

September 15, 2011

Mr. Pedro Ramos
Superintendent
Big Cypress National Preserve
33100 Tamiami Trail
Ochopee, FL 34141-1000

Dear Superintendent Ramos:

Public Employees for Environmental Responsibility (PEER) commends you for beginning to evaluate recreational sport hunting in Big Cypress National Preserve. On August 8, 2011, the National Park Service (NPS) announced scoping for an environmental assessment (EA) for a "Hunting Management Plan." Our six (6) major recommendations are highlighted in italics at the end of the text.

I. SUMMARY

Congress established Big Cypress National Preserve as a unit of the National Park System on October 11, 1974. The Organic Act of the National Park Service (NPS), as amended and supplemented, and the law establishing Big Cypress govern and protect the Preserve and its resources. Other Federal laws, such as laws protecting endangered species, impose protective responsibilities on the NPS that reinforce and amplify NPS mandates.

Congress authorized several uses in the Preserve that are not customarily found in most areas of the national park system, among them are hunting and trapping. Congress also recognized that, in general, the laws of the State of Florida govern Preserve visitors who engage in hunting, fishing and trapping.

NPS regulations at Title 36 Code of Federal Regulations (CFR) govern the take of fish and wildlife throughout the national park system. The NPS adopted the current regulations in 1983. Congress directed the Secretary to publish rules in the Federal Register to limit or control the use of Federal lands in Big Cypress National Preserve for hunting, fishing and trapping. NPS Management Policies of 2006 also require that the NPS publish special regulations for National Park System areas where Congress authorizes hunting and/or trapping.

In Big Cypress, Congress empowered the Secretary to designate zones where and periods when no hunting, fishing or trapping may occur for several reasons. Such limitations, except in emergencies require consultation with, but not the consent of, the Florida

agency responsible for managing wildlife, hunting, trapping and fishing. That agency is the Florida Fish and Wildlife Conservation Commission.

Both the State of Florida and the United States exercise some degree of control over the take of fish and game in Big Cypress National Preserve while ultimate responsibility for managing Big Cypress and its fish and wildlife falls on the NPS. The State's role is essential but does not preempt or undo the laws that impose obligations and responsibilities on the NPS.

Florida's wildlife laws and regulations are comprehensive and may afford greater protection to wildlife in the Big Cypress than in some other parts of the State. Nonetheless, PEER concludes that Federal laws obligate the NPS to provide added protection for wildlife in Big Cypress.

To fulfill these obligations imposed by law, the NPS must take measures, in consultation with the Florida Fish and Wildlife Conservation Commission, to govern hunting, trapping and fishing within Big Cypress National Preserve.

II. STATUTORY REQUIREMENTS

A. Big Cypress National Preserve

Public Law 93-440 of October 11, 1974 established the Big Cypress National Preserve in southwestern Florida. The purpose of the Preserve is "...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..." 16 U.S.C. 698f. Big Cypress was America's first national "preserve," established on the same day as Big Thicket National Preserve in Texas.¹

On April 29, 1988, Public Law 100-301 added significant new lands to the Preserve. That statute restated the purpose of the Preserve as the core purpose of the Addition along with two other objectives. The purposes for establishing the Addition are to:

- (1) Achieve the purposes of section 698f of this title;
- (2) Complete the preserve in conjunction with the planned construction of Interstate Highway 75; and
- (3) Insure appropriately managed use and access to the Big Cypress Watershed in the State of Florida. (16 U.S.C. 698m-1)

¹ Congress has since designated other national preserves, ten in Alaska (1980), the Little River Canyon National Preserve, Alabama (1992), the Mojave National Preserve, California (1994) and Great Sand Dunes National Preserve, Colorado (2000). Unlike national recreation areas, several of which lack congressional authorization for hunting and/or trapping, Congress provides for hunting and/or trapping in all National Park System areas it has entitled "preserves."

The enabling act creating Big Cypress specifically provided for hunting, trapping and fishing. Congress instructed the Secretary to develop regulations to govern these activities. Section 4(b) of the Act mandates that "...the Secretary shall develop and publish in the Federal Register such rules and regulations as he deems necessary and appropriate to limit or control the use of Federal lands and waters with respect to...(6) hunting, fishing and trapping..."

Section 5 of the act gives specific authorization, and guidance on the development of rules and regulations for hunting, fishing and trapping. Section 5 provides:

The Secretary shall permit hunting, fishing, and trapping on lands and waters under his jurisdiction within the preserve in accordance with the applicable laws of the United States and the State of Florida, except that he may designate zones where and periods when no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection and management, or public use and enjoyment. Except in emergencies, any regulations prescribing such restrictions relating to hunting, fishing or trapping shall be put into effect only after consultation with the appropriate State agency having jurisdiction over hunting, fishing, and trapping activities. (16 U.S.C. 698j)

The Big Cypress Addition Act made Section 5 applicable to the added lands. The Addition Act also says this:

The Secretary and other involved Federal agencies shall cooperate with the State of Florida to establish recreational access points and roads, rest and recreation areas, wildlife protection, hunting, fishing, frogging, and other traditional recreational opportunities in conjunction with the creation of the Addition and in the construction of Interstate Highway 75. Three of such access points shall be located within the preserve (including the Addition). (16 U.S.C. 698m-2)

Big Cypress National Preserve is part of the National Park System. Congress directed that the Secretary is to administer the lands of Big Cypress National Preserve "...as a unit of the National Park System in a manner which will assure their natural and ecological integrity in perpetuity in accordance with the provisions of this Act and in accordance with the provisions of the Act of August 25, 1916 (39 Stat, 535; 16 U.S.C. 1-4), as amended and supplemented." 16 U.S.C. 698i.

The legislative history for the Big Cypress National Preserve illuminates the degree to which the NPS is to permit authorized uses, such as hunting and trapping. The Committee Reports, in identical language, recognize that preserves "differ in some respects from national parks and monuments insofar as administrative policies are

concerned. Hunting, for example, subject to reasonable regulation by the Secretary, could be permitted to the extent compatible with the purposes for which the area is established.”²

The report continues “[A]ll management activities within these areas (Big Cypress and Big Thicket) should be directed toward maintaining the natural and scientific values of the area, including preservation of the flora and fauna and establishment of the indigenous plant and animal life, if possible.” The report states “[N]ational preserves may accommodate significant recreational uses without impairing the natural values, but such public use and enjoyment would be limited to activities where, or periods when, such human visitation would not interfere with or disrupt the values which the area is created to preserve.”³

It is indisputable that Congress mandated a number of recreational uses of Big Cypress, among them hunting and trapping. But, the legislative history makes clear that those uses must be regulated in such a manner so as not to harm the natural and ecological integrity of Big Cypress.

B. National Parks Omnibus Management Act

Congress, in the 1998 National Parks Omnibus Management Act (NPOMA), directs that the NPS is to “assure that management...is enhanced by the availability and utilization of a broad program of the highest quality science and information.” 16 U.S.C. 6932. Removal of game animals from park ecosystems by hunting and/or trapping has generally not been subject rigorous scientific review at Big Cypress by the NPS. Until research is conducted that shows such practices have no or little effect on ecosystem integrity, the NPS must not acquiesce in these practices. The burden of scientific proof lies upon the NPS to show that recreational take of park wildlife is governed by the “highest quality science.”

III. NPS SPECIAL REGULATIONS

As described above, the Big Cypress enabling act requires that the NPS publish special regulations in the Federal Register to govern hunting, trapping and fishing in the Preserve. The special regulation for Big Cypress is found at 36 CFR 7.86(e). While this special regulation may meet the facial requirement imposed by Section 4(b) of the Big Cypress enabling act, it is so minimal as to be worthless. It simply adopts whatever hunting and trapping rules are prescribed by the State.⁴

In addition to the largely useless special regulation at 36 CFR 7.36(e), the NPS has applied its general authority to regulate the take of wildlife in the Preserve primarily by imposing closures and restrictions under 36 CFR 1.5.

NPS regulations provide:

² P. 6, H. Rpt. 93-502 (September 13, 1973); and p. 5, S. Rpt. 93-1128 (August 22, 1974).

³ Pp. 6-7, H. Rpt 93-502.

⁴ Contrast the special hunting regulations for Big Cypress with that adopted by the NPS for its sister Big Thicket National Preserve at 36 CFR 7.85.

(a) Consistent with applicable legislation and Federal administrative policies, and based upon a determination that such action is necessary for the maintenance of public health and safety, protection of environmental and scenic values, aid to scientific research, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities, the superintendent may:

- (1) Establish, for all or a portion of a park area, a reasonable schedule of visiting hours, impose public use limits, or close all or a portion of a park area to all public use or to a specific use or activity.
- (2) Designate areas for a specific use or activity, or impose conditions or restrictions on a use or activity.
- (3) Terminate a restriction, limit, closure, designation, condition, or visiting hour restriction imposed under paragraph (a)(1) or (2) of this section. (36 CFR 1.5(a))

NPS regulations require that when the park superintendent acts under 36 CFR 1.5(a), the superintendent will, among other things, prepare a written determination justifying the action. An action that "...will result in a significant alteration in the public use pattern of the park area, adversely affect the park's... values, require a long-term or significant modification in the resource management objectives of the unit, or is of a highly controversial nature, shall be published as rulemaking in the FEDERAL REGISTER." (36 CFR 1.5(b))

NPS regulations further require that "...the superintendent shall compile in writing all designations, closures, permit requirements imposed under discretionary authority." (36 CFR 1.7(b)) he NPS calls these compilations "compendia." Big Cypress possesses a current compendium.

The NPS has used the authority of 36 CFR 1.5 to implement several long-term actions with regard to the take of wildlife in the Preserve. Some (but not all) of the following actions remain in effect:

- Prohibits all dogs (including dogs used for hunting) in the Loop Unit. (Compendium, October 1, 1990);
- Prohibits all dogs used for hunting, except bird dogs and retrievers. (*Id.*);
- Closes Stairsteps Unit, south of Loop Road and east and south including Sig Walker Strand to all public activities, including hunting. (Compendium, September 26, 1992);
- Requires that all hunters during muzzleloading and general gun season wear a minimum of 500 square inches of daylight fluorescent orange material above the waistline as an outer garment; Florida regulations require this only when deer hunting. (*Id.*);
- Closes any area burned by human-caused fires to hunting (Compendium, November 11, 1994);

- Closes all NPS property in the Addition lands of 1988 to all hunting and the use of off road vehicles. (Compendium, November 5, 1996);
- Closes Stairsteps, Corndance and Turner River Units to airboats from 1 am to 5 am to provide wildlife with a rest period. (Compendium, January 29, 1999); and
- Prohibits taking of frogs for sale; limits take to gigs only; limits daily bag to one five-gallon bucket per airboat or individual; possession limit of 18 pounds of dressed legs. (*Id.*)

In addition, the NPS has implemented short- term actions to restrict access and/or hunting due to high water or low water conditions. These actions are usually rescinded when water levels change.

Despite early and vigorous opposition to some of the above NPS restrictions, current Florida hunting rules adopted some of them.

IV. MANAGEMENT POLICY REQUIREMENTS

National Park Service Management Policies (2006) provide that each park in which Congress authorizes recreational hunting or trapping must promulgate special regulations to govern that activity. This NPS first adopted this provision of policy in the Management Policies 2001, and maintains it today. The Policies provide that:

“Hunting and trapping, whether it takes place as a mandated or a discretionary activity, will be conducted in accordance with federal law and applicable laws of the state or states in which a park is located. However, except for Alaska park units (which are subject to Alaska National Interest Lands Conservation Act and regulations published at 36 CFR Part 13), the park in which hunting and trapping occur **MUST ALSO PUBLISH SPECIAL REGULATIONS** to govern the activity. Those regulations may be more restrictive than applicable state laws when necessary to prevent unacceptable impacts.” (Emphasis added) NPS Management Policies, Chapter 8 - Use of Parks, Section 8.2.2.6 – Hunting and Trapping.

In a memo of February 27, 2009 to all Regional Directors, the Acting NPS Director Dan Wenk reminded them of the Management Policy requirement. He wrote “To reiterate, it is important to note that even a park where hunting and trapping is expressly authorized by Congress must have a published special regulation specific to hunting and trapping.” The NPS publishes special regulations for individual parks at 36 CFR Part 7.

Management Policies require special regulations so that the NPS may implement measures more restrictive than may be allowed under the applicable laws of the State. The purpose is to “prevent unacceptable impacts.” The Policies do not list practices that may rise to the level of “unacceptable impacts.” But, the Policies do list goals that the NPS pursues when managing animal populations. The goals apply to parks open by law to recreational hunting and trapping.

The goals are found in several sections. The general goal is “preserving and restoring natural abundances, diversities, dynamics, distributions...and behaviors of native...animal populations.” Ibid, Chapter 4 – Natural Resources Management, Section 4.4.1.

Section 4.4.1.2 provides that “When native...animals are removed for any reason ---such as hunting... – the Service will maintain the appropriate levels of natural genetic diversity.

Section 4.4.2 provides that “Management is necessary...to protect rare, threatened or endangered species.

Section 4.4.3 provides that “Where harvesting (of animals, etc.) is allowed and subject to NPS control, the Service will allow harvesting only when (1) the monitoring requirement contained in section 4.4.2 and the criteria in section 4.4.2.1 above have been met, and (2) the Service has determined that the harvesting will not unacceptably impact park resources, or natural processes, including the natural distributions, densities, age-class distribution of

- Harvested species
- Native species that the harvested species use for any purpose, or
- Native species that use the harvested species for any purpose.

In consultation and cooperation, as appropriate, with individual state or tribal governments, the Service will manage harvesting programs.”

The Management Policies (2006) leave no doubt that the NPS is to play an active and affirmative role in managing harvest of animals by recreational hunting and/or trapping.

SIX RECOMMENDATIONS

- *The EA must consider no hunting at all in the Big Cypress Addition lands. These lands have been closed to hunting since 1988, nearly a quarter century. The lands and their animal populations serve as a ready-made study control on the effects of hunting on the Preserve’s ecological integrity. Such a continued closure would also give the benefit of the doubt to the endangered Florida panther, much of whose habitat lies within the Addition.*
- *The NPS must keep in place its prohibition on the use of dogs now found in the park compendium.*
- *The EA for a Big Cypress Hunting Management Plan must consider ALL of the Management Policy criteria found in Chapter 4 when it*

promulgates meaningful special regulations to govern hunting in the Preserve.

- *PEER supports the prohibition on trapping small game found in current Florida hunting rules for the State's designated Big Cypress Wildlife Management Area.*
- *PEER requests that the NPS continue to employ its authority under 16 U.S.C. to remove animals deemed to be "detrimental" such as non-native nutria by whatever means available consistent with Federal law, and adopt more liberal take provisions than Florida law may allow.*
- *An NPS Hunting Management Plan needs a clarification on "falconry." Florida rules allow use of falcons to take migratory and non-migratory game (See Florida rules under "Guns" #9 and #10). The NPS has no general rule prohibiting use of raptors to take game (i.e. falconry) in parks open to hunting. However, the NPS officially adopted the position on February 27, 2009 that persons are forbidden to collect raptors for falconry or any other purposes in any parks, including parks open by law to hunting. This prohibition must be stated clearly in the NPS Hunting Management Plan.*

If you have any questions about PEER's comments, please contact me at (202) 265-PEER.

Cordially,

Jeff Ruch
Executive Director