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60-day Notice of Intent to Sue for Violations of the Endangered Species Act

RE: Notice of Intent to Sue for Violations of Endangered Species Act Regarding Failure to Close Los Padres National Forest to Unmanaged Target Shooting and Allow Target Shooting Only in Designated Areas, and Reliance on a Legally Flawed Biological Opinion.

Dear Sirs and Madam:

In accordance with the 60-day notice requirement in Section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), Los Padres ForestWatch (“LPFW”), hereby provides notice of its intent to sue the U.S. Forest Service (“the Forest Service”) for violations of the ESA arising from its management of Los Padres National Forest (“the Forest”) that jeopardize the continued existence of endangered and threatened species.

As detailed below, the Forest Service has violated and is violating the ESA by failing to reinitiate consultation over impacts of the Los Padres Land Management Plan (“the Forest Plan”) on endangered and threatened plants, animals, and designated critical habitat, after failing to implement Standard 36 of the Forest Plan by closing the Forest to unmanaged target shooting and allowing target shooting only in designated areas and ranges, which was an explicit condition precedent for the “no jeopardy” determination made by U.S. Fish and Wildlife (“FWS”) in its applicable Biological Opinion (“BiOp”). Moreover, the Forest Service has violated and is violating the ESA by arbitrarily and capriciously relying upon the legally and factually flawed BiOp, because it explicitly and erroneously relied upon the implementation of Standard 36.

The Forest Service must either close the Forest to unmanaged target shooting and allow target shooting only in designated areas and ranges—as it committed to do in 2005—or reinitiate and complete new consultations to ensure that it is satisfying its duty to avoid jeopardy, adverse modification of critical habitat, and take of these important and highly imperiled species.

LEGAL BACKGROUND

The ESA was enacted to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” 16 U.S.C. 1531(b), and “a program for the conservation of such endangered species and threatened species.” *Id.* It requires “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* 1532(3). The Supreme Court has described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

Section 7 of the ESA requires that a federal agency (the “action agency”), in consultation with another agency (the “consulting agency”), insure that any action it authorizes, funds, or carries out “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). After consultation has concluded, the consulting agency is

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required to provide “a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.” *Id.* This written statement prepared by the consulting agency is known as a Biological Opinion (“BiOp”).

The ESA consultation regulations require, in pertinent part, the reinitiation of formal consultation by the acting federal agency and by FWS as consulting agency, “where discretionary Federal involvement or control over the action has been retained or is authorized by law and: ... (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; [or] (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16. When an action agency fails to reinitiate consultation when reinitiation is required under § 402.16, the Biological Opinion for the proposed action becomes invalid. *Center for Biological Diversity v. Bureau of Land Management*, 698 F.3d 1101 (9th Cir. 2012) (citing ESA Handbook 4-23).

FACTUAL BACKGROUND

I. The Harmful Impacts of Unmanaged Target Shooting in the Los Padres National Forest

Unmanaged target shooting in the Forest is a longstanding problem, with myriad, ongoing adverse impacts to plant and animal species, soil quality, and human safety. The Forest Service acknowledges these impacts in numerous instances. For example, the 2005 Final Environmental Impact Statement for the Land Management Plans for Angeles, Cleveland, Los Padres, and San Bernardino National Forests (“2005 EIS”) states that dispersed recreational target shooting may cause loss of individuals or habitat by:

Shooting of animals and plants; vegetation disturbance and destruction; mortality of individuals by off-route driving; litter (nuisance species/ingestion of plastic/animal entrapment); noise disturbance leading to short-term displacement; Cleared parking/shooting areas contribute to soil erosion and sedimentation; Disturbance and abandonment of habitat; Erosion and sedimentation from heavily utilized shooting lanes; Habitat loss from invasive nonnative plants in disturbed areas; Trampling of plants and animals; Increased threat of destructive wildland fires; and Lead shot poisoning with animal consumption.

2005 EIS, vol. 2, p. 96. The EIS further observes that target shooting results in a “zone of influence” in which there are fewer individual animals, a decreased diversity of species, a lower density of animals, decreased nesting/denning activity, and lower biomass. *Id.* at 104.

The 2005 EIS specifically notes that target shooting may lead to negative effects to species-at-risk and biodiversity, including damage or death of animal and plant species and degradation of habitat. 2005 EIS, vol. 1, p. 344-349. The EIS lists several at-risk species as being threatened by unauthorized shooting including California condor (which is listed as endangered),

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Golden eagle, Turkey vulture, and Nelson's bighorn sheep. *Id.* at 162, 173, 174, 368, 370. The EIS specifically recognizes the danger that unauthorized target shooting could affect condors, "if carcasses and lead shot are left in the field." *Id.* at 405. The EIS notes that "poisoning and other physical ailments can occur when animals and birds ingest lead shot or fragments ... and the spent ammunition and trash left on the ground." *Id.* at 345. The EIS also associates other at-risk species with unspecified threats that are addressed by Standard 36 (*infra*), including: Arroyo toad, California red-legged frog, Coast range newt, Mountain yellow-legged frog, Bald eagle, and Nelson's bighorn sheep. *Id.* at 368-370. At target shooting sites, animals may also be "trampled by shooters or run over by vehicles." *Id.* Moreover, crushing or removal of vegetation associated with human activity at such sites can eliminate plant species-at-risk and reduce available habitat for nesting birds. *Id.* The EIS observes that animals that survive the direct effects of target shooting at such sites may be harassed or disturbed in other ways, including being "chased away from their habitat by human presence, noise, or being shot at." *Id.*

According to the EIS, target shooting sites in National Forests also "can lead to riparian conservation area and water quality effects." 2005 EIS, vol. 1, p. 433. These effects are caused by "trampling of the area, uncontrolled vehicle use, erosion, sedimentation and physical damage to riparian vegetation ... [resulting] from this activity." *Id.* Moreover, "high concentrations of lead shot" left in such areas may directly lead to water quality degradation. *Id.* The EIS observes that national forests "have experienced an increasing problem with large amounts of trash such as refrigerators, scrap metal and old cars being left on a site after shooters use them for targets," which may also disturb watershed conditions. *Id.* at 433.

In addition to the negative effects on species, biodiversity, and watershed conditions linked to target shooting, the EIS observes that target shooting can be unsafe to bystanders, and contributes to "trash and toxic metal buildups," before suggesting "restricting target shooting to designated sites." 2005 EIS, vol. 1, p. 238. The Forest Service further recognizes in the EIS that target shooting "is a fire management concern based on historical fire occurrence and fire suppression costs," having already resulted "in a number of large, expensive, wildland fires on each of the national forests during the past decade." *Id.* at 312. The EIS also recognizes indirect adverse effects at dispersed target shooting sites, such as the sites developing into "large open areas where the vegetation is cleared, crushed, or damaged from being shot ... [and] compacted from motor vehicles driving and parking," and becoming "magnets for an assortment of items brought in as targets (ranging from refrigerators and old cars to other trash) that is abandoned and left after use." *Id.* at 345.

II. The Forest Plan and Standard 36

The Forest Service first documented the problem of unmanaged target shooting in the Los Padres National Forest in 1976, when officials noted "a rapid increase in promiscuous shooting" and "pure wanton acts of destruction" in the Mount Pinos Ranger District. *See* Hunter, James. 1976. "Vandalism on the Mt. Pinos District," in U.S. Forest Service Pacific Southwest Forest and Range Experiment Station, *Vandalism and Outdoor Recreation: Symposium Proceedings*, USDA Forest Serv. Gen. Tech. Rep. PSW-17/1976.

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In September 2005, the Forest Service revised the Land Management Plan: Southern California National Forests Vision (“Forest Plan - Part 1”), the Land Management Plan: Los Padres National Forest Strategy (“Forest Plan - Part 2”), and the Land Management Plan: Design Criteria for the Southern California National Forests – Angeles National Forest, Cleveland National Forest, Los Padres National Forest, and San Bernardino National Forest (“Forest Plan - Part 3”), reflecting these concerns about the adverse effects of target shooting and others. In particular, the revised Forest Plans purport to address these many negative effects of target shooting by way of Standard 36, which states as follows.

Recreational target shooting will only be allowed in designated areas and ranges. Shooters shall remove their targets and spent shells when departing designated shooting areas. Shooters shall not use paintballs or other forms of ammunition that would result in visible residue except where authorized in ranges that operate under special-use permit.

Forest Plan - Part 3, p. 9.

In Table 490 (included below), the Forest Plan specifically lists the designated sites where target shooting is allowed, and states that the rest of the forest “is generally closed to recreational shooting,” with possible future sites managed in accordance with Standard 36.

Table 490. Designated Shooting Areas - Los Padres National Forest

Component	Shooting Areas
Concession-Operated Sites	None
Permitted Gun Clubs: Limited or No Public Access	Winchester Gun Club Ojai Gun Club
Designated Shooting Sites by Forest Order (Other Shooting Restrictions May Apply)	3 sites along Camino Cielo
Remainder of Forest	The rest of the Forest is generally closed to recreational shooting although sites have been identified where future recreational shooting may be allowed under managed conditions per Standard S36.

The Forest Plan later reiterates that “recreational target shooting is restricted to designated areas with an emphasis on ranges under special-use authorizations.” Forest Plan - Part 2, p. 27. It sets the following applicable goals for Los Padres National Forest: to “evaluate existing and potential dispersed use, including recreational target shooting;” “identify areas where that use is inconsistent with resource protection and public safety, and mitigate or eliminate problems over time;” and “in designated areas where target shooting is allowed, emphasize management of target shooting activity through development of appropriate range facilities and on-site management presence, using special-use authorizations or other partnership opportunities.” Forest Plan - Part 2, p. 129.

The associated Record of Decision (“ROD”) for the Los Padres Forest Plan also expresses an unequivocal intent to close the Forest to unmanaged target shooting and allow

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target shooting in designated sites where the activity is permitted. ROD, p. 10-11. The Regional Forester's exact language in the ROD concerning target shooting is as follows.

My decision represents our intent to implement a fundamental change in policy for the Los Padres National Forest with regard to recreational target shooting. Recreational target shooting includes the use of firearms, air guns, and gas guns that are not associated with hunting. The Los Padres National Forest has been historically open to recreational target shooting except where prohibited by closure order; however, with increasing numbers of national forest users, concerns for public health and safety, resource damage to areas where the activity has been concentrated, and the documentation of numerous wildland fires that have been caused by recreational target shooting. The Los Padres National Forest intends to develop a Forest closure order based on Standard S36 in Part 3 of the forest plan. This means the Los Padres National Forest will generally be closed to recreational target shooting except where it is allowed in designated open areas and ranges. [...] This is not new in southern California. The other three southern California national forests (the Angeles, the Cleveland, and the San Bernardino National Forests) have restricted recreational target shooting to designated areas. Because of its rural character, the Los Padres National Forest has not seen the need to implement this strategy until now. As the population continues to grow and recreation demand increases, I must manage shooting in a way that provides for public health and safety and protects the forest environment.

In 2013, the Forest Service issued a supplemental EIS ("SEIS") for the four Southern California Forest Plans concerning proposed amendments relating to roadless area management and monitoring, following a 2011 Settlement Agreement. 2013 SEIS, iii. Through the SEIS and the corresponding 2013 Final Record of Decision ("ROD"), the Los Padres Forest Plan was revised to change the Land Use Zoning ("LUZ") of 293,000 acres from existing land use zones to back country non-motorized. 2013 ROD, p. 1. The 2013 changes, referred to as Alternative 2a, do not change "the management strategies adopted in the 2006 revised LMP, and the implementation of Alternative 2a will provide improved habitat conditions consistent with this finding." *Id.* at 1, 9. Moreover, the 2013 ROD observes that "Alternative 2a is limited in scope," and "doesn't change the definitions of suitable uses, doesn't change or add any land use zone prescriptions, and doesn't change the forest-wide standards and guidelines." *Id.* at 10.

The 2013 SEIS describes the state of unmanaged target shooting in Los Padres National Forest as follows.

There have been no changes since the LMP was issued in 2006. The Forest is mostly open without special restrictions. There are two gun clubs under permit and a few designated recreational target shooting areas.

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2013 SEIS, p. 95. Elsewhere, the 2013 SEIS states that “environmental protection, safety and disturbance of the public remain concerns,” in the context of shooting ranges and areas. *Id.* at 236.

III. The Biological Assessment and 2005 Biological Opinions, the 2013 FWS Biological Opinion’s reliance on Standard 36, and assumptions about target shooting in the Forest.

In March 2005, the Forest Service initiated ESA § 7 consultation with FWS concerning the revised 2005 Forest Plans, and provided a Biological Assessment (“BA”), upon which FWS was to make its ESA § 7 jeopardy determinations. 2005 EIS vol. 2, p. 82. The BA states that many of the Forest Plan’s design criteria (including standards) “are directed at mitigating effects associated with national forest management activities on threatened and endangered species and their habitats,” and that “these forest plan level decisions constituted the Proposed Action for the [sic] making the BA determinations.” *Id.* at 81. In the BA, the Forest Service notes that the biological evaluation of potential effects of the revised forest plans on sensitive species in the planning area included, among other components, the requirement to “make a determination of no effect, beneficial effect, or ‘may effect’ on the species.” *Id.* at 85-86. In that context, the BA states that the selected Alternative, 4a, resulted in a determination of “may affect individuals, but not likely to lead to a trend toward federal listing” for species that face substantial threats, but that LUZ distributions and Forest Plan Standards “contribute to assuring that no sensitive species would end up worse off under the revised forest plans than under current conditions.” *Id.*

FWS concluded consultation in September 2005 by issuing its Biological Opinion, which found no jeopardy to listed species. Our client, LPFW, subsequently brought suit against the Forest Service and FWS for failure to issue an Incidental Take Statement (“ITS”) in the 2005 BiOp. *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 623 F.Supp.2d 1044 (N.D. California 2009). In 2011, the court ordered the agencies to prepare a revised BiOp that included an ITS within six months. *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 08-cv-01278-EMC (N.D. California). In 2013, FWS issued a new Biological Opinion (“2013 BiOp”) for the amended Forest Plans, which included an ITS as ordered by the court.

The 2013 BiOp states that the Forest Plan – Part 1 describes the “vision, long-term goals, and desired conditions for various landscapes,” and provides “questions and monitoring indicators for land managers to use in evaluating their progress toward achieving desired conditions.” *Id.* It states that the Forest Plan – Part 2 describes the “objectives and strategic management direction appropriate to each forest for achieving the vision and desired conditions in Part 1,” and “identifies suitable uses through land use zones.” *Id.* Lastly, it states that the Forest Plan – Part 3 describes “the design criteria, which includes the laws, standards, and other applicable guidance that the Forest Service uses during project planning and implementation,” and defines Standards as “mandatory requirements that come into play as site-specific activities are planned,” which are “designed to be consistent with the objectives in Part 2 and the desired conditions in Part 1.” *Id.*

The 2013 BiOp discusses the direct and indirect effects of target shooting on plant and animal species at numerous points. Under the header of “Programs Likely to Adversely Affect

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Listed and Candidate Species,” the sub-header “Roads and Trails Management,” and the sub-sub-header “General Effects on Plants,” the 2013 BiOp states that direct impacts include “trampling and habitat destruction from associated activities (e.g., ... target shooting, and trash dumping).” *Id.* at 22. Under the sub-sub-header “General Effects on Animals,” the 2013 BiOp states that dispersed shooting can result in the shooting of a listed species, and that a “more significant potential indirect effect” of target shooting is lead poisoning. *Id.* at 23.

The 2013 BiOp discusses the effects of the Forest Plan on specific endangered species. With respect to the Unarmored threespine stickleback, the 2013 BiOp states that “the Forest Service proposes to minimize adverse effects ... by applying BMPs and standards that would reduce the likelihood of mortality and injury to the species,” and that lists Standard 36 as one such standard. *Id.* at 41. The same is true for the California red-legged frog. *Id.* at 66. With respect to Smith’s blue butterfly, the 2013 BiOp lists Standard 36 as one of the standards that would generally reduce the likelihood of mortality and injury, and specifically under “Special Use Permit Administration” as a measure that is especially applicable “to minimize the administration of special use permits.” *Id.* at 202.

The 2013 BiOp states that 1,803 acres (1.2%) of California condor habitat is in areas where concentrated dispersed recreation (which includes target shooting) is most likely to occur. *Id.* at 103. The BiOp discusses the effects of target shooting on California condors, which it describes as posing “a major health risk.” *Id.* It states that “the Forest Service proposes to minimize adverse effects to the California condor and its occupied and critical habitat from recreation management by applying BMPs and standards that would reduce the likelihood of mortality and injury to the species and adverse modification of its critical habitat.” *Id.* at 103. Standard 36 is listed as one of a number of standards that would generally reduce that likelihood, but is discussed specifically as well: “Standard 36 would allow recreational target shooting only in designated areas and would require shooters to remove their spent shells and targets. These minimization measures would also reduce the likelihood of adverse effects to California condor critical habitat.” *Id.*

The 2013 BiOp states that impacts to Southern mountain buckwheat will be minimized, in part because “target shooting will be restricted to designated areas under standard 36 and should help limit impacts due to dispersed recreation.” *Id.* at 240.

For each of these species, the no jeopardy determination was based on an adverse effects analysis, which assumed the implementation of the forest closure to unmanaged target shooting set out in Standard 36. The 2013 BiOp lists the reasons for each finding of no jeopardy, and for each of these species the reasons for finding no jeopardy explicitly included Standard 36.

As acknowledged by the Forest Service in its 2005 EIS, BA, and ROD, as well as by FWS in its 2013 BiOp, unmanaged target shooting in Los Padres National Forest poses a serious threat to the survival of multiple species listed as threatened or endangered under the ESA. The BA invited FWS to rely upon the certainty of Standard 36’s implementation in determining whether the Forest Plan would jeopardize listed species, which FWS explicitly did before issuing its no jeopardy determinations.

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In 2016, Los Padres ForestWatch published a report titled “Forest in the Crosshairs: The Environmental & Health Impacts of Target Shooting in the Los Padres National Forest” (“LPFW Report”). The LPFW Report identified serious impacts to the environment and threatened species associated with unmanaged target shooting. LPFW Report, p. 3-4. In particular, the report found significant accumulation of lead at shooting sites frequented by California condors, and in close proximity to high-use condor areas such as nesting, roosting, and perching sites. *Id.* at 9. In total, the LPFW Report found 94 dispersed target shooting sites accounting for dozens of acres of trash, hazardous materials, and damaged natural resources. *Id.* at 21. Many of these sites are near rivers and streams, which may be contaminated with lead. *Id.* at 4, 23. In addition, the LPFW Report found that target shooting was cited as an official cause of 53 wildfires in the Los Padres National Forest between 1992 and 2016, burning a combined total of 74,478 acres, including habitat for endangered and threatened species. The LPFW Report concluded that unmanaged target shooting is now “one of the most widespread threats facing the Los Padres National Forest.” *Id.* at 21.

For the reasons set forth below, the Forest Service’s continued reliance upon a legally and factually flawed Biological Opinion without reinitiating ESA consultation is arbitrary and capricious, unlawful, and violates the Forest Service’s substantive duty under the ESA to avoid jeopardizing the survival of listed species and negatively impacting designated critical habitat.

ESA VIOLATIONS

As set out below, we have identified ESA violations in the Forest Service’s management of Los Padres National Forest. These violations relate to the three-part 2005 Land Management Plan for the four Southern California National Forests, and the Forest Service’s subsequent and ongoing failure to close the Forest to unmanaged target shooting and allow target shooting only in designated sites, as required by the Forest Plan, the corresponding 2005 ROD, EIS, BA, and the 2013 SEIS, BA, and FWS BiOp.

A. Failure to Reinitiate Consultation

The Forest Service’s failure to implement Standard 36 triggered its obligation to reinitiate formal consultation under ESA § 7 for two reasons. The ESA regulations require the reinitiation of formal consultation by the acting federal agency and by FWS as consulting agency, “where discretionary Federal involvement or control over the action has been retained or is authorized by law and: ... (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; [or] (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the [BiOp].” 50 C.F.R. § 402.16. When an action agency fails to reinitiate consultation when reinitiation is required under § 402.16, the BiOp for the proposed action becomes invalid. See *Center for Biological Diversity v. Bureau of Land Management*, 698 F.3d 1101 (9th Cir. 2012) (citing ESA Handbook 4-23).

The fact that the Forest remains open to unmanaged target shooting constitutes “new information” not considered in the BiOp, thus triggering the Forest Service’s duty to reinitiate formal consultation under § 402.16(b). Additionally, the Forest Service’s failure to implement

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Standard 36 and close the Forest to unmanaged target shooting has constructively modified the agency action for which FWS found no jeopardy, and therefore also triggers the Forest Service's duty to reinitiate formal consultation under § 402.16(c).

Where a BA sets forth specific measures that will minimize or mitigate harm to listed species otherwise entailed by the project and the BiOp relies upon those measures, but those measures are defective or never materialize, the loss of that benefit "necessarily implies" that the net effect on listed species will be greater than previously thought and the agencies must reinitiate consultation. *Pacificans for a Scenic Coast v. Caltrans*, 204 F.Supp. 3d 1075, 1093 (N.D. Cal. 2016); *see also Forest Guardians v. Johanns*, 450 F.3d 455, 464-466 (9th Cir. 2006).

The 2005 BA invited FWS to rely upon the implementation of Standard 36 in determining jeopardy to listed species, which is exactly what FWS did before finding no jeopardy. The BA states that many of the Forest Plan's design criteria, including standards, "are directed at mitigating effects associated with national forest management activities on threatened and endangered species and their habitats," and that "these forest plan level decisions constituted the Proposed Action for the [sic] making the BA determinations." EIS Vol. 2, 81. Moreover, the BA states that the selected Alternative, 4a, resulted in a determination of "may affect individuals," but that LUZ distributions and Forest Plan standards, among others, "all contribute to assuring that no sensitive species would end up worse off under the revised forest plans than under current conditions." The LUZ distributions under Alternative 4a explicitly assume the implementation of Standard 36. This express, unambiguous language contemplates the possibility of harm to listed species without Standard 36's implementation, before inviting FWS to rely on the certainty of Standard 36's implementation in making its determinations. By inviting FWS to rely on the certainty of Standard 36's implementation, the Forest Service committed itself to an action certain, which it effectively modified when it did not follow through with the general closure of the Forest to target shooting.

The 2013 BiOp, issued by FWS after Los Padres ForestWatch prevailed in its challenge to the 2005 BiOp's lack of an Incidental Take Statement ("ITS"), expressly relies upon Standard 36. In particular, the 2013 BiOp specifically states that Standard 36 "would reduce the likelihood of mortality and injury to the [California condor]," and "would reduce likelihood of adverse effects to California condor critical habitat." Moreover, the 2013 BiOp states that impacts to Southern mountain buckwheat will be minimized, "because target shooting will be restricted to designated areas under standard 36 and should help limit impacts due to dispersed recreation." FWS thus explicitly and unambiguously followed the Forest Service's invitation, by way of the 2005 BA, to rely on Standard 36 in determining no jeopardy to listed species in the 2005 BiOp—determinations which were carried forward by the 2013 BiOp. The loss of that benefit to these vulnerable species constitutes new information not considered in the BiOp, and a significant material change to the Forest Plan, thus triggering the Forest Service's legal obligation to reinitiate consultation. The 2013 BA, which reflected amendments to LUZ distributions that were limited in scope, did nothing to suggest that Standard 36 would not be implemented.

Of the standards in the Forest Plan on which FWS could reasonably rely in reaching its no jeopardy determination for these species, Standard 36 is among the most concrete. Whereas nearly all of the other applicable standards only set parameters for unspecified future action, or

are couched in vague terms and programmatic language, Standard 36 unambiguously sets out a concrete and specific action – the closure of the forest to unmanaged target shooting – upon which the BiOp actually and explicitly relied in reaching its “no jeopardy” determinations.

The loss of the benefit that Standard 36 would have on listed species and their critical habitat throughout the Forest necessarily implies that the Forest Plan’s net effect on these listed species is greater than contemplated by the Biological Opinion. The loss of this benefit constitutes new information, and constructively modifies the Forest Plan, to the extent that the current BiOp is invalid and the immediate reinitiation of ESA § 7 consultation is required by law. The Forest Service’s failure to reinitiate ESA § 7 consultation following its apparent decision to unlawfully forgo the implementation of Standard 36 violates the Forest Service’s obligations under the ESA.

Finally, the impacts associated with unmanaged target shooting in the Forest and detailed in Los Padres ForestWatch’s 2016 report constitute “new information” separate and apart from the Forest Service’s failure to implement Standard 36. This report triggered the Forest Service’s duty to reinitiate consultation under § 402.16(b). The 2016 report found extensive contamination of soil and water associated with the accumulation of lead ammunition at dispersed shooting sites, and litter and hazardous electronic waste left behind by target shooters. Moreover, the report found lead contamination at sites visited by California condors, as well as sites in close proximity to California condor nesting, roosting, and perching sites. And the report found extensive wildfires caused by target shooting that adversely affected habitat for endangered species, including areas designated as “critical habitat” under the ESA. These impacts go beyond those considered in the BiOp, and therefore represent “new information” within the meaning of §402.16(b). The Forest Service’s failure to reinitiate consultation following this report being published violates the Forest Service’s obligations under the ESA.

B. Unlawful Reliance on Flawed Biological Opinion

For the same reasons discussed above, the Forest Service’s past and continued reliance upon the 2013 FWS BiOp violates the agency’s substantive duties under the ESA. The ESA imposes not only a procedural duty to initiate formal consultation where planned actions may affect listed species or their critical habitat, but also a substantive duty not to jeopardize the continued existence of those species or their habitat. 16 U.S.C. § 1536(a)(2). When an agency arbitrarily and capriciously relies on a flawed BiOp, it violates its substantive duty under the ESA to ensure that its actions are not likely to jeopardize threatened and endangered species. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010); *Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005).

An action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species,” and may not rely solely on a BiOp “to establish conclusively its compliance with its substantive obligations” under the ESA. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). Thus, “the ultimate responsibility for compliance with the ESA falls on the action agency.” *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006). An action agency “cannot meet its section 7 obligations by ... failing to discuss information that would undercut the opinion’s conclusions.” *Center for*

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Biological Diversity v. BLM, 698 F.3d 1101, 1127 (9th Cir. 2012). An action agency must “consider all the relevant factors,” and offer “an explanation for its decision that is both plausible and internally coherent.” *Pacific Coast Feder. of Fishermen’s v. Gutierrez*, 606 F.Supp.2d 1122, 1188-1189 (E.D. Cal. 2008); *Defenders of Wildlife*, 420 F.3d at 959.

The Forest Service’s continued reliance on the 2013 BiOp is arbitrary and capricious, and a violation of the ESA. The Forest Service has relied and continues to rely on the 2013 BiOp, by proceeding with the management of Los Padres National Forest under the terms of the 2013 BiOp and the protection of the ITS. As set forth above in Section A, FWS expressly relied upon the implementation of Standard 36 and the assumption that the Forest would be closed to unmanaged target shooting in reaching its “no jeopardy” determinations for numerous listed species. The Forest Service’s failure to implement Standard 36 undercuts the 2013 BiOp’s explicit assumptions and conclusions concerning jeopardy to listed species affected by unmanaged target shooting. Therefore, by continuing to rely on the 2013 BiOp’s no jeopardy determinations, the Forest Service has violated its procedural and substantive obligations under the ESA.

Despite the 2013 SEIS specifically stating that the Forest remains open to unmanaged target shooting, eight years after the issuance of the governing Forest Plan calling for said closure, the 2013 BiOp explicitly relies on the assumption that the Forest will be closed in reaching its no jeopardy determinations. The 2013 BiOp did not consider the fact that the Forest remained and would remain open to target shooting, nor the increasingly clear possibility that Standard 36 would never be implemented, and thus failed to consider all relevant factors. Because as action agency the Forest Service bears the ultimate responsibility for complying with the ESA, the Forest Service has not fulfilled its legal duty to consider all relevant factors.

For these reasons, the 2013 BiOp is factually and legally flawed, and the Forest Service’s continued reliance on the 2013 BiOp is arbitrary and capricious and a violation of the ESA. The Forest Service must immediately implement the general closure of the Forest to unmanaged target shooting on which the 2013 BiOp expressly relies, or otherwise reinitiate the ESA § 7 consultation process in view of the fact that Standard 36 has not been implemented, and the possibility that it might not be implemented.

APA VIOLATION

In addition to the ESA violations described above, the Forest Service has violated the APA by unlawfully withholding the closure of the Forest to unmanaged target shooting. Section 706(1) of the Administrative Procedure Act (APA) provides that a reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The terms of the Forest Plan and the ROD legally commit the Forest Service to the implementation of Standard 36.

CONCLUSION

For the foregoing reasons, the Forest Service must either close Los Padres National Forest to unmanaged target shooting and allow target shooting only in designated areas and ranges, or immediately reinstate ESA § 7 consultation to ensure its continued compliance with its substantive duty under the ESA to avoid jeopardizing these at-risk species. Until such time as the Forest Service so acts, the Forest Service's reliance on the flawed 2013 FWS BiOp is arbitrary and capricious.

If the Forest Service does not cure the violations of law described above immediately, upon expiration of the 60 days after the date of this amended notice the parties to this notice intend to file suit against the Forest Service pursuant to the citizen suit provision of the ESA, 16 U.S.C. 1540(g) and/or the APA. If you would like to discuss the violations described herein and seek a mutually acceptable solution to them, please feel free to contact me.

Sincerely,

/s/ Nina Robertson

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Counsel for the Notifier Los Padres ForestWatch

The name, address and phone number of the designated representative of the organization giving notice of intent to sue are as following:

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60-day Notice of Intent to Sue for Violations of the Endangered Species Act

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