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' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT Case No. 1:15-cv-00157-JAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

INTRODUCTION

The U.S. Fish and Wildlife Service (FWS) acquiesced to a plan and Permit that failed to meet issuance criteria previously sought by FWS itself. Most notably, as described in Plaintiffs' opening brief, and acknowledged by the agency's response, FWS rejected Maine's 2008 draft plan as insufficient to meet ESA issuance criteria after Maine refused to make FWS's suggested revisions to the plan. Defendants' Brief at 11–12. The 2014 draft did not remedy these substantial flaws and was actually worse. It included further sources of take from new trapping programs (i.e., predator management and animal damage control), new forms of trapping (e.g., cable restraints, cage traps), and reductions from existing protections (e.g., recession of the 2007 Consent Decree to allow unlimited foothold trap size), all without counterbalancing increases in the take calculation, further minimization measures, or an enhanced mitigation plan. See AR-70424, n 2. The only change to the plan between the 2008 and 2014 drafts was a more robust "changed circumstances" provision which, as described herein, cannot substitute for practicable minimization measures and is contrary to law.

When confronted with the damaging evidence from its own record, the agency's attorneys predictably claimed that Plaintiffs "selectively excerpt[ed]" and "mischaracterize[d]" the record instead of challenging the substance of the agency's final documents and decision. Defendants' Brief at 2. Yet the "thorough, probing, in-depth" review of the record as a whole, as required by law, readily demonstrates that the agency's final decision to issue the Incidental Take Permit (ITP) is contradicted by the agency's own evidence, biological expertise, and prior longstanding positions. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). Even the substance of the agency's final documents demonstrates that FWS's decision was arbitrary, capricious, and contrary to law.

ARGUMENT

I. FWS'S FAILURE TO MINIMIZE AND MITIGATE THE TAKE TO THE MAXIMUM EXTENT PRACTICABLE IS UNLAWFUL.

A. The Plan's Take Calculation Should Receive No Deference Because FWS Failed to Follow Its Own Methodology By Not Utilizing the 2013 Take Data.

Recognizing that the entire Permit hinged on the take calculation, see AR-008349 (the higher the level of take, the more minimization and mitigation will be required), and that significant uncertainty surrounded this calculation, FWS accepted a methodology that purported to use the highest year of take, and then added a 20% buffer to account for uncertainty. AR-0070433; AR-0070166. At the time this methodology was accepted, data from the years 1999 to 2012 was available. AR-0070165. The highest year of take was 2004, with 11 lynx taken, resulting in a take calculation of 195 lynx. AR-0070164 (Table 4.1.4 - Incidents of lynx takings), AR-0070166 (Table 4.2.1 - Requested allowance for incidental captures).[1]

However, during the ensuing permit proceedings, take data from 2013 became available, with a take of 14 lynx. Rather than applying its own methodology and using this year as the basis for the calculation because it was the highest year of take, FWS continued with a take calculation based on the 2004 data of 11 lynx taken. If the 2013 data had been used, consistent with the agency's accepted methodology, the take calculation should have been 252 lynx [14 + 20% buffer = 16.8 x 15 years = 252].[2]

---

[1] The agency's response erroneously asserted that none of the documents cited by Plaintiffs support the statement that FWS viewed MDIFW's take calculation as "confounded by assumptions." Defendants' Brief at 27, n. 18. In fact, notes prepared by the lynx biologist at the FWS Maine Field Office described Maine's methods for calculating take as "confounded by assumptions." AR-0058249.

[2] Contrary to the 2014 Findings, the 2015 Permit described a second methodology for calculating take, based on the highest years of take in the recreational trapping and predator management programs combined, that remarkably resulted in the exact same take calculation of 195 lynx. AR-0074223–24. However, as with the methodology stated in the 2014 Findings, using the most

FWS's assertion that it could not have used better take data in its take calculation "because there is none" plainly contradicts the record. Defendants' Brief at 32. In estimating the number of lynx that would be taken over the life of the Permit, FWS refused to use the most recent data available, from 2013, which was the highest take recorded. FWS failed to provide any rational explanation for failing to use this highly relevant data in the take calculation. Defendants' Brief at 28; AR-0070165–66. Instead, FWS unreasonably chose to use data that was a decade old—from 2004—in calculating the estimated number lynx that would be taken. AR-0070164.

Moreover, FWS's contention that the 2013 data "was consistent with the data from 2007–2012" is arbitrary and illogical. Defendants' Brief at 29. To begin with, the take calculation set forth in the 2014 Findings was premised on data from 2004, not 2007–2012. Further, the take data from 2013 was significantly higher than the prior years and, consequently, would have resulted in a much higher take calculation. Last, the point is not whether the 2013 data was "consistent," the point is that, having set forth a methodology for calculating the estimated take, FWS failed to follow that methodology by not using the year with the highest recorded take, perhaps because doing so would have led to a substantially higher take calculation that would have required redoing the entire proposed permit. FWS's failure to follow its own take calculation methodology, or to explain its failure to do so, was arbitrary and capricious. Earth Island Inst. v. Hogarth, 494 F.3d 757, 763–64 (9th Cir. 2007) ("[N]o deference to agency

---

recent data from 2013 would have resulted in a substantially higher take calculation of 270 lynx [11 lynx taken in recreational trapping in 2013 plus 4 lynx taken in predator management in 2012 equals 15 total lynx plus 20% buffer equals 18 total lynx taken per year, times 15 years = 270 lynx taken]. The agency's failure to use the 2013 take data is equally arbitrary no matter which methodology is used.

discretion as to methodology is appropriate when the agency ignores its own statistical methodology.").

In addition, FWS's explanation for failing to include unreported take runs contrary to its own evidence and experts. FWS claimed that, prior to mandatory reporting of takes, 81% of lynx taken in traps were reported. Defendants' Brief at 30. However, this assertion runs contrary to the consultation between FWS's own Maine Field Office and FWS Law Enforcement that concluded that 75% of lynx trap events go unreported. AR 0039763–64. The record also demonstrated FWS's recognition that unreported lethal take may be much greater than the reported lethal take, and that significant unreported lethal take could affect lynx populations and recovery. AR 0066861. Rather than follow its own data and the conclusions of its lynx biologists and law enforcement, FWS arbitrarily accepted the convenient beliefs and assurances of the Permit applicant.

B. FWS Failed to Minimize the Impacts of the Take to the Maximum Extent Practicable.

1. FWS Arbitrarily Failed to Require BMP Traps.

FWS cannot lawfully grant the Permit unless Maine minimizes the impacts of its taking "to the maximum extent practicable." 16 U.S.C. § 1539(a)(2)(B)(ii). This 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). Stated another way, the applicant may do something less than fully minimize the impacts of take only where to do more would not be practicable. Nat'l Wildlife Fed'n v. Norton, 306 F. Supp. 2d 920, 928 (E.D. Cal. 2004). In this case, FWS's own Findings demonstrate that Maine readily could have—and then therefore should have—done more to minimize the take of lynx.

According to the 2014 Findings, the goal of the conservation strategy for nonlethal traps is "minimizing the potential for injury from [these traps]." AR-0070427; see also AR-0070439 ("[T]he conservation strategy . . . is designed to minimize the potential for injury from nonlethal [traps]."). In turn, Best Management Practice ("BMP") traps are designed to achieve precisely this goal because they are padded or have offset jaws that do not close completely on the animal's leg and therefore reduce the harm to the captured animal. AR-0070440 (Association of Fish and Wildlife Agencies recommends BMPs for minimizing injury rates); AR-0039285 (minimization measures FWS believes would meet maximum extent practicable issuance criteria includes BMPs); AR-0039649 (BMPs recommended practicable minimization measures); AR-0040471 (FWS insisting BMP traps be phased in over a five-year period because they minimize foot and leg injuries to trapped lynx). And, in fact, tests of BMP traps on animals of similar size, such as bobcats and coyotes, have demonstrated fewer injuries to the trapped animal. Id.; AR-0070440 (data provided by Maine suggests that injury scores of lynx caught by fur trappers were similar to injury scores observed for coyotes and bobcats caught during BMP trap testing).

Most significantly, the 2014 Findings acknowledge that "it is reasonable to assume that BMP traps may also have benefit to nontarget species." AR-0070440. Further, FWS promoted BMP traps in its brochure educating trappers on ways to avoid and minimize incidental trapping of lynx, AR-0020274 (FWS stated in the 2009 brochure "How to Avoid Incidental Capture of a Lynx" that it "recommend[s] trappers use foothold traps that meet BMP criteria"), and FWS itself insisted on BMP traps throughout the six-year permit process. AR-0008461.

However, in November 2014 FWS acquiesced and did not require BMP traps, allegedly because it had no data concerning nontarget species such as lynx. AR-0070400. That is no excuse. No lynx-specific data is required to know that use of BMP traps would reduce harm to

lynx, as it is well-established that BMP traps reduce harm to whatever animals are captured through common-sense measures like padded jaws. FWS made no finding that BMP traps are impracticable, which would have been the only basis for doing less than minimizing the take to the maximum extent practicable. Nat'l Wildlife Fed'n, 306 F. Supp. 2d at 928. Nor could FWS have made such a finding, because thousands of Northeast trappers already use BMP traps. AR-0023889.

Last, the record reveals that the more likely reason FWS did not require BMP traps is because Maine told the Maine Trappers Association that it would not use BMP traps as a regulatory tool. AR 0009957. Under the ESA, Maine had no business making this illusory promise, and FWS violated the law by acceding to it, contrary to the evidence before the agency and to its own insistence on BMP traps throughout the process.

FWS's refusal to require BMP traps shows the agency did not fully minimize the impacts of the nonlethal traps, and its explanation for this failure "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 Court should reject FWS's shirking of its duty to minimize the impacts of the take to the maximum extent practicable by holding that the failure to require BMP traps was arbitrary and contrary to the ESA.

2. FWS Arbitrarily Failed to Limit Trap Size Consistent With the 2007 Consent Decree.

The 2007 Consent Decree limited the width of foothold traps to minimize the incidental take of lynx. AR-0006058–59. In declining to grant further injunctive relief, this Court noted the testimony of a biologist presented by the trappers, who asserted the size restrictions on leghold traps reduced the likelihood that lynx would get trapped. Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 79 (D. Maine 2008).

In this permit process, the trappers and Maine have changed their tune, and sought to rescind the restriction on trap size based on limited data that "suggest," rather than prove, that the restriction did not affect the injury rate of trapped lynx. AR-0070440. To the contrary, FWS had specific data demonstrating the obvious conclusion that larger and heavier traps likely increase injury rates because (1) they have more powerful springs, higher impact velocity and force, and higher clamping force; (2) the heavier traps create leverage that leads to fractures above the point of impact; (3) larger traps increase the risk of severe injury by catching the animal higher on the leg; and (4) freezing injuries also can increase. AR-0069937. Rather than following this available data to its logical conclusion, FWS again acquiesced to Maine, thereby failing to require a longstanding and practicable minimization measure in violation of the ESA, and arbitrarily adopting a conclusion that ran counter to the evidence before the agency.

C. FWS Failed to Mitigate the Impacts of the Take to the Maximum Extent Practicable.

One of the biggest failures of the mitigation plan is that it provides mitigation only for the three lynx that will be killed. Without any support, FWS completely disregarded the impact of the taking of nine lynx that sustain serious injuries—so serious that the animals will require treatment and rehabilitation, and the 183 lynx that will be trapped and released.

This assumption conflicted with FWS's own record and with common sense. The record demonstrated that at least some of those nine lynx with serious injuries likely will not live as long, reproduce as successfully, or otherwise function as well as untrapped lynx. AR-0070440; AR-0070424; AR-0070433–34. Moreover, as to the 183 lynx that are trapped and released, according to the record and to the agency's own argument, "most" of these lynx can be released with little or no harm, and "most" survive to produce offspring. Defendants' Brief at 43; AR

0070442-43; AR-0070215. "Most" is not "all," but the premise of the mitigation plan is that "most" equates to "all."

For these reasons, FWS's own biologists and lynx experts in the Maine field office sought mitigation for the entire take, rather than just the three lynx expected to be killed. AR-0039658; AR-0060735; AR-0038285. Because conservation and recovery of the lynx is "to be afforded the highest of priorities," Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978), the impacts from the 9 lynx that will sustain severe injuries and the 183 lynx that will be trapped must be accounted for and addressed in the mitigation plan, not discounted entirely.

II. FWS'S USE OF "CHANGED CIRCUMSTANCES" TO AVOID REQUIRING PRACTICABLE MINIMIZATION AND MITIGATION MEASURES IN THE PERMIT IS CONTRARY TO LAW.

Under the ESA, FWS's duty in reviewing this Permit is to require that Maine minimize and mitigate take "to the maximum extent practicable." 16 U.S.C. § 1539(a)(2)(B)(ii). As noted above, pursuant to this plain language, the only qualifier on "maximum" is "practicable," and the only basis for failing to "fully minimize" the impacts of the take is impracticability. Nat'l Wildlife Fed'n, 306 F. Supp. 2d at 928. The ESA does not provide that FWS may use "changed circumstances" as a vehicle for failing to fully minimize the impacts of the take, but, contrary to the law, that is what the agency did in this Permit.

Many of the available minimization measures—lynx exclusion devices, BMP traps, and limits on trap size—are practicable, but are unpopular with certain trappers, and so Maine refused to commit to these measures. AR-0053822 (Trappers responding in opposition to exclusion devices for killer-type traps on leaning poles believing that it would eliminate all trapping in northern Maine). FWS parked all of these controversial measures in a "changed circumstances" section, whereby they would be employed only if the lynx suffered highly-serious impacts. AR-0070216. But the very purpose of the minimization requirement is to avoid

such impacts in the first place. By putting the risks on the lynx, rather than minimizing the take to the maximum extent practicable, FWS failed to give lynx conservation "the highest of priorities," Tenn. Valley Auth., 437 U.S. at 174, and violated its statutory duty under the ESA.

The effect of this perverse approach became evident in the first two weeks of trapping under the Permit, when two lynx were killed in legally-set killer-type traps without exclusion devices. Before approving the Permit, the agency knew that lynx exclusion devices are highly effective at excluding lynx from killer-type traps, and also had evidence that lynx can climb leaning poles. AR-0039247 (video showing lynx climbed leaning poles in 16 out of 16 trials). Yet, FWS put exclusion devices into the "changed circumstances" category even though lynx deaths were "not entirely unexpected." Defendants' Brief at 4. When the entirely predictable occurred, and two lynx were killed, FWS did what it should have done from the beginning by requiring lynx exclusion devices on all killer-type traps. FWS's misuse of "changed circumstances," rather than implementing minimization to the maximum extent practicable, resulted in the preventable deaths of two lynx. This highly significant, non-minimized impact demonstrates FWS's approach to "changed circumstances" violated the statute.

In addition, FWS's approach here is contrary to the agency's own regulations that govern when the "changed circumstances" provision can be employed. The intent of the "changed circumstances" provision is to address future events that could not be fully predicted, such as "the listing of new species, or a fire or other natural catastrophic event . . . ." 50 C.F.R. § 17.3. As the agency explained in adopting this Rule, "changed circumstances" cannot be used as an escape-hatch for avoiding the implementation of practicable minimization measures because the plans and permits must otherwise satisfy the issuance criteria under Section 10(a)(2)(B). Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859-61 (Feb. 23, 1998).

In this case FWS misused the "changed circumstances" provision in an attempt to avoid implementing practicable minimization measures. It applied "changed circumstances" to trapping that kills and injures lynx—the very focus of and reason for this permit—and to takes that could have and should have been minimized with measures such as lynx exclusion devices, BMP traps, and restrictions on trap size. The Court should enforce the ESA as written by requiring FWS to minimize the impacts of the take to the maximum extent practicable.

III. FWS FAILED TO ENSURE ADEQUATE FUNDING FOR THE PLAN.

In applying the word "insure" in Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), in a case that halted a multi-million dollar dam, the Supreme Court held that "[t]his language admits of no exception." Tenn. Valley Auth., 437 U.S. at 173. Pursuant to Section 10 of the ESA, 16 U.S.C. § 1539(a)(2)(B)(iii), FWS must "ensure" adequate funding for the permittee's plan, language that likewise "admits of no exception." Accordingly, the agency may not accept speculative funding sources or arrangements. Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1156 (S.D. Cal. 2006).

In this case, the agency unreasonably accepted Maine's speculative funding proposal. According to the plan, the Maine Bureau of Parks and Lands is responsible for the bulk of the mitigation efforts (e.g., overstory thinning and timber treatments to create quality hare habitat) at some unknown cost, AR-0070232, AR-0070401, but the Bureau of Parks is not the permittee. AR-0070422. Moreover, that Bureau made no commitment to fund the mitigation, because the Memorandum of Understanding between the Bureau and the permittee (Maine Department of Inland Fisheries and Wildlife) contained no funding commitments or other funding specifics. AR-0070399–401. Neither this nebulous arrangement, nor the other vague elements of Maine's proposal, ensured adequate funding as required by the ESA.

Even if Maine's plan somehow was adequate, FWS nevertheless failed to ensure adequate funding because, at the conclusion of the permit process, it changed the consequence of failing to fund the Plan from the mandatory "shall" revoke the permit to the discretionary "may." AR-0070227. According to the agency's 2014 Findings, this change "clarified" that failure to ensure funding was "grounds" for permit revocation. AR-0070447.

This explanation is Orwellian. Rather than clarifying, the change from "shall" to "may" muddied what had been a clear consequence of funding deficiency into a mere potential consequence. If plan implementation truly is "critical for ensuring the ITP is achieving the biological goals," as the agency itself asserted in the very same paragraph of the 2014 Findings, id., the only consequence of failing to do so that is consistent with the mandatory "ensure" of the statute is mandatory permit revocation.

The agency's attorneys offered the post-hoc rationale that permit revocation generally is discretionary. Defendants' Brief at 50–55. That rationale is irrelevant because the requirement to "ensure" adequate funding is mandatory under the ESA. Given the speculative nature of the funding plan and the agency's reliance on the requirement that Maine annually demonstrate adequate funding, the only consequence of a failure to demonstrate that annual funding that is consistent with "ensure" is mandatory permit revocation. In addition, if the incidental take authorization truly is to be "contingent" on demonstrating adequate annual funding, Defendants' Brief at 51, the ESA requires mandatory permit revocation if Maine fails to demonstrate adequate annual funding. The agency's last-minute substitution of "may" for 'shall" violated the ESA, and its explanation for this change was irrational.

IV. FWS VIOLATED NEPA BY FAILING TO PREPARE AN EIS.

A. Context Shows that the Impacts of the Permit May Be Significant.

FWS argues that Plaintiffs misrepresent the applicable National Environmental Policy Act (NEPA) law by failing to consider context. Defendants' Brief at 55. Plaintiffs agree that Council on Environmental Quality (CEQ) regulations require the agency to consider context as well as intensity in evaluating factors to determine whether to conduct an EIS. 40 C.F.R. § 1508.27. However, a thorough and careful consideration of context in this case highlights FWS's failure to prepare an EIS because the evidence before the agency demonstrated a substantial possibility that the issuance of the Permit—in the context of all the other threats to the lynx population—may have a significant impact.

The Permit context begins with consideration of a vulnerable Canada lynx population on the decline. 65 Fed. Reg. 16055 (Mar. 24, 2000). Today, FWS estimates the lynx population is 500 individuals. AR-0069898. This small population faces threats from a warming climate, changing forest practices, changing land ownership patterns, energy-related development, residential and resort development, predation by other wildlife species, competition with other wildlife species, vehicle collisions, trappers' snowmobile use, trappers' use of forest roads, and shooting. AR-0070464; AR-0070450; AR-0069938; AR-0069949–54; AR-0070450–52; AR-0070077–79. Many of these impacts will be greatest in northern Maine's forest, where the lynx live. AR-0070464. Based on forest practices alone, the Canada lynx population is expected to drop 65% by 2032, which would leave a population of 175 lynx. AR-0069950.

In this context, every lynx matters. Nonetheless, the Permit authorizes the take of 195 lynx over 15 years, including 3 dead and 9 severely injured. By the end of the Permit, a large proportion of Maine's dwindling lynx population will have been impacted by trapping. See AR-0069983. This context reinforces the significance of the Permit and the multiple intensity factors

involved, indicating that FWS's failure to prepare an EIS was irrational and in violation of NEPA. See N. Slope Borough v. Andrus, 642 F.2d 589, 599 (D.C. Cir. 1980) (EIS is vital to informed decision making); see also W. Watersheds Project v. Bureau of Land Mgmt., 721 F.3d 1269 (10th Cir. 2013) (an EIS provides the public with access to the same set of facts; such transparency, in turn, allows for informed public participation).

B. FWS's Decision not to Prepare an EIS Violates NEPA Because Issuance of the Permit Triggers Six of the CEQ Intensity Factors.

As FWS notes, the second consideration in determining significance is intensity. 40 C.F.R. § 1508.27. CEQ regulations list ten factors that "should be considered in evaluating intensity." 40 C.F.R. § 1508.27(b). The presence of one such factor may be sufficient to deem the action significant in certain circumstances. See Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 865 (9th Cir. 2005); see also Friends of the Earth v. U.S. Army Corps of Eng'rs, 109 F.Supp.2d 30, 43 (D.D.C. 2000). While one intensity factor can be significant enough to trigger an EIS, in this case there are at least six. Plaintiffs focus on three below.

First, FWS improperly analyzed the "cumulative effects" factor because it failed to consider trapping within the broader context of the multiple threats facing the lynx, as described above. It was unreasonable for FWS to suggest that in the face of threats like changed forest practices, trapping is insignificant. Defendants' Brief at 57. FWS acknowledged the severe toll these threats will have on the lynx, but then concluded, without explanation, that the "incremental effects of trapping over the 15-year life [of the permit] . . . will be negligible." AR-0069952. With only several hundred lynx left in Maine, and the population expected to continue declining, every take becomes even more significant. Id. The preparation of an EIS would have provided the information to show the true effects of trapping in the context of the cumulative effects of all threats posed to lynx.

Second, the evidence FWS used to show the Permit would have no precedential effect actually proves the opposite. FWS argues that it allowed trapping programs before under Section 7 of the ESA, an entirely different provision of the statute. AR-0070464; 16 U.S.C. § 1536. But Maine's permit was approved under Section 10 of the ESA. AR-0069868. FWS provided no evidence that a Section 10 permit for trapping ever has been approved before—the very definition of "precedential." Further, multiple other states are in the process of seeking similar permits under Section 10. Those states are looking to Maine's Permit for guidance, heightening the significance of this Permit's approach to the issuance criteria. See AR-0009858; see also AR-0070464 ("Like any other plan or HCP, other entities will look at this one for examples of how issues were addressed or described"). Because Maine's Permit "action may establish a precedent for future actions with significant effects," an EIS is required. See 40 C.F.R. § 1508.27(b)(6).

Third, FWS claims to have dealt with the Permit's uncertain effects on the human environment through the "changed circumstances" provision. Defendants' Brief at 58. FWS admits that it grappled with uncertainty throughout the permitting process. Defendants' Brief at 10, 14, 26 n. 15, 28, 33, 36, 38, 39, 41, 42, and 46. As discussed above, FWS created a "changed circumstances" provision in the Permit to account for uncertainty regarding lynx population size, trapper effort, trapper compliance, and efficacy of minimization and mitigation measures. The mere fact that the agency employed an extensive "changed circumstances" provision reflecting all of these uncertainties shows that an EIS was required to analyze these uncertain effects. See 40 C.F.R. § 1508.27(b)(5) (requiring an EIS when effects are "highly uncertain or involve unique or unknown risks").

Just as the agency arbitrarily adopted a mitigation plan that addressed only the impacts of the three dead lynx allowed by the Permit, and discounted entirely the impacts of 9 severely injured lynx and 183 lynx that were permitted to be trapped and released, infra at 7, the agency's consideration of only the impacts of the three dead lynx was similarly arbitrary under NEPA. AR-0070462. Proper consideration of the impacts of all of the takes allowed under this Permit required an EIS.

V. THE PLAN AMENDMENTS WERE NOT MINOR AND REQUIRED A SUPPLEMENTAL NEPA ANALYSIS.

FWS attempts to avoid its legal obligations in regards to major ITP amendments by focusing on whether MDIFW sought an amendment to its Plan rather than its Permit. Defendants' Brief at 51. However, this difference is not significant because as FWS admitted in its brief, "[t]he Permit expressly incorporates the Plan and requires MDIFW to implement it." Defendants' Brief at 14. MDIFW's request to amend the Plan rather than the Permit does not excuse FWS of its obligation to independently classify the amendments according to its regulations, nor does it excuse FWS from supplementing the NEPA analysis given that actual lynx take is significantly higher than assumed in the EA.

FWS argues the Plan amendments were not "major" because MDIFW did not seek to increase the takes authorized by the Permit. But the record here shows that the amendments also modify activities covered by the HCP and may affect the conservation strategy, which qualify as major amendments. AR-0070241. Further, as FWS acknowledged, in order for an amendment to qualify as "minor" the HCP must have defined what types of amendments were considered minor. See Defendants' Brief at 52; AR-0000597. Here, MDIFW's Plan never specified that proposed amendments based on the changed circumstances provision constituted minor amendments.

Regardless of whether the Court finds that amendments to the Plan were minor or major, new information about lynx deaths, as well as changes in the Plan, required supplemental NEPA documentation. FWS's duty to supplement its NEPA analysis in response to significant new information is "mandatory, not precatory." Dubois v. United States Dep't of Agric., 102 F.3d 1273, 1292 (1st Cir. 1996); 40 C.F.R. § 1502.9(c). Here, FWS "acknowledge[d] that the killing of two lynx last season and the resulting regulatory changes is new information." AR-0074523. However, FWS argues that it does not need to supplement its analysis because the EA mentioned a changed circumstances provision in the event of lynx deaths from killer-type traps. The fact that FWS recognized the possibility of a changed circumstance is not sufficient to fulfill its NEPA obligations. Massachusetts v. Watt, 716 F.2d 946, 950 (1st Cir. 1983) (rejecting Defendants' argument that it did not need to supplemental its environmental analysis based on new information where the new expected outcome was within the range contemplated, but not fully analyzed, by the original EIS).

Contrary to FWS's implication in its brief, it never analyzed the impact of the Permit under a scenario where killer-type traps could (and would) kill at least two lynx. See AR-0069930. Nor did FWS analyze the impacts of the changed circumstances provision, what additional measures would be implemented, and the overall impact of those measures. FWS's failure to analyze the deaths of lynx from killer-type traps, as well as its failure to analyze the Amended Plan is critical because FWS's existing analysis is based on the assumption that three or less lynx would be killed over a fifteen-year period and none of those deaths would be from killer-type traps. Thus, the new regulations must be sufficient to prevent any deaths in killer-type traps as well as reduce the risk from all other trapping activities by 2/3 of what FWS initially anticipated. While the Amended Plan may reduce the risk to lynx as compared to the

prior plan, there is no analysis on how the Amended Plan will impact lynx. Moreover, the public never got an opportunity to participate in a NEPA decision-making process analyzing the impact of the amendments or potential alternatives.

Finally, the fact that the Amended Plan will allegedly reduce the impact on lynx does not exclude FWS from the requirement to prepare supplemental NEPA documentation, which is required whenever "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" emerge. 40 C.F.R. § 1502.9(c)(1)(ii); see Watt, 716 F.2d at 949–50.

VI. FRIENDS OF ANIMALS HAS STANDING.

Although Defendants do not challenge the standing of the other Plaintiffs, Defendants assert, based primarily on three contentions, that Friends of Animals ("FOA") lacks standing because its members have not suffered cognizable injuries-in-fact.[3] First, Defendants claim that FOA's declarants cannot be harmed because they have never seen lynx or signs of lynx before. ECF 113 at 22. Then, they argue there is no injury because there is only a "remote possibility that [FOA's declarants] will encounter a lynx that is incidentally captured" when they visit the Moosehead Lake region in October. Id. at 23. Finally, Defendants claim FOA's declarants had no definite plans to visit areas where lynx are found at the time FOA filed its complaint. Id. at 23. The first two contentions are wrong as matters of law. And the third is based on nothing more than Defendants' speculation and is flatly contradicted by sworn declarations by FOA's declarants. See, e.g., ECF 112-4, ¶ 7; Supplemental Declaration of Katherine Graczyk, ¶¶ 7–10 ("Graczyk Supp. Dec.") (filed herewith). Accordingly, this Court should grant FOA summary judgment on the issue of standing. See Lang v. Wal-Mart Stores East, L.P., 813 F.3d 447, 460

[3] Defendants do not challenge the causation or redressability elements of standing and thus Plaintiffs do not address those elements in this response.

(1st Cir. 2016) ("It should go without saying—but we say it anyway—that a party cannot ward off summary judgment with proffers that depend . . . on arrant speculation, optimistic surmise, or farfetched inference.") (internal quotations and citations omitted).[4]

Initially, Defendants correctly recognize that "[i]t is well-established that 'the desire to use or observe an animal species, even for purely [a]esthetic purposes, is . . . a cognizable interest for purpose[s] of standing[,]'" ECF 113 at 21–22 (emphasis added). But Defendants then seek to undermine FOA's standing by pointing out that FOA's declarants have never seen a lynx in the past. See id. at 22. Courts easily have rejected such superficial arguments. See Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553, 560 (D. Vt. 2005) (observation of endangered species not necessary for standing in ESA cases).

Next, Defendants mischaracterize FOA's members' injuries as related to the likelihood they will see a captured lynx during their upcoming trip to Moosehead Lake. ECF 113 at 23. While seeing a trapped lynx certainly would injure their interests in lynx, FOA declarants also are injured because lynx already have been, and will continue to be, harmed or killed due to trapping allowed by the Permit. See ECF 112-4, ¶¶ 10-14; Graczyk Supp. Dec., ¶¶ 11-12. The diminished ability to observe lynx in the wild in the future is the harm on which standing for other plaintiff organizations is based, which Defendants have not challenged. See Animal Welfare Inst., v. Martin, 623 F.3d 19, 25 (1st Cir. 2010) (describing plaintiffs' harm as the reduction in "the likelihood that the members will observe Canada lynx in their natural state on future visits") (emphasis added).

[4] If Defendants' argument regarding FOA's standing is treated as part of Defendants' cross-motion, then it is even easier for this Court to reject it, because when the facts are viewed in the light most favorable to FOA, which they must be, the signed, sworn declarations are more than sufficient to establish FOA's members' definite plans to visit lynx habitat so as to defeat Defendants' cross-motion.

Finally, Defendants' argue that because FOA's members have never been to lynx habitat, they cannot be injured. But while past visits to an area may evince a future intent to visit, Defendants have cited no cases—and FOA has not found any—saying that past visits are required to prove standing. See Ctr. for Biological Diversity v. Kempthorne, No. C 06-07117 WHA, 2008 WL 205253, at *5 (N.D. Cal. Jan. 23, 2008) ("nowhere in Lujan is there a requirement that a plaintiff allege past visitation and concrete plans to return . . . . Future or imminent harm, however, may be enough to establish standing if such harm is concrete and cognizable."). Defendants speculate that FOA's members did not have definite plans to visit Moosehead Lake at the time FOA filed its Complaint. See ECF 113 at 22–24. To the extent there are any questions on this issue, Ms. Graczyk's supplemental declaration puts them to rest. Graczyk Supp. Dec., ¶¶ 6-10. That they did not have tickets or specific reservations at the time FOA filed its Complaint is of no moment given their close geographic proximity. Cf. Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–67 (1992) (plaintiffs lacked standing where their members had no reservations to visit species' habitat located in other countries); Kempthorne, 2008 WL 205253, at *6–7 ("In terms of concreteness, it is one thing for an American to plan to visit Colorado early next year, but entirely different for an American to plan to visit Lord Howe Island. The sheer distance and remoteness relative to the United States and the amount of effort required to organize such a trip is significant."). As such, this Court should deny Defendants' motion, and instead find that, because FOA's members' desire to observe lynx in the wild and definite plans to visit lynx habitat constitute injuries that are concrete, particularized, and imminent, FOA has standing.[5]

[5] This Court need not even reach the issue of FOA's standing if it finds that co-plaintiffs have standing. See Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 976 (1st Cir. 1989) ("where co-plaintiffs have a shared stake in the litigation . . . the finding that one has standing to sue renders

CONCLUSION

For the reasons stated, FWS's decisions to approve the Permit under the ESA and to avoid an EIS under NEPA are contrary to the agency's own record, prior longstanding positions, and the ESA, and thus are arbitrary, capricious, and not in accordance with the law.

Respectfully submitted this 22th day of July, 2016.

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

/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/ 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

---

it superfluous to adjudicate the other plaintiffs' standing"). Defendants already have acknowledged all of the Plaintiffs have a shared stake in this litigation. See ECF 63 (Defendants' unopposed motion to consolidate). Moreover, the relief resulting from all Plaintiffs' claims is the same. Thus, it is unnecessary to decide FOA's standing unless Plaintiffs lose on all claims except FOA's Second Claim for Relief.

Counsel for Consolidated Plaintiffs, **pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2016, I electronically filed the foregoing **Plaintiffs' Response to Defendants' Cross-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 July 22, 2016.

/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

Counsel for Consolidated Plaintiffs, **pro hac vice*

SUPPLEMENTAL DECLARATION OF KATHERINE GRACZYK

I, Katherine Graczyk, declare as follows:

1. The facts set forth in this declaration, and in the previous declaration I submitted for this case, are based on my personal knowledge and if called as a witness, I could and would testify thereto under oath. As to those matters that reflect a personal opinion, they reflect my personal opinion and judgment on the matter.

2. I first heard about Mooschead Lake when I moved to Maine nine years ago because of it being such an iconic destination due to its natural beauty and the amazing wildlife that call it home. Since that time, I've wanted to visit the area.

3. At that time, although I knew my husband and I would visit Moosehead Lake some day, I would not say I had any definite plans to do so. That changed recently as I describe below.

4. My interest and desire to visit the Moosehead Lake region really increased when some of my friends went on a trip to the Lake in 2013. Hearing about their trip and experiences cemented my interest and intentions to visit Moosehead Lake.

5. In late 2014, before I became a member of Friends of Animals ("FOA"), I had a conversation with Michael Harris of FOA in which we discussed some of the threats to Canada lynx in Maine, including harm from trapping.

6. My conversation with Mr. Harris caused me to do two things immediately. First, my husband and I joined FOA so we could support and be part of an organization that worked to protect wildlife like the Canada lynx. FOA's mission is consistent with my values regarding animals and wildlife; values that I've held since I was a child growing up in Colorado. Those values are why I have volunteered for and been a board member of the Animal Welfare Society in Maine since 2013.

7. The second thing that my conversation with Mr. Harris caused me to do immediately was add Moosehead Lake to a written, running list of places that I definitely plan to visit and things that I plan to do in the near future. Specifically I wrote, "Moosehead Lake for lynx" on my list in December 2014.

8. For several reasons, placing Moosehead Lake on my list meant my husband and I had definite plans to visit the Moosehead Lake region at that point. First, we already had intentions to visit Moosehead Lake prior to placing it on the list. Second, after my conversation with Mr. Harris in which I learned details about the threats lynx were facing from trapping practices in Maine, my sense of urgency to visit an area where I knew lynx were increased since I was concerned that my ability to observe lynx in the wild in the future was in jeopardy.

9. Finally, I do not leave items sitting on my list for long, especially when I list places I plan to visit and trips I plan to take. For example, in 2010 I added visiting Martha's Vineyard to my list and I made a trip out there in 2010. Since my first trip in 2010, traveling to Martha's Vineyard remains on my list, and I have been there at least four times since 2010. I usually take multiple trips to places that I visit because I don't feel one can truly experience a place by visiting it just once. This is especially true for places that I can easily drive to and thus where I do not need to make travel plans well in advance, such as Moosehead Lake. So my plan and expectation is that we will visit the Moosehead Lake region again after our trip there this October. In particular, I plan to visit Moosehead Lake in multiple seasons, so that I can experience it at different times of the year.

10. Unlike trips where I need to have a passport and make significant flight arrangements, such as traveling to Stockholm, Sweeden (which I did in 2015), I knew I didn't need to make actual reservations far in advance to go to Moosehead Lake. Since moving to Maine I have

explored numerous areas of the State, including much of the coastline, in order to see the different species that call it home and the amazing natural beauty of the State. It has always been, and will always be, my goal to explore all that Maine has to offer.

11. I know that lynx are rare, and my husband and I will be constantly looking for lynx and signs of lynx when we are in the areas that we know lynx inhabit. The fact that I haven't seen a lynx yet, only *increases* my desire to do so. As I said in my earlier declaration, if I was able to observe or photograph a lynx in the wild, it would be, without a doubt, the highlight of that trip.

12. Unfortunately, I am concerned that because of trapping I will not be able to see Canada lynx during my husband's and my visit to the Moosehead Lake region this October. Just knowing now that populations of Canada lynx are threatened and deaths and injuries are still occurring will lessen my enjoyment of the Moosehead Lake region and the wildlife that call it home.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 18 day of July, 2016, in Kittery Point, Maine.

Katherine Graczyk