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Parks Conservation Association • The Humane Society of the United States • Public  
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June 14, 2007

VIA FAX AND CERTIFIED MAIL

Ms. Karen Gustin  
Superintendent, Big Cypress National Preserve  
33100 Tamiami Trail  
East Ochopee, FL 34141

Mr. Dale Hall  
Director, U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

Mary Bomar  
Director, National Park Service  
1849 C Street, NW  
Washington, DC 20240

Dirk Kempthorne  
Secretary, U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

**RE: Notice of Legal Violations in Recent Action to Allow More Off-Road  
Vehicle Use in Big Cypress National Preserve's Bear Island Unit**

Dear Superintendent Gustin, Director Hall, Director Bomar, and Secretary Kempthorne:

On February 21, 2007, the National Park Service ("Park Service") announced that nearly twenty miles of additional primary and secondary trails would be opened to off-road vehicle ("ORV") use in Big Cypress National Preserve's ("BCNP" or "Big Cypress") Bear Island Unit, effective February 28, 2007. ORV traffic in these newly opened areas will adversely impact highly sensitive habitats in eastern and southern Bear Island and the endangered Florida panther that hunts and dens within the Unit. Pursuant to the sixty-day notice requirement of the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), on behalf of Defenders of Wildlife, Sierra Club, Wildlands CPR, The Wilderness Society, National Parks Conservation Association, The Humane Society of the United States, Public Employees for Environmental Responsibility and the Florida Biodiversity Project, we are notifying you that your actions violate the Endangered Species Act ("ESA"), 16 U.S.C.A. §§ 1531-1544, the Clean Water Act, 33 U.S.C. §§ 1251-1387, the terms of the Preserve's ORV Management

Plan and Supplemental Environmental Impact Statement, the National Park Service Organic Act, 16 U.S.C.A. § 1 *et seq.*, and Executive Orders 11,644 and 11,898.

## **I. Background**

The Florida panther population represents the last known members of a subspecies that once roamed much of the southeastern United States. The population is now isolated to southernmost Florida and is estimated at a number fewer than 100 adults and sub-adults. S.L. Pimm et al., *The Genetic Rescue*, 9 ANIMAL CONSERVATION 115 (May 2006). As a result of land development and road-building in the panther's current range, an area smaller than 5% of its historic range, the U.S. Fish and Wildlife Service ("FWS") has "identifie[d] the panther as a subspecies with a high degree of threat of extinction." FWS, TECHNICAL/AGENCY DRAFT FLORIDA PANTHER RECOVERY PLAN 6 (3rd rev. Jan. 2006). The loss and fragmentation of suitable panther habitat is one of the "most significant threats to the continued survival of the panther throughout its range." *Id.* at 31.

Big Cypress National Preserve is located in the center of the largest contiguous tract of panther habitat in its range, connecting the freshwater prairies of the Everglades National Park to the south and the federally protected cypress country and Florida Panther National Wildlife Refuge to the west. Of the estimated 2.2 million acres of viable habitat for the panther in southern Florida, over 25% lies within the boundaries of Big Cypress National Preserve.<sup>1</sup> Panthers traverse the Preserve's diverse terrain in search of prey and to den. In fact, BCNP is considered the species' "primary zone," land that, if preserved, will contribute most to the long-term persistence of the species in the wild. Randy Kautz et al., *How Much is Enough? Landscape-scale Conservation for the Florida Panther*, 130 BIOLOGICAL CONSERVATION 118-133 (February 2006). Sixty-three percent of habitat considered "essential" to maintaining a minimum viable population of panthers in south Florida is located within the preserve. NATIONAL PARK SERVICE, ORV MANAGEMENT PLAN/SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ("ORVMP") 117 (2000). Data from radio-collar tracking shows that approximately thirty panthers, one-third of the total population, use portions of the BCNP. FWS, BIOLOGICAL OPINION ON IMPACTS OF ORV MANAGEMENT PLAN TO ENDANGERED SPECIES IN BIG CYPRESS NATIONAL PRESERVE ("BO") 28 (July 14, 2000).

The Bear Island Unit of BCNP, located in the northwest corner of the preserve, has been identified as having an especially high concentration of Florida panthers. Its topography – ranging from hardwood hammocks and pine flatwoods to cypress swamps and border habitats like prairies and marshes – is essential habitat for the panther. As identified by the FWS, "Bear Island Unit is of great importance to panthers. It has the highest proportion of preferred panther habitat within the original BCNP boundaries. Its location north of 1-75 provides additional prey resources and upland plant communities not available in the southern portion of BICY." BO at 29.

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<sup>1</sup> This figure excludes the preserve's Addition Lands, an expanse of land in the northeast corner of BCNP acquired in 1988. The Addition Lands, currently off-limits to ORV activity and for which a management plan is currently being drafted, contains the highest concentration of panthers in the Preserve.

Furthermore, and especially given the explosive rate of development in private lands north of the preserve, BCNP is an increasingly critical refuge for the species as contiguous panther habitat continues to shrink. “As the remaining forested uplands are lost, sloughs containing cypress, marsh and shrub wetlands comprise a greater percentage of the remaining habitat available to panthers, relative to the habitat historically available to the species.” BO at 8. FWS has noted that the conservation of remaining panther habitat is crucial, so much so that “[c]ontinued deterioration, fragmentation, loss of habitat and further reductions in the current extent of the occupied range will likely reduce the south Florida population below the level necessary for demographic and genetic health.” BO at 15.

The adverse impacts of ORV activity on BCNP wildlife and habitat and the Preserve’s inadequate management of such activity were first addressed in 1995 when a local environmental group challenged the NPS and FWS for failure to protect the fragile ecosystems of Big Cypress from excessive ORV traffic. As a result of a settlement reached the following year, the Park Service agreed to protect sensitive areas of the preserve and to prepare a comprehensive ORVMP. The objective of the ORVMP is to establish management “with the goal of assuring the natural and ecological integrity of BCNP resources.” ORVMP (HTML) at 34. To meet this goal, the ORVMP addresses the impacts of ORV use on the preserve and its wildlife, and provides restrictive guidelines for such use. The Final ORVMP and Supplemental Environmental Impact Statement (“SEIS”), published in 2000, mandated reducing approximately 23,300 miles of dispersed ORV use to 400 miles of designated trails.

In the Bear Island Unit, the ORVMP proposed action included the reduction of fifty-five miles of trails to approximately thirty miles with the purpose of minimizing impacts to panthers and sensitive substrates. Immediately following the Record of Decision, thirty miles of trails in Bear Island Unit were closed; prairie and marsh trails in the eastern and southern portions of the Unit were restricted as mandated by the final Record of Decision. These closures were based on best available science, suitability evaluations of the terrain, and concerns about disturbances to Florida panthers in the Unit. The ORVMP stated that the “[Bear Island] Unit contains a relatively high density of Florida panthers. Therefore, ORV use restrictions were initiated...to reduce potential disturbance to panthers, control hunting pressure on panther prey, and protect important resources areas.” ORVMP (HTML) at 89.

The impacts of ORV use on the panther and the sensitive habitats within BCNP are not debatable. In 1991, the Park Service remarked that “the decline of the Florida panther has been attributed to the loss of habitat quality due to increased hunting [and] ORV use.” NATIONAL PARK SERVICE, BIG CYPRESS GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT (“GMP”) 231 (1991). More up-to-date scientific studies have further established the detrimental effects of ORV activity on the panther, including adverse behavioral changes and a “lowering of the quality” of panther habitat. MICHAEL W. JANIS & J.D. CLARK, THE EFFECTS OF RECREATIONAL DEER AND HOG HUNTING ON THE BEHAVIOR OF FLORIDA PANTHERS 63 (May 1999). The Park Service has noted that “panthers tend to leave the Bear Island Unit in the preserve during hunting season” and that panthers in the adjoining Addition Lands and private lands north

of I-75 where there is significantly less ORV use are “more abundant, heavier, and healthier than their counterparts south of I-75 in the preserve.” GMP at 231; 179. FWS has stated that it considers “hunting and ORV use as the principal activities that may affect the panther” and there is evidence that Florida panthers have “altered their home ranges in response to activities associated with past hunting seasons” in Big Cypress. FWS BO for GMP at 4, 5. FWS has also concluded that there is evidence that ORVs and hunting result in a decrease of the panther’s prey base. FISH AND WILDLIFE SERVICE, SOUTH FLORIDA MULTI-SPECIES RECOVERY PLAN 3-123 (1999).

Off-road vehicles pose a significant threat to the quality and character of Big Cypress wetlands and wetland border habitats, which in turn diminishes the quality of wildlife habitat. *See* U.S. GEOLOGICAL SERVICES, EFFECTS OF PUBLIC LAND USE ON INDICATOR SPECIES’ POPULATIONS AND HABITATS IN BIG CYPRESS NATIONAL PRESERVE 2 (2001) (“ORV use in Big Cypress National Preserve has impacted wildlife populations and habitats through modifications to water flow patterns and water quality, soil displacement and compaction, direct vegetation damage, disturbance to foraging individuals, and ultimately, overall suitability of habitats for wildlife.”). Degradation to soil and vegetation as a result of ORV traffic diminishes and transforms landscapes, especially in low elevation wetland terrains such as prairies and marshes. Prairies and marshes have been identified as “the vegetation community in the preserve most impacted by ORV use.” The suitability of six types of preserve terrain for ORV traffic is categorized in the ORVMP: of the six substrates, prairies and marshes were the only terrain ranked as having “low” substrate suitability. *See* ORVMP (HTML) at 47, Table 1: Substrate Suitability and Resource Sensitivity.

## **II. Legal Violations**

### **A. The Park Service and the FWS Are In Violation of the ESA.**

Opening nearly twenty miles of additional primary and secondary trails in southern and eastern Bear Island will unquestionably adversely affect the highly endangered Florida panther. The Park Service and FWS have failed to complete formal consultation under section 7(a)(2) of the ESA in making this decision. The Park Service and FWS are in violation of Sections 7(a)(1) and 4(f) for failing, respectively, to implement the ORVMP and Florida Panther Recovery Plan. Moreover, the Park Service’s failure to meet the terms of the BO and Incidental Take Statement for the ORVMP, and its action to increase trails in the Bear Island Unit, both cause the take of endangered panthers in violation of section 9 of the ESA.

#### **1. Violations of Section 7(a)(2)**

The best scientific and commercial data available establish that ORV use in Bear Island adversely affects the Florida panther. As discussed above, Big Cypress and the Bear Island Unit in particular are exceedingly important to the panther’s survival and recovery. It is also beyond any reasonable dispute that ORV use diminishes the quality of panther habitat and causes negative behavioral changes in panthers. *See* GMP at 231, USGS at 2. Accordingly, the Park Service and FWS have failed to formally consult on

the impacts to the panther when making the decision to open more terrain to ORV use, and failed to ensure that this decision and resulting impacts are not likely to jeopardize the species' continued existence, which violates section 7(a)(2) of the ESA and FWS implementing regulations. 16 U.S.C. §1536(a)(2); 50 C.F.R. § 402.14(a) (requiring formal consultation whenever an action "may affect listed species or critical habitat").

NPS and FWS unlawfully relied on the July 14, 2000 FWS final BO for the ORVMP to avoid formal consultation on the Park Service's most recent decision. This reliance is unreasonable because the Park Service's decision to reopen ORV trails in the Bear Island Unit is plainly inconsistent with the best available science and the BO and Incidental Take Statement ("ITS") and will further jeopardize the panther's continued existence.

The BO and ITS specifically establish reasonable and prudent measures to minimize the impact of incidental take on the panther. The ITS provides that the "NPS will reduce the extent of trails in BICY" and that "[a]ppropriate levels of use compatible with the Florida panther need to be determined for all areas of BICY." ITS at 38. The ITS also establishes several terms and conditions including not only that the "NPS will *reduce* the extent of trails in Bear Island" but that NPS will "study the level of ORV use in Bear Island to determine the level that is acceptable and compatible with panther use of this management unit," "continue panther monitoring and initiate a study similar to the Janis and Clark study concurrent with the ORV carrying capacity and level of use study," and "provide the Service with copies of studies performed on panther use and related ORV investigations." *Id.* These are non-discretionary terms which NPS has illegally failed to satisfy.

In fact, in direct contravention of these legal obligations, the Park Service has approved ORV access to upwards of 45 miles of new primary and secondary trails in Bear Island. This significant increase in the extent of trails is the exact opposite of what was contemplated and addressed in the BO and, as a result, ORV traffic on primary and secondary trails combined now approaches pre-settlement agreement levels. Accordingly, by opening ORV use in areas where Florida panthers will be adversely affected, which directly contravenes the BO, the ITS and the best available science, the Park Service is jeopardizing the panther's continued existence.

Further, the NPS has violated its legal duty to reinitiate consultation with the FWS regarding its decision to open trails in Bear Island. FWS regulations require reinitiation of consultation whenever "the amount or extent of taking specified in the incidental take statement is exceeded," "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent that was not previously considered," or "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. The Park Service's decision to open new trails in Bear Island will increase take of panthers through harassment beyond the level authorized in the Incidental Take Statement, will impact this species in a manner that was not previously addressed in the BO, and represents a modification to the NPS's management of ORV use in Big Cypress and Bear Island specifically in a manner that was also not

previously addressed in the BO. Accordingly, the NPS has failed to reinstitute consultation in violation of Section 7(a)(2) and 50 C.F.R. § 402.16.

## 2. Violations of Section 7(a)(1) and 4(f)

Section 7(a)(1) of the ESA directs Federal agencies to “utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed.” 16 U.S.C. § 1536(a)(1). NPS’s actions – including the increase of trail mileage in Bear Island, the re-opening of trails in sensitive areas of the Unit, and the failure to conduct ORV compatibility studies – violate several key terms of the ORVMP proposed action. The proposed action explicitly emphasizes resource protection, the preservation of ecological integrity, the benefits of such preservation to endangered species, the precautionary principal and studies of impacts on panthers and coordination with the Service. In violating the ORVMP, NPS’s actions are in direct contravention of the agency’s affirmative duty to carry out programs to conserve the species under section 7(a)(1).

In addition, section 4(f) of the ESA instructs the Secretary of the Interior to implement recovery plans for the survival and conservation of federally listed species. FWS’s Florida Panther Recovery Plan states that “the recovery strategy for the Florida panther is to maintain, restore and expand the panther population and its habitat in south Florida.” Specifically, the plan identifies the need to concentrate conservation efforts on “maintaining the total available area, quality and spatial extent of habitat within the Primary Zone.” FWS, TECHNICAL/AGENCY DRAFT FLORIDA PANTHER RECOVERY PLAN 6 (3rd rev. Jan. 2006) at 112. The Bear Island Unit exists entirely in Florida panther Primary Zone. The expansion of ORV trails and access within Bear Island Unit will undoubtedly degrade the quality of Primary Zone panther habitat, in direct conflict with Florida panther recovery goals and FWS’s duty under ESA Section 4(f) to conserve the species through the implementation of the recovery plan.

## 3. Violations of Section 9

Section 9 of the ESA prohibits the taking of any endangered or threatened species. 16 U.S.C. § 1538; 50 C.F.R. § 17.31. The term “take” means “to *harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.*” 16 U.S.C. § 1532(19) (emphasis added). The term “harm” is further defined to encompass habitat modification. 50 C.F.R. § 17.3. If it is determined that a federal agency action will likely incidentally take any listed species, FWS must issue, within a biological opinion, an incidental take statement (“ITS”) along with mandatory reasonable and prudent measures to minimize the impact of any such taking on the species and terms and conditions to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4).

As discussed above and as the best scientific evidence establishes, ORV activity takes and otherwise adversely impacts the Florida panther through harassment and by adversely destroying and modifying its habitat. This take is authorized only to the extent it will not jeopardize the panther’s survival and recovery and if the measures, terms and

conditions of the BO and ITS are met. NPS has failed to meet the majority of the non-discretionary terms and conditions set forth in the ITS. (*See* BO at 38. “NPS will reduce the extent of trails in Bear Island;” “study the level of ORV use in Bear Island to determine the level that is acceptable and compatible with panther use of this management unit;” “continue panther monitoring and initiate a study similar to the Janis and Clark study concurrent with the ORV carrying capacity and level of use study;” and “provide the Service with copies of studies performed on panther use and related ORV investigations.”). NPS has also failed to implement the precautionary principle anticipated by the BO and ITS. *See* BO at 3. Accordingly, NPS’s failure to comply with the ITS while authorizing ORV activity on pre-existing trails alone – that is, trails open prior to the mileage increase announced in late February – constitutes unauthorized take and violates section 9 of the ESA.

The Park Service’s decision to *increase* the number of panther incompatible ORV trails in Bear Island further violates the nondiscretionary reasonable and prudent measures and terms and conditions established under the BO’s ITS and will therefore result in additional unauthorized take of the Florida panther in violation of section 9 of the ESA. The NPS’s authorization of ORV activity and new ORV trails in Bear Island is flatly illegal under section 9 in the absence of a lawful ITS from the FWS authorizing such action.

### **B. The Park Service Is Violating the Terms of Its ORV Management Plan Supplemental EIS and Settlement Agreement By Opening Trails In the Bear Island Unit of Big Cypress National Preserve**

In authorizing the re-opening of nearly twenty miles of primary and secondary trails in Bear Island Unit, the Park Service is blatantly violating the terms of its ORV Management Plan, SEIS and Record of Decision. As mandated by the 1995 settlement agreement, the ORVMP provides “methods for limiting and controlling ORV use to minimize impacts to resources in the preserve...methods of avoiding adverse impacts to wetlands and sensitive resources from ORVs...and procedures and considerations for closing, opening and reopening areas to ORV use.” ORVMP (HTML) at 35. These methods include the reduction of trails in Bear Island from 55 miles of trails to approximately 30 miles and the closure of all trails in prairie or marsh habitat.

The ORVMP, SEIS and Record of Decision all state explicitly that the trails now re-opened in Bear Island are unsuitable for ORV use. The ORVMP and SEIS specify that prairies and marshes have “low substrate suitability,” are the most sensitive and most impacted areas of the Unit, and thus are restricted from ORV activity. ORVMP (HTML) at 138. NPS’s final Record of Decision (“ROD”) states that “environmentally sensitive areas, such as prairies, will be closed to ORV use.” NATIONAL PARK SERVICE, RECORD OF DECISION ON THE *FINAL RECREATIONAL OFF-ROAD VEHICLE MANAGEMENT PLAN/SUPPLEMENTAL EIS* AT 5 (SEPTEMBER 2000). The proposed ORVMP action states that “sensitive areas would be closed immediately to all ORV traffic, including *all* marl prairies [and] specific Bear Island Unit trails.” ORVMP (HTML) at 6. (emphasis added). As explained by Superintendent John Donahue at the time of trail closures, “the Bear Island trails that were closed were almost exclusively in prairies and other sensitive

areas.” NATIONAL PARK SERVICE, LETTER FROM DONAHUE TO ALLEN EGBERT, EXECUTIVE DIRECTOR OF FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, NOVEMBER 14, 2000. In accordance with the final Record of Decision, these trails must remain closed. The reopening of trails in prairie areas of Bear Island Unit violates the proposed actions of the ORVMP and ROD and is thus arbitrary and capricious.

The NPS’s action is also illegal because it was made in the absence of any meaningful public input in patent violation of NEPA and the plain terms of the settlement agreement. Paragraph 6 of the Settlement Agreement provides that “the ORV Plan will be reviewed on a continuing basis. Supplemental environmental analyses of the ORV Plan will be prepared in the future if the NPS makes substantial changes in proposed action that are relevant to environmental concerns...The public will be allowed to participate in such supplemental analyses to the full extent required by NEPA, the CEQ regulations and the NPS regulations.” *Florida Biodiversity Project v. Kennedy*, NO. 95-50-CIV-FTM-246. M.D. FL, October 25, 1995.) The increase of ORV trail miles in Bear Island Unit and the authorizing of ORV activity on prairies in the Unit constitute a substantial change to the proposed action of the ORV Plan and thus trigger NEPA requirements for supplemental review and public comment.

### **C. The Park Service Is Violating the Mandates of the Organic Act By Opening Trails On Terrain Deemed Unsuitable for ORV Use.**

The language of the National Park Service Organic Act (“Organic Act”) mandates that the mission of the Park Service is:

[To] promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified . . . by such means and measures to conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is 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 (emphasis added). In the 1978 Amendment to the Organic Act, Congress reiterated the protectionist mission of the Park Service, stating:

[T]he promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by [the Organic Act], to the common benefit of all the people of the United States. The authorization of activities shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

The Organic Act imposes a duty upon the NPS to first and foremost conserve park wildlife and other natural and historical resources. The NPS is further charged with



providing for the enjoyment of the resources that it has conserved. Without conservation of the resources, there can be no legitimate enjoyment. "Indisputably preservation comes first in law. Indisputably, it comes first in logic—without preservation, the rest is utterly pointless." NPS STRATEGIC PLAN AT 1 (1994).

*Id.* § 1a-1; *see also Nat'l Rifle Ass'n v. Potter*, 628 F. Supp. 903, 905 (D.D.C. 1986) ("paramount objective of the park system with respect to its indigenous wildlife, and the philosophy which came to pervade the new Park Service to whom it was entrusted, was, from the beginning, one of *protectionism*") (emphasis added). Moreover, the ORVMP provided that land managers must use the precautionary principle when approving actions on public lands, stating that "in all situations involving conflicts between resource protection and resource use, the NPS would decide in favor of resource protection." ORVMP (HTML) at 29.

#### **D. The Park Service Is Violating Executive Orders 11,644 and 11,989 By Opening Trails On Terrain Deemed Unsuitable for ORV Use.**

In 1972, President Nixon specifically addressed the conflict between resource protection and resource use created by ORV activity on NPS land by issuing an Executive Order which directed the NPS to "establish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands." Exec. Order No. 11,644, 3 C.F.R. 666 (1971-1975). President Carter issued a second Executive Order in 1977 requiring the Secretary of Interior to immediately close areas or trails open to ORVs if "such use is determined to be causing or likely to cause considerable adverse effects on the soil, vegetation, wildlife habitat or cultural historic resources of public lands." Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977). In *Wildlife Conservation Fund v. Norton*, a case involving ORV users' challenge to the Big Cypress ORV Management Plan in 2002, the court determined that taken together, these executive orders "generally prohibit ORV use on public lands except those in areas or trails that are determined to be suitable for such use." *Wildlife Conservation Fund of America v. Norton*, 2:01cv25-FtM29-DNF (M.D. Fla. Aug. 15, 2003). This ruling corresponds with language in the ORVMP which states that among criteria for developing a trail system is the avoidance of areas through "vegetation communities most susceptible to impacts" and that "cannot sustain ORV use." ORVMP (HTML) at 45.

#### **E. Violations of the Clean Water Act**

Section 301 of the Clean Water Act ("CWA") prohibits "the discharge of any pollutant," 33 U.S.C. § 1311(a), which includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutant is broadly defined and includes, for example, dredged spoil, rock, sand, biological materials and solid waste. 33 U.S.C. § 1362(6). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The U.S. Army Corps of Engineers ("Corps") has interpreted "navigable waters" to include "[a]ll interstate waters including interstate wetlands," 33 CFR § 328.3(a)(2); "[a]ll other waters

. . . streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds,” 33 CFR § 328.3(a)(3); “[t]ributaries of [such] waters,” 33 CFR § 328.3(a)(5); and “[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands),” 33 CFR § 328.3(a)(7). See also 40 CFR § 230.3(s) (corresponding EPA regulatory definition of “waters of the United States”). Nonetheless, discharges to such waters are lawful if, under section 402, the Administrator of the EPA “issue[s] a permit for the discharge of any pollutant, ... notwithstanding section 1311(a),” or, for dredge and fill material, if the Army Corps of Engineers under Section 404 “issue[s] permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” See 33 U.S.C. §§ 1342, 1344.

The NPS service has violated the CWA by authorizing the use of ORVs in waters of the United States in the Bear Island Unit of BCNP, such as wetlands and prairies, without first obtaining permits from the EPA and the Corps. Not only does the ORV use that NPS authorizes result in the excavation and dredging, and subsequent addition and redepositing in other locations, of dirt, soil and biological materials, but it also results in the deposition of uncombusted fuels and oils in such waters. As discussed above, such ORV activity has adverse impacts on the wildlife, soil, vegetation and hydrology of the Bear Island Unit.

### **III. Conclusion**

Defenders of Wildlife, Sierra Club, Wildlands CPR, The Wilderness Society, National Parks Conservation Association, The Humane Society of the United States, Public Employees for Environmental Responsibility and the Florida Biodiversity Project support the Park Service’s efforts to consider the interests of conservation and motorized recreation in implementing its ORV Management Plan and believe that suitable areas exist within the preserve for ORV activity. However, the newly re-opened trails in southern and eastern Bear Island are not appropriate for ORV use given their significance to the recovery of the Florida panther and their highly vulnerable substrate. We ask that the National Park Service and the U.S. Fish and Wildlife Service take immediate action to remedy their violations of law by immediately closing the newly re-opened trails in Bear Island Unit to ORV use. If these trails are not closed, we intend to file suit following the expiration of sixty days from the date of this letter. Please contact us if you wish to discuss this matter.

Sincerely,

/s/

Tamara Zakim  
Michael Senatore  
Defenders of Wildlife