



June 13, 2006

Via Certified Mail, Return Receipt Requested

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Re: 60-Day Notice Letter of Intent to Sue for Violations of the Endangered Species Act Concerning the Los Padres National Forest Oil and Gas Leasing Proposal

Dear Secretaries Kempthorne, Johanns and Gutierrez; Director Hall; Chief Bosworth and Under Secretary Lautenbacher:

This letter provides notice on behalf of the Center for Biological Diversity, Defenders of Wildlife, and Los Padres ForestWatch ("the Noticing Parties") to inform you of violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, relating to the Los Padres National Forest Oil and Gas Leasing proposal (the "Proposed Action"), and to inform you of the Noticing Parties' intent to sue the United States Forest Service ("Forest Service"), United States Fish and Wildlife Service ("FWS"), and National

Oceanic and Atmospheric Administration Fisheries (“NOAA Fisheries”) for these violations. This letter is provided to you pursuant to the sixty-day notice requirements of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2).

Factual Background

The Proposed Action is the Forest Service’s plan to authorize leases for oil and gas extraction in Los Padres National Forest. According to the Proposed Action, the Forest Service will make available 52,075 acres within the South Cuyama, Sespe, and San Cayetano High Oil and Gas Potential Areas (“HOGPAs”) of Los Padres National Forest. Of this acreage, 4,277 acres will be available for leasing with surface development.

The Biological Opinion (“BO”) for the Proposed Action (FWS File #1-8-04-F-32) describes five general phases of ground-disturbing activities associated with oil and gas development: preliminary investigation (including geophysical/seismic exploration); exploratory drilling; development; production; and abandonment. The entire process (preliminary investigation through abandonment) may cover a time span of up to 50 years. Geophysical exploration may consist of

the introduction of shock waves into the earth with truck-mounted thumpers, explosives placed into small-diameter holes drilled 100 to 200 feet deep, surface charges detonated 3 feet above ground, or the detonation of primacord [textile-wrapped lengths of explosive cord] buried in 2.5-foot deep furrows plowed by a tractor. Off-road cross country travel by trucks may be necessary, unless helicopters are used to deliver equipment to remote locations. Drilling water, when needed, is usually obtained locally. Detonations and seismic sensors may be located along lines on a 1- to 2-mile grid, although once a lease has actually been obtained, investigations may be intensified by extending lines on a 0.5-mile grid.

BO at 4. Exploration activities are not limited to the 4,277 acres designated for surface development, but may occur on lands designated as No Surface Occupancy (“NSO”). *See* BO at 3-5.

Drilling operations on lands leased through the Proposed Action would occur 24 hours a day, seven days a week, and “would be accompanied by considerable noise and highly visible activity.” BO at 5. Testing of wells generally requires “flaring of the test gas in large quantities for up to 30 days.” BO at 5.

After exploration, and concurrently with drilling the wells, development of the oil and gas field begins. This includes planning for roads, wells, storage tanks, camps, airstrips, water supplies, waste disposal methods and reclamation plans. Pipelines between wells (2 to 4 inches in diameter) are installed either above or below ground, and later a pipeline to a market outlet is also constructed if enough oil or gas is present to make such construction economical. After gas pressure is depleted from a well, the remaining oil or gas is artificially pressurized or pumped to the surface:

Surface pumping units would be powered either by electric motors or internal combustion engines, which operate at high noise levels. Failed pump components are a common cause of oil spills. Gas compressor stations, which can compress natural gas over 100 times normal atmospheric pressure, also operate at high noise level and are normally housed in large metal buildings.

BO at 5.

According to the FWS, on April 5, 2004, the Forest Service requested formal consultation with the FWS pursuant to section 7 of the ESA based on the Proposed Action's effects on the federally endangered arroyo toad (*Bufo californicus*), blunt-nosed leopard lizard (*Gambelia sila*), California condor (*Gymnogyps californianus*), least Bell's vireo (*Vireo bellii pusillus*), southwestern willow flycatcher (*Empidonax trailii extimus*), giant kangaroo rat (*Dipodomys ingens*), and San Joaquin kit fox (*Vulpes macrotis mutica*), and on the federally threatened California red-legged frog (*Rana aurora draytonii*). A portion of the HOGPAs include areas designated as critical habitat for the California condor, arroyo toad, California red-legged frog,¹ and steelhead (*Oncorhynchus mykiss*).

On February 23, 2005, the FWS issued the BO for the Proposed Action. The BO concluded that the Proposed Action is not likely to jeopardize the continued existence of the arroyo toad, blunt-nosed leopard lizard, California condor, least Bell's vireo, southwestern willow flycatcher, giant kangaroo rat, and San Joaquin kit fox, and California red-legged frog because "the actual issuance of leases will not result in any physical activities on the ground that would adversely affect these species." In addition, the BO concluded that future oil and gas exploration and development activities on these leases are not likely to jeopardize the continued existence of these species because:

1. The number of individuals that are expected to be adversely affected by on-the-ground activities within the parcels leased for oil and gas development would be relatively small.
2. Only 20.4 acres of surface disturbance are estimated to result from the on-the-ground activities within the parcels leased for oil and gas development;
3. A small proportion of the ranges of these species would be affected by the on-the-ground activities within the parcels leased for oil and gas development; and
4. The Forest Service has proposed measures that would avoid or minimize the adverse effects of the on-the-ground activities within the parcels leased for oil and gas development on these species.

¹ When the Forest Service issued its Record of Decision on the Proposed Action, these areas were proposed as critical habitat for the California red-legged frog. The final rule designating critical habitat for the California red-legged frog issued on April 13, 2006. 71 Fed. Reg. 19243.

BO at 33. The BO further concluded that the Proposed Action will not result in incidental take of the listed species, and did not include reasonable and prudent measures or terms and conditions to avoid take. BO at 34.

The 20.4 acres of surface disturbance estimate is based on a Reasonably Foreseeable Development (“RFD”) scenario. BO at 6. The RFD scenario is, in turn, based on a 1993 report prepared by the Forest Service. Thus, the RFD scenario, on which the BO’s analysis and “no jeopardy” conclusion is based, is tied to economic and technological assumptions that are more than a decade old. In addition, the BO expressly notes that the 20.4 acre estimate “does not include temporary habitat disturbances associated with exploration, such as small diameter holes drilled for explosives or off-road vehicle travel to access detonation sites.” *Id.*

The measures proposed by the Forest Service are described on pages 6 through 8 of the BO, and would be included as conditions of approval for leases when the Forest Service determines that threatened, endangered, or proposed species or their habitats could be affected by a proposed operation. BO at 6. The following list provides a glimpse into the types of mitigation measures that were considered:

1. California Condor

- 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 Section 7 consultation;
- All power lines, poles and guy wires which exist within flyways used frequently by California condors shall be retrofitted with raptor guards, flight diverters and other anti-collision devices as deemed necessary to minimize the potential for collision or electrocution of condors;
- To preclude impacts on California condors, *all* construction debris and other trash...shall be covered or otherwise removed from a project site at the end of each day or prior to periods when workers are not present at the site.

2. Arroyo Toad and California Red-Legged Frog

- Oil and gas facilities and access roads shall be located outside of vernal pools, riparian zones and other aquatic or wetland habitat areas identified as suitable, key or occupied threatened, endangered, or proposed species habitat, unless approved by a site specific section 7 consultation;
- Drill pad location, design and construction shall avoid or minimize added sedimentation or other harmful runoff from entering key or TEP aquatic or wetland habitat or adversely affecting the natural drainage patterns of such habitat areas.

BO at 6-8. Based on measures such as these, the FWS determined that the Proposed Action would not likely jeopardize the continued existence of the species of concern. BO at 33. With respect to the California condor, the FWS specifically stated that “although

California condors may be adversely affected, few or none are likely to be killed.” BO at 32.

Following the issuance of the BO and the preparation of an Environmental Impact Statement, the Forest Service issued its Record of Decision (“ROD”) approving the Proposed Action on July 27, 2005.

Notice of Violation

A. **The Forest Service and FWS Failed to Use The Best Scientific and Commercial Data Available in Consulting on the Proposed Action.**

The ESA provides that, in consulting 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 and FWS shall use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2). A BO that does not rely on the best available science in its jeopardy analysis is invalid because it fails to adequately evaluate whether the action will jeopardize listed species. *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

Throughout the BO, the FWS relies on minimization measures of unproven and unknown effectiveness to avoid take of listed species and destruction or adverse modification of the critical habitat of such species. The BO also relies on an outdated RFD estimate predicting that only 20.4 acres of surface disturbance will result from on-the-ground oil and gas development activities, even though the BO specifically states that surface disturbance on Los Padres National Forest lands within the three HOGPAs would be allowed on up to 4,277 acres. BO at 3, 33. In addition, “exploration” activities are not limited to the 4,277 acres designated for surface disturbance, but may occur on lands designated as NSO. *See* BO at 3-5. Likewise, even though the Forest Service proposed minimization measures with unknown effectiveness and relied on this flawed FWS analysis, the agency still made an independent determination that its actions would avoid jeopardy. Therefore, both the FWS and Forest Service are in violation of the ESA’s Section 7(a)(2) mandate to use the best scientific and commercial available data in consulting on the Proposed Action. 16 U.S.C. § 1536(a)(2).

B. **The Forest Service Failed to Insure Against Jeopardy and Destruction or Adverse Modification of Critical Habitat.**

Section 7(a)(2) of the ESA requires that each Federal agency “shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species ...” 16 U.S.C. § 1536(a)(2). Under the ESA regulations, “jeopardize the continued existence” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and

recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. §402.02.

The obligation to “insure” against a likelihood of jeopardy or adverse modification of critical habitat requires federal agencies to give the benefit of the doubt to the species and to place the burden of protecting against risk and uncertainty on the agency. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The ultimate duty to insure that an activity does not jeopardize listed species lies with the action agency. *See Aluminum Company of America v. BPA*, 175 F.3d 1156 (9th Cir. 1999)(“...an action agency may not escape its responsibility under the Endangered Species Act by simply rubber stamping the consulting agency’s analysis.”). Accordingly, in authorizing the Proposed Action, the Forest Service failed to insure that the Proposed Action would not jeopardize listed species or destroy or adversely modify their critical habitat.

1. *California Condor*

To begin with, the Forest Service failed to insure that the Proposed Action would not jeopardize California condors or destroy or adversely modify their critical habitat. Listed on March 11, 1967, condors are a critically endangered species. 32 Fed. Reg. 4001. Los Padres National Forest includes the largest wild population, with approximately 22 condors in the southern portion of the Forest where the Proposed Action will occur. However, condor nest sites are located within 1.5 miles of areas proposed for surface disturbance as part of the Proposed Action, and the BO describes a variety of ways that oil and gas development could harm condors. BO at 27. First, “General human activity associated with oil and gas extraction could discourage condor use of habitat” that may otherwise be suitable. BO at 30. Also, “Project-related noise ... could cause adult birds to repeatedly flush from, or eventually abandon, an active nest, or prevent them from choosing otherwise suitable habitat as a nest site.” *Id.* In addition, condors are known to digest small trash items associated with human activity. *Id.* at 31. And, finally, condors have been known to visit oil well pads and become oiled as a result of contact with pooled oil. *Id.* The BO states that the Forest Service’s minimization measures “would serve to eliminate or minimize most of these potential adverse effects.” BO at 31.

The Forest Service, however, has offered no evidence that the minimization measures intended to reduce impacts to the California condor will be effective. On the contrary, the BO concludes “although California condors may be adversely affected, few or none are likely to be killed.” BO at 32. Also, despite admitting that the Proposed Action could result in “take” of the California condor, the BO fails to include an Incidental Take Statement (“ITS”) and inexplicably states, “Because no individuals of listed species will be taken as a result of the proposed action...this biological opinion does not provide any exemptions to the prohibitions against take that are contained in Section 9 of the Act.” BO at 33-34. This level of uncertainty and blatant oversight regarding the Proposed Action’s effect on condors is inconsistent with section 7(a)(2)’s mandate that the Forest Service must insure against jeopardy, particularly in light of the fact that there are currently only approximately 22 free ranging condors in the southern portion of Los Padres National Forest.

In addition, in approving the Proposed Action, the Forest Service failed to consider the Proposed Action's effects on the California condor's critical habitat, designated on September 24, 1976. 41 Fed. Reg. 4194. 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). Yet, although the Sespe HOGPA contains a portion of the condor's designated critical habitat, the BO failed to state the location of critical habitat areas in relation to the new oil drilling areas. This lack of information and evidence clearly does not provide the Forest Service with the information needed to insure that the Proposed Action will avoid destruction or adverse modification of critical habitat for a threatened or endangered species and, therefore, renders the Forest Service in violation of section 7(a)(2) of the ESA.

2. *Arroyo Toad*

The Forest Service also failed to insure that the Proposed Action would not jeopardize arroyo toads or destroy or adversely modify their critical habitat. Arroyo toads are another critically imperiled species, listed as endangered on December 16, 1994. 59 Fed. Reg. 64859. The BO explains that almost any activity within arroyo toad habitat will injure or kill them. BO at 28. Sespe Creek, which flows through the Sespe HOGPA in the Los Padres National Forest, and its adjacent uplands house "one of the largest arroyo toad populations." 70 Fed. Reg. 19584 (April 13, 2005).

However, the Forest Service has offered no evidence that the minimization measures intended to reduce impacts to arroyo toads will be effective. Despite the fact that the toads rely on both riparian and upland areas as essential habitat, the Forest Service relied on the minimization measure that no oil and gas activities will take place in riparian areas in approving the Proposed Action. BO at 28. While the BO specifically states that arroyo toads can be killed or injured by almost any activity within its habitat and that "suitable upland habitat adjacent to occupied riparian corridors...could be affected by road, pipeline, or well pad construction," the Forest Service neglected to consider that the BO did not include measures that would reduce impacts to toads in upland areas. *Id.* Furthermore, the Forest Service failed to include any measures to address the impacts of water pumping associated with the Proposed Action, although the BO acknowledges that such pumping may occur. BO at 5. These significant oversights clearly put the Forest Service in direct violation of the ESA's mandate to insure against jeopardy. 16 U.S.C. § 1536(a)(2).

In addition, the arroyo toad's critical habitat was not designated until after the BO on April 13, 2005, 70 Fed. Reg. 19561-19633. Thus, in approving the Proposed Action, the Forest Service also failed to consider the effects of the Proposed Action on the arroyo toad's designated critical habitat. In fact, the BO only addressed the toad's habitat in relation to Piru Creek, also in the Sespe HOGPA, and failed to include any discussion of the toad's significant presence in Sespe Creek. BO at 23. In the final critical habitat designation, Sespe Creek is specifically described as an area with "one of the largest

arroyo toad populations on the Los Padres National Forest.” 70 Fed. Reg. 19584. Again, under the ESA, an 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 v. FWS*, 378 F.3d 1059. An adequate analysis would have included a discussion of the toad’s considerable occurrence in Sespe Creek. Therefore, in approving the Proposed Action, the Forest Service violated section 7(a)(2)’s mandate to insure against the destruction or adverse modification of critical habitat for a threatened or endangered species. 16 U.S.C. § 1536(a)(2).

3. *California Red-Legged Frog*

Along with the California condor and arroyo toad, the Forest Service has also failed to insure that the Proposed Action would not jeopardize California red-legged frogs or destroy or adversely modify their critical habitat. On May 23, 1996, the California red-legged frog was listed as threatened under the ESA. 61 Fed. Reg. 25813. Like the arroyo toad, the BO explains that almost any activity within California red-legged frog habitat will injure or kill them. BO at 28.

Nonetheless, the BO presents contradictory information on habitat suitability for the frog, claiming that the frog is less likely to reside in the South Cuyama HOGPA because it is dry, but at the same time declaring that making the Sespe HOGPA drier through reduced creek flow will benefit the species. BO at 24-25. Besides this extremely problematic contradiction, the Forest Service also failed to offer any evidence that the minimization measures intended to reduce impacts to the California red-legged frog will be effective. For instance, the Forest Service neglected to consider the BO’s omission of minimization measures that would reduce impacts to California red-legged frogs in upland areas, despite the fact that frogs rely on both riparian and upland areas as essential habitat. BO at 28. Again, the BO specifically states that the California red-legged frog can be killed or injured by almost any activity within its habitat and that “suitable habitat adjacent to occupied riparian corridors...could be affected by road, pipeline or well pad construction.” *Id.* Such uncertainties and omissions are inconsistent with section 7(a)(2)’s mandate that the Forest Service must insure against jeopardy 16 U.S.C. § 1536(a)(2).

In addition, the FWS also recently finalized designation of critical habitat for the California red-legged frog on April 13, 2006. 71 Fed. Reg. 19224 et seq. Therefore, in approving the Proposed Action, the Forest Service failed to consider the effects on the frog’s critical habitat. 71 Fed. Reg. 19244 et seq. Indeed, the BO acknowledged that a small portion of the proposed critical habitat falls within the Sespe HOGPA and would be available for surface use, but that the FWS could not determine whether or not it would affect critical habitat. BO at 2. Particularly, the FWS admitted that it did not “know the current status of the species within the Sespe HOGPA” and, further, commented that “the presence of exotic predators, such as bullfrogs...may keep California red-legged frogs from inhabiting most or all of Piru Creek. BO at 24-25. However, the final critical habitat designation specifically stated that Piru Creek, in the Sespe HOGPA, “contains...features that are essential for the conservation of the subspecies” and that “persistence of the subspecies in this area is important to prevent further isolation of

breeding locations in this portion of the subspecies' range." 71 Fed. Reg. 19272. As stated previously, under the ESA, an 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 v. FWS*, 378 F.3d 1059. Accordingly, it remains remarkably unclear as to how the Forest Service could insure that the Proposed Action would not destroy or adversely modify the California red-legged frog's habitat, thereby clearly violating section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

C. The Forest Service and FWS Failed to Reinitiate Consultation Upon Designation of Critical Habitat for the Arroyo Toad and California Red-Legged Frog.

The ESA regulations mandate that an action or consulting agency must reinitiate consultation if critical habitat is designated that may be affected by the agency action. 50 C.F.R. § 402.16. Critical habitat for the arroyo toad and California red-legged frog was designated after release of the BO and both species have critical habitat designated within one of the three HOGPA's. 70 Fed. Reg. 19561-19633 (April 13, 2005); 71 Fed. Reg. 19224 et seq. (April 13, 2006). However, upon this final designation, neither the Forest Service nor the FWS took any initiative to reinitiate consultation. Since consultation under Section 7(a)(2) requires an agency take a harder look than that required under the conference mandate regarding proposed species or proposed critical habitat, the Proposed Action could result in impacts that were not previously considered by the agencies. 16 U.S.C. § 1536(a)(2),(4). Thus, such failure to reinitiate consultation is in direct violation of the mandates of the ESA.

D. In Approving the Proposed Action, the Forest Service Violated the Take Prohibition Under Section 9 of the ESA.

Section 9 of the ESA prohibits the "take" of any endangered species. 16 U.S.C. § 1538(a)(1). "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at §1532(19). The 9th Circuit has interpreted the term "harm" rather broadly and has held that "a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to 'harm' under the ESA." *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996). In addition, "harass" is defined as "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. §17.3.

In order to prove a take, a take must have occurred already or must be reasonably certain to occur. *See Marbled Murrelet*, 83 F.3d at 1068. With respect to oil and gas activities in the Los Padres National Forest, the FWS blatantly confessed in the BO that these activities would result in "take" of the California condor, as well as the arroyo toad. BO at 32 ("Although California condors may be adversely affected, few or none are likely to be killed."); *see also* BO at 28 ("Individuals...could be injured or killed by vehicles or heavy equipment involved in road construction, off-road vehicle travel, exploration, field development, reclamation activities, water contamination, or well pad construction.").

These statements prove that take of these species are reasonably certain to occur. Yet the Forest Service still approved the Proposed Action and, further, failed to issue any ITS to deal with such take. This renders the Forest Service in violation of Section 9 of the ESA.

E. The FWS Failed to Identify the Correct Action Area in the Biological Opinion.

A BO must include a description of the proposed action which, in turn, includes a description of the “action area.” U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook, 4-15 (1998)(hereinafter “Consultation Handbook”). An “action area” is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. In making a jeopardy determination, the consulting agency must evaluate the current status of the listed species or critical habitat, the environmental baseline, the effects of the action, and cumulative effects, relative to the action area. 50 C.F.R. §402.14(g)(2)-(3); *see also* Consultation Handbook 4-15 to 4-31. Therefore, many crucial aspects of the BO’s analysis rely on an accurate depiction of the action area and any discrepancy could lead to the exclusion of potentially relevant impacts of an agency action.

However, rather than base the action area on “all areas to be affected directly or indirectly” by the Proposed Action, the FWS mistakenly determined action areas for each species. *See* BO at 23-27. For instance, the action area for the arroyo toad was described as “all of the area within the Sespe HOGPA that we [FWS] proposed as critical habitat...as well as the lowest 1 mile of Canton Canyon” which “includes all of Piru Creek within the Sespe HOGPA and the lower portion of Canton Creek, along with flood zones, riparian areas and upland habitat associated with both of these creeks.” BO at 24. Yet, the California red-legged frog’s action area was described as “all modeled habitat...within each of the three HOGPAs as well as any private lands containing potentially suitable habitat for the species that are within 0.5 mile of lease areas within one of the three HOGPAs.” BO at 25. Such a species-by-species determination is in direct contradiction of the very definition of an “action area” and, effectively, diminishes the impacts of an agency’s action on each species. *See Oceana, Inc. v. Evans*, 384 F.Supp. 2d 203, 229 (D.D.C. 2005)(“...there is no support for the conclusion that the action must be extended to include the migratory range of loggerhead turtles. Any contrary conclusion would contravene the regulatory definition of ‘action area,’ which focuses on the effects of an action in a geographic ‘area,’ and not on a species.”).

Furthermore, with respect to the California condor, the FWS considered the immediate area involved in the Proposed Action instead of “all areas.” 50 C.F.R. § 402.02. For example, the BO describes the action area for the condor as “...all areas offered for oil and gas leasing within the three HOGPAs, private lands that are within 0.5 mile of lease areas, and all land within 1.5 miles of these two land types.” BO at 27. Essentially, this means that if an area is leased within the Sespe HOGPA, then the action area would only encompass private lands within 0.5 miles and/or land within 1.5 miles from the specific area offered for lease. Thus, in effect, the action area only considers the immediate area. Again, the FWS must define the action area by “all areas to be affected directly or

indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

F. The Biological Opinion Fails to Adequately Analyze Cumulative Effects.

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, however, defers this required analysis to future 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.” BO at 32. The BO similarly defers analysis of cumulative impacts on private lands surrounding the forest. *Id.*

The 9th Circuit has explicitly stated that “incremental-step consultation does not vitiate the ESA requirement that the Secretary prepare a comprehensive biological opinion” and that a BO must assess the potential impacts of all post-leasing activities. *Conner v. Burford*, 848 F.2d at 1455-58. In addition, since the FWS failed to identify the correct action area, the agency could not adequately evaluate the cumulative effects of the Proposed Action. By deferring the analysis of the Proposed Action’s cumulative effects until future review of site-specific projects and relying on an incorrect action area, the FWS failed to perform a full and adequate analysis of cumulative impacts as required by the ESA.

G. The Forest Service Failed to Formally Consult with NOAA Fisheries Regarding the Proposed Action’s Effects on the Federally Endangered Southern Steelhead and NOAA Fisheries Improperly Concurred with the Forest Service’s Decision.

The core mandate of the ESA’s § 7(a)(2) is clear: “Each Federal agency shall, *in consultation* with and with the assistance of the Secretary [of the Interior or Commerce], *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 or result in the destruction or adverse modification of [critical] habitat . . .” 16 U.S.C. § 1536(a)(2)(emphasis added). An agency’s duty to consult under this provision is triggered whenever it is determined that an action “may affect” a threatened or endangered species. 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.12 - 402.14.

With respect to 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). In fact, the 9th Circuit has explicitly rejected previous Forest Service claims that “incremental” biological opinions may be prepared in the context of oil and gas leasing, holding that a consulting agency

“must prepare biological opinions assessing the potential impacts of all post-leasing activities [i.e. road building, well construction, etc.]” *Conner v. Burfurd*, 848 F.2d at 1458.

Despite these authorities, the Forest Service still unlawfully limited the scope of the “agency action” in making the determination that the Proposed Action would not adversely affect the endangered southern California steelhead. In its concurrence letter, NOAA Fisheries specifically acknowledged that steelhead critical habitat fell within the three HOGPA’s.² *See* Letter from NOAA Fisheries to Forest Service of 4/15/05 (“...140 acres of suitable steelhead habitat and 13 acres of occupied habitat” occur in the leasing area.); ROD, Oil and Gas Leasing Analysis, New Preferred Alternative Vicinity Map (Figure 2-3); 70 FR 52488 (September 2, 2005). Still, the Forest Service opted to segment the actions associated with oil and gas leasing in the LPNF and deferred consultation indefinitely into the future. *Id.* (“In the event it is determined 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 addition, whether or not the Forest Service would like to admit it, their 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. *See id.* (“NMFS understands that the proposed action will not result in any actual ground breaking activities or development.”); *see also* BO at 4-6.

Likewise, NOAA Fisheries arbitrarily concurred with the Forest Service’s determination that the Proposed Action will “not likely adversely affect” the southern California steelhead. *See* Letter from NOAA Fisheries to Forest Service of 4/15/05. Again, this concurrence decision was made with the knowledge that steelhead critical habitat exists within the areas proposed for leasing. *Id.* Accordingly, both the Forest Service and NOAA Fisheries are in violation of section 7 of the ESA.

Notice of Intent to Sue

If the Forest Service and the FWS do not correct the violations described above within sixty days, we intend to pursue legal action on the claims identified above after the 60-day period expires. An appropriate remedy would be for the Forest Service to immediately revoke or suspend authorization for the Proposed Action and to re-initiate consultation with the FWS to address these violations.

Noticing Parties

The Noticing Parties include:

² Please note that NOAA Fisheries concurrence letter mistakenly states, “This action would set the stage for the potential leasing of up to 4,277 acres....”, rather than the correct 52,075 acres. Letter from NOAA Fisheries to Forest Service of 4/15/05 (emphasis added).

1. The Center for Biological Diversity (the “Center”) is a non-profit corporation with over 22,000 members and offices in California, Arizona, New Mexico, and Oregon. The Center is dedicated to the preservation, protection, and restoration of biological diversity, native species and ecosystems through science, policy, education, and environmental law. Center members and staff reside near Los Padres National Forest, use the Los Padres National Forest, including areas included as part of the Proposed Action, for recreational, wildlife viewing, scientific, and educational purposes, and intend to continue to use and enjoy these areas for these purposes. The Center brings this notice on its own behalf and on behalf of its members and staff who have been, and will continue to be, harmed by the actions described in this notice letter. The Center’s offices are located at 1095 Market Street, Suite 511, San Francisco, California 94103.

2. Defenders of Wildlife (“Defenders”) is a national non-profit, public-interest organization with more than 490,000 members and supporters, including 123,000 that reside in California, and offices throughout the country. Defenders works to preserve the integrity and diversity of natural ecosystems, prevent the decline of native species, and restore threatened habitats and wildlife populations. Furthermore, Defenders advocates new approaches to wildlife conservation that prevent species from becoming endangered or threatened. Defenders members and staff reside near Los Padres National Forest, use the Los Padres National Forest, including areas included as part of the Proposed Action, for recreational, wildlife viewing, scientific and educational purposes. Defenders brings this notice on its own behalf and on behalf of its members and staff who have been, and will continue to be, harmed by the actions described in this notice letter. Defenders’ California office is located at 1303 J Street, Suite 270, Sacramento, California 95814.

3. Los Padres ForestWatch (“ForestWatch”) is a community-based 501(c)(3) nonprofit organization headquartered in Santa Barbara, California. ForestWatch works to protect and restore the natural and cultural heritage of the Los Padres National Forest using community involvement, scientific collaboration, and legal advocacy. ForestWatch and its members are at the forefront of safeguarding the region's public lands from inappropriate oil development, and visit the forest for ecological study, scientific research, recreation, and aesthetic enjoyment. ForestWatch members and staff reside near the Los Padres National Forest, use the Los Padres National Forest, including areas included as part of the Proposed Action, for recreational, wildlife viewing, scientific, and educational purposes, and intend to continue to use and enjoy these areas for these purposes. ForestWatch brings this notice on its own behalf and on behalf of its members and staff who have been, and will continue to be, harmed by the actions described in this notice letter.

The Noticing Parties are represented by legal counsel in this matter. All communications concerning this Notice Letter should be addressed to:

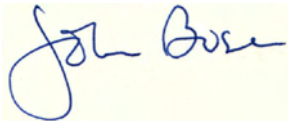
John Buse, Staff Attorney
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Gina LaRocco, Staff Attorney
Defenders of Wildlife
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Albuquerque, New Mexico 87102
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Conclusion

The Noticing Parties are hereby providing sixty-days notice to the FWS, Forest Service and NOAA Fisheries of their intent to bring the above-referenced ESA claims pursuant to the ESA citizen suit provision, as required by 16 U.S.C. §1540(g). The Noticing Parties may bring suit sooner with respect to those claims arising under the Administrative Procedure Act. However, the Noticing Parties seek to resolve their claims without the need for litigation and send this notice letter in the hope that a mutually-agreeable resolution can be achieved short of litigation. If you would like to discuss the violations described herein and search for a mutually acceptable solution, please feel free to contact us.

Sincerely,

A handwritten signature in blue ink that reads "John Buse". The signature is written in a cursive style and is placed on a light yellow rectangular background.

John Buse
Staff Attorney
Center for Biological Diversity

Gina LaRocco
Staff Attorney
Defenders of Wildlife

cc: Gloria Brown, Los Padres Forest Supervisor
Carl Benz, FWS Assistant Field Supervisor (Ventura Field Office)
Rodney R. McInnis, NOAA Regional Administrator