689(f), *et seq.*; National Park Service, *Big Cypress National Preserve Geologic Resource Evaluation Report*, Natural Resource Report NPS/NRPC/GRD/NRR—2008/021, 1, 2 (February 2008), available at: <https://irma.nps.gov/DataStore/DownloadFile/426452>.

⁶ *Id.*

⁷ *Id.* at 1.

⁸ U.S. Dep’t of the Interior, National Park Service, *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.*, 1, 11 (March, 2016) (hereinafter, “Revised EA”), available at: <https://parkplanning.nps.gov/document.cfm?parkID=352&projectID=53498&documentID=71803>.

⁹ Revised EA, Appendix B at 10.

¹⁰ 16 U.S.C. § 698i(a) (2015).

¹¹ *Id.* at § 698i(b).

¹² 36 C.F.R. § 9.30(a) (2016).

authority to preserve, conserve, and protect the natural, scenic, hydrologic, floral and faunal, and recreational values of the Preserve.

In May 2016, NPS authorized the first of four phases of Burnett Oil’s seismic survey, which will encompass more than 110 square miles (70,454 acres) within the Preserve.¹³ The seismic survey was proposed and approved to involve the off-road usage of 33-ton “vibroseis” vehicles and other off-road vehicles (ORVs) in pristine habitat, including wetlands. The size, magnitude, and survey technology¹⁴ of this seismic survey is unprecedented. After conducting a NEPA review of the first phase of Burnett Oil’s seismic exploration, NPS issued a “mitigated FONSI,” which results when an agency concludes its NEPA review with an Environmental Assessment (hereinafter, “EA”) that is based on a commitment to mitigate significant environmental impacts, so that a more detailed Environmental Impact Statement is not required.¹⁵

Here, NPS conditioned its approval on Burnett Oil’s implementation of 47 Minimization and Mitigation Measures listed in its mitigated FONSI in an attempt to avoid or lessen potentially significant environmental effects of the first phase of seismic exploration.¹⁶ However, based on a review of some of the documentation of the impacts caused by Burnett Oil’s 2017 seismic activities, including NPS correspondence, photographs, and video, it is clear that Burnett Oil is either not complying with the Minimization and Mitigation Measures, or these measures are not effective in avoiding or minimizing impacts to the Preserve, including sensitive wetland environments.

According to the White House Council of Environmental Quality (hereinafter, “CEQ”), which is charged with overseeing NEPA’s implementation by Federal agencies,¹⁷ mitigation failure occurs when a previously adopted mitigation commitment has not been implemented or is not as effective as predicted in lessening the significance of the impacts.¹⁸ Where, like here, an EA with a mitigated FONSI was predicated on the implementation of mitigation, failure of that mitigation calls into question the basis for the FONSI because impacts were not reduced to below the level of significance in the manner anticipated.¹⁹ Based on the foregoing, the undersigned Conservation Groups have questions about what NPS intends to do about the Minimization and Mitigation Measures that were either not implemented, or were not as effective as predicted, in lessening the significance of the Preserve impacts, as further articulated below.

¹³ See, generally, 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*, 1, 1 (Dec. 2014) (hereinafter, “Plan of Operations” or “POP”), available at:

<https://parkplanning.nps.gov/document.cfm?parkID=352&projectID=53498&documentID=66527>.

¹⁴ Revised EA at 8.

¹⁵ White House Council on Environmental Quality, *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 76 Fed. Reg. 3843 (Jan. 14, 2011) (hereinafter, “Mitigation Guidance”), available at:

<https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1188.pdf> (last visited January 31, 2018).

¹⁶ FONSI at 5-13.

¹⁷ Mitigation Guidance at 3843.

¹⁸ *Id.* at 3845.

¹⁹ *Id.*

II. Burnett Oil failed to implement the Minimization and Mitigation Measures intended to avoid or minimize environmental damage to the Preserve during its 2017 seismic survey activities, resulting in significant impacts.

A. Burnett Oil Failed to Minimize or Mitigate Impacts to Vegetation

The use of vibroseis vehicles and other ORVs in wetlands resulted in significant impacts to sensitive environments in the Preserve. For example, Burnett Oil failed to ensure that plant material would be left in place to facilitate natural re-vegetation, and that trimming native vegetation below the height or beyond the width of 35 inches or with a 4-inch or greater truck diameter as measured at breast height would be avoided, as required by Minimization and Mitigation Measure Nos. 17 and 20.²⁰ NPS correspondence and photographs reveal the cutting of over 30 trees with diameters at breast height greater than 4 inches.²¹ Additionally, Burnett Oil damaged trees within dense cypress stands.²² Minimization and Mitigation Measure No. 17 required Burnett Oil to treat wounded or marred trees with “a commercially available, non-toxic pruning paint or wound coating.”²³ However, damaged cypress trees were observed without pruning paint or wound coating.²⁴ Burnett Oil asserted that it was not required to always use pruning paint in the field,²⁵ but this assertion is contrary to Minimization and Mitigation Measure No. 17, which expressly requires it.²⁶

B. Burnett Oil Failed to Minimize or Mitigate the Impacts from its Vehicles

Burnett Oil initially conducted its seismic survey utilizing vibroseis vehicles that weigh over 60,000 pounds.²⁷ During the NEPA review of Burnett Oil’s Plan of Operations, NPS raised concerns about the ability of these large vehicles to negotiate the terrain in the Preserve, so Burnett Oil arranged for a demonstration in 2015, during which the vibroseis test vehicle became stuck.²⁸ Despite this failed demonstration, Burnett Oil insisted on using the over 60,000 pound vibroseis vehicles to conduct the seismic survey in wetlands, even though it had smaller vibroseis vehicles

²⁰ FONSI at 7-8.

²¹ Exhibit 3-5, 20170719 email TWhittington Re Logistics at 1-2, attached hereto and incorporated herein as Composite Exhibit 3; Exhibit 3-1, 20170430 Image AJohnson cuts larger than 4in DBH w coords (3), Exhibit 3-2, 20170430 Image AJohnson cuts larger than 4in DBH w coords (1), Exhibit 3-3, 20170430 Image AJohnson cuts larger than 4in DBH w coords (2), attached hereto and incorporated herein as Composite Exhibit 3; *see also* Map and Photographs of 2017 Seismic Survey Activities to Explore for Oil and Gas in the Big Cypress National Preserve, attached hereto and incorporated herein as Composite Exhibit 6.

²² Composite Exhibit 3, Exhibit 3-2, 20170430 Image AJohnson cuts larger than 4in DBH w coords (1), and Exhibit 3-3, 20170430 Image AJohnson cuts larger than 4in DBH w coords (2).

²³ FONSI at 7-8.

²⁴ Quest Ecology, Inc., *Technical Review of Wetlands, Wildlife, Vegetation, and Habitat Aspects of Phase I Burnett Oil Company Nobles Grade 3-D Seismic Survey, Big Cypress National Preserve* (August 2017) (hereinafter, “Quest Technical Review”) at 5, attached hereto and incorporated herein as Exhibit 4; *see also* Composite Exhibit 6.

²⁵ Letter from Neal McAliley to Daniel Reeves dated September 13, 2017 at 4, attached hereto and incorporated herein as Exhibit 8.

²⁶ FONSI at 7-8.

²⁷ Plan of Operations, Exhibit 7 (Vibroseis Equipment) at page 5 (specification sheet with heading “AHV4-PLS 362 Vibrator Buggy W/Frame Rollover Protection).

²⁸ Email from Don Hargrove, NPS, to Ron Clark, NPS, Steve Schulze, NPS, J.D. Lee, NPS, Deborah Jansen, NPS, and William Snyder, NPS, re: Opinion Burnett Oil Company Vibroseis Test Demonstration, with attachment (May 7, 2015) at 5, attached hereto and incorporated herein as Exhibit 1.

at its disposal.²⁹ Once again, the over 60,000 pound vibroseis vehicles became stuck in the Preserve.³⁰ The smaller vibroseis vehicles, also known as “Envirovibes,” are lighter vehicles that purport to have a reduced environmental impact and have been available since at least 2006.³¹ According to an email exchange between Burnett Oil and NPS staff at Big Cypress, Burnett Oil did not bring in the Envirovibes vehicles until May 2017, after the heavier vibroseis vehicles had already become stuck in the Preserve.³² Burnett Oil stated that it would use the Envirovibes vehicles to “extricate the stuck [vibroseis] buggy.”³³ Since Burnett Oil had these smaller vehicles at its disposal when it started Phase I of the seismic exploration, it is unclear why it chose to experiment with the larger vehicles in wetlands in the Preserve, despite the failed 2015 vibroseis demonstration.

Further, Burnett Oil failed to minimize impacts of its vehicles, including vibroseis trucks and other ORVs on sensitive environments, as required by Minimization and Mitigation Measure Nos. 5, 10, and 11,³⁴ and Florida law.³⁵ Most of the damage occurred off existing roads and trails, and Burnett Oil failed to minimize soil and vegetation impacts from vehicle tracks, pursuant to Minimization and Mitigation Measure Nos. 5, 10, and 11,³⁶ and Florida law.³⁷ Observations made by Preserve visitors from the Florida National Scenic Trail suggest that, when in use, the vibroseis trucks exhibit sound levels of up to 97.8 dBA, which is comparable to a jet taking off at just a 305-meter distance. This is, once again, inconsistent with the revised Environmental Assessment, which states that the expected sound levels for three vibroseis trucks would be up to 67 dBA.³⁸

Additionally, Minimization and Mitigation Measure No. 11 required the machinery to be operated slowly and attentively to minimize potential impacts and at a low speed.³⁹ Minimization and Mitigation Measure Nos. 15, 16, 30, 33, 39 and 40⁴⁰ required scouting and ground-truthing by qualified ecologists or other parties with the expertise to identify sensitive habitats and wildlife concurrently with seismic survey operations. The intent was so that in the event protected species, dens, nests, or other potentially sensitive wildlife areas were discovered, appropriate setbacks and program design modifications could be implemented.⁴¹ Florida law also requires that all geophysical activities be conducted in a manner to minimize environmental damage and

²⁹ *Id.* at 6 (attesting that Burnett Oil had access to smaller vehicles); Email string from Pamela Geffre, NPS, to Ron Clark, NPS, and Damon Doumlele, NPS, et al., forwarding email re: Burnett Oil Briefing Materials at 6 (October 8, 2015) (attesting that after the failed demonstration, Burnett Oil elected not to amend their plan of operation to replace existing buggies with smaller versions), attached hereto and incorporated herein as Composite Exhibit 2.

³⁰ Composite Exhibit 3, Exhibit 3-5, 20170519 email TWhittington re: Logistics; *see also* Composite Exhibit 9 (showing photo of stuck vibroseis vehicle being extricated by another vibroseis vehicle).

³¹ Don Lawton and Malcolm Bertram, *New seismic and other geophysical equipment at University of Calgary*, 31 RECORDER, 1, 8 (2006) (describing new equipment, including Envirovibes), available at: <http://csegrecorder.com/articles/view/new-seismic-and-other-geophysical-equipment-at-the-university-of-calgary> (last visited February 6, 2018); *see also* Composite Exhibit 6 (showing a photo of a smaller vibroseis vehicle compared to a larger 60,000 pound vibroseis vehicle).

³² Composite Exhibit 3, Exhibit 3-5, 20170519 email TWhittington re: Logistics.

³³ *Id.* at 3.

³⁴ FONSI at 6-7.

³⁵ Rule 62C-26.007(6)(b), Florida Administrative Code.

³⁶ FONSI at 6-7.

³⁷ Rule 62C-26.007(6)(b), Florida Administrative Code.

³⁸ Revised EA at 94.

³⁹ FONSI at 7.

⁴⁰ *Id.* at 7, 9-10 and 11-12.

⁴¹ *Id.* at 7, 9-10.

disturbance to wildlife, especially threatened or endangered species and their habitats.⁴² However, according to correspondence between NPS staff at the Preserve, long days, high heat and the speed of the vibroseis trucks prevented ecologists from keeping up with the vibroseis trucks to ensure that protected species habitats were not being disturbed.⁴³

Further, the vibroseis vehicles caused significant soil rutting off existing roads and trails in wetlands.⁴⁴ Vibroseis vehicle tracks were observed in soft soils and in standing water,⁴⁵ in violation of Minimization and Mitigation Measure No. 7, which prohibited survey activities in soft soils and standing water areas to reduce the risk for rutting and subsequent channelization.⁴⁶ The soil ruts created by the vibroseis trucks and other vehicles are approximately 17 inches deep in parts of the Preserve.⁴⁷ Pursuant to Specific Condition 9 of Burnett Oil's Environmental Resource Permit issued by the Florida Department of Environmental Protection (hereinafter, "ERP"), soil rutting is defined as impressions greater than 3 inches deep.⁴⁸

Burnett Oil has indicated that it will switch to using the "Envirovibe" vehicles to complete Phase I of the seismic survey.⁴⁹ NPS should evaluate whether the pressure exerted by the treaded tires of the Envirovibe vehicles will nonetheless cause similar damage to Preserve resources as the larger vibroseis vehicles. The Envirovibes will exert around 15,000 pounds of max theoretical peak force on the ground,⁵⁰ and appear to use treaded tires,⁵¹ as opposed to the smooth treaded balloon tires required by NPS in Minimization and Mitigation Measure No. 8, to reduce short-term impacts to soils, ground pressure, and rutting depth.⁵² In light of the soil rutting observed after Burnett's 2017 seismic activities, NPS should reconsider whether the Envirovibe vehicles are, in fact, less damaging than the heavier vibroseis, based on the soils present, the distribution of weight of the Envirovibes vehicles, and the friction and soil rutting associated with the use of treaded tires. If the Envirovibes vehicles caused soil impacts during the 2017 seismic activities, or are likely to cause similar damage as the larger vibroseis vehicles, NPS should reconsider other less-damaging alternatives to these vehicles. During the NEPA scoping process, the undersigned Conservation Groups, as well as NPS staff, made suggestions on surveying alternatives that could potentially minimize surface impacts. For example, based on the failed 2015 vibroseis field test, NPS staff suggested alternatives of providing reasonable access to the seismic survey area with handheld equipment instead of vibroseis trucks, or conditionally approving partial access limited to areas where vibroseis vehicles may be able to drive with less damage to the Preserve. Additionally,

⁴² Rule 62C-26.007(6)(a), Florida Administrative Code.

⁴³ Composite Exhibit 3, Exhibit 3-5, 20170519 email TWhittington re: Logistics at 1.

⁴⁴ See Exhibit 4, Quest Technical Review at 2; Composite Exhibits 6 and 9.

⁴⁵ See Exhibit 4, Quest Technical Review at 1-2; see also Photographs of the Phase I seismic survey area dated May 24, 2017, attached hereto and incorporated herein as Composite Exhibit 5.

⁴⁶ FONSI at 6.

⁴⁷ See Exhibit 4, Quest Technical Review at 2; see also Composite Exhibits 6 and 9.

⁴⁸ Notice of Intent to Issue Environmental Resource Permit: Nobles Grade 3D Geophysical Seismic Survey, Florida Department of Environmental Protection, File No.: 11-0323836-002, dated June 15, 2015 (hereinafter "ERP").

⁴⁹ Burnett Oil Company, Inc., *Nobles Grade 3D Seismic Survey, Florida Department of Environmental Protection Application for Permit to Perform Geophysical Exploration, Non-Confidential Copy*, 1, 1 (.pdf 11-12) (July 26, 2017), available at: <https://floridadep.gov/water/oil-gas/content/current-applications> (last visited February 7, 2018).

⁵⁰ *Id.* at Exhibit 17 (.pdf 212-219).

⁵¹ Composite Exhibits 6 and 9 (showing photos of vibroseis vehicles with treaded tires).

⁵² FONSI at 6.

wilderness areas and Important Resource Areas⁵³ could be eliminated from the survey area, or aerial survey methods could be utilized, to reduce or eliminate surface impacts altogether. Has NPS taken another look at these options, or any other options, to avoid or minimize the environmental damage documented during Burnett Oil’s 2017 seismic survey activities?

C. Burnett Oil Failed to Reduce Environmental Impacts by Staging Vehicles and Equipment inside of the Preserve

The FONSI states that the use of a staging area outside of the Preserve known as the Vulcan Mine site would replace the five staging areas originally planned in wetlands within the Preserve, and that personnel and equipment would be transported by vans and pickup trucks to and from Preserve access points on I-75 at mile markers 63 and 70.⁵⁴ The stated intent of this change was to “...significantly reduce environmental impacts, personnel, and vehicular traffic, as well as eliminate the use of tractor trailers in the Preserve.”⁵⁵ Further, Florida law provides that wetlands shall not be used for staging areas.⁵⁶ Burnett Oil’s existing ERP specifies the steps that Burnett Oil must take in order to stage equipment in wetlands, providing that Burnett Oil must “install a system of at-grade composite mats to avoid any permanent impacts and to protect the soils from significant disturbance or compression for the access routes and staging areas located in wetlands.”⁵⁷ Despite these limitations, Burnett Oil staged vehicles, portable toilets, fuel, and other equipment in wetlands in the Preserve during its 2017 seismic activities, in violation of NPS’s conditional approval, and without the use of composite mats,⁵⁸ required by its ERP.⁵⁹

Burnett Oil stated in its application for a Permit to Perform Geophysical Exploration submitted to the Florida Department of Environmental Protection last year that these staging areas are not staging areas, but, rather, “deployment areas or zones,”⁶⁰ that “were different than the staging areas referenced in the Department’s permit and do not require use of geo-mats.”⁶¹ These so-called “deployment areas” were located in wetlands despite the NPS requirement that all equipment staging areas were to be moved out of wetlands in the Preserve to the Vulcan Mine.⁶² Staging of equipment in “deployment areas” is a change in name only and has the same effects in terms of wetland impacts in violation of NPS’s conditional approval, Florida law, and Burnett Oil’s ERP. Therefore, will NPS allow “deployment areas” or “deployment zones” to be constructed and operated in wetlands inside of the Preserve? If so, where, and how many? Will Burnett Oil be required to utilize at-grade composite mats in “deployment areas” or “deployment zones” installed

⁵³ Revised EA at 9 (Important Resource Areas include cypress strands, mixed-hardwood swamps, sloughs and cypress domes, marshes, hardwood hammocks, old-growth pinelands, and mangrove forests).

⁵⁴ FONSI at 3.

⁵⁵ *Id.*

⁵⁶ Rule 62C-26.007(6)(b)2., Florida Administrative Code.

⁵⁷ Notice of Intent to Issue Environmental Resource Permit: Nobles Grade 3D Geophysical Seismic Survey, Florida Department of Environmental Protection, File No.: 11-0323836-002, dated June 15, 2015 (hereinafter “ERP”).

⁵⁸ See Composite Exhibit 9; Exhibit 4, Quest Technical Review at 12.

⁵⁹ ERP at 5.

⁶⁰ Burnett Oil Company, Inc., *Nobles Grade 3D Seismic Survey, Florida Department of Environmental Protection Application for Permit to Perform Geophysical Exploration, Non-Confidential Copy*, 1, 8 (July 26, 2017).

⁶¹ Letter from Neal McAliley to Daniel Reeves dated September 13, 2017 at 5, attached hereto and incorporated herein as Exhibit 8.

⁶² Revised EA at 20.

in wetlands, as required by its ERP, to protect soils from significant disturbance or compression, or from leaking vehicle fluids into the ground and surrounding wetlands?

D. Burnett Oil Failed to Limit its Seismic Activities to “Dry Season Conditions”

Minimization and Mitigation Measure No. 1 required Burnett Oil’s seismic activities to be conducted during “dry season conditions,” which NPS stated are “typically November through mid-May.”⁶³ However, NPS did not include any contingencies to describe what should happen if dry season conditions were not “typical” during the performance of seismic activities, which is exactly what occurred in 2017.⁶⁴ Burnett Oil failed to cease operations with sufficient time to remove all its survey equipment before wet season conditions began in 2017. It instead continued to perform the seismic survey, and failed to remove equipment from the survey area until after wet season conditions had already begun,⁶⁵ resulting in damage to sensitive environments in the Preserve, including leaking hydraulic or other fluid from a vibroseis vehicle into standing water.⁶⁶

Further, Burnett Oil had no exit strategy in place in the event wet season conditions were to begin during its seismic survey. For example, when the 2017 seismic survey was terminated due to heavy rains and high-water levels, Burnett Oil had no plan in place for retrieving their equipment from the Preserve, including the vibroseis vehicles. An internal email exchange within NPS revealed that the helicopter pilots that Burnett Oil or its contractor hired to bring in and remove survey equipment from the Preserve were unable to land in the rain and failed to “retrieve 1000s of ground sensors,” which were apparently left behind.⁶⁷ Burnett Oil was forced to wait until the waters receded, at which point a Helicopter Operations Manager with Burnett Oil’s contractor, Dawson Geophysical, estimated that it would take “10-14 days to clean” up all the equipment.⁶⁸ Two days following this email exchange, helicopters were observed carrying equipment out of the Preserve.⁶⁹ Additionally, portable toilets containing potential contaminants were left behind in the unauthorized staging areas in wetlands in the Preserve when the Preserve flooded, along with trash and other debris.⁷⁰

Burnett Oil acknowledged that it “began the process to remove its equipment” only after the Preserve was already flooded by water that was “several feet deep.”⁷¹ Burnett Oil failed to indicate whether its ground sensors and other equipment have all been removed from the Preserve, to date. Burnett Oil also stated, without providing any supporting information, that “removal of equipment does not constitute conducting the survey.”⁷² This suggests that Burnett Oil could leave its equipment in the Preserve as long as it wants without any requirement or deadline to remove it,

⁶³ FONSI at 5-6.

⁶⁴ Exhibit 8, Letter from Neal McAliley to Daniel Reeves dated September 13, 2017 at 4-5.

⁶⁵ Composite Exhibit 3, Exhibit 3-8, 20170608 email MOLeary Fleet aircraft supporting Non-gov work in BICY at 1; Exhibit 4, Quest Technical Review at 1, 8-9; Composite Exhibits 6 and 9.

⁶⁶ See Exhibit 4, Quest Technical Review; Composite Exhibit 6 (photo of leaks from vibroseis trucks in standing water); Composite Exhibit 9.

⁶⁷ Composite Exhibit 3, Exhibit 3-8, 20170608 email MOLeary Fleet aircraft supporting Non-gov work in BICY.

⁶⁸ Composite Exhibit 3, Exhibit 3-9, 20170611 email SSchulz Dawson Heli ops in BICY Update 2.

⁶⁹ Exhibit 4, Quest Technical Review at 1; Composite Exhibit 3, Exhibit 3-5, 20170519 email TWhittington Re Logistics.

⁷⁰ Exhibit 4, Quest Technical Review at 12; Composite Exhibit 9.

⁷¹ Exhibit 8, Letter from Neal McAliley to Daniel Reeves dated September 13, 2017 at 4-5.

⁷² *Id.* at 5.

which would completely negate the purpose of obtaining an access permit from the NPS or state permits with express deadlines for completion of Phase I of the seismic survey. Has Burnett Oil removed all of its equipment from the Preserve? In the event NPS allows Burnett Oil to complete Phase I of the seismic survey this year, will there be a contingency plan in place to guide equipment removal in the event wet season conditions begin while seismic activities are taking place?

E. Burnett Oil Failed to Restore the Damage It Caused to Vegetation and Soils

To date, restoration of the areas impacted by Burnett Oil's 2017 seismic activities remains incomplete. Minimization and Mitigation Measure No. 18 required ruts, depressions, and vehicle tracks resulting from field operations to be restored to original contour conditions concurrent with daily operations using shovels and rakes to prevent the creation of new trails.⁷³ Further, Minimization and Mitigation Measure No. 22 required soils to be decompacted and returned to match the original grade, and reclamation of impacts was supposed to begin immediately as the survey continued.⁷⁴ Florida law also requires that "all ruts shall be repaired."⁷⁵ Soil impacts were observed, including rutting and compaction, but remain unrepairs.⁷⁶

Burnett Oil asserts that it did not have to restore soil rutting or otherwise reclaim the areas impacted by its 2017 seismic activities because it was told not to do so by undisclosed NPS staff.⁷⁷ An agency must prepare a supplemental assessment if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns."⁷⁸ If NPS subsequently modified any of the Minimization and Mitigation Measures outside of the NEPA review process, a supplemental NEPA review should be undertaken to evaluate the impacts to the Preserve without full implementation of the Minimization and Mitigation Measures, and to inform the public and solicit public input.⁷⁹ Also, when exactly will NPS require Burnett Oil to restore the documented environmental damage caused by its 2017 seismic survey activities? In the event the Phase I seismic survey activities are permitted to continue this year, will NPS require Burnett Oil to restore the environmental damage caused last year before the continuation of Phase I seismic activities?

⁷³ FONSI at 8.

⁷⁴ *Id.*

⁷⁵ Rule 62C-26.007(e)(i), Florida Administrative Code.

⁷⁶ See Exhibit 4, Quest Technical Review; Composite Exhibits 6 and 9; Exhibit 8, Letter from Neal McAliley to Daniel Reeves dated September 13, 2017 at 5; see also Exhibit A to the Settlement Agreement between the State of Florida Department of Environmental Protection, Burnett Oil Company Inc., Conservancy of Southwest Florida, and Natural Resources Defense Council dated December 14, 2017, attached hereto and incorporated herein as Composite Exhibit 7.

⁷⁷ Exhibit 8, Letter from Neal McAliley to Daniel Reeves dated September 13, 2017 at 5.

⁷⁸ *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 705 (10th Cir. 2009) (citing 40 C.F.R. § 1502.9(c)(1)(i)); see also 40 C.F.R. § 1502.9(c)(1)(h) (NEPA requires a supplemental analysis if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts").

⁷⁹ Cf. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) (finding a withdrawn guidance document changed operating conditions and rendered EIS deficient, finding "[w]ithout supplemental analysis of impacts absent the TMP [Forest's Travel Management Plan], previously stressed in parts of the agency's assessment, the public would be at risk of proceeding on mistaken assumptions."); *New Mexico v. Bureau of Land Mgmt.*, 565 F. 3d at 707-08 (requiring BLM to supplement its EIS, finding "NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur. Such a state of affairs would be anathema to NEPA's "twin aims" of informed agency decisionmaking and public access to information.").

Further, Minimization and Mitigation Measure No. 45 requires Burnett Oil to compensate for any temporal loss of wetland function resulting from vehicle use documented by the NPS by conducting an equivalent area of wetland restoration elsewhere in the Preserve, as identified by NPS, to offset the specific functional loss identified by NPS.⁸⁰ Burnett Oil is required to restore an area providing wetland functional benefit equivalent to the wetland functional loss documented by the NPS from the project.⁸¹ The evidence, including correspondence, video, photographs, obtained from NPS, clearly demonstrates that there has been a temporal loss of wetland function resulting from vehicle use because the soil rutting, compaction, and vegetation damage remains unrestored.⁸² Has NPS identified the amount of functional wetland loss that occurred as a result of Burnett Oil’s 2017 seismic survey activities? Will NPS require Burnett Oil to restore an area providing wetland functional benefit equivalent to this wetland functional loss, to compensate for the time lag associated with mitigation – the period of time between when the functions are lost at an impact site and when the site has achieved the desired outcome – and the risk associated with mitigation, as required by Florida law?⁸³

F. It is Unclear Whether all the Seismic Activities were Authorized

Finally, it is unclear whether Burnett Oil confined its 2017 seismic survey activities to the NPS-approved Phase I boundary, as shown in the Revised EA.⁸⁴ A map was created using the information contained in the geo-tagged photographs obtained from NPS in response to a FOIA request submitted by the Natural Resources Defense Council. It appears from a review of the NPS photographs that there were photographs of seismic activities taken outside of the NPS-approved Phase I seismic survey boundary.⁸⁵ Was this the case? And, if so, was this work approved? If not, what will NPS do to ensure that Burnett Oil confines its seismic activities within the approved Phase I boundary? It also appears that fill material was stockpiled and spread in wetlands along access roads in the Preserve.⁸⁶ Was this filling performed to facilitate Burnett Oil’s seismic survey? If so, was it authorized?

III. Recommendations

Based on the foregoing, it appears that the Minimization and Mitigation Measures were not fully implemented during Burnett Oil’s 2017 seismic activities. If NPS subsequently modified any of the Minimization and Mitigation Measures outside of the NEPA review process, as suggested by counsel for Burnett Oil, NPS should consider conducting a supplemental NEPA review of Burnett Oil’s seismic activities to evaluate the impacts to the Preserve without full implementation of the Minimization and Mitigation Measures. This information should also be disclosed to the public and made available for public comment.

Further, Burnett Oil failed to comply with its federal and state permits, including the Minimization and Mitigation Measures, blaming its non-compliance on everything from the weather to directions allegedly given to its contractors in the field from unidentified NPS staff. National Park Service

⁸⁰ FONSI at 13.

⁸¹ *Id.*

⁸² See Exhibit 4, Quest Technical Review; Composite Exhibits 3, 5, 6, and 9.

⁸³ Rule 62-345.600, Florida Administrative Code.

⁸⁴ Revised EA at 4.

⁸⁵ See Composite Exhibit 6.

⁸⁶ Exhibit 4, Quest Technical Review at 12, Appendices A and B.

Regulations prohibit permittees from “(a) Operating in violation of the terms or conditions of . . . an approved operations permit” and “(b) Damaging federally owned or administered lands, waters, or resources of a System unit as a result of violation of the terms or conditions of . . . an operations permit.”⁸⁷ NPS may suspend operations or revoke a permit in response to such violations, or levy fines or other penalties.⁸⁸ Based on the foregoing evidence, Burnett Oil repeatedly violated the terms of its NPS permit, and we respectfully request that NPS prohibit Burnett Oil from continuing damaging seismic survey activities in the Preserve, particularly in sensitive wetland environments. This is based on Burnett Oil’s demonstrated failure to comply with NPS’s Minimization and Mitigation Measures, and its failure to restore the environmental damage caused during its 2017 seismic survey operations, as required by its federal and state permits.

We respectfully request that NPS enforce its conditional approval and permit and require Burnett Oil to restore the impacts it caused during the 2017 seismic activities, prior to conducting any further seismic activities. At a minimum, Burnett Oil should implement a detailed restoration plan with specified deadlines for initiation and completion, including soil decompaction and re-grading, planting according to defined specifications, treating of wounded trees, and implementation of a long-term maintenance and monitoring plan to ensure the success of the restoration. In the event NPS allows Burnett Oil’s Phase I seismic activities to continue, it must require Burnett Oil to fully implement all Minimization and Mitigation Measures. In the event NPS agrees to modify any of these measures, such as allowing Burnett Oil to use treaded tires on vibroseis vehicles, or stage or deploy equipment in wetlands, it should consider supplementing its NEPA review to analyze and disclose the impacts of the seismic survey without full implementation of the Mitigation and Minimization Measures, and make this supplemental review available for public comment.

Finally, we respectfully request a meeting with Superintendent Whittington to discuss the concerns described herein. Please feel free to contact Alison Kelly at Natural Resources Defense Council at (202) 717-8297 or akelly@nrdc.org, to schedule a meeting at your earliest convenience. Thank you in advance for your attention to this matter.

Sincerely,

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⁸⁷ 36 C.F.R. § 9.180.

⁸⁸ *Id.* § 9.181.

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U.S. Senator Bill Nelson
U.S. Representative Francis Rooney

Enclosures