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January 10, 2017

Tom Tidwell, Chief  
USDA Forest Service  
1400 Independence Ave., SW  
Washington, D.C. 20250-0003

Sally Jewell, Secretary of the Interior  
U.S. Dept. of the Interior  
1849 C Street, NW  
Washington, D.C. 20240

Constance Cummins, Forest Supervisor  
Superior National Forest  
8901 Grand Avenue Place  
Duluth, MN 55808

Daniel Ashe, Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, D.C. 20240

**Sixty-Day Notice of Intent to Sue the U.S. Forest Service, Secretary of the Interior,  
and U.S. Fish and Wildlife Service Pursuant to the Endangered Species Act**

Dear Chief Tidwell, Secretary Jewell, Forest Supervisor Cummins, and Director Ashe,

The U.S. Forest Service (“Forest Service”), Secretary of the Interior Sally Jewell (“Secretary”), and the U.S. Fish and Wildlife Service (“FWS”) are hereby notified that the Center for Biological Diversity and Earthworks intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), to challenge the Forest Service’s and FWS’s failure to comply with Section 7 of the ESA concerning the NorthMet Project and Land Exchange (“NorthMet Mine”) on the Superior National Forest, as well as FWS’s unlawful revision of the critical habitat designation for Canada lynx in violation of Section 4 of the ESA. First, FWS violated the ESA in preparing the February 5, 2016 Biological Opinion for the NorthMet Mine, and the 2016 Biological Opinion is arbitrary, capricious, and contrary to the ESA. 16 U.S.C. § 1536; 5 U.S.C. § 706. Second, the Forest Service’s reliance on the legally flawed 2016 Biological Opinion violates the Forest Service’s independent duty under Section 7 of the ESA to insure that the NorthMet Mine is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Third, FWS also violated Section 4 of the ESA by revising the agency’s final rule designating critical habitat for Canada lynx without complying with the required notice and comment rulemaking procedures. 16 U.S.C. § 1533.

**I. Identity of the Organizations Giving Notice:** The name, address, and phone number of the organizations giving notice of intent to sue under the ESA are:

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Tucson, Arizona 85702-0710  
Tel: 520-623-5252

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**II. Counsel for the Party Giving Notice:**

Marc Fink, Senior Attorney  
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**III. Requirements of the ESA**

Congress enacted the ESA to provide “a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b). Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “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 this [Act] are no longer necessary.” 16 U.S.C. § 1532(3). Section 7(a)(1) of the ESA explicitly directs that all federal agencies “utilize their authorities in furtherance of the [aforesaid] purposes” of the ESA. 16 U.S.C. § 1536(a)(1).

Section 4 of the ESA directs the Secretary of the Interior to designate species that are threatened or endangered with extinction, and to designate “critical habitat” for such species. 16 U.S.C. § 1533(a). “Critical habitat” is defined as the area that contains the physical or biological features essential to the “conservation” of the species and which may require special protection or management considerations, 16 U.S.C. § 1532(5)(A), and the ESA lays out a specific process for the designation and revision of such critical habitat. 16 U.S.C. §§ 1533(a) & (b). Section 4 also requires the Secretary to develop and implement recovery plans for the conservation and survival of threatened and endangered species, unless the Secretary finds that such a recovery plan will not promote the conservation of the species. *Id.*, § 1533(f).

Section 7 of the ESA requires the Forest Service, in consultation with FWS, to insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the

continued existence of any threatened or endangered species, or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air; and actions intended to conserve listed species or their habitat. 50 C.F.R. § 402.02.

For each proposed federal action, the Forest Service must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present in such area, the Forest Service must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* If the Forest Service determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation, FWS must provide the Forest Service with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

If FWS concludes that the proposed action will jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If FWS concludes in the biological opinion that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement” (“ITS”), specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the Forest Service to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

In order to monitor the impacts of incidental take, the Forest Service must monitor and report the impact of its action on the listed species to FWS as specified in the ITS. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action, the amount or extent of incidental taking is exceeded, the Forest Service must reinstate consultation with FWS immediately. 50 C.F.R. § 401.14(i)(4).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19). Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9. 16 U.S.C. § 1536(o)(2).

#### **IV. The 2016 Biological Opinion for the NorthMet Mine**

On February 5, 2016, FWS completed the Biological Opinion for the NorthMet Mine (“Biological Opinion”). As explained in the Biological Opinion, PolyMet Mining Inc. (“PolyMet”) proposes the NorthMet Mine, an open-pit mine, on land in which the surface rights are owned by the United States, which would operate for 20 years. Biological Opinion, p. 2.

The Forest Service has proposed a land exchange with PolyMet, and the development of the NorthMet Mine is dependent on the land exchange. *Id.* The NorthMet Mine is therefore an interrelated activity, and the effects of both the land exchange and the open-pit mine proposal on listed species and critical habitat are considered in the Biological Opinion. *Id.*

According to the Biological Opinion, the NorthMet Mine would disturb 3,918 acres, including 1,719 acres at the Mine Site and 2,189 acres at the Plant Site. Biological Opinion, p. 44 (Table 2). This disturbance at the Mine Site includes 528 acres of open mine pits, up to 794 acres of overburden and waste rock stockpiles, and 397 acres of infrastructure. *Id.*, p. 4. Moreover, the destruction of habitat at the Mine Site includes 1,333 acres of lynx denning, wolf cover, and northern long-eared bat roosting habitat. *Id.*, p. 50. PolyMet would reclaim 397 acres at the Mine Site, including up to 202 acres that may be feasible for woody vegetation growth. *Id.*, p. 6. This loss of lynx, wolf, and bat habitat will be permanent, except where the reclamation of forested habitat can occur, which will take at least several decades. *Id.*, p. 51.

According to the Biological Opinion, mining activities at the Mine Site “are likely to adversely affect lynx, wolf, critical habitats for lynx and wolf, and [the northern long-eared bat].” Biological Opinion, p. 6. These impacts include the loss of habitat, reduced habitat effectiveness, habitat fragmentation, increased human presence, noise, and transportation impacts. *Id.*, p. 44. New roads will be constructed, mostly within the Mine Site. *Id.*, p. 46. These roads “will be well-traveled and there will be noise and activity associated with construction and operations, 24 hours per day and year-around for up to 20 years.” *Id.* Moreover, there will be approximately 22 round-trips daily of ore trains. *Id.*

Wildlife movement in the region is already restricted because of the extensive landscape changes, and the NorthMet Mine would further adversely affect remaining wildlife travel corridors near the Mine Site. Biological Opinion, p. 54, 56. More specifically, wildlife travel corridors #16 and #17 would be directly affected by mining-related activities. *Id.*, p. 54. And reduced or restricted access to travel corridors #16 and #17 may further affect adjacent travel corridors due to increased use from displaced lynx, wolves and their prey. *Id.*, p. 56.

FWS determined in the Biological Opinion that the NorthMet Mine will result in significant adverse effects to the northern long-eared bat, gray wolf, and Canada lynx, including take. Biological Opinion, p. 62. Despite this determination, however, FWS concluded that the NorthMet Mine is not likely to jeopardize the continued existence of the northern long-eared bat, gray wolf, or Canada lynx, and is also not likely to adversely modify critical habitat for the gray wolf or Canada lynx. *Id.*

The Biological Opinion includes an ITS. Biological Opinion, p. 63. FWS anticipated “incidental take in terms of one lynx and one wolf killed by a vehicle or train every 20 years in the action area.” *Id.* In addition, FWS “described incidental take through a surrogate of acres of habitat for the lynx, wolf, and northern long-eared bat primarily due to vegetation and overburden removal at the Mine and Plant Sites, and along the Transportation and Utility Corridors.” *Id.* “Vegetation removal on all these sites/corridors totals no more than 3,918 ac, including 1,719 ac at the Mine Site, less than 10 ac along the Transportation and Utility Corridors, and 2,189 ac at the Plant Site.” *Id.* FWS further found that direct incidental take of

northern long-eared bat may occur, but is not prohibited provided specific actions are implemented under the January 2016 final 4(d) rule for the bat. *Id.*, p. 64.

FWS concluded in the Biological Opinion that the anticipated incidental take will not jeopardize the continued existence of Canada lynx, gray wolf, or northern long-eared bat. Biological Opinion, p. 64. FWS also concluded that “while there may be adverse effects to critical habitat for both lynx and wolf, it will not be adversely modified.” *Id.*

FWS included two “reasonable and prudent measures” (“RPMs”) within the ITS, which it stated “are necessary and appropriate to minimize take of Canada lynx, gray wolf, and northern long-eared bat.” Biological Opinion, p. 64. The first RMP concerned the incidental take of lynx and wolves caused by vehicle collisions: (1) “Implement proposed action Conservation Measures to reduce likelihood of vehicle collisions with lynx and wolf.” *Id.* The second RMP concerned the incidental take of northern long-eared bats: (2) “Implement measures to reduce the likelihood of injuring or killing any northern long-eared bats during vegetation removal, other mining-related activities, and forest management.” *Id.*

FWS also included two “terms and conditions” (“T&C”) within the ITS. Biological Opinion, p. 64. The first T&C concerned the incidental take of the northern long-eared bat, and provided that PolyMet will not conduct any activities that disturb or disrupt hibernating bats if any hibernacula are found in the Project area. *Id.* The second T&C set forth “reporting requirements,” including the requirement to report any vehicle collisions with lynx or wolves within 72 hours; the requirement to report any sick, injured, or dead bats; and the requirement for PolyMet to provide FWS with an annual report by January 31 of the following calendar year. *Id.*, pp. 65-66.

FWS concluded “that no more than one Canada lynx and one gray wolf will be incidentally taken, and up to 3,918 acres of habitat for lynx, wolf, and [northern long-eared bat] will be removed as a result of the proposed action during the 20-year duration of this biological opinion.” Biological Opinion, p. 66. “If, during the course of action, this level of incidental take is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided.” *Id.*

## **V. The Canada Lynx Critical Habitat Designation**

On February 25, 2009, FWS issued a final rule revising the critical habitat designation for Canada lynx. 74 Fed. Reg. 8616 (Feb. 25, 2009). By definition, the critical habitat designation includes the specific areas within the geographic area which is occupied by lynx and on which are found the physical and biological features that are essential to the conservation of the species. 16 U.S.C. § 1533(5)(A)(i). The designated critical habitat within Minnesota is considered essential because it is the only area in the Great Lakes Region for which there is evidence of recent lynx reproduction. 2016 Biological Opinion, p. 19. Moreover, it likely acts as a source for, or provides connectivity to, more peripheral portions of the lynx’s range in the region. *Id.*

For the portion of the critical habitat designation within St. Louis County of Minnesota, FWS carved out the “mining district” and excluded it from the designation. 74 Fed. Reg. at 8643,

8670. According to FWS, in much of this mining district, mining has removed all vegetation. *Id.* at 8643. And areas that are still vegetated “are extensively fragmented by the mined areas and haul roads.” *Id.* “These disturbed areas are not included in this final designation.” *Id.*

The Plant Site of the NorthMet Mine proposal is within the mining district that is already excluded from the lynx critical habitat designation, while the Mine Site is located within the currently designated critical habitat. 2016 Biological Opinion, p. 49. The NorthMet Mine would result in the long-term, and in most areas, permanent loss of lynx habitat at the Mine Site and contribute to habitat fragmentation. *Id.*, p. 38. Of the 1,719 acres of lynx critical habitat that would be destroyed at the Mine Site, only 202 acres have the potential to be eventually reclaimed with woody vegetation growth, although this may take many decades to be suitable as lynx habitat. *Id.*, p. 6, 45. And even these 202 acres may never be conducive to use by lynx. *Id.*, p. 52. The remaining 1,519 acres will be permanently lost to lynx habitat, and further fragment the remaining habitat in the area. *Id.*, p. 51.

The NorthMet Mine would cause the permanent loss at least 1,500 acres of lynx critical habitat to mining at the Mine Site, directly adjacent to the “mining district” that is already excluded from the lynx critical habitat designation. This includes the loss of 1,333 acres of potential lynx denning habitat. *Id.*, p. 52. The permanent loss of these 1,500 acres of lynx critical habitat, and significant expansion of the “mining district” in Minnesota that is already excluded from the critical habitat designation due to the permanent impacts of mining, is an implicit and *de facto* revision of the 2009 final rule designating lynx critical habitat. FWS, however, did not follow the notice and comment rulemaking procedures required by the ESA prior to making this significant revision of the 2009 final rule.

## **VI. Secretary of Interior, FWS, and Forest Service Violations of the ESA**

FWS violated the ESA in preparing the February 5, 2016 Biological Opinion for the NorthMet Mine, and the Biological Opinion is arbitrary, capricious, and contrary to the ESA. 16 U.S.C. § 1536; 5 U.S.C. § 706(2)(A). The Biological Opinion is unlawful, arbitrary, and capricious because: (1) FWS failed to analyze or consider the effects of the NorthMet Mine on the recovery of the Canada lynx; (2) FWS failed to adequately explain why it was impracticable to express a numerical population measure of the anticipated incidental take of lynx and wolves caused by habitat destruction resulting from the NorthMet Mine; (3) FWS failed to choose a proper surrogate instead of a numerical population measure of the incidental take of lynx and wolves caused by habitat destruction, as the chosen surrogate fails to provide an adequate trigger for the reinitiation of consultation; (4) FWS failed to provide reasonable and prudent measures, or terms and conditions, to minimize the incidental take of lynx and wolves caused by habitat destruction; (5) FWS relies on inadequate conservation and mitigation measures that are not reasonably specific, certain to occur, capable of implementation, or enforceable; (6) FWS failed to include any terms and conditions to implement RPM #1 concerning vehicle collisions; (7) FWS failed to consider or address that the NorthMet Mine’s permanent destruction of lynx critical habitat would revise FWS’s critical habitat designation for lynx by expanding the “mining district” in Minnesota that is excluded from the designation (*see* 74 Fed. Reg. 8616, 8643, 8670); (8) FWS failed to use the best scientific data available in making its findings and determinations; and (9) FWS’s determination that the NorthMine is not likely to adversely modify the designated critical

habitat for the Canada lynx or gray wolf is unsupported, arbitrary, and capricious.

The Forest Service's reliance on this legally flawed Biological Opinion violates the Forest Service's independent and continuing duty to insure that the authorization and implementation of the NorthMet Mine is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of designated critical habitat, in violation of Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

FWS has also violated Section 4 of the ESA by revising the critical habitat designations for the Canada lynx without following proper ESA-mandated procedures. 16 U.S.C. § 1533. Canada lynx has designated critical habitat in the action area, which is by definition essential to the conservation of lynx. 16 U.S.C. § 1532(5). Critical habitat can only be revised pursuant to the specific notice and comment rulemaking procedures under Section 4 of the ESA, and any such revision must comply with the procedural and substantive standards for critical habitat designation. 16 U.S.C. §§ 1533(a)(3)(A) & (b). By authorizing and allowing the NorthMet Mine within designated critical habitat for Canada lynx, which will permanently destroy and wholly negate the conservation value of over 1,500 acres at the Mine Site, FWS implicitly and *de facto* revised the 2009 final rule designating critical habitat for lynx to effectively and permanently exclude the Mine Site from the designation without complying with the notice and comment rulemaking procedures of the ESA. *Id.*; see *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (finding ESA cause of action for claim that biological opinion resulted in implicit designation of critical habitat).

## **VII. Conclusion**

For the above stated reasons, the Forest Service, Secretary of Interior, and FWS have violated and remain in ongoing violation of the ESA. If these violations of law are not cured within sixty days, the Center for Biological Diversity and Earthworks intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. 16 U.S.C. § 1540(g). This notice letter was prepared in good faith after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



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