

## **History of Wilderness Review for the Big Cypress Addition**

**12/29/10**

In 1988 Public Law (P.L.) 100-301 expanded the boundaries of Big Cypress National Preserve, Florida, originally established in 1974. The Big Cypress Addition Act required that:

Within five years...from April 29, 1988, with respect to the Addition, the Secretary shall review the area...within the Addition...and shall report to the President, in accordance with section 1132(c) and (d) of this title, his recommendations as to the suitability or unsuitability of any area...within the Addition...for preservation as wilderness, and any designation of any such areas as a wilderness shall be accomplished in accordance with section 1132(c) and (d) of this title.

16 U.S.C. 698l.

### **2001-2002**

Eight years beyond the April 29, 1993 deadline, in 2001, the NPS undertook a review of the lands in the Addition that were suitable for wilderness. Park Superintendent John Donahue produced a wilderness suitability review and study that determined that 128,000 acres of the Addition were suitable as wilderness (Note: Until 2006, the NPS used the term “suitable.” In the Management Policies of 2006, the NPS substituted the term “eligible.”).

The Superintendent forwarded to superiors the detailed review and studies of both the Addition and the original Preserve on February 22, 2002. In response to Regional Office comments that the wilderness review was too detailed, the superintendent resubmitted a less detailed suitability determination on June 12, 2002. On June 25, 2002, Acting Regional Director Patricia Hooks rejected any idea that the NPS should even consider a wilderness proposal in the Addition GMP/EIS. Her concern was that wilderness consideration could circumscribe ORV use. She wrote “...that those areas in an Addition Lands GMP preferred alternative which recommended uses not compatible with wilderness designation may be removed from further wilderness consideration” The unspecified incompatible uses were primarily use of ORVs. In other words, if the GMP recommended ORV use on otherwise eligible lands, the NPS wanted to remove those lands from further wilderness consideration and interim guidance of the NPS Management Policies. Following orders from Region, the Park removed all reference to wilderness review from the GMP newsletter on July 9, 2002.

### **2005-2009**

In October 2005, new park superintendent Karen Gustin mailed out “The Addition GMP Newsletter #3.” The newsletter did not mention “wilderness” as an issue to be addressed,

ignoring the plain language of the 1988 Addition law. More perplexing, the newsletter did not even list wilderness as an issue “not addressed in this Plan.” Newsletter, p.2.

The Gustin decision to deliberately ignore wilderness review was in open violation of the 1988 law establishing the Big Cypress Addition but was in concert with the orders from her NPS superiors in Atlanta.

In December 2005 South Florida conservationists submitted a letter petitioning Ms. Gustin to review the Big Cypress for wilderness. They did so under a little used provision of the regulations of the Secretary of the Interior, found at 43 CFR 19.4(b). In response to such a petition from any person, the DOI agency manager (in this case, Ms. Gustin) must consider the recommendation, study it and forward it with a report to the Secretary. As a consequence of this letter and other public response to Newsletter #3, the NPS altered its course and conceded that the GMP/EIS would contain a wilderness review.

On January 17, 2006 the Circuit Court of Appeals for the District of Columbia dismissed a complaint from The Wilderness Society (TWS), on appeal from the district court (TWS v. Norton). TWS alleged that the NPS had violated its own management policies as well as several park specific laws by failing to review roadless areas for wilderness suitability. Among the parks was the Big Cypress Addition. The Court dismissed TWS’ claim on the basis of lack of standing by the TWS. But, the Circuit Court refused the conclusion of the district court that the 1988 requirement of the Big Cypress Addition Act for a wilderness review by 1993 had expired, by some sort of statute of limitations. In other words, because the NPS had failed to meet its statutory responsibility by 1993, the NPS was no longer bound by the law’s requirement or subject to legal challenge. The Circuit Court said this about that defense for the NPS’ failures “[T]his court has repeatedly refused to hold that actions seeking relief...to “compel agency action unlawfully withheld or unreasonably delayed” are time-barred if initiated more than six years after an agency fails to meet a statutory deadline.” Thus, all that was needed to mount an acceptable challenge to the NPS’ failure at Big Cypress was a plaintiff who could demonstrate standing. In South Florida, there are many such parties.

Perhaps the NPS responded to the “handwriting on the wall” of the Circuit Court reasoning, and to the citizen petition of December 2005 because the agency’s posture changed between the Newsletter #3 of October 2005 and summer 2006.

On July 11-12, 2006, the NPS assembled an interdisciplinary team of over 15 people from the park, regional office and the Denver Service Center. They met at Big Cypress headquarters in Ochopee, Florida. NPS national wilderness program manager Rick Potts also attended. The team produced a detailed, professional analysis of the Addition and concluded 109,000 acres were eligible for wilderness. The April 2007 GMP Newsletter publicly announced that the NPS determined that 109,000 acre of the Addition were eligible for wilderness under all applicable criteria. The NPS further refined the eligibility determination in late 2007, addressing an area of the Addition that was

mistakenly eliminated from eligibility (an area called “The Gap”) to arrive at a figure of 111,600 eligible acres.

In July 2009 the NPS released the Draft GMP/EIS for the Big Cypress Addition. It restated the determination that 111,601 acres of the Addition were eligible for wilderness. The NPS Preferred Alternative then called for a wilderness proposal of 85,862 acres. The NPS determination and proposal brought some support from conservationists, whose comments generally sought that all eligible acres be proposed.

Others, however, were aroused to fierce opposition. ORV groups see use of ORVs as essential to sport hunting, a legitimate and legally-authorized recreational use of the Preserve. Public comments on the Draft GMP/EIS poured into NPS offices into the early Fall of 2009. In the meanwhile, Superintendent Gustin transferred from Big Cypress and was replaced by Pedro Ramos.

## **2010**

Superintendent Ramos responded to this concerted ORV opposition. His first strategy was to free Big Cypress Addition from the shackles of NPS Management Policies (2006) that constrained his flexibility in managing wilderness eligible lands. NPS Management Policies have long provided that the NPS manage wilderness eligible lands so as not to alter their eligibility until the review process is completed by Congress. (The NPS currently has approximately 24 parks with wilderness recommendations or proposals, encompassing several million acres, on which Congress has not acted, and that the NPS manages to protect their wilderness character.)

Current Management Policies state: “The National Park Service will take no action that would diminish the wilderness eligibility of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed. Until that time management decisions will be made in expectation of eventual wilderness designation.” Further, “*For purposes of applying these policies*, the term “wilderness” will include the categories of *eligible*, study, proposed, recommended, and designated wilderness. Potential Wilderness may be a subset of any of these five categories. *The policies apply regardless of category except as otherwise provided.*” Emphasis added. Management Policies 6.3.1. Thus, under the latter directive, the NPS must manage lands it determines wilderness eligible as if it were wilderness, *as a matter of policy*.

Early in 2010 Superintendent Ramos and his supervisor, Regional Director Vela, met with the NPS Director Jonathan Jarvis in Washington, D.C.; a meeting attended by several others. They requested that the Director use his authority to waive this provision of Management Policies. Their rationale was simple. If the NPS’ GMP preferred alternative ultimately decided to allow motorized use on lands also determined to be wilderness eligible, the park could not construct those trails and/or allow motorized use UNTIL the wilderness review process was completed by action of Congress. They did not wish to wait. Rather, they wanted the ability to implement any ORV trail/use system upon signing of the Record of Decision for the GMP. Director Jarvis heard their request

but denied it, refusing to issue a waiver of the Management Policies on interim wilderness management standards.

After Director Jarvis' decision not to waive Management Policies for them, Ramos and Vela implemented a new strategy. If lands deemed eligible for wilderness stand in the way of their pending ORV decision, they would simply reanalyze the lands. They conducted a quick re-analysis. Vela submitted the re-analysis to the Director on April 20, 2010. Deputy Director Dan Wenk approved it on May 12, 2010. The NPS did not make this re-analysis known, as required by Management Policies at 6.2.1.3:

“Notification will include the issuance of news releases to the local and regional news media and publication of a final eligibility determination in the *Federal Register*. The final determination of an area's eligibility or ineligibility, for further study must be approved by the Director before publication...in the *Federal Register*.” The NPS does not dispute that, after the May 12, 2010 approval by Wenk, the NPS failed to publish the required notice in the *Federal Register*. Instead, the clandestine re-analysis first became public on November 23, 2010 as Appendix B of the Final GMP/EIS.

As a result of the re-analysis, the NPS' own 2009 publicly-announced determination of 111,600 eligible acres, shrunk by 40,000 acres to 71,000 acres, in the re-analysis. It appears to be no coincidence that in the Final GMP, the NPS Preferred Alternative then placed miles of ORV trails upon many of the “lost” acres. To add insult to injury, the NPS then declares the Preferred Alternative as the “environmentally preferable alternative.”

Regional Director Vela stands ready to sign the Record of Decision on the EIS for the Final GMP. And though the NPS has yet to implement the 2000 ORV Plan EIS for the original Preserve by confining ORVs to designated routes, the NPS may proceed to start the construction of new ORV trails in some of the most pristine, wild and untouched lands remaining in South Florida. Some of these lands besides being wild and roadless, are also largely wet and cannot support heavy ORV traffic. Wilderness is only one resource that the Final GMP threatens. It also threatens vegetation, water quality and endangered species.

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