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SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: Notice of Violations of the Endangered Species Act in Relation to Offshore Well Stimulation Treatments on the Southern California Outer Continental Shelf

Dear Ms. Hopper, Mr. Salerno, Mr. Yarde, Mr. Barbee, Secretary Pritzker, and Secretary Jewell:

On behalf of the Environmental Defense Center (“EDC”) and Santa Barbara Channelkeeper (“Channelkeeper”), we write to you concerning the Bureau of Ocean Energy Management’s (“BOEM”) and Bureau of Safety and Environmental Enforcement’s (“BSEE”) May 27, 2016 decision to approve the use of well stimulation treatments (“WSTs”) including acid well stimulation and hydraulic fracturing, in order to facilitate oil and gas development and production on the forty-three current leases and twenty-three operating platforms located within federal, Outer Continental Shelf (“OCS”) waters off California’s coastline, under a Finding of No Significant Impact (“FONSI”) based on the analysis contained in the agencies’ *Programmatic Environmental Assessment of the Use of Well Stimulation Treatments on the Southern California Outer Continental Shelf* (“PEA”). The government’s decision to approve the FONSI and PEA authorizing the use of offshore well stimulation in the Southern California OCS—without qualification or restriction—is an agency action that may affect at least twenty-five species listed as endangered or threatened under the Endangered Species Act (“ESA”), 16

U.S.C. §§ 1531–1544. However, BSEE and BOEM have failed to engage in consultation to ensure the action does not jeopardize these listed species or result in the destruction or adverse modification of their critical habitat, as required by Section 7(a)(2) of the ESA, *id.* § 1536 (a)(2). This letter constitutes notice required by Section 11(g) of the ESA, *id.* § 1540(g)(1)(A), prior to commencement of legal action.

The Southern California OCS (“action area”) harbors such incredible biological diversity that the Santa Barbara Channel has been dubbed “the Galapagos of North America.” The action area is home to the following species listed as endangered or threatened pursuant to the ESA: two endangered marine invertebrate species (black abalone and white abalone); four endangered marine and coastal fish species (southern California steelhead, scalloped hammerhead shark, green sturgeon and tidewater goby); six endangered marine mammals (sei whale, blue whale, fin whale, North Pacific right whale, humpback whale, sperm whale); two threatened marine mammals (Guadalupe fur seal and southern sea otter); seven marine and coastal bird species (light-footed Ridgway’s rail, western snowy plover (Pacific DPS), marbled murrelet, California least tern, short-tailed albatross, Hawaiian petrel, and California Ridgway’s rail), two endangered sea turtles (the loggerhead sea turtle (North Pacific Ocean DPS), and the leatherback sea turtle) and two threatened sea turtles (the green sea turtle, and the olive ridley sea turtle). These threatened and endangered species depend on the action area for their survival and recovery.

The best available scientific information demonstrates that offshore well stimulation, including fracking and acid well stimulation, as well as similar practices including “routine” acid treatments or “acid washes,” may impact threatened and endangered marine and coastal species in numerous respects:

- Offshore well stimulation involves the use of toxic chemicals that are transported to platforms, injected down wellbores, and discharged with flowback into the open ocean. The chemicals risk being spilled during transportation and delivery, and WST-related wastes risk being spilled during handling, processing, and disposal. Impacts of these toxic discharges on the marine environment have never been meaningfully analyzed.
- In addition, the action threatens many of these species with noise disturbance or being struck by platform supply vessels delivering WST equipment and supplies, and by the risk of accidental seafloor surface expressions or produced water pipeline leaks.
- Well stimulation also extends the life of existing oil platforms thereby prolonging the occurrence and impacts of offshore drilling. Such impacts include the risk of oil spills on a sensitive marine environment suffering from a history of devastating spills, including the May 19, 2015 rupture of the Plains All-American Pipeline, which delivered crude that originates from offshore platforms where WSTs have occurred. The spill harmed hundreds of coastal birds and other marine wildlife.

During the programmatic WST NEPA process, BSEE and BOEM specifically acknowledged the potential for impacts to listed species. If an action “may affect” a listed species or critical habitat, consultation is required. 50 C.F.R. § 402.14(a). This standard triggers consultation if an action has “any chance of affecting listed species or critical habitat,” even if

effects are “benign” or of an “undetermined character.” *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (internal citations omitted). The agencies, however, dismissed these impacts as “negligible,” and did not initiate consultation with the expert agencies U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) on the many threatened and endangered species that may be present. Therefore, BSEE and BOEM have violated Sections 7 and 9 of the ESA, §§ 1536(a)(1)–(2), 1538, by failing to lawfully consult with NMFS and FWS regarding the action’s impacts on listed species and their critical habitat, including by failing to: obtain a list of species that may be present, engage in formal or informal consultation, or issue a valid “no effect” determination.

I. Background

A. The Environmental Defense Center and Santa Barbara Channelkeeper

EDC is a California public benefit, non-profit corporation, with offices in Santa Barbara and Ojai. Founded in response to the 1969 Santa Barbara oil spill, EDC has approximately 3,000 members and protects and enhances the local environment through education, advocacy, and legal action on behalf of itself and other non-profit, environmental organizations. Since its founding more than thirty years ago, EDC has worked to protect the Santa Barbara Channel, other local coastal waters, the Channel Islands, and the terrestrial coastal environment of Santa Barbara and Ventura Counties from the risks and impacts of offshore oil drilling. The large majority of offshore oil and gas platforms off California’s coast continue to be located in the Santa Barbara Channel. The issue of offshore oil drilling directly impacts all four of EDC’s primary organizational priorities: the Santa Barbara Channel, clean water, open spaces and wildlife, and climate and energy.

Channelkeeper is a non-profit public benefit corporation with its principal place of business located in Santa Barbara, and has approximately 800 members. Channelkeeper’s mission is to protect and enhance the water quality of the Santa Barbara Channel and its tributaries for the benefit of its ecosystems and the surrounding human communities. Channelkeeper accomplishes its mission through science-based advocacy, education, field work, and enforcement of environmental laws. Specifically, Channelkeeper and its members monitor and participate in the activities of the Regional and State Water Boards, and other local, state, and federal agencies. Channelkeeper and its members also create and collaborate on the development of policies and programs affecting pollution issues in the Santa Barbara Channel and its tributaries, including pollution from oil and gas exploration and development, and pipeline oil spills such as the May 2015 spill near Refugio State Beach. Channelkeeper and its members play an important role in contributing to the health of the Santa Barbara Channel through a variety of programs, including river and coastal monitoring and scientific data collection.

EDC and Channelkeeper have members who live, recreate, and work in and around waters of the State of California, including communities in Santa Barbara, Ventura, Los Angeles, and Orange Counties that are at risk or are otherwise impacted by oil exploration, production,

development, and transportation, including the offshore oil platforms and related oil infrastructure at issue in this case. EDC and Channelkeeper members regularly use these waters and surrounding areas for recreational, academic, economic, and other activities, including whale watching, bird watching, kayaking, fishing, sailing, diving, and surfing. As described below, BSEE and BOEM have failed to initiate consultation with respect to listed species. This failure has impaired and will continue to impair both EDC's and Channelkeeper's members' interests.

B. The Agency Action and Related NEPA Process

EDC filed a federal lawsuit against BSEE and BOEM in late 2014 alleging numerous violations of NEPA in relation to BSEE's approval of permits for offshore WST. *See Environmental Defense Center v. Bureau of Safety and Environmental Enforcement*, No. 2:14-cv-09281 (C.D. Cal. Dec. 3, 2014) (*EDC v. BSEE*). In January 2016, EDC reached a settlement agreement with BSEE and BOEM that required the agencies to prepare a PEA addressing environmental impacts of offshore well stimulation in federal waters offshore California. Settlement Agreement, *EDC v. BSEE* (Settlement lodged Jan. 29, 2016, No. 79-1).

In our comments on the draft PEA, EDC urged BSEE and BOEM to initiate preparation of an Environmental Impact Statement ("EIS") that provides a detailed and thorough analysis of the potential significant environmental impacts and risks associated with offshore fracking and acidizing. In addition, EDC alleged that the failure to initiate consultation with respect to the action violates the ESA. However, on May 27, 2016, the agencies released a final PEA and FONSI concluding that the "[p]roposed Action would not cause any significant impacts" FONSI, p. 8, and declining to initiate consultation pursuant to the ESA.

Under this final agency action, BSEE and BOEM have chosen "Alternative 1," programmatically authorizing "the use of selected well stimulation treatments (WSTs) on the 43 current active leases and 23 operating platforms on the Southern California Outer Continental Shelf (OCS)." PEA, at p. ES-1; FONSI, at p. 4.

C. The Action Area and Species that May Be Affected

The large majority of California's offshore oil platforms in federal waters are located in the Santa Barbara Channel. Reflecting its environmental importance, many of the waters and islands of the Santa Barbara Channel are specially designated and protected, including the Channel Islands National Park and Channel Islands National Marine Sanctuary. Specific platforms from which WSTs have been used are in direct proximity to these protected zones. The Santa Clara Unit (Platforms Gail and Gina in particular), for example, lies in close proximity to the Marine Sanctuary boundaries, while Platforms A, B, and C are directly adjacent to the Santa Barbara Channel Federal Ecological Preserve. In addition, the Channel is home to a network of state and federal Marine Protected Areas ("MPAs"). There are thirteen MPAs at the Channel Islands and five along the mainland coast from Point Conception to the Goleta Slough. Offshore well stimulation, including "frac pacs," are routinely utilized from offshore well platforms located in San Pedro Bay, including Platforms Ellen and Eureka.

There are at least twenty-five threatened or endangered species that depend on the action area for their survival and recovery and that may be affected by the action. The Ninth Circuit Court of Appeals has already specifically recognized the potential for adverse impacts on listed species in relation to OCS oil and gas production offshore California. *California v. Norton*, 311 F. 3d 1162, 1176–77 (9th Cir. 2002) (finding potential adverse impacts on threatened and endangered species including the southern sea otter; the potential adverse effects on ecologically significant or critical areas including the Channel Islands National Marine Sanctuary). The following species and critical habitat may be affected by BSEE and BOEM’s action:

- The endangered black abalone, with critical habitat designated on portions of the shoreline of the Channel Islands, 74 Fed. Reg. 1937 (January 14, 2009);
- The endangered white abalone in its pacific coast range, 66 Fed. Reg. 29054 (May 29, 2001);
- The endangered southern California steelhead, with designated critical habitat on multiple waterways between the Santa Maria River and San Mateo Creek, 71 Fed. Reg. 834 (Jan 5, 2006), 50 C.F.R. §§ 224.101, 266;
- The endangered scalloped hammerhead shark, Eastern Pacific DPS, 79 Fed. Reg. 38214 (July 3, 2014);
- The threatened green sturgeon (southern DPS), 71 Fed. Reg. 17757 (April 6, 2005);
- The endangered tidewater goby, proposed to be reclassified as threatened, 59 Fed. Reg. 5494 (Feb. 4, 1994), with critical habitat in waterways along Santa Barbara, Ventura, and Los Angeles Counties, 78 Fed. Reg. 8746 (Feb. 6, 2013);
- The endangered sei whale, 35 Fed. Reg. 18319 (Dec. 2, 1970);
- The endangered blue whale, 35 Fed. Reg. 18319 (Dec. 2, 1970);
- The endangered fin whale, 35 Fed. Reg. 18319 (Dec. 2, 1970);
- The endangered North Pacific right whale, 35 Fed. Reg. 18319 (Dec. 2, 1970); 73 Fed. Reg. 12024 (March 6, 2008);
- The endangered humpback whale, 35 Fed. Reg. 18319 (Dec. 2, 1970);
- The endangered sperm whale, 35 Fed. Reg. 18319 (Dec. 2, 1970);
- The threatened Guadalupe fur seal, 50 Fed. Reg. 51252 (December 16, 1985);
- The threatened southern sea otter, 42 Fed. Reg. 2965 (January 14, 1977);
- The endangered Hawaiian petrel, 32 Fed. Reg. 4001 (March 11, 1967);
- The endangered California Ridgway’s rail, 35 Fed. Reg. 16047 (Oct. 13, 1970);
- The endangered short-tailed albatross, 65 Fed. Reg. 46643 (July 25, 2000);
- The endangered California least tern, 35 Fed. Reg. 16047 (October 13, 1970);
- The endangered light-footed Ridgway’s rail, 35 Fed. Reg. 16047 (October 13, 1970);
- The threatened western snowy plover (Pacific DPS), 58 Fed. Reg. 12864 (March 5, 1993);
- The threatened marbled murrelet, 57 Fed. Reg. 45328 (Sep 28, 1992);

- The endangered loggerhead turtle North Pacific DPS, 76 Fed. Reg. 58868 (Sep. 22, 2011);
- The endangered leatherback turtle, 35 Fed. Reg. 8491 (June 2, 1970);
- The threatened green turtle East Pacific DPS, 81 Fed. Reg. 20057 (April 6, 2016); and
- The threatened olive ridley turtle. 43 Fed. Reg. 32800 (July 28, 1978).

D. The Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 180 (1978). Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . .” 16 U.S.C. § 1531(b). To achieve these objectives, the ESA directs FWS or NMFS to determine which species of plants and animals are “threatened” and “endangered” and place them on the endangered species list. *Id.* § 1533. An “endangered” or “threatened” species is one “in danger of extinction throughout all or a significant portion of its range,” or “likely to become endangered in the near future throughout all or a significant portion of its range,” respectively. *Id.* § 1532(6), (20).

Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but its ultimate recovery. One central protection, Section 7(a)(2), mandates that all federal agencies avoid actions that: (1) jeopardize listed species; or (2) destroy or adversely modify designated critical habitat. *Id.* § 1536(a)(2). Federal agency actions include those projects “authorized, funded, or carried out by such agency.” 50 C.F.R. § 402.02. To comply with these Section 7(a)(2) safeguards, the federal agency taking action and FWS or NMFS take part in a cooperative analysis of potential impacts to listed species and their designated critical habitat known as a consultation process.

First, the agency must obtain “a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area” from NMFS or FWS. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)–(d). If a species or critical habitat may be present, the agency must prepare a biological assessment to determine whether the proposed action “may affect” or “is not likely to adversely affect” any listed species or critical habitat. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(f), 402.14(a), (b)(1). If the agency determines, with the concurrence of the wildlife agency, that the action is not likely to adversely affect a listed species, formal consultation is not required. *Id.* § 402.14(a). Such a determination must be set aside, however, if it is “arbitrary and capricious,” meaning it failed to consider relevant factors or “articulate a rational connection between the facts found and the choice made.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011).

Federal agencies must initiate formal consultation with FWS or NMFS when their actions “may affect” a listed species or designated critical habitat. 50 C.F.R. § 402.14(a). The standard for consultation is low: “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.” *W. Watersheds Project*,

632 F.3d at 496 (quoting 51 Fed. Reg. 19,949). Effects that must be considered as part of this inquiry include “direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R. § 402.02. Indirect effects are “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.*

Through the formal consultation process, FWS or NMFS prepares a “biological opinion” as to whether the action jeopardizes the species or destroys or adversely modifies critical habitat and, if so, suggests “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). During the consultation process, both agencies must “use the best scientific and commercial data available.” *Id.* § 1536(a)(2); 50 CFR § 402.14(d).

Section 9 of the ESA prohibits the “taking” of any endangered species. 16 U.S.C. § 1538(a). The ESA defines the term “take” broadly to include “harass, *harm*, pursue, hunt, shoot, wound, *kill*, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19) (emphasis added). “Take” includes indirect as well as direct harm and need not be purposeful. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995). The ESA provides a limited exception to the prohibition on take under Section 9 for taking that is in compliance with an incidental take statement (“ITS”). *See* 16 U.S.C. § 1536 (o)(2). After consultation pursuant to Section 7, if NMFS and FWS conclude jeopardy is not likely or offer reasonable and prudent alternatives to avoid jeopardy, NMFS and FWS may issue an ITS, which authorizes limited take of a species. *Id.* § 1536 (b)(4)(iv). Such a statement specifies the impacts of “incidental taking” on listed species and measures to minimize impacts. *Id.* § 1536 (o)(2). Any take of a listed species that is not in compliance with an ITS violates Section 9. *See Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1239 (9th Cir. 2001).

II. BSEE’s and BOEM’s Violations of the Endangered Species Act

BSEE and BOEM failed to initiate ESA consultation on their final agency action to approve the FONSI and PEA, programmatically authorizing the use of offshore well stimulation in the Southern California OCS. Under the ESA, the duty to consult is triggered by *any* potential impact to a listed species. *Karuk Tribe*, 681 F.3d at 1027; 50 C.F.R. § 402.14(a). This failure to initiate and complete consultation with FWS (in relation to the southern sea otter, the Guadalupe Fur Seal, the light-footed Ridgway’s rail, western snowy plover, marbled murrelet, California least tern, short-tailed albatross, Hawaiian petrel, and California Ridgway’s rail) and NMFS (in relation to the sei whale, blue whale, fin whale, North Pacific right whale, humpback whale, sperm whale, southern California steelhead, scalloped hammerhead shark, southern green sturgeon, tidewater goby, loggerhead turtle, leatherback turtle, green turtle, and olive ridley turtle) with respect to the FONSI and PEA violates Section 7(a)(2) of the ESA. As explained below, while the action is subject to the ESA, BSEE and BOEM failed to even obtain a list of species present, or engage in consultation with FWS or NMFS even though the action “may affect” all twenty-five of the endangered or threatened species that may be present in the action

area. To the extent BSEE and BOEM claim that their failure to consult was based on a conclusion of “no effect” to listed species, such determinations are unlawful.

A. The Programmatic Authorization of Offshore WST is an Agency Action Subject to Consultation under Section 7(a)(2) of the Endangered Species Act

On May 27, 2016, BSEE and BOEM issued their final agency action under a FONSI and PEA, programmatically authorizing the use of four WSTs without any limitation in the Southern California OCS: Diagnostic Fracture Injection Test, Hydraulic Fracturing, Acid Fracturing, and Matrix Acidizing. FONSI at p. 2-3. This approval fits squarely within the ESA’s definition of agency action because it is one “authorized” by the agencies. *See* 50 C.F.R. § 402.02

B. BSEE and BOEM Failed to Obtain a List of Listed Species That May be Present

BSEE and BOEM’s first requirement under Section 7 is to request from both NMFS and FWS “a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)–(d). Along with the list, NMFS and FWS would also “provide available information (or references thereto) regarding these species and critical habitat, and may recommend discretionary studies or surveys that may provide a better information base for the preparation of an assessment.” 50 C.F.R. § 402.12(d)(2). If NMFS and FWS conclude there are no species or critical habitat present, a biological assessment or further consultation is not required. 50 C.F.R. § 402.12. However, if NMFS or FWS advise that a listed species *may be present*, BSEE and BOEM must prepare a biological assessment.

Without the wildlife agencies’ production of this list identifying the possibility of listed species and critical habitat, it is impossible for BSEE and BOEM to even begin adequate analysis of potential impacts and ensure against jeopardy. Further, any list must include all such species that “may be present,” which does not require evidence of occurrence of the species in the action area. In the PEA, BSEE and BOEM dismiss certain species as occurring infrequently; however, the ESA threshold requires inclusion of all such species that *may be present*. *Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1077 (D. Mont. 2013) (“it is not necessary that grizzly bears occupy an area to satisfy the ‘low threshold’ for consultation”).

To the best of EDC and Channelkeeper’s knowledge, BSEE and BOEM have not created a species list and received concurrence from NMFS and FWS, nor have they requested the preparation of the list. BSEE and BOEM have failed to meet even this first step in complying with the “heart of the ESA,” Section 7 consultation. BSEE and BOEM’s failure to request a list of species that may be present is a violation of Section 7(a)(2).

Even though BSEE and BOEM failed to obtain the required species list, the agencies nonetheless acknowledge the presence of many listed species in the action area throughout PEA Section 3.5 (Ecological Resources) and 4.5.1.4 (Environmental Consequences- Ecological Resources), and as explained in detail below. However, the agencies failed to prepare a

biological assessment to determine whether the action “may affect” or is “not likely to adversely affect” these listed species. With respect to some species, the agencies acknowledge potential impacts, and with respect to others, the agencies conclude the action will have “no effects” on such species. *See* PEA Section 3.5 (Ecological Resources); 4.5.1.4 (Environmental Consequences- Ecological Resources).

C. The Action “May Affect” Listed Species, Therefore Consultation Is Required

Even though BSEE and BOEM never obtained a list of species, the agencies acknowledge the presence of, and potential impacts on, at least twenty-one listed species. The agencies broadly admit that the action “is expected to have negligible to minor effects on biological resources,” FONSI, at p. 4, and that “operational discharges to the ocean from the platforms and support vessel traffic *may affect* ecological resources in the project area.” PEA, at p. 3-37 (emphasis added). While BSEE and BOEM’s analysis dismisses these impacts based on unfounded assumptions, even the acknowledged “negligible” impacts trigger consultation. *See Karuk Tribe*, 681 F.3d at 1027 (“[A]ctions that have *any chance* of affecting listed species or critical habitat—even if it is later determined that the actions are ‘not likely’ to do so—require at least some consultation under the ESA.”) (emphasis added). The specific endangered or threatened species present and their associated potential impacts supporting the need for consultation are explained below:

- **Benthic Organisms:** The PEA identifies potential impacts to benthic organisms, which includes black abalone and white abalone. For example, it states there are “minimal effects on benthic organisms” regarding the discharge of flowback fluids. PEA, at p. 4-52.
- **Marine and Coastal Fish:** The PEA identifies potential impacts to marine and coastal fish, which includes the southern California steelhead, the scalloped hammerhead shark, and the tidewater goby. For example, it recognizes the potential for fish to be “temporarily exposed to highly diluted concentrations of WST-related chemicals” in platform discharges. PEA, at p. 4-54.
- **Marine Mammals:** The PEA identifies potential impacts to marine mammals, which includes the sei whale, the blue whale, the fin whale, the humpback whale, the sperm whale, the Guadalupe fur seal, and the southern sea otter. For example, it acknowledges potential impacts “associated with the discharge from platforms of WST-related fluids and chemicals,” PEA, at p. 4-54, from “noise” and being “struck by PSVs,” PEA, at p. 4-55, from a surface spill of WST chemicals, *id.* at p. 4-56, and from “disturbance in behavior and/or distribution of some individuals.” *Id.*
- **Marine and Coastal Birds:** The PEA identifies potential impacts to birds, which includes the western snowy plover, the marbled murrelet, and the California least tern. For example, the PEA states that marine and coastal birds may be affected by “noise or the presence of PSVs” and the “accidental release of WST chemicals.” *Id.* at p. 4-59–60.
- **Sea Turtles:** The PEA identifies potential impacts to sea turtles, which includes the loggerhead turtle, the leatherback turtle, the green turtle, and the olive ridley turtle. For example, sea turtles could be impacted by the “accidental release of WST fluids and

crude oil,” resulting in “decreased health, reproductive fitness, and longevity,” PEA, at p. 4-61, “affected during spill containment and cleanup activities,” *id.* at p. 4-62, “struck by PSVs,” disturbed by noise associated with PSVs, and “expos[ed] [to WST chemicals] through direct contact and through ingestion of contaminated food,” *id.* at p. 4-60.

These impacts are at least some of the threats that the many species in the action area face, but is by no means an exhaustive analysis of potential impacts. In addition to the potential impacts identified above, BSEE and BOEM have also failed to address indirect and cumulative impacts, for example, the impacts to threatened and endangered species and their critical habitat from extending the life of oil platforms and infrastructure, such as oil pipelines that may rupture and harm wildlife.

The PEA does not constitute a biological assessment of specific threatened and endangered species; however, if BSEE and BOEM are implicitly making a “no effect” or “not likely to adversely affect” determination with respect to any of the species, such a determination is invalid because it is arbitrary and capricious. BSEE and BOEM rely on cursory analysis and unfounded assumptions about the frequency of WSTs to reach the conclusion that impacts are “minimal” or “negligible.” There is no rational connection between recognizing these potential impacts and any conclusion of “no effect,” and the agencies overlook many important aspects of the problem such as extending the life of existing platforms. *See Native Ecosystems Council*, 946 F. Supp. 2d at 1079 (“To recognize that the Project will result in ‘disturbance effects’ and then conclude that the Project will have ‘no effect’ on grizzly bears is arbitrary and capricious.”).

Further, the relevant inquiry to determine whether consultation is required is not whether impacts are “minimal” or “negligible,” rather, consultation is required when an action “may affect” a listed species. 50 C.F.R. § 402.14(a). This includes “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character.” 51 Fed. Reg. 19926 (June 3, 1986); *Karuk Tribe*, 681 F.3d at 1027; *Native Ecosystems Council*, 946 F. Supp. 2d at 1079 (“While the ‘disturbance effects’ may be discountable or insignificant . . . ‘any possible effect’ requires the [agency] to obtain the concurrence of the Wildlife Service in order to avoid consultation.”). BSEE and BOEM’s own analysis identifies such potential effects, triggering the consultation requirement.

D. BSEE’s and BOEM’s “No Effect” Determinations are Arbitrary and Capricious

With respect to some species, the North Pacific right whale, short-tailed albatross, Hawaiian petrel, southern green sturgeon, and California Ridgway’s rail, BSEE and BOEM explicitly concluded the action will have “no effect” on these listed species. However, in the analysis for all species, BSEE and BOEM summarily reach conclusions that the species will not occur in the area with any regularity as a basis for concluding that the action will have “no effect” on the species. Their own analysis, however, fails to use the best scientific information available, and recognizes that species may be present, yet fails to explain how despite their presence, the species will not be impacted.

For example, with respect to the North Pacific right whale, the PEA states that there are “very few sightings of individuals off southern California and any individuals that may enter the project area would likely spend a very limited amount of time in the vicinity of any of the offshore platforms.” PEA, at p. 4-55. However, because this species has a migration range that includes the action area, individuals are subject to all of the same threats to which the other whales assessed in the PEA are subject, including collisions with vessels. With regard to the short-tailed albatross, the PEA reaches a “no effect” conclusion because of irregular occurrence and “lack of recorded sightings in the vicinity of the project area.” PEA, at p. 3-60. However, it also notes that nine of the records of sightings have occurred in the action area, including around the Channel Islands. *Id.* at p. 3-59. Therefore, the short-tailed albatross is likewise subject to the same potential impacts to which the other marine and coastal birds are subject. BSEE and BOEM’s analysis of the Hawaiian petrel and the California Ridgway’s rail follow similar unsupported conclusions. With respect to the southern green sturgeon, the agencies overlook that the species may be present, as it occurs up and down the west coast, including near Point Conception. *See* NMFS, Green Sturgeon Range Map (December 2007).

BSEE’s and BOEM’s “no effect” conclusions with respect to the North Pacific right whale, the southern green sturgeon, the short-tailed albatross, the Hawaiian petrel, and the California Ridgway’s rail are arbitrary and capricious and fail to use the best scientific information available, in violation of Section 7 and 9 of the ESA, *id.* §§ 1536(a)(1)–(2), 1538.

As a result of failing to engage in consultation under Section 7, BSEE and BOEM have likewise failed to establish an ITS that would account for impacts from “incidental take” associated with offshore WSTs, and thus face liability under Section 9. *See* 16 U.S.C. § 1536 (o)(2) (establishing that taking that is “in compliance with the terms and conditions specified” in the ITS is “not considered a prohibited taking” under Section 9). Potential impacts that could constitute take are described above, and include, for example, impacts from exposure to toxic chemicals or collisions with PSVs. *See* PEA Section 3.5 (Ecological Resources); 4.5.1.4 (Environmental Consequences- Ecological Resources). However, in the absence of an ITS that sets limits on take and is designed to ensure against jeopardy, impacts from offshore WSTs that cause take with respect to all twenty-five listed species that may be affected, likewise violates Section 9. BSEE and BOEM are hereby on notice that their authorization of offshore WST pursuant to the FONSI and PEA violates Section 9’s prohibition on “taking” of any threatened or endangered species. *See* 16 U.S.C. §1538(a).

III. Noticing Parties and Counsel

The name, address, and telephone number of Channelkeeper and EDC are as follows:

Kira Redmond, Executive Director
Santa Barbara Channelkeeper
714 Bond Avenue
Santa Barbara, CA 93103
(805) 563-3377

Owen Bailey, Executive Director
Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101
(805) 963-1622

EDC and Channelkeeper have retained legal counsel to represent it in this matter. Please direct all communications to:

Brian Segee
Environmental Defense Center
111 West Topa Topa Street
Ojai, CA 93023
(805) 640- 1832
bsegee@environmentaldefensecenter.org

Maggie Hall
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906 Garden Street
Santa Barbara, CA 93101
(805) 963-1622
mhall@environmentaldefensecenter.org

IV. Conclusion

As outlined in this letter, the government's failure to initiate consultation despite the potential for adverse impacts, and the agencies' determination that the use of well stimulation treatments on the Southern California OCS will have no effect on certain listed species, violates the ESA. We thus hereby provide notice that BSEE's and BOEM's failure to conduct consultation under Section 7 of the ESA, and BSEE's and BOEM's "no effect" determinations or any "not likely to adversely affect" determinations, violate Section 7 and Section 9 of the ESA. These violations may result in significant adverse environmental effects offshore California and may harm and undermine efforts to protect, conserve, and recover these imperiled species within the United States. Should BSEE or BOEM fail to remedy these violations of law within 60 days, EDC and Channelkeeper intend to pursue this matter in Federal District Court. Please contact us should you wish to discuss this notice letter in further detail.

Sincerely,



Maggie Hall
Staff Attorney



Brian Segee
Senior Attorney

BOEM & BSEE

Notice of ESA Violations Regarding Offshore Well Stimulation on California OCS

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cc:

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West Coast Region
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