

1 Justin Augustine (CA Bar No. 235561)
2 Center for Biological Diversity
3 1212 Broadway, Suite 800
4 Oakland, CA 94612
5 (503) 910-9214
6 jaugustine@biologicaldiversity.org

7 Brian Segee (CA Bar No. 200795)
8 Center for Biological Diversity
9 660 S. Figueroa Street, Suite 1000
10 Los Angeles, CA 90017
11 (805) 750-8852
12 bsegee@biologicaldiversity.org

13 *Attorneys for Plaintiffs*

14 **UNITED STATES DISTRICT COURT**
15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

16 **LOS PADRES FORESTWATCH;**) Case No. 2:19-cv-05925
17 **EARTH ISLAND INSTITUTE; and**)
18 **CENTER FOR BIOLOGICAL**)
19 **DIVERSITY,**)

20 Plaintiffs,)

21 v.)

) **COMPLAINT FOR**
) **DECLARATORY AND**
) **INJUNCTIVE RELIEF**

22 **UNITED STATES FOREST SERVICE;**)
23 **KEVIN B. ELLIOTT, Supervisor, Los**)
24 **Padres National Forest; and UNITED**)
25 **STATES FISH AND WILDLIFE**)
26 **SERVICE,**)

27 Defendants.)
28)

1 **INTRODUCTION**

2 1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331
3 (federal question), 28 U.S.C. § 1346 (United States as a defendant), and 5 U.S.C. §§
4 701-706 (Administrative Procedure Act).

5 2. This Court has authority to grant the requested relief pursuant to 28 U.S.C.
6 §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706
7 (Administrative Procedure Act).

8 3. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e)(1).

9 4. Plaintiffs Los Padres ForestWatch, Earth Island Institute and Center for
10 Biological Diversity challenge the “Tecuya Project” in the Los Padres National Forest.
11 The Project will log over 1,000 acres of National Forest land, destroying California
12 condor habitat and desecrating the Antimony Inventoried Roadless Area in the process.

13 5. Inventoried Roadless Areas are protected from logging by the federal
14 Roadless Area Conservation Rule (“Roadless Rule”), except in limited circumstances
15 when the logging of small diameter trees is allowed. Here, the U.S. Forest Service
16 violated the Roadless Rule by authorizing the logging of all diameter classes and by
17 failing to protect the Area’s roadless characteristics.

18 6. The U.S. Forest Service also violated the National Environmental Policy
19 Act (“NEPA”) when approving the Tecuya Project. The agency wrongly relied on a
20 “categorical exclusion” under NEPA instead of conducting an environmental assessment
21 (“EA”) or environmental impact statement (“EIS”), thereby short-circuiting public
22 involvement and the consideration of alternatives to the Project.

23 7. Moreover, U.S. Fish and Wildlife Service condor tracking data shows that
24 the Tecuya Project could impact over 50 condor roost sites. These roost sites are
25 typically large live or dead trees that are used by condors for resting overnight between
26 long flights. The Forest Service Decision Memo for the Project ignores these known
27 roost sites and thus does not protect them as required by law. Plaintiffs have sent the
28

1 Forest Service a 60-day notice of intent to sue under the Endangered Species Act
2 (“ESA”) if the Forest Service does not correct this wrongful action.

3 8. The U.S. Fish and Wildlife Service is also complicit in causing harm to the
4 endangered California condor. The Fish and Wildlife Service ignored its own data
5 showing the presence of numerous roosting sites in the Project area and therefore was
6 arbitrary and capricious under the ESA and Administrative Procedure Act (“APA”)
7 when it wrongly concluded the Project is “not likely to adversely affect” the California
8 condor.

9 **PARTIES**

10 9. The Forest Service approved the Tecuya Project in the Los Padres National
11 Forest on April 9, 2019, in contravention of NEPA, the National Forest Management Act
12 (NFMA), the ESA, the Roadless Area Conservation Rule, and the Administrative
13 Procedure Act (APA).

14 10. In addition, the U.S. Fish and Wildlife Service issued a “not likely to
15 adversely affect” finding for the Project in violation of the ESA and APA.

16 11. Some of Plaintiffs’ members have used and enjoyed the tracts of forest and
17 lands where the Project is set to occur, and have specific plans to return. They will be
18 directly harmed by this Project.

19 12. Plaintiff LOS PADRES FORESTWATCH (“ForestWatch”) is a nonprofit
20 corporation headquartered in Santa Barbara, California. The organization’s mission is to
21 protect and restore public lands along the Central Coast through legal advocacy,
22 scientific collaboration, and community outreach. ForestWatch focuses its work
23 throughout the Los Padres National Forest and nearby public lands. To further its
24 mission and protect the interests of its members and supporters in preserving public
25 lands, ForestWatch monitors forest conditions and activities in the Los Padres National
26 Forest and reviews and comments on proposed Forest Service projects. ForestWatch
27 also organizes habitat restoration and forest stewardship projects using crews of
28

1 volunteers, making the forest a better place for all to enjoy and visit. In addition,
2 ForestWatch programs seek to engage underserved youth by providing them with
3 opportunities to explore nature and foster an appreciation of the outdoors.

4 13. ForestWatch's members include individuals who regularly use public lands
5 within the Los Padres National Forest, including the Tecuya Project areas proposed for
6 logging in particular, for scientific study, recreational enjoyment, aesthetic beauty, and
7 nature photography. These members' interests will be irreparably harmed by the
8 planned logging, as they will no longer be able to take nature photographs of the area in
9 its pre-logging state, enjoy the aesthetic beauty of the unlogged forest habitat and its
10 inhabitants, or observe endangered California condors in the area.

11 14. Plaintiff EARTH ISLAND INSTITUTE (EII) is a nonprofit corporation
12 organized under the laws of the State of California. EII is headquartered in Berkeley,
13 California. EII's mission is to develop and support projects that counteract threats to the
14 biological and cultural diversity that sustains the environment. Through education and
15 activism, these projects promote the conservation, preservation and restoration of the
16 earth. One of these projects is the John Muir Project—whose mission is to protect all
17 federal public forestlands from exploitation that undermines and compromises science-
18 based ecological management. John Muir Project offices are in San Bernardino County,
19 California. EII is a membership organization with over 15,000 members in the U.S.,
20 over 3,000 of whom use and enjoy the National Forests of California for recreational,
21 educational, aesthetic, spiritual, and other purposes. EII through its John Muir Project
22 has a longstanding interest in protection of national forests. EII's John Muir Project and
23 EII members actively participate in governmental decision-making processes with
24 respect to national forest lands in California and rely on information provided through
25 the NEPA processes to increase the effectiveness of their participation.

26 15. EII's members include individuals who regularly use public lands within
27 the Los Padres National Forest, including the Tecuya Project areas proposed for logging
28

1 in particular, for scientific study, recreational enjoyment, aesthetic beauty, and nature
2 photography. These members' interests will be irreparably harmed by the planned
3 logging, as they will no longer be able to scientifically study these areas in their pre-
4 logging state, take nature photographs of the area in its pre-logging state, or enjoy the
5 aesthetic beauty of the unlogged forest habitat and its inhabitants.

6 16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the Center) is a non-
7 profit corporation with offices in Oakland, Los Angeles, and Joshua Tree, California.
8 The Center is actively involved in species and habitat protection issues throughout North
9 America and has about 69,000 members, including many members who reside and
10 recreate in California. One of the Center's primary missions is to protect and restore
11 habitat and populations of imperiled species, including from the impacts of logging.

12 17. The Center's members and staff include individuals who regularly use and
13 intend to continue to use the Los Padres National Forest, including the lands that are
14 now planned for logging as part of the Tecuya Project. These members and staff use the
15 area for observation, research, aesthetic enjoyment, and other recreational, scientific,
16 spiritual, and educational activities. Many of the Center's staff and members use the
17 area to enjoy its character and to observe or study imperiled species, like the condor,
18 which have habitat in the Project area. These members' interests will be irreparably
19 harmed by the planned logging in the Project area, as they will neither be able to visit
20 and enjoy this area in its unlogged state any longer, nor be able to observe or attempt to
21 observe the species which use and are dependent on these areas in their unlogged state.

22 18. This suit is brought by ForestWatch, EII, and the Center on behalf of
23 themselves and their adversely affected members and staff. Plaintiffs and their
24 members' present and future interests in and use of the Tecuya Project areas are and will
25 be directly and adversely affected by the challenged decision. Those adverse effects
26 include, but are not limited to: (1) impacts to native plants and wildlife and their habitats
27 within and around the Project areas from logging; (2) reduction and impairment of
28

1 recreation opportunities; (3) impaired aesthetic value of forest lands, trails, and
2 landscapes caused by Defendants' logging; and (4) loss of scientific study and viewing
3 opportunities with regard to wildlife in areas proposed for logging. In addition,
4 Plaintiffs and their members and staff have an interest in ensuring that Defendants
5 comply with all applicable laws, regulations, and procedures pertaining to the
6 management of national forest lands.

7 19. Because Defendants' actions approving the Project violate the law, a
8 favorable decision by this Court will redress the actual and imminent injury to Plaintiffs.

9 20. If the Forest Service had complied with its legal duties under NEPA, it
10 would have prepared an Environmental Assessment (EA) or Environmental Impact
11 Statement (EIS) with a range of alternatives, thereby undertaking a more thorough
12 environmental analysis and minimizing or averting the harm to Plaintiffs' members that
13 will be caused from the logging and destruction of wildlife habitat by the Project.

14 21. Defendant KEVIN B. ELLIOTT is sued in his official capacity as the
15 Supervisor of the Los Padres National Forest. He is directly responsible for forest
16 management in the Los Padres National Forest and for ensuring that all resource
17 management decisions comply with applicable laws and regulations. Supervisor Elliott
18 signed the Decision Memo for the Tecuya Project challenged here.

19 22. Defendant UNITED STATES FOREST SERVICE is a federal government
20 agency within the Department of Agriculture, which holds the National Forests in trust
21 for the American people and is responsible for actions in the Tecuya Project area.

22 23. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the
23 federal agency within the Department of Interior charged with responsibility for
24 conserving endangered and threatened species under the Endangered Species Act, for
25 enforcing and implementing the ESA, and for complying with the APA in connection
26 with the Service's ESA actions.

1 **STATUTORY FRAMEWORK**

2 **THE ADMINISTRATIVE PROCEDURE ACT (“APA”)**

3 24. The APA allows persons and organizations to challenge final agency
4 actions in the federal courts. 5 U.S.C. §§ 702, 704. The APA declares that a court shall
5 hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of
6 discretion, or otherwise not in accordance with law. *Id.* § 706(2)(A).

7 **THE NATIONAL ENVIRONMENTAL POLICY ACT (“NEPA”)**

8 25. Congress enacted NEPA, 42 U.S.C. §§ 4321-4370h, to, among other things,
9 “encourage productive and enjoyable harmony between man and his environment” and
10 to promote government efforts “that will prevent or eliminate damage to the
11 environment.” *Id.* § 4321. As a general matter, NEPA requires that federal agencies
12 analyze and disclose to the public the environmental impacts of their actions. *Id.* §
13 4332(2)(C).

14 26. To this end, the Council on Environmental Quality (CEQ) has promulgated
15 regulations implementing NEPA. Among other things, the rules are intended to “tell
16 federal agencies what they must do to comply with the procedures and achieve the goal
17 of [NEPA],” to “insure that environmental information is made available to public
18 officials and decisions are made and before actions are taken,” and to ensure “better
19 decisions” and “foster excellent action.” 40 C.F.R. § 1500.1(a)-(c).

20 27. CEQ’s regulations mandate that “NEPA procedures must insure that
21 environmental information is available to public officials and citizens before decisions
22 are made and before actions are taken,” and emphasize that “[a]ccurate scientific
23 analysis, expert agency comments, and public scrutiny are essential to implementing
24 NEPA.” 40 C.F.R. § 1500.1(b).

25 28. Under NEPA, federal agencies are required to consider the potential
26 environmental impact of all agency actions. 42 U.S.C. §§ 4321-4370m. Where agency
27 actions may have potentially significant effects, the agency must prepare an
28

1 Environmental Impact Statement (“EIS”). 40 C.F.R. § 1502.9. Where the agency is not
2 sure whether an EIS is required, it must prepare an Environmental Assessment (“EA”).
3 40 C.F.R. § 1508.9.

4 29. NEPA requires agencies to develop procedures to implement the Act. 40
5 C.F.R. § 1507.3. These procedures permit agencies to establish specific categories of
6 actions that “do not individually or cumulatively have a significant effect on the human
7 environment and which have been found to have no such effect,” known as “categorical
8 exclusions.” 40 C.F.R. §§ 1508.4 & 1507.3(b). For these categories of actions, the
9 agency need not prepare either an EA or an EIS, but only if no “extraordinary
10 circumstances” exist related to the proposed action. *See e.g.* 36 C.F.R. § 220.6.

11 30. Forest Service regulations define the “extraordinary circumstances” that
12 may require preparation of an EA or EIS even where the action meets the definition of a
13 particular categorical exclusion. These circumstances include the presence of, and
14 impacts to:

15 (i) Federally listed threatened or endangered species or designated
16 critical habitat, species proposed for Federal listing or proposed
17 critical habitat, or Forest Service sensitive species; ... [and]

18 (iv) Inventoried roadless area or potential wilderness area

19 36 C.F.R. § 220.6(b)(1)(i) & (iv). The “mere presence” of one of these resource
20 conditions does not require the agency to prepare an EA or EIS. 36 C.F.R. § 220.6(b)(2).
21 Instead, “[i]t is the existence of a cause-effect relationship between a proposed action
22 and the potential effect on these resource conditions, and if such a relationship exists, the
23 degree of the potential effect of a proposed action on these resource conditions that
24 determines whether extraordinary circumstances exist.” *Id.*

25 31. In undertaking environmental analysis, each agency must consider
26 environmental impacts including direct, indirect, and cumulative effects. 40 C.F.R.
27 § 1508.8(b). Cumulative impacts are defined as “the impact on the environment which
28

1 results from the incremental impact of the action when added to other past, present, and
2 reasonably foreseeable future actions regardless of what agency (federal or non-federal)
3 or person undertakes such other actions. Cumulative impacts can result from
4 individually minor but collectively significant actions taking place over a period of
5 time.” 40 C.F.R. § 1508.7.

6 32. In addition, when conducting environmental analysis pursuant to an EA or
7 EIS, an agency must consider alternatives to the proposed action. *See e.g.* 40 C.F.R. §
8 1508.9(b).

9 **THE NATIONAL FOREST MANAGEMENT ACT (“NFMA”)**

10 33. The National Forest Management Act directs the Forest Service to develop
11 Land and Resource Management Plans (“Forest Plans”) by which to manage each
12 National Forest. 16 U.S.C. § 1604.

13 34. The Forest Service implements a Forest Plan by approving or disapproving
14 particular projects such as the Tecuya Project here. Proposed projects must be consistent
15 with the Forest Plan. *Id.* at § 1604(i).

16 **THE ROADLESS AREA CONSERVATION RULE (“ROADLESS RULE”)**

17 35. The Roadless Area Conservation Rule, adopted by the Forest Service in
18 2001, generally prohibits road construction and the cutting, sale, or removal of trees
19 within identified “inventoried roadless areas.” 36 C.F.R. § 294.12(a) & 294.13(a),
20 published in 66 Fed. Reg. 3244, 3272-73 (Jan. 12, 2001).

21 36. However, the Forest Service may approve logging “infrequent[ly]” in
22 inventoried roadless areas if the agency determines that certain circumstances exist,
23 including the following:

- 24 (1) The cutting, sale, or removal of *generally small diameter timber* is
25 needed for one of the following purposes and will maintain or
26 improve one or more of the roadless area characteristics as defined in
27 § 294.11.
28

1 (i) To improve threatened, endangered, proposed, or sensitive species
2 habitat; or

3 (ii) To maintain or restore the characteristics of ecosystem
4 composition and structure, such as to reduce the risk of
5 uncharacteristic wildfire effects, within the range of variability
6 that would be expected to occur under natural disturbance regimes
7 of the current climatic period.

8 36 C.F.R. § 294.13 (emphasis added).

9 37. Roadless area characteristics as defined in § 294.11 are as follows: (1) High
10 quality or undisturbed soil, water, and air; (2) Sources of public drinking water; (3)
11 Diversity of plant and animal communities; (4) Habitat for threatened, endangered,
12 proposed, candidate, and sensitive species and for those species dependent on large,
13 undisturbed areas of land; (5) Primitive, semi-primitive nonmotorized and semi-
14 primitive motorized classes of dispersed recreation; (6) Reference landscapes; (7)
15 Natural appearing landscapes with high scenic quality; (8) Traditional cultural properties
16 and sacred sites; and (9) Other locally identified unique characteristics.

17 **THE ENDANGERED SPECIES ACT (“ESA”)**

18 38. Section 7 of the ESA requires each federal agency, in consultation with the
19 U.S. Fish and Wildlife Service, to insure that any action authorized, funded, or carried
20 out by the agency is not likely to (1) jeopardize the continued existence of any
21 threatened or endangered species or (2) result in the destruction or adverse modification
22 of the critical habitat of such species. 16 U.S.C. § 1536(a)(2).

23 39. “Action” is broadly defined to include actions that may directly or
24 indirectly cause modifications to the land, water, or air; and actions that are intended to
25 conserve listed species or their habitat. 50 C.F.R. § 402.02.

26 40. If listed or proposed species may be present in the project area, the federal
27 agency must prepare a “biological assessment” to determine whether the listed species
28

1 may be affected by the proposed action. 50 C.F.R. § 402.12.

2 41. If the agency determines that its proposed action may affect any listed
3 species or critical habitat, the agency must normally engage in “formal consultation”
4 with the U.S. Fish and Wildlife Service. 50 C.F.R. § 402.14. However, an agency need
5 not initiate formal consultation if, as a result of the preparation of a biological
6 assessment or as a result of informal consultation with the U.S. Fish and Wildlife
7 Service, the agency determines, with the written concurrence of the U.S. Fish and
8 Wildlife Service, that the proposed action is not likely to adversely affect any listed
9 species or critical habitat. *Id.*

10 42. If the U.S. Fish and Wildlife Service concludes that the proposed action
11 “will jeopardize the continued existence” of a listed species, a “biological opinion” must
12 outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the
13 biological opinion concludes that the action is not likely to jeopardize the continued
14 existence of a listed species, and will not result in the destruction or adverse
15 modification of critical habitat, the U.S. Fish and Wildlife Service must provide an
16 “incidental take statement,” specifying the amount or extent of such incidental taking on
17 the species, any “reasonable and prudent measures” that USFWS considers necessary or
18 appropriate to minimize such impact, and setting forth the “terms and conditions” that
19 must be complied with by the agency to implement those measures. 16 U.S.C. §
20 1536(b)(4); 50 C.F.R. § 402.14(i).

21 43. Agencies must also reinitiate consultation on agency actions over which the
22 federal agency retains, or is authorized to exercise, discretionary involvement or control
23 . . . “(b) If new information reveals effects of the action that may affect listed species or
24 critical habitat in a manner or to an extent not previously considered” 50 C.F.R. §
25 402.16.

26 44. After the initiation or reinitiation of consultation, the federal agency is
27 prohibited from making any irreversible or irretrievable commitment of resources with
28

1 respect to the agency action. 16 U.S.C. § 1536(d).

2 45. In fulfilling its obligation to ensure that its actions do not jeopardize the
3 continued existence of any endangered species or destroy or adversely modify its critical
4 habitat, the federal agency is required to use the best scientific and commercial data
5 available. 16 U.S.C. § 1536(a)(2).

6 **FACTUAL BACKGROUND**

7 46. On March 13, 2018, the Los Padres National Forest proposed the Tecuya
8 Project. The Forest Service stated that it did not plan to conduct an EA or EIS for the
9 Project because the agency believed the Project would fit within the “categorical
10 exclusion” for “[t]imber stand and/or wildlife habitat improvement activities that do not
11 include the use of herbicides or do not require more than 1 mile of low standard road
12 construction.” *See* 36 C.F.R. § 220.6(e)(6).

13 47. Plaintiffs commented on the Tecuya Project proposal in April 2018, noting,
14 among other things:

- 15 • The importance of the Project area as a roosting area for the endangered
16 California condor;
- 17 • The significant harm logging can cause to habitat for condors and other
18 wildlife;
- 19 • The lack of science supporting the Forest Service’s proposal;
- 20 • The published science showing the Forest Service’s proposal would be
21 ineffective;
- 22 • The undeveloped character of the Antimony Inventoried Roadless Area that
23 would be damaged by the logging;
- 24 • The Roadless Rule’s requirement to log only small diameter trees;
- 25 • The need to prepare an EA or EIS;
- 26 • The need to disclose and address the cumulative impacts of the Tecuya
27 Project, together with other projects, including the directly adjoining Cuddy
28

1 Valley Project which would log or otherwise remove trees on a neighboring
2 1,200 acres.

3 48. Plaintiffs also provided the Forest Service with supplemental comments
4 containing additional information, such as with respect to the Project's impacts to
5 condors, in September 2018, December 2018, and April 2019.

6 49. On April 9, 2019, Los Padres National Supervisor Kevin Elliott signed a
7 Decision Memo approving the Tecuya Project. The Decision Memo notes that the
8 agency received public comments but provides no substantive responses to any of them.
9 The Decision Memo further states that the agency's decision "is not subject to
10 administrative review or appeal." The Decision Memo concludes that "[t]his action is
11 categorically excluded from documentation in an environmental impact statement (EIS)
12 or an environmental assessment (EA)," relying on 36 CFR 220.6(e)(6).

13 50. Concerning potential impacts to the Antimony Inventoried Roadless Area,
14 the Decision Memo relies on the October 12, 2018, Decision Memorandum by Deputy
15 Regional Forester Bernie Gyant concluding that the Tecuya Project "is consistent with
16 the 2001 Roadless Area Conservation Rule." The Decision Memorandum does not
17 address, however, the fact that the Project authorizes the logging of large trees, and
18 instead the Decision Memorandum assumes that only "trees less than 21 inches DBH
19 [diameter at breast height]" will be logged. The Decision Memorandum also does not
20 explain why a 21 inch diameter tree is a small diameter tree.

21 51. Concerning potential impacts to endangered California condors, the
22 Decision Memo relies on a Forest Service Biological Assessment and a concurrence
23 letter from the U.S. Fish and Wildlife Service (USFWS) concluding that the proposed
24 Project is "not likely to adversely affect" the California condor. Neither the Forest
25 Service's Decision Memo nor the USFWS concurrence, however, acknowledge or
26 address the detailed roosting data that shows that condors are utilizing large live trees
27 and snags within the Tecuya Project area and within the Antimony Inventoried Roadless
28

1 Area for overnight roosting.

2 52. The Decision Memo contains multiple, contradictory, statements about tree
3 diameter limits for logging. For instance, the Decision Memo states that “[t]rees would
4 be removed throughout all diameter classes and would include the removal of
5 commercial trees,” but also states that “only smaller trees (21 inches diameter breast
6 height or less) would be cut or removed for safety or operability reason.” Moreover,
7 none of the Project’s “Design Features” included in the Decision Memo’s appendix
8 include any diameter limits, and the Decision allows large snags to be removed “at the
9 discretion” of the logger.

10 53. The Tecuya Project also impacts the California spotted owl and yellow-
11 blotched salamander, which are “Sensitive Species.”

12 54. The Los Padres Forest Plan and the Tecuya Project Decision Memo require
13 surveys for spotted owls prior to Project implementation. To date, on information and
14 belief, the Forest Service has not conducted the surveys.

15 55. The Tecuya Decision also states that “suitable habitat for [the yellow-
16 blotched salamander] is present within the project area, but the species has not been
17 documented.” There are, however, at least two known occurrences within the Project
18 area.

19 56. In November 2018, the Los Padres National Forest approved the Cuddy
20 Valley Project, which will log or otherwise remove trees on 1,200 acres, including
21 Forest Service land that directly abuts the Tecuya Project. The Tecuya Decision Memo
22 contains no mention of the adjacent Cuddy Valley project.

23 **CLAIMS FOR RELIEF**

24 **FIRST CAUSE OF ACTION**

25 **National Environmental Policy Act Violations: Failure To Prepare An**
26 **Environmental Assessment Or Environmental Impact Statement**

27 57. The allegations in all previous paragraphs are incorporated herein by
28

1 reference.

2 58. NEPA requires federal agencies, including the Forest Service, to complete
3 an EA or an EIS, and to consider reasonable alternatives, before approving any major
4 proposed federal action, unless the proposed action falls under a “categorical exclusion”.
5 *See* 40 C.F.R. § 1508.18, 1508.9, 1508.11, 1508.4.

6 59. Moreover, even where an action meets the definition of a particular
7 categorical exclusion, if “extraordinary circumstances” exist due to the action,
8 preparation of an EA or EIS is still required. 36 C.F.R. § 220.6. These “extraordinary
9 circumstances” include the presence of, and impacts to the following “resource
10 conditions”:

11 (i) Federally listed threatened or endangered species or designated
12 critical habitat, species proposed for Federal listing or proposed
13 critical habitat, or Forest Service sensitive species; ... [and]

14 (iv) Inventoried roadless area or potential wilderness area

15 36 C.F.R. § 220.6(b)(1)(i) & (iv). The “mere presence” of one of these resource
16 conditions does not require the agency to prepare an EA or EIS rather than use the
17 categorical exclusion, 36 C.F.R. § 220.6(b)(2). It is “the existence of a cause-effect
18 relationship between a proposed action and the potential effect on these resource
19 conditions, and if such a relationship exists, the degree of the potential effect of a
20 proposed action on these resource conditions that determines whether extraordinary
21 circumstances exist.” *Id.* If the agency determines that it is uncertain whether the
22 proposed action may have a significant effect on the environment, it must prepare an
23 EA. 36 C.F.R. § 220.6(c).

24 60. The Forest Service concluded that the Tecuya Project fits within the
25 following “categorical exclusion”: “Timber stand and/or wildlife habitat improvement
26 activities that do not include the use of herbicides or do not require more than 1 mile of
27 low standard road construction.” 36 C.F.R. § 220.6(e)(6). This “categorical exclusion”
28

1 cannot be used for the Tecuya Project, however, because:

- 2 • The project size does not allow it. For example, harvest of live trees is not
3 to exceed 70 acres under a categorical exclusion. 36 C.F.R. § 220.6(e)(12).
4 This Project will log over 1,000 acres of live trees.
- 5 • This Project cannot qualify as a “timber stand improvement activity.” The
6 Forest Service defines “timber stand improvement” to be “[a]n intermediate
7 treatment of trees not past the sapling stage made to improve the
8 composition, structure, condition, health, and growth of even- or uneven-
9 aged stands.” Forest Service Manual § 2470.5. The Tecuya Project
10 authorizes logging of trees far past the sapling stage.
- 11 • “Extraordinary circumstances” are present and the Forest Service’s
12 “extraordinary circumstances” analysis was flawed. For example, with
13 respect to the federally endangered California condor, the Forest Service
14 ignored the U.S. Fish and Wildlife Service condor tracking data showing
15 the presence of numerous condor roosts in the Project area and thereby
16 failed to protect those roosting sites. Moreover, the Forest Service failed to
17 ensure that roosting trees – large live trees and snags – will be retained in
18 the Project area. The Forest Service’s “extraordinary circumstances”
19 analysis with respect to the Antimony Inventoried Roadless Area was
20 likewise flawed because the Forest Service ignored impacts to important
21 roadless area characteristics such as the Antimony Area’s “[n]atural
22 appearing landscapes with high scenic quality.” *See* 36 C.F.R. § 294.11.
23 Logging obviously damages the natural appearance and scenic value of a
24 roadless area and the Forest Service neither mentions nor analyzes such
25 impacts. Moreover, Forest Service regulations identify classes of actions
26 that “normally” require preparation of an EIS, and these include
27 “[p]roposals that would substantially alter the undeveloped character of an
28

1 inventoried roadless area . . . ,” 36 C.F.R. § 220.5(a)(2), which is the case
2 here because logging unequivocally will degrade the Area’s character.

- 3 • Factors are present that require the preparation of at least an EA.
4 Specifically, NEPA’s implementing regulations describe a number of
5 factors to be considered when assessing a project’s potential for significant
6 impacts that would necessitate an EA or EIS. 40 C.F.R. §1508.27. These
7 factors include “the degree to which the effects on the quality of the human
8 environment are likely to be highly controversial,” “the degree to which the
9 possible effects on the human environment are highly uncertain or involve
10 unique or unknown risks,” and “the degree to which the proposed action
11 affects public health or safety.” *Id.* Here, those factors are present to a
12 degree that requires the preparation of at least an EA. For instance, there
13 exists a substantial dispute regarding the efficacy of the Tecuya Project
14 because evidence casts serious doubt upon the Forest Service’s conclusions.
15 As described in a journal publication (Syphard et al. 2011) regarding the
16 efficacy of fuelbreaks, the Tecuya Project is too remote to be effective:
17 “[T]his study strongly supports the notion of constructing fuel breaks along
18 the wildland–urban interface where firefighters will have better access to
19 the fuel breaks, and where the fuel breaks will provide an immediate line of
20 defense adjacent to homes that are at risk. . . . [C]onstructing fuel breaks in
21 remote, backcountry locations will do little to save homes during a wildfire
22 because most firefighters will be needed to protect the wildland–urban
23 interface, and fires will not be stopped by those fuel breaks that are located
24 farther away.”
 - 25 • Moreover, the Project will take resources away from effective fire
26 management actions such as creating defensible space near homes.

27 61. For the above reasons, the Forest Service’s reliance on a “categorical
28

1 exclusion”, and its failure to complete an EA or an EIS before approving the Tecuya
2 Project, violates NEPA and was arbitrary, capricious, an abuse of discretion, or
3 otherwise not in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A).

4 **SECOND CAUSE OF ACTION**

5 **National Environmental Policy Act Violations: Failure To Address**
6 **Cumulative Impacts**

7 62. The allegations in each paragraph above are incorporated herein by
8 reference.

9 63. NEPA and the APA require federal agencies to ensure that their projects
10 will not cause significant impacts and to consider the cumulative effects associated with
11 a proposed project when doing so. *See e.g.* 40 C.F.R. § 1508.8(b), 40 C.F.R. §
12 1508.27(b)(7)

13 64. Cumulative impacts are defined as “the impact on the environment which
14 results from the incremental impact of the action when added to other past, present, and
15 reasonably foreseeable future actions regardless of what agency (federal or non-federal)
16 or person undertakes such other actions. Cumulative impacts can result from
17 individually minor but collectively significant actions taking place over a period of
18 time.” 40 C.F.R. § 1508.7.

19 65. Despite the fact that the Cuddy Valley Project is directly adjacent to the
20 Tecuya Project, the Forest Service failed to disclose or analyze the cumulative impacts
21 of the two Projects together. Together, the Projects will log over 2,000 acres of National
22 Forest land, and without a diameter limit, thus leading to degradation of habitat and loss
23 of fire-resistant large trees.

24 66. The Forest Service’s failure to disclose and analyze the cumulative impacts
25 of the Tecuya Project together with the impacts of the Cuddy Valley Project violates
26 NEPA and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
27 with law under the APA, 5 U.S.C. § 706(2)(A).

THIRD CAUSE OF ACTION

Roadless Area Conservation Rule Violation

67. The allegations in each paragraph above are incorporated herein by reference.

68. The Roadless Area Conservation Rule generally prohibits road construction and the cutting, sale, or removal of trees within identified “inventoried roadless areas.” 36 C.F.R. § 294.12(a) & 294.13(a), published in 66 Fed. Reg. 3244, 3272-73 (Jan. 12, 2001). However, the Forest Service may approve logging “infrequent[ly]” in inventoried roadless areas if the agency determines that certain narrow circumstances exist, including the following:

(1) The cutting, sale, or removal of generally small diameter timber is needed for one of the following purposes and will maintain or improve one or more of the roadless area characteristics as defined in § 294.11.

(i) To improve threatened, endangered, proposed, or sensitive species habitat; or

(ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.

36 C.F.R. § 294.13.

69. The Tecuya Project does not comply with the Roadless Rule’s mandates because:

- The Forest Service’s Roadless Decision Memorandum is based on improper assumptions and falsehoods. For example, it presumes that the Project involves “mechanical thinning of trees less than 21 inches DBH,” but the

1 Project does not contain a 21 inch diameter cap.

- 2 • The Decision Memo and Project documents contain contradictory
3 statements about a diameter limit and allow the logging of any diameter tree
4 in violation of the requirement to limit logging to “generally small diameter
5 timber.”
- 6 • Even if a 21 inch diameter cap existed, it would not be legal because no
7 explanation is provided, nor could one be, to justify the assertion that a 21
8 inch diameter tree is a small diameter tree. Small diameter trees are
9 normally 10 inches or less in diameter on the Los Padres National Forest.
- 10 • The Tecuya Project will destroy, rather than improve, habitat for the
11 endangered California condor. For example, known roosting habitat can be
12 logged and thus will not be properly protected from the logging.
- 13 • The Forest Service failed to demonstrate that the Tecuya Project will
14 maintain or improve one or more of the roadless area characteristics as
15 defined in 36 C.F.R. § 294.11.

16 70. For the above reasons, the Forest Service violated the Roadless Area
17 Conservation Rule in approving the Tecuya Project and its Decision was arbitrary,
18 capricious, an abuse of discretion, or otherwise not in accordance with law under the
19 APA, 5 U.S.C. § 706(2)(A).

20 **FOURTH CAUSE OF ACTION**

21 **Endangered Species Act Violation: Arbitrary and Capricious “Not Likely To** 22 **Adversely Affect” Determination**

23 71. The allegations in each paragraph above are incorporated herein by
24 reference.

25 72. On January 28, 2019, the U.S. Fish and Wildlife Service issued a letter to
26 the Forest Service stating that the agency concurred with the Forest Service’s
27 determination that the Tecuya Project is “not likely to adversely affect” the endangered
28

1 California condor.

2 73. However, both the Forest Service and the U.S. Fish and Wildlife Service, in
3 making their “not likely to adversely affect” conclusions, ignored the U.S. Fish and
4 Wildlife Service’s condor tracking data showing that the Project area includes numerous
5 roosting sites for California condor.

6 74. Plaintiffs sent a 60-day notice of intent to sue under the Endangered Species
7 Act to the Forest Service on July 10, 2019, explaining that the Forest Service’s failure to
8 properly address and protect condor roosting sites violates the Endangered Species Act.

9 75. By failing to address their own condor tracking data showing roosting sites
10 in and near the Project area, the U.S. Fish and Wildlife Service failed to ensure
11 protection for the condor and prevent adverse impacts to the condor. The U.S. Fish and
12 Wildlife Service “not likely to adversely affect” concurrence was therefore arbitrary and
13 capricious, an abuse of discretion, or otherwise not in accordance with law under the
14 APA. 5 U.S.C. § 706(2)(A).

15 **FIFTH CAUSE OF ACTION**

16 **National Forest Management Act Violations: Failure to Comply With Forest Plan**

17 76. NFMA requires the creation of Forest Plans and requires projects within the
18 Forest to follow the Forest Plan.

19 77. The Los Padres Forest Plan and Tecuya Project Decision Memo require, per
20 Forest Plan Standard 28: “Avoid or minimize disturbance to breeding and roosting
21 California condors by prohibiting or restricting management activities and human uses
22 within 1.5 miles of active California condor nest sites and within 0.5 miles of active
23 roosts.”

24 78. Here, however, because the Forest Service has failed to properly identify
25 the existence of over 50 condor roosting sites in or near the Project Area, and is instead
26 outright ignoring those roosting sites, the Forest Service is not properly implementing
27 Standard 28.

1 79. For the above reasons, the Forest Service is in violation of NFMA, and its
2 actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
3 with law under the APA, 5 U.S.C. § 706(2)(A).

4 **SIXTH CAUSE OF ACTION**

5 **National Environmental Policy Act and National Forest Management Act**

6 **Violations: Sensitive Species**

7 80. NFMA requires the creation of Forest Plans and requires projects within the
8 Forest to follow the Forest Plan.

9 81. The Los Padres Forest Plan and Tecuya Project Decision Memo require
10 surveys for spotted owls. To date, on information and belief, the Forest Service has not
11 conducted the surveys.

12 82. The Tecuya Decision also states that “suitable habitat for [the yellow-
13 blotched salamander] is present within the project area, but the species has not been
14 documented.” There are, however, at least two known occurrences within the Project
15 area.

16 83. For the above reasons, the Tecuya Project is in violation of NFMA and the
17 Decision approving the Project is arbitrary, capricious, an abuse of discretion, or
18 otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A).

19 **PRAYER FOR RELIEF**

20 Plaintiffs respectfully request that this Court enter judgment in their favor and
21 against Defendants and provide the following relief:

22 1. Declare that Defendants U.S. Forest Service and Forest Supervisor Elliott
23 violated NEPA, NFMA, the Roadless Area Conservation Rule, and the APA in
24 approving the Tecuya Project;

25 2. Declare that Defendant U.S. Fish and Wildlife Service violated the ESA
26 and APA in issuing a concurrence letter for the Tecuya Project as to the endangered
27 California condor;

