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By Certified Mail

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**Re: Notice Of Violations Of The Endangered Species Act In Connection With
The Fish And Wildlife Service's Legally Inadequate Biological Opinion For
The Addition Lands Final General Management Plan, And The National
Park Service's Reliance On And Implementation Of That Unlawful Opinion**

On behalf of the Sierra Club, Public Employees for Environmental Responsibility, the South Florida Wildlands Association, and the Florida Biodiversity Project, we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service ("FWS") and the National Park Service ("NPS") have violated and are continuing to contravene various provisions of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and the Act's implementing regulations by issuing and relying on FWS's November 17, 2010 Biological Opinion for the Final General Management Plan ("FGMP") for the Addition Lands ("the Addition") of the Big Cypress National Preserve.



BACKGROUND

A. 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).¹ 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 requiring a federal permit to determine the effect of the project on the 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); *see also Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1149-50 (W. D. Wash. 2000) (remanding biological opinion where agency failed to “meaningfully analyze” the risks to the species and the key issues); *Nat’l Wildlife Fed’n v. Norton*, 332 F. Supp. 2d 170 (D.D.C. 2004) (remanding

¹ 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.*

biological opinion based on arbitrary conclusion of non-jeopardy for the Florida panther). Moreover, FWS may not disregard reasonably foreseeable projects “with a relatively small area of impact but that carry a high risk of degradation when multiplied by many projects and continued over a long time period.” *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. NMFS*, 265 F.3d 1028, 1036 (9th Cir. 2001).

Without an adequate biological opinion in place, any activities likely to result in incidental takes of members of listed species are unlawful. Accordingly, anyone who undertakes such activities, or who authorizes such activities, 16 U.S.C. § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens for declaratory and injunctive relief. *See* 16 U.S.C. § 1540.

B. The Florida Panther

The Florida panther (*Puma concolor coryi*) is perhaps the most imperilled wildlife species in North America, restricted to a single breeding population in southern Florida “of approximately 100 animals.” November 17, 2010 Biological Opinion (“2010 BiOp”) at 7, available at <http://parkplanning.nps.gov/document.cfm?parkID=352&projectID=11164&documentID=37621>. Due to human population growth, logging, mining, road construction, commercial and residential development, conversion of natural lands to agriculture, widespread hunting of panther prey (white-tailed deer, feral hogs, etc.), and federal authorization of recreational and other activities in the panther’s habitat, the species is now constrained to “less than 5 percent of its historic range.” *Id.* Indeed, while the species has enjoyed very modest population growth over the past decade, the panther remains perilously close to extinction (estimated at only 113 members as of 2009), meaning that each and every panther is critical for ensuring ultimate survival and recovery of the species. *See id.* at 10.

Panthers “require large areas to meet their needs,” and the home range for a single male panther has been found to average 89,690 acres (and 44,160 acres per female), although the home range size increases considerably with reduced prey abundance. *Id.* at 12-13. Thus, to maintain and recover a viable population, large amounts of contiguous, intact, and fully or significantly undisturbed habitat is necessary. *See* Florida Panther Recovery Plan, 3rd Revision (“Recovery Plan”) (2008) at viii, available at <http://www.fws.gov/verobeach/images/pdflibrary/20081022%20Florida%20Panther%20Recovery%20Plan%20-%203rd%20Revision.pdf>.

The primary threats to panther survival and recovery are “habitat availability, prey availability, and lack of human tolerance.” *Id.* at ix. Because of the increasing habitat pressures the panther faces from development on private lands encircling the Preserve and the Addition,²

² Since 1984, FWS has approved 138 projects on 96,151 acres of occupied panther habitat, preserving only 41,955 acres for mitigation purposes – meaning that FWS-approved projects over the past 27 years have already resulted in a net loss of 54,196 acres of high-quality

these federally-protected areas constitute the critical epicenter of panther survival and recovery. Indeed, a recent survey confirmed that at least 50 panthers – or at least 44% of the entire population – used the Preserve and/or the Addition during the survey period. 2010 BiOp at 31. Moreover, as NPS recognized in its FGMP, the Preserve and the Addition constitute at least “63% of the [panther’s] essential habitat” needed “to maintain[] a minimum viable population of panthers in south Florida.” FGMP at 178. Therefore, protective policies on these federal lands – identified by NPS as the species’ most essential habitat – are crucial to ensuring the species’ survival and recovery.³

Most importantly, ORV use and consequent hunting within the Addition – a place entirely devoid of any publicly permitted ORV use or hunting before implementation of the FGMP – must be managed extremely carefully to ensure that disturbances to panthers will not drive panthers, or their prey base, elsewhere to potentially more dangerous, development-prone private lands leading to increased mortality. For example, previous studies (Maehr 1990; Janis & Clark 2002) have shown that ORV use and/or ORV-associated hunting during hunting season alter panther behavior, *see* 2000 BiOp at 18, which has resulted in Big Cypress panthers at least temporarily moving northward to the Addition and private lands during past hunting seasons. September 19, 2007 Biological Opinion on the Designated Trail System in Bear Island Unit of Big Cypress National Preserve (“2007 BiOp”) at 30; 2010 BiOp at 40-41 (explaining that a pertinent study “noted that panthers used Bear Island less and moved off to private property as hunting season progressed”). In any case, as private landowners continue to develop private lands outside of the Preserve, and with an extensive and ecologically-damaging ORV trail system in four large units of the original Preserve, preservation of the Addition with minimal human disturbance is key to ensuring that some of the last existing refugia remains intact for the benefit of panthers and their prey base.⁴

panther habitat. 2010 BiOp at 69. There are additional projects in the permitting or planning stages yet to go through FWS consultation that will further decrease the available panther habitat.

³ Because panther home ranges are relatively large in order to meet foraging and other biological needs, and further because development, road construction, and other habitat-destructive activities continue to rapidly constrict the species’ available range, the ever-smaller habitat available to the species is becoming overcrowded, which is likely to lead to increased intraspecific aggression events, as well as cause issues with genetic diversity when the shrinking amount of available habitat is no longer capable of supporting a gene pool diverse enough to ward off diseases and other catastrophic events.

⁴ The overwhelming majority of ORV use on federal lands in south Florida correlates with hunting. *See, e.g.*, FWS, February 11, 1991 Biological Opinion on the GMP for Big Cypress National Preserve (explaining that ORV use and hunting “are strongly correlated; the NPS estimates that up to 90% of the ORV use in the existing Preserve is generated by hunters”); NPS, Visitor Study for

The adverse impacts of disturbing panthers by forcing them to alter their traditional home ranges via human disturbance (e.g., ORV trail use and hunting), and/or from severely depleting their prey base via hunting, are significant, i.e., they can lead to increased home range sizes or altered home range locations, and can potentially increase the likelihood of panther mortality due to road crossings and/or intraspecific aggression as panthers are flushed from their former home ranges or forced to increase those ranges as their prey base diminishes; in addition, panthers may be forced onto development-prone private lands adjacent to the Preserve. *See* 2010 BiOp at 16-17.⁵

Not only is ensuring contiguous, intact tracts of undisturbed land important in the Preserve and the Addition, but maintaining an adequate prey base – one of FWS’s express recovery actions for the species – is also critical in preventing panther population declines. *E.g.*, Recovery Plan at 106 (explaining that federal and state agencies must appropriately regulate “recreational hunting to ensure that it does not negatively impact the panthers’ prey base”); *id.* at 112 (FWS must “[e]nsure an ample, healthy, and diverse prey base”). The “panther’s most important species association is with its prey species,” which by biomass and numbers are predominantly satisfied by white-tailed deer and feral hogs. July 8, 2000 Biological Opinion for the ORV Management Plan for Big Cypress National Preserve (“2000 BiOp”) at 11; 2010 BiOp at 12-13; *see also* 2000 BiOp at 10 (explaining that “[d]eer and hogs accounted for 85.7 percent of consumed biomass north of I-75 and 66.1 percent south of I-75”). Male panthers need to consume a deer-sized prey every 8-11 days, and females need to consume a deer-sized prey every 14-17 days, albeit much more frequently when a female has kittens (every 3.3 days for a female with three kittens). 2010 BiOp at 14.

Indeed, NPS has explicitly recognized the importance of maintaining an adequate prey base for panthers, as evidenced by the closure of the Deep Lake Unit of the Preserve which was closed to ORV use precisely because of “illegal and unchecked hunting” and because a closure

the Big Cypress National Preserve ORV Management Plan (2001) (finding that at least 81% of ORV users engage in “[g]eneral gun hunting [for] deer or hog,” and another subset of ORV users engage in other types of hunting).

⁵ In 2010 alone, even before more stressors are added the ecosystem in the Preserve and the Addition, there were 24 documented panther mortalities throughout the species’ range, 6 of which were attributed to intraspecific aggression and 16 to vehicle collision. Florida Fish and Wildlife Conservation Commission, PantherNet, available at <http://www.floridapanthernet.org/index.php/pulse/>. At least three of the 2010 intraspecific aggression incidents occurred in the Preserve or the Addition, *id.*, and many of the vehicle mortalities appear to have occurred to the north of the Preserve/Addition. *Id.* Indeed, there has been a consistent trend of high intraspecific mortality in the Addition and private lands just north of the Addition, a trend that could potentially worsen as panthers are flushed from the Addition due to the introduction of ORV use and ORV-associated hunting of the panther’s prey. Figure 10 of 2010 BiOp.

would “reduce hunting pressure on panther prey and potential disturbance from ORV use of panther habitat.” SEIS for the 2000 ORVMP for Big Cypress National Preserve at 90 (emphasis added), available at <http://www.nps.gov/bicy/planyourvisit/loader.cfm?csModule=security/getfile&PageID=136536>. According to FWS’s Recovery Plan, hunters in the original Preserve considerably decrease the prey base of the panthers there by an average of far more than 300 animals each year (only reported kills) – “[o]ver the past 25 years, the annual deer and hog harvest reported at check stations has averaged 210 and 127, respectively, representing a sample of deer and hogs actually harvested.” Recovery Plan at 33.

Panther prey base numbers in the Addition are already at a level that is plainly inadequate to withstand any additional pressure from ORV-associated hunting. The state wildlife agency estimates only 187 deer in the Northeast Addition (133 north of I-75 and 54 south of I-75), in addition to approximately 14 wild turkeys and an unknown but significantly declining feral hog population. FGMP at 198-99. Because these prey species are already constrained in the Preserve and particularly the Addition, any increased ORV disturbance and ORV-facilitated hunting of panther prey will almost certainly force panthers into less suitable habitats in search of prey, potentially increasing the likelihood of mortalities via intraspecific interactions and road crossings as panther home ranges necessarily expand.

C. Addition Lands Final General Management Plan

NPS issued the FGMP for the Addition on November 24, 2010. NPS, FGMP for the Addition, available at <http://www.nps.gov/bicy/parkmgmt/addition-lands-gmp.htm>. On February 4, 2011, NPS issued a Record of Decision (“ROD”) for the FGMP. NPS, ROD for the FGMP for the Addition, available at <http://parkplanning.nps.gov/document.cfm?parkID=352&projectID=11164&documentID=38924>. Among other things, the FGMP authorizes “a substantial amount of [ORV] access and riding opportunities,” ROD at 2, which will consist of “[a]pproximately 130 miles of primary trails” in addition to many more miles of “secondary trails” that NPS did not bother to quantify in the FGMP. *Id.* at 3.⁶ Moreover, NPS anticipates connecting the newly-authorized extensive Addition Lands ORV trail system to the trail system in the Bear Island Unit of the Preserve. *Id.* A total of 650 annual ORV permits will be issued by NPS for the Addition’s trail system. *Id.*

As early as the draft GMP that was circulated for public comment, there was concern in the independent scientific community – and even from other federal agencies – that NPS’s preferred alternative (i.e., opening the Addition to 130 miles of ORV trails and hunting) would likely have significant impacts on the panther. *See, e.g.*, Environmental Protection Agency

⁶ As evidenced by what has occurred with the Bear Island Unit, although purportedly designed to serve as “short trails that branch off primary trails to specific destinations,” ROD at 3, “secondary” trails may ultimately result in even more invasive and harmful use of an area than designated primary trails.

(“EPA”), September 3, 2009 Comments on the Draft GMP for the Addition at 4, available at <http://parkplanning.nps.gov/document.cfm?parkID=352&projectID=11164&documentID=29995> (criticizing the DGMP for not explaining how “white-tailed deer hunting within the Addition [will] be managed to insure that it does not have an impact on the Florida Panther’s prey supply”). Indeed, based on its scientific expertise, the EPA recommended that NPS select an alternative that would authorize “the maximum amount of wilderness, no ORV use, and minimal new facilities for visitor contact along I-75.” *Id.* at 5.

Nonetheless, in the FGMP and accompanying ROD, NPS ultimately selected an alternative that, while proposing some acreage for wilderness designation, also authorized an extensive primary trail network (and many miles of secondary trails). The FGMP was again condemned by the EPA (as well as by conservation organizations), because the plan authorizes “substantial ORV access” and “[e]vidence is mounting that ORVs pose a serious threat to wildlife, water, soil, plants, and the rest of the natural world.” EPA, January 4, 2011 Comments on the FGMP for the Addition at 1-2. Accordingly, the EPA concluded by recommending that NPS select a less-damaging alternative (i.e., more limited ORV use) because the agency “continues to have environmental concerns with [the] NPS preferred alternative because of the adverse environmental impacts that would result [from] its implementation.” *Id.* at 6.

D. FWS’s November 17, 2010 Biological Opinion

Because NPS’s decision to authorize the various aspects of the FGMP will impact listed species, NPS engaged in formal consultation with FWS, resulting in the November 17, 2010 Biological Opinion. The biological opinion concurs with NPS’s assessment that the FGMP is likely to adversely affect the Florida panther, and provides a detailed history and biological description of the species. Notably, the opinion emphasizes the importance of prey abundance in panther survival and recovery, *e.g.*, 2010 BiOp at 13, 22, and also notes that most studies analyzing the effects of ORV use and/or hunting on panthers suggest altered behavioral patterns as a result of those intrusive human uses (i.e., take of panthers via harassment and other modes) – even in areas where panthers had long been exposed to such activities after years of publicly permitted ORV use and related hunting. *E.g.*, *id.* at 25-26 (explaining Maehr, Schortemeyer, and Janis & Clark studies in the original Preserve); *but see id.* at 26 (explaining Fletcher & McCarthy study).

Moreover, the opinion explains the significance of the action area for the FGMP, asserting that at least 29 panthers (at least 26% of the entire population) have home ranges located entirely or partially within the action area. *Id.* at 32. After analyzing the potential effects of the FGMP, the opinion ultimately concludes that the activities authorized by the FGMP are “not likely to jeopardize the continued existence of the Florida panther.” *Id.* at 43. FWS also issued an incidental take statement authorizing an unspecified number of incidental takes via harassment, *id.*, but required nothing more than the distribution of educational materials

to ORV users, creation of a more effective trail designation system, and monitoring of panther trends. *Id.* at 45-46.

In addition to the panther – on which the substantial majority of the Opinion focuses – FWS summarily dismisses effects to other federally protected species including the eastern indigo snake and the red-cockaded woodpecker, determining without analysis that the FGMP is “not likely to adversely affect” these species. *Id.* at 6.

DISCUSSION

A. FWS’s November 17, 2010 Biological Opinion is Contrary to the ESA Because it Entirely or Substantially Fails to Address Several Key Threats to Florida Panthers.

The November 17, 2010 Biological Opinion issued by FWS omits various pieces of critical scientific information that should have been considered as part of consultation, and in other cases reaches illogical conclusions about threats to the Florida panther without providing adequate factual or biological data to support such counterintuitive leaps made to support NPS’s FGMP. Each of these various deficiencies, which are described in detail below, constitute flagrant violations of the section 7 process, 16 U.S.C. § 1536, particularly the agencies’ statutory and regulatory obligations to fully consider all direct and indirect effects of the action, 50 C.F.R. § 402.14(g)(3), to consider the “best scientific . . . data available” in reaching its conclusions, *id.* § 1536(a)(2), to apply an “institutionalization of . . . caution” in making decisions bearing on a highly endangered species, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178 (1978),⁷ and to fully evaluate the species’ current status to ensure that any new effects authorized by the action will not move the species any closer to extinction. 50 C.F.R. § 402.14(g)(2). These violations have the net effect of unlawfully authorizing takes through harassment and other modes that have not been sufficiently analyzed or mitigated in the Opinion or accompanying incidental take statement – thus constituting section 9 violations if and when NPS relies in any way on the Opinion and undertakes unlawful activity pursuant to the FGMP. 16 U.S.C. § 1538(a)(1)(B). As such, the Biological Opinion is both contrary to the ESA and arbitrary and capricious, and NPS cannot proceed under the FGMP unless and until, at minimum, the issues below are sufficiently addressed in compliance with the Act.⁸

⁷ As the Supreme Court has explained, “Congress has spoken in the plainest of words [in the ESA], making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” *Hill*, 437 U.S. at 194.

⁸ The only thing under scrutiny in this letter is whether the extensive level of ORV use and ORV-associated hunting authorized by NPS and FWS here complies with the congressional mandate in the ESA. This letter does not address whether any lesser level of ORV use and hunting may or may not be legally permissible in the Addition.

1. FWS Must Consider All Direct and Indirect Effects of the Action on Panthers

As part of the section 7 process, FWS is required by its own regulations to “[e]valuate the effects of the action,” 50 C.F.R. § 402.14(g)(3), which are defined as “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” *Id.* § 402.02. Accordingly, when FWS fails to fully analyze the direct and indirect effects of an action, the resulting biological opinion contravenes the section 7 mandate and cannot be relied on by the action agency. *E.g., Conner v. Burford*, 848 F.2d 1441, 1451-58 (9th Cir 1988) (expressly rejecting “incremental-step consultation” on projects, and requiring FWS in its effects analyses to “look at all the possible ramifications of the agency action”).

a. Prey Abundance Impacts from ORV-Associated Hunting

Strikingly, FWS failed entirely to even mention – let alone evaluate – a key issue implicated by NPS’s FGMP: the panther’s already small prey base in the Addition will be substantially diminished by the FGMP’s facilitation of extensive ORV-associated hunting of panther prey (deer, hogs, and turkeys) in a location that has never been publicly open to this invasive activity. *See* FGMP at i. To be clear, there is no question that the FGMP, on its face, contemplates that ORV use will be associated with hunting. *See id.* at 42 (explaining that “[h]unting access is addressed in this plan and is provided for in *all* alternatives” (emphasis added)). Further, there is no dispute that extensive hunting – with which at least 80-90% of ORV use in the Preserve correlates – will have significant adverse effects on the primary prey base (deer, hogs, and turkeys) of the Florida panther in the Addition. *E.g., see* FGMP at 50 (“White-tailed deer, feral hogs, and wild turkey are . . . [important] as prey for the endangered Florida panther and as the *principal game animals for potential hunting in the Addition* [and] [h]unting activities in the Addition *could reduce local populations, thus potentially affecting the panther’s foraging opportunities.*” (emphases added)). Therefore, the inevitably extensive hunting that the FGMP facilitates by way a vast primary and secondary ORV trail system is a direct effect of the FGMP, or at bare minimum an indirect effect – either of which FWS is obligated to evaluate as part of this section 7 process *before* trails are constructed.⁹

⁹ Also absent from the direct and indirect effects sections is any discussion about the recent closure of the Stairsteps Unit (zones 3 and 4) to deer hunting because of a “significant decline” in the deer population in those areas that are traditionally open to ORV use and ORV-associated hunting. FWC, Stairsteps Closure FAQs, available at http://myfwc.com/recreation/Deer_StairstepFAQs.htm. While on one hand FWC asserts that “[h]unting is not the cause,” *id.*, on the other hand FWC explains that it is closing only zones 3 and 4 because those are the only zones in the unit where extensive ORV use and ORV-associated hunting is authorized. *Id.* (“The population decline is most evident in zones 3 and 4 of the Stairsteps Unit. Also, walk-in only access is allowed for Zone 1 and limited ORV access in

Indeed, while devoting many pages of the Opinion to explaining the vital importance of prey abundance in individual and population-level survival and recovery of the panther, *e.g.*, 2010 BiOp at 12-14, 22, 25, FWS *never* utilizes that data to engage in any meaningful analysis of the agency action here – the FGMP and its broad authorization of ORV use and ORV-associated hunting of the panther’s prey – and how that drastic departure from the ecological status quo (*i.e.*, the environmental baseline) in the Addition will impact the panther. That omission is all the more flagrant in light of the relatively limited prey base on which panthers in the Addition currently rely – which the federal and state wildlife agencies concede amounts to only 187 deer in the Addition (133 north of I-75 and 54 south of I-75), approximately 14 wild turkeys, and an unknown but significantly declining feral hog population. FGMP at 198-99. Thus, considering that many panthers use the Addition, and further that FWS estimates that each panther needs to eat approximately 30-35 deer-sized prey each year, *see* 2010 BiOp at 14, it is highly unlikely that the Addition contains enough prey to sustain resident panthers *and* to accommodate hunting of up to 33% of the prey population – the figure mentioned as “sustainable” in the FGMP. *E.g.*, FGMP at 199 (“Typically, up to 33% of the game population can be harvested annually and remain sustainable.”). Accordingly, the complete omission of any analysis of the direct or indirect effects of ORV-associated hunting on the panther’s prey base in the Opinion is arbitrary and capricious, and plainly contravenes section 7 of the ESA and the FWS’s regulatory obligation to fully and fairly evaluate direct and indirect effects. 50 C.F.R. § 402.14(g)(3); *see e.g.*, *Conner v. Burford*, 848 F.2d at 1451-58.¹⁰

b. Extensive Secondary Trail System

Despite the fact that a vast secondary trail system will necessarily accompany the 130-mile primary trail system authorized by the FGMP, FWS did not analyze the direct or indirect effects of that secondary trail system simply because NPS “did not provide an estimate of the

Zone 2, which limits the potential take of deer.”). Therefore, it appears that even the state agency that regulates hunting in the Preserve along with NPS recognizes the benefit of closing sensitive areas with low deer densities to ORV-associated hunting to ensure that the deer population – and in turn the panther – is not significantly and adversely impacted.

¹⁰ To the extent FWS intends to reinitiate consultation on hunting regulations at some future time – which is never expressly articulated – such a deferral would unlawfully segment FWS’s statutorily required section 7 analysis because it would allow the construction of a vast ORV trail system – constructed almost solely to facilitate hunting in the Addition – to be built *before* any hunting plan is adequately analyzed by FWS, making the extensive ORV trail system, and the resulting devastation on the Addition’s natural resources, a *fait accompli*. Furthermore, since hunting will likely be regulated by a state agency (Florida FWC), section 7 obligations will likely not attach to the State’s hunting regulations and therefore the direct and indirect effects of the hunting authorized by the FGMP must be analyzed simultaneously with other effects of the federal action here since they necessarily and inevitably stem from NPS’s FGMP.

number of miles of secondary trails that may be opened.” 2010 BiOp at 45. Just as the primary trail system will result in a substantial loss of prime panther habitat (at least 16,808 acres, or more than 11% of the Addition, according to FWS numbers), a vast secondary trail system will also implicate a significant loss of high-quality habitat for the species. While FWS acknowledges that “NPS may have to reinitiate consultation to address the establishment of secondary trails in the future,” *id.*, such an acknowledgment fails to come to grips with the reality that ORV users will begin creating ecologically devastating secondary trails branching off of primary trails as soon as ORV access is granted to the primary trail system (and before reinitiation of consultation on secondary trails) – a pattern that has been repeated numerous times before in the Preserve and elsewhere on public lands in Florida. Thus, by segmenting the secondary trail analysis from the primary trail analysis, FWS is effectively allowing an extensive secondary trail system to be built before any effective ESA compliance on that system occurs, at which point the secondary trail system is a *fait accompli*. In so doing, FWS has jettisoned the express regulatory mandate to evaluate all direct and indirect effects of the action in patent violation of section 7. 50 C.F.R. § 402.14(g)(3).

c. Access Points and Parking Lots

To facilitate access for ORV users, NPS – in conjunction with the Florida Department of Transportation and the Federal Highway Administration – has authorized the construction of three new access points to the Addition along I-75 (which will include parking lots and permanent structures) – two at mile marker 63 and one on the north side of mile marker 52. *E.g.*, 2010 BiOp at 3, 39-40. While FWS concedes that section 7 consultation is necessary to analyze the impacts of those access points, *id.* at 40, FWS proposes to initiate consultation separately on those projects at some indefinite time in the future presumably after construction of the primary trail system has begun. However, because the location of the primary ORV trail system is inextricably linked to the ultimate location, size, and other parameters of the access points and parking lots, it is legally inappropriate to defer analysis of the direct and indirect effects of the access points until later, because such segmentation of the analysis (i.e., authorizing ORV trail construction via the 2010 BiOp, but deferring on consultation for the access points until some later date) would severely circumscribe the future options available for locating access points and determining the proper size and scope of such points. Said differently, by authorizing a trail system in a particular location in the 2010 Opinion, FWS necessarily limits the range of alternatives available for access points on I-75 because the access points must necessarily correlate to user convenience to enter the ORV trail system.

Indeed, FWS explained this precise point very eloquently in its August 15, 1990 Biological Opinion on the I-75 Recreational Access Plan, stating that “[a]ctual levels of use and associated impacts will be dictated more by the relative ease of access *off* the highway, the number of parking spaces available, and future decisions regarding hunting” and that “[i]t is reasonable to expect that public facilities adjacent to an interstate highway, providing access to public lands, will generate much more activity in the Preserve [A]ddition than the historic activity while in private ownership, and thus increase the potential for associated impacts on the

panther.” August 15, 1990 BiOp at 6 (Attachment 1). Therefore, the access points are clearly direct, indirect, and/or interrelated effects of the FGMP and necessarily influence the extent and layout of ORV use and ORV-associated hunting that will impact the panther and other listed species in the action area. Accordingly, by shirking its regulatory duty to analyze all direct and indirect effects of this particular action – which will inevitably lead to new access points along I-75 – FWS has violated its own regulations, 50 C.F.R. § 402.14(g)(3); *Conner v. Burford*, 848 F.2d at 1451-58, and in effect would allow NPS to undertake irretrievable and irreversible commitments of resources foreclosing other alternatives in direct violation of section 7(d) of the ESA. 16 U.S.C. § 1536(d).¹¹

d. Connection of Trails in the Bear Island Unit to the Addition

The FGMP anticipates “a potential future ORV trail connection from the Northeast Addition to the existing trail system in Bear Island.” FGMP at 368. While the connection is not set in stone, NPS and ORV users have long been advocating for such a connection between the Addition and the Bear Island Unit of the Preserve, and it is reasonable to assume that it will occur given the pressure from the agency and ORV trail proponents, as well as the express mention of it in the FGMP – thus meaning that it constitutes a very likely foreseeable action of the FGMP and should be analyzed as an indirect effect of the action. Currently, NPS issues 2,000 ORV permits annually in the Preserve. 2010 BiOp at 33. Another 650 are proposed for issuance in the Addition – the number on which FWS relied in considering the impacts of the FGMP. Indeed, based on the rampant illegal ORV use that has occurred in the Preserve to date, it is reasonably certain that far more than the 650 permit-holders will use the trails in the Addition once the Addition-Bear Island Unit connection is made. In fact, past history dictates that use may be three to four times as many, since up to 2,650 permit-holders between the two (assuming the permit-holders in the Addition are distinct from those in the Preserve) – in addition to illegal ORV users known to utilize trails in the Preserve and the Addition – will now have ready access to the Addition’s trails by way of the connection. Thus, under the agency’s own regulations, FWS was obligated to analyze the indirect effect of the FGMP of connecting the proposed primary trail system in the Addition to the Bear Island Unit trail system, and failure to do so is patently unlawful. 50 C.F.R. § 402.14(g)(3).¹²

¹¹ To further elucidate the 7(d) violation that would occur if NPS proceeds in reliance on this Opinion, any ORV trail construction, parking lot construction, or related activities by NPS or partner agencies (e.g., Federal Highway Administration) would plainly violate the ESA’s explicit prohibition of resource commitments that foreclose other practicable alternatives. 16 U.S.C. § 1536(d).

¹² The precise amount of illegal ORV use and hunting in the Preserve and the Addition is unknown, but there are regularly reported incidents in both the Preserve and the Addition. Pers. Comm., Ed Clark, NPS, Chief Ranger of the Big Cypress National Preserve, Mar. 3, 2011.

e. **Intraspecific Mortality**

FWS has provided no reasoned analysis of the potential increase of panthers that are expected to be harassed by ORV use and ORV-associated hunting under the FGMP, and thus that might seek to move from traditional home ranges in the Addition to development-prone private lands or tribal lands adjacent to the Addition. 2010 BiOp at 38. That omission is particularly concerning in light of FWS's own map that shows a dense concentration of past intraspecific mortalities in the Addition north of I-75 *before* the additional pressures of ORV use and ORV-associated hunting were introduced into the Addition. *See* Figure 10 of 2010 BiOp (depicting 19 intraspecific mortalities in the Addition or just to the north on private or tribal lands). Thus, with intraspecific mortality already extremely common in this particular area *prior* to issuance of the FGMP and the dramatic changes it authorizes in the Addition, it is legally inadequate under the ESA's implementing regulations for FWS to summarily dismiss the potential flushing effects and interrelated potential for increased intraspecific mortality in the area without providing a more detailed analysis. Indeed, in the original Preserve FWS "noted that panthers used Bear Island less and moved off to private property as hunting season progressed," 2010 BiOp at 40-41, and that same conclusion must be applied to the introduction of ORV use and hunting in the Addition where there will presumably be a more severe flushing effect in light of the baseline here. Because the increased likelihood of flushing and potential intraspecific mortalities is never meaningfully analyzed in the Opinion's effects section or authorized via the incidental take statement, the Opinion violates 50 C.F.R. § 402.14(g)(3), and is arbitrary and capricious.

2. **A Biological Opinion Must Rely on the Best Available Science, and the FWS's Section 7 Process Is Dictated by an Institutionalization of Caution in Favor of Species Protection**

As part of the section 7 process, FWS has an express statutory obligation to rely on the "best scientific . . . data available" in reaching its decisions, 16 U.S.C. § 1536(a)(2). Moreover, the Supreme Court has instructed that Congress itself wrote into the ESA, and particularly the section 7 process, an "institutionalization of caution" that affords the benefit of the doubt to the species if the science is too uncertain to draw firm conclusions. *Tenn. Valley Auth. v. Hill*, 437 U.S. at 178, 194. Therefore, when FWS fails to adhere to either of these legislative mandates – by either making biological determinations that do not comport with the best available scientific evidence or by authorizing potentially significant impacts to a listed species without a full understanding of the extent of those effects over the long term – the underlying Biological Opinion violates the strictures of the ESA, and is arbitrary and capricious.

a. **Loss of Nearly 17,000 Acres of Prime Panther Habitat in the Addition**

Using a widely accepted buffer zone of 180 meters around proposed ORV trails – the distance which previous studies have concluded that panthers disperse due to harassment from ORV use and hunting near ORV trails – FWS determined that at least 16,808 acres of high-

quality panther habitat would be lost during hunting season due to the FGMP. 2010 BiOp at 38.¹³ However, despite the large spatial requirement for each panther's home range and panthers' "particular[] sensitiv[ity] to habitat fragmentation," *id.* at 35, FWS never explains how the loss of such a vast piece of acreage in the critical epicenter of the species' habitat does not adversely impact the species. Instead, FWS's provides an unquantified incidental take statement in the form of harassment, *id.* at 45, in effect providing blanket authorization to NPS and ORV users to harass as many panthers as needed, as frequently as needed, to achieve their goals of ORV use and ORV-associated hunting in the Addition. Such a blanket authorization that sanctions routine and potentially significant levels of take of a highly imperiled species does not demonstrate FWS's institutionalized caution, but instead reaches an opposite result. Without a more in-depth evaluation of the impacts to the panther from this action and a much better defined level of acceptable take that will ensure non-jeopardy of the species, the Opinion has defied the institutionalization of caution that must be afforded the panther.

b. Unregulated ORV Use and ORV-Associated Hunting

After recognizing that "[m]anpower to enforce closure is limited at present," FWS simply assumes in the Opinion that unregulated ORV use and ORV-associated hunting will not occur because "NPS has included additional enforcement in the PA, therefore, the level of unregulated use should diminish." 2010 BiOp at 35. However, considering available evidence of the consistent illegal hunting that occurs within the Preserve (which presumably has more enforcement personnel than the Addition will ultimately have), this assurance by FWS, without more, that NPS will somehow eliminate or diminish illegal ORV use and hunting is baseless and is not supportable based on current trends and data from the Preserve and the fact that NPS itself does not know the pre-FGMP extent of illegal hunting in the Addition. Indeed, the fact that the Addition is conveniently located on a major interstate with heavy traffic, I-75, makes it *more* likely that illegal ORV use and ORV-associated hunting will occur once convenient new access points are constructed. In fact, this issue is the *precise* reason that NPS closed the Deep Lake Unit of the Preserve from ORV use and hunting where concerns over illegal hunting due to convenient access from the much smaller SR-29 were paramount. *See* SEIS for the 2000 ORVMP for Big Cypress National Preserve at 90. Therefore, the complete lack of analysis on this point – especially in light of available scientific and other evidence to the contrary for *less-traveled* roads – does not comply with the ESA's mandate that the section 7 process must be based on the best available evidence. 16 U.S.C. § 1536(a)(2).

c. Scientific Evidence on ORV Use and ORV-associated Hunting

An unpublished study on which FWS heavily relies (Fletcher and McCarthy) in reaching its conclusion about the extent of impacts here appears to have limited import to the impacts that

¹³ Even more acreage of prime habitat will be lost once an extensive secondary trail system is constructed – something not considered by FWS in the Opinion, 2010 BiOp at 45 – an issue which is discussed in more detail above.

are expected to occur in the Addition from the FGMP. 2010 BiOp at 36-38.¹⁴ In any case, while the study might have some relevance to an area previously open to extensive ORV use and ORV-associated hunting since the data set analyzed is from the Bear Island Unit with those characteristics, the Fletcher study appears to have little to no relevance to the situation at hand, in which the baseline is primarily wilderness where panthers have long hunted, foraged, reproduced, and lived without significant and routine disruption from ORV use, hunting, or other invasive human activities. Therefore, only a study analyzing how panthers in a generally *undisturbed* area react when extensive ORV use and hunting are introduced would provide permissible scientific and regulatory bases for concluding that the anticipated impacts of a particular action will not kill, harass, or otherwise take members of a highly endangered species and that stringent measures are not necessary to minimize and mitigate takes. Since no such study exists (i.e., the science is uncertain as to how severely ORV use and ORV-associated hunting will affect the panther in this previously undisturbed area), and since all previous studies documented some level of adverse impacts from these activities *even* where those uses had proliferated for many years in those respective locations, the institutionalization of caution compels the conclusion that some level of impact *more* significant than that seen in previous studies (e.g., Janis & Clark) is likely to occur in the Addition – an analysis and conclusion that is never fully evaluated in the Opinion, and thus again defying the mandate of institutionalized caution.

3. FWS Must Evaluate the Species' Current Status in Determining the Environmental Baseline to be Affected by an Agency Action

FWS is also required by its own regulations to “[e]valuate the current status of the listed species or critical habitat,” 50 C.F.R. § 402.14(g)(2), also known as an “environmental baseline,” against which the direct and indirect effects of an action are measured to determine the extent and severity of the impacts reasonably expected to occur as a result of the action. *Id.* §§ 402.14(g)(3), 402.02. Accordingly, when FWS fails to appropriately evaluate the current status of a species on the basis of the best available science, the resulting biological opinion violates section 7 of the ESA and its implementing regulations. *E.g., Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224, 1235-36 (9th Cir. 2007) (explaining that “where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm,” and affirming the district court’s holding that the environmental baseline must be meaningfully considered by FWS/NMFS because the agencies cannot “conduct the bulk of [their] jeopardy analysis in a vacuum”).

¹⁴ We have not had an opportunity to read this unpublished study, but our understanding from the description provided in the Opinion is that the study’s data all came from places where ORV use and ORV-associated hunting had existed for many years, and not from locations where panthers had not been regularly exposed to consistent invasive human uses of these kinds.

a. Climate Change

While FWS pays lip service in its Opinion to climate change and the consequent impacts on the panther, 2010 BiOp at 29-30, there is no discussion of how climate change interrelates with the extensive ORV use and ORV-associated hunting authorized here by the FGMP and the Opinion. Indeed, FWS cited recent climate modeling applied to the panther which determined that, “without rapid conservation actions that establish a population to the north, they predict that the Florida panther may go extinct in the wild due to climate change effects.” *Id.* at 30. That conclusion – i.e., likely jeopardy in a short time frame – is not surprising considering that the *entire* panther population currently inhabits land in south Florida that is particularly susceptible to climatic impacts, including sea level rise that is widely expected by scientists to have catastrophic effects on south Florida in the very near future. However, rather than attempting to square that empirical data with FWS’s seemingly illogical conclusion that extensive ORV use and ORV-associated hunting, in conjunction with impending climate pressures, “is not likely to jeopardize the continued existence of the Florida panther,” FWS was silent on the topic of climatic impacts in analyzing effects in the Opinion. Thus, because climate change presents a serious and significant threat to panther viability in the foreseeable future, it is imperative that FWS and NPS factor climate change into the environmental baseline, and then meaningfully address the interrelation of that baseline (and specifically climate change) with the expected direct and indirect effects of the action here. Without doing so, the Opinion plainly violates the ESA’s implementing regulations, 50 C.F.R. §§ 402.14(g)(2)-(3), and its attempt to conduct its jeopardy analysis in a vacuum is arbitrary and capricious.

b. Contrast to Other Units of the Preserve

As discussed in subsection (A)(2)(c) above, the environmental baseline in the Addition is dramatically different than in other portions of the original Preserve that have been publicly open to extensive ORV use and ORV-associated hunting for many years. *E.g.*, FGMP at 203 (“The remote character of the Addition provides outstanding opportunities for solitude. . . . The Addition is currently open mainly to foot and bike travel — it has never been legally open to public hunting and motorized use.”). Yet, despite that fact, FWS never meaningfully addresses those stark differences, while seemingly cutting and pasting relatively large portions of the Opinion from past biological opinions for activities *in the original Preserve*. While using verbatim language about certain aspects of the species’ biology might be appropriate, entirely failing to seriously analyze the unique ecological nature of the Addition – some of which has been proposed as wilderness by NPS because of its relatively undisturbed qualities – and how those differences will almost certainly mean that the effects of introducing vast ORV use and ORV-associated hunting here will have *even more significant* impacts than those seen elsewhere in the original Preserve from such activities, violates fundamental scientific and regulatory principles including the obligation to fully examine the environmental baseline *in the specific area* where the action will be implemented. 50 C.F.R. §§ 402.14(g)(2). Thus, without a more genuine analysis of the impacts of these extensive and invasive human activities – which the EPA has explained will have devastating environmental and natural resource impacts – in a

particularly sensitive area not previously open to public ORV use and ORV-associated hunting, the Opinion is in violation of FWS regulations, and is arbitrary and capricious.¹⁵

B. The FWS’s “Not Likely to Adversely Affect” Determinations with Regard to Other Species Violate Fundamental Scientific Principles, and Are Arbitrary and Capricious.

1. Eastern Indigo Snake

In the Opinion, FWS provides a single paragraph about threatened eastern indigo snakes, and concludes that “NPS determined the development and implementation of the FGMP is not likely to adversely affect the eastern indigo snake . . . [and] the Service concurs.” 2010 BiOp at 6. However, NPS did *not* determine that the FGMP was unlikely to adversely affect the snake – to the contrary, NPS expressly determined that “[t]he determination of effect under Section 7 of the Endangered Species Act would be *likely to adversely affect* [the eastern indigo snake].” FGMP at 362.

Further, FWS’s sparse “analysis” and effects conclusion in the Opinion with respect to the snake, *see* BiOp at 6, is at odds with FWS’s own concession that “[e]astern indigo snakes have been seen in the Addition Lands,” *id.*, and NPS’s laundry list of adverse effects that NPS expects to impact the snake as a result of the FGMP. For example, NPS anticipates the following effects which it classifies as “adverse” and “moderate”¹⁶:

- “[T]his recreational [ORV] use may flush snakes (or their prey), which may disrupt the snake’s foraging, breeding, and dispersing behaviors. The ORV access may also lead to spur trails that have direct effects on snake burrowing and foraging areas. Limiting the

¹⁵ For example, FWS relies on a scientific study that “noted that panthers used Bear Island less and moved off to private property as hunting season progressed.” BiOp at 40-41. However, the fact that such an impact (i.e., flushing panthers from federal lands to development-prone private lands where harassment, mortalities, and other forms of take are more likely than on federally protected lands) was observed *even in Bear Island* – where resident panthers had long been exposed to rampant ORV use and ORV-associated hunting – is highly probative for concluding that even more severe impacts will result in the Addition – something never addressed in the Opinion.

¹⁶ NPS defines “moderate” effects to be those where “[i]ndividuals may be impacted by disturbances that interfere with critical periods (i.e., breeding, nesting, denning, feeding, resting) or habitat; however, the level of impact would not result in a physical injury, mortality, or extirpation from the Addition.” FGMP at 253. Therefore, this level of impact includes takes via harassment and other modes, and must necessarily be included in any biological opinion and incidental take statement.

number of ORV permits under the two alternatives that include ORV use would help minimize habitat disturbance.” FGMP at 49.

- “Impacts on the potential habitat for and thus on the eastern indigo snake under [the FGMP] would be short term and long term, minor to moderate, adverse, and localized to Addition-wide. The determination of effect under Section 7 of the Endangered Species Act would be *likely to adversely affect*. There would be a short-term and long-term, moderate, adverse cumulative impact on the potential habitat for the eastern indigo snake.” FGMP at 142.
- “The eastern indigo’s relatively large home range also makes it vulnerable to habitat loss, degradation, and fragmentation (Lawler 1977, Moler 1985b). Extensive tracts of wild land are the most important refuge for large numbers of eastern indigo snakes. Large areas of natural habitats, protected from roads and the fragmentation associated with development, are needed to maintain viable snake populations.” FGMP at 197.
- “The long-term public use of the ORV trails, radiating spur trails, and the increase in human occupation and disturbance in the backcountry would have adverse effects on potential eastern indigo snake habitat. Noise from off-road vehicles and nearby human presence and activity would disturb or flush snakes and thus might disrupt normal foraging, breeding, or dispersing. In addition, ORV use and spur trails that extend beyond the immediate vicinity of designated ORV trails would also displace a variety of potential snake habitat types. This off-trail activity by the public could disturb or degrade vegetative groundcover and soil substrates in areas that support foraging, breeding, and snake burrows or refuges, such as pinelands or successional hardwood hammocks. The combination of these impacts could cause eastern indigos to leave the area, abandon den sites, and miss foraging and mating opportunities.” FGMP at 360.
- “Given the snake’s large home range and need to disperse across a variety of habitat types to sustain viable populations, the eastern indigo is particularly vulnerable to habitat fragmentation and the resulting “edge effect” (Layne and Steiner 1996, Breininger et al. 2004). Unlike the no-action alternative, large habitat areas would become fragmented into smaller habitat “islands” by ORV trail corridors. This would result in diminished habitat value for the snake throughout the Addition. The effect of this habitat fragmentation would be long term, minor to moderate, adverse, and Addition-wide.” FGMP at 361.
- “Public hunting would also be allowed (walk-in or via ORV access), and this would have adverse impacts on eastern indigo habitat if the hunting frequently takes places in or near vegetation communities that are commonly occupied by the snake (e.g., pinelands, successional hardwood hammocks, and mangrove forests).” FGMP at 361.

Moreover, a recent dissertation by current USGS biologist Dr. James Waddle that studied ORV use on smaller animals within the original Preserve (amphibians) found a marked negative

impact to 75% of the species studied due to habitat fragmentation, vegetation disturbance, and altered hydrology. *See* Dr. James Waddle, Use of Amphibians as Ecosystem Indicator Species at 46-47, available at http://etd.fcla.edu/UF/UFE0016760/waddle_j.pdf. These are similar impacts to those expected by NPS to affect the eastern indigo snake here, and presumably the impacts in the Addition (where public ORV use did not previously exist) would be more deleterious to snakes and other small fauna than the adverse impacts observed in the original Preserve (where ORV use had long existed).

In sum, FWS's total disregard for NPS's reasonably certain expectation of at least moderate effects to the snake – and complete lack of meaningful analysis of the effects to this federally protected species – cannot be squared with the congressional mandate in section 7 of the Act. Accordingly, FWS's failure to evaluate the direct and indirect effects to the snake contravenes 50 C.F.R. § 402.14(g)(3), and is arbitrary and capricious.

2. Red-Cockaded Woodpecker

Similarly, the Opinion contains only a single paragraph about the endangered red-cockaded woodpecker, and concludes that “NPS determined the development and implementation of the FGMP is not likely to adversely affect the red-cockaded woodpecker . . . [and] [t]he Service concurs.” 2010 BiOp at 6. However, just as with the snake, NPS did *not* determine that the FGMP was unlikely to adversely affect the woodpecker – to the contrary, NPS expressly determined that “[t]he determination of effect under Section 7 of the Endangered Species Act would be *likely to adversely affect* [the red-cockaded woodpecker].” FGMP at 353.¹⁷

Once again, FWS's brief “analysis” and effects conclusion in the Opinion with respect to the woodpecker, *see* BiOp at 6, runs counter to the action agency's own biological determination that adverse impacts are likely:

- “At least one red-cockaded woodpecker colony lives in the Addition. Proposed actions, such as ORV use and other visitor use, could reduce the quality of habitat preferred by these species, directly disturb individual animals, or reduce foraging opportunities.” FGMP at 47.¹⁸

¹⁷ Climate change will likely drive red-cockaded woodpeckers currently on the southern edge of the Addition into the suitable habitat in the Addition. This must be factored into the analysis of effects of the FGMP on the woodpecker since a foreseeably larger concentration of woodpeckers in the Addition will necessarily implicate more regular and significant impacts to the species.

¹⁸ It should be noted that NPS contradicts itself in the FGMP, in some places mentioning an active woodpecker colony in the Addition and in others mentioning those colonies just south of the Addition. In any event, NPS determined that adverse effects were likely to result from the

- “Impacts on the potential habitat for and thus the red-cockaded woodpecker under [the FGMP] would be long term, minor to moderate, adverse, and mostly localized. The determination of effect under Section 7 of the Endangered Species Act would be *likely to adversely affect*. There would be a long-term, moderate, adverse cumulative impact on the potential habitat for and thus the red-cockaded woodpecker. The actions contained in alternative B would contribute a small increment to this cumulative impact.” FGMP at 141.
- “Lands in the Addition contain suitable habitat for the red-cockaded woodpecker.” FGMP at 185.
- “The [woodpecker] population in the Preserve is the southernmost and perhaps the largest in south Florida (NPS, 1981).” FGMP at 186.
- “Currently, there are between 70 and 80 active colonies [in the Preserve] (Schulze 2007). A sample of the known colony sites is monitored each year during the breeding season by NPS staff to determine the status of the colonies. There are no known colonies in the Addition, although red-cockaded woodpeckers have historically colonized the Addition. There are a few colonies near the southern boundary of the northeast Addition. The habitat in the Addition, especially in the Northeast Addition, is suitable for woodpeckers. Recent management activities in this area have improved the quality of woodpecker habitat. These areas could be recolonized by the redcockaded woodpecker in the future.” FGMP at 186.
- “Adverse impacts on woodpeckers from ORV use would include their displacement and avoidance of certain areas within the Addition. . . .The impacts would be long term, minor to moderate, adverse, and localized.” FGMP at 353.

In light of these concerns raised by NPS, and in conjunction with the environmental baseline of climate change that will almost certainly drive woodpecker colonies in the Preserve farther north into suitable habitat in the Addition, FWS’s failure to meaningfully evaluate the impacts to this species violates the agency’s statutory and regulatory obligations, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(3), and is arbitrary and capricious.¹⁹

FGMP. *See* FGMP at 47; *but see id.* at 186.

¹⁹ Like the eastern indigo snake and the red-cockaded woodpecker, FWS erroneously stated that NPS had determined a non-likelihood of adverse effect to the Everglade snail kite, *see* 2010 BiOp at 5. However, yet again, NPS *did* in fact conclude that adverse effects were likely. FGMP at 358 (“Impacts on the snail kite under the preferred alternative would be long term, minor to moderate, adverse, and mostly localized. The determination of effect under Section 7 of the Endangered Species Act would be *likely to adversely affect*.”). Thus, this failure to evaluate direct and indirect effects for this species also violates 50 C.F.R. § 402.14(g)(3).

C. Because of Various Legal Deficiencies with FWS's Biological Opinion, NPS Cannot Lawfully Proceed with Implementation the FGMP Or Engage in or Authorize Related Construction Activities.

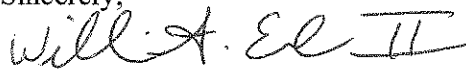
The Biological Opinion violates various provisions of the ESA and the Act's implementing regulations, and is arbitrary and capricious for the reasons explained above. Moreover, the Opinion fails to state a rational connection between the non-jeopardy conclusion and the biological information available in the Opinion. Accordingly, since the Opinion is legally impermissible, NPS may not lawfully rely on that Opinion, and thus none of the activities purportedly authorized by the FGMP (e.g., ORV trail construction, hunting, construction of access points, etc.) can be implemented by NPS or other agencies without violating the ESA. Indeed, by proceeding with such activities, NPS would not only violate section 9 by initiating conduct reasonably likely to take panthers without lawful authorization from FWS to do so, 16 U.S.C. § 1538(a)(1)(B), but NPS would also violate section 7(d) of the Act by committing irretrievable commitments of resources that would severely circumscribe alternatives to NPS's preferred action in its FGMP. *Id.* § 1536(d).

CONCLUSION

As described above, the November 17, 2010 Biological Opinion cannot pass the statutory and regulatory muster of the ESA, and thus cannot be relied upon by NPS in its current form. Therefore, we urge FWS to retract the Opinion and to conduct a legally permissible re-analysis of the FGMP and its impact on listed species; in the interim, NPS should not commit any resources to implementing the FGMP.

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 highly imperilled Florida panther and other listed species in accordance with the requirements of the ESA.

Sincerely,



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