UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF ANIMALS,

Plaintiff,

v.

PAUL PHIFER, Assistant Regional Director of Ecological Services for the Northeast Region Office of the U.S. Fish and Wildlife Service, et al.,

Defendants

and

STATE OF MAINE, et al.,

Intervenor Defendants

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Consol Plaintiffs,

v.

U.S. FISH AND WILDLIFE SERVICE, et al.,

Consol Defendants.

PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Case No. 1:15-cv-00157-JAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **iv**

MOTION FOR SUMMARY JUDGMENT 1

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 1

INTRODUCTION 1

BACKGROUND 2

A. The Threatened Canada Lynx Continues To Decline 2

B. Trapping In Maine Captures Lynx 3

C. FWS Issued the 2014 Permit Despite Fact That FWS Found Maine's Permit Inadequate 5

D. The 2014 Permit Issued By FWS Is Inadequate 11

E. Two Lynx Were Killed By Traps Immediately After 2014 Permit Was Issued 15

F. FWS Failed To Analyze The Significant Impacts Of The Permit And Failed To Prepare An EIS 16

STANDARD OF REVIEW 18

ARGUMENT 19

I. THE PERMIT ARBITRARILY FAILS TO MINIMIZE AND MITIGATE THE TAKE TO THE MAXIMUM EXTENT PRACTICABLE. 19

A. The Calculation Of Take Prepared By Maine And Accepted By FWS Understated The Likely Take From Maine's Three Trapping Programs 19

B. The Permit Arbitrarily Fails to Minimize The Take To The Maximum Extent Practicable. 23

C. The Permit Arbitrarily Fails To Mitigate The Take To The Maximum Extent Practicable. 25

II. FWS VIOLATED THE ESA BY FAILING TO ENSURE ADEQUATE FUNDING FOR MAINE'S MINIMIZATION AND MITIGATION PLANS. 27

III. FWS VIOLATED NEPA BY FAILING TO ANALYZE THE SIGNIFICANT IMPACTS OF THE PERMIT AND FAILING TO PREPARE AN EIS. 30

A. The Permit adversely affects an ESA listed species, Canada lynx. 31

B. The Permit impacts an ecologically critical area. 31

C. The Permit has potentially precedential effect. 32

D. The Permit's cumulative impacts on the environment are significant. 33

E. The effects of the Permit are highly uncertain. 34

F. The effects of the Permit are highly controversial. 37

IV. FWS'S CHARACTERIZATION OF THE PERMIT AMENDMENTS AS "MINOR" WAS ARBITRARY AND NOT IN ACCORDANCE WITH THE ESA AND ITS IMPLEMENTING REGULATIONS 40

V. PLAINTIFFS HAVE STANDING. 42

CONCLUSION 42

TABLE OF AUTHORITIES

CASES

Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004) 32

Animal Welfare Inst. v. Martin, 623 F.3d 19 (1st Cir. 2010) 42, 43

Audubon Soc. of Cent. Ark. v. Dailey, 977 F.2d 428 (8th Cir. 1992) 36

Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) 33

Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv., 226 F.Supp. 2d 330 (D. Mass. 2002) 20

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 18

Conservation Law Found. v. Watt, 560 F. Supp. 561, 571-72 (D. Mass.) aff'd sub. nom. Com. of Mass. v. Watt, 716 F.2d 946 (1st Cir. 1983) 20

Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701 (9th Cir. 2009) 34

Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 202 F. Supp. 2d 594 (W.D. Tex. 2002) 26

Found. for N. Am. Wild Sheep v. U.S. Dept. of Agr., 681 F.2d 1172 (9th Cir. 1982) 36, 37, 39

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) 42, 43

Friends of the Wild Swan v. Jewell, No. CV 13-61-M-DWM, 2014 WL 4182702 (D. Mont. Aug. 21, 2014) 20, 25

Gerber v. Norton, 294 F. 3d 173 (D.C. Cir. 2002) 23, 25

Heckler v. Mathews, 465 U.S. 728 (1984) 43

Helena Hunter & Anglers v. Tidwell, 841 F. Supp. 2d 1129 (D. Mont. 2009) 32

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 42, 43

Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989) 18

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 18

Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274 (E.D. Cal. 2000) ..... passim

Nat'l Wildlife Fed'n v. Norton, No.CIV-S-04-0579 DFL JF, 2005 WL 2175874 (E.D. Cal. Sept. 7, 2005) 20, 26

Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7 (2d Cir. 1997) 36

Nat'l Audubon Soc'y v. Hoffman, 917 F. Supp. 280 (D. Vt. 1995), aff'd in part, rev'd in part sub nom. Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7 (2nd Cir. 1997) 36

Nat'l Parks and Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) 31

Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274, 1294 (E.D. Cal. 2000) 28, 38

Natural Resources Defense Council v. Kempthorne, 506 F. Supp. 2d 322 (E.D. Cal. 2007) 20

Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18 (1st Cir. 2007) 42, 44

Roosevelt Campobello Int'l Park Commission v. Envtl. Prot. Agency, 684 F.2d 1041 (1st Cir. 1982) 20

Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973) 37

SEC v. Chenery Corp., 332 U.S. 194 (1947) 18

Sierra Club v. Babbitt, 15 F. Supp. 2d 1274 (D. Ala. 1998) 28

Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) 19, 30

Sierra Club v. Morton, 405 U.S. 727 (1972) 43

Sierra Club v. Norton, 207 F. Supp. 2d 1310 (S.D. Ala. 2002) 35

Sierra Club v. U.S. Forest Service, 843 F.2d 1190 (9th Cir. 1988) 38

Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118 (S.D. Cal 2006) appeal dismissed and remanded, 409 F. App'x 143 (9th Cir. 2011) 28

TVA v. Hill, 437 U.S. 154 (1978) 18

United States v. Coalition for Buzzards Bay, 644 F.3d 26 (1st Cir. 2011) 19

WildEarth Guardians v. FWS, 622 F. Supp. 2d 1155 (D. Utah 2009) 26

STATUTES

16 U.S.C. § 1532(19). 20, 26

16 U.S.C. § 1536(a)(2) 20

16 U.S.C. § 1539(a)(2)(B) 20

16 U.S.C. § 1539(a)(2)(B)(i)-(ii) 19

16 U.S.C. § 1539(a)(2)(B)(iii) 28

16 U.S.C. § 1539(a)(2)(C) 29

42 U.S.C. § 4332(2)(C)(i) 30

5 U.S.C. § 706(2)(A) 18

OTHER AUTHORITIES

65 Fed. Reg. 58, 16054 32

65 Fed. Reg. 58, 54793 32

Fed. R. Civ. P. 56 1

REGULATIONS

40 C.F.R. § 1501.3 30

40 C.F.R. § 1508.13 30

40 C.F.R. § 1508.27(b)(3) 32

40 C.F.R. § 1508.27(b)(4) 37, 38

40 C.F.R. § 1508.27(b)(5) 34

40 C.F.R. § 1508.27(b)(6) 32

40 C.F.R. § 1508.27(b)(7) 33

40 C.F.R. § 1508.27(b)(9) 31

40 C.F.R. § 1508.7 33

40 C.F.R. § 1508.9 30

40 C.F.R. § 1508.9(a)(1) 30

40 C.F.R. §1501.4 30

50 C.F.R. § 17.22(b)(1) 19

50 C.F.R. §17.32(b)(1) 19

MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiffs Center for Biological Diversity et al. and Friends of Animals (Plaintiffs) move for summary judgment on the claims stated in their Amended Complaints (ECF 76, ECF 77) and seek an order from the Court directing Federal Defendants U.S. Fish and Wildlife et al. to prepare an adequate incidental take permit and environmental impact statement to protect Canada lynx from trapping. Plaintiffs are entitled to judgment as a matter of law because there are no genuine issues of material fact and Federal Defendants have violated the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act. A memorandum in support of this motion is incorporated.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Trapping in Maine kills, injures, and otherwise "takes" Canada lynx, a rare cat that is protected as a threatened species under the Endangered Species Act (ESA). In November 2014, the United States Fish and Wildlife Service (FWS) issued an Incidental Take Permit ("2014 Permit") to the Maine Department of Inland Fisheries and Wildlife (Maine) to permit the otherwise unlawful taking of lynx caused by Maine's trapping programs. Throughout the seven-year permitting process, FWS continually insisted that Maine's proposals for meeting the requirements of the ESA were inadequate. FWS wrote extensive comments questioning whether Maine was proposing to take the steps necessary to minimize and mitigate the take to the maximum extent practicable, and whether Maine could ensure adequate funding for implementation. Having insisted that Maine comply with these important requirements of the ESA for a period of multiple years, FWS then reversed course in 2014 and abruptly, arbitrarily, and capriciously acquiesced to Maine's resistance by approving a Permit that lacked many of

these necessary measures and thereby violated the ESA. FWS also failed to analyze the significant impacts of its decision with an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA).

Within three weeks of the effective date of the 2014 Permit, two lynx were killed in traps even though that permit estimated that trappers would only kill three lynx during the 15-year permit term. In response to the deaths, Maine promulgated an emergency regulation that eliminated the use of certain killer-type traps, and began the process of seeking an amended permit. On October 9, 2015, FWS approved amendments to Maine's Permit ("2015 Permit"). However, the amendments did not address the fatal flaws in the 2014 Permit, and in some cases, compounded the Permit's earlier errors.

BACKGROUND[1]

A. The Threatened Canada Lynx Continues To Decline

The Canada lynx is one of the rarest cats in the United States. AR-0002032 (Federal Register listing the Canada lynx as threatened under the ESA). Historically, lynx occurred throughout much of the northern United States, including in New York, Vermont, New Hampshire, and Maine. Id. It is associated with boreal or mixed boreal/deciduous forests, and within these general forest types, lynx are most likely to persist in areas that receive deep snow, for which the lynx is highly adapted. Id. The lynx's long legs and large, snowshoe-like paws give it a competitive advantage in deep snow in hunting its primary prey, the snowshoe hare. Id. Lynx populations are tied to hare abundance, with its cyclical spikes and collapses. AR-0069579–80.

[1] Pursuant to the November 9, 2015 Scheduling Order (ECF 67), the requirement for the filing of Statements of Material Facts is waived in this case insofar as the review of the administrative record will govern the Court's determination of the motions.

Significant declines in lynx populations, largely due to habitat loss and trapping, led FWS in 2000 to list the lynx as "threatened" under the ESA. AR-0002032; AR-0002041. FWS acknowledged that the lack of reliable population data made it difficult to assess the impact of trapping on lynx, but noted that "[i]f other threats to a resident population of lynx exist, the additive nature of additional losses to the population [from trapping] may prove to be significant." AR-0002044.

The total current lynx population in Maine is uncertain. AR-0024037 (FWS stating that even under the best-case scenario, lynx density may decline by 55% by 2012); AR-0074349–50 (FWS stating that Maine's population estimates of 750-1,000 were too high); AR-005870–71. FWS data and University of Maine studies indicate that the Maine lynx population is declining and will continue to decrease by approximately 65% over the next 5 to 20 years due to habitat loss for prey. AR-0069654.

B. Trapping In Maine Captures Lynx

Maine's Recreational, Predator Management, and Animal Damage Control Trapping Programs result in "taking" of Canada lynx. AR-0067993. Between 1999 and 2012, 70 lynx were reported as trapped in Maine, including seven lynx that died in traps. AR-0051885–86; AR-0073534. Maine examined less than half of these captures. AR-0051894. In 2013, 14 lynx were reported as trapped in Maine. AR-0051894–95. In 2014, 20 lynx were reported as trapped in Maine, including two lynx that died in the traps. Id.

Maine relies on trapper self-reporting to assess the number of incidentally captured lynx AR-0074392; AR-0074336; AR-074421. Maine did not require trappers to report lynx captures until 2008 and acknowledges that not all incidental captures of lynx are reported. AR-0006547. FWS was aware and expressed concern that unreported take of lynx is much greater than

indicated by Maine. AR-0004949 (notes to file showing trappers were told not to report lynx captures at a state sponsored, mandatory trapper training where wardens were present); AR-0012501 (FWS correspondence regarding significant amount of "shovel and shutup" correspondence in Maine trapper's blogs and acknowledging that reporting rate for lynx trapping was unknown); AR-0039763 (FWS noting blog posts from Maine trappers that claim that they would never report trapped lynx); AR-0066036; AR-0066861 (FWS stating that unreported lethal take may be much greater than reported and that significant amounts of unreported lethal take in killer-type traps can be enough to affect populations and recovery); AR-0065756 (FWS noting that take in foothold traps alone could be 3-7 times greater than Maine estimates and injury rates could be substantially greater).

FWS made an "important note" in its letter rejecting Maine's 2008 draft Permit that "it is apparent that in some situations lynx takes are not being reported promptly, thorough investigations are not taking place, and valuable information is not being collected . . . ." AR-0009786. In light of this, FWS informed Maine "[a] goal of the ITP should be to collect accurate information on incidental take incidents and use this knowledge to help reduce future taking." AR-0009786. In November 2012, FWS concluded that 75% of lynx trap events go unreported based on internal consultation between the FWS Maine Field Office and FWS Law Enforcement. AR-0039763–64.

Maine allows conibear traps, foothold traps, and cable restraints/snares under Maine's trapping programs. AR-0074373–79. Conibear traps are lethal, body-gripping traps designed to crush the neck of the animal, although these traps also catch lynx by their paws. AR-0020250; AR-0071168; AR-0020250; AR-0075080. Two lynx were reported as killed in conibear traps within the first three weeks after the 2014 Permit became effective. AR-0073488. Foothold traps

snap closed around an animal's paw, holding the animal until it can be killed or released. AR-0051952. Foothold traps are intended to be non-lethal, but they often injure animals by the force of closure or when animals struggle to escape. AR-0051892. Of the lynx caught in foothold traps and examined by Maine personnel between 1999 and 2012, 81% (26 of 32) were found to have injuries. AR-0051894.

Cable restraints, like snares, seize animals around the neck or leg. AR-0051913. Snares are known to kill and injure lynx. AR-0068304. Lynx, like all cats, respond to neck snares by struggling, increasing their chance of harm and mortality. AR-0051913.

C. FWS Issued the 2014 Permit Despite Fact That FWS Found Maine's Permit Inadequate

In May 2006, Maine began drafting a permit to cover its Recreational Trapping Program in response to an action in this Court, which resulted in a Consent Decree approved by this Court in 2007. AR-0006562; AR-0058217. Under the Consent Decree, Maine was required to apply for an incidental take permit and to adopt numerous measures to minimize the incidental take of lynx in Maine's recreational trapping program (Case No. 1:06-cv-128-JAW). AR-0006056.

In May 2007, Maine submitted a draft permit to FWS that covered only Maine's Recreational Trapping Program. AR-0058217; AR-0006562. In September 2007, FWS notified Maine that this draft permit did not meet the submission criteria. AR-0008457.

The take calculation in Maine's 2007 permit application estimated that, over a fifteen-year period, 221 lynx might be trapped and 49 killed. AR-0058217; AR-0006562. Instead, of a refined estimate of Maine's lynx population, Maine used a "less precise" estimate of 500 lynx based on study of trapped lynx that were radiocollared. AR-0006521; AR-0006545. Maine also stated "this may be an overly optimistic prediction for the lynx population, given the predicted decline of snowshoe hare habitat in Maine." AR-0006561. FWS told Maine that it needed to

refine its incidental take calculation in order to meet ESA requirements. AR-0008457 (FWS letter rejecting Maine's 2007 draft permit). Specifically, FWS stated that the anticipated incidental take must factor in the most recent data, which indicated that lynx population was declining and will likely fluctuate in the future. AR-0008460. FWS also stated that the permit must include a table detailing all past take because "[a]bsent this information, [FWS] will be unable to attach significant value to the minimization measures." AR-0008460. Last, FWS stated that the take calculation should be presented in terms of the type or manner of take likely to occur, to account for all meanings of "take" in the ESA. AR-0008460.

FWS also rejected Maine's minimization plan in its draft permit and required a "fuller explanation of why measures to minimize take that were not adopted are impracticable." AR-0008457. FWS recommended the following practicable minimization measures: (1) reduce canid trapping seasons; (2) restrict the types and sizes of foothold traps to those recommended in Best Management Practices (BMPs) for bobcats and canids; (3) require modification to foothold traps (e.g., padded jaws, offset jaws, etc.); (4) require modifications to chains, swivels, and stakes (e.g. eliminate use drag hooks, require recommendations in lynx guidelines or trapping BMPs); (5) reduce the five day conibear trap tending time; (6) develop policy that requires wildlife professionals be part of trapper training programs and present information on endangered species minimization measures; (7) require trappers to attend mandatory trapper education courses; and (8) incorporate measures that were in place from the 2007 Consent Decree. AR-0008461–62.

Likewise, FWS also found several fatal flaws in Maine's mitigation plan in its 2007 draft permit, including a lack of clear and long-term habitat creation and management commitments; uncertain effectiveness; unclear connection to the incidental take; no specific adjustments in response to adaptive management triggers; and no monitoring program to assess the mitigation

plan's effectiveness. AR-0008270–71. FWS explained that "[w]e can consider commitments for future plans/activities (1) if the goals and timing are sufficiently explicit to support analysis of benefits and (2) if the plan contains a contingency to deal with non-attainment (e.g., some specific alternative mitigation will be substituted, amount of allowable take will be reduced). These two considerations are particularly important with respect to proposed lynx habitat . . . which we conclude lacks specificity to be a valid supportable mitigation measure." AR-0008464.

Finally, FWS rejected Maine's funding plan for its minimization and mitigation because Maine failed to specify or sufficiently explain the costs and funding sources. AR-0008465; AR-008703. FWS stated "[w]e do not expect an unequivocal commitment of funding given the vagaries of government funding," but Maine must consider how to account for possible shortfalls in funding. AR-0008465.

In 2008, Maine submitted a revised draft permit. AR-0009937. In September 2008, FWS again advised Maine to withdraw its proposed final permit because it failed to meet ESA requirements. AR-0009780.

Specifically, Maine did not provide more accurate population data, as FWS requested. AR-0009925; AR-0009399 (Maine acknowledged there is "insufficient data available to model the statewide lynx population."). Maine did not establish a baseline incidental take amount and demonstrate how minimization measures will reduce take from the baseline level. AR-0009783. Furthermore, FWS found that the explanations provided by Maine regarding minimization measures in the 2008 draft permit were inadequate. AR-0009786. Additionally, FWS noted that Maine avoided the issue of self-reporting by trappers even though "many incidental take

occurrences are not immediately reported and discovered weeks or months after the event." AR-0009783.

Finally, FWS rejected Maine's mitigation plan as "too speculative and too general in description to support permit issuance," emphasizing "[m]itigation should be able to demonstrate a measureable, incremental increase in protection." AR-0009794. FWS stated that "to assess whether and how an activity mitigates take to the maximum extent practicable, it must be described with sufficient specificity for [FWS] to determine when it has been accomplished and to support an estimate of the amount, location, and timing of benefits to the lynx population." AR-0009795. FWS continued that this is "particularly important with respect to proposed lynx habitat management . . . which we conclude lacks specificity to be a valid and supportable mitigation measure." AR-0009795. Further, FWS stated that "unless the specified mitigation fully (or very nearly) offsets the anticipated take (after implementation of measures to reduce the take), then the application must provide an explanation as to why other measures (e.g., habitat management agreements on private lands) are not practicable." AR-0009795.

In April 2009, FWS again noted outstanding deficiencies in the proposed permit and expressed concern that these were not resolved prior to public notice and comment. AR-0013352–53. These issues included: the quantification of take; assessment of recent take and species population levels; adequacy and extent of proposed avoidance, minimization, and mitigation measures needed to be further developed; the uncertainty concerning the jurisdiction, willingness, and extent of binding commitments to conserve lynx habitat on land held by third parties. AR-0013348.

In 2011, FWS provided more comments on Maine's draft permit. AR-0067142. Because Maine continued to allow use of killer-type traps in occupied lynx habitat as long as the traps

were placed on leaning poles (trees with a lean of at least 45 degrees) that purportedly would be inaccessible to lynx, the FWS Maine Field Office informed Maine of studies it had conducted that found that lynx could easily reach leaning pole traps set up to four feet off the ground. AR-0027785. In addition, FWS specified that Maine should revise the mitigation plan to: (1) create or maintain 10,000 acres of optimal lynx habitat, rather than 5,000 acres; (2) establish a management area of 1.5–4 townships in size (34,560–92,160 acres); (3) demonstrate mitigation that compensated for all forms of take, lethal and non-lethal; and (4) prohibit trapping in the mitigation area. AR-0039944–45.

In April 2012, another study by FWS demonstrated the ability of lynx to climb leaning poles to access killer-type traps. AR-0039270; AR-0043225. Seven out of sixteen lynx observed in the study successfully climbed leaning poles; the remaining nine lynx observed were able to reach the trap and the bait without climbing the pole. AR-0039267. These trials were documented and filmed. AR-0039247.

In May 2012, FWS again provided Maine with an outline of changes necessary to meet the ESA's Permit issuance criteria. AR-0039649–52. Similar to FWS's 2007 comments, these changes included requirements for lynx exclusion devices on conibear traps, BMP standards for foothold traps that reduce the injuries from these traps (such as offset jaws or padded jaws), and elimination of drag sets (foothold traps that are not anchored to the ground). AR-0049779–80; AR-0039284 (FWS list of minimization and mitigation measures that would meet maximum extent practicable issuance criteria); AR-0040477; AR-0039274–75 (FWS recommending exclusion boxes on leaning poles); AR-0039574–76 (FWS recommending exclusion boxes, stating they would "decrease and possibly eliminate the incidental take of Canada lynx"); AR-0023885; AR-0043201; AR-0043205; AR-0043194; AR-0043198; AR-0053924. These lynx

exclusion devices essentially are wire boxes placed over the traps that exclude adult lynx from the traps. AR-0070177. FWS's continued insistence on the need for lynx exclusion devices was driven by doubts over Maine's stance that placing the traps on leaning poles effectively would deter lynx exposure to killer-type traps. AR-0044624; AR-0039270.

In February 2013, FWS again informed Maine that the size of the mitigation area needed to be revised to "incorporate stronger commitments for lynx management." AR-0044713; AR-0044715. FWS commented that in order "to adequately support long-term lynx presence, habitat management areas should be large enough to accommodate adult males and females and allow for seasonal and annual increases that may occur that may occur in home range size." AR-0044713. FWS described maximum home ranges in high quality habitat for a male lynx as 14,720 acres and for a female lynx as 9,600 acres. AR-0044713. If there is a 70% overlap between the male and female ranges, "then a lynx habitat management unit may need to be 21,000 acres or nearly a township to accommodate one adult male and several females." AR-0044713. FWS concluded that, based on its review of the draft permit, "more is needed to demonstrate the sufficiency of the mitigation in offsetting the estimated take." AR-0044713.

Additionally, in February 2013, FWS informed Maine that the agency could not understand how Maine's mitigation plan would actually be achieved. AR-0044715. FWS commented "'[i]f the area is already prime lynx habitat and will continue to be in the near future, and lynx area already present, how will 'new' lynx be created sufficient to offset anticipated take?'" AR-0044715. Further, FWS recommended Maine "incorporate a robust analysis of future forest conditions and associated hare and lynx populations to demonstrate how the mitigation will be achieved." AR-0044715.

In March 2013, Maine submitted a revised permit that sought coverage for significantly more trapping because, for the first time, the permit included, in addition to Maine's Recreational Trapping Program, Maine's Animal Damage Control Trapping Program and Predator Management Trapping Program, both of which engage in extensive trapping. AR-046859; AR-046872. Instead of adding additional restrictions to trapping with the goal of minimizing lynx take, this draft permit instead reduced regulation of foothold traps, increasing trappers' ability to trap in December, a time when lynx are particularly vulnerable to trapping. AR-0002032. Despite these additional sources of increased potential take of lynx, Maine made no substantive changes to the proposed permit's take calculation, minimization plan, or mitigation plan. AR-046613, AR-0046618–19, AR-0046631–32.

In June 2014, FWS's biologists noted that the size of the proposed mitigation area was only marginally suitable to attract and support three lynx, and that the proposed mitigation area did not compensate for all forms of anticipated take, including nine severe injuries and 183 minor injuries. AR-0054073.

Maine submitted a final permit to FWS in October 2014. AR-0067982. This permit still lacked most of the mitigation and minimization recommendations made by FWS and failed to ensure adequate funding of the deficient minimization and mitigation plans. AR-0068059. Nevertheless, FWS approved the Permit on November 4, 2014. AR-0070454.

D. The 2014 Permit Issued By FWS Is Inadequate

The 2014 Permit provides that, over a fifteen-year period, three lynx may be killed or rendered unreleasable by trapping, nine lynx may suffer severe injury and subsequent rehabilitation; and 183 lynx may be trapped with minor injury and immediate release. AR-0068040.

As outlined above, FWS disagreed with the method Maine employed for calculating take throughout the permitting process. AR-0012336. FWS stated internally that Maine's method was "confounded by assumptions." AR-0016432; AR-0016459; AR-0016703; AR-0016809; AR-0040998; AR-0041031; AR-0043205; AR-035936; AR-035951–52; AR-035961; AR-036020–21. FWS repeatedly noted deficiencies in Maine's data because Maine failed to account for unreported take of lynx, or for lynx taken in illegally set traps. AR-0043126. Despite this, FWS issued a final Permit that calculated take based solely on the rate of trapper self-reporting. AR-0068040.

This take calculation accepted by FWS did not consider or address 2013 data on lynx trapping incidents in Maine, even though more lynx (14) were trapped in 2013 than in any year since 1999. AR-0070151–70; AR-0069856; AR-0069857. If this 2013 data had been included in the formula used to calculate take, the total anticipated take would have been at least 255 lynx, rather than 195 lynx. AR-0058247. The Permit now includes but fails to consider 2014 data on lynx trapping incidents in Maine. AR-0074405–08. Despite the trapping of more lynx (20) in 2014 than in any year since 1999, neither Maine nor FWS made changes to the Permit's take calculation. AR-0058247. If 2014 data had been included in the formula used to calculate take, the total anticipated take would have been at least 360 lynx, rather than 195 lynx. Id. The take calculation also relied on data of lynx trapping incidents from years where more restrictive measures from the 2007 Consent Decree were in effect to reduce the number of takes. AR-0053924.

Significantly, the 2014 Permit removed minimization measures that already were required by the 2007 Consent Decree. AR-0070125–32.

To begin, the Consent Decree banned foothold traps over 5 3/8 inches that pose greater risks to lynx, unless they were placed fully or partially under water, where lynx are not caught. AR-0006068 (Consent Decree), AR-0070126 (Permit - Consent Decree comparison table). In contrast, the 2014 Permit approved by FWS included no foothold size restrictions. AR-0070130.

The Consent Decree also prohibited snares. AR-0006069. Yet, the 2014 Permit allows for cable restraints, which are a type of snare that causes many of the same injuries as traditional snares. AR-0070131. FWS noted, "[i]t is difficult to understand how Maine added several new forms of trapping and . . . still requests the same level of take." AR-0066010.

The Consent Decree recommended the use of foothold traps with offset jaws, for the purpose of reducing incidental trap injuries. AR-0006069. FWS omitted this recommendation from the 2014 Permit. AR-0070125–32.

The 2014 Permit failed to include important minimization measures that FWS repeatedly recommended. AR-0070234. Even though numerous studies demonstrated that lynx could access killer-type traps on leaning poles, FWS approved a Permit that did not require lynx exclusion devices. AR-0070177. In addition, FWS relented and failed to require BMP traps that serve to reduce injury to lynx with offset, padded jaws. AR-0039649 (recommended practicable minimization and mitigation measures).

Under the 2014 Permit, Maine proposed to offset the lethal take of three lynx though the creation of a mitigation area that can meet the "high quality hare habitat requirement." AR-0070210. Implementation of the mitigation plan depends actions on the Maine Bureau of Public Lands (BPL). AR-0070210–11; AR-0073866. Specifically, BPL needs to develop a forest management plan for the proposed mitigation area, but BPL does not have a plan and is not required to complete one for three years. AR-0073866. BPL has not assessed the trajectory of the

existing habitat or demonstrated when, where, and how sufficient high quality hare habitat will be maintained or created. AR-0073866. In fact, BPL does not expect to have capability to provide this needed analysis for several years. AR-0073866.

As of the first Permit report period in May 2015, BPL had not completed any forest management activities necessary to improve the mitigation area for lynx and its prey. AR-0073867. Moreover, because it takes 10-12 years before regenerating clearcut forests develop into high quality hare habitat, AR-0054074, the proposed new habitat will not become suitable for lynx until after the permit expires. Id. In addition, the mitigation area is smaller than what FWS had previously insisted upon. Maine refused to increase the mitigation plan of 6,200 acres to at least 10,000 acres, as needed to compensate for lethal take of three lynx. AR-0039944; AR-0044475-76. Overall, the approved mitigation plan fell short of FWS's repeated recommendations for a larger acreage of optimal habitat within a larger management area; did not compensate for all types of take, as FWS previously had insisted upon; and permitted trapping in the lynx mitigation habitat, contrary to FWS's prior demands. AR-0039944–45.

Maine estimates that implementation costs of its minimization plan will average $69,000 annually. AR-0070228. The mitigation plan will cost $65,000 over the life of the Permit. AR-0070232. As such, the Permit's minimization and mitigation measures will cost more than $1 million to implement over the 15-year life of the Permit. AR-0070230; AR-0070232. Instead of ensuring funding for the minimization and mitigation plans, the 2014 Permit requires Maine to provide evidence on an annual basis that Maine's legislature has appropriated adequate funds to implement the plans by July 15th of each year. AR-0070227.

All drafts of Maine's permit prior to October 2014 provided that failure to demonstrate sufficient funding by July 15th of each year would result in revocation of the permit. AR-

0045671; AR-0047021; AR-0048024. In contrast, FWS approved the 2014 Permit that provides discretionary language that inadequate funding "may" result in revocation of the Permit. AR-0070227.

E. Two Lynx Were Killed By Traps Immediately After 2014 Permit Was Issued

Traps killed two lynx within the first three weeks after the 2014 Permit became effective, even though the Permit estimated that trappers would only kill three lynx during the 15-year Permit term. In response to the deaths, Maine on December 9, 2014 promulgated an emergency regulation that eliminated use of killer-type traps set on leaning poles in Wildlife Management Districts (WMDs) occupied by lynx. AR-0075765.

After the two lynx were killed, Mark McCollough, a biologist with the FWS Maine Field Office, had meetings with Maine and the Maine Trappers Association (MTA). AR-0073634. In reaction to the two lynx deaths, McCollough noted that trappers believed the incidental take numbers in the 2014 Permit were too low. AR-0073633. Specifically, McCollough noted that MTA asked "[w]hy didn't [Maine] ask for more incidental take? We are going to regularly take lynx." Maine responded "[a]t the time we wrote the [Permit], we thought lynx populations were going to decline. We used max number of lynx caught (in 2005? = 11) and inflated that by 20% . . . it was just our best guess at the time. We were wrong about our assumptions concerning the leaning pole. We believed the number of trap nights with no reported take in legal set leaning poles indicated the leaning pole was effective. We were wrong . . . ." AR-0073634.

The following September, Maine amended its 2014 Permit. AR-0074316. Among other amendments, Maine changed trapping regulations. The new regulations (1) prohibited use of killer-type traps on leaning poles and drag sets (traps that are not staked to the ground), (2) required new practices for foothold traps, including solid staking, central chain mounts and three

swivels, (3) required lynx exclusion devices for most killer-type traps, but not for blind sets, overhanging bank sets, or aquatic sets; and (4) eliminated Consent Decree limitations on foothold trap sizes and expanded the use of killer-type traps on land throughout lynx Wildlife Management Districts. AR-0074317–20. FWS approved these amendments to Maine's 2014 Permit as a minor amendment in a letter dated October 9, 2015 ("2015 Permit"). AR-0074518.

F. FWS Failed To Analyze The Significant Impacts Of The Permit And Failed To Prepare An EIS

Maine's Permit was the first permit issued for incidental lynx takes by a state's recreational trapping program granted under the ESA. AR-0037239; AR-0049546.

In 2009, five years before the completion of the permit process, FWS began preparing a draft Environmental Assessment of the Permit, based on the false assumption that it was "clear" that the proposed trapping activity would not have a significant impact on the human environment. AR-0017454; AR-0018848.

In 2012, more than two years prior to the issuance of the 2014 Permit, FWS's timeline for the permit indicated that a Finding of No Significant Impact (FONSI) would be one of the final steps for the permit's approval. AR-0041996.

In 2014, FWS field staff confirmed that multiple intensity factors under NEPA's regulations, 40 C.F.R. § 1508.27, in fact warranted a full EIS, including: substantial uncertainties about extent of lynx take, degree of injury from trapping, extensive controversy, past and pending lawsuits in Maine and other states, the Permit's precedential effect on lynx Permits in other states, cumulative impacts from unreported and otherwise illegal take of lynx, and the potentially significant impacts on lynx, a threatened species under the ESA, and its critical habitat. AR-0065756; AR-0036690.

FWS was aware of that the Permit would have a precedential effect on permit applications for trapping programs in Minnesota, Montana, and Idaho. AR-0037239; AR-0065756; AR-0036690.

Additionally, Maine's trapping programs impact ESA listed species and critical habitat. AR-0024037 (explaining that even under the best scenarios lynx population density may decline by 55% by 2032). Among other impacts, the trapping authorized under the Permit already has resulted in the lethal take of at least two lynx. AR-0075765; AR-0074520.

Another factor is the uncertainty that pervaded the permit application process. AR-0008270–71 (letter from FWS outlining permit deficiencies); AR-0040540 (FWS noting "lots of uncertainty"). For example, in 2014, FWS estimated that the number of lynx captured in foothold traps alone could be three to seven times higher than the Permit's estimates, which further illustrates the uncertainty over the Permit's take calculation. AR-0065756; AR-036022.

In addition, much controversy surrounded this Permit, as evidenced by 11,700 individual comments, the majority of which opposed the Permit, and ongoing litigation. AR-0049171. Moreover, internal FWS communications described Maine's Permit application as "highly controversial." AR-0008224; AR-0065756; AR-0036690.

Additionally, the Permit has significant cumulative impacts from actions directly or indirectly related to the proposed trapping activity. AR-0065756. For example, FWS was concerned that Maine had not adequately accounted for unreported and illegal captures of lynx that were related to Maine's legal trapping activities. In November 2012, FWS concluded that 75% of lynx trap events go unreported. AR-0039760.

Despite these significance factors, in November 2014, FWS issued an EA and a FONSI for the Permit. AR-0070462. Even after the death of two lynx and the incidental take of 20 lynx during the 2014-15 trapping season, FWS did not revisit or revise its 2014 EA and FONSI.

STANDARD OF REVIEW

FWS's decisions to approve the Permit under the ESA and to avoid an EIS under NEPA shall be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413–14 (1971). This review is narrow, but "searching and careful." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 387 (1989). The agency acted arbitrarily and capriciously if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). The reviewing court must determine whether the agency examined the relevant data and explained a "'rational connection between the facts found and the decision made.'" Id. The agency's "course of inquiry, its analysis, and its reasoning" must be "plain" based on the record. Id. The reviewing court "'may not supply a reasoned basis for the agency's action that the agency itself has not given.'" Motor Vehicle Mfrs., 463 U.S. at 43 (quoting SEC v. Chenery Corp., 332 U.S. 194, 209 (1947)).

In applying the ESA, the Supreme Court has held that the language, history, and structure of the ESA "indicate beyond doubt that Congress intended endangered species to be afforded the highest of priorities." TVA v. Hill, 437 U.S. 154, 173 (1978). The ESA represented the most comprehensive legislation for the preservation of endangered species ever enacted, and "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Id. at 180, 184.

In the First Circuit, an agency's decision not to prepare an EIS is reviewed under a "substantial possibility" standard. This standard assures that the agency has conducted a thorough examination of a project's potential effects in determining whether an EIS is needed. An EIS is required if there is "a 'substantial possibility' that agency action 'could significantly affect the quality of the human environment.'" Sierra Club v. Marsh, 769 F.2d 868, 870-71 (1st Cir. 1985) (emphasis added). The Court must "insure that the agency has taken a 'hard look' at environmental consequences" of its proposed action in deciding not to prepare an EIS. United States v. Coalition for Buzzards Bay, 644 F.3d 26, 31 (1st Cir. 2011).

ARGUMENT

I. THE PERMIT ARBITRARILY FAILS TO MINIMIZE AND MITIGATETHE TAKE TO THE MAXIMUM EXTENT PRACTICABLE

FWS may only issue an incidental take permit if it determines that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts" of the taking. 16 U.S.C. § 1539(a)(2)(B)(i)-(ii); 50 C.F.R. §§ 17.22(b)(1), 17.32(b)(1). FWS's decision to issue this Permit was arbitrary and capricious because Maine's Permit understated the likely take from the three trapping programs covered by the Permit, and failed to minimize and mitigate the take to the maximum extent practicable.

A. The Calculation of Take Prepared by Maine and Accepted by FWS Understated the Likely Take From Maine's Three Trapping Programs

FWS arbitrarily accepted a take calculation that understated the likely take from the three trapping programs covered by the Permit and that ignored numerous problems identified by FWS biologists. Because this arbitrary and understated take calculation is the basis for the minimization and mitigation plans, these plans do not minimize and mitigate the take "to the maximum extent practicable."

"Take" is defined broadly as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Take calculations determine the level of minimization and mitigation required under the Permit. See Id. § 1539(a)(2)(B); Nat'l Wildlife Fed'n v. Norton, No.CIV-S-04-0579 DFL JF, 2005 WL 2175874, at *13 (E.D. Cal. Sept. 7, 2005); Friends of the Wild Swan v. Jewell, No. CV 13-61-M-DWM, 2014 WL 4182702, at *4 (D. Mont. Aug. 21, 2014).

In addition, FWS "shall use the best scientific and commercial data available" when issuing an incidental take permit. 16 U.S.C. § 1536(a)(2); Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274 (E.D. Cal. 2000); Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv., 226 F.Supp. 2d 330 (D. Mass. 2002). In the First Circuit, this standard requires a "first class" effort on the part of the agency, including the performance of "any . . . tests and studies . . . suggested by the best available science and technology." Conservation Law Found. v. Watt, 560 F. Supp. 561, 571-72 (D. Mass.) (citing Roosevelt Campobello Int'l Park Commission v. Envtl. Prot. Agency, 684 F.2d 1041, 1052 n.9 (1st Cir. 1982)), aff'd sub. nom. Com. of Mass. v. Watt, 716 F.2d 946 (1st Cir. 1983). Failing to incorporate any information about population abundance into the setting of the take limits is a "fundamental failure." Natural Resources Defense Council v. Kempthorne, 506 F. Supp. 2d 322, 373 (E.D. Cal. 2007).

In this case, the Permit's take calculation, and therefore its minimization and mitigation plans, are not based on the best available data because (1) the take calculation did not include 2013 or 2014 lynx trapping data; (2) the take calculation omitted lynx trapping data from illegally set traps, unreported takes, or non-lethal takes; (3) the take calculation excluded lynx trapping data from Maine's Animal Damage Control and Predator Management trapping programs; and (4) the Permit lacked the most recent data on Maine's lynx population.

Maine considered only lynx trapping data from 1999-2012 in its take calculation and failed to incorporate trapping data from 2013 and 2014, even though this data showed the highest number of lynx trapped since 1999. AR-0058247 (FWS biologist's notes on estimating take). The highest take years in Maine's data set were 2004 and 2012, with 11 and 12 lynx taken respectively. Id. However, the number of lynx takes in 2013 and 2014 were 14 and 20, respectively. Id. Using Maine's own take calculation methodology, the 2013 and 2014 data would increase the total take estimate by 85%—from 195 to 360 lynx takes. Id. This data was available to FWS when it issued the Permit, but FWS arbitrarily accepted a take calculation that omitted this data. Id.

Maine's take calculation also omitted take from illegally set traps, unreported takes, or non-lethal takes, even though such takings are predictable consequence of Maine's regulated trapping programs. Id. Up until the final approval of the Permit, FWS consistently stated that unreported takes and takes resulting from illegally set traps should be included in the take calculation. AR-66009. In comments on the final draft of the draft permit, FWS staff stated

> [Maine's] method requires an assumption that all lynx are reported, for which there is significant uncertainty. This assumption is probably more problematic and serious than any of the assumptions the Maine Field Office made in calculating incidental take [referring to alternative methods refused by the FWS Regional Office], yet it is not mentioned here.

Id. Despite this concern by its own experts, FWS accepted Maine's underestimate of take in approving the Permit.

FWS accepted this flawed estimate even while it acknowledged that Maine's take calculation was "confounded by assumptions" that most trapped lynx are reported. AR-0058247. Using their own take calculation methodologies, FWS estimated that the number of takes was actually more than 500 lynx over the course of the years studied. Id. Not only did FWS fail to

justify why data from these types of takes was omitted from the take calculation, but FWS tried to downplay this fact. AR-0053924.

Further compounding the errors associated with calculating take, Maine did not increase the take calculation or the requested amount of authorized takes even after adding the Animal Damage Control and Predator Management trapping programs to the programs covered under the Permit. AR-0043445; AR-0054062. As FWS's endangered species specialist put it,

> [i]t is difficult to understand how [Maine] added several new forms of trapping and the [predator management] and [animal damage control] programs and still requests the same level of take as in the 2008 ITP (without any of these trapping programs, traps, and vacating parts of the Consent decree). How do we explain this in the Findings? We received many public comments on this issue. Does this make sense, particularly in light of the rate at which [Predator Management] trappers are catching lynx and new forms of trapping like cable restraints, cage traps and larger foothold traps, which will be used later into the winter?

AR-0066010.

As a demonstration of the impact of these additional trapping programs on lynx, 40% of the takes that occurred in 2012 were from the trappers in the new predator management program. AR-0070164. It is inconceivable that FWS would not increase its take calculation after adding more types of trapping and more trapping programs—especially when it knew that those additional trapping programs account for such a high percentage of overall take—but that is what FWS did.

Last, FWS arbitrarily failed to use the best available data on lynx population in setting a take limit. In the month preceding approval of the permit, FWS noticed that the baseline lynx population was not consistent between the EA, the Findings, and the Biological Opinion (BiOp). AR-0063450; AR-0069861; AR-0070424; AR-0070042. The BiOp stated that Maine's Permit estimated 750-1000 adult lynx lived in northern Maine in 2006, but both the BiOp and EA used 500 adult lynx as the population estimate. AR-0070057. The final Permit listed the population as

750-1000 lynx but then stated that Maine used 750 and 600 for its population modeling. AR-0074349.

In addition to a shifting and contradictory lynx population baseline, FWS admitted that it did not use recent population data and that the older data is not representative of current circumstances. AR-0070068 at n. 8. Maine completed its population modeling in 2007, during a time when the population of the lynx's main prey—the snowshoe hare—was in the early stages of decline. Id. The hare decline lasted from 2006-2011. Id. FWS acknowledged that this results in an inaccurate, inflated lynx population estimate ("This would inflate [Maine's] projections of population growth rate"), but used it anyway. Id.

FWS's acceptance of Maine's take calculation, in spite of these multiple and compounding errors that grossly underestimated the lynx takings, was arbitrary and capricious. This take calculation is foundational to FWS's determination of appropriate minimization and mitigation conditions. AR-0008457. Without a scientifically-based and factually-supported take calculation based on the best available data, FWS could not reasonably conclude that Maine's Permit would meet the requirements of the ESA.

B. The Permit Arbitrarily Fails to Minimize the Take to the Maximum Extent Practicable

The ESA requires that Maine minimize the impacts of its taking "to the maximum extent practicable." 16 U.S.C. § 1539(a)(2)(B)(ii). The provision requires that FWS find that there are no practicable alternatives that would further minimize the taking of Canada lynx. Gerber v. Norton, 294 F. 3d 173, 185 (D.C. Cir. 2002); see also, FWS Habitat Conservation Planning Handbook at AR-0000649–50 (explaining that the ESA requires consideration of whether the minimization program is the "maximum that can be practically implemented by the applicant").

In this case, FWS arbitrarily approved a minimization plan that did not include minimization measures that (1) had been ordered by this Court as part of its 2007 Consent Decree and that plainly were practicable because they were implemented for six years pursuant to that Decree; and (2) were demanded by FWS itself until the final iteration of the permit, and that plainly are practicable because many Maine trappers actually implement them.

The 2007 Consent Decree contained two minimization measures that are absent from Maine's Plan and Permit: (1) a prohibition on foothold traps of width greater than 5and 3/8 inches in lynx Wildlife Management Districts (WMDs), except when set under water, because these large traps pose the greatest risk to lynx when set on land, and (2) a prohibition on snares, which can catch animals by the neck or leg and usually are fatal (the Permit allows cable restraints, which also can catch animals by the neck and usually are fatal). AR-0006068–69. These minimization measures plainly are practicable because they were implemented for six years, but FWS arbitrarily gave no reason for omitting them from its Permit.

Similarly, throughout the multi-year process of issuing the Permit, FWS repeatedly insisted on minimization measures in addition to those proposed by Maine, including: (1) requiring lynx exclusion devices for all killer-type traps set in upland areas in lynx WMDs; (2) requiring that Best Management Practice ("BMP") foothold traps be phased in over a five-year period in lynx WMDs (these traps either do no close completely or are padded, thus minimizing foot and leg injuries to trapped lynx); (3) eliminating drag sets for foothold traps in lynx WMDs; and (4) eliminating blind sets in lynx WMDs. AR-0039643; AR-0040471; AR-0040471; AR-0062087. After six years of insisting on these minimization measures, in November 2014, FWS abruptly acquiesced to Maine's refusal to include them, but gave no explanation for this sudden reversal. AR-0074411; AR-0053924; AR-0053315; AR-036039; AR-036112; AR-036131.

The effect of these arbitrary concessions became clear in the first few weeks of the 2014 trapping season, when two lynx were killed in killer-type traps. AR-0073951. Doing what it should have done all along, and what FWS should have required, Maine adopted emergency regulations on December 9, 2014 that require lynx exclusion devices for most killer-type traps, but not for blind sets, overhanging bank sets, or aquatic sets, and eliminated drag sets for foothold traps in lynx Wildlife Management Districts. AR-0075765.

Even though some of the changes recommended by FWS went into effect after those two lynx died, the 2015 Permit does not require a phase-in of BMP traps in lynx Wildlife Management Districts. AR-0074411. This measure plainly is practicable because approximately 50% of Northeast trappers already use or plan to use BMP traps. AR-0023889. As with the two minimization measures from the Consent Decree, FWS gave no reason for its failure to include this measure, which reversed its longstanding insistence on requiring this type of foothold trap, along with lynx exclusion devices on killer-type traps.

FWS's failure to require these minimization measures or to explain why they were impracticable (which it could not do because they plainly are practicable) was arbitrary and illegal. Gerber, 294 F. 3d at 185; accord National Wildlife Federation v. Babbitt, 128 F. Supp. 2d 1274, 1293 (E.D. Cal. 2000) (the agency's failure either to require BMP mitigation measures or to explain how they would be impracticable was arbitrary).

C. The Permit Arbitrarily Fails to Mitigate the Take to the Maximum Extent Practicable

As with minimization, the ESA requires that the permit mitigate the impacts of the take to the maximum extent practicable. Courts have interpreted this provision to require a rough balance between the take and the mitigation. Friends of the Wild Swan v. Jewell, No. CV 13-61-M-DWM, 2014 WL 4182702, at *4 (D. Mont. Aug. 21, 2014); WildEarth Guardians v. FWS,

622 F. Supp. 2d 1155, 1165 (D. Utah 2009); Nat'l Wildlife Fed'n v. Norton, No. CIV-S-04-0579 DFL JF, 2005 WL 2175874, at *13 (E.D. Cal. Sept. 7, 2005); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 202 F. Supp. 2d 594, 609 (W.D. Tex. 2002).

In this case, the Permit's mitigation plan failed to provide a reasonable balance between the take and mitigation because it addressed only the expected lethal take of 3 lynx, and failed to mitigate for the 9 lynx that are permitted to sustain serious injury, as well for the 183 lynx that are permitted to be trapped and released. AR-0070423. In so doing, FWS redefined the term "take."

The statute defines "take" as including "kill," "wound," "trap," and "capture." 16 U.S.C. § 1532(19). The Permit covers the taking of all 195 lynx that may killed, wounded or trapped. In turn, because the ESA's definition of take includes nonlethal captures, the ESA requires that the impacts of all of these permitted takes be mitigated to the maximum extent practicable. Thus, the statute expressly rejects mitigation only of the impacts of lethal takes.

Nevertheless, since 2008, Maine has proposed to create an area of optimum lynx habitat to offset only the lethal take of three lynx. AR-0011258–60.

Contrary to Maine's proposal, but consistent with the statute, in early drafts of the Environmental Assessment, FWS stated that the final Permit must mitigate for both lethal and non-lethal takes of lynx. AR-0022833; AR-0053924. However, FWS arbitrarily abandoned this position without explanation. AR-0070151. The Permit is fatally flawed because FWS's failure to require mitigation for all 195 takes allowed under the Permit was arbitrary and contrary to law.

In addition to this fatal flaw, the mitigation plan is arbitrary because it relies on logging and other forest management to create optimal lynx habitat, but these measures will not be

effective during the 15-year life of the Permit. According to the mitigation plan, in the initial three years of the Permit, Maine will develop a forest management plan for the mitigation area that will depend on logging to create habitat for snowshoe hares that in turn will attract and support lynx. AR-0070211. The problem is that it takes another 12 years for clearcut or other logged areas to develop enough snowshoe hares to attract or maintain lynx. AR-0044478; AR-0023482. Thus, the managed mitigation area will have limited value for hares and lynx, if any, for the next 15 years, the very life of the Permit. Nor is there any guarantee or assurance that, having finally achieved the status of hare-lynx habitat 15 years from now, these management areas will continue to be suitable habitat. AR-0066798. In fact, Maine has no incentive to continue maintaining that habitat in a condition optimal for lynx and hare after the term of the Permit has expired. Thus, the Permit actually provides no assurance at all of the creation of quality hare-lynx habitat, because the Permit will expire when the logged habitat is attaining its value. These absurdities in the mitigation plan are significant factors that the agency failed to address.

Last, the mitigation plan is arbitrary because it allows trapping even in the very area set aside for mitigation as lynx habitat. It makes no sense to create habitat to mitigate for trapping impacts and then allow trapping to threaten the survival of any lynx that are attracted to that area. FWS demanded this restriction on trapping in rejecting an earlier version of Maine's proposed plan. AR-0039659. But this demand, like so many others, arbitrarily vanished without explanation in the final version of the Permit. AR-0074411.

II. FWS VIOLATED THE ESA BY FAILING TO ENSURE ADEQUATE FUNDING FOR MAINE'S MINIMIZATION AND MITIGATION PLANS

By approving a Permit that relies on speculative funding, FWS acted arbitrarily and contrary to the plain language of the ESA. Maine explicitly admitted that it "cannot guarantee"

either State funds or grant money necessary to implement the plan. AR-0070227. Not only is the funding not guaranteed, it is not at all certain that the proposed funding sources are even likely. This is so, because these funding sources all depend upon the future, speculative actions of others, including appropriations from the legislature and a mishmash of uncertain sources such as discretionary private and governmental grants, restricted-use federal funds, state hunting and fishing license fees, and conservation license plate fees. AR-0070227. In contrast to this uncertain funding scheme, the ESA requires that FWS and Maine "ensure adequate funding for the plan." 16 U.S.C. § 1539(a)(2)(B)(iii) (emphasis added).

Multiple courts have found that FWS approval of plans that relied on similarly speculative and third-party sources of funding was arbitrary and contrary to the ESA. Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1155-56 (S.D. Cal 2006) appeal dismissed and remanded, 409 F. App'x 143 (9th Cir. 2011); Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274, 1294 (E.D. Cal. 2000). In Bartel, for example, the City's proposed funding plan did not "ensure" funding because it "relied on future actions," and because the City had "no control over" funding that relied on "future action by the electorate." 470 F. Supp. 2d at 1156. Likewise, in Babbitt, the combination of third-party funding sources plus a city's refusal to guarantee funding rendered FWS approval of the plan arbitrary and in violation of the ESA. 128 F. Supp. 2d at 1294-95; see also Sierra Club v. Babbitt, 15 F. Supp. 2d 1274, 1282 (D. Ala. 1998) (reliance on speculative funding from third parties is arbitrary and capricious). Babbitt also held that the mere threat of permit revocation is insufficient to meet the statute. 128 F. Supp. 2d at 1295.

Apart from providing a laundry list of speculative, third-party funding sources, Maine provided no basis to conclude that Maine "ensured" adequate funding. Maine did not specify the

amounts of the various funding sources, whether these sources are new sources or are redirected from existing allocations, or its track record in obtaining such funds. Instead, as in Bartel and Babbitt, FWS and Maine arbitrarily relied on speculative and future action by third parties—the state legislature, federal and state agencies, unspecified grantors, and citizens who purchase hunting and fishing licenses and conservation license plates—in the admitted absence of any guaranteed funding. AR-0070227.

Moreover, this case is even more concerning than Babbitt because, at the end of the process, the FWA removed even the threat of mandatory permit revocation and substituted discretionary action instead. In all drafts of the Permit and Findings in the years leading up to the final Permit, FWS insisted that a failure to demonstrate sufficient funding by July 15th of each year "shall" result in mandatory revocation of the Permit. AR-0045671; AR-0047021; AR-0048024. In October 2014, in the final version of the Permit, the FWS Regional Office deleted this mandatory verb "shall," and replaced it with the discretionary verb "may." AR-0070227. FWS provided no explanation of or justification for this critical change, which sidesteps an important provision of the ESA requiring FWS to enforce the ESA through permit terms. See 16 U.S.C. § 1539(a)(2)(C) (the Secretary "shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.").

FWS's approval of Maine's speculative and uncertain funding violated the ESA's plain language, which requires that Maine "ensure" funding, and lacked any reasonable support in the record. As noted in FWS's own ITP Issuance Criteria, "[FWS] must ensure that funding sources and levels proposed by the applicant are reliable and will meet the purposes of the HCP, and that measures to deal with unforeseen circumstances are adequately addressed. Without such findings, the section 10 permit cannot be issued." AR-0000473. Here, FWS violated the ESA and

its own criteria, and thus arbitrarily approved a State plan that failed to "ensure" adequate funding.

III. FWS VIOLATED NEPA BY FAILING TO ANALYZE THE SIGNIFICANT IMPACTS OF THE PERMIT AND FAILING TO PREPARE AN EIS

The National Environmental Policy Act (NEPA) requires an environmental impact statement (EIS) for every proposed federal action that may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). The Council on Environmental Quality regulations explain that "significance" involves both the context of an action and the intensity of its impacts. 40 C.F.R. § 1508.27. Context refers to the "setting of the proposed action." Id. Intensity refers to the "severity of the impact" of the action. Id. To determine the intensity of the action, the CEQ lists ten factors that the agency must consider. Id. The presence of any one of these intensity factors usually compels the preparation of an EIS. 40 C.F.R. § 1508.9.

In contrast to an EIS, an "Environmental Assessment" (EA) is a preliminary document used to determine if the environmental effects of a proposed action are "significant." 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.27. An EA is supposed to be a "concise" document that "briefly" discusses the relevant issues and that leads either to the preparation of an EIS or to Finding of No Significant Impact (FONSI). Id. §§ 1508.9(a)(1), 1508.13; Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985).

In this case, FWS's decision not to prepare an EIS was arbitrary because this Permit implicates not just one of the intensity factors, but six: (1) the potential adverse impacts on threatened or endangered species or critical habitat; (2) the unique characteristics of the geographic area; (3) the action will set a precedent; (4) the cumulative impacts of all foreseeable actions; (5) the degree which the effects on the environment are "highly uncertain"; and (6) the

effects on the environment are "highly controversial." 40 C.F.R. § 1508.27. These six intensity factors required the preparation of an EIS.

A. The Permit adversely affects an ESA listed species, Canada lynx

According to the CEQ regulations, an agency must consider "the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the [ESA]." 40 C.F.R. § 1508.27(b)(9). In reviewing a challenge to a FONSI under this CEQ factor, a court must evaluate whether the proposed mitigation measures "constitute an adequate buffer against the negative impacts that may result" so as to "render such impacts so minor as to not warrant an EIS." Nat'l Parks and Conservation Ass'n v. Babbitt, 241 F.3d 722,734 (9th Cir. 2001).

By its nature, the Permit affects a threatened species under the ESA because it authorizes otherwise prohibited "takes" of Canada lynx. The Permit clearly affects lynx because trapping is allowed in the Wildlife Management Districts where lynx are present, and FWS estimates that 195 lynx will be taken. AR-0070106. FWS failed to ensure that the adverse effects would be minimized and mitigated because there are no assurances in the Permit that these measures will be effective. AR-0066798; AR-0066839. By failing to adequately minimize and mitigate the impacts of trapping on the lynx population, as explained above, the Permit adversely affects an endangered species and its critical habitat to a high degree, and these impacts must be analyzed in an EIS. AR-0057017 (FWS suggests even with mitigation measures proposed by Maine, take will be significantly higher than predicted having significant adverse effect on lynx population).

B. The Permit impacts an ecologically critical area

Further, an EIS is required because the Permit authorizes actions that impact an ecologically critical area. According to the CEQ regulations, an agency must consider the

"[u]nique characteristics of the geographic area such as proximity to . . . ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). Courts have held that the lack of information about possible impacts to ecologically critical areas warrant an EIS. Helena Hunter & Anglers v. Tidwell, 841 F. Supp. 2d 1129, 1317 (D. Mont. 2009).

In this case, FWS repeatedly stated that lynx habitat in Maine is ecologically critical to the lynx. 65 Fed. Reg. 58, 54793 (Federal Register designating lynx critical habitat in Maine); 65 Fed. Reg. 58, 16054 (Federal Register listing the Canada lynx as threatened under the ESA); AR-0070054. Lynx persist in boreal or mixed boreal/deciduous forests in areas that receive deep snow, areas for which the lynx is specially adapted. Under the Permit, FWS approved Maine's proposal to manage a mitigation area that abuts the lynx critical habitat and to trap throughout the lynx critical habitat and in the proposed mitigation area. AR-0070106. Given that the Permit has the potential to impact this unique geographic area, it was arbitrary for FWS to conclude that the Permit will not cause a significant impact, thus an EIS is required.

C. The Permit has potentially precedential effect

An EIS is required because Maine's Permit was the first permit issued for incidental lynx takes by a state's recreational trapping program granted under the ESA. AR-0037239; AR-0049546. According to the CEQ regulations, "the degree to which the action may establish a precedent for future actions with significant effects . . . ." requires preparation of an EIS. 40 C.F.R. § 1508.27(b)(6). Further, an agency must consider the degree to which this precedent may "cumulatively have a negative impact on the environment." Id.; Anderson v. Evans, 371 F.3d 475, 493 (9th Cir. 2004). An agency's approval of a single action "will establish a precedent for other actions which may cumulatively have a negative impact on the environment. Id.

In this case, FWS failed to consider or even address the precedential effect of the Permit in its EA. AR-0069861. FWS acknowledged in internal communications that Maine's Permit would have a precedential effect on other states with trapping programs because no other state in the nation with a lynx population holds an incidental take permit covering trapping programs. AR- 0037239. Moreover, FWS was aware during the course of reviewing Maine's permit that other states, such as Minnesota, Montana, and Idaho, had pending permit applications for trapping of lynx. AR-0037239. Yet, FWS did not evaluate the degree to which issuance of Maine's permit would establish precedent for future permit applications these states. AR-0065756. The presence of this potentially precedential effect requires FWS to prepare an EIS.

D. The Permit's cumulative impacts on the environment are significant

An EIS is required because of the significant cumulative impacts on the environment from the actions authorized under the Permit. According to the CEQ regulations, an agency must consider the "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. The impact is significant "if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7). If there are significant impacts from several actions, then these impacts must be evaluated in an EIS. Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (1998) (explaining that when several actions have a cumulative environmental effect, the consequence must be considered in an EIS).

In this case, the evidence relating to cumulative impacts strongly supports a finding that FWS should have developed an EIS instead of issuing a FONSI. FWS itself concluded that there would be significant cumulative effects from the reasonably foreseeable and concurrent actions in its EA. AR-0069634. FWS concluded that the cumulative effects from climate change,

changing forest practices, and development would have significant impacts on the lynx. AR-0069634. While FWS concluded in the EA that the effects of trapping would be negligible, their analysis misses the greater point, as established in the law, that the presence of those cumulative impacts requires that the agency conduct an EIS to evaluate the nature of the impact of the proposed action. In this case, a full EIS would have provided FWS and the public the opportunity to more carefully consider the impacts of trapping in light of the cumulative risks to the survival of the lynx. Instead, FWS attempted to side-step the full range of impacts on the lynx and arbitrarily issued a FONSI. AR-0070462.

E. The effects of the Permit are highly uncertain

An EIS is required because the effects of the Permit are highly uncertain. As explained above, the Permit is fundamentally grounded in uncertainty: (1) the take calculations that underlie the Permit decision are uncertain; (2) the minimization and mitigation measures authorized by the Permit may not work; and (3) the funding mechanism relies on future, speculative sources. See supra Part I. According to the CEQ regulations, the existence of "highly uncertain effects or involvement of unique or unknown risks" requires the preparation of an EIS. 40 C.F.R. § 1508.27(b)(5); Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701, 712 (9th Cir. 2009); Nat'l Wildlife Federation v. Babbitt, 128 F. Supp. 2d 1274 (E.D. Cal. 2000)("NEPA's approach to such uncertainty is to require an EIS.").

In this case, throughout the Permit process, FWS repeatedly acknowledged the presence of substantial uncertainties and unknown risks associated with the Permit's minimization and mitigation measures, and funding assurances. FWS's decision to issue a FONSI and not prepare an EIS, in light of substantial uncertainties, is inconsistent with the informed decision-making process that NEPA mandates.

Without a reasonable understanding of current lynx population levels and the number of lynx taken, it is impossible for FWS to determine that the Permit's impacts will not be significant. The court in Sierra Club v. Norton, addressed this issue directly. 207 F. Supp. 2d 1310 (S.D. Ala. 2002). In Norton, environmental organizations sued FWS, alleging that FWS violated NEPA when it failed to prepare an EIS for a development project impacting the endangered Alabama beach mouse. FWS admitted that the widely fluctuating characteristics of the mouse's population size made it impossible to determine the impact the project would have on the species. Id. at 1332. The court held that if information to reach a decision is not currently available, then the agency must conduct an EIS and weigh whether or not to gather such additional information. Id. at 1335-36.

In this case, FWS has repeatedly conceded to substantial uncertainties regarding Maine's lynx population size and the amount of lynx taken. See supra Part IA at 19. Given substantial uncertainties surrounding Maine's lynx population and take estimates, it was arbitrary for FWS to conclude that the Permit will not cause a significant impact on the lynx. Like in Norton, FWS must prepare an EIS in order to gather adequate lynx population and take data.

Further, the likelihood that the minimization measures will be successful is also uncertain. See supra Part IB at 23. FWS failed to include adequate monitoring in the Permit of nearly all of its minimization measures, creating substantial uncertainty about the effectiveness of such measures. AR-0070188-98.

Similarly, the implementation and effectiveness of the Permit's mitigation measures are highly uncertain. Further, it is highly uncertain whether the proposed mitigation areas will create high quality hare habitat during permit timeframe. Courts routinely hold that inadequately supported mitigation measures require the preparation of an EIS. Audubon Soc. of Cent. Ark. v.

Dailey, 977 F.2d 428 (8th Cir. 1992); Nat'l Audubon Soc'y v. Hoffman, 917 F. Supp. 280, 283 (D. Vt. 1995), aff'd in part, rev'd in part sub nom. Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7 (2nd Cir. 1997); Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274 (E.D. Cal. 2000) (uncertainty regarding the likely success of the mitigation measures required an EIS); Found. for N. Am. Wild Sheep v. U.S. Dept. of Agr., 681 F.2d 1172 (9th Cir. 1982).

In Hoffman, the Court noted that "[a]gencies should not cite inadequately-supported mitigation measures without support for their efficacy" and that "[t]he record [did] not support a conclusion that any of [the] mitigation measures [would] actually work." Hoffman, 917 F. Supp. at 289. The Second Circuit upheld this conclusion, emphasizing that "mitigation measures [must] be supported by substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS. That is to say, agencies should define "significance" broadly and not rely on proposed mitigation measures as an excuse to avoid preparing an EIS. Hoffman, 132 F.3d at 17. In Wild Sheep, the court held that where such substantial uncertainty is raised with regards to the effectiveness of setting aside new habitat, an EIS must be prepared. 681 F.2d at 1179.

In this case, and similar to the cases outlined above, the mitigation measures in the Permit are uncertain. The Permit proposes to set aside a habitat management area, yet lacks commitment from another state agency and private landowners in order to fulfill. FWS repeatedly expressed concerns that the proposed mitigation measures were flawed because they relied on land that lacked firm commitments from the Maine Department of Conservation and from private landowners; that the mitigation measures would not be in place until after the Permit expired; and these is no evidence that the proposed mitigation area will be able to support lynx. See supra Part IC at 25; AR-008225-27; AR-0044481; AR-0012336; AR-0067469; AR-0039957; AR-

0067472; AR-0054074; AR-0054073; AR-0068089-90; AR-0070213; AR-0054074. Given substantial uncertainties surrounding Maine's mitigation measures, it was arbitrary for FWS to fail to prepare an EIS.

F. The effects of the Permit are highly controversial

An EIS is required because the effects of the Permit are highly controversial. According to the CEQ regulations, the existence of "highly controversial" effects requires the preparation of an EIS. 40 C.F.R. § 1508.27(b)(4). "Controversial" refers "to cases where a substantial dispute exists as to the size, nature or effect of the major federal action." See Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973); see also Nat'l Wildlife Fed'n, 128 F.Supp.2d at 1301 (citing Wild Sheep, 681 F.2d at 1182). Such controversy goes directly to the purpose of NEPA and why an EIS is required for federal actions. Nat'l Wildlife Fed'n, 128 F.Supp.2d at 1301(finding "controversy concerning likely effects of the permit…implicate[s] the very purpose of conducting an EIS").

In this case, FWS arbitrarily failed to prepare an EIS despite the fact that (1) it admitted in its EA that the effects of the Permit were highly controversial; (2) FWS's own experts disputed the size, nature, and effect of the Permit; and (3) the public overwhelmingly disagreed with the FONSI during the public review process. AR-0026368 (outlining potentially controversial issues, and explicitly stating "trapping is controversial, period").

In addition, throughout the Permit process, FWS experts internally disputed the size, nature, and effect of the Permit. Federal actions are "highly controversial" when an agency's own experts go beyond a showing of mere "existence of opposition" to each other's opinions, and show a "substantial dispute as to the size, nature or effect of the major Federal action." Nat'l Wildlife Fed'n, 128 F.Supp.2d at 1301; see also Rucker, 484 F.2d at 162. Substantial

disagreement between experts within an agency during the decision-making process demonstrates the necessary controversy, showing the necessity of an EIS. See Sierra Club v. U.S. Forest Service, 843 F.2d 1190, 1193 (9th Cir. 1988) (concluding that "affidavits and testimony of conservationists, biologists, and other experts who were highly critical of the environmental assessments satisfied the highly controversial standard under 40 C.F.R. § 1508.27(b)(4)).

In National Wildlife Federation, the Sacramento Area Flood Control Authority (Authority) applied for a permit for the incidental take of the giant garter snake, threatened species under the ESA. Nat'l Wildlife Fed'n, 128 F.Supp.2d at 1278. The court ultimately held that FWS violated NEPA because the record reflected "not merely a post hoc assertion of scientific controversy by plaintiffs' own experts, but substantial controversy. . . by the Service's own experts during the planning process." Id. at 1301 (emphasis in original).

As in National Wildlife Federation, FWS's Field Office and Regional Office experts substantially controverted each other's conclusions concerning the effects of trapping in lynx habitat, as well as the scientific basis for the mitigation and minimization programs. On numerous occasions, experts at the Field Office identified significant deficiencies in the Permit and the EA. AR-0008224–25; AR-0045898; AR-0053982; AR-0066833. Throughout the decision-making process, both Field Office biologists disagreed repeatedly with the Regional Office's position on the Permit. AR-0067763; AR-0053484. Field Office biologists also stated that despite the request for their comments from the Regional Office on draft EAs and Permits, the Regional Office ignored their input during its decision-making process. AR-0067763. This scientific dispute regarding the size, nature, and effect of the Permit goes beyond "mere opposition" to being highly controversial, and demonstrates that an EIS was required.

In addition, the substantial number of public comments disputing the draft and final EAs and Permit demonstrates controversy. Actions that result in numerous comments disputing an agency's conclusions may establish an action as controversial. Wild Sheep, 681 F.2d at 1182 (finding numerous comments received by U.S.F.S. from environmental groups, conservationists, biologists, and state agencies, all disputing the decision not to prepare an EIS as "precisely the type of 'controversial' action for which an . . . [EIS] must be prepared." (emphasis added)). In National Wildlife Federation, the court recognized that the creation of an extensive EA, containing much of the work required for an EIS, demonstrated that the level of controversy that the EA dealt with was indicative that an EIS was necessary. Nat'l Wildlife Fed'n, 128 F.Supp.2d at 1301–02.

In this case, FWS received over 11,000 comments, many of which disputed the agency's draft and final EAs, as well as FWS's conclusion to issue the Permit. AR-0057017 (FWS identifying litigation in four states and over 11,000 comments as appearing controversial). Even FWS's own scientists agree that the filing of thousands of public comments show that its decision regarding the Permit is highly controversial. AR-0067419.

In sum, application of the six intensity factors outlined above to the facts of this case demonstrate that FWS acted arbitrarily, capriciously and otherwise not in accordance with the law when it issued a FONSI. In this matter, where the evidence in the record substantiates a risk of cumulative and significant impacts on the Canada lynx, where the Permit will set a precedent with serious implications throughout the lynx's range, where the Permit is grounded in uncertain and controversial information and analysis, there can be no question that NEPA requires FWS to conduct a full EIS.

IV. FWS'S CHARACTERIZATION OF THE PERMIT AMENDMENTS AS "MINOR" WAS ARBITRARY AND NOT IN ACCORDANCE WITH THE ESA AND ITS IMPLEMENTING REGULATIONS

As explained above, within three weeks of the 2014 Permit's effective date, two lynx were dead from legally set traps. Put another way, between now and 2029, only one lynx can be killed due to Maine's three trapping programs before Maine reaches the quota for lethal lynx take in the Permit. This startling development promoted Maine to promulgate an emergency rule restricting the use of certain trap types and sizes, and led to an amended Permit, which FWS approved on October 9, 2015. AR-0074518.

The 2014 Permit and EA were both based on the assumption that no lynx would be killed in killer-type traps, and that a maximum of three lynx would be killed in 15 years. AR-0070094; AR-0069861. Accordingly, FWS failed to analyze the impacts of lynx deaths. In lieu of such analysis, the 2014 Permit includes a "changed circumstances" provision, which identified certain occurrences that would trigger the need to modify the Permit. However, the Permit also did not analyze the effects of any of the identified possible changed circumstances. For example, FWS did not identify how its decision would be impacted if the actual take far exceeds the estimated take, which it is on track to do.

When Maine sought an amended Permit, FWS accepted Maine's characterization of the necessary permit amendments as "minor," and then depended on that characterization to avoid procedures set forth in its own regulations and Habitat Conservation Planning Handbook. AR-0000597. Specifically, instead of dismissing these changes as "minor," FWS should have recognized that such an obvious and significant miscalculation required revisiting the Permit, revoking the FONSI, and preparing an EIS (as it should have done when it issued the 2014

Permit in the first place). FWS did not even take the bare minimum step of publishing the proposed amendments in the Federal Register for public notice and comment.

FWS regulations implementing the ESA explain when additional analysis is needed for permit amendments. They provide: "A permit amendment consists of the same process as the original permit application, requiring an amendment to the HCP addressing the new circumstance(s), a Federal Register notice, NEPA compliance, and an intra-Service section 7 consultation." Id. However, FWS may expedite some amendments that are "commonly needed over the life of a permit." Id. Such amendments are considered "minor," and can be accomplished with reduced documentation and public process. FWS's HCP Handbook provides examples of minor amendments, including "corrections in land ownership; [and] minor revisions to survey, monitoring, or reporting protocols." HCP Handbook at AR-0000597.

Here, the lynx deaths and other circumstances that necessitated an amendment to the Permit do not fit within the "minor" category. First, this was not the type of amendment "commonly needed over the life of a permit;" rather, it was an emergency response within the first month of the Permit's issuance to unforeseen and unanalyzed high levels of take. There is no similarity between the examples of minor amendments provided in FWS's HCP Handbook and an amendment designed to address a fundamental miscalculation in the Permit regarding the level of expected take. Finally, there must be some rational relationship between the changed circumstances necessitating the amendment and the characterization of the amendment itself. Here, it is unreasonable to assume, without any additional environmental analysis, that a "minor" change to the Permit would be sufficient to address such an extreme unforeseen circumstance. In fact, it is reasonable to assume the opposite—that significant changes to the Permit are needed.

Labeling an amendment "minor" does not make it so; especially when it is made in response to a major miscalculation in the Permit—specifically, Maine reaching 67% of the Permit's lethal take quota within the first 0.004% of the permit term. FWS's decision to approve the "minor" amendment and avoid the necessary rigorous examination, and attendant public process, into why its lethal take calculations had so missed the mark was unreasonable.

FWS should have required Maine to go back to the drawing board, at least with respect to its lethal take calculations, and the effect those estimates may have on minimization and mitigation measures. Instead, FWS allowed Maine to nibble around the edges with some "minor" changes (the true effect of which is unknown because there was no analysis), which became a self-fulfilling prophecy of a "minor" amendment. FWS's decision to forgo publishing the proposed amendments in the Federal Register for public notice and comment and updating the environmental analyses to account for the changed circumstances was arbitrary and capricious and not in accordance with the ESA.

V. PLAINTIFFS HAVE STANDING

Plaintiffs Animal Welfare Institute, Center for Biological Diversity, Friends of Animals, and the Wildlife Alliance of Maine have standing to bring their claims. The law regarding standing has been extensively discussed in decisions of the U.S. Supreme Court such as Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) and Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) and in the First Circuit cases Animal Welfare Inst. v. Martin, 623 F.3d 19 (1st Cir. 2010) and Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18 (1st Cir. 2007).

Under these cases, the courts have established the following criteria that a plaintiff must meet to establish standing to sue in such cases as the one now before this Court: (1) that the

plaintiff has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id.

To satisfy the "injury in fact" requirement, plaintiffs need only show injury to health or aesthetic, environmental, and recreational interests. Laidlaw, 528 U.S. at 183; Sierra Club v. Morton, 405 U.S. 727, 735 (1972). Injury sufficient to meet the standing requirement may be actual or threatened. Heckler v. Mathews, 465 U.S. 728, 738 (1984). Other equally protected interests include plaintiffs' rights to procedural due process. Lujan, 504 U.S. at 573 ("[a] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

An association can bring suit on behalf of its members when its members have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit. Laidlaw, 528 U.S. at 181.

Here, Plaintiffs' members have standing to sue on their own to protect their interests in the survival of the Canada lynx and protection of its habitat, as well as the opportunity to participate in the federal decisions affecting those interests. Plaintiffs' members live, work, and recreate in Maine's north woods where lynx are present and at risk from trapping under the Permit, and are harmed by injuries and deaths of lynx resulting from FWS's legally deficient Permit which would harm their recreational and aesthetic interest in the area. See Andresen Decl., Croce Decl., Dejoy Decl., Graczyk Decl., Hyre Decl., Robey Decl., Weissbrod Decl., Winslow Decl.; see also Animal Welfare Inst. v. Martin, 623 F.3d at 25. In addition, Plaintiffs

have suffered a procedural injury because FWS has failed to properly consider the environmental impacts of its decision to issue the Permit through the NEPA process. Id.; see also Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d at 27. These interests and concerns are of importance to the Plaintiff organizations, and this suit does not require the participation of individual members. See Friends of Animals Amended Complaint (ECF 77) at ¶15; see also Center for Biological Diversity et al. Amended Complaint (ECF 76) at ¶¶2–5.

These injuries are traceable to the FWS's approval of the Permit which authorizes the take of Canada lynx without meeting the minimum requirements for protecting lynx set forth in the ESA and before preparing an EIS under NEPA. This Court can redress these injuries by vacating the Permit and FONSI and remanding to FWS for a decision consistent with the requirements established by Congress in the ESA and NEPA.

CONCLUSION

For the reasons stated, the Plaintiffs should prevail on their claims that FWS's decisions to approve the Permit under the ESA and to avoid an EIS under NEPA are arbitrary and capricious. Plaintiffs request this Court vacate the Permit and the FONSI, and order the agency to prepare a lawful incidental take permit and EIS to protect Canada lynx from trapping.

Respectfully submitted this 18th day of May, 2016.

/s/ David K. Mears
David K. Mears
Vermont Bar No. 4248*
Environmental and Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, Vermont 05068
Tel: (802) 831-1136
Fax: (802) 831-1631
dmears@vermontlaw.edu

/s/ Kevin M. Cassidy
Kevin M. Cassidy, Esq.
MA BBO# 681301*
Earthrise Law Center
Lewis & Clark Law School
P.O. Box 445
Norwell, MA 02061
Tel: 781-659-1696
Fax: 503-768-6842 Email:
cassidy@lclark.edu

/s/ Douglas A. Ruley
Douglas A. Ruley
Vermont Bar No. 5207*
Environmental and Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, Vermont 05068
Tel: (802) 831-1624
Fax: (802) 831-1631
druley@vermontlaw.edu

/s/ Sarah LeClaire
Sarah LeClaire
Law Office of Sarah LeClaire
409 Main Street
Presque Isle, ME 04769
Telephone: (207) 762-2244
Fax: 207-769-2213
sleclaire1@mac.com

/s/ Collette L. Adkins
Collette L. Adkins
Minnesota Bar No. 035059X*
Center for Biological Diversity
PO Box 595
Circle Pines, Minnesota 55014
Tel: (651) 955-3821
Fax: (415) 436-9683
cadkins@biologicaldiversity.org

/s/ Sean Mahoney
Sean Mahoney
Maine Bar No. 8661
Conservation Law Foundation
53 Exchange Street
Portland, Maine 04101
Tel: (207) 210-6439
smahoney@clf.org

Counsel for Consolidated Plaintiffs, **pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2016, I electronically filed the foregoing **Plaintiffs' Motion and Memorandum in Support of Motion for Summary Judgment** with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to all registered counsel through the Court's electronic filing system.

Dated May 18, 2016.

/s/ David K. Mears
David K. Mears
Vermont Bar No. 4248*
Environmental and Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, Vermont 05068
Tel: (802) 831-1136
Fax: (802) 831-1631
dmears@vermontlaw.edu

Counsel for Consolidated Plaintiffs, **pro hac vice*