



October 7, 2011

VIA FACSIMILE: (703) 440-1551

Dr. John Lyon
Eastern States Office Director
United States Department of the Interior
Bureau of Land Management
Eastern States
7450 Boston Boulevard
Springfield, Virginia 22153

RE: Protest of the Bureau of Land Management's Notice of Competitive Oil and Gas Lease Sale Concerning Parcels in Perry, Gallia, and Athens Counties, Ohio

Dear Dr. Lyon:

Buckeye Forest Council (BFC), Ohio Environmental Council (OEC), Sierra Club Ohio Chapter, the Center for Health, Environment & Justice (CHEJ), the Natural Resources Defense Council (NRDC), Heartwood, and Environment Ohio hereby protest the agency's planned offering of ES-041-12/11, OHES 57244 ACQ (528.15 acres, Perry County); ES-042-12/11, OHES 57245 ACQ (150.65 Acres, Gallia County); ES-043-12/11, OHES 57246 ACQ (264.93 acres, Athens County); ES-044-12/11, OHES 57247 ACQ (1,238.06 acres, Athens County); and ES-045-12/11, OHES 57248 ACQ (1,120.58 acres, Athens County) at the December 7, 2011 lease sale in accordance with 43 CFR 3120.1-3. The five parcels are publicly owned lands of the Wayne National Forest, and will hereinafter be referred to as "the parcels."

THE PROTESTING PARTIES AND THEIR INTERESTS

The Buckeye Forest Council (BFC) is a membership-based, grassroots organization dedicated to protecting Ohio's native forests and their inhabitants. The BFC uses education, advocacy and organizing to address the need for forest preservation and low-impact recreation over logging and resource extraction. We seek to instill in Ohioans a sense of personal connection to and responsibility for Ohio's native forests and to challenge the exploitation of land, wildlife and people. The BFC focuses forest protection efforts on Ohio's 21 state forests and the Wayne National Forest. BFC's members frequently recreate in and enjoy the Wayne. We are concerned that leasing and development of the offered parcels could negatively impact wildlife, habitat, and human health and recreational enjoyment.

Ohio Environmental Council ("OEC") is an Ohio not-for-profit corporation with an office in Columbus, Ohio. OEC is a statewide environmental and conservation advocacy organization with a stated mission to secure healthy air, land, and water for all who call Ohio home. We are Ohio's leading advocate for fresh air, clean water, and sustainable land use. The OEC has a widely respected 40-year history of using legislative initiatives, legal action, scientific principles, and statewide partnerships, to secure a healthier environment for Ohio's families and communities. OEC has over 100 conservation member organizations and thousands of members throughout Ohio. We have a strong membership base in Athens, Galia, and Perry Counties that we feel will be directly impacted by this project, and many members in and outside these counties that recreate in Wayne National Forest. OEC is concerned that drilling in the Wayne National Forest, without the proper safeguards and adherence to Federal law, threatens the environmental integrity of the forest ecosystem and puts at risk the human health and safety of forest visitors and neighboring properties.

The Sierra Club is the nation's oldest and largest environmental non-profit with 1.4 million members dedicated to exploring, enjoying, and protecting the planet. The Sierra Club Ohio Chapter has 28,000 members, many of whom are regular visitors to the three units of the Wayne National Forest. We are deeply concerned by the lack of forethought given to the proposed leasing of 3,300 acres of the Wayne. The proposed leases would not only impact the health of Ohio's only National Forest, but could jeopardize the public health of all Ohioans. The water supply for the city of Nelsonville and Athens may be gravely impacted as a result of potential shale development on the Athens Unit.

The NATURAL RESOURCES DEFENSE COUNCIL (NRDC) is a non-profit environmental membership organization with more than 400,000 members throughout the United States, including thousands in Ohio. NRDC has had a longstanding and active interest in the protection of national forests. With its nationwide membership and a staff of lawyers, scientists, and other environmental specialists, NRDC plays a leading role in a diverse range of land and wildlife management and resource development issues, including oil and gas exploration and production.

Heartwood is a cooperative network of grassroots groups, individuals, and local businesses working to protect and sustain healthy forests and vital human communities in the nation's heartland. Heartwood, Heartwood members and member groups (including Buckeye Forest Council) regularly use the Wayne National Forest and have been involved in its

management for many years. In May 2008, Heartwood published a report, *Economic Analysis of the 2006 Wayne National Forest Plan*, raising numerous unresolved issues regarding the economics of oil and gas leasing on the WNF. Our concerns for impacts to flora, fauna, water resources and recreation inform this protest.

The Center for Health, Environment & Justice (CHEJ) mentors a movement, empowering people to build healthy communities, and preventing harm to human health caused by exposure to environmental threats. Through training, coalition-building and one-on-one technical and organizing assistance, CHEJ works to level the playing field so that people can have a say in the environmental policies and decisions that affect their health and well-being. By organizing one school, one neighborhood, one community at a time, CHEJ is making the world cleaner and healthier for all of us. CHEJ is concerned that the Wayne leases offered for sale could negatively impact the environment as well as our local member groups throughout the region.

Environment Ohio is a statewide, citizen-based environmental advocacy organization. Our professional staff combines independent research, practical ideas and tough-minded advocacy to overcome the opposition of powerful special interests and win real results for Ohio's environment. Environment Ohio draws on 30 years of success in tackling our state's top environmental problems. Environment Ohio is concerned that the Wayne National Forest parcels at issue have not been properly evaluated, and that development of those parcels could have harmful repercussions for the forest and for Ohioans in the region.

STATEMENT OF REASONS

Were the Bureau of Land Management (BLM) to offer these leases for sale, the agency would violate the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”); the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (“ESA”); and the National Forest Management Act, 16 U.S.C. § 1600 *et seq.* (“NFMA”) because the BLM and the U.S. Forest Service (FS) have failed to, *inter alia*: (1) adequately analyze the threat of harm to threatened and endangered species and other resources found on these lands, and to consider alternatives that would prevent some or all of these harms; (2) analyze and take measures to prevent harm to these resources; (3) consult under Section 7 of the ESA with the U.S. Fish & Wildlife Service (“FWS”) regarding these leases; and (4) include all lease stipulations needed to ensure consistency with the forest plan. Accordingly, BLM should withdraw these lease parcels from sale until the agency has fully complied with the aforementioned laws.

I. The BLM and FS Will Violate NEPA If They Offer These Leases For Sale.

A. BLM And Forest Service Must Analyze The Potential Environmental Impacts Of Horizontal/Directional Drilling Prior To Offering These Leases For Sale.

The Forest Service's consent to lease the Wayne parcels and BLM's decision to offer these parcels for sale are major federal actions requiring the preparation of an Environmental Impact Statement. As the National Environmental Policy Act (NEPA) provides, an EIS must be prepared for any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C.A. § 4332 (2)(C); 40 C.F.R. § 1502.3.

With the possible exception of the Gallia County parcel, the Wayne parcels offered for sale sit atop the Utica shale,¹ a formation that is currently being developed in Ohio using high volume horizontal hydraulic fracturing techniques. Horizontal drilling and the host of environmental impacts associated with it were not considered in the 2006 Wayne FEIS, the 2006 LRMP, or the ROD associated therewith. Consequently, BLM and FS must undertake additional NEPA analysis prior to offering Wayne parcels for sale.

1. The 2006 FEIS Does Not Consider The Potential Impacts Of High Volume Horizontal Hydraulic Fracturing.

The FS and BLM rely on the analysis contained in the 2006 Wayne NF LRMP, Record of Decision and Final EIS for the preleasing NEPA analysis necessary to assess the impacts arising from oil and gas exploration and development on these leases. However, neither the 2006 FEIS nor the 2006 ROD examine the potential environmental impacts of directional drilling. BLM's and FS's reliance on these documents is therefore misplaced.

The 2006 LRMP FEIS fails to provide any analysis of the potential environmental impacts of directional drilling. Moreover, the more specific practice of directional (or "horizontal") drilling combined with high-volume hydraulic fracturing is nowhere mentioned in the FEIS. This is perhaps not surprising, as the high volume hydraulic fracturing of shale formations such as the Utica and Marcellus had barely begun when the 2006 FEIS was completed. Appendix G to the 2006 LRMP FEIS, which projected the future development of oil and gas on the Wayne, specifically stated that directional drilling technology was not economically feasible on the Wayne:

[O]perator feedback coupled with the fact that only 12 wells out of 1,704 permitted during the 10 year period were directional wells, suggest that this type of technology is still not yet economically feasible within the WNF.

2006 FEIS, page G-5, "Directional/Horizontal Drilling."

2. Changed Circumstances Require Supplemental And/Or New NEPA Analysis.

Circumstances have clearly changed and new information has arisen since the 2006 FEIS was completed. Further analysis is therefore required under NEPA. 40 C.F.R. § 1502.9(c)(1) (supplemental EIS must be prepared when there are significant new circumstances or information). High volume horizontal hydraulic fracturing, or "fracking," is a recently developed process of natural gas drilling that differs significantly in many respects from conventional oil and gas drilling. Since the 2006 FEIS and LRMP were completed, the practice of directional drilling has become widespread in neighboring states such as Pennsylvania. The

¹ Patchen, D.G., Hickman, et al., Interval-Thickness Map of the Utica, 2006, A geologic play book for Trenton-Black River Appalachian Basin exploration: Morgantown, W. Va., U.S. Department of Energy Report, DOE Award Number DE-FC26-03NT41856, 601p., map accessible at: <http://www.dnr.state.oh.us/Portals/10/Energy/Utica/Interval-Thickness%20of%20the%20Utica%20x11.pdf> [Map modified by Powers, D.M., and Martin, D.R.]

practice is now rapidly expanding in the State of Ohio.

As the Record of Decision for the 2006 Wayne LRMP states, per 36 CFR 228.102(e) the Forest Service must first “verif[y] that oil and gas leasing of [the] parcel[s] has been adequately addressed in a NEPA document and is consistent with the Wayne National Forest LRMP” before issuing consent to offer WNF lands for lease. 2006 LRMP FEIS ROD, page 37. In addition, the 2006 LRMP FEIS ROD states that:

If new information or circumstances requiring further environmental analysis are discovered during processing of nominated lease parcels, then such analysis will be done before nominated parcels are forwarded to BLM with final Forest Service consent to leasing.

Id. BLM’s decision to offer the parcels at issue for competitive leasing rests, in part, on its finding that: “The Forest Service has determined that no new information or circumstances have arisen that would require additional analysis.” ROD NEPA # DOI-BLM-ES-0030-2011-0008-ROD, signed June 7, 2011; ROD NEPA # DOI-BLM-ES-0030-2011-0013-ROD, signed June 20, 2011. However, the Forest Service’s determination that no new circumstances requiring additional analysis had arisen is clearly in error; consequently, BLM’s reliance on FS’s determination is misplaced. Changed circumstances require FS and BLM to conduct additional NEPA analysis prior to issuing consent to lease and prior to offering the parcels for sale, respectively.

3. BLM And FS Must Complete Site-Specific NEPA Analysis Prior To Leasing.

FS and BLM rely upon the 2006 Wayne NF LRMP, Record of Decision and Final EIS in an attempt to satisfy their NEPA requirements. However, neither of these documents contains the site-specific analysis necessary to satisfy NEPA’s requirements, especially that needed for a “hard look” at the impacts.

The WNF’s decision to make land available to BLM for oil and gas leasing necessitates a full environmental analysis of the likely post-leasing impacts of oil and gas development before any leases are issued. Oil and gas lease rights severely constrain the agency’s options to limit or prohibit development on an existing lease to protect other natural resources. The Forest Service has stated that “once a lease is issued the opportunity to deny access is irreversible for the life of the lease or the life of the producing field.” February 2003 FEIS on Oil and Gas Leasing in Bridger-Teton at 3-192. The Forest Service is consenting to lease with surface occupancy on most of the lease areas and with no surface occupancy (NSO) designations in limited portions of some of the parcels. Even for NSO areas, the Forest would likely permit surface operations somewhere else in or near each parcel, necessitating impact assessment. Non-NSO leases and limited-NSO leases do not reserve to the government the absolute right to prevent all surface disturbing activities, and thus their issuance constitutes “an irretrievable commitment of resources” under section 102 of NEPA.

It is the official position of the Departments of Interior and Agriculture, which positions comport with federal caselaw, that the BLM and the FS must fully analyze the impacts arising from oil and gas exploration and development on leases before leasing. *See, e.g., Southern Utah Wilderness Alliance*, 159 IBLA 220, 240-43 (2003); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147 (10th Cir. 2004); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

Given the absence of an underlying NEPA document or analysis that adequately considers the impacts of these leases on area resources the leases cannot be sold without violating NEPA. *Pennaco*, 377 F.3d 1147; *Conner*, 848 F.2d 1441; *Peterson*, 717 F.2d 1409.

B. Potential Impacts of Horizontal Drilling Were Not Considered By BLM Or FS.

High volume horizontal hydraulic fracturing, or “fracking,” is associated with numerous significant environmental impacts. The operational size and associated impacts of horizontal shale development dwarf those of conventional oil and gas drilling. For instance, the typical size of a shale operation’s drill pad is 3 to 5 acres;² much greater than the .69 to 1.1 acres considered in the 2006 FEIS.³

Water usage in shale gas plays far exceeds that of conventional operations: 2 to 4 million gallons of water are typically needed every time a shale well is fractured.⁴ Moreover, horizontal shale wells are commonly fractured multiple times during their lifespan. The 2006 FEIS did not consider the potential impacts that high volume water withdrawals could have on the forest. These potential impacts need to be considered as part of the NEPA process.

Similarly, truck traffic associated with horizontal shale wells occurs on a much greater scale than is the case with conventional drilling. For example, the National Park Service has estimated that total truck traffic of between 300 and 1,300 trucks per well would occur in Marcellus Shale production areas.⁵ BLM and Forest Service did not consider such an increase in truck traffic in the 2006 FEIS; both agencies must give the potential impacts proper NEPA consideration prior to offering the Wayne parcels for lease.

The 2006 FEIS did not take the requisite “hard look” at the potential impacts of oil and gas wastewater, let alone at the likely increases in wastewater associated with horizontal shale development. Significantly, the amount of wastewater flowback from horizontal shale operations occurs in far greater amounts than that associated with conventional drilling. Flowback

² Office of Research and Development U.S. Environmental Protection Agency, *Draft Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources*, pp. 10-11 (February 7, 2011), EPA/600/D-11/001/February 2011/www.epa.gov/research.

³ 2006 LRMP FEIS, Appendix G, p. G-6.

⁴ Office of Research and Development U.S. Environmental Protection Agency, *Draft Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources*, p. 19 (February 7, 2011), EPA/600/D-11/001/February 2011/www.epa.gov/research.

⁵ See Office of Research and Development U.S. Environmental Protection Agency, *Draft Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources*, p. 55 (February 7, 2011), EPA/600/D-11/001/February 2011/www.epa.gov/research.

wastewater⁶ from shale operations is highly toxic and can contain significant amounts of heavy metals, carcinogenic materials, and radioactivity. The West Virginia Department of Environmental Protection (WVDEP) found many contaminants of concern present in oil and gas wastewaters,⁷ including arsenic, lead, and hexavalent chromium, while EPA Region 8 identified the presence of barium, chloride, sodium, sulfates, and other minerals.⁸ Samples of produced water in the Marcellus Shale analyzed by the New York State Department of Environmental Conservation (NYSDEC) were reported to contain “levels of radium 226, a derivative of uranium, as high as 267 times the limit safe for people to drink.”⁹ Analysis of fracturing fluid flowback waters from Pennsylvania and West Virginia found the known carcinogen benzene present in nearly half of all fracturing fluid flowback waters at average concentrations nearly one hundred times the maximum acceptable contaminant levels established by EPA.¹⁰

The George Washington National Forest in Virginia is evaluating horizontal shale drilling as part of its forest plan revision process, and the GW’s Draft Revised LRMP prohibits horizontal drilling in the forest due to water quality-related environmental concerns:

Horizontal drilling and the associated hydrofracturing of the Marcellus shale formation may impact water quality. Given the questionable nature of the development potential on the Forest, along with the high level of concern for water quality, the Plan does not allow horizontal drilling.¹¹

A recent study conducted in West Virginia involved the application of hydraulic fracturing flowback fluids onto a plot of the Fernow Experimental Forest. The study’s results were alarming, as it found that 56% of the trees in the fluid application area were dead within two years of fluid application.¹²

The 2006 FEIS did not examine the potential impacts of open brine storage pits on wildlife in the Wayne, including potential impacts on the federally endangered Indiana bat. Ohio

⁶ Estimates of the amount of fracturing fluid recovered as flowback in shale gas operations vary from as low as 25 percent to high as 70 to 75 percent.

⁷ The contaminants of concern included: “sulfate, chloride, arsenic, titanium, cobalt, nickel, silver, zinc, vanadium, tin, cadmium, lead, chromium, hexavalent chromium, copper, fluoranthene, cyanide, mercury, selenium, antimony, beryllium, barium, ammonia nitrogen, fluoride, nitrite nitrogen, nitrate nitrogen, oil and grease, total suspended solids, iron, aluminum, chloroform, benzene, phthalate esters, strontium, strontium-90, boron, lithium, gross alpha radiation, gross beta radiation, radium 226+ [and] radium 228.” Letter from West Virginia Department of Environmental Protection to William Goodwin, Superintendent Clarksburg Sanitary Board, July 23, 2009.

⁸ EPA REGION 8, AN ASSESSMENT OF THE ENVIRONMENTAL IMPLICATIONS OF OIL AND GAS PRODUCTION: A REGIONAL CASE STUDY, WORKING DRAFT 3-11 (2008).

⁹ N.Y. DEP’T OF ENVTL. CONSERVATION, DRAFT SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM at app. 13 (2009); Abraham Lustgarten, ProPublica, *Natural Gas Drilling Produces Radioactive Wastewater*, SCIENTIFIC AMERICAN, Nov. 9, 2009.

¹⁰ N.Y. DEP’T OF ENVTL. CONSERVATION, DRAFT SGEIS 5-104 (2009).

¹¹ GW Draft Revised LRMP, page 3-15, available at: http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5297819.pdf

¹² Mary Beth Adams, *Land Application of Hydrofracturing Fluids Damages a Deciduous Forest Stand in West Virginia*, J. ENVIRON. QUAL. 40:1340-1344, at 1341 (2011), doi:10.2134/jeq2010.0504, available at: http://www.nrs.fs.fed.us/pubs/jrnl/2011/nrs_2011_adams_001.pdf

law does not require that temporary brine storage pits be fenced or netted;¹³ nor does the 2006 Wayne LRMP. The failure to require pit operators to use even the most basic protection devices such as fencing or netting greatly increases the likelihood that wildlife will come into contact with oil and gas waste and suffer significant harm. A recent report prepared by the U.S. Fish and Wildlife Service (USFWS) indicates that brine storage pits present significant risks to wildlife. Pits can “entrap and kill migratory birds and other wildlife [. . .] Birds are attracted to reserve pits by mistaking them for bodies of water. [. . .] The sticky nature of oil entraps birds in the pits and they die from exposure and exhaustion.”¹⁴ Storage pit leaks and spills are also a significant concern. In Ohio, a fracturing flowback pit was cut with a track hoe in 2010, causing more than 1.5 million gallons of fluid were spilled into the environment.¹⁵ In 2008, the back wall of a pit in Ohio gave way, causing pit contents to spill and flow towards a creek.¹⁶ Prior to offering the parcels for sale, BLM and FS must consider the potential impacts that open brine storage pits may have on the Wayne and identify mitigation measures.

BLM and FS must also consider the air quality impacts of horizontal drilling as part of the NEPA process. Air emissions from horizontal operations exceed those from conventional drilling. The U.S. Environmental Protection Agency recently reported that hydraulic fracturing of one well leads to emissions of approximately 23 tons of volatile organic compounds (VOCs)—roughly 200 times more than if the well was not hydraulically fractured.¹⁷ VOCs can be highly toxic and also contribute to regional air quality problems like ozone. Researchers at Cornell University recently released a study showing that fugitive methane emissions from shale operations are “at least 30% more than and perhaps more than twice as great as those from conventional gas.”¹⁸ There have been numerous reports of changes in air quality from horizontal shale drilling. For example, in Battlement Mesa, Colorado, residents complained of gases and vapors from a nearby natural gas well and state officials attributed the problem to flowback of hydraulic fracturing fluids (Webb, 2010). Reports from Texas have linked pollutant emissions from natural gas drilling in the Barnett Shale to substantial reductions in air quality (Michaels et al., 2010). Additionally, areas of highly concentrated natural gas development in southwest Wyoming and eastern Utah have experienced episodes of degraded air quality (e.g., high levels of winter time ozone concentrations).¹⁹ BLM and FS must consider the potential for air pollution increases associated with hydraulic shale development prior to offering the Wayne parcels for lease.

¹³ U.S. FISH & WILDLIFE SERV., REGION 6, ENVTL. CONTAMINANTS PROGRAM, RESERVE PIT MANAGEMENT: RISKS TO MIGRATORY BIRDS, 13 fig. 15 (2009).

¹⁴ U.S. FISH & WILDLIFE SERV., REGION 6, ENVTL. CONTAMINANTS PROGRAM, RESERVE PIT MANAGEMENT: RISKS TO MIGRATORY BIRDS, i (2009).

¹⁵ Ohio Department of Natural Resources, Notice of Violation No. 1278508985, June 21, 2010.

¹⁶ Ohio Department of Natural Resources, Notice of Violation No. 2016754140, May 16, 2008.

¹⁷ USEPA, Proposed Rule: “Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews,” Federal Register /Vol. 76, No. 163 at 52757, available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-23/pdf/2011-19899.pdf>

¹⁸ Howarth, et al., Methane and the greenhouse-gas footprint of natural gas from shale formations: A Letter, Climatic Change, at Abstract (2011).

¹⁹ Office of Research and Development U.S. Environmental Protection Agency, *Draft Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources*, p. 55 (February 7, 2011), EPA/600/D-11/001/February 2011/www.epa.gov/research.

Given the absence of an underlying NEPA document or analysis that adequately considers the impacts of these leases on area resources the leases cannot be sold at this point without violating NEPA.

II. The BLM and FS Will Violate The ESA If They Offer These Leases For Sale.

The FS and BLM will violate the Endangered Species Act (ESA) if they offer these lease parcels for sale. The proper conclusion if listed species exist in the area is that leasing “may affect” those listed species, which triggers the requirement that the BLM and/or FS engage in consultation with the U.S. Fish and Wildlife Service (FWS). 50 C.F.R. § 402.14(a). In addition, reinitiation of formal consultation is required where new information reveals effects of an agency action that may affect listed species in a manner or to an extent not considered in an applicable FWS opinion. 50 C.F.R. § 402.16. The BLM and FS, as far as protesting parties have been able to determine, have not consulted with FWS on this lease sale, specifically, or on the potential impacts of horizontal shale development, generally. This violates the ESA.

Section 7 of the ESA requires federal agencies to consult with the FWS regarding the impacts of proposed federal actions on threatened and endangered species. 16 U.S.C. § 1536(a)(2). Further, as the ESA’s implementing regulations make absolutely clear, “[e]ach federal agency shall review its actions *at the earliest possible time*” to determine whether an action may affect protected species, and, if so, to engage in the appropriate level of conferral. 50 C.F.R. § 402.14(a) (emphasis added); *see also Wilderness Soc’y v. Wisely*, 524 F. Supp. 2d 1285, 1301 (D. Colo. 2007) (“the BLM’s duty to confer with the FWS arises as of the time that it was possible for the two agencies to engage in meaningful conference regarding the decision to be made”). Thus, the BLM and FS must consult with the FWS regarding the impacts to Indiana bats and other listed species on the proposed oil and gas lease sale parcels. The BLM’s and FS’ failure to initiate and/or reinitiate consultation with FWS violates the ESA.

The extreme subterranean pressures associated with high volume horizontal hydraulic fracturing injections could potentially impact bats hibernating in caves and abandoned mines. Nevertheless, potential impacts of horizontal drilling on the endangered Indiana bat were not considered as part of the 2006 FEIS and LRMP ESA Section 7 consultation process.

In addition, neither BLM nor FS has consulted FWS regarding the impacts a potential increase in fracking waste pits could have on the Indiana bat. Neither Ohio law nor the 2006 Wayne LRMP requires that oil and gas waste pits be fenced or netted. Recently, Forest Service biologists reviewing the proposed Berry Energy project on the Fernow Experimental Forest on the Monongahela NF expressed serious concern about the threat posed by potentially toxic slurry pits to Indiana bats.²⁰ Bat mortality in oil and brine separation pits has been documented elsewhere. The Five-Year Status Review for the Virginia big-eared bat states:

Oil and brine separation pits can become *a death trap for bats* that enter these structures and come in contact with the contents. For example, in 1992 and 1993, oil pits in the well fields of southwestern Indiana were surveyed for dead animals,

²⁰ Letter to Michael Rains, Northern Research Station, USFS, 1/22/08, from M.B. Adams, W.M. Ford, and T.M. Schuler, NRS Timber and Watershed Lab.

and hundreds of dead birds and bats were found.²¹

Moreover, the potential harm of horizontal shale gas activity must be considered in light of and in addition to white-nose syndrome, the greatest threat to ever confront North America's hibernating bat species. White-nose syndrome was discovered to have reached Indiana bat populations in Ohio earlier this year. The significant new discovery of White-nose syndrome in Ohio bats combined with the failure of BLM and FS to formally consult with FWS regarding potential impacts of horizontal drilling is clear demonstration that formal consultation is required before the Wayne parcels may be offered for sale.

Per the ESA, BLM and FS must formally consult with FWS regarding the potential impacts of these leases as they relate to the Indiana bat and other federally listed species before the Wayne parcels may be offered for sale.

III. The BLM and FS Will Violate The NFMA If They Offer These Leases For Sale.

The BLM and FS will violate the National Forest Management Act (NFMA) if they offer these leases for sale. Under the NFMA, "Resource plans and permits, contracts and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. § 1604(i). All oil and gas development activities and other site-specific projects must be consistent with the Forest Plan. *Id.* Courts uniformly enforce this consistency requirement. See Northwoods Wilderness Recovery, Inc. v. USFS, 323 F.3d 405, 407 (6th Cir. 2003) ("Implementation of the forest plan is achieved through individual site-specific projects, and all projects must be consistent with the forest plan."); see also Cherokee Forest Voices v. USFS, Case No. 05-6570, 2006 U.S. App. LEXIS 13214, * 11-12 (6th Cir. May 25, 2006) (unpublished); Sierra Club v. Martin, 168 F.3d 1, 4-5 (11th Cir. 1999); Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068 (9th Cir. 1998); National Audubon Society v. Hoffman, 132 F.3d 7, 19 (2nd Cir. 1997).

Lease stipulations implement Forest Plan standards. Failure to include them here means leasing activities would proceed that were not consistent with the Forest Plan. The Wayne NF has developed at least 18 lease stipulations relating to oil and gas development, and yet only 3 such stipulations are applied to the parcels here at issue. For instance, the parcels are not subject to a stipulation requiring retention of potential Indiana bat roost trees even though the Wayne LRMP contains standards and guidelines relating to just this issue.

The Forest Plan should have been examined closely and lease stipulations written to cover all applicable Forest Plan standards before the lease sale notice was posted. The parcels proposed for leasing should be withdrawn until this occurs.

²¹ (USFWS Bloomington Field Office, unpubl. Data 1993-1994 *in* USFWS 2007). [Emphasis added]. FWS WVFO, Virginia Big-Eared Bat 5-Year Status Review 2008, at 14.

REQUEST FOR RELIEF

The protesting parties request that BLM withdraw the protested parcels from the December 2011 Competitive Oil and Gas Lease Sale until such time as the BLM and FS have complied with NEPA, the ESA, and the NFMA. The protesting parties further request that BLM suspend the offering of the Wayne parcels while the agency considers this protest.

Sincerely,



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