



June 30, 2010

Via Electronic and Certified Mail

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RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act; Actions Relating to August 19, 2009 Ruling on Petition to List the Ashy Storm-petrel (*Oceanodroma homochroa*) as Threatened or Endangered

Dear Mr. Salazar and Mr. Gould:

This letter serves as a 60-day notice on behalf of the Center for Biological Diversity (“the Center”) of intent to sue the Department of Interior and the U.S. Fish and Wildlife Service (collectively “the Service”) over violations of Section 4 of the Endangered Species Act (“ESA”) (16 U.S.C. § 1531 *et seq.*) for the Service’s failure to propose listing of the Ashy Storm-petrel (*Oceanodroma homochroa*) as threatened or endangered under the ESA. *See* 16 U.S.C. §§ 1533(a)(1), (b)(1) & (b)(3)(B).

On August 19, 2009, the Service published its 12-month finding that listing of the Ashy Storm-petrel was not warranted. *See* Endangered and Threatened Wildlife and Plants; Notice of 12-Month Finding on a Petition to List the Ashy Storm-petrel as Threatened or Endangered, 74 Fed. Reg. 41832 (Aug. 19, 2009). The Service’s belief that listing is not warranted is largely based on the assumption that Ashy Storm-petrel populations are increasing. However, the Service arrived at this conclusion by extrapolating from an unpublished report in a manner refuted by both the report’s own authors and the Service’s own staff biologists. The Service’s assertion that Ashy Storm-

petrel populations are increasing also ignored key scientific studies indicating significant population declines. Because the Service's fatally flawed conclusions regarding population status and trends are at the heart of the finding, much of the remainder of the finding, including the finding's threat and significant portion of range analyses, is not credible. Accordingly, the 12-month finding is arbitrary and capricious and otherwise unlawful because it was not based on the best available science as required by the ESA and fails to provide a reasoned explanation for the Service's decision not to list the Ashy Storm-petrel.

This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

I. BACKGROUND

The Ashy Storm-petrel is a small, smoke-grey seabird that nests on islands and offshore rocks along California and northern Baja California. 74 Fed. Reg. at 41833. More than 95 percent of the species breeds in two population centers at the Farallon Islands and in the California Channel Islands. *Id.* The global population size of the Ashy Storm-petrel is extremely small, numbering approximately 5,559 breeding individuals based on the most recent population counts. *Id.* at 41834. Ongoing threats to the Ashy Storm-petrel include depredation by introduced and native predators, artificial light pollution from vessels and off-shore energy terminals, plastic ingestion, eggshell thinning due to marine contaminants, and oil spills. Climate change and ocean acidification also pose serious threats to this species' long term persistence.

On October 15, 2007, the Center submitted a formal, detailed petition to list the Ashy Storm-petrel under the ESA ("Petition"). On May 15, 2008, the Service made a positive 90-day finding on the Center's petition and initiated a 60-day public comment period. Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List the Ashy Storm-petrel (*Oceanodroma homochroa*) as Threatened or Endangered, 73 Fed. Reg. 28080 (May 15, 2008). On July 11, 2008, the Center submitted additional scientific evidence demonstrating that the Ashy Storm-petrel faces multiple threats to its survival and qualifies for listing under the ESA. After the Service failed to meet its legal deadline to make a 12-month finding, the Center and the Service reached a settlement requiring the Service to submit a 12-month finding to the Federal Register for publication by August 12, 2009.

In preparing the 12-month finding, the Service initially determined that the Ashy Storm-petrel warranted listing as threatened.¹ In a series of subsequent reviews by the Regional Office, the Service modified the initial finding to conclude that listing was still warranted based on threats to the species, but precluded due to other listing priorities (a

¹ *See* FOIA 248_20081004_AshyStorm-Petrel12MonthFinding_Draft1[AFWO] (Draft 12-month finding dated October 4, 2008). Documents received by the Center from the Service pursuant to the Center's Freedom of Information Act (FOIA) request for documents pertaining to the Ashy Storm-petrel finding are identified as "FOIA" followed by the electronic filename for those documents as described by the Service.

“warranted but precluded” finding).² However, slightly over a month before the deadline to publish the 12-month finding in the Federal Register, the Service reversed its listing determination to “not warranted.”³ The Service’s Region 8 Office re-wrote the finding to conclude that five previously identified threats to the Ashy Storm-petrel no longer threatened the species⁴ and that the Ashy Storm-petrel population is increasing.⁵ William McIver, the Service staff biologist and expert on the Ashy Storm-petrel who was the lead author on the original draft finding, raised strong concerns that the revisions made by the Regional Office contained “inaccuracies,” including improper use and overreliance on population data in an unpublished report by PRBO Conservation Science.⁶ In apparent disregard for Mr. McIver’s concerns, the Service published its “not warranted” determination in the Federal Register on August 19, 2009. 74 Fed. Reg. at 41833.

I. THE SERVICE’S “NOT WARRANTED” FINDING IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS NOT BASED ON THE BEST AVAILABLE SCIENCE AND NOT ADEQUATELY SUPPORTED BY THE ADMINISTRATIVE RECORD

The ESA requires the Service to determine whether a species is endangered or threatened due to any of five factors including “the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1). The Service must make determinations of whether a species is endangered or threatened solely on “the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). Reliance upon the best available scientific data, as opposed to requiring absolute scientific certainty, “is in keeping with congressional intent” that an agency “take preventive measures before a species is ‘conclusively’ headed for extinction.” *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679-80 (D.D.C. 1997) (emphasis in original); see also *American Wildlands v. Norton*, 193 F. Supp. 2d 244, 251 (D.D.C. 2002) (same). “The ‘best available science’ mandate of the ESA sets a basic standard that ‘prohibits the [agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.’” *The Consolidated Salmonid Cases*, 2010 U.S. Dist. LEXIS 54937, *108 (E.D. Cal. 2010) (citation omitted).

The Service’s “not warranted” finding for the Ashy Storm-petrel violates the ESA because it is not based on the best available science and does not constitute supported and

² See FOIA 270_20081004_AshyStorm-Petrel12MonthFinding_Draft1[AFWO]_RO through FOIA 280_20090705_AshyStorm-Petrel12MonthFinding_clean (series of draft 12-month findings - dates of draft documents are identified on document file names).

³ FOIA 282_20090706_AshyStorm-Petrel12MonthFinding mbf; FOIA 283_20090706_AshyStorm-Petrel12MonthFinding_RO-edits.

⁴ *Id.*

⁵ FOIA 302_FACTOR C - THOME - 20090706_AshyStorm-Petrel12MonthFindi.

⁶ FOIA 213_7-20-09_Fw_ Ashy 12-month sent_ (July 18, 2009 email from Bill McIver re: Ashy 12-month sent?).

reasoned decision-making. In particular, the Service failed to reach supportable conclusions regarding Ashy Storm-petrel populations. Because much of the finding, including the threat and significant portion of range analyses, were premised on the unsupported belief that Ashy Storm-petrel populations are increasing, the entirety of the finding does not withstand scrutiny.

A. The Service’s Determination That Ashy Storm-Petrel Populations Are Increasing Was Arbitrary and Capricious

Unsupported and inaccurate conclusions regarding Ashy Storm-petrel population status and trends are sufficient to render Service determinations under the ESA invalid. *See, e.g., Tuscon Herpetological Society v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009) (Service lacked sufficient evidence to conclude lizard populations were in fact viable and stable through most of current range); *Rock Creek Alliance v. United States Fish & Wildlife Service*, 390 F. Supp. 2d 993, 1008 (D. Mt. 2005) (arbitrary and capricious to rely on population study inapplicable to smaller populations). Here, the Service’s finding the Ashy Storm-petrel populations are increasing fails because it is based on the misinterpretation of a preliminary analysis in an unpublished report and ignores contrary evidence indicating significant population declines.

The heart of the Service’s finding that protection under the ESA for the Ashy-Storm petrel is not warranted is that the population is increasing. To support this conclusion, the Service relied on an unpublished report by PRBO Conservation Science, cited as Warzybok and Bradley (2007). This report summarized population size and reproductive performance of breeding seabirds on Southeast Farallon Island in 2007. Based on this report, the Service concluded:

Although there are caveats associated with Warzybok and Bradley’s (2007) analysis (See Factor C: Disease and Predation section below), their report represents the best available information to date and suggests an increasing population of Ashy Storm-petrels.

74 Fed. Reg. at 41835. Following publication of the 12-month finding, the PRBO report’s authors faulted the Service for its misuse of their study. In a memo to the Service, the authors expressly disagreed with the Service’s conclusion, stating “we disagree with the last statement above, ‘their report ... suggests an increasing population of ashy storm petrels.’” (PRBO Conservation Science Memo, attached hereto as Exh. A.) The authors further explained that the report was “preliminary and not intended to be the basis for decision-making” and that the data in the report was insufficient to “indicate the status of the species.” *Id.*

The Service was also explicitly warned of the flaws in its reliance on the PRBO report prior to issuing its finding. The draft finding, prepared by Service biologist William McIver, an expert on the Ashy Storm-petrel who has conducted research on the species for more than 15 years, correctly determined that the preliminary analyses of Warzybok and Bradley (2007) did not provide a sufficient basis for determining Ashy Storm-petrel population trends, and further that an increase in population size was not

consistent with the low level of chick production that has been observed on SE Farallon Island since the mid-1990s.⁷ Only in its last-minute reversal of the finding did the Regional Office rewrite the finding to conclude that the Ashy Storm-petrel is increasing. In doing so, the Service misused the scientific information and disregarded its own experts. Following the rewrite of the finding, Mr. McIver raised strong objection to the revisions made by the Regional Office, informing the Regional Office the altered finding contained “inaccuracies,” including improper use and disproportionate reliance on the PRBO report.⁸ *See Tuscon Herpetological Society*, 566 F.3d at 878-79 (overturning finding where evidence did not support conclusion of viable and stable lizard population).

Given the Service’s close relationship with PRBO, there is simply no legitimate excuse for its blatant misinterpretation and misuse of the PRBO report. The PRBO report, subtitled “Report to the Fish and Wildlife Service,” states that “[u]nder contract with USFWS/Farallon NWR, PRBO monitors the population size and reproductive success of seabirds on Southeast Farallon Island (SEFI), California and has done so since 1971.” Given the close partnership between PRBO and the Service, the Service has no excuse for drawing conclusions from the PRBO report that were directly at odds with the views of the report’s authors and its own staff.

The Service’s determination that Ashy-Storm petrel populations are increasing is also directly contrary to record evidence indicating significant population declines on SE Farallon Island, evidence the Service ignored in its finding. The Service failed to consider a peer-reviewed, “in press” study (now published) by Ainley and Hyrenbach (2009) that found that the at-sea abundance of Ashy Storm-petrels declined by 76% during the 22-year period from 1985 to 2006 in a large marine study region surrounding the Farallon Islands.⁹ Although the Service cited this study entitled “Long-and-short term factors affecting seabird population trends in the California Current System 1985-2006” for its discussion of how invasive grasses affect the Ashy Storm-petrel, it failed to acknowledge or consider the significant, recent decline in abundance reported by the study.

The Service also failed to consider the declining trend in Ashy Storm-petrel chick production (i.e. reproductive success) at SE Farallon Island during 1971-2006 that shows that chick production decreased significantly in the 1990s and has failed to recover since that time.¹⁰ The downward trend in reproductive success provides an important indicator that the SE Farallon Island population is declining. As stated by the draft July 5 Finding prior to its revision by the Regional Office, “an apparent increase in population size is not

⁷ FOIA 280_20090705_AshyStorm-Petrel12MonthFinding_clean at 51.

⁸ FOIA 213_7-20-09_Fw_Ashy 12-month sent_ (July 18, 2009 email from Bill McIver).

⁹ FOIA Ref 006_Ainley & Hyrenbach_In Press (David Ainley & David Hyrenbach, Long- and Short-Term Factors Affecting Seabird Population Trends in the California Current System (1985-2006)).

¹⁰ *See* FOIA Ref 161_McChesney_2008_Petition Comment (Comment letter submitted by acting Farallon Island National Wildlife Manager Gerald McChesney stating that “[i]n an analysis of data from 1971 - 1997, Sydeman et al. (2001) reported a declining trend in Ashy Storm-petrel breeding success that occurred during the 1990s. Annual monitoring since 1997 has shown that breeding success has remained similar to the 1990s level (Warzybok and Bradley 2007)”.); FOIA Ref 038_CBD 2007 Ashy Storm-Petrel petition_2007.pdf at 8.

supported by low levels of productivity that have been observed for the species at the island since at least 1994.”¹¹ Moreover, in making its determination, the Service discounted the published study of Sydeman et al. (1998) that estimated that the Ashy Storm-petrel experienced a 42 percent decline in abundance between 1972 and 1992.¹² Because the best-available science clearly indicates that the Ashy Storm-petrel is declining at SE Farallon Island, a colony site that supports approximately half the global population, the Service’s not warranted finding is arbitrary and capricious. *See Am. Wilderness v. Kempthorne*, 530 F.3d 991, 998 (D.C. Cir. 2008) (the “best available science” mandate of the ESA sets a basic standard that “prohibits the [agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.”).

B. The Service’s Unsupported Conclusion That Ashy Storm-Petrel Populations Are Increasing Contaminated the Service’s Threat and Significant Portion of Range Analyses

Because the Service’s threat analysis and significant portion of the range analysis relied on the improper conclusion that Ashy Storm-petrel populations are increasing, these analyses are also arbitrary, particularly with regard to the Service’s analysis of avian predation under factor C.

In draft findings through July 5, the Service conducted detailed analyses of the scientific evidence demonstrating that avian predation from Western gulls and burrowing owls threatens the Ashy Storm-petrel on SE Farallon Island. The July 5 Finding concluded that avian predation threatens the Ashy Storm-petrel based on the high observed rate of avian predation at SE Farallon Island which results in an estimated 4.5% mortality rate for breeding birds (e.g. predation averaged ~120 birds killed per year during 2003-2008 from a small population last estimated at 1990 breeding birds (p. 45)); this rate does not include birds that were depredated but never found, meaning that the predation rate is almost certainly higher; evidence that predation rates from Western gulls (p. 46) and burrowing owls (p. 47) have increased over time; and a population assessment that indicates that declines in the Ashy Storm-petrel population are likely a result of sustained or increasing avian predation: “Based on comparisons to studies of stable storm-petrel populations on relatively predator-free islands, we agree with Sydeman et al.’s (1998a, p. 30) assessment that the Ashy Storm-petrel population at Southeast Farallon Island is not stable, but is decreasing and is likely a result of sustained or increasing avian predation (i.e., western gulls and burrowing owls)” (p. 50).¹³

The Service’s final Finding cited the same evidence as the July 5 Finding, but came to the opposite conclusion, that avian predation does not pose a threat to the Ashy

¹¹ FOIA 280_20090705_AshyStorm-Petrel12MonthFinding_clean at 51.

¹² FOIA Ref 137_Sydeman et al._1998b (William J. Sydeman et al, *Status and Trends of the Ashy Storm-petrel on Southeast Farallon Island, California, Based Upon Capture-Recapture Analyses*, 100 CONDOR 438 (1998)).

¹³ FOIA 280_20090705_AshyStorm-Petrel12MonthFinding_clean at 50.

Storm-petrel. This demonstrates that the Service failed to use the best available science and relied on factors that Congress did not intend it to consider. The Service relied upon its misinterpretation of Warzybok and Bradley (2007) as a primary basis for this conclusion. Specifically, the Service determined that avian predation is not impacting the population on Southeast Farallon Island or rangewide because “[a]shy Storm-petrel populations appear to be increasing in the presence of such predation”:

Avian predation upon Ashy Storm-petrels at Southeast Farallon Island has probably occurred continually for decades. Based on recent reports showing possible increases in Ashy Storm-petrel survival and numbers (Warzybok and Bradley 2007, p. 17), we have no indication that such predation is impacting the population on Southeast Farallon Island or rangewide. We conclude that, since Ashy Storm-petrel populations appear to be increasing in the presence of such predation, we have no reason to believe that such predation will cause a change in that trend.

74 Fed. Reg. at 41845.

William McIver, the lead author on the finding, also raised strong concerns that the analysis of avian predation in the finding submitted to the Washington Office on July 12 was flawed based on its misinterpretation of Warzybok and Bradley (2007):

I find the revision to Factor C is flawed, and relies heavily upon select sentences from the PRBO Conservation Science reports, particularly Wazybok and Bradley (2007). It disregards text in these reports that acknowledge the limitations of their own preliminary analyses.

The revised Factor C section does not include text we recommended regarding factors that can influence capture rates, such as weather conditions and moonlight levels, and does not acknowledge (as does the PRBO reports) that numbers of non-breeders captured needs further analysis, and that capture probabilities of storm-petrels over time needs further analysis.¹⁴

Because the conclusion that Ashy Storm-petrels are increasing is fundamentally flawed, the conclusion that avian predation does not threaten the Ashy Storm-petrel is also scientifically unfounded and without legitimate support.

In making a finding, the Service is also required to conduct a Significant Portion of the Range (SPR) Analysis. To so doing, the Service purported to analyze “whether there are any significant portions of the range where the species is in danger of extinction or likely to become so in the foreseeable future” by “determining whether there is substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there.” 74 Fed. Reg. at 41859. Here, the Service determined that Southeast Farallon Island and the Channels Islands may be significant

¹⁴ FOIA 213_7-20-09_Fw_Ashy 12-month sent_.

but concluded that “neither the Ashy Storm-petrels on the Southeast Farallon Island or the Channel Islands are in danger of extinction (the second step in determining whether an area is a significant portion of the range), because there is not substantial information to suggest that the Ashy Storm-petrel in either portion may become an endangered species within the foreseeable future.” *Id.* at 41860. However, as discussed above, the Service discounted significant threats to the Southeast Farallon Island SPR based on misplaced reliance on the PRBO report. *Id.* at 41845, 41860. Accordingly, the conclusion that avian predation does not threaten the Ashy Storm-petrel in the SE Farallon Island SPR does not withstand scrutiny.

C. The Service’s Threat Analysis for the Ashy Storm-Petrol is Largely Based on Unsupported and Speculative Rationalizations

In reversing its initial conclusion that listing was warranted for the Ashy Storm-petrel, the Service altered its prior determinations that five threats, categorized under three listing factors, threaten the Ashy Storm-petrel with extinction. The Service based its new conclusions on illogical and scientifically unsupported statements that do not reflect the best-available science and contort the finding to conform to a “not warranted” outcome. Although none of the Service’s conclusions regarding the five identified threats were properly reasoned, the Service’s conclusions regarding skunk predation on Santa Cruz Island and oil pollution from offshore platforms and vessels are two particularly egregious examples of the unsupported and inadequate reasoning used in the finding.

The Service initially concluded that island spotted skunk predation poses a threat to the Ashy Storm-petrel at Santa Cruz Island now and in the foreseeable future. This conclusion was based on substantial data, including that: (a) almost 20% of the Ashy Storm-petrel breeding population (~102 adults of an estimated 535) on Santa Cruz Island was killed by spotted skunks in two recent events--a 2005 event which killed ~70 adults and decimated that largest Ashy Storm-petrel colony on Santa Cruz Island and a 2008 event which killed at least 32 adults and their nests; (b) spotted skunk numbers have increased on Santa Cruz Island; (c) “Ashy Storm-petrels nesting in all sea caves on the island are likely vulnerable to predation by skunks”; and (d) that the development and implementation of skunk management plans to prevent skunk predation is uncertain.¹⁵ The initial draft finding concluded that “predation of Ashy Storm-petrels by island spotted skunks poses a threat to Ashy Storm-petrels, and could occur at any sea cave at Santa Cruz Island where Ashy Storm-petrels breed, until population numbers of island spotted skunks at Santa Cruz Island reduce, and/or the distribution of island spotted skunks there changes such that they do not have access to sea caves.”¹⁶

However, the Service reversed this finding to conclude that spotted skunks do not pose a threat to the Ashy Storm-petrel by underplaying the severity of a threat that kills breeding adults and eliminates the age group that contributes most to population growth rate and by speculating that uncertain future skunk management measures will reduce

¹⁵ FOIA 280_20090705_AshyStorm-Petrel12MonthFinding_clean (draft July 5, 2009 finding) at 63.

¹⁶ *Id.* at 63.

predation. 74 Fed. Reg. 41845, 41847 (asserted that “efforts to control skunks by the Park will diminish the possibility of skunk predation even further.”). The Service’s speculative reliance on uncertain future management actions to justify its post-hoc reversal of the initial determination to list the Ashy Storm-petrel is without merit as courts have repeatedly struck down the dismissal of current threat based on uncertain future management actions because such wishful thinking violates the protective listing standard of the ESA. *See Biodiversity Legal Foundation v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996); *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9th Cir. 2001); *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000); *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998).

In its initial draft finding, the Service also concluded that the oil spills from offshore oil platforms and vessels pose a threat to the Ashy Storm-petrel. The Service cited the history of ongoing, frequent oil spills from the 26 active oil platforms in the Channel Islands and heavy vessel traffic along the California coast that have killed seabirds including Ashy Storm-petrels; the high estimated probability of future spills (e.g. 90.5 percent probability of a 22,800-barrel (957,600 U.S. gallons) tanker spill during years 2002 to 2030); and the large percentage of the Ashy Storm-petrel population that could be affected.¹⁷ However, in the final Finding, the Service reversed its conclusion, claiming that oil spills from platforms and tankers do not threaten the Ashy Storm-petrel by citing the same evidence as the initial finding but adding two unsupported statements to its conclusion:

We conclude that a relatively small proportion of the population would likely be exposed to any single oil spill, and consequently oil spills are not considered to be a significant threat to Ashy Storm-petrels anywhere within the species’ range. 74 Fed. Reg. at 41855.

However, the Service has no information indicating that tanker spills in the Monterey Bay are predictable or even likely. Therefore, we consider oiling from tanker spills to be insignificant to Ashy Storm-petrels anywhere within the species’ range. 74 Fed. Reg. at 41855.

These statements are not supported by the best available science. Studies cited by the Service indicate that the Ashy Storm-petrels form at-sea aggregations in close proximity to active oil platforms and major shipping routes,¹⁸ indicating that a spill could affect a substantial portion of the population. Another study cited by the Service, which provides data on the frequency and size of major oil spills from tankers and vessels in California from 1984-2003 as well as numbers of seabirds killed, found that 6 of 12 major spill incidents affected Sonoma to Monterey county waters that encompass Monterey Bay.¹⁹

¹⁷ *Id.* at 108.

¹⁸ FOIA Ref 001_Adams & Takekawa_2008 (J. Adams & J.Y. Takekawa, *At-Sea Distribution of Radio-Marked Ashy Storm-Petrels *Oceanodroma Homochroa* Captured on the California Channel Islands*, 36 MARINE ORNITHOLOGY 9 (2008)); FOIA Ref 131_ShearwaterJourneys_2008 (Shearwater’s Journeys, Sep 12 Monterey Bay, Birds, Birds, Birds!, www.shearwaterjourneys.blogspot.com).

¹⁹ FOIA Ref 058_Hampton et al._2003 (Steve Hampton et al, *Tank Vessel Operations, Seabirds, and Chronic Oil Pollution in California*, 31 MARINE ORNITHOLOGY 29 (2003)).

This study contradicts the Service's unsupported claim that "the Service has no information indicating that tanker spills in the Monterey Bay are predictable or even likely." 74 Fed. Reg. at 41855.

D. The Factor Analysis Fails to Consider Cumulative Impacts to the Ashy Storm-Petrel

The finding is further flawed because it looks at each of the multitude of threats facing the Ashy Storm-petrel in isolation, rather than examining their cumulative effect on species survival. In doing so, the finding downplays the collective threat to the Ashy Storm-petrel. Absent a cumulative analysis, the conclusion that the species does not warrant listing under the ESA cannot stand.

III. CONCLUSION

The Service's determination that listing of the ashy storm petrel is "not warranted" violates the specific mandates of the ESA regarding how a determination as to whether to list a species is to be made because it is not based on the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The Service's determination is therefore arbitrary and capricious in violation of the ESA and APA.

If the Service does not act within 60 days to correct this violation of the ESA, the Center for Biological Diversity will pursue litigation in Federal Court against the Service and will seek injunctive and declaratory relief regarding these violations. If you have any questions, wish to discuss this matter, or believe this notice is in error, please contact me at 415-436-9682 x 309. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Vespa", with a long horizontal flourish extending to the right.

Matthew Vespa
Senior Attorney
Center for Biological Diversity