

January 25, 2023

Via Email

Michael Regan, Administrator
Environmental Protection Agency
regan.michael@epa.gov

**Re: Formal Request for EPA to Exercise its Clean Water Act Section 404(c)
Authority to Restrict Specification of Waters of the United States as Disposal
Sites within Big Cypress National Preserve in Florida**

Dear Administrator Regan,

Thank you for your lifelong dedication and commitment to public service to protect, restore, and enhance the natural and built environments throughout the United States.

I am writing on behalf of National Parks Conservation Association (“NPCA”), which is the only conservation organization focused solely on protecting the National Park System. Founded in 1919, NPCA is a 501(c)(3) non-partisan, non-profit organization that works to preserve America’s national parks for current and future generations. Through more than a century of stewardship, science-based advocacy, education, and outreach, NPCA has established itself as a leader in national park conservation and as an expert in the application of laws that ensure long-term conservation of national park units. Given NPCA’s significant expertise in national park matters, NPCA often collaborates closely with federal and state agencies to ensure that all necessary steps are taken to promote the best stewardship for America’s national parks.

In that spirit, NPCA petitions the Environmental Protection Agency (“EPA”), pursuant to 5 U.S.C. § 553(e), to exercise its Section 404(c) authority pursuant to the Clean Water Act (“CWA”), 33 U.S.C § 1344(c), by restricting future specification of waters of the United States within Big Cypress National Preserve (the “Preserve”) as disposal sites for the purpose of any activities associated with exploration for, or extraction of, oil or gas.

After nearly fifty years as a national park unit (and as the nation’s first national preserve), it has become clear that the Preserve plays a vital role in the long-term integrity of the unique hydrologic system and wildlife habitat essential to a healthy Greater Everglades Ecosystem. Yet the Preserve’s fragile waters, protected and endemic wildlife species, and sensitive habitats and soils are especially susceptible to human disturbance and can take decades, if ever, to recover from even relatively minor anthropogenic damage.

For this reason and as explained below, it is imperative that EPA act promptly to exercise its Section 404(c) authority to restrict the issuance of future Section 404 permits within the Preserve’s borders in connection with oil and gas exploration and extraction activities—together among the most detrimental and damaging undertakings facing the Preserve. While NPCA

would support a total prohibition against specification of waters of the United States as disposal sites in the Preserve (thus prohibiting the issuance of Section 404 permits for any damaging activity in the Preserve), NPCA is making a more modest request by asking EPA only to restrict specification of waters of the United States as disposal sites in the Preserve *for the purpose of oil and gas exploration or extraction activities*. Based on current scientific evidence, NPCA views this narrower, activity-tailored restriction as the least burdensome outcome required to ensure that “the discharge of . . . materials into” the Preserve’s waters will not “have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” 33 U.S.C § 1344(c).

BACKGROUND

For purposes of this request, we assume EPA’s familiarity with the legal and regulatory framework undergirding the CWA (and Section 404(c) in particular), as well as the agency’s history of exercising its Section 404(c) authority. Nonetheless, we provide a brief background discussion of the relevant laws and facts pertaining to this request.

Legal Framework

In 1972, Congress enacted the modern Clean Water Act. *See* 33 U.S.C. §§ 1251–1389. Section 404 of the CWA, *id.* § 1344, governs permits for discharges of dredged or fill material into waters of the United States. Section 404(a) allows the U.S. Army Corps of Engineers (“Corps”) to issue permits authorizing an applicant to discharge fill into specified disposal sites. *Id.* § 1344(a). Section 404(b) provides the substantive environmental criteria that the Corps must use to evaluate permit applications. *Id.* § 1344(b). EPA may transfer this permitting authority to a State under certain circumstances. *Id.* § 1344(g), (h) (authorizing EPA, upon request by a State, to transfer the Corps’ Section 404 responsibilities to a State when certain criteria are satisfied).

Section 404(c) confers on EPA the exclusive authority to prohibit, restrict, or withdraw the specification of any area as a disposal site by the Corps or an approved State in its administration of the Section 404 program. *Id.* § 1344(c). Specifically,

The Administrator [of EPA] is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the [Corps]. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

Id. § 1344(c). Thus, Section 404 divides authority between the Corps (or approved States) and EPA. The Corps and approved States may specify disposal sites in Section 404 permits, but those

specifications are subject to preemptive prohibition or restriction, as well as subsequent withdrawal, if EPA determines that discharging fill into those sites “will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” *Id.*¹

In 1979, EPA promulgated regulations interpreting its authority under Section 404(c) and creating a process for exercising that authority. *See* 40 C.F.R. Part 231. Those regulations explain that EPA “may exercise a veto over the specification by the [Corps] or by a state of a site for the discharge of dredged or fill material.” *Id.* § 231.1(a). EPA “may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state.” *Id.* EPA clarified that it is “authorized to prohibit or otherwise restrict a site whenever [EPA] determines that the discharge of dredged or fill material is having or will have an ‘unacceptable adverse effect’ on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” *Id.* Highlighting the breadth of the agency’s Section 404(c) authority, EPA stated that “[t]he regulations set forth in this part are applicable whenever [EPA] is considering whether the specification of any defined area as a disposal site should be prohibited, denied, restricted, or withdrawn”; “[t]hese regulations apply to all existing, proposed or potential disposal sites for discharges of dredged or fill material into waters of the United States, as defined in 40 C.F.R. § 230.2.” *Id.* § 231.1(c).

In these regulations, EPA defined ‘unacceptable adverse effect’—i.e., the legal threshold to support a decision under Section 404(c)—as an “impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas.” *Id.* § 231.2(e). “In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines,” *id.*, which are located at 40 C.F.R. Part 230. The Section 404(b)(1) Guidelines—which directly pertain to EPA’s determination of whether to exercise its Section 404(c) authority—identify myriad relevant resource considerations. *See* 40 C.F.R. §§ 230.10–.54 (authorizing consideration of physical and chemical changes in receiving waters, impacts to endangered or threatened species and wildlife habitat, effects to fish and aquatic organisms, impacts to wetlands, and loss of recreational values due to the degraded quality of the habitat).

EPA utilizes a formalized process for vetting and making determinations under Section 404(c). “Proposed determinations” originate with the Regional Administrator for EPA that oversees the relevant geographic area. *See id.* § 231.3. The issuance of a proposed determination commences a detailed public process on the proposal. *See id.* To ensure a transparent process,

¹ On December 22, 2020, EPA published notice of its approval of the State of Florida’s application to assume jurisdiction over the CWA’s Section 404 permitting program. *See* 85 Fed. Reg. 83,553 (Dec. 22, 2020). Therefore, the Florida Department of Environmental Protection (“FDEP”), not the Corps, is the entity that administers the Section 404 permitting process in Florida by, *inter alia*, specifying waters of the United States as disposal sites and deciding whether to issue Section 404 permits upon receiving permit applications.

EPA must solicit public comments on its proposal and may conduct a public hearing if it so desires. *See id.* § 231.4.

Next, the Regional Administrator must submit her “recommended determination” to the EPA Administrator (here, Administrator Regan), which must summarize “the unacceptable adverse effects that could occur from use of the disposal site for the proposed discharge,” and make “[r]ecommendations regarding a final determination to prohibit, deny, restrict, or withdraw, which shall confirm or modify the proposed determination, with a statement of reasons.” *Id.* § 231.5(d). After conferring with the Corps and/or an approved State that administers the Section 404 program, the EPA Administrator, as delegated to the Assistant Administrator in the Office of Water, makes “a final determination affirming, modifying, or rescinding the recommended determination.” *Id.* § 231.6.

Factual Background

A. History of Big Cypress National Preserve

In 1916, Congress enacted the National Park Service (“NPS”) Organic Act, 54 U.S.C. §§ 100101–104909, which governs NPS’s management actions within all national park units. Under the Organic Act, NPS is required to manage national park units “to conserve the scenery, natural and historic objects, and wild life . . . and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 U.S.C. § 100101(a). This overarching directive is referred to as the “non-impairment” mandate. NPS has promulgated management policies that interpret the agency’s legal duties and obligations in complying with the NPS Organic Act when managing national park units. *See* NPS, [Management Policies](#) (2006).

In 1974—two years after enacting the CWA—Congress established Big Cypress National Preserve as a national park unit managed by NPS. In its enabling legislation, Congress clarified that the Preserve’s paramount purpose was “to assure the preservation, conservation, and protection of the natural, scenic, hydrologic, floral and faunal, and recreational values of the Big Cypress Watershed in the State of Florida and to provide for the enhancement and public enjoyment thereof.” Pub. L. 93–440, 88 Stat. 1255, 1258 (Oct. 11, 1974) (codified at 16 U.S.C. §§ 698f–698m-4).

In 1988, Congress amended the enabling legislation for the Preserve, through the Big Cypress National Preserve Addition Act. *See* Pub. L. 100-301, 102 Stat. 443 (Apr. 29, 1988). The primary purpose of this amendment was to authorize NPS to obtain the property for an expansion of the Preserve (expanding the total acreage in the Preserve from its original 574,000 acres to 727,235 acres).

When Congress created the Preserve in 1974 and expanded it in 1988, “surface ownership within both areas was acquired by the U.S. government.” NPS, [Big Cypress National Preserve Geologic Resource Evaluation Report](#) (“*Geologic Resource Evaluation Report*”) (2008), 7. However, “[p]rivate entities or the State of Florida retained the subsurface mineral rights on these lands, with private entities retaining most (approximately 99%) of these rights.”

Id. Thus, “[t]he federal government does not own any of the subsurface oil and gas rights in the preserve, yet the NPS is required by its laws, policies, and regulations to protect the preserve from any actions, including oil and gas operations, that may adversely impact or impair park resources and values.” *Id.*

Since approximately 1996, NPS has managed the original Preserve and the addition lands as a single national park unit referred to herein as the “Preserve.”

B. The Preserve’s Sensitive Resources and the Vitally Important Ecosystem Services the Preserve Provides to the Greater Everglades Ecosystem

NPS “envisions the [P]reserve as a nationally significant ecological resource” and “a primitive area where ecological processes are restored and maintained and where cultural sites are protected from unlawful disturbance.” NPS, [*Big Cypress National Preserve General Management Plan and Final Environmental Impact Statement*](#) (1992), i, iii.

It would be difficult to overstate the importance of the Preserve to the Greater Everglades Ecosystem and the many wetlands and wildlife species that call this iconic national park unit home. The Preserve—which is a water-dependent ecosystem located in southwestern Florida that supplies freshwater to surrounding areas of the Everglades and the rich marine estuary system along Florida’s southwestern coast—“is a mosaic of extensive prairies and marshes, forested swamps, and shallow sloughs on exceptionally flat terrain.” *Def. of Wildlife v. Salazar*, 877 F. Supp. 2d 1271, 1279 (M.D. Fla. 2012). “The Preserve is an important watershed located upstream of Everglades National Park, and is an important and fragile area.” *Id.* “Due to soft soils and vegetation, the marshes and prairies are highly sensitive to [human] use, which can cause severe and irreparable damage to the Preserve’s ecosystems.” *Id.*

The Preserve “protects nine federally listed and 31 state listed animal species that are threatened and endangered or species of special concern, as well as two federally listed plant taxa, one federally listed plant species, and 120 state listed threatened and endangered plant species.” NPS, [*Big Cypress National Preserve Backcountry Access Plan / Wilderness Study / Supplemental Draft Environmental Impact Statement*](#) (Aug. 2022) (“2022 SDEIS”), 2. These unique and often-endemic species include the Florida black bear, Florida bonneted bat, Eastern indigo snake, wood stork, red-cockaded woodpecker, many species of wading birds, and imperiled plants like Everglades crabgrass, Everglades bully, and ghost orchid. In addition, “[t]he Preserve and nearby public land provide approximately half of the habitat for the Florida Panther (*Felis concolor coryi*), which was listed as an endangered species in 1967 and has remained on the Endangered Species List” as one of the nation’s most endangered mammals. *Def. of Wildlife*, 877 F. Supp. 2d at 1279–80 (citing 32 Fed. Reg. 4,001 (Mar. 11, 1967)). “There are currently approximately 80–100 adult and immature Florida panthers within the Preserve boundaries”—i.e., roughly half of the species’ remaining population. *Id.* at 1280.

As NPS has explained, “[w]ater is the unifying force of the [P]reserve, connecting its seven principal habitats,” and “[w]etlands compose approximately 85% of the [P]reserve.” NPS, [*2022 SDEIS*](#), 2 and 54. Roughly 85% of the land mass in the Preserve constitutes “waters of the United States” and is thus subject to the CWA’s jurisdiction. These important water resources in

the Preserve provide 42% of the water flowing into Everglades National Park and comprise a vast hydrologic network—among the least altered remaining in south Florida. See NPS, [Geologic Resource Evaluation Report](#), at 1. The Preserve serves as a significant aquifer recharge area; “[i]n the wet season, approximately 90% of the [P]reserve is inundated.” *Id.* at 6. “Water flows on the surface in marshes and sloughs and below ground through porous substrate in aquifers.” *Id.* “The environment at the preserve is dependent on the seasonal flow of non-polluted water across the landscape.” *Id.* NPS has issued a manual governing its management activities with respect to wetlands. See NPS, [Procedural Manual # 77-1: Wetland Protection](#) (June 2016) (“*Wetland Protection Manual*”).

In addition, NPS has determined that at least 343,624 acres—i.e., 47% of the Preserve—satisfy the Wilderness Act’s criteria as eligible Wilderness. 16 U.S.C. §§ 1131(c) (defining “Wilderness” as “affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable”; with “outstanding opportunities for solitude or a primitive and unconfined type of recreation”; of “at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition”; and containing “ecological, geological, or other features of scientific, educational, scenic, or historical value”). This means that these relatively pristine, quiet, and remote areas are integral to both recreational users and wildlife in the Preserve, and for these reasons the Wilderness Act allows NPS to propose to Congress the permanent protection of Wilderness-eligible areas for future generations. See *id.* §§ 1131–1136.

C. Current Threats Imperiling the Preserve’s Fragile Resources

One of the most damaging human activities in the Preserve is off-road vehicle (“ORV”) use. Despite NPS’s attempts to significantly curtail ORV use over the last two decades by restricting ORVs to a limited network of designated trails, “ORV use [in the Preserve] has caused and continues to cause major damage to the hydrology, water quality, and soils.” NPS, [Geologic Resource Evaluation Report](#), at 8. Indeed, “[e]xtensive areas of marl prairies within the [P]reserve are being irreparably rutted (Rice et al. 2003)”; “[b]y churning and burying the substrate, buggies and other ORVs destroy living algae (terraphytes) populations in the soils.” *Id.* “The entire ecosystem is based on these microorganisms, which lie dormant in dry conditions” and “[w]hen they are churned up and buried by passing ORVs, the landscape loses its capacity to support native vegetation.” *Id.*

In addition to suffering these substantial impacts from ORV use, areas of the Preserve have been indelibly harmed by the exploration for and extraction of oil and gas, which is at risk of greatly expanding in the future. NPS’s regulations provide that “operators exercising non-federal oil and gas rights within a System unit outside of Alaska [must] use technologically feasible, least damaging methods to . . . [p]rotect federally owned or administered lands, waters, or resources of System units; [p]rotect NPS visitor uses or experiences, or visitor or employee health and safety; and . . . [p]rotect park resources and values under the statute commonly known as the NPS Organic Act.” 36 C.F.R. § 9.30(a). As noted in the Big Cypress National Preserve Superintendent Compendium, “[o]il and gas operations” are “[p]rohibited unless authorized in writing by the Superintendent.” NPS, [Big Cypress Superintendent Compendium](#). Currently, the only active oil and gas extraction activities that have been allowed by NPS are limited to two

areas of the Preserve that have been in place since the 1970s; however, there have been recent renewed actions taken that would facilitate exponentially expanding the scale of both exploration and extraction of oil and gas in the Preserve.

To date, “[d]rilling and production activities in [the] Preserve have created a large environmental footprint in the form of roads, well pads, and production facilities.” NPS, [Geologic Resource Evaluation Report](#), at 8. These activities lead to severely “disturbed lands” in the Preserve, including “areas directly affected by oil and gas operations (pads and fields), borrow pits excavated for the construction of oil and gas pads, and roads built to access remote sites.” *Id.* at 10. NPS has explained that oil and gas “[a]ccess roads may pose the largest lasting threat to the hydrologic system at [the] Preserve because they interrupt water flow, introduce contaminants associated with motorized vehicles, and permit access to the heart of the [P]reserve.” *Id.*; *see also id.* at 1 (noting that oil and gas development “efforts pose a number of resource management issues, including increased access to the heart of the preserve, alterations and interruptions to the natural overland water flow, potential contamination of natural resources, and the presence of abandoned oil well pads and roads that require remediation”). Moreover, “[t]he pads and roads left behind when a well is plugged and abandoned leave a large scar on the landscape and affect the hydrologic system” in the Preserve. *Id.* at 8.

In addition, oil and gas exploration activities that occurred in 2017 and 2018—which used vibroseis trucks that are much larger and heavier than ORVs—have been demonstrated through independent scientific study to be extremely damaging to the Preserve’s fragile soils, wetlands, hydrologic sheet flow, wildlife, and habitat, often leading to adverse impacts that cannot be restored for decades, if ever. *See, e.g.*, Quest Ecology, [Technical Review of Wetlands, Wildlife, Vegetation, and Habitat Aspects of the Proposed Burnett Oil Company Nobles Grade 3-D Seismic Survey](#) (Apr. 2016); Quest Ecology, [Phase I Seismic Survey Inspection Report](#) (May 2018); Quest Ecology, [Preliminary Evaluation of Potential Effects of Seismic Surveying for Oil and Gas in and near the Big Cypress National Preserve on the Florida Panther](#) (Oct. 2018); Quest Ecology, [Seismic Survey Inspection Report](#) (June 2019); Quest Ecology, [Summary of March 6, 2020 Site Assessment](#) (Mar. 2020).

Moreover, it is well-established, including through a detailed science panel review resulting in an extensive independent report, that oil and gas exploration and extraction activities cause highly devastating harm to soils, flora, fauna, wetlands, and other resources that are essential to the Preserve’s long-term health and viability. *See* Davis, et al., [Oil and Gas Impacts in the Big Cypress Ecosystem: Analysis of Impacts Associated with Proposed Activities in the Nobles Grade Area](#) (2010); *see also* PSE Health Energy, [Review of Proposed Class II Disposal Wells and Operations Permit Applications in Big Cypress National Preserve](#) (Jan. 2022) (concluding that proposed oil and gas extraction would contaminate soil, wetlands, surface water, and groundwater in the Preserve).

In addition, oil and gas extraction activities use immense amounts of groundwater from underground aquifers (such as the Lower Hawthorn Aquifer) that would otherwise be safeguarded as municipal water supplies for future use in nearby municipalities including Lee and Collier Counties. *See, e.g.*, NRDC, et al., [Letter Re: Burnett Oil Company, Inc.’s Water Use Permit Application Nos. 210420-2 and 210420-3](#) (May 2021), 2 (estimating that a single

permitted oil and gas operation would use a “minimum level of approximately 60 million gallons per month” from “the Lower Hawthorn aquifer,” which “is comparable to the impact of a new development supporting approximately 10,000 families”).²

Despite the severe, irreparable damage that results from oil and gas exploration and extraction activities in the Preserve, a mineral extraction company is actively seeking authorization from NPS (under its regulations governing mineral extraction pursuant to non-federal mineral rights in national park units) and is planning to re-submit a permit application for authorization from FDEP (pursuant to Section 404 of the CWA) to engage in widespread activities related to oil and gas development in the Preserve. NPCA and other organizations have notified EPA of this proposal before. *See, e.g.,* Ctr. for Biological Diversity, et al., [Letter Requesting that EPA Object to Burnett Oil Company, Inc.’s Section 404 Clean Water Act Permit Applications](#) (May 2021).³

Balanced against the irreversible damage that oil and gas activities cause to this unique ecosystem is the fact that the oil and gas resources underlying the Preserve are not particularly valuable from a financial standpoint either for developers or for Florida’s economy, as discussed in more detail below. *See, e.g.,* Synapse Energy Economics, Inc., [Why Drill for Oil in Florida: Tiny Industry; Huge Risks](#) (Nov. 2018); Conservation Economics Institute, [The Economics of Oil Development in the Everglades: Bad Business, Huge Risks](#) (Jan. 2022). In addition, injecting new oil and gas extraction activities into the Preserve would undermine the substantial economic investments being made by the federal government and the State of Florida to restore the water and wetlands of the Everglades from harms caused by human activities and industrial development, including mineral extraction. *See, e.g.,* NPS, [Comprehensive Everglades Restoration Plan](#) (explaining the “more than \$10.5 billion” that is being spent on “the largest hydrologic restoration project ever undertaken in the United States”); Everglades Restoration, <https://www.evergladesrestoration.gov/>. Accordingly, the intrinsic, long-term ecological value of the Preserve greatly outweighs any limited, short-term economic benefits associated with oil and gas development in the Preserve.

² Further compounding the harm these activities cause in the Preserve is the fact that companies seeking to extract oil and gas often self-servingly fail to utilize rigorous monitoring protocols and/or significantly underreport the actual effects to the Preserve’s sensitive soils, wetlands, and wildlife. *See, e.g.,* Quest Ecology, [Comments on Turrell, Hall and Associates, Inc.’s 2019 Reclamation Monitoring Report](#) (Jan. 2020); Quest Ecology, [Comments on Turrell, Hall and Associates, Inc.’s 2020 Reclamation Monitoring Report](#) (Dec. 2020); Quest Ecology, [Review of Turrell, Hall and Associates, Inc.’s Nobles Grade Seismic Exploration Impacts and Mitigation Summary Report](#) (Aug. 2021).

³ Although NPS issued previous exploration authorizations to Burnett Oil Company, Inc. starting in 2016, neither NPS nor FDEP (nor the Corps) has since issued any permits to Burnett or other companies for new oil and gas extraction activities in the Preserve. To NPCA’s knowledge, there is currently one pending application before NPS, although it is expected that Burnett will resubmit its 404 permit applications to FDEP in the near future.

DISCUSSION

The Preserve is at critically important crossroads that will decide the fate not only of the Preserve itself but also the long-term ecological health and integrity of the Greater Everglades Ecosystem in south Florida. Either the federal government (along with FDEP) will open the Preserve to widespread oil and gas exploration and extraction activities resulting in irreparable damage to myriad fragile and sensitive resources, or EPA will take immediate action necessary to prevent this outcome that by any objective metric would result in “an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” 33 U.S.C § 1344(c). Accordingly, in light of the high stakes involved, it is imperative that EPA promptly commence the Section 404(c) process to restrict future specification of waters of the United States in the Preserve as disposal sites in connection with oil and gas exploration and extraction activities, and expeditiously complete that process by exercising EPA’s Section 404(c) authority to provide much-needed protections to the lifeblood of the entire southern Florida ecosystem.⁴

NPCA offers this letter in support of EPA initiating a process, which, if this formal petition is granted, will be followed by a public process and additional, extensive legal and scientific review. NPCA believes the results of this review will compel the conclusion that EPA should exercise its Section 404(c) authority. Prior to that process’s conclusion, however, for even the brief reasons explained below, it is clear that this is precisely the type of situation Congress contemplated when conferring this important backstop authority to EPA in order to protect our nation’s special aquatic-based places for future generations. Put simply, the law, facts, and science individually and collectively counsel in favor of the requested disposal site restriction in the Preserve under Section 404(c).

First, the statutory criteria are amply satisfied for restricting the future specification of disposal sites in wetlands of the Preserve for discharge related to oil and gas exploration and extraction activities. As has been well-established by surveys and research on the effects of existing oil extraction and prior oil exploration activities, even with the implementation of best management practices and attempted minimization and mitigation efforts, these activities are highly detrimental to the Preserve’s sensitive soils, wetlands, hydrologic processes, wildlife, wildlife habitat, and microorganisms. *See supra* at 6–8. In particular, these activities have

⁴ That there is no pending Section 404 permit application does not diminish EPA’s authority to restrict the specification of disposal sites under Section 404(c). *See, e.g.*, 33 U.S.C. § 1344(c) (authorizing EPA “to prohibit [or restrict] the specification . . . of any defined area as a disposal site, . . . whenever [EPA] determines” that the statutory requirement of “an unacceptable adverse effect” is satisfied (emphasis added)); 40 C.F.R. § 231.1(a) (noting that EPA may exercise this authority “with regard to any existing or potential disposal site *before a permit application has been submitted to or approved by the Corps or a state*” (emphasis added)); EPA, Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 58,076, 58,076 (Oct. 9, 1979) (“[S]ection 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued”; “[i]n each case, the Administrator may prevent any defined area in waters of the United States from being specified as a disposal site, or may simply prevent the discharge of any specific dredge or fill material into a specified area.”).

devastating, long-term effects on many endangered and threatened species and their essential habitat in the Preserve, and they also significantly disrupt and impede the hydrologic sheet flow that is crucial to the high-functioning integrity and health of the Greater Everglades Ecosystem.

In addition, oil and gas extraction is extremely water-intensive and thus threatens to permanently remove tens of millions of gallons monthly from the Lower Hawthorn Aquifer underneath the Preserve. Such activities also present a serious contamination risk to the aquifer's groundwater supplies with toxic chemicals and byproducts of the extraction process and contaminants from motorized vehicles associated with oil and gas exploration, thus raising serious concerns about both the quantity and quality of public drinking water supplies in the region over the next fifty years. *See supra* at 7–8.

Moreover, these activities fundamentally alter and destroy the setting, feel, and character of remote portions of the Preserve, introducing noise, noticeable human imprints, and major disturbances associated with such activities that undermine the solitude, character, and other recreational factors that led NPS to find many of these remote areas Wilderness-eligible in the agency's formal wilderness surveys. *See supra* at 6. In this way, the expansion of oil and gas development activities threatens to destroy the character of lands already deemed Wilderness-eligible, including lands that NPS has demonstrated its intent to propose to Congress for permanent protection as Wilderness Areas.

For all of these reasons, it would be difficult to imagine a more appropriate and reasonable exercise of EPA's Section 404(c) authority than the Preserve, where it is crystal clear that future oil and gas exploration and extraction activities will result in "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C § 1344(c).⁵

Second, although the statutory criteria alone establish that EPA may (and should) exercise its Section 404(c) authority in this instance, this fact is further bolstered by the Section 404(b)(1) Guidelines that EPA may take into account in deciding whether to exercise its Section 404(c) authority. *See* 40 C.F.R. § 231.2(e) ("In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines," which are located at 40 C.F.R. Part 230). Indeed, EPA routinely considers the Section 404(b)(1) Guidelines in determining whether the effects of an action will be unacceptably adverse. *See* EPA, [*Final Determination for the Jack Maybank Site*](#) (Apr. 1985), 19 ("[T]he 404(c) regulations indicate that I should give consideration to relevant portions of the Section 404(b)(1) Guidelines in assessing what is an unacceptable adverse effect including . . . a determination of what constitutes significant degradation as described at 230.10(c)," which "include[s] consideration of impacts on life stages of aquatic life and other wildlife dependent upon aquatic ecosystems,

⁵ While NPCA has serious concerns about the irreparable harm that *existing* oil and gas extraction activities have caused and continue to cause in the Preserve, we are recommending only a *proactive* restriction (rather than a retroactive withdrawal) under Section 404(c) because we view that as the best balance of the relevant environmental and other considerations involved, especially as the existing decades-old facilities near the end of their useful lifespans.

effects on ecosystem diversity, productivity and stability, including loss of habitat, or loss of the capacity of a wetland to purify water, and impacts on recreational and aesthetic values.”).

Many factors in the Section 404(b)(1) Guidelines underscore the need for EPA to exercise its Section 404(c) authority here. For example, the Guidelines identify examples of the types of effects that constitute significant degradation under the CWA, each of which aligns to precisely the types of impacts that oil and gas exploration and extraction cause in the Preserve:

- Under 40 C.F.R. § 230.10(c)(1), it is unassailable that oil and gas exploration and extraction activities in the Preserve will cause “[s]ignificantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.” Special aquatic sites, which include most of the Preserve that is inundated during the wet season, are further defined as “geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values”; “[t]hese areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.” 40 C.F.R. § 230.3(m); *see also id.* § 230.41, .43 (further defining “special aquatic sites” to include “wetlands” and “vegetated shallows”).
- Under 40 C.F.R. § 230.10(c)(2), routine oil and gas exploration and extraction activities in the Preserve (apart from the potential for spills) will almost certainly cause “[s]ignificantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal through biological, physical, and chemical processes.”⁶
- Under 40 C.F.R. § 230.10(c)(3), these activities in the Preserve are virtually certain to cause “[s]ignificantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability”; “[s]uch effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy.”

⁶ In exercising its Section 404(c) authority, EPA may consider the foreseeable “downstream” effects of discharges outside the defined area of a proposed prohibition, restriction, or withdrawal, including areas that are not under the CWA’s jurisdiction. *See Mingo Logan Coal Co. v. Env’tl. Prot. Agency*, 829 F.3d 710, 725 (D.C. Cir. 2016) (“We have little trouble concluding that, as part of the EPA’s overall authority, section 404(c) authorizes [the agency] to assess the effects of the fill beyond the fill’s footprint and that nothing in the statute prohibits water quality from being part of that assessment.”).

- Under 40 C.F.R. § 230.10(c)(4), it is beyond dispute that oil and gas exploration and extraction activities in the Preserve will result in “[s]ignificantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.”
- Under 40 C.F.R. §§ 230.20–.54, oil and gas exploration and extraction activities in the Preserve can be reasonably expected to result in serious impacts that are the very same as the examples enumerated under the Section 404(b)(1) Guidelines, including effects to the substrate, suspended particulates and turbidity, hydrologic modifications, alterations of natural water fluctuations, endangered and threatened species, wildlife habitat, aquatic organisms, stability of the aquatic food chain, resident and transient birds and other animals, municipal and private water supplies, water-related recreation, aesthetics, and Wilderness Areas and Wilderness-eligible lands.

In sum, in addition to satisfying the statutory criteria, future oil and gas exploration and extraction activities significantly implicate nearly *every* representative concern identified in the Section 404(b)(1) Guidelines, which guide EPA’s exercise of its Section 404(c) authority in evaluating whether there will be an “unacceptable adverse effect.”

Third, the importance of EPA exercising its Section 404(c) authority to protect the Preserve’s iconic natural resources from irreversible damage due to oil and gas exploration and extraction activities is reinforced by the unique legal and regulatory framework that applies in this instance because Congress already decided long ago that the Preserve’s resources warrant long-term protection as a national park unit. *See supra* at 4–5. Because these are Congressionally protected public lands administered by NPS, several important laws and policies overlay the Preserve that, in contrast to private lands, strongly support utilizing Section 404(c) to protect this national park unit and its sensitive natural resources from future degradation.

To begin with, the NPS Organic Act requires the federal government to manage the park in a manner that will “conserve the scenery, natural and historic objects, and wild life . . . and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 U.S.C. § 100101(a). This non-impairment mandate can be best achieved in the Preserve in the absence of future oil and gas exploration and extraction activities, which EPA can accomplish through the prompt exercise of its Section 404(c) authority.

Such exercise of EPA’s authority will also promote and ensure the federal government’s compliance with NPS’s management policies that apply to all national park units, including the Preserve. For example, those policies require the government to:

- “preserv[e] and restor[e] the natural abundances, diversities, dynamics, distributions, habitats, and behaviors of native plant and animal populations and

- the communities and ecosystems in which they occur”; and “minimize[e] human impacts on native plants, animals, populations, communities, and ecosystems, and the processes that sustain them,” NPS, [Management Policies](#), § 4.4.1;
- “prevent the introduction of exotic species into units of the national park system,” *id.* § 4.4.1.1;
 - “perpetuate surface waters and groundwaters as integral components of park aquatic and terrestrial ecosystems,” *id.* § 4.6.1;
 - “take all necessary actions to maintain or restore the quality of surface waters and groundwaters within the parks consistent with the Clean Water Act and all other applicable federal, state, and local laws and regulations;” *id.* § 4.6.3;
 - “prevent the destruction, loss, or degradation of wetlands;” “preserve and enhance the natural and beneficial values of wetlands;” and “avoid direct and indirect support of new construction in wetlands,” *id.* § 4.6.5;
 - “prevent or minimize all noise that through frequency, magnitude, or duration adversely affects the natural soundscape or other park resources or values,” *id.* § 4.9;
 - “administer th[e] use [of motorized equipment] to be compatible with the purpose, character, and resource values of the particular wilderness area involved,” *id.* § 6.4.3.3;
 - “seek to remove or extinguish valid mining claims and nonfederal mineral interests in wilderness through authorized processes,” *id.* § 6.4.9;
 - “protect public health and safety;” “prevent unacceptable impacts to park resources or values;” and “minimize visitor use conflicts,” *id.* § 8.2.

Additionally, EPA’s exercise of its Section 404(c) authority will harmonize the federal government’s duty to protect wetlands, as set forth in Executive Order 11990 and NPS’s Wetland Protection Manual. The former requires all federal agencies “to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands.” Exec. Order 11990, *Protection of Wetlands*, 42 Fed. Reg. 26,961 (May 25, 1977). To achieve this directive, “each agency shall consider factors relevant to a proposal’s effect on the survival and quality of the wetlands,” such as “public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion;” “maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife,

timber, and food and fiber resources”; and “other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.” *Id.* at 26,963.

The latter explains that “[f]or proposed new development or other new activities, plans, or programs that are either located in or otherwise have the potential for direct or indirect adverse impacts on wetlands, the NPS will employ a sequence of [first] avoiding adverse wetland impacts to the extent practicable.” NPS, [Wetland Protection Manual](#), § 2.4. In addition, NPS explains that “[w]here appropriate and practicable, the NPS will not simply protect, but will seek to enhance natural wetland values by using them for educational, recreational, scientific, and similar purposes that do not disrupt natural wetland functions.” *Id.* § 2.8. NPS notes that “the Section 404 permit program regulates only the discharge of dredged or fill material, while Executive Order 11990 covers a much broader range of actions that can have adverse impacts on wetlands, including groundwater withdrawals, water diversions, nutrient enrichment, and other examples,” so “a broader range of shallow aquatic habitat types fall under these NPS procedures.” *Id.* § 3.2. NPS’s policy obligates the agency to evaluate the following factors in examining potential adverse impacts on wetlands: biotic functions, hydrologic functions, cultural values, research and scientific values, and effects to fisheries or tourism. *Id.* § 5.3.3.

Accordingly, EPA’s exercise of its Section 404(c) authority to ensure long-term conservation of the Preserve and its resources will reconcile the purposes underlying the Clean Water Act with the laws and directives that apply to the Preserve through the NPS Organic Act, NPS Management Policies, Executive Order 11990, and NPS’s Wetland Protection Manual. In this way, EPA has a unique opportunity to preserve these federally protected public lands unimpaired for future generations, consistent with Congress’s intent in enacting the laws that apply to the fragile resources of the Preserve.

Fourth, EPA’s exercise of its Section 404(c) authority is fully consistent with the agency’s prior practice in exercising this authority. For instance, in 1988, EPA exercised its Section 404(c) authority over rockplowing in 432 acres of privately owned wetlands near the East Everglades expansion area. *See* EPA, [Final Determination for Rockplowing in East Everglades](#) (June 15, 1988). Although that action involved only a fraction of the wetlands contained in the Preserve, EPA determined that “rockplowing the wetland sites at issue will result in the loss of habitat that is very important to the wildlife of the Everglades National Park - East Everglades wetlands ecosystem.” *Id.* at 1. “This conclusion, cabined with the cumulative losses of East Everglades wetlands leads me to my determination that the discharge of fill material, as a result of rockplowing [these] sites, will result in unacceptable adverse effects to wildlife.” *Id.*

In reaching this conclusion, EPA provided extensive support for the importance of wetlands in south Florida, including for hydrology, fish and wildlife habitat, food chain production, groundwater recharge, water storage, and biological and geochemical nutrient and pollutant uptake. *Id.* at 8–18. Ultimately, EPA concluded that “there have been significant cumulative losses of East Everglades prairie wetlands and that these losses have been linked to the decline of some species in this region and that rockplowing these three sites would aggravate the effect of these losses.” *Id.* at 22. On that basis, EPA

determined that, “considering site specific and cumulative impacts, rockplowing these wetland sites will result in unacceptable adverse effects to wildlife for the purposes of Section 404(c) of the CWA.” *Id.*

By comparison, if destroying 432 acres of functioning wetlands in this region results in an “unacceptable adverse effect” sufficient for EPA to exercise its Section 404(c) authority, surely the decades-long destruction and impairment of potentially *hundreds of thousands of acres of wetlands* in the Preserve that could result from the expansion of oil and gas exploration and extraction activities in the absence of EPA’s exercise of its Section 404(c) authority constitute an unacceptable adverse effect warranting the same substantive outcome. Indeed, because of the magnitude of wetlands in the Preserve—and the special importance of these wetlands for aquatic-dependent species, other wildlife, groundwater recharge, drinking water supplies, recreational users, and hydrologic processes necessary to sustain the Greater Everglades Ecosystem—the need for EPA’s exercise of its Section 404(c) is far more important here than the situation in which EPA already exercised this authority in the same region.

Likewise, there is ample authority for EPA to exercise its Section 404(c) authority to prohibit, restrict, or withdraw specification as disposal sites large wetland complexes across broad swaths of land. For example, in 2008, EPA exercised this authority to prohibit seasonal inundation of 67,000 acres of wetlands within a larger complex of land involving 630,000 total acres, through a series of proposed water pumps in the Yazoo Backwater Area. See EPA, [*Final Determination for Yazoo Backwater Area Pumps Project*](#) (Aug. 31, 2008). There, EPA noted that “[e]xtensive information collected on the Yazoo Backwater Area demonstrates that it includes some of the richest wetland and aquatic resources in the Nation” including “a highly productive floodplain fishery, substantial tracts of highly productive bottomland hardwood forests that once dominated the Lower Mississippi River Alluvial Valley, and important migratory bird foraging grounds.” *Id.* Similarly, EPA found that “[t]hese wetlands provide important habitat for an extensive variety of wetland dependent animal and plant species, including the federally protected Louisiana black bear and pondberry plant”; “[i]n addition to serving as critical fish and wildlife habitat, project area wetlands also provide a suite of other important ecological functions” such as “protect[ing] and improv[ing] water quality by removing and retaining pollutants, temporarily stor[ing] surface water, maintain[ing] stream flows, and support[ing] aquatic food webs by processing and exporting significant amounts of organic carbon.” *Id.* EPA ultimately concluded:

The construction and operation of the proposed pumps would dramatically alter the timing, and reduce the spatial extent, depth, frequency, and duration of time that wetlands within the project area are inundated. After extensive evaluation of the record for this project, EPA has determined that these large-scale hydrologic alterations would significantly degrade the critical ecological functions provided by approximately 67,000 acres of wetlands in the Yazoo Backwater Area, including those functions that support wildlife and fisheries resources.

Id. Federal courts ultimately upheld EPA’s decision to exercise its Section 404(c) authority in this manner. *See generally Bd. of Miss. Levee Comm’n v. Env’tl. Prot. Agency*, 674 F.3d 409 (5th Cir. 2012). This example provides the perfect blueprint for EPA to exercise its Section 404(c) authority to protect the ecologically critical wetland complex and hydrologic system in the Preserve for future generations.

Fifth, consistent with court decisions interpreting Section 404(c) and EPA’s regulations, NPCA does not view costs or other non-environmental considerations as relevant factors to EPA’s determination of “unacceptable adverse effect[s].” *See Creppel v. U.S. Army Corps of Eng’rs*, No. 77-cv-25, 1988 WL 70103, at *7 (E.D. La. June 29, 1988) (holding that “[t]he plain language of section 404(c) does *not* require a balancing of environmental concerns against ‘the public interest,’” which is supported by legislative history); *James City Cnty. v. Env’tl. Prot. Agency*, 12 F.3d 1330, 1335–36 (4th Cir. 1993), *cert. denied*, 513 U.S. 823 (1994) (holding that EPA’s “authority to veto to protect the environment is practically unadorned,” and “[t]his broad grant of power to the EPA focuses only on the agency’s assigned function of assuring pure water and is consistent with the missions assigned to it throughout the [CWA],” thus negating any need to consider non-environmental factors in making an unacceptability determination); 44 Fed. Reg. at 58,078 ((rejecting commenters’ requests to require a “cost/benefit analysis” for unacceptability determinations, reviewing Section 404(c) and its legislative history, and concluding that “there is no requirement in 404(c) that a cost/benefit analysis be performed, and there is no suggestion in the legislative history that the word ‘unacceptable’ implies such a balancing”).⁷

In any event, even if costs were a relevant consideration, they could not outweigh the grave long-term risks posed to the Preserve’s resources if EPA fails to exercise its Section 404(c) authority. On the one hand, the Preserve supplies vital waters within the heart of the Greater Everglades Ecosystem and provides invaluable ecological services to the soils, wetlands, hydrologic processes, microorganisms, wildlife, drinking water supplies, and recreational users in the Preserve and downstream of it. Indeed, as the Supreme Court explained in the landmark Tellico Dam case regarding ESA-listed wildlife species, Congress has already determined that the “value” of endangered and threatened species is “incalculable,” thus making it impossible for courts or agencies “to balance the loss of a sum certain—even \$100 million—against a congressionally declared incalculable value.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187–88 (1978) (quotation marks and citation omitted). This value is all the more incalculable where this special Preserve provides shelter to, and promotes the survival and recovery of, at least nine ESA-listed wildlife species, in addition to dozens of State-protected animal and plant species.

On the other hand, oil and gas resources in the Preserve are neither particularly profitable nor expected to realistically contribute significantly to job creation or economic stimulation in the region. *See, e.g.*, Conservation Economics Institute, [*The Economics of Oil Development in*](#)

⁷ One court suggested in the context of EPA *withdrawing* an existing specification of an area as a disposal site—which NPCA does not request here—that EPA might need to consider the costs of exercising its Section 404(c) authority. *See Mingo Logan*, 829 F.3d at 730 (avoiding “precisely what the EPA may and must consider in making a post-permit withdrawal decision,” but acknowledging that EPA may not be “generally exempt from considering costs in evaluating whether to withdraw a previously approved disposal site under section 404(c)”).

the Everglades: Bad Business, Huge Risks. In fact, it is predictable that extensive oil and gas operations in the Preserve would actually result in substantially *decreased* revenue and jobs in the tourism industry, which is a much more robust economic driver in south Florida than oil and gas development. *See id.* at 1–2, 9–10. This independent report emphasizes that “drilling for oil in Florida (and Big Cypress) makes little economic sense” and “allowing new oil development in Big Cypress would also counter existing federal policy for the largescale restoration of the Everglades and national goals of reducing greenhouse gas emission[s].” *Id.* at 16. Moreover, the limited economic value of oil and gas resources in the Preserve is dwarfed by the billions of dollars of intensive Everglades ecosystem restoration efforts being undertaken by the federal government and the State of Florida, which would be severely undermined by expanded oil and gas extraction in the Preserve and its associated detrimental impacts to the Preserve’s wetlands and waters.

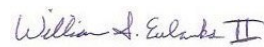
Accordingly, even if economic considerations were relevant to EPA’s determination of unacceptable adverse effects under Section 404(c)—and they are not—there is no scenario in which the modest (if any) short-term economic benefits of exploring and extracting oil and gas in the Preserve would outweigh the permanent, irreversible damage those activities would inflict to hydrologic, wetland, drinking water, wildlife, recreational, wilderness, and other resources of immeasurable value to American society.

CONCLUSION

NPCA respectfully urges EPA to take swift action to immediately commence a Section 404(c) process for Big Cypress National Preserve, consistent with EPA’s statutory and regulatory authority under the CWA. And because it is the only justifiable outcome of that process, NPCA respectfully requests that EPA exercise its Section 404(c) authority to restrict specification of waters of the United States within the Preserve as disposal sites in connection with oil and gas exploration and extraction activities, in order to prevent unacceptable adverse effects to the Preserve’s many resources that are critical to the long-term health, integrity, and sustainability of the Greater Everglades Ecosystem.

We look forward to collaborating with EPA on this extremely important process to permanently conserve one of our nation’s hydrologic and biodiversity treasures. Thank you in advance for your consideration of and swift action in response to this important, historic request to safeguard the waters of our country’s first national preserve.

Respectfully submitted,



William S. Eubanks II
Owner & Managing Attorney
EUBANKS & ASSOCIATES, PLLC

Counsel for NPCA