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USDA Forest Service
Los Padres National Forest
Ojai Ranger District
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Via Facsimile and Overnight Mail

RE: Comments on Oil and Gas Leasing Proposal for the Los Padres National Forest

Dear Mr. Hess:

The Attorney General of the State of California submits the following comments regarding the Draft Environmental Impact Statement (DEIS) for the U.S. Forest Service proposal to identify and lease lands within the Los Padres National Forest for the purpose of exploration, development and production of oil and gas resources.

The Attorney General submits these comments pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. *See* Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office.

While these comments focus on some of the primary issues raised by the DEIS, they are not an exhaustive discussion of all issues.

INTRODUCTION

Our review of the Forest Service's pending proposal and DEIS for oil and gas development in the Los Padres has concluded that this endeavor makes little sense for several reasons. First, the Forest Service proposes to make specific lands available for leasing prior to completion of the comprehensive forest plan update that will involve balancing all competing uses of forest land for the maximum benefit to the public, and that may determine that oil and gas

development is not the best use for these lands. This DEIS puts the "cart before the horse," both legally and in terms of rational forest planning. Second, this project presents some enormous potential risks to the viability of the California Condor, a species that just two decades ago hovered on the brink of extinction and now is making a recovery within the Los Padres National Forest.[1] The effort to plan for the best uses of the forest must have at its forefront the impacts on the condor recovery project. Third, the hundreds of miles of new oil and gas pipelines that will be required present human health and environmental risks from potential ruptures and leaks that have not been adequately analyzed. Balanced against these serious risks is minimal benefit. Federal land managers have admitted that there does not appear to be a pressing demand by bidders for leases in the Los Padres and that the amount of oil estimated to be present by the Forest Service is minuscule, amounting to less than one percent of the oil and less than .06% of the natural gas thought to exist under federal lands nationwide.

The Attorney General's Office has a long history of participation in national forest planning in California that reflects the importance of national forests and forest resources to the people of this State.[2] We have consistently supported comprehensive, regional planning approaches designed to protect and preserve all the values of the national forest resources within the State.[3] National forests cover millions of acres in California, including some of the most spectacular and sensitive areas of the State, and the Los Padres National Forest ("Los Padres") is no exception. This forest contains large swaths of undeveloped land, including wilderness and

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[1]As reported in the *Los Angeles Times* on April 16, 2002, for the first time since 1984, a condor chick has been hatched in the wild in Los Padres National Forest from an egg that was laid and brooded by wild condors. The Sespe Condor Sanctuary within Los Padres is one of the main locations for the surviving birds, only 64 of which exist in the wild. *San Diego Tribune*, "Captive Bred Condors Produce Egg in Wild," March 4, 2002.

[2]Beginning in the 1980s, this Office has participated constructively in several forest planning debates. For example, we submitted extensive comments on a number of proposed forest plans (including plans covering the Plumas, Sequoia, Tahoe, Modoc, Shasta-Trinity, and Lassen National Forests), appealed and intervened in the appeals of several plans, and participated in a seventeen-month mediation process for the Sequoia National Forest land management plan that culminated in an agreement that still governs management of that forest. Most recently, we commented on and intervened in the administrative appeal in support of adoption of the comprehensive ecosystem management plan for Sierra Nevada Region, the Sierra Nevada Framework Plan.

[3]Indeed, it may be that an ecosystem-based approach is the only one that would enable the Forest Service to comply with all applicable environmental laws. *See Seattle Audubon Society v. Lyons*, 871 F.Supp. 1291, 1311 (W.D. Wash 1994) ("Given the current condition of the forests, there is no way the agencies could comply with the environmental laws *without* planning on an ecosystem basis."), *aff'd, Seattle Audubon Society v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

roadless areas, that provide vital habitat for a number of endangered and sensitive species. Located along the California coast from Big Sur to Ventura County, the Los Padres offers unparalleled scenery and recreational opportunities, and is among the last remaining wild and open spaces in the whole of Southern California.

As discussed in the comments below, it is our conclusion that the Forest Service has misapplied applicable legal authority in determining that it must proceed with this leasing decision in advance of completion of the forest plan amendment process already underway. Proceeding in this fashion is inconsistent with the purpose and requirements of the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. §§ 1600 *et seq*. and the regulations adopted pursuant to the Federal Onshore Oil and Gas Leasing Reform Act of 1987 ("Reform Act"), found at 36 C.F.R. part 228 subpart E.

In addition, this DEIS fails to adequately analyze a number of potential impacts of the leasing proposal, including spills from oil and gas pipelines and affects on the California condor, in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*.

COMMENTS

1. To identify specific lands for leasing prior to completion of the revised forest plan is inconsistent with the purpose and requirements of the NFMA.

At the same time that it has released this DEIS, the Forest Service is in the midst of a multi-year process – commenced in 1999 after four years of assessment and analysis – to revise and amend the current Los Padres National Forest Land and Resource Management Plan, as part of a Southern California "Conservation Strategy." The strategy is designed to identify how all uses of forest land can be accommodated and at the same time provide regional ecosystem health and protection of endangered and sensitive species. DEIS at p. 1-8.

The strategy includes updating forest plans for the Angeles, Cleveland, and San Bernardino National Forests, as well as for the Los Padres, because the Forest Services' analytical studies have identified a number of areas where the existing forest plans do not adequately protect threatened, endangered and sensitive species. 66 Fed. Reg. 48856. The plan amendment process is addressing several issues relevant to the decision whether to develop additional lands for oil and gas production, including: the effect of land use patterns on the amount, distribution and loss of habitat; the appropriate locations of infrastructure facilities; and site-specific conservation strategies to address the effects of existing and potential mining activity. *See* U.S. Forest Service, *Province Forest Plan Monitoring and Evaluation Report For Activities Related to Southern California National Forests,* February 2000. A draft EIS to support the revised forest plans is planned for release this calendar year. 66 Fed. Reg. 48856.

Given the extensive scientific and legal record the Forest Service has developed in

support of the need to revise the Forest Plan in order to develop consistent and appropriate management direction for the Los Padres, to undertake a sweeping, forest-wide decision to commit particular lands to oil and gas development before the new management prescriptions are in place is, from a planning perspective, premature and illogical. As the Forest Service acknowledges, its leasing decisions could very well conflict with revised Forest Plan direction that will be finalized only two years from now, and – if leases have been issued by the BLM in the meantime – that the Forest Service would be bound to honor them even should they conflict with the new Forest Plan. *Oil and Gas Leasing Study and EIS, Frequently Asked Questions*, Q-9, pp. 3-4. More importantly, however, such an approach is directly contradictory to the purpose and requirements of the National Forest Management Act.

The project does not comply with forest planning requirements. It is through the forest planning process required by the NFMA (16 U.S.C. §§ 1600 *et seq.*) and its implementing regulations (36 C.F.R. part 219) that the Forest Service determines whether the use of the forest lands for the production of oil and gas is the best use as compared to all the other possible values for the same lands, including protection of wildlife, preservation of aesthetic resources and recreational uses. The statutory scheme set forth in the NFMA is predicated on the development of forest plans that comprehensively balance competing uses of forest lands. *See, e.g.*, 16 U.S.C. § 1600(3) (to serve the national interest, national forest management must be "based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's . . . forests and rangelands, through . . . coordination of multiple use and sustained yield opportunities . . . and public participation . . .."); 16 U.S.C. § 1604(f)(1) (plans developed under the NFMA "shall form one integrated plan for each unit of the National Forest System"). *See also* 16 U.S.C. § 531(a) (resources of national forests shall be utilized in the combination that best meets the needs of the American people).

Likewise, the implementing planning regulations require development of a comprehensive planning framework and require that site-specific decisions be consistent with that framework. *See, e.g.*, 36 C.F.R. § 219.2 (2001)[4] (the "first priority for planning . . . is to maintain or restore ecological sustainability of national forests and grasslands to provide for a wide variety of uses, values, products, and services"); 36 C.F.R. § 219.7 (2001) ("Plan decisions guide or limit uses of National Forest System resources and provide the basis for future agency action .. . . [P]lan decisions provide a framework for authorizing site-specific actions that may commit resources. . .. In making decisions, [the Forest Service] should seek to manage . . . resources in a combination that best serves the public interest without impairment of the productivity of the land . . ..")

What the Forest Service is proposing is directly contrary to the requirements of this

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[4]These references are to the Forest Service's 2000 planning regulations. Although the Los Padres forest plan revision is proceeding under the 1982 planning rule (66 Fed. Reg. 48856), the 1982 regulations express similar policy. *See, e.g.*, 36 C.F.R. §§ 219.1, 219.27 (1999).

statutory scheme. Instead of waiting for the comprehensive plan, the Forest Service proposes to rush through a large-scale leasing program that would commit the much of the remaining wild areas in the Los Padres to a particular consumptive use, making other choices which might be favored in the upcoming plan no longer available or viable. Decisions about forest-wide oil leasing and its impacts will be made in a separate process, divorced from consideration of all the information and factors currently being simultaneously evaluated in the update process, rather than in the context of the balancing of competing demands upon the Los Padres as required by the NFMA. *Nevada Land Assn'n v. U.S. Forest Service*, 8 F.3d 713, 719 (9th Cir. 1993) (the NFMA "directs the [Forest] Service to manage conflicting uses of forest resources"); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511 (9th Cir. 1992). This approach is particularly improper given the acknowledged inadequacies of the existing plan. *See* 66 Fed. Reg. 48856.

There is no valid reason for circumventing the forest planning process. The amount of oil estimated to be present in the Los Padres is a mere pittance, less than one percent of the oil and less than .06% of the natural gas thought to exist under federal lands nationwide. It is generally recognized that stricter conservation and fuel economy standards would save many times this amount. In addition, there appears to be scant demand by bidders; federal land managers have admitted that few oil companies have expressed an interest in Los Padres drilling. *Bakersfield Californian*, "Los Padres Reserves on Tap for Drilling," February 27, 2002. Yet, the Forest Service is proposing to irretrievably commit specific areas to oil and gas development (*see* DEIS at p. 1-11), in the absence of full information, unnecessarily foreclosing many other options for the uses of those lands. For instance, 74 percent of the area estimated to have high potential for occurrence of oil and gas is within inventoried roadless areas.[5] Q-6, *Frequently Asked Questions* at p. 2. Other tracts identified for leasing are within areas containing designated Wild and Scenic Rivers, within view of designated wilderness areas, and within areas designated as critical habitat for the condor.

The Forest Service may well discover after completion of the forest plan revision that the use of these areas for oil production was inappropriate when balanced against the other uses and needs of the Los Padres. By proceeding in contrary fashion, the Forest Service has failed to comply with the NFMA and has deprived the public of a meaningful opportunity to evaluate fully the impacts of the decision. *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987).

The project is inconsistent with the forest plan. The DEIS does not point to any authority that permits the Forest Service to *first* decide to lease specific lands and then to conform the forest plan to that decision at a later date. In fact, the NFMA and its implementing regulations require uses of forest land to be consistent with the applicable forest plan. 16 U.S.C. § 1604(i); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067-68 (9th Cir. 1998); 36

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[5]It certainly seems premature to identify designated roadless areas for further development before the roadless policy is resolved.

C.F.R. § 219.10 ("all site-specific uses, including authorized uses of land, must be consistent with the applicable plan"). In addition, the Reform Act regulations also require consistency with the forest planning process. 36 C.F.R. § 228.102(c) ("[t]he leasing analysis shall be conducted . . . in accordance with the requirements of 36 C.F.R. part 219"); 36 C.F.R. § 228.102(e) (Forest Service must verify that oil and gas leasing is consistent with the land and resource management plan before making the decision to lease specific lands). The existing forest plan references these NFMA planning principles by expressly requiring that the exploration and development of energy resources be "integrate[d] . . . with the use and protection of other resource values." DEIS at p. S-24. Inconsistent with this plan directive, however, this DEIS has been deliberately divorced from the ongoing planning process to examine use and protection of other resources from a forest-wide perspective. Other inconsistencies between the project and the plan exist as well. For example, the existing forest plan requires oil and gas leases to be documented through NEPA *after* consideration of the guidelines in Appendix J (DEIS at p. S-24). Here, however, the Forest Service proposes to reverse the process, by revising Appendix J *after and based on* the leasing decision.[6]

The DEIS proposes to remedy inconsistencies between the leasing decision and the forest plan by amending the *plan* to conform to the decision. DEIS at pp. S-8, 1-14; *see also*, Q-1, *Frequently Asked Questions* at p. 1 ("[t]he Forest Plan will be amended, as necessary, to incorporate the leasing decisions"); DEIS at p. 2-17 (the decisions based on the DEIS will "supercede" portions of the existing forest plan). This is exactly backwards of the process required under the NFMA. *Friends of Southeast's Future*, 153 F.3d at 1070 (retroactive application of forest plan amendments to a proposed timber sale is impermissible under the NFMA). [7]

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[6]Another problem with making leasing decisions of on such a broad scale before comprehensively amending the forest plan is demonstrated by the DEIS' apparent failure to propose an alternative that *is* actually consistent with the forest plan. The DEIS states that Alternative 1 is inconsistent; presumably this is because existing leases authorize development of a higher "density" than the plan allows (*see* DEIS at p. 4-183). Yet, since all alternatives incorporate Alternative 1 (the "no action" alternative), the DEIS states that *all* alternatives are inconsistent with the Forest Plan (DEIS at p. 4-103). Although the discussion in the DEIS regarding plan consistency is not very clear or straightforward, it appears that the DEIS does not analyze an alternative that is truly consistent with the plan. This may create NEPA compliance issues. *See Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.").

[7]It may be that the Forest Service believes that section 228.102(e) of the Reform Act regulations authorizes it to wait until a specific lease is actually issued to make the determination that the leasing decision is consistent with the forest plan. *See* Q-5, *Frequently Asked Questions* at p. 2; *see also, Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43, 52-54 (D.C.Cir. 1999) (Forest Service's interpretation that it may complete the verification process

2. The Forest Service is not legally compelled to authorize oil and gas leasing in advance of the currently ongoing forest plan update.

From the documentation supporting the leasing proposal, it appears that the Forest Service believes it is compelled to proceed with the leasing decision at this time – based on a Wyoming district court case interpreting the Energy Security Act of 1980, *Mountain States Legal Foundation v. Hodel*, 668 F.Supp. 1466, 1472 (D.Wyo. 1987). *Frequently Asked Questions*,"Q-9, pp. 3-4.[8]

This reliance, however, is misplaced; *Mountain States Legal Foundation* does not compel this leasing decision for two reasons. First, the *Mountain States* case is distinguishable on its facts, as the Forest Service is not faced with a similar situation with respect to Los Padres leasing. Second, the case was decided prior to the effective date of the Reform Act and its implementing regulations, and these regulations now expressly *require* consistency with forest

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specified in section 228.102(e) after the BLM has proposed to lease specific parcels, although not necessarily the most reasonable interpretation, is subject to deference). If this is the Forest Service's reasoning, however, it is incorrect on a number of bases. First, even if Ninth Circuit would agree with the *Wyoming Outdoor Council* decision that the Forest Service may delay verifying consistency with the plan until later stages in the leasing process, section 228.102(c) of the Reform Act regulations require consistency with planning requirements at the earlier "leasing analysis" stage. Second, it appears (although the DEIS is extremely unclear on this point) that this DEIS is actually intended to support the decision to lease specific parcels. *See, e.g.,* DEIS at p. 1-4 (this EIS addresses two stages of the process: "lands available for leasing" and "lease or not lease specific lands"), p. 1-11 (this EIS is intended to provide analysis for the decision that results in an "irreversible and irretrievable commitment of resources" when leases are issued), and p. A-7 (after citing to both subdivisions (c) and (e) of section 228.102, the DEIS states that the Forest Service has decided to "combine the Land Availability Decision with the second step, the Leasing Specific Lands decision"). Much of the lack of clarity is attributable to the failure of the DEIS to explain what is meant by the lease of "specific lands." The Forest Service's lack of clarity on this point dates back to the time of enactment of the regulations themselves. *See Wyoming Outdoor Council*, 165 F.3d at 54. Third, even if the Forest Service's interpretation of section 228.102(e) is correct, that section would only allow deferral of the "verification" of consistency. The DEIS cites no authority showing that this regulation usurps the requirements of the NFMA that land use determinations be consistent with the plan at the time they are made.

[8]There appears to be another rationale as well. Although the Forest Service acknowledges that the leasing analysis already has been delayed by various factors over the last few years, it states that it is proceeding with the DEIS now because the DEIS is "consistent with the current Administration's policy encouraging energy development on public lands." Q-3, *Frequently Asked Questions*, at p. 2 . Consistency with current energy policy, however, is not a substitute for compliance with the NFMA.

planning requirements.

***Mountain States* is not factually similar.** There, plaintiffs challenged a decision to suspend and delay mineral leasing pending the completion of the initial forest plan required under the NFMA. *Mountain States Legal Foundation*, 668 F.Supp. at 1469. The court found that the suspension violated the Energy Security Act's requirement to process pending applications for leases notwithstanding the "current status" of a forest plan being prepared under the NFMA. *Id.* at 1472.

The Energy Security Act of 1980, however, was passed only four years after the NFMA, at a time when the first generation of forest plans under the NFMA had not yet been prepared. It is reasonable to conclude that there was likely a Service-wide backlog of uncompleted plans only four years following enactment of the comprehensive requirements contained in the NFMA. Indeed, the language of the NFMA itself recognizes that it will take a number of years to implement the planning statute's mandate. 16 U.S.C. § 1604(c) (The Secretary "shall attempt to complete [the incorporation of standards and guidelines required under the NMFA] for all . . . units by no later than September 30, 1985."). The situation when *Mountain States* was decided is very different from here, where not only does the initial NFMA plan for the Los Padres already exist, but a comprehensive update of the management direction that will analyze appropriate land uses, including oil and gas development, is underway at the same time as the separate leasing analysis and is nearing completion.

In addition, in *Mountain States*, the Forest Service had actually revoked already issued or approved leases to await the outcome of the forest planning.[9] *Mountain States v. Hodel*, 669 F.Supp. at 1471-2. Thus, the court rejected the Forest Service's argument that it was "processing" the leases in the context of completing the forest plan. Here, however, the Forest Service is not suspending already approved leases, but is simply undertaking the leasing decision analysis at the same time as the forest plan revision. Nothing in *Mountain States* requires that the Forest Service must process lease applications by conducting the leasing analysis in a separate document, on a separate but parallel planning track. The issue here is not whether it is proper to suspend leasing pending the development of a plan, but whether the leasing analysis must be in a separate document on its own track or, instead, must be part of a comprehensive forest plan re-evaluation. Indeed, as set forth above, the NFMA requires that all conflicting uses of forest resources be balanced in an integrated plan to achieve the best use.

***Mountain States* was decided prior to adoption of the Reform Act.** The Reform Act was passed in 1987, the same year *Mountain States* was decided, and presumably became

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[9]In *Mountain States*, the Regional Forester apparently suspended leases that, in some cases, had already been forwarded to the BLM for issuance or even had already been issued. *Mountain States v. Hodel*, 669 F.Supp. at 1471-2. (In "suspending" leasing, the Forest Service requested that BLM "return" lease files already forwarded to the BLM and, in at least one case, actually "revoke" an already issued lease.) The DEIS discloses nothing similar occurring here.

effective the next year. In 1990, regulations were adopted to implement the Reform Act; these regulations reconcile any conflicts between leasing decisions and forest planning. Section 228.102(c) of the regulations provide that leasing analyses are to be conducted *in accordance with* the NFMA regulations governing forest planning. In addition, section 228.102(e) provides:

> At such time as *specific lands are being considered* for leasing, the Regional Forester shall review the area or Forest-wide leasing decision and shall authorize the Bureau of Land Management to offer specific lands for lease subject to . . . [v]erifying that oil and gas leasing of the specific lands . . . is *consistent with the Forest land and resource management plan.*

36 C.F.R. § 228.102(e) (emphasis added). These regulations were adopted ten years later than the Energy Security Act, at a time when the Los Padres (and other forests) had adopted completed plans under the NFMA.

This DEIS states that it serves as the basis for the first two steps of the four stage leasing decision process: (1) the analysis of lands available for leasing; *and* (2) *the decision to lease or not to lease specific lands*. DEIS at pp. 1-4, 1-8, A-7; *see also* note 7, above. Thus, the section 228.102 consistency requirements are applicable to this leasing decision and, unlike in *Mountain States*, the Forest Service is not free to ignore the status of the forest plan in deciding which specific lands to lease.[10]

3. <u>The DEIS fails to adequately analyze potential environmental impacts in violation of the National Environmental Policy Act.</u>

Under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.* decisions undertaken by federal agencies must be based on complete analysis so that they are fully informed and well-considered. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). This DEIS falls far short of this standard, particularly with respect to its analysis of impacts from pipeline spills and to the California Condor, two issues of particular concern to the Attorney General.[11]

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[10] *Mountain States* is questionable authority in another regard. The court there also held – relying on the earlier case of *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D.Wyo. 1980) – that the failure to process lease applications was an unlawful "withdrawal" of public land in violation of the Federal Land Policy and Management Act of 1982, 43 U.S.C. section 1714. The holding of the *Andrus* case, however, was roundly criticized and ultimately rejected by the Ninth Circuit in *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229-30 (9th Cir. 1988). Thus, a significant basis for the court's invalidation of the government's action has been overruled.

[11] While the DEIS may also be deficient in other respects, these comments focus on only these two issues.

Pipeline spills. One of the most significant flaws in the DEIS is its failure to discuss in more than passing fashion the potential impacts of ruptures, spills, and leaks from the oil and gas pipelines that will be needed to link wells and tanks and to carry the product to refineries or markets. The production of oil and gas from the new Los Padres leasing will not only necessarily result in the construction of numerous new pipelines, but will increase the use of existing ones. As acknowledged in the DEIS, as much as 427 miles of new pipeline will need to be constructed if all of the areas contemplated for oil and gas production are leased and developed. DEIS at p. 4-165.

While the DEIS has several one sentence references at various places within its pages regarding the possibility of leaks from pipelines, none of these brief statements indicate or analyze the potential seriousness of these spills. The risk of spills and leaks is more than theoretical – according to an article published earlier this year in the *Washington Monthly*, the United States Office of Pipeline Safety counted nearly 6,400 pipeline accidents that occurred in the United States between 1986 and August of 2001, causing 376 deaths, 1,799 injuries and $1,140,697,582 in property damage. Charles Pekow, *Washington Monthly*, "Lines of Fire," January 1, 2002. The increased potential for a serious accident from hundreds of miles of new pipeline – including the possible physical danger to recreational users and residents of the forest, as documented in the *Washington Monthly* – is a substantial human health risk of leasing operations that simply has not been analysed in the DEIS. Instead, the DEIS only includes a reference to the "small danger of spills and associated fires." DEIS at p. 4-153. There is not even an explanation of why the Forest Service considers the risk small.

Spills from oil pipelines also present the possibility of environmental damage to waterbodies, wildlife, and other sensitive resources. Given that some of the alternatives will make lands in or near designated Wild and Scenic Rivers and other environmentally sensitive areas available for leasing (DEIS at pp. 4-169, 4-157), the potential for spills to cause environmental harm is serious and substantial. Although a short section of the DEIS refers to spills, it is extremely general, and is principally concerned with possible water pollution, and with spills from wells, tanks and trucks. DEIS at pp. 4-154-6.[12] This discussion contains no specifics, and omits mention of fire and explosion dangers, and of pipeline accidents.

Failure to provide information about the major potential environmental consequences from forest-wide oil leasing activity means this DEIS fails to meet NEPA requirements to provide the public with full environmental disclosure. *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973). An EIS must "set forth sufficient information for the general public to make an informed evaluation .... and for the decision maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action." *Sierra Club v. United States Army*

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[12]Although the DEIS refers to "Cumulative Watershed Effects" and provides a chart for likelihood of negative impacts, this discussion is so obtuse and vague as to be completely unhelpful to the reader seeking guidance from the document. DEIS at p. 3-49.

Corps of Engineers, 701 F.2d 1011, 1029-1030 (2d Cir. 1983). NEPA requires that the EIS contain a reasonably thorough discussion of the significant aspects of the probable consequences of an action. *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). An EIS is invalid if the information and analysis it contains is "too vague, too general and too conclusory." *Silva,* 482 F.2d at 1285. It is a fundamental tenet of NEPA that federal agencies must take a "hard look" at environmental consequences arising from proposed projects. *Id.* The DEIS' cursory, generic reference to the possibility of spills from oil production (including spills from petroleum trucks, tanks and wellheads), without a thorough discussion of the particularly significant risks to the environment and to human health posed by the potential of spills and leaks from hundreds of miles of new oil pipeline, does not meet this standard.

Because the environmental impacts analysis in the DEIS lacks detail, the document's discussion of mitigation of spill impacts is also lacking in meaningful specifics. Instead, the DEIS discusses, in only a very general way, that the Oil Spill Contingency Plan for Los Padres will be followed, and that operators will be required to prepare spill prevention and HAZMAT plans. DEIS at pp. 4-155, C-29, E-5. It is unclear whether and to what extent any of these requirements addresses mitigation for the specific risks posed by this project; accordingly, the DEIS fails to comply with the requirements of NEPA to discuss mitigation in sufficient detail to ensure that environmental consequences are fairly evaluated. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352 (1989). Impacts of pipeline accidents are a forest-wide as well as a site-specific issue, and should have been addressed in this DEIS to allow for informed decision making.

California Condor. As the Forest Service is well-aware, it is only through the superhuman efforts of the U.S. Fish and Wildlife's captive breeding program that it may be possible to bring this species back from the brink of extinction. The proposed oil leasing puts the future success of this effort in jeopardy. Four hundred acres of the Sespe High Oil and Gas Potential Area (HOGPA) and 540 acres of the Piedra Balanca HOGPA proposed to be made available for leasing have been designated as critical habitat for the California Condor. DEIS at p. 3-54-5. Accordingly, the DEIS correctly, but cursorily, recognizes that the proposed leasing activity could result in the future loss of condor habitat.

Having briefly identified part of the impact, however, the Forest Service fails to complete its obligations under NEPA by, first, failing to fully analyze the impacts and, second, failing to appropriately identify and analyze measures to mitigate the impacts. For example, the DEIS references the well-documented danger to the California Condor from power lines that will serve the project, yet it does this without offering any specific analysis of the problem, nor suggesting any mitigation, other than that raptor guards "may" be required.[13] DEIS at pp. 4-54, 4-55, 4-68,

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[13]There also is a reference to siting requirements for power lines (i.e. 200 meters below the crest of hills "wherever feasible") (DEIS at p. 4-77), but there is no analysis of how either of these measures will mitigate impacts to the condor (which is a vulture, not a raptor), or why they are expected to cause impacts to be less than significant.

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4-77. Similarly, there is a reference to the danger posed to birds from drinking from contaminated pools, but again, any discussion of the gravity of the danger or whether it can be avoided or mitigated is absent. DEIS at p. 4-55. Also missing is analysis of any other specific impacts that are foreseeable to the condor from this project. In fact, the lengthiest discussion in the DEIS concerning the California Condor occupies only a few short paragraphs. DEIS at pp. 3-54-5.

The DEIS' entire narrative discussion of mitigation measures for loss of condor habitat, or any other impact to the condor, is limited to statements that future site-specific surveys and consultation with U.S. Fish and Wildlife biologists "should" avoid or mitigate impacts so that the viability of species is not further jeopardized. DEIS at p. 4-62, 4-72, B-21. This does not satisfy the Forest Service's obligation under NEPA to discuss possible mitigation in sufficient detail to enable full disclosure of potential impacts and informed decision-making. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989.) An EIS necessarily involves some degree of forecasting and if discussion of environmental consequences can be deferred based on a promise to perform a comparable analysis in connection with some later site-specific projects, no environmental consequences would ever need to be addressed in an EIS. *Kern v. United States BLM*, 2002 U.S. Dist. Lexis 4602, at 20 (9th Cir. Mar. 22, 2002). Without a reasonably detailed evaluation of the likely success of various measures available to mitigate the impacts to condors caused by the new power lines required for additional oil and gas development in the Los Padres, it is impossible to evaluate and make a decision about the potential harms and risks of this project. It may be that the project is simply inconsistent with the condor's survival. The viability of possible mitigation measures– and thus the condor itself – needs to be assessed now.

Despite claims in the DEIS that stipulations applied to leasing agreements will provide for mitigation and that therefore identification of stipulations is of "utmost importance in this EIS," (DEIS at p. 1-11), no examples of mitigation for impacts to condors (nor any other of the impacted wildlife species, for that matter) can be found in the DEIS to place in the "model stipulations" found in Appendix B. Instead, Appendix B relies exclusively on the use of time and surface occupancy restrictions that will be based on future surveys and future consultation with the United States Fish and Wildlife Service. DEIS at pp. B-21. This attempt by the Forest Service to defer analysis and consideration of mitigation to later site-specific environmental review and to the Endangered Species Act consultation process is does not meet the requirements of NEPA. The Ninth Circuit has made it clear that where impacts are reasonably foreseeable, it is not appropriate to defer analysis to a future date. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F3d. 1372, 1380 (9th Cir. 1998).

This is true even where, as here, the EIS at issue is the first tier environmental document of a multi-stage process. The standards set forth in *State of California v. Block*, 690 F2d. 753 (9th Cir. 1982) are applicable here. There, plaintiffs challenged a decision to designate 36 million acres of national forest land as "nonwilderness" on the grounds that the EIR did not contain enough site-specific data to support the designation. *Id.* at 760. The Forest Service argued that, since the EIS described only the first step of a multi-step national project, a generalized

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discussion of environmental impact was sufficient. *Id.* at 761-2. The court disagreed, on the basis that the decision to commit the areas to nonwilderness status would make an irreversible and irretrievable commitment of resources that required environmental scrutiny at the time the decision is made to constrain future choices. *Id.* at 762-3.

In limited circumstances, where future choices will not be constrained, the courts allow some deferral of impact analysis. *See Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992) (limited mitigation discussion was permissible, because the agency would make no decision that could negatively affect the environment without additional environmental review). In contrast to *Lujan*, the leasing decision DEIS is intended to be used by the Forest Service to commit specific lands for lease and to specify what lease stipulations to apply to which lands. The BLM will be notified of the lands available for lease, and will then offer them for competitive bid. DEIS at p. 1-11. Thus, this proposal will alter the balance of land uses in the Los Padres, forest-wide, necessarily foreclosing some other uses of the areas offered for leasing. Under *Block*, these impacts and measures to mitigate these impacts must be analyzed at the time the decision is made, in this DEIS, in order to foster informed decision-making and informed public participation. *Block*, 690 F.2d at 761. If there were any doubt, the DEIS itself dispels it by the statement on page 1-11 that "issuance of a lease constitutes the 'irreversible and irretrievable commitment of resources' that requires NEPA analysis and disclosure," and that "this EIS is intended to provide that analysis for the lands within the study area." DEIS at p. 1-11.[14]

Because this DEIS will commit specific lands within the Los Padres to oil and gas

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[14]As discussed in note 7 above, this DEIS is extremely unclear as to the exact scope of the decision(s) the Forest Service will make based upon it. Despite many contrary statements, the DEIS appears to imply in some places that this is only a "leasing analysis," consistent with the process outlined by the D.C. Circuit court in the *Wyoming Outdoor Council* case (165 F.3d 43). There, the court found it did not have jurisdiction to hear a challenge to the EIS' failure to contain site-specific analysis because there had not yet been an irreversible and irretrievable commitment of resources to establish ripeness. *Id.* at 49. As one court has pointed out, however, the *Wyoming Outdoor Council* case "stands alone" in its interpretation of when NEPA issues are ripe. *Center for Biological Diversity v. Dombeck*, 2001 U.S. Dist. Lexis 22158, at 12 (D. Ariz. 2001). In addition, that case is factually different because, there, the leasing plan at issue did not identify specific areas available for leasing; instead, it identified only broad categories of lands. *See Wyoming Outdoor Council v. Dombeck*, 148 F.Supp.2d 1, 5 (D.D.C 2001). As discussed above, here it appears that Forest Service intends to use this DEIS to support an irreversible and irretrievable commitment of resources. Even if the Forest Service plans to undertake additional site-specific NEPA analysis as individual specific parcels are leased, for the reasons set forth above, NEPA still requires a more detailed analysis of the forest-wide implications of this proposal than now exists in the DEIS.

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development, possibly foreclosing wilderness and wildlife habit uses, and because the project could negatively impact condor habitat, NEPA requires the Forest Service to conduct a much more thorough analysis of the potential harm to this endangered species from this project, and of measures to mitigate that harm. Particularly in light of the huge amount of emotional and financial resources that have been invested to attempt to save the condor, more detail is required to enable full public disclosure.

CONCLUSION

Since 1999, based on studies initiated in 1995, the Forest Service has been working to prepare an update to the Los Padres Forest Plan that not only seeks to fill some key gaps in the existing plan, but also seeks to achieve consistent management direction across several southern California forests in order to protect and sustain particularly vulnerable and unique ecological communities. The government has also undertaken superhuman efforts to attempt to save the critically endangered California condor. The proposal to lease specific lands for oil and gas development now, without the benefit of the planning process required under the NFMA and without the full information required under NEPA, threatens to seriously jeopardize these ongoing efforts. Because the minuscule amount of oil and gas that is, theoretically, obtainable from the Los Padres does not and cannot justify action in contravention of applicable environmental laws, we request that the Forest Service withdraw this proposal and this DEIS.

If you or your staff have questions regarding these comments, please contact Deputy Attorneys General Sally Magnani Knox at 916-322-1802, or Brian Hembacher at 213-897-2638.

Sincerely,

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