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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO DEFENDANT-INTERVENORS' MEMORANDA

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

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I. A "THOROUGH, PROBING, IN-DEPTH REVIEW" OF THE ADMINISTRATIVE RECORD DEMONSTRATES THAT FWS'S FINDINGS ARE UNSUPPORTED BY THE RECORD.

In response to Defendants' and Intervenors' attacks on Plaintiffs' characterization of the Administrative Record, Plaintiffs highlight the following facts to aid the "thorough, probing, and in-depth review" to determine whether the agency considered the important aspects of the problem and explained a "rational connection between the facts found and the decision made." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

The record shows that throughout the permitting process, Maine Department of Inland Fisheries and Wildlife (MDIFW or Maine) consistently refused FWS's recommendations for meeting the requirements of the Endangered Species Act (ESA), including recommendations to minimize and mitigate the take to the maximum extent practicable, and recommendations to ensure adequate funding for Maine's minimization and mitigation plans. Despite FWS's rejection of Maine's 2008 draft permit and Maine's ongoing refusal to accept these recommendations, FWS arbitrarily approved a comparable Permit in 2014 that continued to fail to meet these ESA requirements. FWS also failed to prepare an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA).

A "searching and careful" review of FWS's final documents reveals these inadequacies, and FWS's own comments on prior draft permits and responses to public comments shows how the agency's own evidence, biological expertise, and prior positions contradict its findings and conclusions. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 387 (1989).

A. The 2014 Permit Mimicked The "Insufficient" 2008 Draft Permit Except for a More Extensive "Changed Circumstances" Provision.

In May 2006, Maine began drafting its Habitat Conservation Plan to support its application for an ITP in response to a pending lawsuit over the illegal take of lynx through the state's trapping program. AR-0070457.[1] That lawsuit led to a 2007 Consent Decree approved by this Court that adopted numerous measures to minimize the incidental take of lynx in Maine's recreational trapping program (Case No. 1:06-cv-128-JAW). AR-0006056 (2007 Consent Decree). Maine submitted several draft plans to FWS between 2006 and 2008, all of which FWS determined did not meet permit issuance criteria. See Plaintiffs Opening Brief at 5-8; see also e.g., AR-0008714[2]; AR-0009937; AR-0009780.

Maine submitted what it considered to be its final draft plan on August 13, 2008. AR-0011189 ("2008 Draft Permit"). Over the next three years, FWS's technical and scientific staff and attorneys reviewed the 2008 Draft Permit and expressed concern about its content and analysis.[3] AR-0067140–43 (ITP Chronology); see e.g., AR-0012191; AR-0012137; AR-0012300; AR-0019724; AR-0019298; AR-0015669; AR-0015770.

Dr. Nordstrom, a biologist and Field Supervisor at FWS's Maine Field Office, summarized FWS's concerns over the inadequacies of the 2008 Draft Permit in a letter dated April 14, 2009, as (1) the quantification of take; (2) the adequacy and extent of proposed avoidance, minimization, and mitigation measures need to be further developed; (3) certain of

[1] Appendix 1 of FWS's Findings and Recommendations memorandum provides a chronology of key dates in the ITP review process. AR-0070457–61. The Administrative Record also contains a more detailed and comprehensive draft of this chronology. AR-0067138–47.
[2] Plaintiffs' opening brief cited to a prior draft of this letter in error. See Plaintiffs Opening Brief at 5 (AR-0008547 should be AR-0008713).
[3] The State's assertions concerning comments by a "single FWS employee" are untrue. State's Brief at 2. In fact, the record reflects comments and concerns from multiple FWS biologists and other staff, including Dr. McCollough, Dr. Nordstrom, Dr. Hecht, Martin Miller, Glen Smith, and Dave Rothstein. AR-0012137, AR-0012300, AR-0019724, AR-0019298.

MDIFW's positions regarding feasibility; and (4) the uncertainty concerning jurisdiction, willingness, and extent of binding commitments to conserve lynx habitat on [Maine Bureau of Public Land] lands and identification of the conservation measures to be employed on those lands over the period of the permit. AR-0012336.

Despite receiving notice that the 2008 Draft Permit did not meet the issuance criteria, Maine "was unwilling to make revisions," AR-0012517-58, and as a result "FWS was forced to draft an EA based on a draft plan that FWS deemed insufficient in several areas." FWS's Brief at 11; AR-0013350-51; AR-0012336.

FWS solicited public input on the 2008 Draft Permit and a draft EA in 2011. FWS's Brief at 11; AR-0012517; AR-0028931 (Notice of Availability, 76 Fed. Reg. 69,758 (Nov. 9, 2011)). This Notice of Availability described the outstanding issues and concerns FWS had with the 2008 Draft Permit, many of which were left unresolved or unexplained by FWS in its findings and issuance of the final Permit. See AR-0028931 (Notice of Availability). Among these issues are (1) Maine's take calculation did not adequately address unreported take, which could significantly increase the overall take estimate and, thus, the level of minimization and mitigation required to offset this take; (2) Maine's projections about the impact of the take on the overall lynx population, and whether these projections were accurate; and (3) the absence of available mitigation measures, and whether there were "different trapping methods that could be more effective in avoiding trapping of lynx." AR-0028932.

A comparison of the 2008 Draft Permit and the final 2014 Permit reveals that the only meaningful difference between the drafts is a more extensive "changed circumstances" provision. AR-0011252 (2008 Draft Permit); cf. AR-0070094 (2014 Permit); AR-0070433 (2014 Findings). Both the 2008 Draft Permit and the 2014 Permit use the same take calculation

methodology and lynx trapping data from 2004 to reach a total take of 195 lynx. AR-0011252 (2008 Draft Permit); cf. AR-0070165-70 (2014 Permit); AR-0070433 (2014 Findings). The 2014 Draft Permit covers more trapping than the 2008 Draft Permit, yet does not increase the take request, minimization plan, or mitigation plan. AR-0070165-70 (2014 Permit); AR-0070424, n. 2; AR0070433. Moreover, both the 2008 Draft and 2014 Permit rescinded trap size restrictions and failed to require BMP traps or lynx exclusion devices. AR-0011277-95; cf. AR-0070433. Instead of incorporating FWS's recommendations concerning these measures or addressing the issue of their practicability, the final Permit put some of them into a "changed circumstances" provision. AR-0070216; AR-0012336.

B. FWS's Findings Are Contradicted By Data And Evidence In FWS's Final Documents.

Significant data and evidence in the FWS's own Final EA and its responses to public comments undermine its decisions and its arguments in this case. AR-0060169–96 (August 2014 Draft EA); AR-0069957–83 (FWS's final response to public comments).

First, FWS's response to public comments states that the FWS reviewed research on BMP traps and that the "best available science" demonstrated that these traps may reduce injury rates to lynx. AR-0060178. Despite this best available science, and the FWS's own repeated recommendation of BMP traps to reduce injury rates, FWS "did not even reach the question of practicability" and did not require BMPs traps as a minimization measure. FWS's Brief at 40. Further, this measure is not even listed in the "changed circumstances" provision, likely because Maine promised the trappers that it would not mandate BMP traps. AR-0060178; AR-0070216.

Second, the EA disclosed data and analysis demonstrating that larger traps likely increase injury rates because they are heavier, have stronger springs, and have a larger jaw spread, thereby supporting a limit on trap size as a measure to minimize injuries to lynx. AR-0070440;

AR-0069937. Despite this data and analysis, FWS accepted Maine's assertions that larger traps likely would not increase injury rates, and put a limit on trap size into the "changed circumstances" section, without addressing its practicability.

Third, the FWS's response to comments essentially admitted that funding for Maine's mitigation plan was not assured, and therefore any failure to demonstrate funding must have a consequence that "will be" implemented, as opposed to "may be" implemented. AR-0060194.

Last, the FWS's responses to comments disclosed that lynx exclusion devices are "100% effective" in keeping lynx from killer-type traps, in contrast to Maine's "assessment" that leaning poles also kept lynx from these killer-type traps. AR-0060174–75. Despite the proven, 100% effectiveness of lynx exclusion devices, the FWS did not require these devices as a minimization measure, and likewise placed them into the "changed circumstances" provision, leading to two dead lynx immediately after this Permit became effective.

In light of these unresolved issues, which were fatal to the 2008 Draft Permit, FWS's findings in the final Permit regarding the take calculation, minimization measures, mitigation plan, and funding assurances are arbitrary and violate the Endangered Species Act. See generally AR-0070424–61 (2014 Findings); AR-0070094–421 (2014 Permit).

II. THE TAKE CALCULATION ARBITRARILY FAILED TO USE THE MAXIMUM/HIGHEST YEAR OF TAKE.

FWS and the State of Maine tell conflicting stories regarding the overall take calculation of 195 lynx. According to the FWS's 2014 Findings and Recommendation on Issuance of the 2014 Permit, this take calculation was based on "the maximum reported take of 11 lynx in 2004" with an additional 20% allowance. AR-0070433 (2014 Findings); AR-0069964 (FWS's response to public comments on take calculation in 2014 Draft Permit and EA). According to the briefs filed by FWS and Maine, this take calculation was based on the total of the "highest"

years of take in both the recreational trapping program (7 lynx taken in 2011) and predator management program (4 lynx taken in 2012), for 11 total lynx, again plus a 20% allowance. FWS's Brief at 27; State's Brief at 5.

Whichever story is correct, and whichever of these methods is used, the critical point is that neither calculation actually used the "maximum" or "highest" year of take. The method described in the 2014 findings results in a take calculation of 252 lynx because the "maximum reported take" was 14 lynx in 2013, plus the 20% buffer. AR-0074404[4] (Table 4.1.4, 2015 Permit). The method described in the governmental briefs results in a take calculation of 270 lynx because the recreational program took 11 lynx in 2013, combined with the 4 lynx taken in the predator management program in 2012, for a total of 15 lynx, plus the 20% buffer. See Plaintiffs' Response Brief at 2 n. 2.

Maine's brief states that the take calculation methodology was based on the lynx caught "in the single highest year." State's Brief at 6. But that's not accurate. The "single highest year" was in 2013, but this data was not used in the take calculations. The State's only explanation for its failure to use the single highest year—2013—was that "Maine decided that it was not appropriate to revise the data when it submitted the final Plan in October 2014." Id. at n.4. This post-hoc excuse embodies an arbitrary decision that failed to articulate a satisfactory explanation for the action and that ran counter to the agencies' own methodology and evidence. Motor Vehicle Manufacturer's Ass'n., 463 U.S. at 42–43 (1983).[5]

[4] Plaintiffs' opening brief cited to a prior draft EA in error. See Plaintiffs Opening Brief at 3 (AR-0051894 should be AR-0074404).

[5] Nor did the FWS "address" this 2013 take data. FWS Brief at 29. The record reflects that the FWS acknowledged the 2013 take data, but gave no explanation for its failure to use this data in the take calculation. AR-0069872; AR-0069875; AR-0069964; AR-0070433.

The State also erroneously asserts that FWS used this calculation only to limit the number of takes authorized by the Plan. State Brief at 5. Again, the State is wrong. The take calculation also affected the amount of mitigation required and the NEPA analysis. As FWS recognized in its 2014 Findings, it used the take calculation to estimate the number of lynx that would be killed and severely wounded. AR-0070433–34. A higher total take calculation of 252 or 270 lynx would have resulted in higher estimates of lynx killed (4 or 4.3) or severely wounded (11 or 12), which in turn would have required more mitigation and affected the analysis of likely significant impacts under NEPA. By ignoring the 2013 data, FWS failed to follow its own take calculation methodology and thereby rendered the entire Permit arbitrary and capricious.

III. FWS FAILED TO MINIMIZE AND MITIGATE THE IMPACTS OF THE TAKING TO THE MAXIMUM EXTENT PRACTICABLE.

A. FWS Failed To Find That BMP Traps And Limits On Trap Size Were Impracticable and Arbitrarily Ignored Its Own Assessments and Experts.

Before issuing this Permit, the FWS was required to find that there were no practicable alternatives that would further minimize the take of lynx. Gerber v. Norton, 294 F. 3d 173, 185 (D.C. Cir. 2002). In its 2014 Findings and Recommendation concerning this Permit, the FWS summarized its statutory duties under 16 U.S.C. § 1539(a)(1)(B)(ii) as follows:

> It is the Service's position that the impacts of the proposed project that were not eliminated through the ITP/HCP process, must be minimized to the maximum extent practicable, and then those remaining impacts that cannot be further minimized must be mitigated commensurate with the level of take.

AR-0070437 (2014 Findings) (emphasis in original).

The plaintiffs have summarized the evidence before the FWS and the opinions of the agency's own lynx experts that (1) requiring the use of BMP traps, with padded or offset jaws, and (2) limiting trap size, would minimize the impacts of trapping by reducing the injury rate to lynx. Most notably, FWS's responses to public comments admitted that the best available

science demonstrated that these traps may reduce injury rates to lynx. AR-0060178. Moreover, the 2014 Findings stated that BMP traps probably would benefit non-target species, the FWS itself promoted BMP traps as minimizing the incidental take of lynx, and FWS biologists sought BMP traps as a minimization measure throughout the permit process. AR-0070440, AR-0020274, AR-0008461. Likewise, FWS's own documents and assessments demonstrated the common-sense proposition that smaller traps with less powerful springs likely reduce injury rates to lynx. AR 0069937. Moreover, in a similar case involving incidental trapping of lynx in Idaho, the FWS recommended traps with a "relatively small trap-jaw spread" that remain efficient for bobcats, foxes, and coyotes. Ctr. for Biological Diversity v. Otter, No. 1:14-CV-258-BLW, 2016 WL 233193, at *2 (D. Idaho Jan. 8, 2016).

Neither Maine nor the trappers contested any of this evidence. Indeed, Maine admitted that FWS recommended BMP traps as a minimization measure, and the trappers admitted that they sought the larger traps because these traps have stronger springs. State's Brief at 9 n. 12; Trapper's Brief at 13. Nor did either of the Intervenors contest that, at the beginning of the BMP trap testing process years prior to the FWS's approval of this permit, Maine promised the trappers that it would not require BMP traps, contrary to the FWS recommendation and to the requirements of the ESA. AR-0037525 (Maine Trappers Association's 2012 public comment on use of BMP traps: "[w]hen Maine participated in BMP testing of foothold traps several years ago, the MTA was assured by [MDIFW] that BMP standards would never be made mandatory here.").

Thus, the record demonstrates that FWS violated the ESA by failing to require BMP traps and failing to limit trap size, as these minimization measures plainly are practicable and the FWS made no findings to the contrary. FWS also acted arbitrarily by ignoring its own

recommendations, assessments, and experts, all of which indicated that these measures would reduce the impacts of the take by reducing the injury rate to trapped lynx.[6]

B. FWS Failed To Mitigate The Impacts Of The Take To The Maximum Extent Practicable.

As stated in the Plaintiffs' opening brief, courts have interpreted the mitigation provision of 16 U.S.C. § 1539(a)(1)(B)(ii) to require a rough balance between the impacts of the take and the mitigation, such that the mitigation fully offsets the take. Plaintiffs' Opening Brief at 25–26; Union Neighbors United, Inc. v. Jewell, 2016 WL 4151237 at * 13 (D.C. Cir. 2016).

According to the FWS regulations, the "impact" of a take means "the amount or extent" of such take. 50 C.F.R. § 402.14(i)(1)(i). The First Circuit has held that "take" includes not just fatalities, but also injuries to the listed species. Strahan v. Coxe, 127 F. 3d 155, 165 (1st Cir. 1997). Likewise, the FWS Handbook explains that the number of individuals taken is the foundation for the development of the conservation plan, and the EA reinforced that, in this case, the impact of the take is "the potential for injuries or fatalities of lynx that are incidentally captured." AR-0000578, AR-0069976 (emphasis added).

For these reasons, FWS and Intervenors' claim that the agency "fully offset" the take of lynx rings hollow because the FWS completely discounted any and all impacts from the 9 lynx permitted to sustain severe injuries requiring treatment and from the 183 lynx permitted to be trapped and released. First, since FWS itself repeatedly described the injuries to the 9 lynx as "more severe," it is contradictory and arbitrary to discount those injuries entirely and to treat those takes as having no impact. AR-0070434 (2014 Findings). Second, the data FWS relied on

[6] The trappers argued that the challenge to the failure to prohibit large foothold traps is not ripe, an argument that neither the FWS nor Maine asserted. Trappers Brief at 12. This challenge plainly is ripe because the federal action is final, the Permit is granted, and the ESA violation has occurred. Abbot Labs v. Gardner, 387 U.S. 136, 149 (1966); State of Rhode Island v. Narragansett Tribe, 191 F. 3d 685, 692 (1st Cir. 1994).

demonstrated that 6% of lynx caught in foothold traps had moderately severe to severe injuries, and 75% had mild injuries, so to treat all 183 of these lynx as functioning as if they sustained no injuries or impact at all was contradictory and arbitrary. Id. Third, the record contains substantial evidence that these trapped lynx will not live as long and function as well as untrapped lynx. AR-0070440; AR-0070424; AR-0070433–34. Fourth, FWS's own biologists and lynx experts in the Maine Field Office sought mitigation for the entire take of 195 lynx. AR-0039658; AR-0060735; AR-0038285.

For these reasons, the failure to provide any mitigation at all for the permitted taking of 192 trapped lynx was arbitrary, and the mitigation plan itself was arbitrary for the reasons stated in the Plaintiffs' opening brief. Plaintiffs' Opening Brief at 25–27.

IV. FWS CANNOT AVOID IMPLEMENTATION OF PRACTICABLE MINIMIZATION MEASURES THROUGH A "CHANGED CIRCUMSTANCES" TRIGGER.

Because FWS amended the ITP to require lynx exclusion devices (after two lynx died in traps set on leaning poles), Plaintiffs are not asking the court to determine whether FWS acted arbitrarily by not requiring lynx exclusion devices.[7] Rather, Plaintiffs' claim is based on the fact that, through an illegal use of a "changed circumstances" provision, FWS failed to minimize the impacts of take to the maximum extent practicable by refusing to require practicable minimization measures until after traps set on leaning poles killed lynx. FWS's approach illegally placed all risks on the lynx, rather than minimizing those risks up front, as the law requires.

[7] Plaintiffs raised this claim in their initial Complaint, before the FWS amended the ITP to require lynx exclusion devices one month later, and then retained the facts, but not the legal claim, in their Amended Complaint. ECF 1; ECF 76.

As stated in Plaintiffs' response brief, at least three practicable and effective minimization measures—lynx exclusion devices, BMP traps, and limits on trap size—were not required in the ITP because they were unpopular with the trappers. AR-0053822. Under the ESA, the test for whether to require a minimization measure is practicability, not favorability with the permit applicant. 16 U.S.C. § 1539(a)(1)(B)(ii). Despite the statutory duty to require minimization measures unless those measures are impracticable, FWS parked these readily-available and effective, but controversial measures in a "changed circumstances" section, where they would be employed only if the lynx suffered severe injuries or were killed. AR-0070216.

FWS knew that lynx exclusion devices were practicable and advised Maine throughout the permitting process to require them on killer-type traps. See e.g., AR-0070439 (2014 Findings); AR-0069962 (FWS's final response to public comments). FWS's own experts doubted that trap placement on leaning poles would prevent lynx exposure to killer-type traps.[8] Id. Despite the overwhelming evidence at the time FWS issued the Permit that lynx exclusion devices were "100% effective" in keeping lynx from killer-type traps, FWS violated the ESA by neither requiring them nor making a finding that they were impracticable. The irrationality of FWS's approach is demonstrated by the two dead lynx, whose deaths would have been prevented if FWS initially had required this practicable minimization measure. Although FWS remedied this particular mistake by amending the ITP to require lynx exclusion devises, FWS's violation

[8] Maine spent four pages defending its position that leaning poles keep lynx from killer-type traps. See State's Brief at 11–15. Regardless of whether this position was reasonable, neither Maine nor FWS ever found that lynx exclusion devices were impracticable. See AR-0070439 (2014 Findings); AR-0069962 (FWS's final response to public comments). In fact, the evidence in the record demonstrated that lynx exclusion devices are the most practicable way to prevent lynx from accessing killer-type traps, aside from prohibiting trapping altogether, and these devices are in use today, but only after two lynx were killed. See AR-00060175 (FWS's response to public comments on 2008 Draft Permit and 2011 EA).

continues with respect to BMP traps and restrictions on trap size, which are the other minimization measures that FWS refused to require unless triggered by "changed circumstances."

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

The State of Maine's discussion of funding supports Plaintiffs' argument that the State's funding scheme is speculative and not guaranteed. See Plaintiffs' Opening Brief at 27–30. The State does not dispute that the bulk of the mitigation efforts in its plan fall to the Maine Bureau of Public Land (BPL), a third party, to pay for and implement. See State's Brief at 19–20. The only assurance that the State offers is a Memorandum of Understanding between MDIFW and BPL that, by the State's own admission, "does not expressly address funding." State's Brief at 20; AR-0070399–405 (MOU). This statement flies in the face of the ESA case law that the funding assurances, at a minimum, should include an itemized list of costs associated with implementing the plan and guaranteed sources of funding. See Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1156 (S.D. Cal. 2006).

Tellingly, the only funding assurance provided by Maine is the State's ad hoc promise to the Court that "there can be no doubt that BPL will obtain whatever funding it needs to ensure it can perform its obligations." State's Brief at 20. The hollowness of this statement is highlighted by a review of the terms of the MOU and the FWS Findings that show that neither MDIFW nor BPL actually knows how much implementation of the mitigation plan will cost. AR-0070232 (2014 Permit); AR-0070444 (2014 Findings). Before BPL can implement the mitigation plan, it must conduct forest surveys of the proposed mitigation area to determine the baseline conditions, undertake forest modeling to assess the work required to create high quality lynx foraging habitat, and develop a forestry management plan. Id.; see AR-0073297 (Email from Dr.

McCollough explaining the nature of the mitigation commitments for the 2014 Permit). Because the actual cost of implementation of the mitigation plan will not be known until these assessments are completed, management of the mitigation area could cost significantly more than the State's $50,969 estimate. If the promise of Maine's attorney was taken at face value, BPL would be obligated to pay whatever the actual cost of implementing the mitigation plan turns out to be, a commitment neither BPL nor Maine has made.

Further, as stated in Plaintiffs' opening brief, even if the State knew the actual cost of implementing the mitigation plan, it remains unclear from the record whether any funding is secure or consistently available for the duration of the 15-year permit. Plaintiffs' Opening Brief at 27-30. Maine cannot obtain any funding without collaboration with the state legislature, other state agencies, foundations, and private partners—none of which are guaranteed. AR-0070227 (2014 Permit); see AR-0070403 (Maine Attorney General's Office stating "[i]t should also be self-evident that the legislative process is inherently unpredictable."). In the event that funding falls short, Maine would have no options because it likely cannot enforce the terms of the vague and nonbinding MOU against BPL, and Maine has no funding contingency plan in place.[9] See AR-0070403; AR-0060194 (funding discussion admitted funding not ensured, so must have consequence that "will be" implemented, as opposed to "may be" implemented). Mere promises that the money for mitigation will be found is not sufficient to justify the issuance of the incidental take permit. If Maine could not secure funding for a 15-year permit, it should have requested a permit with a shorter duration.

[9] That MDIFW could "obtain whatever funding it needs to ensure it can perform its obligations" under the ITP is highly doubtful considering that the website for the state agency reveals that funding for threatened and endangered wildlife programs is unstable and insecure. See Support Wildlife Conservation in Maine, Maine Department of Inland Fisheries and Wildlife, MAINE.GOV, http://www.maine.gov/ifw/wildlife/support/ (last visited August 26, 2016).

Last, even if the funding plan was adequate, in light of all of these contingencies and uncertainties, FWS violated the ESA by changing the consequence of a failure to demonstrate funding from "shall" result in permit revocation to "may" result in permit revocation.

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

The Intervenors did not respond to Plaintiffs' NEPA claim. As stated in Plaintiffs' opening and response briefs, considerations of both the context and intensity of the issuance and implementation of Maine's Permit requires an EIS for multiple reasons. 40 C.F.R. § 1508.27; Plaintiffs' Opening Brief at 30–39; Plaintiffs' Response Brief at 13–15.

Moreover, the EA shows that trapping under Maine's Permit, in the context of the other severe threats to the species, may have a significant impact on Canada lynx. See AR-0069949–54 (Final EA). The final EA acknowledges many severe threats to lynx, id., but then inexplicably concludes: "[a]lthough the long-term cumulative effects from changing land ownership patterns, changing forest practices, residential and energy development and climate change may substantially influence the human environment in Maine, the incremental effects of trapping over the 15-year life . . . will be negligible." AR-0069954. This analysis is contradicted by FWS's statement 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, at least on a local scale." AR-0002044 (Final Rule listing lynx as threatened, 65 Fed. Reg. 16,064 (Mar. 24, 2000) (emphasis added)). Further, FWS's analysis is flawed because it entirely fails to consider the impacts of all of the take allowed under this Permit and required by the EIS. Thus, a proper analysis of the cumulative impacts of Maine's Permit—as NEPA requires—would examine the additive nature of trapping at least 195 lynx out of a population of 500 or less, in the context of all of the present and future threats to lynx.

Additionally, the EA fails to analyze the potential precedential effect of issuing and implementing Maine's Permit. First, despite FWS's suggestion that there is no precedential effect because some consent decree measures carryover to Maine's Permit, Section 10 of the ESA holds Maine to higher standards because Maine's Permit must include all practicable minimization measures and include mitigation, which is not addressed in the consent decree. Second, despite FWS's statement that Maine's Permit will not set a precedent for other states, id., the record shows that FWS Maine Field Office, Northeast Regional Office, and Midwest Regional Office communicated the status of pending Habitat Conservation Plans in other states and compared these drafts, in part, to ensure that the conservation strategy was consistent. See AR-0011605 (HCP Side-by-Side Comparison by FWS's Midwest Regional Office); see also AR-0062093 (review of Montana's HCP); see also AR-0075068. Undoubtedly, other states are looking to Maine's ITP as they contemplate the need for take coverage for their trapping programs. Because FWS's approval of Maine's ITP will set a precedent for other states, a full analysis in an EIS is necessary under NEPA.

CONCLUSION

For the reasons stated, FWS's decisions to approve the Permit under the ESA and to avoid preparing an EIS under NEPA are arbitrary, capricious, and contrary to law.

Respectfully submitted this 26th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2016, I electronically filed the foregoing **Plaintiffs' Reply in Support of Motion for Summary Judgment and in Response to Defendant-Intervenors' Memoranda** 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 August 26, 2016.

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