

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

April 15 , 2020

Colonel Andrew D. Kelly, Jr.
District Commander
Department of the Army
Corps of Engineers, Jacksonville District
701 San Marco Boulevard
Jacksonville, Florida 32207-8175

Via electronic mail to: Andrew.d.kelly@usace.army.mil

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

Dear Colonel Kelly:

The undersigned organizations recently learned of the Corps' decision dated April 7, 2020, to rescind its notice to the Burnett Oil Company dated March 6, 2020. The March 6, 2020 notice was issued following a site inspection in the Everglades' Big Cypress National Preserve to view the damage to wetlands caused by Burnett Oil Company's first phase of seismic oil exploration. The Corps based its March 6th notice on a site inspection and Memorandum for Record dated February 7, 2020.

In 2016, the National Park Service authorized the first of four phases of Burnett Oil Company's seismic survey, which encompasses more than 110 square miles (70,454 acres) within the Preserve.¹ Since then, the undersigned conservation organizations have documented the wetland damage caused by the seismic testing and have shared this scientific information with state and federal agencies, including the Corps. We also shared a 2016 report explaining why this activity should be regulated under the Clean Water Act.²

¹ See Burnett Oil Co., Inc., et al., *Nobles Grade 3-D Seismic Survey, Big Cypress National Preserve and Big Cypress National Preserve Addition Plan of Operations*, 1, 1 (2014), <https://parkplanning.nps.gov/documentsList.cfm?projectID=53498>. Note this plan of operations has changed, including, but not limited to, the removal of the use of composite interlocking mats to protect wetland soils and vegetation, the type of vehicles utilized in the seismic testing, and the use of smooth balloon tires on vibroseis vehicles to minimize damage to wetland soils. The National Park Service conditioned its approval of the first phase of the seismic testing on the Burnett Oil Company's compliance with 47 mitigation and minimization measures, which include reclamation, mitigation, and maintenance and monitoring criteria. See U.S. Dep't of the Interior, National Park Service, *Finding of No Significant Impact, Nobles Grade 3-D Seismic Survey Big Cypress National Preserve* (2016) (hereinafter, FONSI), <https://parkplanning.nps.gov/document.cfm?parkID=352&projectID=53498&documentID=72619>; U.S. Dep't of the Interior, National Park Service, *Conditional Approval of Burnett Oil Company, Inc. Nobles Grade 3-D Seismic Survey Plan of Operations, Big Cypress National Preserve, Florida*, (2016) (hereinafter, Conditional Approval), <https://parkplanning.nps.gov/document.cfm?parkID=352&projectID=53498&documentID=72745>.

² Quest Ecology, *Technical Review of Wetlands, Wildlife, Vegetation, and Habitat Aspects of the Proposed Burnett Oil Company Nobles Grade 3-D Seismic Survey, Big Cypress National Preserve*, 20-26 (April 2016), attached hereto.

Following a site visit in February 2020, the Corps' enforcement section determined that the Burnett Oil Company's seismic survey was a regulated activity pursuant to the Clean Water Act. Based on scientific evidence included in its February Memorandum, the Corps determined "that the activity described in this memo is regulated under the Clean Water Act because the activity equates to mechanized land clearing, ditching or channelization resulting in redeposit of fill greater than incidental fallback. The activity causes an identifiable individual and cumulative adverse effect on an aquatic function and change (s) to the bottom elevation of ... a water of the United States..."³ Based on the scientific findings made in the February Memorandum, the Corps correctly issued a notice to the Burnett Oil Company on March 6, 2020, stating:

The Corps concludes that the survey activity caused an impact that resulted in a change in the bottom elevation of the wetland, that the activity caused an identifiable individual and cumulative adverse effect on aquatic function, and that the survey had the adverse effect of degrading a water of the U.S. Finally, the Corps concludes that the completed survey activities represent a cumulative adverse impact thereby causing a situation that is not de minimis.⁴

The Corps further advised Burnett Oil Company that:

any future oil and gas survey activity by Burnett Oil Company in Big Cypress National Preserve should continue to be coordinated with the Corps in accordance with the Clean Water Act. A permit will be required of you unless and until you can demonstrate to the satisfaction of the Corps or Environmental Protection Agency, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States.⁵

One month later, the Corps rescinded this notice following communications with the Burnett Oil Company and the National Park Service, stating it had "re-evaluated all of the current and available information relating to Burnett's prior activities" and "rescinds the conclusions specified in the previous letter and asserts no further action is being taken by Jacksonville District or required of Burnett for its completed seismic survey."⁶

³ U.S. Army Corps of Engineers, Jacksonville District, Enforcement Section, Memorandum for Record CESAJ-RD-PE (1200A) (February 7, 2020) (hereinafter, February Memorandum) at 1, *available at*: https://www.biologicaldiversity.org/programs/public_lands/pdfs/SAJ-2016-1849-Burnett-Oil-Company-in-Big-Cypress-MFR-002.pdf.

⁴ U.S. Army Corps of Engineers, Jacksonville District, Regulatory Division, Notice to Burnett Oil Company (March 6, 2020) (hereinafter, Notice) at 2, *available at*: https://www.biologicaldiversity.org/programs/public_lands/pdfs/SAJ-2016-1849-Burnett-Oil-Company-in-Big-Cypress-3-6-20-Letter-from-Corps.pdf.

⁵ *Id.*

⁶ Colonel Andrew D. Kelly, Commander, Jacksonville District, U.S. Army Corps of Engineers, Letter to Burnett Oil Company (April 7, 2020) (hereinafter, rescission letter); *available at*: https://www.biologicaldiversity.org/programs/public_lands/pdfs/2020041-Draft-Letter-to-BurnettL_20200402-002.pdf.

First, we respectfully request identification of the information the Corps relied upon – including scientific or technical data – in rescinding the March 6th Notice. The Corps’ April 7th rescission letter does not reference a follow-up site inspection or include a Memorandum of Record or other supporting information. Rather, it references correspondence received from the oil company, which was not attached to the rescission letter, and states that the Corps “engaged with the staff at Big Cypress.”

Second, the April 7th rescission letter referred to the Burnett Oil Company’s seismic activities in the past tense, stating that “no further action is being taken by Jacksonville District or required of Burnett for its completed seismic survey” (emphasis added).⁷ Consequently, we have a few clarification questions. Has Burnett Oil Company or the National Park Service represented to the Corps that Burnett Oil Company does not plan to conduct any further seismic testing under its National Park Service Conditional Approval for Phase I of the seismic survey? Did representatives from the Burnett Oil Company indicate whether it plans to seek federal and state authorizations for the additional three planned phases of seismic testing, which would encompass over 360 square miles, or one-third of the Preserve, if completed?

While we have extensively documented the existing wetland damage,⁸ and maintain that the Burnett Oil Company’s seismic activities should have been authorized under an individual Section 404 permit, or, at a minimum, a nationwide permit for the ongoing reclamation activities,⁹ we hope that the Corps will review any future plans for additional seismic testing for oil for compliance with the Clean Water Act. As the Corps previously stated in its February Memorandum, “[u]ntil such time that the survey entity demonstrates otherwise, future survey activities using the techniques described in this Memo should be subject to regulation under Section 404 of the Clean Water Act 33 C.F.R. 325. The entity conducting said activity should be advised as such by the Corps in writing prior to conducting additional survey activity at this location.”¹⁰

⁷ *Id.*

⁸ See, e.g., Quest Ecology, *Summary of March 6, 2020 Site Assessment within Burnett Oil Company’s Nobles Grade 3-D Seismic Oil and Gas Exploration area, Big Cypress National Preserve, Collier County, Florida* (March 15, 2020), <https://www.nrdc.org/sites/default/files/final-quest-ecology-memorandum-20200306.pdf>; Quest Ecology, *Comments on Turrell, Hall & Associates, Inc’s 2019 Reclamation Monitoring Report – August 30, 2019, Burnett Oil Company’s Nobles Grade 3-D Seismic Oil and Gas Exploration in the Big Cypress National Preserve* (January 3, 2020), <https://www.nrdc.org/sites/default/files/quest-ecology-memorandum-2019-reclamation-monitoring-report-01032020.pdf>; Quest Ecology, *Seismic Survey Inspection Report, Big Cypress National Preserve* (June 2019), <https://www.nrdc.org/sites/default/files/seismic-survey-inspection-report-20190615.pdf>; Quest Ecology, *Phase I Seismic Survey Inspection Report, Big Cypress National Preserve* (May 2018), https://assets.nrdc.org/sites/default/files/seismic-survey-inspection-big-cypress-20180531.pdf?_ga=2.61695279.2044034844.1586532000-1336211018.1533580820.

⁹ The reclamation of the seismic lines in wetlands (i.e. pushing dirt around with rakes and shovels) could be considered a discharge pursuant to Nationwide Permit (NWP) No. 27 for Aquatic Habitat Restoration, Enhancement, and Establishment Activities. Pre-construction notification is required for utilization of this NWP, specifically pursuant to General Condition 22, which applies to Activities in Designated Critical Resource Waters and/or their adjacent wetlands. Big Cypress National Preserve is listed as a Critical Water Resource Area. See U.S. Army Corps of Engineers, Jacksonville District, *2017 Nationwide Permits Summary of Applicability, Limits, State and Tribal Certifications and Updated Regional Conditions* (updated May 21, 2018, with revisions), available at: <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/7014>.

¹⁰ February Memorandum *supra* note 3 at 17.

We are unaware of any exemptions to Section 404 of the Clean Water Act that would apply to the Burnett Oil Company's seismic testing for oil. While Section 404 permits are not required for the discharge of dredged or fill material from certain enumerated activities, *see* 33 U.S.C. § 1344(f), Burnett Oil Company's activities do not fall under any of those exemptions.

Therefore, we respectfully request that the Corps require the Burnett Oil Company to apply for an individual Section 404 permit prior to the commencement of any seismic survey activities within the Preserve. The submission of an individual Section 404 permit application will remove any confusion as to the proposed activities and impacts to wetlands in the Preserve. Additionally, the issuance of an individual Section 404 permit for Burnett Oil Company's seismic activities will ensure that both the oil company and the Corps have a clear understanding of Burnett Oil Company's seismic activities and its obligations under the Clean Water Act, thereby reducing the potential for a future enforcement action in the event the Burnett Oil Company resumes seismic testing for oil.

Finally, we respectfully request a virtual or phone meeting with you and your staff to obtain clarification on the decision to rescind the finding that the seismic testing is a regulated activity under the Clean Water Act. We also request notification if the Burnett Oil Company advises the Corps in writing proposing to conduct additional seismic survey activities.

Thank you in advance for your consideration. We look forward to continuing to work with you to protect the Everglades' Big Cypress National Preserve. Please feel free to contact us with any questions.

Sincerely,

/s/Alison Kelly

Alison Kelly
Senior Attorney
Natural Resources Defense Council
1152 15th Street, NW
Suite 300
Washington, DC 20005
(202) 658-8497
akelly@nrdc.org

Jaclyn Lopez
Florida Director/Senior Attorney
Center for Biological Diversity
P.O. Box 2155
St. Petersburg, FL 33731
(727) 490-9190
jlopez@biologicaldiversity.org

Nicole Johnson
Director of Environmental Policy
Conservancy of Southwest Florida
1495 Smith Preserve Way
Naples, FL 34102
(239) 262-0304
nicolej@conservancy.org

Dr. Melissa Abdo
Sun Coast Regional Director
National Parks Conservation Association
450 N. Park Road, Suite 301
Hollywood, FL 33021
(954) 298-0819
mabdo@npca.org

cc:

Shawn Zinszer, Chief, U.S. Army Corps of Engineers, Jacksonville District, Regulatory Division
Robert A. Vogel, Regional Director, Southeast Region, National Park Service
Pedro Ramos, Superintendent, Everglades National Park
Thomas Forsyth, Superintendent, Big Cypress National Preserve
Larry Williams, State Supervisor, Florida, U.S. Fish and Wildlife Service
Noah Valenstein, Secretary, Florida Department of Environmental Protection
John Truitt, Deputy Secretary for Regulatory Programs, Florida Department of Environmental Protection
John Coates, Mining and Minerals Programs Director, Florida Department of Environmental Protection,
Cindy Mulkey, Oil and Gas Program Administrator, Florida Department of Environmental Protection,
Jon Iglehart, South District Director, Florida Department of Environmental Protection

Attachment