



Paul Souza, Acting Field Supervisor
U.S. Fish & Wildlife Service
South Florida Ecological Services Office
1339 20th Street
Vero Beach, FL 32960

9/14/06

Re: Unauthorized incidental take of Florida panther due to Lee County excavation activities and associated increases in traffic volume

Dear Mr. Souza,

We are writing on behalf of the National Wildlife Federation (NWF) and Florida Wildlife Federation (FWF), first to commend you and U.S. Fish and Wildlife Service (FWS) for taking action on a recent proposal by Dr. Frank Hussey to clear over 600 acres of upland area providing habitat for the endangered Florida panther, red-cockaded woodpecker, and wood stork. As you acknowledged in your June 26, 2006 letter to Dr. Hussey, § 9 of the Endangered Species Act (ESA) prohibits the unauthorized take of federally listed species. 16 U.S.C. § 1538(a).¹ In the absence of a “federal nexus,” a private landowner may proceed with activities that may lead to take only upon obtaining an Incidental Take Permit (ITP) in conjunction with an approved Habitat Conservation Plan (HCP). 16 U.S.C. § 1539(a).

We now strongly urge you to apply this same legal standard to oversee mining and other excavation activities in Lee County that are having significant adverse effects on the Florida panther. We understand that several applications for large-scale excavation projects are pending throughout Lee County, and in some cases, these applications are not only bypassing public input but also, apparently, FWS review. Recent Lee County mining applications have been submitted by Resource Conservation Holdings (Corkscrew Excavation), Estero Group LTD, and Golfrock LLC. Cumulatively, the footprints for these three mines alone will result in the loss of more than

¹ “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 U.S.C. § 1532(19). “Harass” is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” is defined as “an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

1800 acres of Secondary Zone panther habitat, lying adjacent to preserved mitigation areas within the Primary Zone. *See* enclosed map. Add to this toll the unauthorized clearing by Parklands Ronto Group of 110 acres of Primary Zone panther habitat on South Florida Water Management District preserved lands adjacent to Corkscrew Regional Ecosystem Watershed (CREW) lands as well as recent attempts by Six L's Farms to sell 5120 acres of Primary and Secondary zone panther habitat to Lee County for mining purposes.

According to Kautz *et al.* (2006), the Primary Zone consists of lands “essential to the long-term viability of the Florida panther,” while the Secondary Zone consists of lands that are “important to transient sub-adult male panthers and have potential to support an expanding panther population, especially if habitat restoration were possible.” R. Kautz, R. Kawula, T. Hoctor, J. Comiskey, D. Jansen, D. Jennings, J. Kasbohm, F. Mazzotti, R. McBride, L. Richardson, & K. Root, *How Much is Enough? Landscape-scale Conservation for the Florida Panther*. *Biological Conservation* 130: 118-133 (2006). Collectively, in their current states, the Primary and Secondary zones together with the Dispersal zone can support 80 to 95 panthers. With restoration effort, however, the Secondary Zone can support many more (25- 30 as opposed to 9-10), increasing the combined total to 96 to 115 panthers. Either way, because currently occupied habitat is insufficient to support a self-sustaining, viable population of 240 individuals, any loss of Primary, Secondary, or Dispersal zone habitat constitutes jeopardy to panther survival and recovery. In this case, we are talking about close to 2000 acres, not counting Six L's Farms 5000+ acres!

Of course, the indirect effects associated with these and related mining activities are harming panthers as well. Collisions with vehicles remain a leading, preventable source of panther mortality. Each collision in conjunction with these permitted mining activities not only constitutes an unauthorized take but also jeopardizes panther survival and recovery. As you know, on August 25 of this year, a Florida panther was killed in a collision with a pickup truck along east Corkscrew Road near the intersection of Alico Road. This is the eighth cat to die in a vehicular collision so far this year, and the second of which to die in Lee County alone. Ironically, this cat was killed within 300 feet of the Corkscrew Road wildlife underpass and associated fencing (D. Lande, *pers. comm.*). The mining activities in the area are increasing traffic volume exponentially—unfortunately, this increase means panthers are more likely to encounter vehicles when crossing roads. With roughly 80-100 individuals remaining in the population, far below the 240 individuals needed to have a self-sustaining, viable population, each of these deaths represents jeopardy to panther survival and recovery.

We therefore strongly urge FWS to notify these mining applicants that they risk violation of §9 of the ESA and that they must apply to FWS for an ITP in conjunction with an approved HCP. As your June 26 letter to Dr. Hussey indicates, an approved HCP must show that “(1) the taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (3) the applicant will ensure adequate funding for the [HCP] will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) the measures, if any, required [by the Secretary as necessary or appropriate] will be met.” 16 U.S.C. § 1539(a)(2)(B). Specifically, we recommend that any approved HCP contain the following measures:

- (a) acquisition of panther habitat elsewhere in Lee County, preferably Primary zone habitat adjacent to preserved areas, to replace lost acreage;
- (b) additional wildlife crossings with associated fencing to secure highway segments that cut through panther travel corridors;
- (c) increased enforcement of speed limits, including payment for additional law enforcement officers if necessary; and
- (d) distribution of information to applicants and workers concerning the risks and benefits of working and traveling through panther country.

We also urge you to notify Lee County that it, too, may be in violation of ESA § 9 and that it, too, is required to apply for an ITP and associated HCP. We note that the ESA § 9 prohibition against unauthorized take applies not only to individuals but to “any State, municipality, or political subdivision of a State” as well as any officer thereof. 16 U.S.C. § 1538(a)(1); *id.* § 1532(13). In fact, § 9 not only prohibits acts that constitute take but also those acts that cause actions that constitute take. *Id.* § 1538(a)(1)(b); *id.* 1538(g); *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997). Thus, if an individual takes a listed species pursuant to the apparent authority of some governmental entity, then that governmental entity also may be in violation of § 9. *Strahan*, 127 F.3d at 163 (finding Massachusetts licensing of commercial fishing operations is likely to result in unauthorized take of northern right whales); *Sierra Club v. Yeutter*, 626 F.2d 429, 438-39 (5th Cir. 1991) (finding USFS management of timber constituted unauthorized take of red-cockaded woodpeckers); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989) (finding EPA’s registration of certain pesticides constituted unauthorized take of endangered species); *Palila v. Hawaii Dep’t of Land & Nat. Res.*, 639 F.2d 495, 487-98 (9th Cir. 1981) (finding state’s maintenance of feral goats and sheep in palila habitat constituted unauthorized take of palila); *Loggerhead Turtle v. County Council of Volusia County*, 896 F.Supp. 1170, 1180-81 (M.D. Fla. 1995) (finding county’s authorization of vehicular beach access constituted unauthorized take of sea turtles).

We recommend that a Lee County HCP for mining operations contain the same provisions as outlined above. We also recommend that FWS work with Lee County to amend its comprehensive plan to specifically address endangered species concerns, particularly relating to cumulative habitat loss and road kills.

We kindly remind you that § 7 of the ESA requires all federal agencies, including FWS, to utilize their authority in furtherance of the purposes of the ESA, namely to conserve endangered and threatened species. 16 U.S.C. § 1536(a).

Finally, we request that not only do you notify individual excavation permit applicants and Lee County of their potential ESA § 9 violation(s), but also that you follow up in a timely manner to insure that these critical issues are addressed before more habitat is irretrievably lost and more panthers are killed on Lee County’s highways.

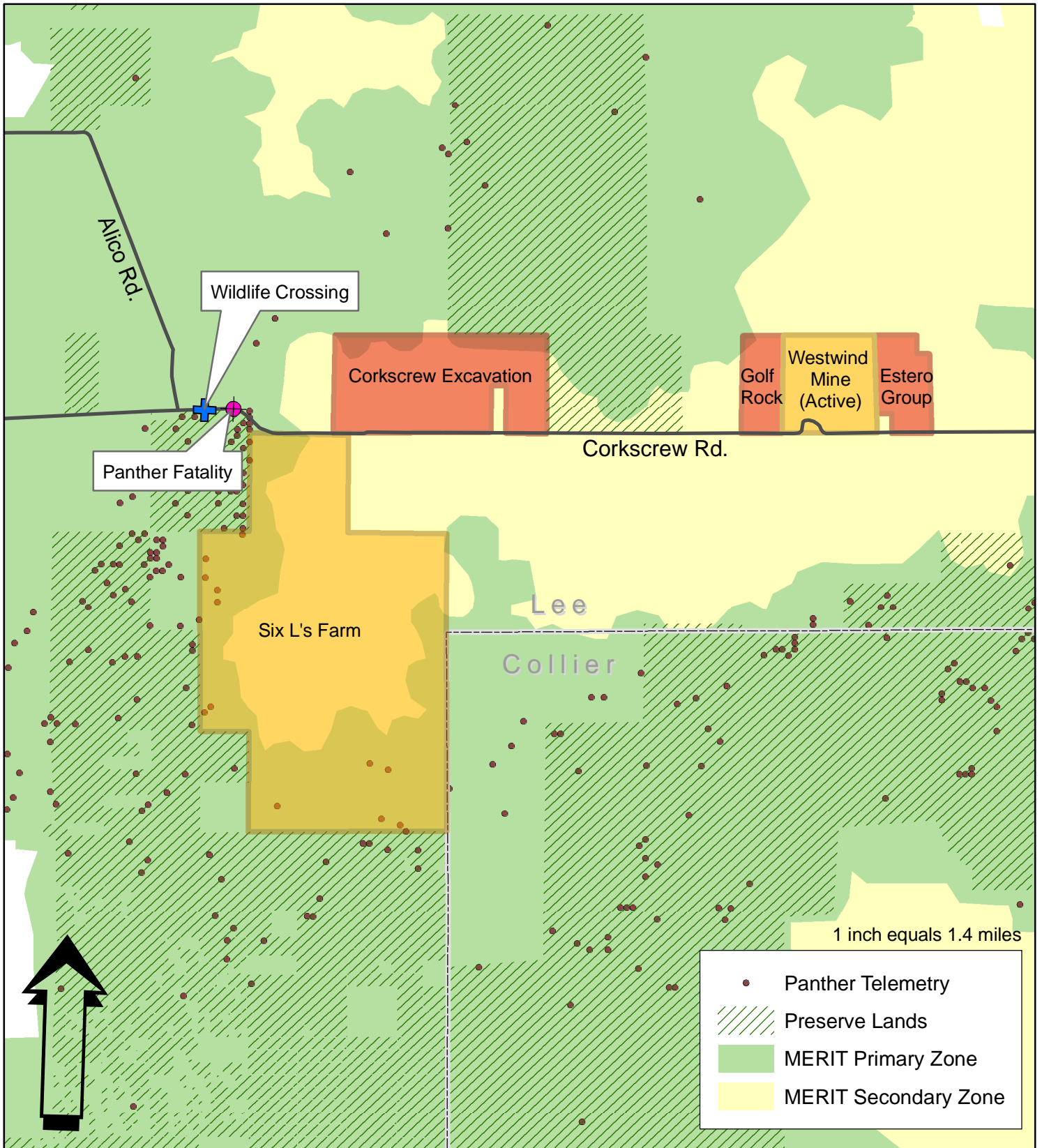
Thank you very much for your prompt and careful consideration in this urgent matter. If you have any questions or would like to discuss this issue further, please do not hesitate to contact Laura Hartt (404-876-8733, x 228/hartt@nwf.org or) or Nancy Payton (239-643-4111/fwfnaples@earthlink.net).

Sincerely,

A handwritten signature in black ink that reads "Laura Hartt". The signature is written in a cursive, flowing style.

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Lee County Mining Operations

