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November 26, 2021

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Re: Second 60-Day Notice of Intent to Sue Over Violations of the Endangered Species Act Related to Approval of the Sanpoil Project

Dear Mses. Haaland, Christiansen, and Williams; and Messrs. Vilsak, Thompson, Casamassa, Smoldon, and Fletcher:

In accordance with the Endangered Species Act (“ESA”) 60-day notice requirement,¹ this letter provides notice on behalf of the Kettle Range Conservation Group (“KRCG”) of its intent to sue the United States Forest Service (the “Forest Service”) and the United States Fish and Wildlife Service (“Fish and Wildlife”) for violations of the ESA, for failing to ensure that the Sanpoil Project (the “Project”) and the 2019 Colville National Forest Land Management Plan (“2019 Forest Plan”) do not jeopardize the Canada lynx (*Lynx canadensis*), and for failing to reinitiate ESA consultation regarding the Sanpoil Project in light of new information.

¹ See 16 U.S.C. § 1540(g)(2)(A)(i).

I. BACKGROUND

A. Forest Service Practices Have Historically Degraded Lynx Habitat

The Colville National Forest (“Colville Forest”) supports numerous federally listed species, including the Canada lynx, which is listed as a threatened species under the ESA and as an endangered species by Washington State.² The Canada lynx is a mid-sized carnivore which has large feet and long hind legs that make it highly adapted to hunting its primary prey, the snowshoe hare, in deep snow.³ Lynx and snowshoe hare live primarily in boreal spruce-fir forests, and are most abundant in areas with long winters and persistent deep, powdery snow.⁴

Like other keystone species, lynx benefit their local ecosystems and play an important role in managing populations of smaller prey species.⁵ Because lynx are highly specialized hare predators, they require landscapes that support high hare densities, although they may take alternate prey species such as red squirrels when hare numbers are low.⁶ Hares are most abundant in “forests with dense understories that provide forage, cover to escape from predators, and protection during extreme weather.”⁷ Although lynx thus hunt in younger forests with thick ground cover, they den in older forests with full canopies.⁸

The Forest Service’s historic mismanagement of this complex habitat has significantly contributed to lynx’s decline.⁹ In fact, the Federal Lynx Listing indicates that the single greatest factor threatening the lynx is “the inadequacy of existing regulatory mechanisms” to preserve lynx habitat in national forests.¹⁰ In Washington, lynx habitat has been eroded by timber harvests and other human disturbances and destroyed by severe wildfires fueled by climate change.¹¹

As a result, the Washington lynx population is in a “precarious” position.¹² The 2020 Lynx Study emphasizes that as the climate warms, preserving the species within the state will require

²See King et al., *Will Lynx Lose Their Edge? Canada Lynx Occupancy in Washington*, The Journal of Wildlife Management, May 2020 at 1, 3 (“2020 Lynx Study”) (noting lynx presence in Colville Forest); see also Determination of Threatened Status for the Contiguous U.S. Distinct Population Segment of the Canada Lynx and Related Rule, 65 Fed. Reg. 16,052, (Mar. 24, 2000) (“Federal Lynx Listing”) (listing Canada lynx as a threatened species); Wash. Admin. Code § 220-610-010 (listing Canada lynx as Washington State endangered species).

³ U.S. Fish and Wildlife Service, *Species Status Assessment for the Canada lynx (Lynx canadensis) Contiguous United States Distinct Population Segment* (Oct. 2017) (“USFS Lynx Assessment”), at 24.

⁴ *Id.* at 1, 2.

⁵ See Jeffrey Lewis, Washington Dept. of Fish and Wildlife, *Periodic Status Review for the Lynx*, (Oct. 2016) at 2 (“2016 Lynx Assessment”).

⁶ USFS Lynx Assessment at 26.

⁷ *Id.* at 27.

⁸ *Id.* at 3.

⁹ See Federal Lynx Listing at 16,052.

¹⁰ *Id.* at 16,082.

¹¹ 2016 Lynx Assessment at 8.

¹² 2020 Lynx Study at 14.

“maintaining the greatest quantities of lynx habitat at high elevation as possible refugia...where favorable snow conditions may persist for some time.”¹³ The 2020 Lynx Study examined data showing that lynx habitat in Washington regenerates slowly, and may take up to 40 years to rebound after impacts from activities such as logging.¹⁴ This conclusion builds on a 2018 study demonstrating that it took lynx habitat in the Northern Rocky Mountains 35-40 years to regenerate after a timber harvest.¹⁵ The Washington Department of Fish and Wildlife reached a similar conclusion in 2016, finding that after a timber harvest, “[g]iven slow growing conditions in high-elevation forests...a regeneration period of 10-40 years is generally required to create suitable winter habitat for...lynx.”¹⁶

Threats to lynx and lynx habitat within the contiguous U.S. are described within the Canada Lynx Conservation Assessment Strategy (“LCAS”).¹⁷ The LCAS divides these threats into two tiers: “those that have the potential to negatively affect lynx populations and habitat, and those that may affect individual lynx but are not likely to have a substantial effect on lynx populations and lynx habitat.”¹⁸ The first tier includes climate change, vegetation management, wildland fire, and fragmentation of habitat.¹⁹

The LCAS provides for the delineation of Lynx Analysis Units (“LAUs”), which are intended to facilitate analysis and monitoring of the effects of management actions on core lynx habitat.²⁰ It provides that LAU boundaries should not be adjusted for individual projects “but must remain constant to be effective for their intended purposes of planning and monitoring.”²¹ The LCAS lists conservation measures for lynx in core and secondary/peripheral habitat, including that management actions should not reduce stem density through thinning to eliminate habitat for snowshoe hares, that no more than 30 percent of an LAU should be in an early stand initiation structural stage, and that LAUs should be managed to have 1,862 stems per acre of conifers, hardwoods, and shrubs, including species preferred by hares.²²

¹³ *Id.*

¹⁴ *Id.* at 12-13

¹⁵ Holbrook et al., *Spatio-temporal responses of Canada lynx (Lynx canadensis) to silviculture treatments in the Northern Rockies*, 422 U.S. Forest Ecology and Management 114, 123 (2018).

¹⁶ 2016 Lynx Assessment at 5.

¹⁷ Interagency Lynx Biology Team, *Canada lynx conservation assessment and strategy*, Forest Service Publication R1-13-19 (2013 3rd Ed.) (“LCAS”).

¹⁸ LCAS at 68.

¹⁹ *Id.*

²⁰ *Id.* at 85-86.

²¹ *Id.*

²² *Id.* at 87-95.

B. Fish and Wildlife Concludes that 2019 Colville Forest Plan Is Not Likely to Jeopardize Continued Existence of Lynx

Trapping nearly extirpated lynx from the Colville Forest over 30 years ago, but the Kettle River Range within the forest provides the second-largest block of potential lynx habitat in Washington.²³ Washington has six Lynx Management Zones, including the Kettle Management Zone, which contains 13 LAUs.²⁴ Along with the rest of the Northern Rockies/Cascades region, these zones create “the most likely stronghold for lynx populations in the contiguous U.S.”²⁵

In October 2019, the Forest Service issued the Final Record of Decision approving the 2019 Forest Plan. The 2019 Forest Plan articulates desired habitat conditions for endangered and threatened species, including the Canada lynx. It provides that habitat conditions for lynx should be analyzed at the LAU scale,²⁶ and indicates that the forest successional stages within LAUs should “provide a mosaic of lynx habitat (including foraging, travel, and denning components) with landscape pattern that is consistent with the historic range of variability” (FW-DC-WL-04).²⁷

The objectives of the 2019 Forest Plan include a goal of restoring 100 acres per year of snowshoe hare and/or lynx habitat within the LAUs (FW-OBJ-WL-02).²⁸ The Forest Plan’s standards indicate that it will change no more than 15 percent of lynx habitat within any single LAU to an unsuitable condition during any 10-year-period (FW-STD-WL-03); that it will not reduce the suitability of habitat within any LAU below 70 percent (FW-STD-WL-05); that it will retain a minimum of 20 percent of habitat in the Kettle-Wedge lynx core area in untreated patches; and that with some exceptions, it will not reduce tree stem densities to less than 500 trees per acre within LAUs through tree removal or prescribed burning (FW-STD-WL-06).²⁹ Finally, the 2019 Plan provides a number of guidelines to meet these standards and objectives, including that management activities in LAUs should be focused in areas of poor snowshoe hare habitat to recruit understories that support dense, horizontal cover (FW-GDL-WL-05); that habitat for alternative prey species, primarily red squirrel, should be available in each LAU (FW-GDL-WL-06); and that no large permanent openings should be created in prey habitat within LAUs (FW-GDL-WL-09).

On March 28, 2017, the Forest Service issued a Biological Assessment for the 2019 Forest Plan, asserting that the 2019 Forest Plan would make a “relatively high contribution” to the recovery of the lynx in both the short and long term, but also concluding that the Plan “may effect”

²³ 2020 Lynx Study at 3.

²⁴ *Id.* at 3-4; U.S. Forest Serv., U.S. Dept. of Ag., Colville National Forest Land Management Plan (Sept. 2019) at 13.

²⁵ Federal Lynx Listing at 16,072.

²⁶ 2019 Forest Plan at 57.

²⁷ *Id.* at 59.

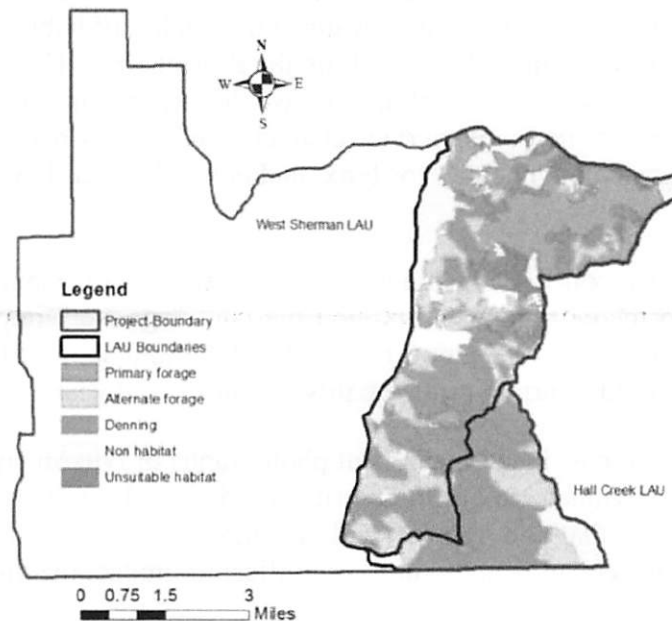
²⁸ *Id.*

²⁹ *Id.* at 62-63.

and is “likely to adversely affect” the lynx. In 2019, Fish and Wildlife issued a Biological Opinion concluding the 2019 Forest Plan is “not likely to jeopardize the continued existence of the lynx.”³⁰

C. Consultation Concludes Sanpoil Project is Not Likely to Adversely Affect Lynx

On December 11, 2020, the Forest Service published the Final Sanpoil Environmental Assessment (“Sanpoil EA”) and approved the Project with a Decision Notice and Finding of No Significant Impact. The Sanpoil Project will allow timber harvest, controlled burns, and road work within 47,956 acres (the “Project Area”) of the Kettle River Range within the Colville Forest.³¹ It will allow timber harvest on 8,410 acres, conduct controlled burns on 19,129 acres, open 10,585 acres up for increased cattle grazing, build approximately 4 miles of new temporary roads, and construct or reopen 12 miles of existing temporary roads.³²



Map from the Sanpoil Biological Assessment showing the Project's overlap with LAUs

The Project Area overlaps with two LAUs, the West Sherman LAU and the Hall Creek LAU.³³ The Sanpoil Biological Assessment (“Sanpoil BA”) predicted that the Project will impact 874 acres of lynx denning habitat, 502 acres of primary foraging habitat, and 1,124 acres of

³⁰ U.S. Fish and Wildlife Serv., Biological Opinion, Colville National Forest Land Management Plan Revision (Oct. 24, 2017) at 279.

³¹ U.S. Forest Serv., U.S. Dept. of Ag., *Sanpoil Environmental Assessment* (Dec. 2020) at 15.

³² *Id.*

³³ Karen Honeycutt et al., U.S. Dept. of Ag., *Biological Assessment of the Sanpoil Vegetation Management Project* (Sept. 2018) (“Sanpoil BA”) at 19. In 2019, the boundaries of all LAUs were redrawn, pursuant to recommendations from the Interagency Lynx Biology Team. The Sanpoil EA and other project documents produced after 2019 reflect this change, although it is not reflected in the 2018 Sanpoil BA.

alternative prey habitat.³⁴ The 2020 Lynx Study revealed that a 2016-2017 camera trap survey had captured four images of lynx in the Kettle River Range, including three in or around the Project Area.³⁵

The Sanpoil BA acknowledged that the Forest Service does not have accurate estimates of populations of threatened and endangered species in the Project Area.³⁶ In particular, the Forest Service noted it is “unlikely that all activity centers such as dens or nests have been found.”³⁷ Lacking such information, the Sanpoil BA indicated that the Forest Service assumes the Project Area is potentially occupied by all of species with habitat in the area, including listed species such as lynx.³⁸

According to the Sanpoil BA, the Project Area will overlap with a combined 15,637 acres of the West Sherman and Hall Creek LAUs.³⁹ The Sanpoil BA assessed the quality of habitat within these sections of the LAUs but failed to evaluate the quality of habitat within the sections of the Hall Creek and Wester Sherman LAUs not within the Project Area. The Sanpoil BA indicated that the Project’s timber harvest and “underburning” would impact “approximately 3,638 acres” of these LAUs, 2,587 of which the Forest Service characterized as lynx habitat.⁴⁰ Such treatments would render the land “unsuitable habitat” for lynx, and any individual lynx or lynx populations would be displaced.⁴¹

Nevertheless, the Sanpoil BA concluded there would be no adverse impact to lynx.⁴² This conclusion was based on the erroneous assumption that any negatively impacted habitat would quickly regenerate. For example, the Sanpoil BA assumed without support that the primary prey habitat that is impacted would return to prime quality “within 15-20 years.”⁴³

The Sanpoil BA also concluded that recent photographs of lynx in and around the Project area reflected just one individual lynx, although it provided no basis for this conclusion. The Sanpoil BA acknowledged that the Project will displace this lynx, but concluded, without explanation, that this displacement is not likely to significantly impact the displaced lynx.⁴⁴

On December 20, 2018, Fish and Wildlife sent a reply that largely parrots the conclusions of the Sanpoil BA (“FWS Concurrence”), including the claim that the Project would not adversely

³⁴ Sanpoil BA at 21.

³⁵ *Id.* at 8.

³⁶ *Id.* at 16.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 19.

⁴⁰ *Id.* at 21.

⁴¹ *Id.* at 22-23.

⁴² *Id.*

⁴³ *Id.* at 22

⁴⁴ *Id.* at 23.

impact lynx because the habitat that is logged and burned will regenerate in “about 15 years.”⁴⁵ The FWS Concurrence acknowledged that “[d]isturbance during project activities may cause any individuals to be displaced from the area,” but concluded, without support, that “the effects would be insignificant to transient individuals.”⁴⁶

The FWS Concurrence also concluded that three of the Project’s design criteria will mitigate impacts to lynx.⁴⁷ The first of these criteria prohibits unauthorized vehicle access on temporary roads.⁴⁸ The second directs the service to close temporary roads post-Project.⁴⁹ The third suggests that certain trees, like live trees that are over 14 inches in diameter and contain old raptor nests, should be retained in “all units possible.”⁵⁰

Based on these findings, Fish and Wildlife concurred with the Forest Service’s conclusion that the Project “may affect, but is not likely to adversely affect” lynx.⁵¹

D. Forest Service Issues Supplemental Analysis that Changes Analysis but Not Conclusion that Project Will Not Adversely Affect Lynx

On May 17, 2021, KRCG issued its first Notice of Intent to Sue under the ESA, related to the Forest Service and Fish and Wildlife’s failure to adequately assess the impact of the Sanpoil Project on lynx. The Forest Service did not respond to this notice. Following this notice, however, internal emails between Forest Service employees reveal the agency’s realization that the Sanpoil BA was fundamentally flawed.

In one email, a Forest Service wildlife biologist points out that the Sanpoil BA failed to analyze the status of lynx habitat on an LAU scale, as indicated by the 2019 Forest Plan and the best available science. As a result, the Sanpoil BA incorrectly calculated the status of lynx habitat within the LAUs.⁵² The biologist also indicated that the Sanpoil BA improperly evaluated the effect of the Project, by “mixing direct, immediate effects with potential future developments and presenting them as the effects of the proposed action.”⁵³ The email also questions the validity of an assertion made in the Sanpoil BA that certain lynx habitat would remain suitable for denning after treatment.⁵⁴

⁴⁵ Brad Thompson, Wash. Fish and Wildlife Office, U.S. Dept. of Int., *Biological Assessment of the Sanpoil Vegetation Management Project* (Dec. 2018) at 6.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Email from John Rohrer, Wildlife Biologist, U.S. Forest Service to Bart Ausland, Natural Resource Staff Officer, and Karen Honeycutt, Natural Resources Program Manager, U.S. Forest Service (Aug. 3, 2021).

⁵³ *Id.*

⁵⁴ *Id.* (referring to Table 9 on p. 22 of the Sanpoil BA).

In another email, the wildlife biologist flags that the standard regarding tree density (FW-STD-WL-06) contained in the 2019 Forest Plan is inconsistent with best available science, stating “[the standard] refers to 500 trees/acre, where one of the conservation measures in the LCAS refers to 4,600 stems/ha (1862 stems/acre)... all the scientific literature about good or optimal snowshoe hare habitat calls for a minimum of 1862 stems/acre.”⁵⁵

In response to these emails, a Forest Service program manager tells Defendant Smolden that she does not understand how the Sanpoil BA had made it through the informal consultation process, and that the analysis must be redone.⁵⁶

On August 24, 2021, Forest Service Central Zone Wildlife Biologist Kelsey Retich issued the Sanpoil Vegetation Management Project Lynx Analysis Supplement (“Supplemental Analysis”), an analysis that “replaces and updates” the Sanpoil BA.⁵⁷

The Supplemental Analysis lists lynx-related standards and guidelines adopted in the 2019 Forest Plan, including the requirements that no more than 15 percent of lynx habitat can be made unsuitable within a 10 year period and that a single LAU must retain at least 70 percent of its suitable habitat.⁵⁸ In analyzing the percentages within each LAU of types of habitat, the Supplemental Analysis indicates that the Forest Service has no data to assess lynx habitat on the Colville Reservation, beyond knowing that approximately 8,000 acres had been treated and were thus assumed to be unsuitable.⁵⁹ The Supplemental Analysis assumes, without support or explanation, that the remaining 10,000 acres of the LAU that are on tribal land are suitable lynx habitat.⁶⁰

The Supplemental Analysis also revises the estimates of the timeline for forest restoration in the Sanpoil BA, concluding that the restoration of treated land to forage habitat would occur “within about 20-30 years.”⁶¹ It similarly acknowledges that use of a forest by lynx “reaches 50% about 20 years after thinning or 35-40 years after regeneration or selection cut treatments.”⁶² In regard to the population of lynx in the Project Area, the Supplemental Analysis asserts with no

⁵⁵ Email from John Rohrer, Wildlife Biologist, U.S. Forest Service to Bart Ausland, Natural Resource Staff Officer, and Karen Honeycutt, Natural Resources Program Manager, U.S. Forest Service (Aug. 3, 2021).

⁵⁶ Email from Karen Honeycutt, National Resources Program Manager to Rodney Smolden, U.S. Forest Service (Aug. 5, 2021).

⁵⁷ Kelsey Retich, Forest Service, U.S. Dept. of Agric., *Sanpoil Vegetation Management Project Lynx Analysis Supplement* (Aug. 24, 2021). The Supplemental Analysis also indicates that it replaces and updates a Biological Evaluation dated May 22, 2020, which KRCG has only been able to locate in draft form.

⁵⁸ FW-STD-WL-03, FW-STD-WL-05 Supplemental Analysis at 1-2.

⁵⁹ *Id.* at 4.

⁶⁰ *Id.*

⁶¹ *Id.* at 6.

⁶² *Id.* at 8. Citing Holbrook et. al. 2018. Spatio-temporal responses of Canada lynx to silvicultural treatments in the Northern Rockies. *Forest Ecology and Management* 422:114-124.

further detail that “there have been lynx detections within the project area” during “the past several years.”⁶³

The Supplemental Analysis identifies several other projects that have or will have a cumulative effect on the LAU’s in addition to the Sanpoil Project. As a result of these cumulative impacts, and the length of time required for forest restoration, the Forest Service concludes that the treatments planned by the Sanpoil Project may create more than 15 percent unsuitable habitat within a single LAU in a 10-year period.⁶⁴ As a result, the Supplemental Analysis announces that the Forest Service has changed its plans under the Sanpoil Project and will delay any treatments within the West Sherman LAU until 2028.⁶⁵

Although it changed the fundamental analysis and project details, the Supplemental Analysis nonetheless reaches the same conclusion as the Sanpoil BA: “Based on the proposed mitigation measure and analysis, the proposed action may affect but is not likely to adversely affect lynx or lynx habitat.”⁶⁶ It reaches this conclusion in part based on its asserted compliance with the 2019 Forest Plan standard that suitable lynx habitat within an LAU should not fall below 70 percent.⁶⁷

The Forest Service sent the Supplemental Analysis to Fish and Wildlife in an email, in which the Forest Service asserted that because “only the timing of activities and not the actual activities have changed, reinitiating of informal consultation is not warranted.”⁶⁸ The email failed to call to Fish and Wildlife’s attention the fundamental changes within the Supplemental Analysis, but cursorily asserted that the “effects call has not changed.”⁶⁹ In response, Fish and Wildlife stated: “Agreed, the proposed activities have not changed and the effects determination has not changed,” but did not issue a statement of concurrence.⁷⁰

E. Summit Trail Fire and Reintroduction of Lynx to the Kettle Range Change Potential Impact of 2019 Forest Plan and Sanpoil Project on Lynx

Several severe forest fires burned in the vicinity of the Colville National Forest during the 2021 wildlife season. These fires included the Summit Trail Fire, which was started on July 12, 2021, by a lightning strike on the Colville Reservation, in an area just south of the Sanpoil Project

⁶³ Supplemental Analysis at 2.

⁶⁴ This measure is based on Standard FW-STD-WL-03 of the Colville National Forest Management Plan. 2019 Forest Plan at 63.

⁶⁵ *Id.*

⁶⁶ Supplemental Analysis at 10.

⁶⁷ *Id.* at 2, 10.

⁶⁸ Email from Karen Honeycutt, Natural Resources Program Manager, U.S. Forest Service, to Ben Solvesky, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service (Aug. 31, 2021).

⁶⁹ *Id.*

⁷⁰ Email from Ben Solvesky, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, to Karen Honeycutt, Natural Resources Program Manager, U.S. Forest Service (Sept. 1, 2021).

Area.⁷¹ As of October 31, 2021, the Summit Trail Fire was fully contained after burning 49,544 acres.⁷² GIS mapping indicates that the fire burned approximately 9,000 acres within the Hall Creek LAU. Based on information and belief, the Summit Trail Fire was very damaging to all levels of forest stands and resulted in significant damage habitat for the lynx and the snowshoe hare with the Hall Creek LAU.

The Supplemental Analysis notes that the Forest Service will reassess the amount of available and unsuitable lynx habitat once the Summit Trail Fire is fully contained.⁷³ Counsel for the Forest Service has indicated that this reassessment is likely to be concluded in January 2022.

On November 15, 2021, Conservation Northwest announced that it had begun a project to reintroduce lynx to the northeast Kettle Range, in partnership with the Colville Confederated Tribes.⁷⁴ At the time of the press release, the groups had successfully trapped five lynx in British Columbia and released them onto the portion of the Kettle Range within the Colville Reservation and hoped to release another five lynx by the end of 2021.⁷⁵ The goal of the project is to reestablish a breeding population within the Kettle Range by reintroducing at least 50 lynx into the area over the next five years, in the hopes of creating a stable breeding population in Washington that will eventually connect with populations through the Cascade Mountain Range and into British Columbia.⁷⁶

II. ENDANGERED SPECIES ACT

Section 7 is acknowledged as “the heart of the Endangered Species Act,” and requires federal agencies to ensure that any action they authorize, fund, or carry out is “not likely to jeopardize the continued existence of any endangered [or threatened] species.”⁷⁷ To ensure compliance with this substantive mandate, the ESA and its implementing regulations impose specific procedural duties, which require an action agency to engage in consultation over any action that “may affect” a listed species or its designated critical habitat.⁷⁸ In complying with these mandates, agencies must “use the best scientific and commercial data available.”⁷⁹ Agencies thus may not “disregard available scientific evidence that is in some way better than the evidence it relies on.”⁸⁰

⁷¹ Incident Information System, *Summit Trail Fire*, at <https://inciweb.nwcg.gov/incident/7677/> (accessed Nov. 26, 2021).

⁷² *Id.*

⁷³ Supplemental Analysis at 4.

⁷⁴ *Colville Tribes and Conservation Partners Relocate Canada Lynx to Kettle Range*, Conservation Northwest (Nov. 15, 2021), at <https://www.conservationsnw.org/news-updates/colville-tribes-and-conservation-partners-relocate-canada-lynx-to-kettle-range/>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 16 U.S.C. § 1536(a)(2).

⁷⁸ *Id.*; 50 C.F.R. § 402.14(a).

⁷⁹ 16 U.S.C. § 1536(a)(2).

⁸⁰ *Nat'l Family Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 925 (9th Cir. 2020) (internal quotations omitted).

An action agency begins the consultation process through preparation of a biological assessment.⁸¹ The biological assessment must evaluate the potential “effects of the action” on listed and proposed species and designated and proposed critical habitat within the “action area,” then determine whether any such species or habitat are “likely to be adversely affected by the action.”⁸² The ESA requires that biological assessments “analyze the effect of the entire agency act” in question.⁸³

Formal consultation, involving the preparation of a more detailed biological opinion, is “excused only where,” on the basis of the biological assessment: (1) the action agency determines that the proposed action is not likely to adversely affect any listed species or critical habitat, and (2) the regional director of Fish and Wildlife, or authorized representative, provides a written concurrence.⁸⁴ If an agency’s determination or Fish and Wildlife’s concurrence is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the ESA, the concurrence is unlawful and must be set aside.⁸⁵

The conclusion that an action “is not likely to adversely affect” a species is appropriate only “when effects on listed species are expected to be discountable, or insignificant, or completely beneficial.”⁸⁶ Discountable effects are those “extremely unlikely” to occur, while insignificant effects cannot be “meaningfully measure[d], detect[ed], or evaluate[d],” and should “never reach the scale where take occurs.”⁸⁷ An agency cannot claim that an effect will be insignificant or discountable if it is unable to qualify that conclusion.⁸⁸

If an action agency concludes that the action is “likely to adversely affect” listed species or critical habitat, the agency must engage in “formal consultation” with Fish and Wildlife to meet the ESA’s substantive “no jeopardy” mandate.⁸⁹ Formal ESA consultation commences with the action agency’s written request for consultation and concludes with Fish and Wildlife’s issuance of a “biological opinion.”⁹⁰

⁸¹ 50 C.F.R. §§ 402.02, 402.12.

⁸² *Id.* § 402.12(a), (c).

⁸³ See *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (examining a biological opinion); see also *Mont. Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127, 1149 (D. Mont. 2004) (applying this standard to biological assessments).

⁸⁴ See *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998); 50 C.F.R. § 402.14(b).

⁸⁵ See 16 U.S.C. § 1536(a)(2); 5 U.S.C. § 706(2).

⁸⁶ *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (1998)* at 3-12 (available at https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) (“ESA Handbook”).

⁸⁷ *Id.* at 3-12.

⁸⁸ See *Rock Creek Alliance v. United State Fish and Wildlife Serv.*, 390 F. Supp. 2d 993, 1009 (D. Mont. 2005) (holding that Fish and Wildlife was arbitrary and capricious in deciding that grizzly bears would not be adverse affected by a displacement, because the agency did not explain or support its conclusion).

⁸⁹ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

⁹⁰ *Id.* § 402.14(g)(4).

During formal consultation, Fish and Wildlife and the action agency must evaluate the “effects of the action,” including all direct and indirect effects of the proposed action, plus the effects of actions that are interrelated or interdependent, added to all existing environmental conditions—that is, the “environmental baseline.”⁹¹ The environmental baseline includes the “past and present impacts of all Federal, State, or private actions and other human activities in the action area” The effects of the action must be considered together with “cumulative effects,” which 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.”⁹²

A biological opinion states Fish and Wildlife’s opinion as to whether the effects of the action are “likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.”⁹³ To “jeopardize the continued existence of” 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.”⁹⁴ The determination of whether an activity is likely to jeopardize the continued existence of a species must be based solely on “the best scientific and commercial data available,”⁹⁵ and Fish and Wildlife must use the best available science in formulating its biological opinion and approving incidental take through formal consultation.⁹⁶

Under Section 9 of the ESA, it is illegal to engage in any activity that results in the unauthorized “taking” an endangered species.⁹⁷ The unauthorized taking of a threatened species may also be prohibited by regulation.⁹⁸ The term “take” is defined in the statute to include “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁹⁹ Pursuant to Section 7(b)(4) of the ESA, a biological opinion may include an Incidental Take Statement (“ITS”), which must specify the impact of any allowable takes of individual members of the species, provide reasonable and prudent measures necessary to minimize the impact of those takes, and set forth terms and conditions that must be followed to implement such measures.¹⁰⁰ An ITS may thus authorize the taking of endangered and threatened species that would otherwise be prohibited by Section 9 of the ESA.

After the consultation process, the action agency and Fish and Wildlife must reinitiate consultation if “[t]he amount or extent of taking specified in the incidental take statement is

⁹¹ *Id.*

⁹² 50 C.F.R. § 402.02. 36.

⁹³ *Id.* § 402.14(g)(4).

⁹⁴ *Id.* § 402.02.

⁹⁵ 16 U.S.C. § 1536(a)(2),

⁹⁶ 50 C.F.R. § 402.14(g)(8).

⁹⁷ 16 U.S.C. § 1538(a)(1)(B). The

⁹⁸ 16 U.S.C. § 1533(d).

⁹⁹ 16 U.S.C. § 1532(18).

¹⁰⁰ 16 U.S.C. § 1536(b)(4); 50 C.F. R. § 402.14(i)(1), (3).

exceeded; 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; the identified action is subsequently modified in a manner that causes an effect to the listed species ... that was not considered in the biological opinion; or a new species is listed or critical habitat designated that may be affected by the identified action.”¹⁰¹

Any agency failure to comply with the substantive or procedural mandates of the ESA is subject to judicial review under the ESA’s citizen suit provision.¹⁰²

III. VIOLATIONS OF THE ESA

As described in the foregoing, the Forest Service and Fish and Wildlife have violated the ESA because (1) the formal consultation process related to impact of the 2019 Forest Plan on the Canada lynx was not based on the best available science and was otherwise arbitrary, capricious or unlawful; (2) the informal consultation process related to the impact of the Sanpoil Project on the Canada lynx was not based on the best available science and was otherwise arbitrary, capricious or unlawful; (3) the Forest Service and Fish and Wildlife have failed to engage in formal consultation related to the impact of the Sanpoil Project on the Canada lynx; and (4) the Forest Service and Fish and Wildlife have failed to reinstate consultation to consider changed circumstances related to the Canada lynx.

First, the Forest Service and Fish and Wildlife violated the ESA because the biological assessment and biological opinion that evaluated the impact of the 2019 Forest Plan on lynx failed to take into consideration the best available science. For example, the agencies failed to adequately consider the impact of the 2019 Forest Plan’s standard that allowed for tree densities within LAUs to be reduced to 500 trees per acre (FW-STD-WL-06), which is inconsistent with the best available science that calls for a minimum of 1,862 stems per acre to maintain habitat for snowshoe hare. As a result, Fish and Wildlife’s conclusion that the 2019 Forest Plan was “not likely to jeopardize the continued existence of the lynx” was arbitrary, capricious, and not in accordance with the ESA.

Second, both agencies violated the ESA during the informal consultation process related to the impact of the Sanpoil Project on the lynx. That process relied upon flawed biological assessments that failed to use the best available science in evaluating the status of lynx habitat throughout the relevant LAUs. The process failed in evaluating the impact of the Sanpoil Project on lynx habitat and on lynx present in the Project Area, and was otherwise arbitrary, capricious, and in violation of the ESA. These violations include, but are not limited to, the following:

- Fish and Wildlife’s concurrence in the Forest Service’s “not likely to adversely affect” determination for the Sanpoil Project was based on the analysis in the Sanpoil BA, which the Forest Service has conceded was fundamentally flawed and not based on the best available science, and which was concluded before the Forest Service changed the boundaries of the lynx LAUs.

¹⁰¹ 50 C.F.R. § 402.16.

¹⁰² 16 U.S.C. § 1540(g)(1)(A).

- The Sanpoil BA failed to use the best available science in evaluating the amount of time it will take for snowshoe hare and lynx habitat to regenerate following the treatments contemplated in the Sanpoil Project. Although the Supplemental Analysis purported to revise that analysis, it failed to appropriately change the effects analysis in accordance with this new analysis.
- Both the Sanpoil BA and the Supplemental Analysis failed to properly and adequately assess the status of lynx and snowshoe hare habitat within the full Hall Creek and West Sherman LAUs, including those portions of the LAUs that are not within the Project Area or the Colville Forest.
- Both the Sanpoil BA and the Supplemental Analysis failed to adequately assess the impact of the Sanpoil Project on the habitat within the Hall Creek and West Sherman LAUs in accordance with the best available science, including the standard that requires a minimum of 1,862 stems per acre to maintain adequate habitat for snowshoe hare.
- Both the Sanpoil BA and the Supplemental Analysis failed to adequately assess the population of lynx within the Project Area, and the impact of the Sanpoil Project on that population, taking into account recent lynx sightings within the Project Area, and analyzing the effect of the Project on those lynx.

Third, the ESA requires a formal consultation on the impact of the Sanpoil Project on the lynx, because the impacts are clearly not “insignificant and discountable,” and thus cannot support a conclusion that the Sanpoil Project is not likely to adversely affect lynx. Compliance with the ESA requires the Forest Service to conclude that the Sanpoil Project is likely to adversely affect lynx, and Fish and Wildlife must prepare a biological opinion regarding these effects.

Fourth, both the Forest Service and Fish and Wildlife have an obligation to reinitiate consultation because there is new information that has not been considered and which will change the evaluation of the impact of the Sanpoil Project on lynx. The Forest Service failed to reinitiate consultation after it fundamentally changed the analysis and details of the Project in the Supplemental Analysis. In addition, neither agency has evaluated the effects of the Sanpoil Project on the lynx population in light of the damage done by the Summit Trail Fire and the reintroduction of lynx to the Kettle Range south of the Colville Forest, including areas in an around the Hall Creek LAU. Due to these significant changes in circumstances, the Sanpoil Project will have a more significant effect on lynx habitat and existing lynx populations.

IV. CONCLUSION

The Forest Service and Fish and Wildlife have violated Section 7 of the ESA by failing to sufficiently analyze whether the 2019 Forest Plan and the Sanpoil Project will jeopardize the continued existence of the lynx. If the Forest Service undertakes activities in accordance with the 2019 Forest Plan and the Sanpoil Project, it will result in the unlawful take of lynx under Section 9 of the ESA.

If actions are not taken to cure these ESA violations within 60 days of the date of this notice, KRCG intends bring suit under the ESA, including through a new action and/or by amending its suit in *Kettle Range Conservation Group v. U.S. Forest Service, et. al*, No. 2:21-cv-161 (E.D. Wash., filed May 13, 2021) to add additional claims brought under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), and the Administrative Procedure Act, 5 U.S.C. § 706.

KRCG hopes to hear from you soon regarding the steps you plan to take to cure these violations. It can be reached through its attorney, Claire Loeb Davis, through the contact information provided below.

Respectfully,

A handwritten signature in black ink, appearing to read 'Claire Loeb Davis', written in a cursive style.

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