Notice of Citizen's Appeal of
Los Padres National Forest Oil and Gas Leasing
Record of Decision and Final Environmental Impact Statement

Submitted to:

Regional Forester Bernie Weingardt, Reviewing Officer
USDA Forest Service
1323 Club Drive
Vallejo, CA 94592

Submitted by Appellants:

LOS PADRES FORESTWATCH

DEFENDERS OF WILDLIFE

CENTER FOR BIOLOGICAL DIVERSITY

September 15, 2005

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Bernie Weingardt, Reviewing Officer
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Re: Notice of Appeal – Los Padres National Forest Oil & Gas Leasing FEIS & ROD

Dear Mr. Weingardt:

On July 15, 2005, Los Padres National Forest Supervisor Gloria Brown issued a Record of Decision (ROD) and associated Final Environmental Impact Statement (FEIS) for oil and gas leasing on the Los Padres National Forest. The ROD authorized oil drilling to expand across 52,075 acres of the forest in Santa Barbara and Ventura counties, including up to 4,277 acres of surface disturbance.

NOTICE OF APPEAL

Pursuant to 36 C.F.R. § 215 and 36 C.F.R. § 217, and for the reasons stated below, Los Padres ForestWatch, Defenders of Wildlife, and the Center for Biological Diversity appeal to the Regional Forester, Pacific Southwest Region, USDA Forest Service, to overturn the ROD and FEIS for oil and gas leasing on the Los Padres National Forest.

This appeal is filed in a timely manner. The legal notice was published in the Santa Barbara News-Press on August 2, 2005. This appeal, including all attachments, was postmarked on September 15, 2005.

Los Padres ForestWatch is a community-based 501(c)(3) nonprofit organization headquartered in Santa Barbara, California. ForestWatch works to protect and restore the Los Padres National Forest and other public lands along California's Central Coast using community involvement, scientific collaboration, and legal advocacy. ForestWatch and its members are interested in the management of the Los Padres National Forest, and visit the forest for ecological study, scientific research, recreation, and aesthetic enjoyment.

Defenders of Wildlife is a national, non-profit membership organization dedicated to the protection of all native wild animals and plants in their natural communities. Founded in 1947, Defenders has more than 480,000 supporters nationwide, with more than 100,000 members in California, many of whom utilize portions of the Los Padres National Forest for recreation and enjoyment. Defenders of Wildlife's programs focus on what scientists consider two of the most serious environmental threats to the planet: the accelerating rate of extinction of species and the associated loss of biological diversity, and habitat alteration and destruction. Defenders of

Wildlife submitted timely comments on the Draft Environmental Impact Statement (DEIS) on April 19, 2002.

The Center for Biological Diversity is a nonprofit corporation dedicated to the preservation, protection, and restoration of biological diversity, native species and ecosystems in the Western United States and elsewhere. The Center has approximately 14,000 members, including those who visit the Los Padres National Forest for ecological study, scientific research, recreation, and aesthetic enjoyment.

Los Padres ForestWatch, Defenders of Wildlife, and the Center for Biological Diversity (collectively referred to as "appellants") each claim standing to file this appeal pursuant to 36 C.F.R. § 217.6(a), which allows any person or organization to file an appeal of a Forest Service decision to approve, amend, or revise a National Forest land and resource management plan. Appellants also claim standing to file this appeal pursuant to 36 C.F.R. § 215.13(a) because they submitted timely, substantive comments on the Draft Environmental Impact Statement.

About the Los Padres National Forest

The Los Padres National Forest spans 220 miles of California's central coast, from the famed Big Sur shoreline southward to the Los Angeles County line. It is California's third-largest national forest, and is also one of the country's most visited. People from across the nation come to visit the rugged coastal peaks, golden potreros, striking rock formations, and abundant recreation opportunities that the forest offers.

A view of the Pacific Ocean from Los Padres National Forest. Photo © LPFW, Inc.

Nestled between the urban areas of San Francisco, Los Angeles, and the southern San Joaquin Valley, the forest provides a variety of recreation opportunities, including hiking, camping, backpacking, rock climbing, mountain biking, angling, hunting, and horseback riding. The forest contains 10 areas designated by Congress as wilderness, including the San Rafael Wilderness, the nation's first primitive area to be protected as wilderness after passage of the Wilderness Act of 1964.

The Los Padres provides valuable habitat for 26 species listed as threatened or endangered, plus another 300 species that the Forest Service has classified as sensitive, species of concern, or species at risk. This is more than any other national forest in California, if not the nation. The Los Padres is perhaps most well-known for its efforts to recover the California condor, one of the world's most endangered vertebrate species. Fifty-six condors now soar above the Los Padres skies. The Los Padres is the only national forest that provides critical habitat for this magnificent bird.

The endangered California condor. The Los Padres National Forest contains some of the best nesting, roosting, and foraging habitat for this magnificent bird. Photo courtesy U.S. Fish & Wildlife Service.

In addition to these diverse recreation opportunities and habitats, the forest also provides pristine water supplies for nearby communities, agriculture, and industry. It contains 1,134 miles of streams and rivers that provide riparian and aquatic habitat for countless species, like the endangered steelhead, arroyo toad, California red-legged frog, and southwestern pond turtle. The forest also supports 60% of the most significant and intact low-elevation streams remaining in southern and central California. The Forest Service has dubbed the Sisquoc River as "the most pristine stream" in southern California. Stephenson & Calcarone 348. Other areas of "high ecological significance" here include Piru Creek, the Upper Cuyama River valley, and Sespe Creek. Id.

Existing Oil Drilling on the Los Padres

The Los Padres is also the only national forest in California with commercial supplies of oil and gas. There are currently 240 oil wells covering 4,800 acres of the Los Padres National Forest. Most of these oil wells are located in the Sespe Oil Field, nestled between the Sespe Wilderness, the Sespe Condor Sanctuary, the Sespe Wild & Scenic River, and the Hopper Mountain National Wildlife Refuge.

An existing oil well in the Sespe Oil Field, between the Hopper Mountain National Wildlife Refuge and the Sespe Condor Sanctuary. Over 500 wells have been drilled in this field over the past century, and it currently consists of approximately 280 wells, 90 well pads, 50 miles of roads, and 50 miles of pipelines. FEIS 4-153. Photo © LPFW.

The ROD and FEIS allow surface disturbance to expand two-fold when compared with the existing amount of acreage impacted by oil drilling. The decision to open up more of our national forest for oil and gas leasing will surely have an impact on the wildlife habitat, recreation opportunities, air and water quality, and scenic vistas that make the Los Padres one of the best national forests in the nation.

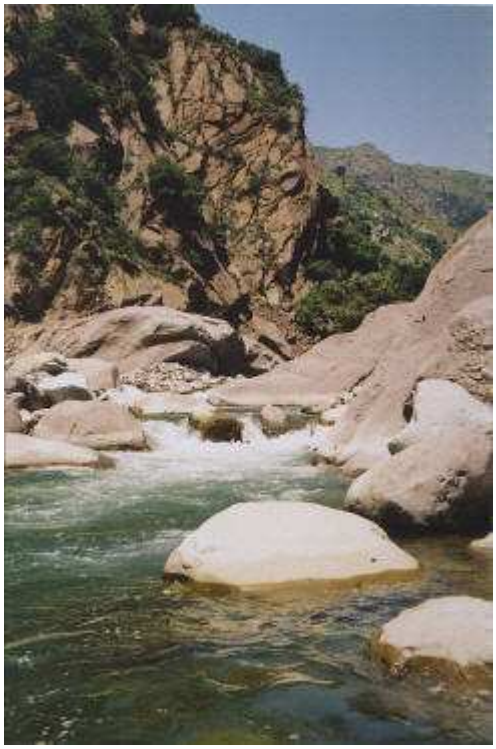
Threats Posed by Oil Drilling

The decision allows oil drilling to expand in three areas of the national forest – the San Cayetano, Sespe, and South Cuyama High Oil and Gas Potential Areas (HOGPAs). The Forest Service contends that these new oil drilling sites are next to existing drilling areas, yet the decision actually allows new drilling to expand up to 10 miles away from existing drilling areas.

The San Cayetano HOGPA, located along the Upper Ojai Valley in Ventura County.

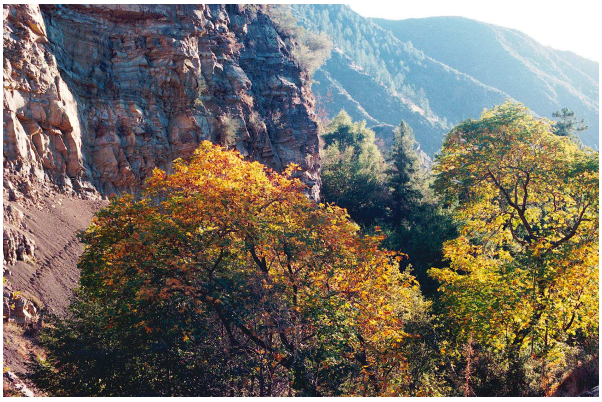
The South Cuyama HOGPA, located in the Cuyama Valley in Santa Barbara County.

Appellants are particularly concerned that the decision allows surface drilling next to some of the most important areas of the national forest. The decision specifically allows surface drilling immediately adjacent to three wilderness areas – the Chumash, Dick Smith, and Sespe wildernesses – and within a few hundred feet of a fourth wilderness area, the San Rafael Wilderness. Finally, the decision allows slant drilling beneath two rivers under study for Wild & Scenic River designation – Sespe Creek and Piru Creek, and beneath Santa Paula Creek, another river eligible for such designation.



The decision allows slant drilling beneath this portion of Sespe Creek (left), called Devil's Gate. This one-mile stretch of river is eligible for Wild & Scenic River designation.

The decision also allows slant drilling beneath the Santa Paula River (right), eligible for Wild & Scenic designation. Photos © LPFW, Inc.



Appellants are concerned about the decision's impact on wildlife, particularly the endangered California condor. The decision allows surface drilling next to the Sespe Condor Sanctuary and the Hopper Mountain National Wildlife Refuge, two areas that are critical for the survival and recovery of the endangered California condor. It also allows drilling along the Sierra Madre Ridge, a critical condor flyway and a condor release site. Appellants contend that the mitigation measures proposed by the agency are inadequate to protect this species from the harmful impacts of oil development, such as collisions with power lines, exposure to oil spills, habituation to human activities, and ingestion of trash and other toxic materials.

Appellants also contend that the decision will significantly impact scenic views and recreation opportunities. The decision allows slant drilling beneath several campsites in the forest, as well as drilling along key access routes to popular recreation areas, such as Dough Flat, the Potholes, the Ojai Front, Aliso Park, and Bates Canyon.

The Ojai Front – dubbed the "Gateway to the Los Padres" – is the site of the San Cayetano HOGPA. The decision will encourage oil drilling on private lands along the forest boundary, near numerous trailheads and campgrounds, from Horn Canyon and Sisar Canyon to the west, to Santa Paula Creek to the east. Photo © 2005 LPFW, Inc.

Finally, appellants are concerned about the lasting impacts to human health caused by expanded oil drilling. According to the agency's own calculations, this decision will result in an addition 12,179 pounds per day of air pollutants to a region that already exceeds state and federal air quality standards. Additional oil drilling could also foul some of the pristine water sources that the Los Padres was established to protect, including Lake Piru, a waterbody already designated as impaired by the Environmental Protection Agency.

Because of these threats, the Los Padres National Forest has been featured in an annual publication called *California's Ten Most Threatened Wild Places* for the past four years, and has also been featured in a nationwide report titled *Twelve Treasures in Trouble*.

By the Forest Service's own calculations, new oil drilling in the Los Padres will produce 17 million gallons of oil and gas equivalent. This represents *less than a day's supply of oil* at current consumption rates. Such a small amount of oil will do nothing to lower rising gasoline prices, increase national security, or promote renewable energy sources. On the contrary, the pursuit of this small amount of oil will result in significant, long-term impacts to our forest.

Summary of Appeal

Appellants contend that the ROD and FEIS are contrary to several of our nation's longstanding environmental laws, including the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Air Act (CAA), and the National Forest Management Act (NFMA).

The ROD and FEIS violate NEPA because the agency's analysis primarily relies on outdated reports and data, most of which is over a decade old. The agency's analysis also fails to adequately analyze and mitigate cumulative environmental impacts caused by past, present, and reasonably foreseeable future actions, including existing oil and gas drilling on the Los Padres. The FEIS also fails to adequately evaluate impacts to air and water quality, recreation, wildlife habitat, recreation, scenic viewsheds, noise, and cultural resources. Furthermore, the Forest Service failed to analyze a true "no action" alternative, and started its analysis with an overly narrow description of the purpose and need for the proposal. The agency also failed to respond to all public comments, the overwhelming majority of which opposed any additional oil drilling on the Los Padres. Taken together, the agency's reliance on this faulty and unlawful FEIS is arbitrary and capricious.

The ROD and FEIS violate the ESA, a law designed to protect our nation's wildlife from extinction and to ensure the survival and recovery of species at risk. The ROD and FEIS fail to use the best available science, and the Biological Opinion relied on by the Forest Service is not legally adequate.

The ROD and FEIS violate NFMA, a law designed to protect our national forests from improper management. The Forest Service approved the ROD and FEIS just weeks before issuing its revised forest plan, thus putting the cart before the horse. The FEIS even fails to contain a legally-adequate analysis of how the decision complies with the current forest plan, and the agency erroneously classified the decision as a "non-significant" forest plan amendment.

The ROD and FEIS violate the CAA because the proposed oil and gas leasing activities will greatly exceed local, state, and federal air quality standards designed to protect public health. The CAA requires the Forest Service to evaluate the conformity of these emissions with the State Implementation Plan and several Air Quality Management Plans, yet the agency failed to do so.

The ROD and FEIS also violate the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA). The Forest Service has relied on an outdated and inaccurate analysis of the reasonably foreseeable development, and has thus severely underestimated the amount of oil drilling and resulting environmental impacts that reasonably could occur.

For the foregoing reasons, appellants urge the Forest Service to withdraw the ROD, include a more accurate assessment of environmental impacts in the FEIS, and select an alternative that will truly protect the spectacular landscapes of the Los Padres National Forest.

STATEMENT OF REASONS

I. THE FEIS VIOLATES THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987.

The Federal Onshore Oil and Gas Leasing Reform Act of 1987, an amendment to the Mineral Leasing Act of 1920, governs issuance of oil and gas leases on National Forest land. See 30 U.S.C. § 226(g)-(h). Pursuant to the Act, the Bureau of Land Management (BLM) and the Forest Service share responsibility and authority for such leases. Id. Under the Forest Service's 1990 implementing regulations, analysis of proposed leasing shall include a projection of "the type/amount of post-leasing activity that is reasonably foreseeable as a consequence of conducting a leasing program," as well as an analysis of the "reasonable foreseeable impacts" of such post-leasing activity. 36 C.F.R §§ 228.102(c)(3), (4). These projections are typically referred to as a Reasonable Foreseeable Development Scenario (RFD).

The importance of the RFD to the Forest Service's analysis of the potential environmental effects of oil and gas development on the Los Padres National Forest is difficult to overstate. As noted in the FEIS, the RFD was developed "to analyze the environmental effects that could result as a result of alternative leasing decisions under each of several leasing decisions." FEIS at p. 2-25. The RFD provides estimates for the most basic of information concerning the extent of oil and gas productions (including the numbers of wells and drill pads, as well as the miles of roads and pipelines to be constructed) and is, in the words of the Forest Service, "the basis for the environmental consequences" evaluation conducted by the agency within the FEIS. Id. (emphasis added). Thus, the accuracy and integrity of the environmental analysis conducted within the FEIS is dependent upon the accuracy and integrity of the RFD.

Despite this central and fundamental importance, the Forest Service bases its RFD analysis on report conducted by a Forest Service petroleum engineer more than a decade ago, in 1993 ("the Bain report")—nearly 8 years before the agency released its DEIS and 12 years before the agency released its FEIS for this proposal ("information [in the RFD] is based on a more detailed technical report [Bain 1993] . . . and includes the data used to develop [the RFD's] conclusions."). FEIS D-3. The extremely outdated nature of the Bain report—and thus of the Forest Service's RFD—is perhaps most glaringly evident with respect to the economic trends projected in that report.

Although the RFD correctly identifies the price of oil as the first "key factor" influencing the rate of oil and gas exploration on the LPNF, the accuracy of its analysis ends there. Bain 1993, pp. 18-19. Demonstrating the profoundly outdated nature of the analysis provided by the Bain report, it predicts $27 per barrel (in 1991 dollars) as the "most likely" oil price for 2005.

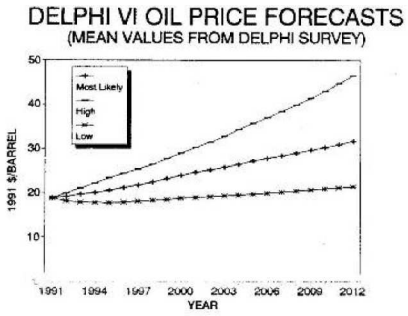


FIGURE 2

Adjusting for inflation, the "most likely" oil price in 2005 dollars is $38.74 per barrel.[1] This is radically lower than today's actual oil prices, which have steadily hovered over $60 per barrel, greatly exceeding even the graph's "high" maximum oil price forecast.

Source: New York Mercantile Exchange
September 15, 2005

Because oil economics have nearly doubled the price of oil from that predicted in the RFD, the RFD is an inaccurate and outdated basis for predicting economic trends, reasonably foreseeable development on the LPNF, and thus the actual extent and potential environmental consequences of oil and gas development that will occur under the proposed leases. In short, the inaccuracies of the RFD result in a fundamentally inaccurate environmental effects analysis throughout the FEIS.

These unprecedented high oil prices are resulting in the development of oil and gas resources within increasingly unexpected—and previously unprofitable—areas within the U.S. This phenomena is significantly affecting federal lands and federal minerals, as evidenced by the fact that BLM is currently experiencing "increased leasing activity for oil and gas exploration across several states not known for oil production—including Arizona, Arkansas, Mississippi, North Dakota and . . .Nevada." Kafanov 2005; see also GAO 2005, p. 5 ("Nationwide, the total number of oil and gas drilling permits approved by BLM more than tripled, from 1,803 to 6,399 for fiscal years 1999 through 2004.") Much of the reason for this boom can be explained by economics, as the "oil industry is to a large degree driven by prices," and "the industry now is flush with a lot of money and with that, they do things like exploration in areas they've normally not considered." Kafanov 2005. As stated by the California Independent Petroleum Association, in its comments on the RFD on behalf of itself and other industry groups:

[1] This calculation is based on the U.S. government's inflation calculator, located at http://data.bls.gov/cgi-bin/cpicalc.pl. This particular calculation was performed on August 30, 2005.

> [We] would like to emphasize that a lack of potential or lack of current industry interest should not be considered a basis for closing lands or imposing constraints on future development. The level of interest can change overnight, rendering an area previously considered to have low potential highly prospective due to new information, technology or economics.

FEIS 9-34.

The Forest Service's attempts to justify its reliance on the outdated Bain report as a basis for the RFD by arguing that like Forest Plans, RFD's are only revised every 10 to 15 years. Bain 1993, p. 5. This explanation fails to pass muster. Although Forest Service regulations at 36 C.F.R. §§ 228 *et seq.* do direct that leasing analysis, and thus the requisite RFD, be completed under the Forest Planning regulations at 36 C.F.R. §§ 219 *et seq.*, they clearly contemplate that the RFD and other requisite components of the analysis be completed contemporaneously, as part of the leasing analysis. By not relying on current and accurate data in support of its RFD analysis, the Forest Service has violated its own regulations governing the leasing of oil and gas resources on National Forest land.

II. THE FEIS VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT BECAUSE IT PRIMARILY RELIES ON OUTDATED DATA

A. The Reasonable Foreseeable Development Scenario is Outdated and Underestimates the True Amount of Surface Disturbance Caused by Drilling

The RFD's reliance on the outdated and inaccurate economic analysis presented in the 1993 Bain report also raises significant NEPA issues. As discussed above, this reliance results in assumptions that significantly underestimate the true amount of surface disturbance caused by new oil drilling. The agency relied heavily on these RFD projections to calculate the amount, location, and extent of environmental impacts of this proposal. Therefore, the FEIS fails to accurately disclose and analyze the true environmental impacts of new oil drilling in the Los Padres.

1. By Relying on an RFD Scenario That is 13 Years Old, the Forest Service Has Failed to Insure the Accuracy and Integrity of the FEIS

In order to take the requisite "hard look" analysis required by NEPA, an agency "may not rely upon incorrect assumptions or data in an EIS." Native Ecosystems Council v. U.S. Forest Service, 2005 U.S. App. LEXIS 16800, *23 (9th Cir. August 11, 2005), citing 40 C.F.R. § 1500.1(b). This requirement serves to meet the mandate of CEQ's implementing regulations that agencies "ensure the integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements." Id. at *23-24, quoting 40 C.F.R. § 1502.24. Thus, reliance upon outdated—and therefore incorrect—data or information constitutes a violation of NEPA. See Lands Council v. Forester of Region One of the United States Forest Service, 395 F.3d 1019, 1031 (9th Cir. 2004)(rejecting thirteen year old habitat surveys for endangered fish).

As discussed above, the Forest Service prepared its RFD for the proposed leasing of oil and gas in August 1993, nearly 8 years before the agency released its DEIS and nearly 12 years before the agency released its FEIS for this proposal. The RFD scenario for this proposal is woefully outdated, and the agency should have prepared either a new RFD scenario or a supplemental DEIS before issuing the FEIS. Its failure to do so is a violation of NEPA because, as discussed below, the reliance on an outdated RFD scenario has skewed the analysis of the proposed action's environmental impacts in the FEIS.

2. The RFD Underestimates the True Amount of Surface Disturbance Caused by Drilling

The RFD analysis predicts that the decision will allow only 20.5 acres of surface disturbance. FEIS 2-43. Appellants believe that this figure dramatically understates the true extent of environmental impacts associated with new drilling. It fails to account for the much larger acreage that will be impacts by the roads, other infrastructure, and other impacts resulting from exploration, development, and operational activities. Whatever the surface disturbance acreage truly is, it surely will not be confined to a single neatly defined sacrifice area. Instead, roads, pipelines, power lines, and well pads will be dispersed over vast areas of the Los Padres, fragmenting wildlife habitat, disturbing vegetative communities, and spoiling recreational experiences.

The RFD and FEIS fail to account for surface disturbance caused by seismic exploration activities. Exploring for oil and gas involves seismic mapping of the surface topography. Seismic mapping, regardless of the technology employed, requires surface disturbance, often involving small dynamite charges placed in a series of holes, typically in patterned grids. The RFD and FEIS fail to account for this acreage in its estimation of surface disturbance.

The RFD bases estimates of future surface impacts on a number of flawed assumptions. The RFD assumes that multiple wells will be drilled from every pad, and bases the estimates of total well pads and total surface disturbance on this assumption. However, the RFD lacks any analysis of the feasibility of drilling multiple wells on single pads, and includes the caveat that specific well locations are unknown, and such feasibility will depend on these locations. Therefore the assumption of multiple wells is arbitrary and capricious and deliberately misrepresents the total surface disturbance that would result from leasing in the Los Padres. Unless there are requirements that operators limit well pads and drill multiple wells from each pad, this assumption will lead to an underestimate of the total number of well pads, pipelines, roads and total surface disturbance.

It is unclear whether this assumption of multiple wells per well pad is extended through the EIS in order to make the estimates of per well drilling costs. These cost estimates form the basis of employment and income multiplier calculations and the subsequent estimate of overall economic impacts of drilling on the affected counties. If industry does drill multiple wells per pad, the per-well costs will be less and this will result in fewer jobs and lower income projections. This, combined with the underestimate of total surface impacts results in the proposal appearing to have much larger benefits and much lower costs that is actually the case.

Total disturbance estimates assume that interim reclamation will occur after drilling, and that it will be successful. However, the FEIS does not include any requirements for interim reclamation. Real-world evidence suggests that oftentimes, oil companies fail to reclaim drilling sites and restore them to pre-drilling condition. In an analysis of oil drilling on National Wildlife Refuges across the country, the General Accounting Office concluded that "oil and gas operators have not consistently taken steps to reverse environmental damages that have occurred from oil and gas activities" and that "reclamation of oil and gas facilities following their use is also inconsistent." GAO 2005, pp. 25-26. The same quite likely holds true for drilling activities on national forest lands. This assumption in the FEIS underestimates the total surface disturbance from the leasing plan, as well as the time span of the surface disturbance. Furthermore, the EIS defines the short term as the life of the project and states that this could be as long as 50 to 100 years. FEIS 4-111. With no requirement for interim reclamation and the "short term" being so long, there is a high likelihood that drilling sites will be unreclaimed for longer periods that projected in the RFD, resulting in greater surface disturbance.

Estimates of total surface disturbance are limited to just the footprint of the well pads, roads and pipelines and doesn't consider the fragmentation that will be caused by the network of roads, pipelines, and well pads. Numerous studies of wildlife indicate that habitat fragmentation caused by roads and other linear surface disturbance can be significant. See Weller *et al.* and Thomson *et al*. for detailed documentation of the impacts of oil drilling on habitat fragmentation.

The EIS states that "More specific estimates of road construction activities can only be determined when the detailed, site-specific Application to Drill (APD) and Surface Use Plans of Operation (SUPO) are submitted to the Forest Service for review and approval." FEIS 4-100. The RFD and EIS underestimate the total impact of the roads and pipelines that are projected, then hedge those estimates with the caveat that the ultimate impact will not be known until APDs are reviewed, leaving more uncertainty about the total impacts from this proposed development.

The FEIS predicts that if a major oil field were found the impacts on scenic and other resources would be great, but because the RFD doesn't predict a major find, these impacts are dismissed. With oil prices much higher than those in effect at the time of the RFD projections, the interest by industry will likely be greater. If this is the case, more wells will be drilled. This does not necessarily mean that a "major field" will emerge, but higher prices means that developing prospects with lower probability of success becomes more attractive to industry. Dry holes will still impose impacts on the landscape, possibly to a greater extent than producing wells. The RFD and FEIS assume that multiple wells will be drilled from each pad. If there is a push to explore lower probability areas, and more dry holes are drilled, there will be more well pads, since the absence of a show of oil will mean that the producer will not drill multiple wells from that pad, but will move on to other areas.

Higher prices for oil will also induce a faster pace of development and will lead to greater surface disturbance than projected in the RFD and FEIS. In the absence of any requirement that producers complete successful interim reclamation of well pads, it is likely that such reclamation will not occur or will be inadequate, and the total surface disturbance will be higher than projected for a longer time.

The FEIS states that the risk of significant impacts is low for all the alternatives analyzed except Alternative 2 (which emphasizes oil and gas drilling). The RFD does not support this prediction. Furthermore, the FEIS ignores its own assumptions in order to inflate the potential positive impacts on local communities, by assuming a much higher level of expenditures and drilling activity than would be expected if the impact-minimizing assumptions are met. These contradictory assumptions serve to make the proposed drilling project more attractive than if an accurate assessment had been made.

3. The Agency Relied Primarily on this Outdated and Flawed RFD Projection in Conducting its Analysis of Environmental Impacts

The Forest Service's analysis of environmental impacts in the FEIS heavily relied on the projections set forth in the RFD. The FEIS states that the "effects on lands and resources were analyzed assuming the reasonable foreseeable development activities (RFD) described Chapter 2 and in Appendix D." FEIS 4-6. Moreover, the FEIS states that the RFD projections helped the agency in "identifying and assessing reasonable leasing alternatives and in estimating and evaluating the resulting environmental effects." FEIS, Appendix D-3.

The FEIS cites to the RFD consistently throughout the document. Clearly, if the agency used more recent (and more reliable) data to formulate the RFD scenario, its entire analysis may have been different. In particular, it is probable that the outdated RFD scenario understates the amount of exploration, production, and surface disturbance that will result from the proposed action.

B. The FEIS and Background Reports Rely on Other Outdated Information

An analysis of Appendix 6 of the FEIS indicates that the environmental analysis primarily relies on sources that are 10-20 years old. Specifically, the following sections rely on outdated information and data:

Impact Area	Age of Documents Referenced (in years)					
	>30	21-30	11-20	6-10	0-5	undated
Air Quality	0	1	14	3	0	0
Biology	10	7	4	2	0	5
Cultural	0	1	2	2	0	0
General	0	0	2	1	1	0
Minerals	0	1	5	3	1	0
Noise	2	1	0	2	0	2
Recreation	1	3	2	1	0	0
Socioeconomic	0	0	2	7	0	9
Traffic	0	1	0	1	0	0
Visual	1	0	0	1	0	0
Watershed	0	0	1	1	0	1
TOTALS	14	15	32	24	2	17

Thus, out of the 104 total referenced documents in the FEIS, only 2 of them are five years old or less, and only one-quarter of the referenced documents are ten years old or less. Our analysis of individual background reports reveals a similar reliance on old and outdated sources.

III. THE FEIS IS INADEQUATE BECAUSE IT FAILS TO ADEQUATELY ANALYZE THE CUMULATIVE AND CONNECTED ENVIRONMENTAL IMPACTS OF ALL OIL AND GAS ACTIVITIES ON THE LOS PADRES NATIONAL FOREST, IN VIOLATION OF NEPA

Under NEPA, the Forest Service is required to analyze all environmental impacts of the proposed action, including direct, indirect, connected, and cumulative effects. 42 U.S.C. § 4332(C)(i); 40 C.F.R. § 1508.25. Direct effects that are actually caused by the proposed action, indirect effects "are caused by the action and are later in time or farther removed in distance, *but are still reasonably foreseeable*," connected effects "are interdependent parts of a larger action and depend on the larger action for their justification," and cumulative effects "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." See generally 40 C.F.R. § 1508.

In the context of oil and gas leasing on federal lands, courts have interpreted these provisions of NEPA to require a "comprehensive" analysis of the "successive, interdependent steps culminating in oil and gas development and production," including the "effects of oil and gas activities beyond the lease sale phase." Connor v. Burford, 848 F.2d 1441, 1444-45 (9th Cir. 1988). Thus, "the government's inability to fully ascertain the precise extent of mineral leasing in a national forest is not . . . a justification for failing to estimate what those effects might be . . ." Id. at 1450. If the Forest Service cannot provide a meaningful evaluation of such effects, it should—at the most—only approve NSO leases. Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983).

A. Existing & Future Oil & Gas Development

The FEIS fails to meet NEPA's cumulative effects mandate. NEPA demands that such analysis be not only comprehensive, but detailed and quantified. See Lands Council v. Powell, 379 F.3d 738, 745 (9th Cir. 2004) (NEPA analysis "must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment."); Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1379 (9th Cir. 1998)("To 'consider' cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the [agency's] decisions, can be assured that the Forest Service provided the hard look that it is required to provide.").

A searching inquiry into potential cumulative effects in this instance is particularly imperative in light of the extensive existing oil and gas infrastructure and operations already present on the Los Padres National Forest (as well as on inholdings within the Forest, and surrounding public and private lands), the highly tenuous status of the California condor and other endangered species

that depend upon habitat within the Los Padres, and the multitude of other threats these imperiled species face. Unfortunately, the FEIS fails to provide such detailed information, and thus fails to portray a "realistic evaluation of the total impacts" of the proposed new development of oil and gas infrastructure on the Los Padres National Forest, as required by NEPA. Grand Canyon Trust, 290 F.3d 339, 342 (D.C. Cir. 2002).

For example, and as noted by the Forest Service, there are 21 existing oil and gas leases on the Los Padres National Forest totaling 4,863 acres. FEIS 1-8. Additionally, the Los Padres currently has a backlog of 29 oil and gas lease applications totaling approximately 25,000 acres. Id. The FEIS does not contain any further information on these existing or potential oil and gas operations. Nor does the FEIS contain any mention or analysis of other oil and gas activities near the Los Padres. A recent computer-aided analysis of government data showed that as of 2003, there were 17 active drilling operations within 5 miles of the Los Padres, and another 18 active leases not yet producing. EWG 2005. The FEIS also fails to account for other nearby drilling operations on private lands, including those in the Upper Ojai Valley, the Santa Clara River Valley, and the Cuyama Valley.

NEPA, however, demands far more than merely mentioning the likelihood of future oil and gas operations. An assessment of cumulative effects must include a "useful analysis," including "discussion and an analysis in sufficient detail" to assist the agency in its decisionmaking process and its efforts to avoid environmental impacts. Churchhill County v. Norton, 276 F.3d 1060, 1080 (9th Cir. 2001), citing Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 809-810 (9th Cir. 1999).

At a minimum, the Forest Service should have included "detailed" information on the exact location of these operations, their relation to endangered species habitat, perennial waters, and other environmentally important or sensitive areas, the nature and extent of past environmental damage or contamination caused by spills or other accidents at those locations, and the amount of road construction and other infrastructure associated with the facilities. Similarly, there is absolutely no assessment of such information in relation to the approved but undeveloped leases on the Los Padres National Forest. As discussed in detail below, this failure to assess the potential effects of new oil and gas development on the Los Padres, in conjunction with the effects of existing development and other actions that may affect the species, habitat, water and other natural resources, represents a clear violation of NEPA's cumulative effects requirement.

B. Biological Resources

Like the other cumulative effects analysis contained within the FEIS, the "analysis" in relation in wildlife is perfunctory and of essentially no value. Although the Forest Service concedes that cumulative impacts "may pose significant barriers to preservation and recovery of listed species," it offers no meaningful, detailed, or quantified analysis of such effects, and in fact, does not even provide analysis specific to individual listed species (let alone other, non-listed, wildlife species). It instead provides only an extremely broad and generalized list of activities that may result in cumulative effects, including oil and gas development, grazing and recreational development, agricultural development, urban and residential development, development of roads, and development of pipelines and power-line corridors.

The cumulative effects analysis only lists the general categories of activities that combine to create cumulative impacts on biological resources, without specifying particular reasonably foreseeable projects. FEIS 4-57. The Forest Service's listing of potential categories of cumulative effects is a textbook example of the type of perfunctory examination that has been repeatedly rejected by the courts. See Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 994 (9th Cir. 2004). This mere listing of broad categories of potential effects falls far short of NEPA's requirement that cumulative effects consideration include a "useful analysis of the cumulative impacts of past, present, and future projects." Kern v. BLM, 284 F.3d 1062, 1075 (9th Cir. 2002).

The remainder of the cumulative impacts analysis is devoted to wildfires and development on private lands. FEIS 4-58. This section provides no quantitative analysis of impacts, no computation of vegetation acreage lost to past fires, and no predictions of vegetation loss caused by future oil-caused fires.

As noted above, a lawful cumulative effects analysis requires consideration not only of reasonably foreseeable future activities, but also of past and present activities. The FEIS fails entirely to analyze or even address the effects of past and present activities on wildlife.

Potential effects to the endangered California condor help illustrate both the importance of conducting a through cumulative effects analysis, and the inadequacies of the Forest Service's analysis. One of the largest sources of mortality for the condor has been, and continues to be, collisions with power lines. Yet, while the Biological Opinion concedes that condors "might also collide with exposed power lines erected to deliver power to well pads to run pumps, compressors, and generators," this potential effect is not even mentioned in the FEIS.

In addition to the direct impacts of further oil and gas development, there are many present and reasonably foreseeable activities posing threats to remaining condors that are both significant and well-known, and thus clearly should have considered in a lawful cumulative effects analysis. Pending development plans on the Tejon Ranch, for example, could transform a currently largely undeveloped 270,000 acre-area in the heart of condor habitat north of Los Angeles, and adjacent to the Los Padres National Forest, into a massive new residential city of more than 100,000 people. At least two facets of this development have been officially considered by local and state regulators: 1) in 2003 Kern County permitted the 1,000-acre, 15 million square foot Tejon Industrial Complex-East (although this project was successfully challenged in state court, Kern County is likely to re-approve the project in late 2005); 2) and in 2004 the County of Los Angeles Department of Regional Planning conducted official CEQA scoping on the Centennial Development, consisting of 23,000 residential units and over 14 million square feet of commercial and retail space on over 11,600 acres. Moreover, the Ranch's developers are currently seeking a blanket "incidental take" permit for the death of condors that would result from these and other future planned developments. All of these actions are clearly either present or "reasonably foreseeable" actions with direct significance for condor recovery efforts.

Because of its highly imperiled status, and the multitude of threats facing its continued existence and eventual recovery, the treatment of impact to the California condor presents one of the most

egregious examples of the inadequacy of the FEIS's cumulative effects analysis in relation to wildlife. There are, however, several other listed species that will also be negatively affected by the proposed oil and gas leasing and other activities, including the arroyo toad, California red-legged frog, and southern steelhead. These listed species, as well as many non-listed wildlife species, similarly received no consideration of the potential cumulative effects of the leasing on their health and viability, another clear violation of NEPA.

The FEIS acknowledges that development activities on private lands surrounding the LPNF could result in cumulative impacts. FEIS 4-58. Instead of providing a quantitative analysis of these impacts along with effective mitigation measures, the FEIS instead states that these projects are subject to further environmental review under the California Environmental Quality Act (CEQA). Postponing analysis and mitigation measures to a state agency, over which the Forest Service holds no authority, is not adequate under NEPA. It is also extremely reckless, since as the FEIS notes, local governments can (and often do) issue "statements of overriding consideration" to allow projects to proceed even though they will cause significant environmental impacts. FEIS 4-58.

In the next breath, the FEIS states that ESA-listed species "may already be suffering from significant cumulative impacts as a result of past and present human actions." FEIS 4-59. The FEIS fails to state what these activities are, whether they are occurring in or near the LPNF, and how the decision will increase or decrease these impacts.

Elsewhere, the FEIS states that development in South Cuyama oil fields may result in cumulative impacts, but then the Forest Service proceeds to approve oil development in the South Cuyama oil fields. Specifically, the FEIS states that

> Future development of existing oil and gas lease areas in the South Cuyama areas if added to Forest Service fuel break construction/maintenance and grazing activities in the area, and potential residential development in Cuyama Valley under Santa Barbara County's proposed Agricultural Cluster Development policies, could contribute to substantial alteration of habitats.

FEIS 4-62. The New Preferred Alternative includes not only development of *existing* lease areas in the South Cuyama areas but also development of *new* lease areas there, yet fails to state that this additional drilling would contribute even more cumulative impacts, fails to quantify such additional impacts, and fails to propose adequate mitigation measures.

C. Heritage Resources

The FEIS provides an inadequate analysis of cumulative impacts to heritage resources and Native American sacred sites. It states, in its entirety, that

> The Forest Plan and the associated EIS (1988) foresees improvement in heritage resource condition over time as a result of increased levels of heritage resource management activities (inventories, evaluations, protection, interpretation and enhancement). However, adverse impacts to heritage resources are expected to

> continue as a result of wildfires, prescribed burns, general forest recreation, and grazing. To the extent that oil and gas development projects result in impacts to heritage resources, these impacts will accumulate along with impacts from other Forest activities. If there is no impact at all to heritage resources, cumulative impacts will not increase. Or, if there are some non-significant project impacts, cumulative impacts could be avoided, minimized, or counter-balanced through project-aided heritage resource enhancement activities.

This statement does not comply with NEPA requirements for cumulative impacts analysis. We also note that the LPNF has accomplished few of the improvements in inventories and evaluations that were predicted in the forest plan 17 years ago to improve heritage resource conditions.

D. Noise & Traffic

The FEIS lacks any discussion of cumulative impacts to noise and traffic, in violation of NEPA.

E. Recreation

The cumulative impacts analysis for recreation is simply a reiteration of the analysis of direct and indirect impacts presented in the preceding pages. FEIS 4-146. A legally adequate cumulative effects analysis looks not only at direct and indirect impacts of oil drilling, but also on other reasonably foreseeable future actions. The discussion in the FEIS falls short of this requirement.

F. Scenic Impacts

The FEIS states that "there are no other reasonably foreseeable activities other than oil and gas leasing that might contribute additional significant scenic impacts on Los Padres National Forest." FEIS 4-110. This statement is inaccurate, as there are several proposed activities on the forest that may significantly affect viewsheds. This statement seems to contradict later conclusions, such as "there are 46,638 acres within the lease study area that are currently experiencing adverse scenic impacts as a result of past and present activities such as existing leases, firebreaks, and roads. FEIS 4-119.

Other than dismissing the chance of a major oil field development, the FEIS lacks any substantive analysis of cumulative impacts caused by the New Preferred Alternative nor any of the other alternatives. The FEIS reveals that adverse scenic impacts are occurring on nearly 4,200 acres in the San Cayetano, Sespe, and South Cuyama HOGPAs. FEIS 3-122. Oil drilling in the Sespe Oil Fields have been classified as "major" and "drastic" disturbances. FEIS 3-126. The FEIS fails to state how additional oil drilling in these areas will avoid contributing even more scenic blight to these areas. FEIS 4-110

G. Air Quality

The cumulative impacts analysis for all alternatives consists of only one paragraph, which states in its entirety:

> Cumulative air quality impacts include the combined impacts from Alternative [] together with other past, present, or reasonably foreseeable projects. The cumulative impacts of localized pollutants (SOx, CO, and PM_{10}) would depend on the locations of the individual projects and any other projects in the near vicinity. Such an assessment can only be conducted at the time of project-level analysis. The cumulative impacts of ozone would depend on the project's consistency with the local air quality management plan. If Alternative [] is consistent with the local AQMP, and the AQMP demonstrates progress toward achieving the ambient ozone standards, then by definition the contribution of the project to cumulative air quality impacts is non-significant. If the project were not consistent with the AQMP, then its cumulative ozone impacts would be significant.

FEIS 4-14 (Alternative 1); 4-18 (Alternative 2); 4-21 (Alternative 3); 4-24 (Alternative 4). This short analysis does not satisfy the requirements of NEPA, and the agency cannot postpone its cumulative impacts analysis to future projects. At a minimum, the agency should have the requisite data needed to conduct a cumulative impacts analysis of air quality impacts caused by *existing* drilling to determine whether those impacts are significant. If existing impacts are significant, then the agency would be able to conclude that any additional pollution caused by new drilling in these same areas would also be significant.

The cumulative impacts analysis must also account for other reasonably foreseeable future actions, such as the proposed Liquified Natural Gas facility off the coast of Port Hueneme, and its impacts on regional air quality and affect on attainment of air quality standards.

IV. THE FEIS FAILS TO PROVIDE SUFFICIENT DETAIL REGARDING POTENTIAL ENVIRONMENTAL EFFECTS TO WILDLIFE, RECREATION, SCENIC VISTAS, CLEAN AIR AND WATER, NOISE, AND HERITAGE RESOURCES.

A. The FEIS Unlawfully Defers Analysis to Site-Specific Projects

Under NEPA, the Forest Service is required to analyze all environmental impacts of the proposed action, including direct and indirect effects. 42 U.S.C. § 4332(C)(i); 40 C.F.R. § 1502.16. These effects include direct effects that are actually caused by the proposed action, and indirect effects "that are caused by the action and are later in time or farther removed in distance, *but are still reasonably foreseeable*." 40 C.F.R. § 1508.8.

The Forest Service fails to provide meaningful analysis of the potential environmental effects of new oil and gas development on the Los Padres National Forest throughout the FEIS. Although

programmatic documents such as the FEIS may lawfully defer full evaluation of site-specific impacts to later decisions, NEPA still requires that the Forest Service provide within the FEIS "sufficient detail to foster informed decision-making." Friends of Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003). The Council on Environmental Quality has also spoken on this issue, stating that

> It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and make those effects known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."

51 Fed. Reg. 15618 (1986).

The FEIS fails to meet this broad standard, punting all analysis of future effects of the proposed action, even though many of those effects are both reasonably foreseeable and possible to predict and estimate. For example:

> *Air Quality* – "Specific project –level detail is necessary to make a consistency determination. Therefore, consistency with the AQMP [Air Quality Management Plan] should be made at the project level, as each applicant proposes to develop a lease area." FEIS 4-11.
>
> "The cumulative impacts of localized pollutants (SOx, CO, and PM_{10}) would depend on the locations of the individual projects and any other projects in the near vicinity. Such an assessment can only be conducted at the time of project-level analysis." FEIS 4-14; 4-18; 4-21; 4-24.
>
> "However, if the emissions exceed the emission thresholds, it means that a more detailed project-level analysis would be necessary to determine whether the impact would be significant." FEIS 4-10
>
> "For emissions that are greater than the significance criteria, dispersion modeling could be performed to determine more definitively whether a local exceedance would occur." FEIS 4-11
>
> *Watershed Resources* – "Additional site-specific mitigation measures, and management restraints consistent with lease terms, can be developed as a result of the NEPA environmental analysis of individual project proposals." FEIS 4-31; 4-33
>
> *Biological Resources* – "The exact locations of future oil and gas activities within the HOGPAs are unknown at this time. Consequently, it is not possible to know what vegetation type(s) oil and gas development activities would occur in any HOGPA with more than one vegetation type." FEIS 4-52.

> *Heritage Resources* – "However, it is not possible at this time to predict specific impacts from future specific developments. This is due to the lack of information about the exact location, acreage and configuration of the future facilities, as well as the lack of detailed survey information about cultural resources for the vast majority of the Forest." FEIS 4-77.
>
> *Social Impacts* – "At this stage the potential for such impacts can only be based on the proximity to HOGPAs and the amount of reasonably foreseeable activity in the HOGPAs under the various alternatives discussed below." FEIS 4-89.
>
> *Noise* – "It is not feasible to do site-specific noise analysis without plans of operation." FEIS 4-92
>
> *Traffic* – "More specific estimates of effects of road construction activities can only be determined when the detailed, site-specific Application to Drill (APD) and Surface Use Plans of Operation (SUPO) are submitted to the Forest Service fore review and approval." FEIS 4-100.

Such a deferential approach violates NEPA, which requires the Forest Service to evaluate all "reasonably foreseeable" effects of the proposed action in the FEIS. It also violates NEPA implementing regulations guiding incomplete or unavailable information. Specifically, 40 C.F.R. § 1502.22 states:

> a. If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> b. If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> 1. A statement that such information is incomplete or unavailable;
> 2. a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
> 3. a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and
> 4. the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

The Ninth Circuit determined that "Section 1502.22 clearly contemplates original research if necessary" and held that "NEPA law requires research whenever the information is significant.

As long as the information is…essential or significant, it must be provided when the costs are not exorbitant in light of the size of the project and the possible harm to the environment." Save Our Ecosystems v. Clark, 747 F.2d 1240, 1244 n.5 (9th Cir. 1984). Much of the deferred analysis is quite essential and very significant, and are not exorbitant in relation to the enormity of this project and the possible harm to the environment.

The agency cannot "increase the risk of harm to the environment and then perform its studies…. This approach has the process exactly backwards." National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001). "Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges." *Id.* An agency's "lack of knowledge does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it." *Id.*

By deferring analysis to the project level, the Forest Service is essentially arguing that such information is not currently available or the means to attain it are unknown. In these situations, NEPA is clear that the agency must at least make a good-faith effort to evaluate the reasonably foreseeable impacts, summarize credible scientific evidence, and evaluate such impacts as best it can using acceptable theoretical approaches or research methods. The FEIS contains none of these for those impacts deferred to future analysis.

B. The FEIS and ROD Fail to Explain How the Agency Identified Specific Drilling Areas

The FEIS contains maps on pages 2-43 through 2-49 that show which lands are opened to new oil drilling, and the type of drilling to be allowed – no surface occupancy, no lease, and a catch-all category that includes everything else (standard lease terms, limited surface use, and timing limitations, among others).

Neither the FEIS nor the ROD provide any explanation for *how* the Forest Service identified these new drilling areas. The lack of any apparent criteria is particularly troublesome, since according to the maps, many of the new drilling areas are in, under, or immediately adjacent to extremely sensitive areas of the Los Padres National Forest.

For example, new drilling areas are located along the boundaries of four wilderness areas, one Wild & Scenic River, a popular recreation lake (Lake Piru), several popular hiking trails and campgrounds along the Ojai front, and adjacent to critical habitat areas for the California condor, such as the Sespe Condor Sanctuary and the Hopper Mountain National Wildlife Refuge. The FEIS and ROD provide no explanation as to why these areas were selected for new drilling, as opposed to less-sensitive areas where fewer impacts to forest resources would occur.

The agency claims that its decision concentrates new oil drilling areas close to existing drilling areas. However, our analysis of the maps shows that the decision allows drilling to expand nearly 10 miles away from sites of existing oil drilling.

HOGPA	Types of New Drilling Allowed and Miles from Existing Drilling Sites	
	Surface Drilling	**Slant Drilling**
South Cuyama West	6.25	7.5
South Cuyama East	7.0	7.5
Sespe	8.0	8.5
San Cayetano	8.0	9.5

C. The FEIS Fails to Take a "Hard Look" at the Environmental Impacts of Expanded Oil Drilling in the Los Padres National Forest

NEPA requires federal agencies to prepare Environmental Impact Statements (EIS) prior to proceeding with any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2)(C). EISs must contain a "detailed statement" of the environmental impacts associated with the proposed federal action. 42 U.S.C. § 4332 (2)(C)(i). The primary purposes of EISs and Environmental Assessments (EA) are (1) to provide decisionmakers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences, and (2) to provide the public with information and an opportunity to participate in gathering information. 40 C.F.R. § 1500.1(b); see also Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97-100 (1978). Although NEPA is a procedural statute, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989), its purpose is substantive in nature:

> Ultimately, of course, it is not better documents, but better decisions that count. NEPA's purpose is not to generate paperwork, even excellent paperwork, but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c)(emphasis added).

Central to NEPA's diverse procedural requirements is the mandate that a federal agency take a 'hard look' at the environmental consequences of its proposed action. Oregon Natural Resources Council v. Lowe, 109 F.2d 714, 717 (9th Cir. 1998). Taking a proper hard look prohibits "general statements about 'possible' effects," Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998), and in fact requires the Forest Service to provide information within the EA or EIS in support of or in opposition to its conclusions. More generally, the hard look doctrine provides the underlying foundation for NEPA's statutory requirements, as well as its substantive purpose.

Failure to provide specific information about the major potential environmental consequences from forest-wide oil leasing activity means that the FEIS fails to meet NEPA requirements to provide the public with full environmental disclosure. Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973). NEPA requires that the FEIS 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. The

FEIS' cursory, generic reference to the possibility of several environmental impacts, presented in more detail below, without a thorough discussion of the particularly significant risks to the environment and to human health posed by new oil drilling, does not meet this standard.

1. Biological Resources

The FEIS fails to adequately analyze the direct, indirect, and cumulative impacts of additional oil and gas drilling on the critically endangered California condor and other protected species that occur within the project area. Nor does the FEIS make a good-faith effort to disclose and analyze all potential impacts should the leases be granted or divulge and analyze the impacts of the new leases together with all existing oil and gas leases.

Instead, the FEIS simply defers all surveys and further consultation with the U.S. Fish and Wildlife Service and/or NOAA Fisheries to a future time when site-specific leases are sought and granted (FEIS 4-59), and provides a mere handful of binding Stipulations and Conditions of Approval regarding ESA-listed species while omitting any protective measures for non-listed sensitive and management indicator species. Unfortunately, these Stipulations and Conditions of Approval fail to protect even the listed species from the adverse effects of the decision.

By permitting actions that adversely impact federally and state protected species on the project site, the decision falls short of legal and biological obligations of the NEPA.

a. California Condor

The FEIS fails to adequately analyze the impacts of the project on the critically imperiled California condor, North America's largest bird and one of the most endangered vertebrate species in the world. The condor is the subject of one of the largest species recovery efforts in U.S. history, and the U.S. Fish & Wildlife Service has spent upwards of $40 million to bring this species back from the brink of extinction.

Therefore, it is imperative that the FEIS contain sufficient analysis of existing conditions and impacts to the condor, as well as specific, scientifically-supported mitigation measures to adequately protect the condor from adverse impacts. Unfortunately, the FEIS fails to apply these high standards, opting instead for inadequate or ineffective mitigation measures and allowing oil drilling in or near some of the most sensitive condor habitats on the national forest.

i. The Decision Allows Drilling In or Near Some of the Most Sensitive Condor Habitat in the Los Padres National Forest

The decision allows new oil drilling to expand into or near some of the most important nesting, roosting, and foraging habitat for the condor. According to the maps provided in the FEIS, the New Preferred Alternative will allow surface disturbance up to the boundary of the Sespe Condor Sanctuary and the Hopper Mountain National Wildlife Refuge, critical habitat areas for the condor. FEIS Figure 2-6, p. 2-47. The decision will also allow slant drilling along several miles of these boundaries, allowing the placement of well pads and other infrastructure as close as ½ mile from these protected areas. *Id.* In her letter to the Forest Service, condor biologist

Janet Hamber concluded that the "condor will incur significant impacts with additional gas and oil development in any area close to the Hopper Mountain National Wildlife Refuge and the Sespe Condor Sanctuary." Hamber 2002.

Also of concern, the decision allows surface drilling within a few miles of Lion Canyon in northern Santa Barbara County, the site of several condor releases and sightings since 1993. FEIS Figure 2-4, p. 2-45. This site was selected as an official condor release site because, according to the U.S. Fish & Wildlife Service, "it contains good condor habitat and *has fewer environmental hazards than the Sespe Condor Sanctuary*." [2] Allowing additional oil drilling in this area would serve to increase the very same environmental hazards that the USFWS sought to avoid in establishing this release site. Moreover, Lion Canyon is located along the Sierra Madre Ridge, a primary condor flyway, and the decision allows or encourages surface drilling along this important area. Palmer 2005.

The FEIS does not even mention the Sierra Madre Ridge nor its value as a major condor flight corridor, and only refers to the Sespe Condor Sanctuary in passing in the section on recreation impacts. Hopper Mountain NWR is only mentioned in relation to a fire that passed through the area in 2003. The FEIS must analyze impacts to these important condor habitat areas caused by existing and proposed new oil drilling, and its failure to do so violates NEPA.

ii. The Proposed Buffer Zones Do Not Adequately Protect Condors From Impacts of Oil Drilling

The FEIS purports to reduce the impacts of the action on the condor by establishing buffer zones around condor roosting and nesting sites. Specifically, the FEIS states that the following buffer "*may* be required*:*"

> 1. No surface occupancy shall be allowed within 1.5 miles of *historic or active* nest sites or reintroduction sites, or within 0.5 miles of *active* roost sites, *unless provided for through site-specific ESA consultation.*

FEIS B-19 (emphasis added). However, the FEIS fails to state how the agency arrived at these figures, and fails to cite to any evidence or supporting documentation showing that these buffers are adequate to protect condors. We believe that this buffer is inadequate for the following reasons:

- The buffer zones are too small.
- The buffer zones do not include *suitable future* nest sites. The Forest Service has an affirmative duty to provide for the conservation *and recovery* of the condor, meaning that it must account for and protect areas suitable for condor expansion. 16 U.S.C. §§ 1532(3); 1536(a)(1). Conversely, the Forest Service must consider any impairment of condor recovery as a potential impact of the proposed action.
- The buffer zones do not include *historic* or *suitable future* nest sites. Again, these sites are crucial to ensure condor recovery.

[2] http://www.fws.gov/pacific/hoppermountain/cacondor/milestone.html

- The buffer zones do not apply to important *foraging* areas for condors.
- The buffer zones are not mandatory. The stipulation contains an exemption, which allows a smaller buffer (or even no buffer at all) if the USFWS decides to allow it. The FEIS states that this measure "will be used *where appropriate* on each project." FEIS B-20. Leaving mitigation measures to the discretion of other agencies is inadequate and impermissible under NEPA.
- The buffer terms are undefined. For example, the Forest Service has acknowledged problems with past documents that fail to define the term "roost site." As the agency itself admitted, this is problematic because of the dynamic nature of roosting sites.

Oil drilling activities can have substantial impacts on condor foraging areas. For example, the GAO concluded that "FWS estimated in 1980 that oil and gas activities at Hopper Mountain NWR eliminated about 63 percent of the potential feeding habitat for condors on the refuge." GAO 2005, 22. While the significance of this loss may be disputed, it does highlight the need for adequate discussion of impacts to condor foraging areas in the FEIS and the imposition of suitable buffers.

These buffers are apparently derived from the February 27, 2001 Biological and Conference Opinions of Land and Resource Management Plans for the Four Southern California National Forests, as Modified by New Interim Management Direction and Conservation Measures ("LRMP BO"). Therein, the U.S. Fish and Wildlife Service cautiously suggested a 1.5-mile buffer from disturbance around nest sites and a 0.5-mile buffer from disturbance around roost sites to reduce adverse effects to nest and roost sites. LRMP BO pp. 243-44. The buffers were not designed to protect the condor from impacts to important foraging grounds, nor were they proposed as a catch-all buffer for every project. The LRMP BO explicitly noted that:

1) The Forest Service has no management guidelines in place for protection of…condor foraging areas.
2) Site-specific considerations are useful in applying the actual placement of buffers; in some cases, the actual distance that an activity should be located from a sensitive area may be more or less than that prescribed by the Forest Service.
3) Several Forest management guidelines refer to condor roosts but no operational definition of a roost is included.

LRMP BO p. 242-43. The protective measures to be put in place under the Oil and Gas Leasing Stipulations and Conditions of Approval do not address these critical concerns for the California condor. With respect to protective buffers and foraging habitat, the species account for the draft revised LRMP (http://www.fs.fed.us/r5/scfpr/draft/publication/builds/build947/index6.htm) notes that:

> "California condors are opportunistic scavengers, feeding exclusively on the carcasses of dead animals. Typical foraging behavior includes long-distance reconnaissance flights, lengthy circling flights over a carcass, and hours of waiting at a roost or on the ground near a carcass…California condors maintain wide-ranging foraging patterns (i.e., at least 2.8 to 11.6 square miles [7.3-30 square kilometers] [Zeiner et al. 1990]) throughout the year, an important strategy for a species that may be subjected to unpredictable food supplies."

The FEIS does not define roost site, which was identified as a problem in the LRMP BO. Thus the public has no assurance that a designated buffer will ever actually be put in place around condor roost sites, which are likely to be dynamic and change based on location of food sources.

iii. The FEIS Fails to Evaluate the Most Important Impact to Condors – Habituation to Human Presence

Oil drilling operations in or near condor habitat inevitably result in increased human activity in these areas. The GAO concluded that "the endangered California condor is particularly susceptible to disturbances from human activities. Condors have been observed landing on oil pads on the refuge, which poses a safety risk to the birds and reduces their fear of humans." GAO 2005, p. 22. As condors become more accustomed to human presence, they are more likely to interact with oil drilling activities. This, in turn, results in an increased likelihood that condors will ingest trash and experience other impacts from other industrial activities on or near the national forest. The FEIS fails to analyze or even acknowledge this impact, in violation of NEPA.

iv. The FEIS Proposes Inadequate Mitigation Measures to Reduce Impacts to Condors

The FEIS contains lease stipulations and conditions of approval to protect the condor. FEIS B-19 to B-20. These measures are not adequate, and many contain vague or involuntary language that renders these protections entirely discretionary. The italicized portions of the following stipulations and conditions demonstrate these deficiencies:

2. *Where necessary*, all *new* power transmission and distribution lines *directly associated* with oil and gas development shall be placed underground to avoid potential for collision by condors; *where under grounding of these power lines is not possible*, location and design of such lines will be allowed only as provided for through ESA consultation.
3. All power lines, poles and guy wires which exist within *high use* flyways shall be retrofitted with raptor guards, flight diverters and other anti-perching or anti-collision devices *as deemed necessary* to minimize the potential for collision or electrocution of condors. No new above ground power lines shall be allowed within *high use* condor flyways *unless provided through site-specific ESA consultations*.
4. All surface structures, *associated with oil and gas leasing*, which are *identified* as a risk to condors will be located, modified (e.g. to include installation of raptor guards, anti-perching devices, etc.) or relocated as required *following site-specific ESA consultation*.
6. To preclude impacts on condors, all construction debris and other trash (including such small items as screws, nuts, washers, nails, coins, rags, small electrical components, small pieces of plastic, glass or wire, and anything that is colorful or

shiny) shall be covered or otherwise removed from a *project site* at the *end of each day* or whenever workers are not present at the site.

7. All food items and associated trash shall be placed in covered containers to preclude access to or use by condors. This will include small bits of trash and debris, such as soda can pull tabs, electrical connectors, broken glass, and pieces of rubber, plastic, and metal.

9. No loose wires, open containers or other equipment or supplies *associated with oil and gas development* which could pose a risk to condors shall be allowed at work sites *unless approved in a site specific ESA consultation*.

10. No ethylene glycol based anti-freeze or other ethylene glycol based liquid substances shall be used on oil and gas work sites. Vehicles assigned to *regular use* of the oil and gas site(s) shall be required to use propylene glycol based antifreeze *unless they can show problems with vehicle engine warranties*. No changing of antifreeze of any type *should* be allowed within an oil and gas development area.

11. No aircraft use shall be allowed within condor habitat areas *without prior review and approval* by a designated Forest Service representative.

12. Flaring sites for natural gas or other flammable gases or substances shall require *prior approval* of the designated Forest Service representative. These actions *should* undergo ESA consultation prior to approval.

FEIS B-19 to B-20. The theme of most of these mitigation measures seems to be "prohibited, unless approved later." Such discretionary and vague mitigation measures are unenforceable and unlawful under NEPA. The Forest Service cannot ensure that the decision will not jeopardize species based on the promise of future mitigation measures. Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).

The agency proposes to use its discretion to move projects up to 200 meters under BLM standard lease terms, but then acknowledges that this distance "may not constitute a sufficient relocation distance to avoid significant indirect impacts such as those resulting from noise and human presence. In such cases, government authority is limited and moving activities further than 200 meters would depend on lessee goodwill." FEIS 4-62. "Lessee goodwill" is *not* a sufficient measure to avoid or mitigate potential impacts to condors.

In addition, the FEIS fails to explain how the Forest Service and/or BLM intend to monitor oil drilling operations to ensure that these mitigation measures are successfully and consistently implemented. Under NEPA, "Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases." 40 C.F.R. § 1505.3. The FEIS fails to explain the agencies' monitoring efforts to date, whether they have been effective, and if not, how the agency intends to improve the monitoring in the future to adhere to the strict requirements in the FEIS.

The LRMP BO requires that the FEIS "must consider if the Forest Service can actually implement the conservation guidelines as provided…." LRMP BO p. 243. The Forest Service must explicitly state how it plans to fund and monitor the existing and new leases so that it can assure the public that the above standards are being followed.

v. The FEIS Fails to Adequately Address and Mitigate Impacts to Condors Caused by Collisions with Power Lines

Out of all impacts to condors caused by oil drilling, collisions with power lines are the most severe. Hamber 2002. The FEIS inadequately addresses impacts of power and transmission lines on condors. As noted in the FEIS, if new oil and gas production is established within or adjacent to existing oil fields, existing facilities such as power lines can be used. FEIS 4-104. However, the FEIS does not disclose impacts of existing use in addition to potential future use of these power lines. Collisions with power lines are a major source of mortality for the condor, and the effects of the continued use of existing power lines for leases that will be permitted under this decision *must* be fully examined in this EIS.

The 1996 Recovery Plan for the California condor reports that collisions with power lines killed at least one condor in 1996, and three in 1993. Furthermore, the California Condor Recovery Program report on the status of released condors from January14, 1992 to October 4, 2002 shows that of 19 confirmed deaths in the wild during that period alone, five died from collisions with power lines; 1 died of electrocution or blunt head/neck trauma after colliding with one or more high-voltage power lines; and 14 birds were captured and brought to the Los Angeles Zoo due to habituation to perching on power poles, landing on man-made structures, and approaching humans.

The 1996 Recovery Plan recommends that "[a]ll agencies/companies planning the construction of such structures should be advised on the most favorable location of such structures from the standpoint of the condor, as well as measures that can be implemented that will help avoid possible condor mortalities." USFWS 1996, p. 32. Unfortunately, condors have continued to be killed as a result of collisions with power lines despite the identification of this grave problem in the Recovery Plan. Condor 89 was killed after striking a power line along Hwy 154 on San Marcos Pass; Condor 129 died on 8/29/97 after colliding with a power line in Cuyama Valley; and Condor 215 died on 3/30/01 after colliding with and being electrocuted by a power line in the Sespe Oil Field. Thus, collisions with power lines were responsible for more than 30 percent of all California condor deaths in the wild from 1992—2002 – including the most recent death by collision which occurred in the Sespe Oil Field. Because the background biology report was completed in 2000 (5 years ago) this death in the Sespe Oil Field was not analyzed in the context of this decision.

Out of all site-specific Biological Opinions from the 70 approved wells within existing leases since 1980, no analyses were conducted that addressed the adverse impacts of existing power lines. Thus, while site-specific ESA consultation might address the impacts of new power lines, there is no plan for addressing existing impacts.

vi. The FEIS Fails to Analyze the Cumulative Impacts of Oil Drilling on the Condor

The FEIS fails to properly analyze the cumulative impacts on the California condor. The Forest Service has approved 70 new drill wells within existing leases since 1980, which included the building of pipelines and roads. Only one proposal to drill 9 wells by the Seneca Resources Corporation elicited a formal biological consultation with the U.S. Fish and Wildlife Service. Apparently, no cumulative effects of the existing and continuing drilling on California condors, or any wildlife species and vegetation have been analyzed over the past 22 years, as required under the current Forest Plan's Fish and Wildlife standards. Under NEPA, the FEIS is required to determine the cumulative effects of past, present and future activities of all parties involved. Each approval for the drilling of a new well used the same rubber-stamp language from the district ranger, and provided no substantiation for the determination of no negative impact to endangered species (aside from pointing out that some operations were at least 1.5 miles from a condor nest).

The history of approval of existing wells would lead the public to believe that little or no analyses are conducted to fully assess the impacts of oil and gas drilling on endangered species, including the California condor. The proper place for a full cumulative impacts analysis is in this process. If cumulative impacts analyses are not conducted at this time, those impacts are not likely to ever be examined at the site-specific project level.

vii. The FEIS Fails to Properly Analyze Impacts on Critical Habitat for the Condor

The FEIS also does not properly analyze the impacts of the action on designated critical habitat for the California condor. The Biological Resources Background Report notes that approximately 400 acres of the Sespe HOGPA is designated critical habitat. USFS 2000, p. 15. However, the FEIS makes no mention of critical habitat except in Table 4-22 which reports that stipulations for Fisheries, Wildlife and Sensitive Plants under Alternative 3 require consultation with U.S. Fish and Wildlife Service in condor critical habitat.

The Biological Assessment/Biological Evaluation ("BA/BE") notes that Limited Surface Use areas with condor critical habitat may result in No Surface Occupancy (NSO) designation after consultation with USFWS, yet also states that no critical habitat is included in the areas subject to leasing. USFS 2004c, p. 21. The FEIS fails to include a concise, comprehensive, quantitative analysis of the impacts of the project on critical habitat for the California condor and other listed species with designated critical habitat.

ix. The FEIS Fails to Analyze the Impacts of Increased Fire Risk on the Condor

In October 2003, three condors were killed during the Piru fire that burned over the Hopper Mountain NWR. All three were last seen on the Refuge the day before the fire and despite extensive searching were not found. USFWS 2004.

In 2001, a brushfire on a federal oil lease near the Sespe Condor Sanctuary burned seven acres, and while the fire did not actually reach the sanctuary itself, it demonstrates the potential impact caused by fires on nearby oil leases to the condor. Jennings 2001.

The FEIS acknowledges that existing and expanded oil drilling will increase the risk of fire in oil drilling areas. FEIS 3-127 ("Over the years there have been several wildfires on LPNF due to oil operations.") Considering the proximity of existing and proposed oil drilling areas to sensitive condor habitat, the FEIS should have analyzed this heightened fire risk on the condor and other species. Its failure to do so constitutes a violation of NEPA.

The FEIS discusses the impacts of the Piru fire on the Sespe Oil Fields, but the analysis is limited to infrastructure impacts. FEIS 3-127. The analysis fails to account for potential impacts of oil-caused fires on the condor and its habitat.

x. The FEIS Fails to Account for Existing Impacts to the Condor

The FEIS concludes, without any supporting studies, monitoring data, or explanation, that existing oil drilling on the Los Padres is having absolutely no impact on the condor or other listed species. Specifically, the FEIS states

> Modeling (refer to Table 4-15) determined that due to the application of current protective measures, specifically those in existing lease terms, effects to listed species habitats are non-existent.

FEIS 4-16. This statement is astonishing, since several condors have covered themselves (and sometimes their young) in oil, present after oil spills from drilling sites and other activities. USFS 2005b; see also GAO 2005 for other documented impacts to condors from existing oil operations. Existing lease terms cannot protect condors from impacts such as habituation to human presence, do not require power lines to be placed underground, and do not contain most of the other stipulations proposed in the FEIS to reduce or eliminate impacts to condors.

Moreover, the California condor, the referenced modeling is limited to "specific habitat use areas." FEIS 4-54. The FEIS fails to describe what this term means, and whether it includes potential, historic, and/or current use areas.

b. Steelhead

In a letter dated February 19, 2002, NOAA Fisheries submitted a detailed letter outlining its views on the adequacy of the DEIS. The letter identified several deficiencies in the DEIS, and recommended several improvements to protect steelhead fisheries and aid the Forest Service's compliance with NEPA and the ESA.

The Forest Service failed to incorporate these recommendations. Instead, in Chapter 9 Responses to Comments, the FEIS merely states that the Forest Service initiated informal consultation with NOAA Fisheries under ESA § 7, and that NOAA Fisheries issued a "not likely to adversely affect" ("NLAA") determination. A NLAA determination does not absolve the

Forest Service of its duties under NEPA, including responding *in full* to all comments and adequately analyzing *all* environmental impacts in the FEIS.

The chart below outlines the recommendations by NOAA Fisheries, the Forest Service's apparent response in the text of the FEIS, and whether the response is complete or incomplete.

NOAA Fisheries Recommendation	Forest Service Response	Adequacy of Response
The EIS does not adequately describe the distribution of steelhead or critical habitat within the area that would be affected by the proposed action. NOAA Fisheries, p. 1.	The FEIS does not contain any description of steelhead distribution or critical habitat. Rather, it merely states that "remnant populations may remain in the Santa Clara River and Ventura River watersheds, Rincon Creek, some small south coast streams, along the Monterey County coastline, and the Carmel River watershed." FEIS 3-52.	**Incomplete**. Steelhead critical habitat is currently designated along Lion and San Antonio creeks in the Ventura River watershed; and along Sespe, Little Sespe, Santa Paula, Sisar, Piru, and Hopper creeks in the Santa Paula River watershed; and other areas. *See* 70 Fed. Reg. 52580-86 (September 2, 2005). The actual distribution of steelhead is much more widespread. The decision will allow or encourage surface drilling along steelhead critical habitat, an impact that the FEIS must disclose.
The EIS should also disclose that areas affected by the proposed action are within designated critical habitat for the Southern California Evolutionarily Significant Unit (ESU) of federally endangered steelhead. NOAA Fisheries, p. 2.	In the section titled "Impact Assessment for Fishery Resources and Aquatic Wildlife," the FEIS does not even mention steelhead critical habitat. Reference to critical habitat is also absent from the various charts depicting impacts to habitat of listed species. These charts only refer to occupied, suitable, and potentially suitable habitat. FEIS 4-53 to 4-76.	**Incomplete**. The decision will allow surface or slant drilling along steelhead critical habitat, or will result in indirect or cumulative impacts to steelhead critical habitat in areas downstream of new drilling areas. The FEIS must disclose these impacts.
The appropriateness and reliability of the sensitivity analysis for predicting potential effects of oil and gas exploration on steelhead are of concern, and therefore the EIS should describe the methods and assumptions that were used to perform the analysis in greater detail. Accordingly, the EIS should include a detailed list of the assumptions used to perform the analysis; a description of whether any validation methods were used to perform the analysis; descriptions of any decision criteria used in the analysis; and the meaning of terminology such as, 'significant,' 'sensitivity,' and 'low,' 'moderate,' and 'high' sensitivity (see Table 3-30) should be clearly described." NOAA Fisheries, p. 2.	Instead of clarifying Table 3-30, the Forest Service removed it entirely from the FEIS. Likewise, instead of describing the sensitivity analysis in greater detail, the agency omitted the analysis for predicting impacts on steelhead.	**Incomplete**. The FEIS contains no definition of the listed terms, and does not include a detailed list of assumptions with respect to fisheries and critical habitat. Moreover, the CWE methodology did not analyze impacts to critical habitat outside of national forest boundaries, even though the decision could result in off-forest impacts to downstream critical habitat.

The existing description of the environmental consequences does not provide a clear and complete understanding of (1) the manner in which the proposed action may affect steelhead and critical habitat; (2) the amount, extent and duration of the adverse effects; and (3) whether potential effects at the individual level would translate into effects at the population-level. NOAA Fisheries, p. 2.	None. The FEIS contains no analysis of impacts to steelhead critical habitat; does not quantify such effects; and does not analyze effects at the individual or population level.	**Incomplete**.
The environmental consequences of the proposed action on the fishery resources (section 4.4.2.3) presents only the potential impacts; this is not adequate because NEPA regulations (40 CFR 1502.16) require that the environmental consequences include a discussion of direct and indirect *effects*. Therefore it is insufficient to confine the discussion to the impacts themselves, rather it should be extended to consider the consequence of the impact itself on steelhead and critical habitat.NOAA Fisheries, p.2.	None. The referenced section has been moved to 4.4.4, and contains nearly the same language that was criticized in the DEIS.	**Incomplete**.
The EIS should describe the potential effect on the loss of fish and eggs on abundance of the affected year class and the local population. NOAA Fisheries, p. 2.	The FEIS contains the same passing description of general environmental consequences as was criticized in the DEIS.	**Incomplete**.
The EIS should also consider whether the anticipated type, amount, extent and duration of adverse effects are likely to measurably affect the long-term survival and recovery of the affected steelhead ESUs. Biological or scientific justification should provide the basis for this assessment and should be presented in the EIS. NOAA Fisheries, pp. 2-3.	The FEIS merely repeats the language criticized in the DEIS. The FEIS states "Accidental spillage of petroleum products or other toxic materials can directly kill fish. Eggs may be smothered or killed, and adults killed." FEIS 4-53. Also, BLM Standard Lease Terms allow the Forest Service to move proposed activities up to 200m, and the FEIS states that this is a sufficient distance to avoid streams and riparian habitats. FEIS then states that toxic spills from roads alongside, or crossing, streams could drain into streams. *Id.*	**Incomplete**. The FEIS fails to quantify the impacts to steelhead and critical habitat. The FEIS does not provide the requested scientific justification for its assertion that activities more than 200m away from streams have no impacts whatsoever on steelhead or critical habitat. The FEIS does not state *how* the potential toxic spills from roads could impact steelhead or critical habitat.
[D]espite the stipulations or terms that may be added to future leases, adverse effects to steelhead and their habitat are likely. For example, it is not sufficient to confine activities away from streams where steelhead are known or believed to be present because offsite effects can still occur (i.e., wet season runoff, water quality alterations, spills of contaminants). Avoid habitat alterations	The FEIS makes no changes.	**Incomplete**.

(both onsite and offsite) that may reduce the quality and quantity of habitat for steelhead. NOAA Fisheries, p. 3.		
Means to modify the proposed action could include the addition of the following measures to oil and gas exploration in watersheds where steelhead or critical habitat are present: Avoid contributing wet or dry season runoff to drainages (i.e. retain runoff onsite);	The FEIS proposes an information notice requiring that standard BMPs be reviewed and applied during site-specific project analysis. FEIS B-24; Appendix E.	**Incomplete**. None of these BMPs require retention of runoff onsite.
Require applicants to implement spill-avoidance plans;	The FEIS states that these plans are required by 40 CFR Part 112. FEIS 2-22.	**Complete**. We note, however, that the FEIS relies solely on industry compliance to ensure proper implementation of these plans. The FEIS states that "It is expected that operators would be able and willing to oversee spill prevention and response for all new operations…. For existing lease operations on LPNF in the Sespe and Cuyama areas, protection and response is currently assumed by the operators." FEIS 4-137. However, the FEIS fails to disclose whether the current scheme is effective in preventing spills and reducing impacts once spills have occurred.
Require applicants to implement contingency plans in the event of an accidental release of harmful materials;	The FEIS states that the applicable BMPs will be applied at the site-specific project level. BMP No. 7.4 requires the lessee/operator to prepare a HAZMAT Contingency Plan. FEIS B-24, E-5.	**Complete.** We note, however, that the Forest Service's response still falls a little short of the recommendation to *require* applicants to implement such plans. Instead, this BMP will be applied in a discretionary manner at the site-specific project level.
Preclude surface occupancy in areas designated as critical habitat for steelhead or in areas that may contribute runoff of sediment or pollution to areas containing critical habitat for steelhead;	The FEIS proposes the following information notice: "Except for approved road crossings, no surface occupancy is permitted within 300 feet of anadromous and 150 feet of all fish-bearing perennial streams." FEIS B-17.	**Incomplete**. The FEIS fails to provide scientific justification for this buffer distance. Surface disturbance more than 300 feet or 150 feet, respectively, from streams could still contribute runoff, sediment, and/or pollution affecting steelhead and other fish species.
Preclude horizontal drilling under streams where steelhead are known or believed to be present or that contain critical habitat;	None.	**Incomplete**. The FEIS specifically allows slant drilling under Sespe Creek and other waterways designated as steelhead critical habitat. FEIS Figure 2-6.
Avoid creating roads; and	The FEIS allows the creation of new roads.	**Incomplete**.
Avoid installing stream crossings.	The FEIS specifically *exempts*	**Incomplete.** The protective

	stream crossings from the 300- and 150-foot buffers for anadramous and other fish-bearing streams, respectively. FEIS B-17. Moreover, the FEIS states that "lessees would be encouraged to minimize stream crossings and, where crossings are unavoidable, cross streams as close to right angles as possible to minimize exposure. All crossing s of perennial streams would also be designed to provide for fish passage." FEIS 4-55.	measures proposed in the FEIS are discretionary ("lessees would be encouraged…") and are not incorporated into the ROD, and are thus unenforceable.

The mitigation measures proposed to protect steelhead are similarly inadequate. The NOAA Fisheries recommended a short list of measures needed to adequately protect steelhead, but the FEIS fails to incorporate these recommendations. NOAA Fisheries, p.4.

The Forest Service may not simply ignore comments of agencies with expertise in particular fields. "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not be simply ignored. There must be good faith, reasoned analysis is response." Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973); see also Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 (9th Cir. 2004) (ignoring FWS undermined the adequacy of NEPA analysis).

Finally, the FEIS fails to adequately address the cumulative impacts to steelhead. The analysis of cumulative effects in the FEIS does not markedly differ from that in the DEIS, which the NOAA Fisheries criticized because:

> The existing description of cumulative effects in regard to steelhead and critical habitat is inadequate because the description does not provide a sufficiently clear understanding of the amount, extent, location and type of cumulative effects that are expected.

NOAA Fisheries, p. 4. To remedy this deficiency, NOAA Fisheries proposed a series of recommendations to incorporate into the FEIS. *Id.* at 4-5. Again, the FEIS fails to incorporate nearly every one of these recommendations.

At the most fundamental level, the FEIS fails to cite to any of the leading studies of impacts to fisheries caused by oil development. At a minimum, the FEIS should contain reference to, and analysis of, all applicable references in Confluence 2005 and incorporated herein by reference. By ignoring the bulk of these credible scientific studies, the FEIS fails to insure the scientific integrity of the analysis as required by NEPA. 40 C.F.R. § 1502.24.

c. Other Listed Species

The FEIS fails to fully analyze the effects of the decision on arroyo toad, blunt-nosed leopard lizard, southwestern willow flycatcher, giant kangaroo rat, San Joaquin kit fox, least Bell's vireo, and California red-legged frog. The analysis of impacts to listed species is presented in Table 4-33, which itself is based solely on the limited project footprint, and does not take into account either the myriad edge effects of new oil and gas developments or the cumulative impacts of the existing oil and gas drilling and associated infrastructure. In fact, the FEIS completely omitted any discussion of the cumulative impacts of the New Preferred Alternative on biological resources, in clear violation of NEPA. FEIS p. 4-75.

Furthermore, the FEIS fails to report survey results for species in the project area, as required by the Forest Plan. For example, according to the BA/BE, no records of blunt-nosed leopard lizards have been recorded for the existing leased areas. USFS 2004c, p.7. However, the document does not state whether any surveys were ever conducted for the species. Moreover, increased infrastructure and traffic can cause indirect negative impacts to designated critical habitat and other suitable habitat for listed species. These impacts were not divulged in the FEIS.

The FEIS proposes few protective measures for federally listed riparian and aquatic species. The Stipulations and Conditions of Approval state that "[d]rill pad location, design and construction shall avoid or minimize sedimentation or other harmful runoff entering key or occupied TEP aquatic or wetland habitat or adversely affecting the natural drainage patterns of such habitat areas." FEIS 2-19. Again, the Forest Service does not specifically outline how it plans to fund and monitor sedimentation and other harmful runoff from the existing and new leases, does not define the term "key habitat," and does not include any protections for suitable habitat. Because the FEIS does not define these terms and does not include a specific plan to monitor impacts, it is in violation of NFMA, NEPA, and the Forest Plan.

d. Other Protected Species

The FEIS fails to analyze consistency of the various alternatives with the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.* The MBTA regulates impacts to all migratory bird species and their nests, and applies to all federal agencies, including the Forest Service. Humane Society v. Cligkman, 217 F.3d 882 (D.C. Cir. 2000) (holding that the MBTA applies to Federal agencies). NEPA requires the Forest Service to analyze consistency with the MBTA in the FEIS. 40 C.F.R. § 1502.16(c) (requiring an EIS to include discussions of possible conflicts between the proposed action and Federal and state laws and policies).

The FEIS fails to identify species protected under the California Endangered Species Act, Cal. Fish & Game Code §§ 2050 *et seq*., California Native Plant Protection Act, Cal. Fish & Game Code § 1900 *et seq.*, and various California "fully protected species" laws, and fails to analyze impacts to these species and to species that the Forest Service has designated as "sensitive." Instead, the FEIS only includes an analysis of impacts to "listed species" for each of the alternatives. See, for example, FEIS Table 4-33.

e. *Noxious Weeds*

The FEIS contains an inadequate description of the affected environment of, and consequences to, noxious weeds. The Chief of the U.S. Forest Service has declared the spread of noxious weeds to be one of the top four threats to national forests across the nation. A statewide survey of invasive species concluded that areas in and surrounding the Los Padres National Forest are particularly hard-hit, with more non-native species than any other California bioregion. Stephenson & Calcarone, p. 76.

Despite the severity of this problem, the FEIS fails to sufficiently describe the current extent of non-native plant infestations on the Los Padres, and the potential of current and expanded oil drilling to promote the further spread of invasive plants.

In the Affected Environment chapter, the FEIS merely lists the non-native species that are the current focus of eradication efforts, and states that

> Given budget limitations and priorities there are not sufficient funds to conduct a noxious plant inventory for all of the forest not withdrawn from mineral entry. Based on limited data, it appears that noxious weeds are spreading, especially along roads, trails, and stream corridors.

FEIS 3-57. This statement does not satisfy NEPA's standards for incomplete or unavailable information. 40 C.F.R. § 1502.22. At a minimum, the FEIS should at least put forth a reasonable effort to describe the main areas of infestation in HOGPAs, which non-native species are a problem, and whether non-native species exist in current oil drilling areas.

The FEIS relies on implementation of the noxious weed information notice to mitigate significant noxious weed impacts. FEIS 4-56. This information notice, however, places sole responsibility for noxious weed management in the hands of the oil lessee, without discussing whether current oil lessees are effectively controlling noxious weed infestations in existing drilling areas. It allows lessees to write their own Noxious Weed Risk Analysis, which is discretionary and only required "when determined by the authorized officer." FEIS 4-56. This mitigation measure does not satisfy NEPA standards for enforceability of mitigation measures.

The FEIS also omits any mention of noxious weeds in the cumulative impacts section. FEIS 4-57 to 4-58.

f. The FEIS Fails to Uphold High Scientific Standards for Species Management and Evaluation of Biological Impacts

The FEIS provides a short analysis of impacts to biological resources, and then proceeds to discount these impacts by espousing the benefits of oil drilling on species diversity without providing any scientific justification. Specifically, the FEIS states

> Oil and gas exploration and development and associated roads have the potential to affect wildlife movement corridors and contribute to fragmentation. However,

> wildlife habitats potentially affected by oil and gas development on the LPNF are primarily located in chaparral, consisting of large blocks of contiguous dense vegetation. Here, where recent fire prevention has resulted in even-age contiguous stands, occasional fragmentation would increase diversity. In some cases new roads may even provide additional movement corridors, which could allow passage of wildlife through otherwise impenetrable areas.

FEIS 4-51. This unsubstantiated statement contains no reference to any credible scientific literature, and appears to be more the opinion of agency employees. Such opinions do not adhere to the strict scientific standards required by NEPA and the ESA.

g. *The FEIS Fails to Adequately Evaluate Impacts to Vegetation and Habitat*

To evaluate impacts to vegetation, the FEIS relies on a methodology with limited accuracy in assessing the true extent of impacts to different vegetation types. According to the FEIS, the agency estimated the acreage disturbed for each vegetation type by "allocating the RFD estimate of disturbed area to vegetation types by the same percent as they occur in the HOGPA." FEIS 4-52. This method, in turn, was used to calculate indirect impacts to wildlife caused by habitat loss. *Id.* However, this methodology limits the analysis only to those impacts caused by surface disturbance, and omits any evaluation of indirect impacts caused by habitat fragmentation and other impacts to habitat not caused directly by surface disturbance.

The FEIS also states that the "preliminary investigation (prospecting) phase can require off-road vehicle travel and some access road construction, particularly if seismic reflection or geophysical surveys are used in exploration. This could result in vehicular damage to unknown sensitive plant populations." This statement fails to quantify these impacts, fails to state whether any exploratory activities will impact sensitive species, fails to recognize other ground-disturbing impacts associated with seismic exploration, and fails to adhere to NEPA standards. This omission is surprising, given that in the very next sentence, the FEIS states that "potential direct impacts of oil and gas development on botanical resources are greatest during exploratory drilling and oil/gas field development phases." FEIS 4-55.

The FEIS states that "most native species of plants and animals on LPNF are unlikely to be significantly impacts by any of the reasonably foreseeable oil and gas activities under any of the alternatives. This is due to their habitat requirements not being located where reasonably foreseeable oil and gas activities are expected." FEIS 4-59. Aside from providing no citations or scientific references, this statement is also just plain false and misleading. According to Table 4-33, the New Preferred Alternative opens to development 3,532 acres of habitat for listed species. FEIS 4-76.

2. Recreation

a. The FEIS Fails to Adequately Analyze the Impacts of the New Preferred Alternative and Other Alternatives on Popular Recreation Areas

The FEIS states that the Forest Service uses a methodology called the Recreation Opportunity Spectrum (ROS) to characterize and analyze recreation opportunity. The FEIS fails to explain this methodology and to explain how it was applied to each of the alternatives, in violation of NEPA. 40 C.F.R. § 1502.24.

The section on Affected Environment provides only a general description of recreation opportunities on the Los Padres, and fails to account for specific recreation sites located in the HOGPAs. FEIS 3-132 to 3-135. The FEIS refers to developed recreation sites, but not undeveloped recreation sites, and only mentions the total length of trails across the entire forest. FEIS 3-132 to 3-134. This lack of specificity is not acceptable, especially considering that the Los Padres is in the top 10% of the most heavily-visited national forests in the nation. FEIS 3-132. At a minimum, to comply with NEPA, the FEIS should identify the major recreation areas and hiking trails in the various HOGPAs.

The FEIS bases its significance criteria on the ROS class table shown on page 2-31 of the FEIS. FEIS 4-145. Howver, the document fails to state *how* the agency derived these significance thresholds. This violates NEPA's methodology standards. 40 C.F.R. § 1502.24.

The FEIS contains no analysis of impacts whatsoever for the New Preferred Alternative. For this alternative (adopted as part of the agency's decision), the FEIS states in its entirety:

> This alternative proposes leasing the South Cuyama, Sespe, and San Cayetano HOGPAs with Alternative 5a stipulations. The remining HOGPAs – Piedra Blanca, Figueroa Mountain, La Brea, Monroe Swell, Lopez Canyon, and Rincon Creek – would not be leased.
>
> The New Preferred Alternative would not allow leasing in 2,122 acres of *Seni-Primitive Motorized* and *Roaded Natural* ROS classes that might otherwise be developed in Alternative 5a.

FEIS 4-172. Under NEPA, the FEIS must disclose the impacts of all alternatives.

b. The FEIS Fails to Provide Adequate Measures to Reduce Existing and Potential Impacts to Recreation

The FEIS states that existing oil drilling in the Sespe Oil Field is already imposing significant impacts on recreation opportunities there. Based on the data provided in the FEIS, the current density of oil development in the Sespe Oil Field exceeds the significance criteria for Rural ROS class on all counts:

Type of Facility	Allowable Density for Rural ROS	Current Density	Exceedance
	(number of facilities per square mile)		
Number of Oil Wells	40	70	+ 175%
Number of Well Pads, Treatment Facilities, and/or Tank Farms	13	22.5	+ 173%
Miles of Roads	7	12.5	+ 178%
Miles of Pipelines	7	12.5	+ 178%

FEIS 2-31 and 4-145. The decision allows additional facilities in this area, contributing even further to these exceedances of significance thresholds. Despite several recreation opportunities in this area, the FEIS fails to provide a single mitigation measure to reduce any further impacts to recreation opportunities.

Instead, the FEIS states that there are no recreation opportunities in this area, and hence no impacts. Specifically, the FEIS states that

> Existing oil and gas activities in the Sespe lease area and adjoining private lands would normally cause significant indirect impacts to recreation opportunities in the adjoining Sespe Wilderness and Sespe Condor Sanctuary. However, since public access is not allowed in the Sespe Condor Sanctuary there are no recreation opportunities there to be impacted.

FEIS 4-145. This is inaccurate. Public access *is* allowed in the Sespe Condor Sanctuary, through two public access corridors – the Sespe Creek bottom and the Alder Creek Trail, which leads to a developed parking area, a condor observation deck at Dough Flat, and numerous campsites in the heart of the Sespe Wilderness accessible by foot or horseback along the trail corridor. Existing drilling areas are quite visible to recreationists accessing these areas, an impact that would worsen with the additional drilling allowed by the decision.

The FEIS similarly discounts significant impacts to the ROS classes of two isolated parcels of forestland in South Cuyama. FEIS 4-146. The FEIS does not consider impacts to these areas significant, even though existing impacts exceed the significance thresholds by two orders of magnitude. While these parcels may be surrounding by private oil fields, their impact to recreation opportunities must still be disclosed, as these parcels are visible en route to several popular recreation areas and trails along the Sierra Madre Ridge.

To address these mitigation measures, the FEIS proposes a series of mitigation measures for several different alternatives, but it is nearly impossible to decipher which mitigation measures will be applied to the new alternative. It appears that only the stipulations for Alternative 3 apply to the New Preferred Alternative. These stipulations rely on a NSO designation for the following areas:

- Within ½ mile of a developed recreation site
- Areas designated “Semi-Primitive Non-Motorized” ROS class

- All designated and study Wild & Scenic River corridors, specifically ¼ mile from the high water line on either side of the river channel.

FEIS B-32. These mitigation measures are inadequate to reduce impacts to less than significant levels, and fall short of the standards imposed by NEPA. The FEIS fails to provide any evidence that ½ mile is a sufficient buffer to protect recreation opportunities, or that ¼ mile is sufficient to protect Wild & Scenic River values. The stipulation does not offer any protection for *undeveloped* recreation sites; limits protection only to the Semi-Primitive Non-Motorized" ROS class, even though the FEIS admits that there are existing significant impacts to the Rural ROS class in the Sespe HOGPA and elsewhere; and fails to protect river corridors that are *eligible* for Wild & Scenic River designation, but not yet under study.

c. The FEIS Fails to Analyze Impacts to Several Popular Hiking Trails and Camps Along the Ojai Front

The only substantive analysis of impacts to hiking trails and camps occurs in discussion of Alternative 2. With respect to the San Cayetano HOGPA, the FEIS states that "the remoteness of the area would be impacted by any oil and gas development. The front country between Fillmore and Ojai serves as a transition between the urban areas and the Sespe Wilderness. Any development, especially near Santa Paula Creek, would have an affect on the recreation experience." FEIS 4-152.

The FEIS fails to identify which trails and campgrounds would be impacted by this or other alternatives. The following trails and campgrounds could potentially be impacted by new drilling, either from surface disturbance on national forest land or through surface disturbance on private lands along the forest boundary where trailheads occur:

- Horn Canyon Trail
- Sisar Canyon Trail
- Santa Paula Creek Trail
- Nordhoff Ridge Road
- Gridley Trail
- East Fork Santa Paula Creek Trail
- The Pines Camp
- White Ledge Camp
- Big Cone Camp
- Cross Camp
- Cienega Camp
- Bluff Camp

In addition, the FEIS fails to analyze impacts to recreation areas from nearby private lands. Much of the Ojai Front in the San Cayetano HOGPA is subject to NSO, which will encourage surface disturbance on private lands along the forest boundary. This, in turn, will have a detrimental impact on the recreation experience en route to, and at the trailheads of, these popular recreation areas. These impacts are already evident along the first mile of the Santa Paula Creek trail, which traverses a developed oil field.

Instead, the FEIS casually refers to all of these areas as the "Ojai Valley viewshed" and states that "scenic stipulations will prevent impacts to this viewshed." FEIS 4-176. However, for the reasons stated above, scenic stipulations will *not* prevent all significant impacts to this viewshed.

d. The FEIS Fails to Adequately Analyze Impacts to the Lake Piru Recreation Area

The FEIS conducts an analysis of impacts to Lake Piru, but it is only in the context of the entire southern portion of the Los Padres National Forest. FEIS 4-174. The FEIS states that lease stipulations will ensure no additional significant impacts to this entire area, including Lake Piru, but for the reasons stated above, these stipulations are inadequate. The stipulations do not account for oil development of private lands along the shores of Lake Piru to access oil under NSO areas along the forest boundary.

The only reference to Lake Piru recreation impacts includes the following statement: "The Blue Point developed campground and Lake Piru recreational area are in *Rural* ROS class areas within the Sespe HOGPA. Oil and gas activities and facilities are not consistent with expected recreation experiences at developed recreation sites….This could have a significant impact on the experience of recreationists at these developed recreation sites." FEIS 4-154. However, this analysis is only in the context of Alternative 2, and there is no analysis of how this impact will be greater or less under the New Preferred Alternative. Nor is there any analysis of impacts to other recreation opportunities at Lake Piru, including hiking along the Potholes and Piru Creek trails and fishing, swimming, and boating opportunities on the lake itself.

e. The FEIS Fails to Adequately Analyze Impacts to Trails and Camps Along the Sierra Madre Ridge

The FEIS briefly mentions that Aliso Park, Salisbury Portrero, and Painted Rock developed campgrounds are within the South Cuyama HOGPA. FEIS 4-156. The analysis omits the following camps and trailheads in or near the vicinity, as well as access routes to these areas:

- Tinta Camp
- Nettle Springs Camp
- Numerous trails along the Sierra Madre Ridge

The failure of the FEIS to analyze direct, indirect, and cumulative impacts to these areas constitutes a violation of NEPA.

f. The FEIS Fails to Adequately Analyze Impacts to the Chumash, Dick Smith, San Rafael, and Sespe Wilderness Areas

The decision allows oil and gas development alongside the boundaries of three wilderness areas – the Chumash, Dick Smith, and San Rafael wilderness areas – and within a few hundred feet of a fourth wilderness area, the San Rafael. According to the FEIS, "oil and gas development outside of designated Wilderness…areas can indirectly disrupt solitude and alter the sense of

remoteness and naturalness within designated areas." FEIS 4-153. However, the FEIS fails to analyze how the decision will specifically impact these four wilderness areas, and fails to propose any mitigation measures to reduce or eliminate these impacts.

The decision allows surface drilling to occur right up to the boundaries of the Sespe, Chumash, and Dick Smith Wilderness Areas. FEIS Figures 2-5, 2-6. The FEIS does not disclose this impact for the Chumash Wilderness Area, and fails to quantify this impact for all of the wilderness areas. For example, the FEIS merely states that "If any oil and gas ground-disturbing activities such as road building or facilities construction were location in South Cuyama HOGPA, and it was within proximity of the Dick Smith and/or San Rafael Wilderness areas, it could be apparent from the Wilderness areas." FEIS 4-157. But the analysis fails to state whether such oil drilling is actually expected to be apparent from the wilderness areas, and fails to provide sufficient mitigation measures. The "if-then" scenario in the FEIS is not sufficient under NEPA because it fails to accurately describe and analyze potential impacts from the various alternatives. In fact, Figure 2-5 does not even show the Dick Smith wilderness boundary. The decision also encourages surface disturbance on private lands that abut wilderness in order to access areas along wilderness boundaries with a NSO stipulation, and the FEIS fails to disclose this impact.

In addition, the decision allows surface drilling within a few hundred feet of the San Rafael Wilderness Area, the first primitive area to be designated as wilderness after passage of the Wilderness Act of 1964. The FEIS does not disclose this impact to the San Rafael Wilderness Area.

g. The FEIS Fails to Adequately Analyze Impacts to Roadless Areas

The FEIS fails to provide a legally adequate analysis of impacts to roadless areas under any of the alternative drilling scenarios. Most importantly, the FEIS fails to account for impacts to roadless areas under the New Preferred Alternative. While the decision prohibits any surface disturbance in roadless areas, we are concerned that the decision will still allow for surface disturbance right up to the boundaries of these pristine areas. This could result in some indirect effects to roadless areas in the form of water and air pollution, impacts to wildlife species and habitat, viewshed impacts, noise, and recreation impacts. None of these impacts are disclosed in the FEIS, in violation of NEPA.

The decision will also encourage surface drilling on private inholdings located partially or wholly within roadless areas, along with potential construction of access roads through roadless areas. The FEIS fails to disclose this potential foreseeable impact as well.

h. The FEIS Fails to Adequately Analyze Impacts to Designated, Study, and Eligible Wild & Scenic Rivers

The FEIS does not evaluate compliance with the Comprehensive Management Plan for the Sespe Wild & Scenic River (WSR). NEPA requires the Forest Service to analyze consistency with all relevant policies and plans, including management plans for WSRs and designated "outstanding remarkable values" for WSRs. This is important because the decision allows slant drilling right

up to the boundary of the Sespe WSR, and the FEIS must evaluate impacts to this WSRs and consistency with the management plan.

The FEIS admits that "oil and gas activities and facilities are not consistent with expected recreation experiences along Wild and Scenic Rivers," yet provides no analysis of the impacts of this particular decision, nor of the various alternatives, and provides no mitigation measures to reduce or eliminate these impacts, in violation of NEPA.

Lower Sespe Creek. Sespe Creek drains the Sespe Wilderness in the Topa Topa Mountains north and east of the community of Ojai. A major tributary of the Santa Clara River, Sespe Creek is one of southern California's last undammed streams, and the Forest Service has declared the creek to be an "Area of High Ecological Significance." Congress designated a 31-mile stretch of the Sespe as a Wild & Scenic River in 1992. This designation recognizes the remarkable sandstone formations in the area, as well as the habitat Sespe Creek provides for southern steelhead, arroyo toads, California red-legged frogs, and the southwestern pond turtle.

The lower one-mile stretch of the Sespe Creek just upstream of the forest boundary was not included in this 1992 legislation, but is still eligible for WSR designation. Evans, p. 15. The decision allows slant drilling beneath this one-mile stretch of Sespe Creek that is eligible for WSR designation. The FEIS fails to disclose the eligibility of this stretch for WSR designation, fails to determine whether slant drilling would render this stretch ineligible for WSR designation, and fails to evaluate the impacts of slant drilling to the wild and scenic values of this stretch of Sespe Creek. Such omissions violate NEPA.

Lower Piru Creek. Piru Creek offers a diverse outdoor experience for anglers, hikers, and families alike. This scenic creek traces a 50-mile long arc created by the tectonic clash between the Coast and Transverse Ranges. The flow in the lower portion of the creek is augmented by releases from Pyramid dam and reservoir. This segment offers one of the few reliable year-round cold water trout fisheries in southern California and is managed as a Wild Trout Stream by the California Department of Fish and Game.

The lower segment of Piru Creek, from Pyramid Lake to Lake Piru, is also designated as a WSR study river. Pub. Law No. 102-301 ("Los Padres Condor Range and River Protection Act."). The decision allows slant drilling beneath a stretch of this WSR study area upstream from Lake Piru.

Santa Paula Creek. Santa Paula Creek – both the main stem and the East Fork – is a WSR study area, and is eligible for WSR designation. Evans, p. 15. The decision allows slant drilling beneath a stretch of this creek near the forest boundary.

3. Scenic Impacts

a. The FEIS Fails to Evaluate Impacts to Scenic Highway 33

Scenic Highway 33, known as the Jacinto Reyes Scenic Byway, is both a National Forest Scenic Byway and a State Scenic Highway. The State Scenic Highway portion of this route passes

through the San Cayetano HOGPA, and a significant portion of the proposed new drilling areas wraps around the highway. The decision will allow a significant amount of surface disturbance along the Highway 33 corridor, and will also encourage slant drilling from private lands along or near the highway. The FEIS fails to analyze impacts to the State Scenic Highway portion of this route, in violation of NEPA. The FEIS briefly evaluates impacts to the Highway 33 corridor south of the crest, but not north of the crest, where most of the oil drilling will occur. FEIS 4-128.

In 2003, the Forest Service developed a Comprehensive Management Plan for the Jacinto Reyes Scenic Byway. U.S.D.A. Forest Service 2004. However, the FEIS fails to identify or analyze consistency with this document.

b. The FEIS Provides Inadequate Viewshed Protections for the Upper Ojai Valley and Other Areas

The FEIS states that the Ojai Valley viewshed is protected by NSO and LSU stipulations. FEIS 4-128. However, the FEIS allows a broad waiver of these stipulations. FEIS B-31. Because of this waiver, it is not clear how effective or mandatory this mitigation measure will be. The agency's reliance on such a mitigation measure violates NEPA.

The FEIS makes a similar statement with respect to the Cuyama Valley. FEIS 4-129. For the same reasons, the proposed mitigation measures are inadequate. Furthermore, the FEIS omits any reference to Lake Piru in the scenic impacts section, though the document references other lakes not affected by the New Preferred Alternative. FEIS 4-130. This omission violates NEPA.

c. The FEIS Fails to Properly Analyze and Mitigate Scenic Impacts to Lands Under Standard Lease Terms

The FEIS states "The New Preferred Alternative would have slightly less scenic impact than Alternative 5a." (FEIS 4-125, 4-126). Furthermore, "Alternatives 4a and 5a would have the same impact as Alternative 4." (FEIS 4-126). Therefore, the New Preferred Alternative would have "slightly less" scenic impact than Alternative 4.

Under the New Preferred Alternative, 4,277 acres would be subject to surface development. Of the 4,277 acres that would be subject to surface disturbance, 1,436 acres would be under Standard Lease Terms (SLT). (ROD 6).

Keeping in mind that the New Preferred Alternative would reportedly have "slightly less" scenic impact than Alternative 4, the FEIS states that development within Alternative 4 would not result in any potential significant scenic impacts or any changes to a human-dominated landscape because of the stipulations given in Alternative 4, namely a combination of LSU and NSO stipulations. However, this does not account for the 1,436 acres that would be under Standard Lease Terms (SLT).

The only explanation is found in the definition of stipulations, which "SLTs provide that the 'lessee shall conduct operations in a manner that minimizes adverse impacts… [and] shall take

reasonable measures deemed necessary by lessor to accomplish the intent of this section.' Under this practice, this has been interpreted to include the allowance for moving a proposed activity up to 200 meters or postponing a current activity up to 60 days within a year." (ROD 6). This explanation is insufficient to explain how the 1,436 acres of surface disturbance under SLT would not have any potential adverse scenic impacts.

4. Heritage Resources

The discussion of impacts to heritage resources is completely inadequate. The FEIS states that

> It is not possible at this time to predict specific impacts from future specific developments. This is due to the lack of information about the exact location, acreage and configuration of the future facilities, as well as the lack of detailed survey information about cultural resources for the vast majority of the Forest,

FEIS, 4-77, and

> It is not cost-effective to gather the needed data at this point in the leasing process. The study area is simply too large. The approach then is to do field surveys, if additional leases are issued, once site-specific development plans are submitted under those leases.

FEIS 3-58. This does not meet the standard established by the NEPA implementing regulations addressing incomplete or unavailable information. 40 C.F.R. § 1502.22. This incomplete information is *essential* to a reasoned choice among alternatives, and the overall costs of obtaining it are *not* exorbitant. The FEIS states that it is not *cost-effective* to obtain this information, but that is not the correct standard – even if the information is not cost-effective to obtain at this point, the agency *must* obtain it unless the costs are exorbitant.

Even if the costs of obtaining this data is exorbitant, the FEIS does not include all the information required by NEPA regulations. Even in the absence of such information, the Forest Service must evaluate such impacts based on theoretical approaches or research methods generally accepted in the scientific community. 40 C.F.R. § 1502.22(b)(4).

The FEIS states that current survey data is "spotty at best" and that additional surveys are "very likely to find many more previously undiscovered sites." FEIS, 3-63, 3-65. These statements underscore the importance of conducting these inventories now. At a minimum, the Forest Service should have conducted inventories in the 4,277 acres opened for surface disturbance.

The FEIS predicts no significant impacts to heritage resources because protection of these areas is required under the National Historic Preservation Act. The NHPA, however, only applies to heritage resources that are eligible for the National Register of Historic Places. FEIS 4-77. However, NEPA requires the Forest Service to analyze impacts to all heritage resources, whether or not they are eligible for placement on the national register. We also note that compliance with legal requirements does not constitute a mitigation measure, especially in light of the LPNF's previous track record in protecting cultural resources. *See* Forest Service Employees for

Environmental Ethics, *Ruined Relics: Crumbling Resource Protection on the Los Padres National Forest*, 2002.

5. Watershed Resources

a. The CWE Analysis is Based on False Assumptions

The FEIS assumes that each acre of oil and gas development disturbance has the same equivalent as one roaded acre. The Forest Service provided no citation or explanation for this assumption.

The FEIS lists the following potential impacts to surface water:

- Sediment loading of stream channels due to the earthwork associated with site construction;
- Introduction of pollutants via spills and releases to surface water from:
    - Oil and produced water treatment, storage, and handling facilities
    - Sanitary facilities
    - Oil and produced water transportation facilities (trucks, pipelines); and
    - Oil, produced water, and drilling fluids
- Water used during the early development of a field could have a short-term adverse effect on local stream flow; and secondary effects on downstream water use due to changes in water quantity or quality described above.

This list omits the following impacts to surface water:

- Sediment loading of stream channels due ongoing post-construction activities at drilling sites, including non-point source runoff
- Water used during later field development and operations, including water used to reduce fugitive dust emissions.

The FEIS must also disclose, evaluate, and propose measures to mitigate or avoid these impacts. Specifically, the FEIS must disclose that oil drilling has the potential to release organic compounds, including toxics such as benzene and naphthalene; dissolved solids, including harmful or toxic salts comprised of sodium bicarbonate, chloride, potassium, and sulfate; and other toxic constituents, including radionuclides and metals. The FEIS must also disclose sources of pollutants in drilling fluids, leaching of contaminants from waste, and dicharges and disposal of wastewater.

b. The CWE Analysis Fails to Account for Cumulative Impacts

The FEIS states that "only the sub-basins within the NF boundary, including non-NF land, were included in the analysis because the agency lacked data for watersheds outside of the forest boundary. Only data within the NF boundary was available in the Forest's GIS database." FEIS, 3-37. The agency dismisses this absence of data as "not problematic" but we see several problems with this omission.

First, this approach completely ignores impacts to watersheds immediately outside of the forest boundary, and thus underestimates the extent of impacts caused by the proposed action. This is problematic because most lands available for leasing are located along the forest boundary with a NSO stipulation. Therefore, in order to access the oil under these lands, drilling (and resulting surface disturbance) will be concentrated in areas immediately outside of the forest boundary. For this reason, the Forest Service must analyze the watershed impacts to those waterbodies that lie outside of the forest boundary.

This method is also problematic because NEPA requires the Forest Service to analyze cumulative impacts of the proposed action, combined with past, present, and reasonably foreseeable activities on national forest *and surrounding private* lands. By excluding lands outside of the forest boundary from detailed impact study, the Forest Service has ignored the cumulative impacts of oil and gas activities combined with other resource-intensive uses outside of the forest.

c. The FEIS Relies on Inadequate and Unsubstantiated Mitigation Measures to Protect Against Impacts to Surface Water

The FEIS states that "Use of BMPs will mitigate potential impacts to surface water to a level less than significant except for potential cumulative watershed impacts." FEIS, 4-30. There are no citations to credible scientific literature to support this conclusion. The FEIS provides no citations stating that the proposed mitigation measures are effective in protecting water quality, and fails to provide any analysis of just how effective they are in reducing impacts to less than significant levels.

This statement also does not include other feasible mitigation measures recommended by credible government agencies with jurisdiction over water pollution, including the Environmental Protection Agency.

In its letter to the Forest Service, the EPA cited to a document published by EPS's Office of Enforcement and Compliance Assistance and titled "Profile of the Oil and Gas Extraction Industry." (October 2000, EPA/310-R-99-006). According to the EPA, this document includes a section on pollution prevention opportunities. The EPA recommended that the Forest Service "include a summary of the pollution prevention opportunities described in EPA's document in the FEIS and commit to applying these techniques, as appropriate, on Conditions of Approval for lease agreements." EPA, 5. The Forest Service failed to summarize this document in the FEIS, and did not commit to applying these techniques on conditions of approval, as recommended.

NEPA requires that "all relevant, reasonable mitigation measures that could improve the project are to be identified." *NEPA's 40 Most Asked Questions*, § 19(b). "Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation." *Id.*

In addition, "the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such

measures will be adopted or enforced by the responsible agencies." *NEPA's 40 Most Asked Questions*, § 19(b).

The FEIS fails to meet these strict legal standards. Instead, the FEIS states that the mitigation measures for air quality "will be used where appropriate on each project." FEIS 4-12. The FEIS also admits that the Forest Service retains the authority to modify, waive, or grant an exception to a stiplulation under several circumstances, including if "the action is acceptable to the authorized Forest officer *based upon a review of the environmental consequences*." FEIS, B-15. Appendix B also lists other criteria that could trigger modification or waiver of these mitigation measures. *See* FEIS B-15 to B-38.

d. The FEIS Proposes Inadequate and Unsubstantiated Mitigation Measures to Protect Against Impacts to Soils and Erosion

Roads represent a persistent cause of watershed degradation and a major contributor in the reduced abundance and range of native salmonids. Beschta et al. "Accelerated short- and long-term sediment production from roads is of particular concern in most watersheds, because it exacerbates the effects of severe fires on soils, aquatic habitats, and water quality (CWWR 1996; USFS 2000)." *Id.*

The Forest Service proposes to require paving of all roads within one year of construction, and decommissioning roads after their use is no longer needed. However, according to Beschta et al.,

> Accelerated surface erosion from roads is typically greatest within the first years following construction although in most situations sediment production remains elevated over the life of a road (Furniss et al. 1991; Ketcheson & Megahan 1996). Thus, even "temporary" roads can have enduring aquatic impacts. Similarly, major reconstruction of unused roads can increase erosion for several years and potentially reverse reductions in sediment yields that occurred with non-use (Potyondy et al. 1991). Where roads are unpaved or insufficiently surfaced with erosion resistant aggregate, sediment production typically increases with increased vehicular usage (Reid & Dunne 1984).

The FEIS failed to disclose or evaluate this fact, and its proposed mitigation measures fail to provide sufficient mitigation, especially during the first year of road construction when erosion prevention is needed most.

The FEIS includes a brief section on impacts to soils, but again proposes inadequate and unsubstantiated mitigation measures. For example, the FEIS states that "when routes are placed on gentle slopes, the amount of cuts and fills is reduced." FEIS, 4-33. The FEIS fails to state whether roads will be prohibited on steep slopes, what constitutes a "gentle slope," and to what extent these impacts are reduced. The FEIS also states that "implementation of erosion control and revegetation measures reduces the amount of erosion." FEIS, 4-33. However, for these and other statements in the soils analysis, the FEIS fails to explain what these measures are, how much they would reduce erosion, and how effective they are in doing so. The FEIS lacks

citations to any sources for these blanket statements. And again, the FEIS defers unspecified mitigation measures to the site-specific level by stating that "the appropriate practices to be applied to individual projects would be identified during site-specific project level analysis." FEIS, 4-34. Many of these BMPs apply to all oil and gas projects, regardless of their site-specific location, and should be addressed in the FEIS accordingly.

e. The FEIS Fails to Analyze Direct Impacts to Riparian Areas

The agency concludes in the FEIS that it expects no direct impacts to riparian areas. Specifically, the FEIS states:

> However, as Best Management Practices and Standard Lease Terms will be applied, none of the proposed alternatives would allow uncontrolled activity in riparian, wetland and floodplain areas, and direct impacts to these areas are not expected to occur with any alternative.

FEIS, 4-35. This statement is false, and entirely underestimates the potential direct impacts to riparian and other wetland areas. The agency seems to be stating that because there will be some sort of "control" over activities in these areas, there will be no direct impacts to these areas whatsoever. The only way this statement could be true is if road building, pipeline construction, and any other surface disturbance was prohibited altogether in any wetland, riparian, and floodplain areas. The FEIS does not include such a statement, and the BMPs and Standard Lease Terms do not contain such a prohibition either. In fact, BMPs may not even be adequate to reduce these impacts to less-than-significant levels,[3] and the failure of the FEIS to disclose this violates NEPA.

The only support the Forest Service provides for this conclusion is its discretionary authority to move facilities and other ground-disturbing activities up to 200 meters without any lease stipulations. The FEIS states that "the *discretional* authority to relocate any proposed activity 200 meters effectively provides for a 400-meter wide corridor centered on riparian strips. As a result, riparian, wetland and floodplain areas would only be subject to indirect impacts." FEIS, 4-35 (emphasis added). This measure is *purely discretionary* on the part of the agency, and the FEIS provides no standards or criteria requiring the agency or oil producers to implement this adjustment. Furthermore, certain factors – such as topography, lease boundaries, and other sensitive resources that may also require implementation of the 200-meter buffer – may restrict

[3] See Beschta, R.L., et al. 2004, p. 957-967 ("It is perhaps widely accepted that 'Best Management Practices' (BMPs) can reduce damage to aquatic environments from roads. However, time trends in aquatic habitat indicators indicate that BMPs failed to protect salmonid habitats from cumulative degradation by roads and logging (Espinosa et al. 1997). Ziemer and Lisle (1993) noted a lack of reliable data showing that BMPs are cumulatively effective in protecting aquatic resources from damage. Although road location, design, construction, and maintenance may have improved over the years, many tens of thousands of kilometers of roads remain on public and private lands that were constructed with relatively low concern for their environmental consequences (e.g., see Figure 2). Until problem "legacy roads" are improved (e.g., surfaced, stabilized, obliterated) they will continue to degrade water quality and aquatic systems for many years. Furthermore, the assumption that road obliteration or BMPs will offset the negative impacts of new road and landing construction and use is unsound since road construction has immediate negative impacts and benefits of obliteration accrue slowly.").

the agency's ability to keep all ground-disturbing activities 200 meters away from riparian, floodplain, and wetland areas.

The mitigation measures proposed to protect riparian areas, wetlands, and floodplains are unsubstantiated, insufficient, and the agency fails to explain their effectiveness or provide citations to any scientific sources.

f. The FEIS Fails to Adequately Identify the Impacts of the New Preferred Alternative

The FEIS states that the New Preferred Alternative will have "fewer impacts than Alternative 3." Alternative 3 identifies 8 sub-basins above 75% the threshold of concern (TOC) in the San Cayetano and Sespe HOGPAs, including two sub-basins that have potential risk of adverse cumulative watershed effects *in their current condition*. Clearly, the additional oil drilling envisioned under the New Preferred Alternative will contribute additional pollutants and sedimentation to these sub-basins that are already experiencing adverse effects. The FEIS fails to state whether such additions represent a significant impact.

6. Groundwater

We commend the Forest Service for addressing potential groundwater contamination, an issue that is often associated with oil and gas drilling but that was somehow omitted from the DEIS. Unfortunately, the FEIS provides only a quick glance at these impacts by providing unsubstantiated statements without any real analysis.

The mitigation measures proposed in the FEIS are inadequate and unsubstantiated. The FEIS proposes the following measures to mitigate potential impacts to groundwater, with our response following each:

- "Prior to casing and during drilling, drilling muds are used to form a 'mud cake' on the walls of the well bore to minimize loss of drilling fluids. Hydrostatic head prevents ground water from entering the well bore." *This is a common industry practice, not a mitigation measure.*
- "Industry standards of equipment, maintenance, and training are expected to be sufficient to minimize the impact on groundwater by oil and gas field operations." *This mitigation measure is inadequate because it does not specify the industry standards nor describe their effectiveness. We also note that industry standards are completely voluntary.*
- "Best Management Practices (BMPs) are applicable to controlling non-point source water pollution related to oil and gas development such as road construction." *The FEIS fails to identify exactly which BMPs will mitigate against the impacts of groundwater contamination.*
- "The laws and regulations, which have been designed to protect ground water quality, will also be followed and are expected to preserve ground water integrity in all cases." *The FEIS fails to identify which laws and regulations pertain to the protection of groundwater, and fails to address the track record of the oil industry in complying with these standards, as well as whether government agencies have sufficient resources to effectively enforce these laws and regulations.*
- "Additional site-specific mitigation measures, and management restraints consistent with lease terms, can be developed as a result of the NEPA environmental analysis of individual

> project proposals." *A promise to identify and implement future, unspecified mitigation measures is not an adequate mitigation measure for the proposed action.*

FEIS, 4-32. The FEIS states that applying these mitigation measures should adequately protect the ground water resource. *Id.* However, the FEIS provides no citations to scientific studies (or any other source) tending to prove that these measures effectively mitigate groundwater contamination.

Finally, the FEIS fails to conduct any cumulative impacts analysis for groundwater resources. Rather, it relies on the CWE analysis, but the CWE analysis is only designed to measure cumulative impacts to *surface* water, not groundwater. We also note that the "Affected Environment" section does not adequately describe the existing condition and extent of groundwater resources of the Los Padres National Forest. The Forest Service cannot escape describing the affected environment by simply stating that it is unknown. *See* 40 C.F.R. § 1502.22.

7. Spills

The Affected Environment section on oil spills contains about one page's worth of text. FEIS 3-128 to 3-129. It merely contains a general description of the potential sources of spills of oil or other hazardous materials, a discussion of PCBs released during the Piru Fire in 2003 from older electrical transformers, and a general discussion about well blow-out rates in the state of California. The FEIS fails to inventory the location, cause, amount, and impacts of past oil spills on or near the Los Padres National Forest. This omission violates NEPA.

The Environmental Consequences section doesn't fare much better. FEIS 4-135 to 4-141. It states that there has never been a single well blowout in the Sespe Oil Field, but again fails to state how many oil spills have occurred in this area over time, and how many are expected to occur in the future. It does not analyze impacts to wildlife caused by spills, other than a general reference to steelhead. There is no disclosure of direct spill-related impacts to other species, such as the California condor. Such omissions violate NEPA.

Oil spill mitigation proposed in the FEIS is similarly flawed. There is a discussion on the application of weir dams, but only opinions are offered as to their effectiveness. FEIS 4-135. The FEIS fails to disclose where these weir dams are located in relation to existing and new drilling areas, and fails to require the construction of additional weir dams as a condition of approval. In addition, this mitigation measure fails to reduce or eliminate impacts along stream streatches between the spill source and the weir dam.

The FEIS also relies on the LPNF Hazardous Substance Contingency Plan, but this too is not sufficient under NEPA. FEIS 4-141. The discussion fails to state how effectively forest personnel have monitored operator's response actions and conduct inspections.

Finally, the FEIS fails to analyze the effects of oil spills on wildlife, particularly the California condor. According to the agency, an adult condor recently dipped his head in a pool of oil and transferred the oil to his chick. This incident "occurred due to a small spill of oil that occurred

when the condor was present and flew down to the spill before the workers could remove the oil." USFS 2005, p.3. The FEIS fails to disclose this impact, and fails to disclose that proposed mitigation measures may not always be adequate to protect condors from the impacts of oil spills.

8. Air Quality

Additional oil drilling in the Los Padres National Forest has the potential to create significant amounts of air pollution in basins that already exceed standards set forth under the Clean Air Act and local Air Quality Management Plans. These impacts formed the basis of a letter from the federal Environmental Protection Agency (EPA) objecting to the proposed new leasing plan. Specifically, the EPA stated that

> EPA objects to this lease proposal on the grounds that both Preferred Alternatives 5 and 5(a) are expected to result in significant short-term, and potentially long-term, ozone impacts in Ventura and Santa Barbara counties, even with mitigation. The Santa Barbara APCD is in serious nonattainment for the national ozone standard, and the Ventura APCD is in severe nonattainment for the State standards for ozone and particulate matter greater than 10 microns in diameter (PM_{10}).
>
> EPA has objections because the projected short-term project emissions for nitrogen oxide (NOx), an ozone precursor, and PM_{10}, are several orders of magnitude greater than the established air quality significance criterion…. These air quality impacts should be avoided, minimized, or mitigated to provide adequate protection for human health and the environment.

EPA, 1. The New Preferred Alternative reduces potential air emissions, but these projected emissions still exceed nearly all of the significance criteria by several orders of magnitude. FEIS, 27. The New Preferred Alternative exceeds significance criteria for short-term emissions in all areas, for all pollutants (NOx, ROC, CO, and PM_{10}), and for all source types. Many of the potential long-term project emissions exceed the significance criteria as well.

Because of these exceedences, it is vitally important that the FEIS and ROD contain sufficient, enforceable mitigation measures to ensure that these impacts are eliminated or reduced to less than significant levels. Unfortunately, the FEIS fails to do so, instead deferring much of the analysis of environmental impacts indefinitely into the future, failing to analyze cumulative impacts, proposing insufficient mitigation measures with broad exceptions, and ignoring EPA recommendations. We urge the Forest Service to revisit its analysis to adequately protect public health from the severe consequences of air pollution.

a. The Decision Does Not Comply with the Clean Air Act, Which Requires the Protection and Improvement of Air Quality

Section 176(c) of the Clean Air Act (42 U.S.C. § 7506(c)) imposes an affirmative duty upon the Forest Service to ensure that the LPNF leasing activities enabled by the decision do not impair

air quality in Santa Barbara County, Ventura County, the adjacent South Coast Air Basin, and the San Joaquin Valley. Section 176(c)(1) provides that no agency of the Federal Government may support "any activity" which does not conform to an implementation plan approved under § 7410. The section goes on to define "conformity" to a plan as:

> (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
> (B) that such activities will not--
> (i) cause or contribute to any new violation of any standard in any area;
> (ii) increase the frequency or severity of any existing violation of any standard in any area; or
> (iii) delay timely attainment of any standard ...

42 U.S.C. § 7506(c)(1).

The United States Environmental Protection Agency ("EPA") adopted regulations implementing this statutory mandate. *See*, 58 Federal Register 63214, 11/30/1993, codified at 40 CFR parts 6, 51 and 93. These regulations, and the underlying Clean Air Act, control federal agency review of this issue.

General Conformity regulations at 40 C.F.R. § 93.150 establish that the Service shall not: "engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan." "Federal Action" is defined in the General Conformity regulations to broadly include "any activity engaged in by a department, agency, or instrumentality of the Federal government." 40 C.F.R. § 93.152. This plainly includes the United States Forest Service and Department of Agriculture and equally plainly includes the leasing decision at issue. As noted elsewhere in this appeal, emissions will affect not only Ventura as a ozone nonattainment area, but also the South Coast Air Basin and San Joaquin Valley Air Pollution Control District, each classified "extreme" for the one hour ozone standard and nonattainment area for the 8-hour ozone standard. In addition, EPA recently concluded that several areas previously considered in attainment of the PM-10 national ambient air quality standard are now in violation of that standard, including Ventura and San Luis Obispo Counties. See Memorandum, 8/25/2005, Annual Air Quality Reports, US EPA Office of Air Quality Planning and Standards (the report "identifies 31 potentially new areas that failed to meet the PM1- NAAQS in 2002-2004…. This may indicate that the nonattainment problem is expanding in those areas.") As shown on the Report's Table 2, attainment areas that have now been determined to be in violation of PM-10 national ambient air quality standards include Ventura and San Luis Obispo. These two counties will be affected by the Project, and evidence shows they are already experiencing degrading air quality. Notwithstanding conformity concerns, this new information requires a reexamination of the Project's effects on regional ambient particulate matter concentrations.

Plainly, the excessive emissions associated with the Project conform to neither the Ventura, Santa Barbara, San Joaquin Valley or South Coast SIPs. 40 C.F.R. § 93.153(k). Not only do the emissions exceed the SIP emissions threshold in each such jurisdiction, but they exceed the

General Conformity thresholds at 40 C.F.R. § 93.153(b)(1). Each such area is a nonattainment area under the California and Federal Clean Air Acts. Any increases in precursor emissions "cause and contribute" to violations and "increase the frequency and severity" of violations. Since the Project's ozone precursor emissions are not reflected in the SIP's emissions inventory, General Conformity requires either a SIP revision or mitigation to zero emissions increases. 40 C.F.R. § 93.158(a)(1)&(2).

Neither the Santa Barbara County applicable implementation plan, the Ventura County applicable implementation plan, the South Coast Air Quality Management District applicable implementation plan or the San Joaquin Valley applicable implementation plan contain Project emissions in the emissions inventory. Each of these SIPs forecast declining oil and gas activity and declining emissions inventories associated with this source category. The Project does not conform to any of the applicable implementation plans, as defined in 40 C.F.R. § 93.158(a)(1).

Similarly, the decision does not conform by virtue of complete offsets, as defined in 40 C.F.R. § 93.158(a)(2). The FEIS and ROD lack competent mitigation measures (as defined at 40 C.F.R. § 93.160) to achieve any modicum of actual mitigation, much less a set of mitigation measures adequate under General Conformity regulations to assure conformity. As noted elsewhere in this appeal, the mitigation measures are vague and non-specific, often stated in optional terms. They lack complete identification, the process for implementing and enforcing such mitigation measures is absent, and no implementation schedule containing explicit timelines is present, in violation of 40 C.F.R. § 93.160(a). As such, there can be no affirmative showing of conformity, and the Forest Service is failing to act in accordance with the law in its approval of this action.

There is no authority for the proposition that the Forest Service may defer complying with 42 U.S.C. § 7506(c) until future individual lease permitting actions. The General Conformity statue and regulations make no such exception – they plainly require an affirmative finding of conformity for <u>any</u> federal activities, including the instant action opening new areas to increased oil and gas development, a highly pollution-intensive activity. Notably, EPA proposed allowing deferral of General Conformity determinations in its Notice of Proposed Rulemaking for the General Conformity regulations, but deleted it from the final rule. Compare proposed rules at 58 Fed. Reg. 13836 (3/15/1993) (40 C.F.R. § 51.857(c)/93.157(c) "As described in § 51.858, paragraph (d), Federal agencies may, in some cases, use the concept of tiering and make short-term conformity determinations for those impacts that are reasonably foreseeable and make conditional long-term conformity determinations which defer the conformity decision on long-range projects. In such cases the conformity determination of the long-term impacts of the action must be completed before any aspects of the project beyond those considered in the short-term conformity determination are taken by the Federal agency" with the final rule, which omitted the concept of tiering, conditional General Conformity determinations, and deferral of General Conformity determinations entirely. 58 Fed. Reg. 63214 (11/30/1993). EPA considered allowing deferral of general conformity determinations under certain circumstances, but omitted such provisions form the final rules. Under the canon of construction *expression unius est exclusion alterius*, it may be inferred that no such deferral was intended. As such, the Service is without authority to avoid this express statutory mandate to perform the general conformity determination prior to taking action.

This applies with vigor in this case for several practical reasons. One such reason why deferral of the general conformity determination at the Forest-wide lease analysis stage is not appropriate is that ozone and particulate matter are regional pollutants. State implementation plan are regional strategies to improve air quality, and are not well suited as yardsticks for individual projects that will follow from this leasing analysis.

Additionally, the Project will cause regional increases in ozone precursors in three separate air Districts (Santa Barbara, Ventura and the South Coast –the Sespe HOGPA straddles Ventura and South Coast Air Basins) whose significance simply cannot be evaluated in project level air quality impact analysis. The South Cuyama HOGPA is less than 3 miles from Kern County and the San Joaquin Valley air basin and a similar distance from San Luis Obispo County. Record evidence (Air Quality Background, *supra*, at Fig. 2-1) shows predominant summer winds transport South Central Coast Air Basin pollutants into the South Coast Air Basin. Pursuant to the California Clean Air Act, the California Air Resources Board has established an air pollution "transport couple" between the South Central Coast Air Basin and the South Coast Air Basin based on this meteorological condition. Ozone Transport: 2001 Review, California Air Resources Board, 4/2001, pages 43-46. See California Health and Safety Code § 39610. Regional ozone and particulate matter nonattainment issues demand regional coordination of air pollution control strategies. In California, this is a requirement of State law that must be incorporated into the instant federal action. California Health and Safety Code § 40912 mandates specific treatment of air pollution transport in both state and federal Clean Air Plans and SIPs. Consideration of the effect of federal actions on regional air pollution problems is the purpose and function of the General Conformity requirements of the Clean Air Act. "The purpose of the conformity language is to assure that before in any way participating in an activity, a Federal agency must find that the activity does not cause or contribute to violations of an ambient air quality standards in any area, does not increase the severity or frequency of existing violations, and does not delay progress in achieving ambient standards in any nonattainment area." S. Rpt. 101-228, 1990 Leg.Hist 8338, 8368 (emphasis added). Appellants note that many of the emissions inventories associated with individual lease actions and project permitting will likely be well below federal conformity thresholds and thus the Project may, through piecemealing, evade the Federal conformity analysis entirely. There is no authority nor rationale for deferring evaluation of General Conformity.

The record document Air Quality Background Report for Pos Padres Oil and Gas Leasing EIS, August 1998, reflects compiled air pollution emissions activity projected to be associated with the Project and several of its various alternatives. This data provides the technical information necessary for the Service to complete its General Conformity Analysis at this stage in this proceeding. Although the decision to meld two alternatives into a revised project may necessitate a reevaluation and recalculation of this Project's emissions inventory, it is clearly technically possible to make this prediction, admittedly with some measure of uncertainty since individual leasing actions may deviate from the estimated calculations. Nevertheless, the Clean Air Act mandates use of "the most recent estimates of emissions, and such estimates shall be determined from the most recent population [and] employment . . . estimates." 42 U.S.C. § 7506(c)(1). The sea-change in oil markets in recent months, and the changed Clean Air Act Subpart 2 reclassifications for two of the affected nonattainment areas (San Joaquin Valley to Extreme, Santa Barbara County finding of achievement of maintenance without a corresponding

designation change) mandate that the Project's General Conformity analysis, and the Service's conformity determination utilize the current, and changed information in evaluating this Project and complying with the Clean Air Act.

b. The Decision Does Not Comply with the National Environmental Policy Act

i. The FEIS Defers Analysis of Impacts that are Reasonably Foreseeable

The FEIS defers nearly every aspect of the air quality analysis to the site-specific project level. Initially, the FEIS sets forth four types of air quality impacts: (1) exceedance of emission thresholds, (2) exceedance of ambient air quality standards, (3) consistency with air quality management plans (AQMP), and (4) off-site odors.

After identifying these four impact types, the FEIS proceeds to defer detailed analysis of each of these impacts to the project level. For example:

Air Quality Impact Type	**Explanation for Deferral**	**FEIS Page No.**
1. Exceedance of Emission Thresholds	"[D]ispersion modeling and direct comparison to ambient air quality standards is a more definitive method for determining localized impacts than comparison to emission thresholds. A detailed approach such as dispersion modeling requires data that can only be available at the individual project level…. [I]f the emissions exceed the emission thresholds, it means that a more detailed project-level analysis would be necessary to determine whether the impact would be significant." "Other pollutants (SOx, CO, and PM_{10}) have no significance criteria for emissions in Ventura County. Therefore, future project-level analysis will be necessary to compare concentrations of these pollutants to the ambient air quality standards." "CO emissions are not as definitive. Project-level analysis would be necessary to determine the long-term impacts for this pollutant." "For PM_{10} and SOx, future project-level analysis will be necessary to compare concentrations of these pollutants to the ambient air quality standards." "[p]roject-level analysis would be required to determine the significance of fugitive dust emissions."	4-10; 4-13; 4-12
2. Exceedance of Ambient Air Quality Standards	"Dispersion modeling analyses, if necessary, would be performed at the project level, when sufficient detail is available for a thorough analysis."	4-11
3. Consistency with AQMPs	"Specific project-level detail is necessary to make a consistency determination. Therefore, consistency with the AQMP should be made at the	4-11

	project level, as each applicant proposes to develop a lease area."	
4. Off-Site Odors	"If project level analysis does identify the potential for off-site odors, mitigation measures will be required as conditions of approval for a particular project. As a result, the proposed project is not expected to create significant odor impacts."	4-12

This defferential approach does not satisfy the agency's responsibility to take a "hard look" at all of the reasonably foreseeable environmental impacts of the proposed action, and on that basis, violates NEPA. This approach is particularly troublesome with respect to impacts 2 and 3 above – exceedance of ambient air quality standards and consistency with AQMPs. The agency should use its professional judgment to determine whether the proposed action and various alternatives are likely to contribute to violations of these standards and plans. The EPA agrees, and in its letter to the Forest Service, stated:

> The DEIS states that because specific project-level emissions cannot be predicted at this time, a conformity determination is not possible and that such a determination will be made when site-specific activitgies are proposed (p.3-16). The DEIS does, however, present data predicting severe air emissions exceedences of established significance criteria. **EPA strongly recommends that the Forest Service use best professional judgment to determine whether the proposal, *as a whole*, is likely to contribute to any new violation of the National Ambient Air Quality Standards, increases the frequency or severity of an existing violation, or delays the timely attainment of a standard.**

EPA, 2-3 (emphasis added).

ii. The FEIS Fails to Adequately Analyze Off-Site Odors

The FEIS states that "odors typically dissipate before they leave the site." FEIS, 4-12. The FEIS provides no citation or analysis for this conclusion. While this statement may be historically accurate, its relevancy to the current proposal is suspect, since the proposed action allows drilling operations to occur along popular trails, campgrounds, and roads where the odors from oil operations would be particularly noticeable. There is a strong likelihood that off-site (and even on-site) odors could significantly impact these areas. The FEIS fails to adequately analyze such impacts.

In addition, the FEIS acknowledges the possibility of significant odor impacts, but brushes them aside by stating merely that "mitigation measures will be required as conditions of approval for a particular project." FEIS, 12. The FEIS fails to specify these mitigation measures and the criteria for their application.

The FEIS references H2S, but fails to mention the harmful (and potentially lethal) effects of this gas.

iii. The FEIS Proposes Insufficient Mitigation Measures to Reduce or Eliminate Impacts to Air Quality

The FEIS states that "mitigation measures listed in Chapter 2 would reduce the air quality impacts associated with all alternatives." FEIS, 4-12. There are no citations to credible scientific literature to support this conclusion. The FEIS provides no citations stating that the proposed mitigation measures are effective in controlling air pollution, and fails to provide any analysis of just how effective they are.

This statement also does not include other feasible mitigation measures recommended by credible government agencies with jurisdiction over air pollution, including the Environmental Protection Agency and various local Air Pollution Control Districts.

NEPA requires that "all relevant, reasonable mitigation measures that could improve the project are to be identified." *NEPA's 40 Most Asked Questions*, § 19(b). "Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation." *Id.*

In addition, "the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies." *NEPA's 40 Most Asked Questions*, § 19(b).

The FEIS fails to meet these strict legal standards. Instead, the FEIS states that the mitigation measures for air quality "will be used where appropriate on each project." FEIS 4-12. The FEIS also admits that the Forest Service retains the authority to modify, waive, or grant an exception to a stiplulation under several circumstances, including if "the action is acceptable to the authorized Forest officer *based upon a review of the environmental consequences*." FEIS, B-15. Appendix B also lists other criteria that could trigger modification or waiver of these mitigation measures. *See* FEIS B-15 to B-38.

> The EPA submitted comments on the DEIS, and concluded
>
> Our review identified significant air quality impacts that should be avoided or minimized to provide adequate protection for the environment. Given the scope and severity of the potential air quality impacts, we have assigned a rating of EO-2, Environmental Objections – Insufficient Information to the Preferred Alternatives identified by the Forest Service.

EPA, 1. A rating of EO-2 means that the review identified significant environmental impacts that *must* be avoided, and that additional mitigation measures recommended by EPA should be included in the FEIS. *Id.* However, the Forest Service failed to adequately incorporate several of the EPA's proposed mitigation measures, and failed to provide an explanation for not doing so. A summary of the EPA's recommendations, and the response in the FEIS, is included in the following table:

EPA Recommendation	Forest Service Response
1. "In the project emissions tables, such as Table 4-4, further specify the emission sources by pollutant…. These tables should be revised to specifically identify emissions by pollutant from mobile sources, stationary sources, and ground disturbance. This source specific information should then be used to identify appropriate mitigation measures and areas in need of the greatest attention." EPA, 1.	1. No response. The format of the referenced tables in the FEIS is exactly the same as the format in the DEIS.
2. "Given the severity of the air quality impacts of this proposal, EPA strongly recommends *requiring*, where appropriate and feasible, these mitigation measures and including them in the lease stipulations cited above." EPA, 1.	2. The Forest Service incorporated these mitigation measures into the lease stipulations. However, as noted above, the agency has retained its discretion to modify, waive, or grant exceptions to these stipulations.
3. "EPA strongly recommends modifying all lease stipulations to require Best Available Control Technology (BACT) to reduce air emissions." EPA, 2.	3. The Forest Service now requires BACT in lease stipulations. However, as noted above, the agency has retained its discretion to modify, waive, or grant exceptions to these stipulations.
4. "EPA recommends the development of an Equipment Emissions Mitigation Plan to reduce diesel particulate, carbon monoxide, hydrocarbons, and NOx associated with construction and drilling activities." The EPA then lists 6 specific mitigation measures to incorporate into the lease stipulations. EPA, 2.	4. Incomplete response. The Forest Service only incorporated one of the six recommended mitigation measures – tuning the engine manufacturer's specifications. The agency failed to incorporate other listed mitigation measures, including prohibiting idling for more than 5 minutes, prohibiting engine tampering to increase horsepower, requiring particulate traps and other control devices, requiring diesel fuel with limited sulfur content, and requiring an independent Licensed Mechanical Engineer to determine which equipment is suitable for control devices.
5. "EPA also recommends that the Forest Service encourage, and require where appropriate, lessees to share facilities and equipment wherever possible." EPA, 2.	5. No response; not incorporated as a lease stipulation.
6. "Develop a plan to phase lease development, especially during the smog season (May – November)." EPA, 2.	6. No response; not incorporated as a lease stipulation.

iv. *The FEIS Fails to Analyze Impacts to Atmospheric Visibility in Nearby Wilderness Areas*

A full evaluation of air quality impacts necessarily includes a discussion of impacts to the four wilderness areas that are adjacent, or in close proximity, to existing and future drilling areas. In fact, the first recommendation from the Ventura County Air Pollution Control District is to "address the potential of each of the alternatives to adversely impact atmospheric visibility in nearby wilderness areas." The discussion of air quality impacts in the FEIS completely ignores this recommendation, and as a result, failed to take a "hard look" at all impacts caused by the proposed action.

v. Baseline Issues- Failure to Include Current Applicable State Standards

The California Air Resources Board has adopted a new ambient air quality standard for ozone based on an 8 hour averaging time, similar to the federal revised national ambient air quality standard, except that the standard was set at 70 ppb, averaged over an 8 hour period. Adopted April 28, 2005, see http://www.arb.ca.gov/research/aaqs/ozone-rs/ozone-rs.htm. Additionally, the California standard is not to be exceeded, unlike the federal standard where exceedances are permitted, and is set at 70 ppb, whereas the federal standard is set at 0.08 ppm. Id. EPA has interpreted this standard to limit ambient air quality to not more than 85 ppb. In short, the state standard is more stringent than the federal standard, and thus the magnitude of the project's inconsistency with applicable state air quality standards is heightened.

vi. The Project's Transported Air Pollution is Not Adequately Documented, and Its Effects on SJVAPCD and South Coast Not Addressed.

The EIS and its supporting documents demonstrate that the Project's emissions will have adverse air quality impacts to two "extreme" ozone nonattainment areas. One, the South Coast Air Basin, managed by the South Coast Air Quality Management District, actually includes a portion of the Project. The Sespe HOGPA straddles the Ventura County and Los Angeles County line, and the Project allows additional leasing on, and possibly over the County line. Los Angeles County is wholly within the South Coast Air Basin. Clearly the Project will impact the South Coast Air Basin directly, yet the effects have not been analyzed in the FEIS, rendering it inadequate.

Additionally, the California Air Resources Board has established the fact of regional air pollution transport between Ventura County and the South Coast Air Basin, such that increased emissions from Project activities in Ventura and Santa Barbara Counties will be transported to and adversely affect air quality in the South Coast Air Basin. See Ozone Transport: 2001 Review, California Air Resources Board, 4/2001, pages 43-46 (air pollution transport from the South Central Coast to the South Coast Air Basin is "significant" on some days). See also the Southern California Ozone Study (SCOS97) [Jackson, et.al., 1998, Doislager, 1998, among others] that further documented and refined the effect of air pollution transport from the South Central Coast to the South Coast Air Basin. The South Coast Air Basin continues to struggle to find emissions reductions necessary to attain the one hour ozone standard, and cannot absorb any additional increased emissions without requiring corresponding offsets in locations and amounts capable of completely negating the effect of the increased emissions. See generally 65 Fed. Reg. 18903 (4/10/2000); See also SCAQMD's commitment to future SIP revisions to address technical inadequacies and emissions reductions shortfalls, 65 Fed. Reg. 6106. Increased emissions from the Project, emitted in and/or transported into the South Coast Air Basin will confound the protracted efforts to improve South Coast air quality. Additional Project emissions increase the burden on the Los Angeles economy, adversely affecting that community's minority populations disproportionally. An environmental justice analysis should be assessed if Project emissions are allowed to increase as anticipated by the FEIS.

The second nonattainment area for which significant impacts were not considered is the San Joaquin Valley. The San Joaquin Valley recently requested that EPA reclassify it to the most

severe Subpart 2 classification - "extreme" – for the one hour ozone standard. 69 Fed. Reg. 20550 (4/15/2004). This revises all thresholds to the lowest possible level, and reflects the extraordinary nature of the San Joaquin Valley's air quality problem. Any increase in emissions, including air pollution transport, will significantly impact San Joaquin Valley air quality and public health. Additional Project emissions increase the burden on the San Joaquin Valley economy, adversely affecting that community's minority populations disproportionally. An environmental justice analysis should be assessed if Project emissions are allowed to increase as anticipated by the FEIS.

Additionally, the San Joaquin Valley recently adopted a revised PM-10 SIP, approved by EPA at 69 Fed. Reg. 30006 (5/26/2004) and upheld by the 9th Circuit Court of Appeals in Association of Irritated Residents v. EPA, 2005 U.S.App. LEXIS 19213, filed September 6, 2005. The PM-10 SIP extended the particulate matter attainment date to 2010, but requires considerable reductions in particulate matter emissions throughout the San Joaquin Valley. See, 69 Fed. Reg. 5412, 5424 (2/4/2004). Additional Project emissions increase the burden on San Joaquin Valley sources to make compensatory emissions reductions.

The San Joaquin Valley Air Pollution Control District includes western Kern County, which is approximately 3 miles from the South Cuyama HOGPA. Prevailing winds are mixed, but the region includes a west to east wind gradient at times. This corner of the relevant Air Pollution Control Districts is not well studied, as to date, there are a limited number of sources in the area. The Project will substantially increase the emissions in this area and thus is highly likely to impact San Joaquin Valley. The FEIS is silent on the Project's impacts to this critical air quality region. Importantly, it is probable that much of the truck traffic servicing the South Cuyama HOGPA will originate and terminate in Bakersfield, in central Kern County and the San Joaquin Valley. This additional mobile source emissions source represents an indirect source which must be evaluated for NEPA impact analysis purposes. The San Joaquin Valley APCD is itself developing an indirect source review rule (ISR) which could apply to the Project. In the absence of any analysis whatsoever, the applicability and significance of the impact is impossible to ascertain. This omission discloses, however, that the Service has failed to take a "hard look" at the Project's likely adverse environmental consequences to San Joaquin Valley air quality.

vii. San Joaquin Valley Fever Exposure is Understated

The human health effects from worker exposure to the San Joaquin Valley fever virus spores during earth disturbance is acknowledged in the FEIS, but it fails to consider the exposure of recreational Forest visitors' exposure to the virus and resulting illness. The areas selected for increased leasing also experience significant recreational use. This impact must be disclosed and considered before the Service has taken a "hard look" at the environmental consequences of its actions.

viii. The Impact of Emissions Not Subject to NSR Is Substantial

The FEIS assumes that NSR programs will function to impose control technology requirements on most sources and impose offset requirements to most emissions, with limited residual emissions remaining. In fact, Oil and Gas operators manipulate their operations to avoid NSR

whenever possible, and few sources, if any, will actually ever be subject to NSR. Consequently, the air quality effect of the project will be considerably greater than anticipated in the EIS.

There are many forms of emissions increases associated with Oil and Gas development and production that are not subject to permit, NSR or offsets. Many sources increase emissions up to the NSR threshold, avoiding offsets and control technology requirements. Some Oil and Gas operators derate the horsepower of their engines simply to avoid thresholds, and thus avoid permitting altogether. "Synthetic" minor operating permits are fabricated to avoid control requirements and offsets. In the field, the general rule is that sources are unpermitted and uncontrolled, with sources that are controlled and that have secured offsets serving as the exception. Even where permits may apply, substantial portions of project-associated emissions are beyond permit, such as the on-road and off-road mobile source emissions, construction emissions, well testing, flaring, portable equipment, startup, shutdown and malfunction, etc. Oil and Gas development involves considerable amounts of unsteady-state operations, where the majority of emissions are associated with startup and shutdowns, from testing, or from malfunctions. The nature of these facilities, in remote areas without data communication lines preclude continuous emissions monitoring equipment capability and experience very limited opportunity for inspection, making the potential for excessive unpermitted and illegal emissions very high. The FEIS is flawed for failing to consider the high rate of non-compliance among this community of sources.

ix. Generic Mitigation Measures Are Available

Many of the Project's adverse impacts to air quality are not adequately minimized and thus mitigated. Air pollution emissions may be minimized by establishing a two-step mitigation requirement for any and all Project emissions. First, emissions must be minimized to the maximum extent practicable. Project conditions should direct that the lowest emitting source be used in each application. For example, all diesel equipment should be fueled with biodiesel or PuriNOx to reduce toxic emissions. Once emissions are minimized, they should be entirely offset. Offsets should include all phases of the lease, from exploration, development and production. They should include all direct and indirect emissions, including temporary and mobile source emissions. This requirement, as a standard lease condition, could feasibly and significantly reduce Project impacts, and thus should be imposed.

x. Dispersion Modeling Is Inappropriate for Regional Pollutants

The Service's proposal to rely on dispersion modeling to examine site-specific emissions of ozone precursors not otherwise subject to NSR is flawed. As noted above, regional transport of ozone and particulate matter precursors is a significant issue for downwind nonattainment areas. Dispersion modeling only proves that the emissions will leave the site, but some criteria pollutants, ozone in particular, would not form at the site anyway. It is a regional pollutant forming in high concentrations under certain conditions. Dispersion modeling ignores regional consequences, and thus a cumulative air quality impact analysis must be developed at the instant Forest-wide Oil and Gas Leasing Analysis stage.

xi. Toxics Emissions Must Be Included in Emissions Inventories

The FEIS air quality analysis is silent on the human health effects of the Project's toxic air pollution. Diesel emissions are toxic air pollutants under California and federal law. The Project will result in substantial amounts of diesel emissions. Although much of the activity is located in rural areas, there will be human exposure. The FEIS is silent in assessing human health exposure for workers, recreational visitors, and any adjacent residents. This potentially significant impact must be developed in a supplemental FEIS.

xii. Flare and Wildfire Issues

Flaring in the Los Padres National Forest has the potential to increase the frequency of wildfires. Evaluation of wildfire emissions by EPA, CARB and local APCDs establishes the excessive emissions that typically accompany wildfires. A considerable number of local ozone exceedances are associated with the presence of wildfires in the region. The FEIS is defective for failing to examine the Project's potential to increase wildfire frequency and the associated adverse air quality impacts.

c. Conclusion

The siting of the proposed Project, located in arid, highly flammable habitat, near major urban areas that both create considerable recreational demand for the areas proposed for leasing represent a "unique environmental concern" that requires particular NEPA scrutiny that has not been accomplished in the Project EIS. Pennaco Energy v. US DOI, 377 F.3d 1147, 1159-60 (10th Cir., 2004). The unhealthful air quality in and around the Project's surrounding urban areas further creates a special circumstance mandating a more thorough and complete regional air quality impact analysis at the Lease Plan amendment stage, not some time in the future. Regional ambient air quality planning in Southern California is a negative sum game – each air basin faces legal mandates to substantially reduce the total amount of ozone and particulate matter precursors to attain the ambient air quality standards "as expeditiously as practicable." 42 U.S.C. §§ 7502(a)(2)(A); 7511(a)(1). Any meaningful increase in emissions from new activity, such as the instant project, imposes upon other sources a new substantial burden to provide compensatory emissions reductions. And those communities and residents that breathe the unhealthful air are adversely affected. Prevailing law requires complete offsets for all Project emissions to assure conformity with applicable implementation plans and avoid significant impacts. The Service has a duty to uphold these laws and recognize the rights of residents and businesses in these affected areas to live healthfully and develop their economies without subsidizing excessively polluting industries that are not required to carry their share of the regulatory burden. The EIS reflects a flawed process which threatens the health and well being of millions of persons. The Forest Service owes a duty to these people and resources as well, and must revise the Project to ensure fulfillment of all legal and moral obligations.

D. The FEIS Does Not Contain the Full Spectrum of Appropriate Mitigation Measures, and the ROD Fails to Explain Why the Agency Did Not Adopt Additional Mitigation Measures

The regulations implementing NEPA require that the ROD "state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation." 40 C.F.R. § 1505.2(c). The Ninth Circuit has consistently held that a "mere listing" of mitigation measures does not satisfy NEPA's requirements, but that an agency must also include some analysis with respect to the alleged effectiveness of those measures. Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998).

The FEIS states that "in order to be effective, mitigation measures must be enforceable and are thus made a part of the oil and gas lease instrument." FEIS, 2-12. Mitigation measures included in the lease instrument are indeed enforceable, but the FEIS and ROD fail to analyze which agency actually enforces lease terms, and the track record of that agency's enforcement efforts on and near the Los Padres National Forest. **A recent report by the U.S. General Accounting Office concluded that BLM's ability to meet its environmental mitigation responsibilities for oil and gas development has been lessened by a dramatic increase in oil and gas operations on federal lands over the past 6 years.** GAO 2005, p.5. As a result of increases in drilling permit workloads, BLM staff has less time to devote to mitigation activities such as environmental inspections and idle well reviews. *Id.* The FEIS violates NEPA because it fails to disclose this report and provides no evidence that the Bakersfield BLM office is not suffering from similar mitigation shortfalls.

Moreover, the ROD does not make these mitigation measures mandatory, giving the Forest Service the discretion to not even apply them to any given lease. To be effective, mitigation measures must be strict, mandatory, and enforceable. The mitigation measures proposed in the FEIS are none of these.

Finally, the FEIS relies heavily on site-specific environmental analyses to impose more detailed mitigation measures for particular leasing proposals. However, the FEIS fails to disclose recent legislation passed by Congress that exempts many oil and gas leasing activities from further environmental review. Specifically, § 390 of the Energy Policy Act of 2005 allows the Forest Service and BLM to claim a categorical exclusion for certain oil and gas exploration and development activities. Pub. L. 109-58. The FEIS omits discussion of this legislation, even though it was pending before the legislature before the release of the FEIS.

E. The ROD Fails to Discuss Considerations of National Energy Supplies

The regulations implementing NEPA require that the ROD "identify and discuss…any essential considerations of national policy that were balanced by the agency in making its decision and state how those considerations entered into its decision." 40 C.F.R. § 1505.2(b).

In deciding to expand oil drilling on 52,075 acres of national forestland, the Forest Service cited the need to "provide commodities for current and future generations." ROD, 3. In her letter to the public announcing her decision, Forest Supervisor Gloria Brown cited a need to "offer[] a portion of our oil and gas potential to the nation." Brown, p.1. However, the FEIS and ROD failed to explain how this decision, which the agency itself estimates will produce less than a day's supply of oil (17 million barrels of oil), will provide a significant amount of commodities for current and future generations.

V. THE FEIS IS UNCLEAR, CONFUSING, AND DOES NOT ADHERE TO STANDARDS OF HIGH SCIENTIFIC QUALITY AS REQUIRED BY NEPA.

A. The FEIS is Unclear and Not Written in Plain Language as Required by NEPA Regulations

NEPA requires that an EIS must be written in "plain language," "provide full and fair discussion of significant environmental impacts," and be "concise, clear, and to the point" so that the public and decision-makers can readily understand it. 40 C.F.R. §§ 1502.1, 1502.8; Oregon Environmental Council v. Kunzman, 817 F.2d 484, 494 (9th Cir. 1987).

The FEIS, however, is written in a style thwarts ready undertanding of the proposed action's environmental effects. This defect is most evident in the impact analysis sections, which force readers to cross-reference multiple alternatives in order to determine the impact of the preferred alternative in comparison to other alternatives. See, e.g., FEIS, 2-63 (extremely vague comparison of alternatives' biological effects); 4-75 – 4-76 (no detailed comparison of preferred alternative's biological impacts without extensive cross-referencing). In another prime example, the analysis of scenic impacts also forces readers to cross-reference the impacts analysis of other alternatives:

> Impacts of the New Preferred Alternative: "The New Preferred Alternative would have slightly less impact on scenery than Alternative 5a." FEIS 4-125.
>
> Impacts of Alternative 5a: Alternative 5a is a modification to Alternative 5 in which the Inventoried Roadless Areas (IRAs) are allocated to NSO…. FEIS 4-124.
>
> Impacts of Alternative 5: The projected scenic impacts of Alternative 5 are the same as Alternative 4. FEIS 4-124.
>
> Impacts of Alternative 4: All of the impacts associated with Alternative 1 are applicable to Alternative 4. FEIS 4-120.

In the above example, the Forest Service seems to be confusing two separate requirements of NEPA: the analysis of impacts of each alternative, and the comparison of alternatives. This results in a very confusing document. The FEIS' failure to clearly convey the preferred alternative's impacts relative to those of the other alternatives does not meet NEPA's standard for readability. See Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 996 (9th Cir. 2004) (NEPA documents "are unacceptable if they are indecipherable to the public.").

B. The FEIS Fails to Reference Scientific Sources and to Identify Methodologies Used

It is a stated policy of NEPA that environmental impact statements be supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1. To this end, agencies must prepare statements that are "based upon the analysis and supporting data from the natural and social sciences and the environmental design arts." 40 C.F.R. § 1502.8. Furthermore,

> Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 C.F.R. § 1502.24. Agencies must disclose "any responsible opposing view" in the statement. 40 C.F.R. § 1502.9(b); see also Center for Biological Diversity v. United States Forest Service, 349 F.3d 1157 (9th Cir. 2003) (holding that an agency's failure to disclose opposing scientific opinion violates NEPA); Seattle Audubon Society v. Moseley, 798 F.Supp. 1473, 1482 (W.D. Wash. 1992) ("NEPA requires that the agency candidly disclose in its EIS the risks of its proposed action, and that it respond to the adverse opinions held by respected scientists.").

The FEIS ignores virtually all of these requirements, not only violating NEPA, but leaving the public in the dark regarding whether the conclusions in the FEIS are supported by sound science, or are the mere opinions of agency officials. "[A]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion." Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998); see also Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding an environmental analysis inadequate when "virtually no reference to any material in support of or in opposition to its conclusions").

"An agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment." Marble Mountain Audubon Society v. Rice, 914 F.2d 179, 182 (9th Cir. 1990) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). The FEIS is rife with examples in which the Forest Service failed to achieve NEPA's standards of high scientific integrity, and many of these examples are referenced in previous parts of this appeal. For example, in the analysis of impacts to biological resources, the FEIS merely states that "[t]here would be no effect on the occupied habitat of any listed species," and then refers to a chart showing the acres of occupied habitat impacted for each species. Accordingly, the FEIS does not meet NEPA's standard for referencing scientific sources and identifying methodologies.

VI. THE FEIS IS INADEQUATE BECAUSE IT DOES NOT CONTAIN A TRUE "NO ACTION" ALTERNATIVE AND THE PURPOSE AND NEED IS TOO NARROWLY-DEFINED, IN VIOLATION OF NEPA

A. The FEIS Fails to Include a True "No Action" Alternative

NEPA requires the Forest Service to "rigorously explore and objectively evaluate all reasonable alternatives," including a no-action alternative. 40 C.F.R. § 1502.14(a), (d). "Informed and meaningful consideration of alternatives -- including the no action alternative -- is … an integral part of the statutory scheme." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988).

While the FEIS does include a nominal No Action Alternative (Alternative 1), the analysis of this alternative is not a true no action alternative and thus does not comply with NEPA. Under the "no action" alternative, at least 20 new wells will be developed, ½ mile of new roads will be created, and 5.0 acres of surface disturbance will occur. FEIS 2-26.

The "No Action Alternative" in the FEIS is described as a "continuation of the current management situation." FEIS 2-9. The FEIS continues:

> No new leasing is allowed under this alternative. Leases are initially leased for a period of ten years. At the end of the ten years the leases are either terminated, if there is no drilling activity or production, or extended as long as they are producing. Alternative 1, as do all alternatives, recognizes the existence, and possible future development, of the 21 leases on 4,863 acres mentioned in Chapter 1. These leases are considered to be a part of the affected environment. Alternative 1 projects activities that are reasonably foreseeable to occur on the existing leases in the future under the existing lease terms and conditions. This alternative serves as a basis of comparison for the other alternatives and is the minimum (no additional) amount of leasing that can occur.

FEIS 2-9. The current management situation allows for the routine termination of oil leases once production ceases. ROD 4. When an existing lease terminates, the Forest Service has the discretion to not offer the land for lease again. Thus, a true no action alternative would include not offering any existing leases for re-lease (i.e. taking *no action*) after their existing leases terminate

The supposed "no action" alternative in the FEIS falls short of this true no-action alternative, is not the minimum amount of leasing that can occur, and does not provide an accurate basis of comparison. Instead, the Forest Service's "no action" alternative proposes to issue no *new* leases, and is silent on allowing existing leases to terminate without re-lease.

The "no action" alternative in the FEIS violates NEPA because it is not a true no action alternative, and because it does not reflect a "reasonable range of alternatives" as required by NEPA. At a minimum, the FEIS must evaluate a scenario where existing leases are not renewed.

B. The FEIS Fails to Contain a Reasonable Range of Alternatives

Under NEPA, "[a]n agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." Northwest Envtl. Defense Center v. Bonneville Power Admin., 117 F.3d 1520, 1538 (9th Cir. 1997). Here, however, the Forest Service has failed to evaluate any alternative that provides complete consistency with the Forest Plan.

The FEIS concludes that Alternative 1 is not in compliance with the current forest plan, and then goes on to conclude that "in general, all alternatives are not in complete compliance with the Forest Plan because they each encompass Alternative 1." FEIS 4-102. Even Alternative 3, dubbed "Meet Current Forest Plan Direction," is inconsistent with the forest plan on this basis.

The analysis of alternatives in the FEIS should be comprehensive in order to meet the CEQ requirements to "sharply define the issues and provide a clear basis for choice among options by the decision maker and the public." 40 C.F.R. § 1502.14. By presenting only alternatives that fail to comply with the forest plan, the Forest Service fails to satisfy the purpose and need for the decision, and restricts analysis only to alternatives that require a forest plan amendment.

C. The FEIS Fails to Analyze a Reasonable Alternative Proposed by Members of the Public

In its comment letter to the Forest Service, the Center for Biological Diversity urged the agency to analyze an alternative that considers disallowing further development of currently available, but undeveloped lands. CBD 2002.

The Forest Service is obligated under NEPA to explore and objectively evaluate all reasonable alternatives. "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995). The Center's alternative was indeed a viable one, and the only alternative that would work towards bringing existing oil leases into full compliance with the Forest Plan. At the very least, the Forest Service must consider imposing further restrictions and conditions on the existing leases.

D. The Purpose and Need Statement in the FEIS is Too Narrowly-Defined

The FEIS must "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. The purpose and need statement plays an essential role in defining the scope of alternatives considered in an EIS. The purpose and need of the proposed action, however, cannot be defined so narrowly that only one alternative will satisfy the stated purpose and need. Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 n.7 (9th Cir. 1999). An overly narrow statement of purpose and need will also have the effect of foreclosing consideration of reasonable alternatives to the proposed action.

The FEIS identifies the following needs for its proposal (FEIS 1-9):

- Identify LPNF lands available for oil and gas leasing;

- Decide on outstanding lease requests; and
- Determine future availability of currently leased land.

The FEIS also identifies the following purposes (FEIS 1-10):

- Minimize impact to and maintain long-term environmental health; and
- Meet forest plan direction.

These statements of purpose and need are overly narrow. This has the result of restricting the range of reasonable alternative analyzed in the FEIS. The stated purpose and need focuses narrowly on providing new leases within LPNF, rather than on meeting the broader demand for energy. Contrary to the requirements of NEPA, the emphasis on the former means that the stated purpose and need can only be met by the proposed action or a close variant thereof. The latter, however, is the unstated purpose of the proposed action – it, rather than a series of bureaucratic leasing decisions, is what the proposed action is really "about." Thus, alternatives that evaluate other means of meeting demand for energy, such as increasing supplies of renewable energy sources, or that reduce demand through increased conservation and efficiency, are foreclosed from analysis in the FEIS.

The public and decision-makers can only evaluate whether the environmental cost of the proposed action is worthwhile if the true purpose of the proposed action is disclosed. Here, given the Forest Service's acknowledgment that only a miniscule amount of energy will likely be produced from new leases in LPNF, it is imperative to consider the proposed action in the larger energy supply and demand context, and to consider alternative means of satisfying the true energy supply objective of the proposed action.

VII. THE FOREST SERVICE SHOULD PREPARE A SUPPLEMENTAL DEIS BECAUSE THE FEIS CONTAINS SIGNIFICANT NEW INFORMATION

The regulations implementing NEPA state that "agencies shall prepare supplements to either draft or final environmental impact statements if…there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed project or its impacts." 40 CFR § 1502.9(c)(1).

The FEIS contains significant new information that must be released for public comment before the agency makes a decision. For example, the new maps in the FEIS showing the exact locations of surface disturbance should be re-released for public comment. This map should also be overlayed with other maps included in the DEIS packet, including roadless area boundaries, watershed stipulations, vegetation types, sensitive condor habitat, and other forest resources.

The NEPA implementing regulations require supplementation of a DEIS if:

(1) The agency makes substantial changes in the proposed action that are relevant to environmental concerns, or
(2) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c)(1). The agency has made substantial changes in the New Preferred Alternative that are relevant to environmental concerns, and has also published significant new information relevant to environmental concerns and impacts.

VIII. THE FOREST SERVICE'S APPROVAL OF THE DRILLING PLAN VIOLATES THE ENDANDGERED SPECIES ACT

The 'no jeopardy' determination in the BO for proposed oil and gas leasing in Los Padres National Forest is arbitrary and capricious because it fails to use the best available science, because it fails to analyze the effects of the action on critical habitat, does not consider effects of flaring or seismic exploration on listed species, and because it fails to adequately determine the environmental baseline for listed species – a critical factor in the jeopardy analysis. To the extent the FEIS relies on conclusions in the BO, these defects also undermine the adequacy of the FEIS' analysis of impacts to threatened and endangered species under NEPA.

FWS fails to use the best available science in the BO when offering 'minimization measures' to offset the effects of the proposed action because the minimization measures are not supported by any science to prove their efficacy. FWS fails to use the best available science in the BO to determine that suitable habitat for the arroyo toad should be 'substantially reduced' from what was considered in the 2004 BA (thus reducing the amount of habitat protected by the relevant 'minimization measure') because that decision was not supported by science, but merely by 'conversations' between the agencies. FWS also completely fails to discuss adverse effects of the action on the critical habitat of several species. This failure renders arbitrary and capricious the finding of no jeopardy. FWS fails to use the best available science in the BO to determine that reducing water flow from Pyramid Dam into Piru Creek and Piru Lake will benefit aquatic species' status, thus mitigating adverse effects from the proposed action.

Finally, because FWS fails to adequately determine the environmental baselines for the listed species (merely listing the areas occupied or potentially occupied is not an adequate environmental baseline), it has not made its 'no jeopardy' decision based on the relevant standards, and its decision is therefore arbitrary and capricious.

A. FWS Biological Opinion is Arbitrary and Capricious

Section 7(a)(2) of the ESA requires that "[e]ach federal agency shall . . . insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species . . ." 16 U.S.C. § 1536(a)(2). Similarly, each agency is required to insure that any such action is not likely to result in the "destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." Id. In fulfilling these requirements, the ESA directs federal agencies to "use the best scientific and commercial data available." Id.

To this end, the Forest Service initiated formal consultation with the U.S. Fish & Wildlife Service (FWS) for the oil and gas leasing analysis. As a result of this consultation, FWS

released its Biological Opinion (BO) on February 23, 2005, analyzing the effects of oil and gas leasing on endangered and threatened species across 52,075 acres of LPNF.

The BO covers 7 endangered species (arroyo toad, blunt-nosed leopard lizard, California condor, least Bell's vireo, Southwestern willow flycatcher, giant kangaroo rat, and San Joaquin kit fox) and 1 threatened species (California red-legged frog).

B. The BO Underestimates the True Acreage of Habitat Disturbed by Expanded Oil Drilling

The BO explains that surface disturbance on LPNF lands within the three HOGPAs would be restricted to 4,277 acres. Instead of relying on this figure, the FWS decided instead to rely on the Forest Service's outdated and unsubstantiated RFD prediction of 20.4 acres of surface disturbance. For the reasons explained above, this RFD report relies on old and inaccurate data and does not accurately reflect the true amount of acreage impacted by the decision.

In addition, the BO states that the 20.4-acre figure "does not include *temporary habitat disturbances associated with exploration*…." BO at 6 (emphasis added). The 20.4 acres of estimated surface disturbing oil and gas activities is a number relied on by FWS throughout the BO for its 'no jeopardy' determination.

C. The Biological Opinion Is Arbitrary and Capricious, Does Not Adequately Consider Impacts to Critical Habitat, and Fails to Use the Best Available Science

Agency action, such as the issuance of a BO, will be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC § 706(a)(2)(A). FWS makes an arbitrary and capricious decision if it fails to articulate a rational connection between the facts in the record and the decisions it makes in the BO. Marsh v. ONRC, 490 US 360, 378 (1989).

FWS should make a finding of 'jeopardy' if "the total of the species' status, environmental baseline, effects of the proposed action, and cumulative effects lead to the conclusion that the proposed action is likely to jeopardize the continued existence of the entire species, subspecies, or vertebrate population as listed." NOAA and FWS *Consultation Handbook*, 4-36 (1998). At the end of consultation, the BO should determine "whether the aggregate effects of the factors analyzed under 'environmental baseline,' 'effects of the action,' and 'cumulative effects' in the action area – when viewed against the status of the species or critical habitat– are likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat." *Id* at 4-31. Thus, FWS should aggregate the environmental baseline, the effects of the action and the cumulative effects such that "the impact of the proposed action is evaluated in a comprehensive context, thus minimizing the chance that a biological opinion will fail to account adequately for the impact of any related threat to listed species." NWF v. NOAA, 2005 WL 1278878, *12 (D. Or. 2005).

§ 7(a)(2) of the Endangered Species Act requires the action agency and FWS to use the "best scientific and commercial data available" during formal § 7 consultation. "The obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." Bennett v. Spear, 520 U.S. 154, 176 (1997).

1. California Condor

The BO describes three major threats to condors that are relevant to the proposed oil and gas leasing: collisions with, and electrocutions from, power lines; 'disturbance threats' to nesting and roosting sites; and ingestion of foreign objects (condors often pick up microtrash such as bolts and bottle caps, causing documented mortality to adults and, when regurgitated, to chicks as well). The BO overlooks the impacts to condors caused by habituation to human activities, such as oil drilling.

The BO also provides no scientific justification for its imposition of a 1.5-mile buffer around nesting sites, and a 0.5-mile buffer around roosting sites. According to the "Environmental Baseline" section of the BO, "no condors have chosen to nest within any of the HOGPAs, [but] they have chosen recent nest sites within 1.5 miles of areas proposed for oil and gas leasing." BO at 27. Magically the FWS included a 'minimization measure' precluding oil and gas surface disturbing activities within 1.5 miles of active or historic condor nesting sites. They have, however, provided no science in the BO to explain the relevance of 1.5 miles. That is, there is no scientific justification in the BO for allowing oil and gas leasing activities within 1.5 miles of condor nest sites, such as any statement explaining that such activity is not noticeable at this distance or that condors are not affected by such activities taking place at least 1.5 miles away. Without evidence to the contrary, one might conclude that FWS chose to preclude activity within 1.5 miles of nesting sites because this would not preclude drilling in any areas under consideration.

The BO also fails to explain its omission of a buffer zone around important condor foraging areas.

Under "Effects of the Action," FWS explains that project-related noise could cause adult birds to flush from and eventually abandon nests and could discourage use of suitable habitat for nesting, roosting or foraging. It goes on to note, however, that the minimization measures "would serve to eliminate or minimize most of these potential adverse effects." BO at 31. The FWS gives no scientific justification to support its conclusion that precluding activity within 1.5 miles of nesting sites, unless allowed after site-specific § 7 consultation, will insulate the condor from noise associated with oil and gas exploration, drilling, and production. Absent any justification whatsoever, this conclusion is arbitrary and capricious because it is not based on the best available science, or any science for that matter.

Other adverse effects on the condors, and the so-called minimization measures, suffer from the same lack of scientific foundation. For example, the FWS admits that power lines are a major contributor to juvenile condor mortality, yet it wholly fails to introduce science proving that the relevant minimization measures (anti-collision devices where "deemed necessary") will reduce

or minimize electrocutions among condors. Minimization Measure 2 does mandate that all new power lines shall be placed underground, unless 'undergrounding' is not possible. The BO does not, however, explain who makes the determination whether it is possible to place power lines underground. Nor does it give any criteria by which that decision is to be made.

FWS expects that, "although condors may be adversely affected, few or none are likely to be killed." BO at 32. That is hardly a reassuring statement given the lack of science in the BO to justify allowing noisy activities within 1.5 miles of condor nest sites, when such activity is known to cause condors to abandon active nests, likely resulting in chick mortality. Also disturbing is the lack of criteria to determine when new power lines will be found impossible to locate underground, when above ground power lines are documented to have electrocuted many condors in the past.

Finally, aside from stating that condor critical habitat has been designated and covers 570,400 acres in California, the BO lacks any discussion whatsoever of effects to California condor critical habitat. Under the ESA, analysis of an action's affect on critical habitat must consider not only whether it diminishes the value of that habitat for the species' survival, but its recovery as well. Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004).

Critical habitat for the condor was designated on Sept. 24, 1976 (41 *Fed. Reg.* 4194). The BO, however, fails to state the location of critical habitat areas in relation to new oil drilling areas. FWS's conclusion that the proposed oil and gas activities in LPNF would not adversely modify or destroy condor critical habitat is arbitrary and capricious because the BO fails to analyze such impacts in any way whatsoever.

2. Arroyo Toad

Critical habitat for the arroyo toad was finalized on May 13, 2005 (70 *Fed. Reg.* 19561), after finalization of the BO.[4] One of these critical habitat areas is Sespe Creek, which flows through the Sespe HOGPA. 70 Fed. Reg. 19584. This unit contains "[o]ne of the largest arroyo toad populations on the [LPNF]" and "is undammed and retains its natural flooding regime." *Id*. Thus, the BO should be amended and supplemented, taking into account that critical habitat for the arroyo toad has been designated in an area that is proposed to be opened to oil and gas activity. This is especially true given that the "prohibitions" on oil and gas activities from taking place within riparian areas, wetlands, and vernal pools is not absolute, and may be undertaken after site-specific section 7 consultation. Until it is determined whether this new critical habitat will be adversely modified or destroyed by the proposed oil and gas activities, the 'no destruction or adverse modification' determination made by FWS in the BO is arbitrary and capricious.

[4] This revised critical habitat designation excludes upland areas. FWS points to a study documenting that arroyo toads use upland areas (both in the notice of final rulemaking for critical habitat and in the BO), but relies on the study's conclusion that only 12% of toads venture out of riparian areas in order to significantly cut critical habitat in upland areas. The BO should include a minimization measure precluding activity in upland areas used or potentially used by arroyo toads, even if such areas are not formally designated as critical habitat.

The USFS 2004 BA states the arroyo toad occupies 69 acres within oil and gas leasing areas and that 874 acres within the oil and gas leasing areas are *potentially suitable habitat* (although not currently known to be occupied). However, "recent discussions between members of [USFS] staff and [FWS] staff have led to a *substantial reduction in the acreage of 'modeled' habitat*…; much of it has been reclassified as unoccupied or unsuitable." BO at 24 (emphasis added). The BO goes on to say, "We consider the action area for the arroyo toad to be all of the area within the Sespe HOGPA *that we have proposed as critical habitat*…, [including] all of Piru Creek…, along with flood zones, riparian areas, and adjacent upland habitats…." BO at 24 (emphasis added).

The BO explains that almost any activity within arroyo toad habitat will injure or kill them, but that oil and gas facilities and access roads would be located outside of riparian zones and aquatic/wetland habitat "identified as suitable for, or occupied by" arroyo toads. BO at 28. However, four pages earlier, FWS explained that based on 'discussions' with USFS, it had agreed to *substantially reduce* the acreage of habitat classified as occupied or suitable. This is important because the relevant 'minimization measure' (number 1 under Arroyo toad) would restrict activities only on such lands. The BO contains no scientific justification for FWS's and USFS's decision to 'substantially reduce' the acreage of occupied or suitable habitat for the arroyo toad, opening this species up to further threats from oil and gas activities. Failing to provide the scientific foundation for its decision to reduce the protections on arroyo toad habitat is arbitrary and capricious. Additionally, as noted above, the "prohibitions" on oil and gas activity within riparian areas and other aquatic habitat can be waived simply by conducting site-specific section 7 consultation.

FWS's BO also attempts to offset the risks posed by oil and gas leasing to the arroyo toad by relying on proposed changes in water releases from Pyramid Dam – upstream from Piru Lake, the arroyo toad's primary habitat. Perennial water releases from Pyramid Dam (to allow for year-round fly fishing in Piru Creek) are blamed for increasing the populations of bullfrogs, which predate on arroyo toads. But, according to the BO, "beginning in March 2005, releases from Pyramid Dam are scheduled to more closely mimic natural flows, which will benefit the arroyo toad." BO at 24. Reducing summer flows in Piru Creek *could* reduce the bullfrog population, resulting in less pressure on the arroyo toad, but this cannot be used to offset or mitigate effects of oil and gas leasing on the arroyo toad and its habitat. The BO does **not** say that reductions in releases from Pyramid Dam will occur, nor does it give any assurance or guarantee that such flow modifications will continue indefinitely to provide the alleged protection to the arroyo toad (and other relevant aquatic and wetland species) into the future. FWS also does not provide any science to show that if this flow modification does occur, the arroyo toad will benefit. Speculative benefits from unsubstantiated, unquantified hydrologic changes cannot be relied upon to set the baseline for analysis of effects on the arroyo toad of oil and gas leasing in LPNF.

FWS relies on the 'minimization measure' that no oil and gas activities will take place in riparian areas (unless approved through later § 7 consultation) for its determination that the arroyo toad (and other water-dependent species) will not be jeopardized by the issuance of oil and gas leases. But the arroyo toad uses upland habitat as well as riparian areas. "Arroyo toad juveniles and adults use upland areas adjacent to breeding habitat for foraging and wintering. They are known to use a variety of upland habitats…." BO at 10. The final rule designating critical habitat also

has a lengthy discussion of arroyo toad use of upland habitat, including a study that found arroyo toads in traps as far as 0.71 miles from riparian areas (and explaining that no traps were placed farther away, meaning that toads likely travel even further into upland habitat). 70 *Fed. Reg.* 19561, 19579. USFS and FWS do not include in any of the minimization measures any language to protect arroyo toads (or other aquatic species) when they venture into their upland habitat. The minimization measure only addresses activity that would take place in "riparian zones and aquatic or wetland habitat…." BO at 28. Without addressing the effects on arroyo toads of oil and gas activity in its upland habitat, it is arbitrary and capricious for the FWS to determine that such activity will not jeopardize the survival and recovery of the arroyo toad (or other aquatic species that also use upland habitat).

The BO states that water for drilling will be found locally, yet it fails anywhere to discuss what, if any, effects this may have on water-dependent species in the area. Would the water taken locally for drilling activities reduce flows in local streams, thereby adversely effecting species' habitats?

3. California Red-Legged Frog

FWS expects the California red-legged frog to benefit from reduced flows of water from Pyramid Dam into Piru Creek. Again, however, FWS provides no scientific justification for its belief that reduced flows will benefit the California red-legged frog populations. In fact, FWS surmises that the frog's presence in South Cuyama HOGPA is "less likely", despite the fact that it contains modeled habitat, due in part to this HOGPA's increased aridity. BO at 25. So, for the Sespe HOGPA, FWS claims that reduced water flow will benefit the California red-legged frog population, while in the South Cuyama HOGPA it claims that aridity is one reason why the frog's presence there is unlikely. That is, according to the BO, the California red-legged frog is less likely to reside in South Cuyama HOGPA because it is dry, but that making Sespe HOGPA drier by reducing creek flow will benefit the species. FWS provides no explanation or justification for this contradiction in habitat suitability and its reliance on these unjustified statements for the 'no jeopardy' finding with respect to the California red-legged frog is therefore arbitrary and capricious because it is not based on the best available science.[5]

While California red-legged frogs' principal habitat is streams and riparian areas, they are known to venture upland during periods of wet weather to reach breeding sites (some traveling 1.7 miles over two months). The BO fails to quantify the number of frogs known to use upland habitat, only saying "most" frogs in one study were non-migrating and remained within 426 feet of their aquatic residence. BO at 13. The minimization measure meant to benefit these aquatic species only applies to riparian areas, and there is no minimization measure that would affect adverse modification to upland habitat used by the California red-legged frog.

4. Southwestern Willow Flycatcher

The Southwestern willow flycatcher has been observed along Piru Creek within Sespe HOGPA. No such observations have taken place within the other two HOGPAs, but all three contain

[5] Obviously, there may be a range of aridity in the atmosphere or water level in the creek which benefits the species, but this was not mentioned in the BO.

modeled Southwestern willow flycatcher habitat. The Southwestern willow flycatcher, like the California condor (and other listed birds in LPNF) can be seriously harmed by project-related noise such as detonation, gas compressors, or diesel-powered electric generators. BO at 29. This noise can cause the Southwestern willow flycatcher to flush from and eventually abandon an active nest or prevent it from choosing an otherwise suitable nest site.

5. Gas Flaring

A significant part of any oil and gas operation is 'flaring'. Flaring is the burning of natural gas that is unable to be processed or sold. Flaring produces bright flames, especially conspicuous at night, and thick columns of black smoke. Flaring also releases air contaminants, including nitrous oxides, sulfur oxides, hazardous air pollutants and particulate matter. The BO contains no analysis whatsoever of the effects of flaring on TEP species. This is important because gas well testing "generally requires flaring … in large quantities for up to 30 days." BO at 5. A 'sour well' is one in which the gas contains sulfur compounds.

> In the downwind plume of sour gas flares sulfur dioxide, hydrogen sulfide and carbon disulfide together with a spectrum of sulfur-containing chemicals are present…. An annual exposure greater than 4 ug/m^3 hydrogen sulfide is associated with spontaneous abortion in animals and humans. The odor threshold of hydrogen sulfide is about 7 ug/ m^3, that is less than the critical concentration. … Hydrogen sulfide induces hypoxia in humans and animals. It affects the ability of the cell to process oxygen by interfering with oxygen metabolic processes.

Argo, p.22. The BO does not discuss the chemical compounds likely to be released from the 'substantial flaring' that will occur in LPNF. Obviously, the BO has failed to adequately take into account and analyze the best available science concerning the harmful effects of flaring on threatened and endangered species in the oil and gas leasing areas of LPNF. This failure is arbitrary and capricious, and thus is a violation of the APA.

D. The Biological Opinion Fails to Adequately Determine the Environmental Baseline for the Listed Species in LPNF.

In evaluating whether a proposed action is likely to avoid jeopardy or destroy or modify critical habitat, FWS must evaluate the "effects of the action," along with the "cumulative effects" on the species. 50 CFR § 402.14(g)(3).

> 'Effects of the action' refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the anticipated impact of all proposed Federal projects in the action area that have already undergone consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur.

50 CFR § 402.02.

The 'environmental baseline' includes "the past and present impacts of all Federal, State, or private actions and other human activities in the action area" and the anticipated effects of future federal projects that have already undergone § 7 consultation. 50 CFR § 402.02. "It is therefore in the analysis of the environmental baseline that other federal activities in the action area that impact [species] must be taken into account by FWS." Defenders v. Babbitt, 130 F. Supp. 2d 121, 127 (Dist. DC 2001).

The section of the BO entitled "ENVIRONMENTAL BASELINE" (pp. 23-27) is wholly inadequate. As noted above, the environmental baseline is meant to provide the background of human effects on the species upon which the effects of the action are to be added to determine if the proposed action will result in jeopardy to the species. The LPNF Oil and Gas Leasing BO does not contain any of the requirements of an adequate environmental baseline analysis. Systematically, for each species, the BO fails to mention, much less describe and analyze, the 'past and present impacts of all federal, state, and private activities in the action area', as is required by 50 CFR § 402.02. The 'environmental baseline' component of this BO is nothing more than a statement of the areas occupied, potentially occupied, or known to be unoccupied by each of the species, followed by a description of the 'action area' for each species. This section also contains, for each species, a declaration of the acreage of habitat (designated, occupied, or potentially suitable) which 'could' be subject to development, as stated in the 2004 BA.

Without an accurate description of the environmental baseline for each species in the LPNF that could be affected by the oil and gas leasing proposal, FWS could not have adequately aggregated the effects of the action, along with the cumulative effects of other federal actions, to come up with a justifiable determination of whether the action will jeopardize the survival and recovery of the species. This failure is a violation of § 7 of the ESA and its implementing regulations, and is thus an arbitrary and capricious action by FWS which renders its BO invalid under APA § 706.[6]

E. The Forest Service Failed to Analyze Consistency with the Recovery Plans for the Condor and Other Threatened and Endangered Species

The ESA mandates the preparation of recovery plans for threatened and endangered species. 16 U.S.C. § 1533(f). FWS has prepared final recovery plans for the California condor (April 1996), arroyo toad (July 1999), California red-legged frog (May 2002), Southwestern willow flycatcher (August 2002), and other listed species found in LPNF. Recovery plans are intended to provide for the “conservation and survival” of threatened and endangered species. 16 U.S.C. § 1533(f)(1). They set out objectives for recovery, criteria for measuring recovery, and specific actions to achieve the recovery objectives. The ESA further defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer

[6] *See e.g. Defenders v. Babbitt*, 130 F. Supp. 2d 121, 128 (Dist. DC 2001) ("The BO must also include an analysis of the effects of the action on the species when 'added to' the environmental baseline – in other words, an analysis of the total impact on the species.").

necessary." 16 U.S.C. § 1532(3). Thus, the ESA equates "conservation" with efforts to recover a listed species.

Federal agencies, including the Forest Service, have an affirmative duty to use their authorities to conserve, and hence to recover, threatened and endangered species. 16 U.S.C. §§ 1531(c)(1), 1536(a)(1). In addition, the CEQ NEPA regulations provide that an EIS must consider "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973" in determining the intensity of an action's environmental impacts. An action that is inconsistent with a species' recovery plan is one that may adversely affect the species because it does not promote, and may hinder, the conservation of the species. Accordingly, in reviewing the proposed action pursuant to NEPA, the Forest Service must consider the consistency of the action with existing recovery plans.

The FEIS, however, fails to consider the proposed action's consistency with either the general recovery objectives or the specific recovery objectives stated in the condor, arroyo toad, California red-legged frog, willow flycatcher, and other relevant recovery plans. As a result, the FEIS fails to disclose whether the proposed action may hinder recovery of these species. In addition, the Forest Service has not demonstrated that it has used its authority to conserve and recover these species by ensuring that its actions are consistent with the recovery plans.

F. USFS Failed to Formally Consult with NOAA Fisheries

The Forest Service failed to formally consult with NOAA Fisheries with respect to impacts to steelhead populations. In a letter to the Forest Service dated April 15, 2005, NOAA Fisheries stated

> NMFS understands that the proposed action will not result in any actual ground breaking activities or development. This action would set the stage for the potential leasing of up to 4,277 acres, of which 140 acres fall within potentially suitable steelhead habitat and 13 acres of occupied steelhead habitat. NMFS understands that LPNF proposes to minimize potential direct impacts of any future operations that are approved by not allowing any project activities within aquatic or riparian areas and will create buffers of up to 200 meters from sensitive habitat. In the event it is determine that a granted lease and actual development may affect a listed species, LPNF would develop a separate and complete biological assessment for those specific actions and would fulfill any Endangered Species Act obligations for threatened and endangered species via a section 7 consultation at that time. In consideration of the above information, NMFS concurs with LPNF that the proposed action is not likely to adversely affect the Southern California ESU for Federally endangered steelhead. This concludes the informal section 7 consultation for this proposed action.

NOAA Fisheries, 1.

This letter illustrates a fundamental error in the consultation process; namely, that both NOAA Fisheries and Forest Service have unlawfully limited the scope of the "agency action" at issue in the consultation, and thus greatly underestimated the extent of expected effects to southern steelhead. In the context of oil and gas leasing, the courts have consistently concluded that "agency action" is to be defined broadly to "encompass[] the entire leasing project, from the issuance of the leases through post-leasing development and production." North Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980). The Ninth Circuit has explicitly rejected Forest Service's claims that "incremental" biological opinions may be prepared in the context of oil and gas leasing, holding that FWS "must prepare biological opinions assessing the potential impacts of all post-leasing activities [i.e. road building, well construction, etc.]" Connor v. Burford, 848 F.2d at 1458. Under this framework of analysis, the Forest Service's decision to issue new oil and gas leases on more than 50,000 acres of the Los Padres National Forest will clearly result in "actual ground breaking activities [and] development," and by asserting otherwise, the actions of both NMFS and the Forest Service are arbitrary and capricious and in violation of the ESA.

Additionally, the NOAA Fisheries letter is factually incorrect (the decision allows leasing of 52,075 acres, not the 4,277 acres listed in the letter), and fails to account for oil development on private lands outside the forest boundary that will likely be developed to access oil reserves under areas of the forest with a NSO stipulation. Some of this private land supports steelhead habitat.

NOAA Fisheries also unlawfully defers consultation indefinitely into the future, even though there is sufficient information right now to conduct a legally adequate formal consultation under § 7 of the ESA. The Forest Service underwent formal consultation with the USFWS, so it is unclear why the agency did not undertake formal consultation with NOAA Fisheries as well.

Finally, the NOAA Fisheries letter fails to analyze whether the stated mitigation measures will be effective.

G. The Forest Service and USFWS Failed to Use the Best Available Science

The ESA provides that, in consulting with FWS to determine whether the action is likely to jeopardize the continued existence of any endangered or threatened species or adversely modify the critical habitat of such species, the Forest Service shall use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2).

For the reasons outlined above, the Forest Service failed to uphold its duty to use the best available science. The FEIS relies on outdated reports and studies, inaccurate data, and fails to provide citations to scientific literature. This failure to use the best available science does not provide the public, the Forest Service, or other agencies with a scientifically sound analysis of impacts.

H. The USFWS Failed to Recommend Reasonable Prudent Alternatives

The ESA provides that, if after consultation with the federal action agency the FWS finds that a proposed action will jeopardize the continued existence of any endangered or threatened species

or adversely modify the critical habitat of such species, the FWS "shall suggest those reasonable and prudent alternatives" that can be taken by the agency to avoid or minimize jeopardy and adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A). In addition, any incidental take statement provided by FWS must specify the impact of the take of listed species incidental to the action and specify reasonable and prudent measures that FWS considers necessary or appropriate to minimize the impact. 16 U.S.C. § 1536(b)(4)(C).

The BO states that "because the proposed action will not result in incidental take, we will not include reasonable and prudent measures or terms and conditions in this biological opinion." BO, 34. As discussed above, however, the BO fails to evaluate adequately the proposed action's potential to adversely modify the critical habitat of threatened and endangered species in LPNF. Thus, the BO's failure to recommend reasonable and prudent alternatives is arbitrary and capricious.

I. The Biological Opinion Fails to Adequately Analyze Cumulative Impacts

A biological opinion must evaluate "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4). "Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02.

The BO defers this analysis of cumulative impacts to site-specific projects, stating "[f]uture Federal actions will be subject to the consultation requirements established in section 7 of the Act and, therefore, are not considered cumulative to the proposed project." USFWS, p.32. The BO then proceeds to similarly defer analysis of cumulative impacts on private lands surrounding the forest. *Id.* This analysis is inadequate, and the Forest Service's reliance on it violates NEPA and the ESA.

J. The Forest Service Failed to Receive, and the USFWS Failed to Issue, an Incidental Take Statement for this Decision

The ESA prohibits the "taking" of an endangered or threatened species unless the take is specifically authorized under the ESA. 16 U.S.C. § 1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

> Harass in the definition of 'take' in the [ESA] means 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 . . . Harm in the definition of 'take' in the [ESA] means an act which actually kills or injures wildlife. Such 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.

50 C.F.R. § 17.3. FWS, however, may authorize a federal agency to take a threatened or endangered species if the taking is incidental to otherwise lawful agency action through an incidental take statement in a BO. 16 U.S.C. § 1536(b)(4). The BO acknowledges that condors may be harmed or even killed, and thus "taken" as a result of the proposed action, yet fails to include an incidental take statement:

> We expect that, although California condors may be adversely affected, few or none are likely to be killed.

BO p. 33-34. Thus, in violation of the ESA, the BO authorizes take of condors in connection with the proposed action without providing the necessary authorization for such take.

IX. THE FEIS AND ROD DISREGARDED PUBLIC COMMENTS AND CITIZEN PARTICIPATION IN THE DECISION-MAKING PROCESS, IN VIOLATION OF NEPA AND NFMA

A. The Forest Service Erroneously Classified the Decision as a Non-Significant Forest Plan Amendment

The old forest planning regulations require the Forest Service to determine whether a forest plan amendment is significant or non-significant. 36 C.F.R. § 219.10(f). Determinations of the significance of a forest plan amendment are "an integral part of decisions" and are thus appealable. FSM § 1922.5. The ROD classifies this decision as a non-significant forest plan amendment. ROD 12,14. This determination is clearly erroneous, and severely curtailed the public's right to sufficiently review a decision of this magnitude.

The consequences of the Forest Service's significance determination is of the utmost importance with respect to public involvement, which lies at the heart of NEPA. For a *non-significant* forest plan amendment, the public only has 45 days to review all the documents and background reports to get a firm understanding of all elements and consequences of the decision. 36 C.F.R. § 217.8(a)(2). For a *significant* forest plan amendment, the public has twice as long (90 days) to review the decision. 36 C.F.R. § 217.8(a)(3). Significant amendments also require additional public notification procedures (the same as those required for the development and approval of a forest plan), while non-significant amendments only require compliance with NEPA's procedures. 36 C.F.R. § 219.10(f).

At the outset, we point out that the Forest Service has not specified exactly what it is proposing to amend. The Forest Service Manual requires the Forest Supervisor to "prepare an amendment to the forest plan" and to notify the public of the amendment as appropriate. FSM 1922.51. Instead, the FEIS merely states that "the decisions based on this EIS will determine which lands are recommended to be leased and thus will supersede the Forest Plan Appendix J Guidelines." FEIS 2-24. The FEIS fails to set out the replacement language for Appendix J, leaving the public to guess as to the nature of the amendment and making it extremely difficult for the public to determine whether it is significant or not.

At any rate, the Forest Service's decision does not meet the criteria for a non-significant forest plan amendment set forth in Forest Service Manual 1922.51. First, Nor does the decision does *not* entail "minor changes in standards and guidelines." FSM 1922.51.

The Forest Service Manual sets forth specific criteria for significant forest plan amendments, including:

1. Changes that would significantly alter the long-term relationship between levels of multiple-use goods and services originally projected; and
2. Changes that may have an important effect on the entire forest plan or affect land and resources throughout a large portion of the planning area during the planning period.

FSM 1922.52. First, oil development is an intensive resource use that generally precludes other uses, so opening up new areas of the forest for oil drilling alters the multiple use goals and objectives for long term land and resource management. This has the resulting effect of significantly altering the long-term relationship between levels of multiple use goods and services originally projected.

Second, this decision will undoubtedly have a tremendous impact on the entire forest plan, and will affect land and resources throughout a large portion of the planning area. The decision opens up 52,075 acres for new oil drilling. No other decision in recent memory has impacted such a large swath of land in the Los Padres National Forest. Considering that the impact of this decision will extend well beyond the boundaries of these 52,075 acres, it is hard to comprehend how the Forest Service can claim this is a non-significant amendment.

B. The Forest Service Failed to File the FEIS with the Environmental Protection Agency, as Required by NEPA Regulations

The regulations implementing NEPA require the Forest Service to file the FEIS with the EPA. Specifically, "Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency." 40 C.F.R. § 1506.9.

This requirement is important because an agency cannot issue a ROD until 30 days *after* the EPA publishes notice in the *Federal Register* that it received the FEIS. The NEPA regulations state that "no decision on the proposed action shall be made or recorded…by a Federal agency until…[t]hirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement." 40 C.F.R. § 1506.10. This 30-day waiting period is waived for agencies – like the Forest Service – that have internal appeal procedures. *Id.* However, this does not waive the requirement that the Forest Service still file the FEIS with the EPA.

C. The Forest Service Failed to Adequately Respond to Public Comments Submitted on the DEIS

Under NEPA, the Forest Service must respond to all comments received from government agencies and members of the public. To the extent that the FEIS failed to incorporate or even respond to the comments provided by government agencies like NOAA Fisheries and the EPA as outlined above, the Forest Service has violated NEPA.

In addition, the Forest Service failed to incorporate comments from noted scientists who provided substantive comments on the DEIS. For example, condor biologist Janet Hamber has spent 25 years monitoring the California condor in and near the Los Padres National Forest, and highlighted significant impacts that could occur if the agency allowed any additional oil drilling in areas close to Hopper Mountain National Wildlife Refuge, the Sespe Condor Sanctuary, and the foothills of the Cuyama Valley.

The agency approved oil drilling in these very areas, yet failed to even mention (let alone address) Ms. Hamber's comments in the FEIS. Ms. Hamber is not referenced by name in the document, and the agency's response does not address her comment. Instead, the response addresses Fox Mountain and the Biological Opinion obtained by the U.S. Fish and Wildlife Service. FEIS 9-72 to 9-74.

X. THE DECISION VIOLATES THE NATIONAL FOREST MANAGEMENT ACT

A. The FEIS and ROD Rely on Antiquated Forest Plan Standards that the Forest Service is Currently Revising Because they are So Old

The Forest Service adopted the current forest plan for the Los Padres National Forest in 1988. FEIS 1-15. Thus, this decision implements (and amends) a forest plan that is 17 years old.

The agency's planning regulations state that a forest plan "shall ordinarily be revised on a 10-year cycle or ate least every 15 years" to take into account changes in conditions or demands on the national forest. 36 C.F.R. § 219.10(g). Decisions that implement a stale forest plan fail to meet NEPA's or NFMA's standards for accuracy and scientific integrity, and should be deferred until a new forest plan is adopted.

The Forest Service has admitted that "conditions and expectations have changed significantly" on the Los Padres National Forest since enactment of the original forest plan in 1988. U.S.D.A. Forest Service 2004b. The Forest Service has also acknowledged that the "existing Forest Plan[] do[es] not adequately protect [threatened and endangered] species, nor provide direction necessary to sustain particular ecological communities." Appellants agree, and believe that such changes require the Forest Service to first update its forest plan before approving a decision of such magnitude.

Appellants contend that it is disingenuous to claim that any of the proposed alternatives in the FEIS are consistent with management standards and guidelines when the Forest Service itself admits that the 17-year-old Forest Plan fails to adequately protect threatened and endangered species and sustain ecological communities.

B. The FEIS Fails to Adequately Analyze Consistency With the Forest Plan

1. The FEIS Contains Inadequate Analysis of Consistency with Other Elements of the Existing Forest Plan

NFMA and 36 C.F.R. § 219 require that all decisions be consistent with the applicable forest plan. Decision documents must "describe how the decision is consistent with applicable laws and regulations," including the forest plan. FSH § 1909.15 § 43.21(6).

Instead of providing a thorough analysis of the New Preferred Alternative's consistency with the Forest Plan, the FEIS instead just provides a conclusory statement that "The New Preferred Alternative is in compliance with the Forest Plan." FEIS, 4-75. The FEIS fails to describe *how* the decision is consistent, in violation of NEPA and Forest Service directives implementing NFMA.

Other alternatives suffer from a similar deficiency. The Forest Plan consistency discussion for each alternative is typically one or two sentences. The FEIS fails to explain *how* each alternative is consistent with the Forest Plan.

On the contrary, the agency's decision is *not* consistent with the forest plan because it omits key analyses that are required under the plan. For example, the FEIS provides essentially no analysis of impacts to Management Indicator Species (MIS). The forest plan requires the agency to monitor all MIS, and that results will be used to verify or modify management, and to "[e]nsure collection of data to monitor project impacts on selected populations of MIS, T&E species, Sensitive and Special Emphasis species, and to develop management guidelines for species without habitat management plans." U.S.D.A. Forest Service, 1988, p. 4-10. Literally no data have been presented on the impacts of existing leases on a number of MIS, including cavity nesters, the California Quail, the Gray Squirrel, and the riparian bird association as required by the Forest Plan, nor has the agency provided any population trend data on these species with which to conduct thorough, scientifically based analyses on impacts of proposed new leasing.

The only mention of MIS species in the entire FEIS is from Table 4-15, p. 4-54, which described the data used to estimate effects. Most of the data was based on a very broad definition of 'habitat used.' Nowhere, however, did the FEIS disclose the results of the vague, habitat-based analysis on a species-by-species basis, nor did it properly analyze cumulative effects on these species.

Moreover, the action does not provide for any future data collection with respect to these species in the Stipulations and Conditions of Approval. The complete failure of the agency to collect and analyze data on population trends and impacts of projects on MIS species is a serious violation of the current LRMP. With this decision, the Forest Service is continuing its tradition

of data-free management, which has resulted in continued declining trends in many special-status species in southern California.

2. The FEIS Contains No Analysis of the Decision's Consistency With the Riparian Conservation Strategy or PACFISH, Parts of the Forest Plan

The current Forest Plan for the Los Padres National Forest was amended in 1995 to include all standards and guidelines specified by both the Interim Strategies for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California (PACFISH) and the Riparian Conservation Strategy (RCS).

In its comment letter, NOAA Fisheries states that the EIS "should clarify whether oil and gas exploration would be incompliance with management direction specified by PACFISH and the RCS." NOAA Fisheries, p. 5. Despite this clear mandate, the FEIS only makes one passing reference to PACFISH (see FEIS 4-54), and only one passing reference to the RCS (see FEIS 4-50, which states, "Given the ESA and Forest Plan management direction, which includes direction given in the Riparian Conservation Strategy, present and reasonably foreseeable non-oil-and-gas activities on the Forest are not expected to result in additional cumulatively significant impacts to biological resources.") No further explanation is given as to *how* the decision is actually consistent with these Forest Plan standards. The Forest Service even failed to heed the simple suggestion of adding PACFISH and the RCS to the "Summary of Laws, Policies, and Decisions" section of the FEIS. NOAA Fisheries, p. 5; FEIS 1-12 to 1-16.

3. The FEIS Improperly Concludes that Alternative 1 is Inconsistent with the Forest Plan

The current Forest Plan contains a multitude of standards and guidelines to protect species and habitats from harmful activities. In analyzing consistency with the Forest Plan for Alternative 1, the Forest Service relies on only a single one of these standards to conclude that Alternative 1 is inconsistent with Forest Plan direction. The standard relied on is that "Habitat improvement will enhance conditions for sensitive, endangered and threatened species." FEIS 4-63. The FEIS then concludes that Alternative 1 is not consistent with this management direction because "additional improvement projects" must be actively conducted to off-set possible adverse impacts of oil and gas development. The FEIS fails to state what these "additional improvement projects" are, why they cannot be implemented as part of Alternative 1, and why the agency's current species protection efforts would not continue under Alternative 1.

C. The Forest Service Prematurely Issued the Decision Before Issuing its Final Revision of the Forest Plan, Effectively Circumventing the Forest Planning Process

At the same time that the Forest Service performed the oil and gas leasing analysis, the agency was also in the midst of a multi-year process to revise and amend the current Los Padres National Forest Land and Resource Management Plan ("Forest Plan"). This plan amendment process, which is still ongoing today, addresses several issues relevant to the leasing decision,

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 drilling activity.

The Forest Service is poised to release its final Forest Plan revision in mid-September 2005, less than two months after the agency issued its oil and gas leasing decision. As presented in detail in two separate comment letters by the California Attorney General's Office and the Center for Biological Diversity, this backwards process prevents the public and the agency from making a fully informed leasing decision with the benefit of up-to-date Forest Plan standards and guidelines. The Forest Service failed to adequately address these comments in the FEIS, so we hereby attach and incorporate these comments by reference in this appeal, and briefly summarize them below.

It is through the forest planning process required by the NFMA and its implementing regulations 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.").

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. § 219.7 ("Plan decision guide or limit uses of National Forest System resources and provide the basis for future agency action….[P]lan decision provide a framework for authorizing site-specific actions that may commit resources").

The Forest Service's decision is directly contrary to the requirements of this statutory scheme. Instead of waiting just two more months for the comprehensive plan, the Forest Service has decided to rush through a large-scale leasing program that would commit over 52,000 acres of the Los Padres to a particular consumptive use, making other choices that might be favored in the upcoming plan no longer available or viable. This approach is particularly improper given the acknowledged inadequacies of the existing plan. See 66 Fed. Reg. 48856.

The Reform Act regulations also demonstrate the backwards nature of the Forest Service's approach. These regulations require the Forest Service to ensure leasing decisions are consistent with the forest plan *before* making the decision to lease specific lands. 36 C.F.R. § 228.102(e). Instead, the agency has performed an end-run around this regulation, proposing a forest plan amendment concurrently with its decision instead of waiting for the revised forest plan and ensuring consistency with the new management direction located therein.

CONCLUSION

Appellants are concerned that allowing oil and gas drilling to expand across 52,075 acres of the national forest, including up to 4,277 acres of surface disturbance, will result in serious and irreversible impacts to water and air quality, wildlife and habitat, popular recreation areas, scenic landscapes, heritage resources, and noise. This is a high price to pay for what amounts to less than a day's supply of oil, according to the Forest Service's own estimates. The analysis of these impacts in the FEIS is inadequate, fails to take a "hard look" at these impacts, fails to properly analyze cumulative impacts, and excessively defers additional analysis indefinitely into the future. Such an approach does not satisfy NEPA's strict standards of high scientific integrity, and fail to provide the agency, and members of the public, with a thorough and scientifically sound disclosure of all environmental impacts associated with this decision.

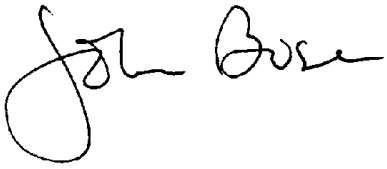
In addition to these impacts, appellants are also concerned that the decision violates the Clean Air Act, the National Forest Management Act, the Endangered Species Act, the Migratory Bird Treaty Act, and the Federal Onshore Oil and Gas Leasing Act.

For these reasons, we respectfully request that the Forest Service withdraw the ROD, perform additional environmental analysis as required by NEPA and other various laws and regulations, and select an alternative that upholds our community's values and better protects the clean water, recreation, and wildlife in the Los Padres National Forest.

Sincerely,

Jeff Kuyper, Executive Director, Los Padres ForestWatch

Kim Delfino, California Program Director, Defenders of Wildlife



John Buse, Staff Attorney, Center for Biological Diversity

APPENDIX A – REFERENCES

Argo, J., Ph.D. *Unhealthy Effects of Oil and Gas Drilling.* Available at http://www.sierraclub.ca/national/oil-and-gas-exploration/soss-oil-and-gas-flaring.pdf .

Bain, D. 1993. *Reasonably foreseeable oil and gas development scenarios for the Los Padres National Forest, California*.

Beschta, R.L., Rhodes, J.J., Kauffman, J.B., Gresswell, R.E., Minshall, G.W., Karr, J.R., Perry, D.A., Hauer, F.R., Frissell, C.A., 2004. Postfire management on forested public lands of the Western USA. Conservation Biology, 18: 957-967.

Brown, G.D. 2005. Letter from Gloria D. Brown, Los Padres National Forest Supervisor to Interested Party, dated July 27, 2005.

California Environmental Protection Agency, Air Resources Board. 2001. Ozone transport: 2001 review. 46pp.

Confluence Consulting, Inc. 2005. Annotated bibliography of the potential impacts of gas and oil exploration and development on coldwater fisheries. 28pp.

Environmental Working Group (EWG). 2005. Losing Ground: Who Owns the West? Available at http://www.ewg.org/reports/losingground/execsumm.php .

Evans, S.L. 2001. Potential wild & scenic rivers in California: a statewide inventory. 23p. Available at http://www.friendsoftheriver.org/Publications/PDF/2001PWSRC_Inventory.pdf .

General Accounting Office. 2005. Oil and gas development: increased permitting activity has lessened BLM's ability to meet its environmental protection responsibilities. GAO-05-418, 70p. Available at http://www.gao.gov/new.items/d05418.pdf .

General Accounting Office. 2003. National wildlife refuges: opportunities to improve the management and oversight of oil and gas activities on federal lands. GAO-03-517, 67p. Available at http://www.gao.gov/cgi-bin/getrpt?GAO-03-517 .

Jennings, M. Fire scorches 7 acres near condor sanctuary. *Ventura County Star*, January 6, 2001. Available at http://www.insidevc.com/getlocal/fillmore/357830.shtml .

Kafanov, L. 2005. *Rising prices fuel leasing boom in unconventional places*. Land Letter, August 25, 2005.

New York Mercantile Exchange. 2005. Home page www.nymex.com accessed September 15, 2005.

Palmer, Bruce. 2005. Telephone communication on June 28, 2005.

Stephenson, J.R.; Calcarone, G.M. 1999. Southern California mountains and foothills assessment: habitat and species conservation issues. General Technical Report GTR-PSW-175. Albany, CA: Pacific Southwest Research Station, Forest Service, U.S. Department of Agriculture; 402p.

Thomson, J.L., Schaub, T.S., Culver, N.W., and Aengst, P.C. 2005. Wildlife at a crossroads: energy development in western Wyoming, Effects of roads on habitat in the Upper Green River Valley. The Wilderness Society: Washington, DC. 40 p. Available at http://www.wilderness.org/Library/Documents/pinedale.cfm

U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries). 2002. Letter from Rodney McInnis, Acting Regional Administrator, to Al Hess, U.S. Forest Service, dated February 19, 2002. 5pp.

U.S. Environmental Protection Agency (EPA). 2005. Memorandum from G. Tom Helms, Group Leader, Ozone Policy and Strategies Group to Air Program Managers, Regions I-X, dated August 25, 2005. 2pp.

U.S. Environmental Protection Agency (EPA). 2002. Letter from Enrique Manzanilla, EPA to Jeannie Derby, Forest Supervisor, Los Padres National Forest, dated April 19, 2002. 6pp.

U.S. Forest Service. 2005a. Final Environmental Impact Statement for Oil and Gas Leasing, Los Padres National Forest.

U.S. Forest Service. 2005b. Effects of the leasing decision on the California condor and other T&E species. August 12, 2005; 4pp.

U.S. Forest Service. 2004a. Jacinto Reyes Scenic Byway Corridor Management Plan. 33p. Available at http://www.fs.fed.us/r5/lospadres/projects/byway/cmp/ .

U.S. Forest Service. 2004b. Draft environmental impact statement for revised land management plans: Angeles National Forest, Cleveland National Forest, Los Padres National Forest, San Bernardino National Forest.

U.S. Forest Service. 2004c. Biological assessment/biological evaluation for leasing of oil and gas resources within the boundaries of the Los Padres National Forest. 44pp.

U.S. Forest Service. 2000. Biological resources background report.

U.S. Forest Service. 1998. Air quality background report for Los Padres Oil and Gas Leasing EIS.

U.S. Forest Service. 1988a. Land and resource management plan, Los Padres National Forest.

U.S. Forest Service. 1988b. Final environmental impact statement, land and resource management plan, Los Padres National Forest.

U.S. Fish & Wildlife Service (USFWS). 2005. Biological opinion on the proposal to lease oil and gas resources within the boundaries of the Los Padres National Forest, California (1-8-04-F-32). Letter from Carl Benz, Assistant Field Supervisor to Gloria Brown, Forest Supervisor, dated February 23, 2005. 35p.

U.S. Fish & Wildlife Service (USFWS). 2004. Milestones in the history of the California condor. Available at http://www.fws.gov/pacific/hoppermountain/cacondor/milestone.html .

U.S. Fish & Wildlife Service (USFWS). 1996. Recovery plan for the California condor.

Weller, C. J, Thomson, P. Morton, and G. Aplet, 2002. Fragmenting our lands: The ecological footprint from oil and gas development. A spatial analysis of a Wyoming gas field. The Wilderness Society, Seattle, WA and Denver, CO. 30 p. Available at http://www.wilderness.org/Library/Documents/FragmentingOurLands.cfm