Animal Welfare Institute
900 Pennsylvania Avenue, SE, Washington, DC 20003 • www.awionline.org
telephone: (202) 337-2332 • facsimile: (202) 446-2131

September 5, 2014

BY ELECTRONIC MAIL (http://www.regulations.gov)

Public Comments
Processing, Attn: FWS–R5–ES–2014–
0020; U.S. Fish and Wildlife Service
Headquarters, MS: BPHC; 5275 Leesburg
Pike; Falls Church, VA 22041–3803

To Whom It May Concern:

On behalf of the Animal Welfare Institute (AWI), Endangered Species Coalition (ESC), and Project Coyote (PC), I submit the following comments on the Incidental Take Plan for Maine's Fur Trapping, Predator Management and Animal Damage Control Program (hereafter revised ITP) and the associated Revised Draft Environmental Assessment For Issuance of a 10(a)(1)(B) Permit for the Incidental Take of Canada lynx (*Lynx canadensis*) (hereafter REA).

The content and analysis contained in these documents is disappointing and inadequate. Instead of developing strategies to protect the threatened lynx from incidental take as required by the Endangered Species Act (ESA), the Maine Department of Inland Fisheries and Wildlife (IFW) is proposing to repeal some of the protections or restrictions currently in place which will increase the risk of incidental take for lynx. This about face from the progress, albeit insufficient, that had been previously made to protect lynx from incidental take by trappers, represents a blatant violation of the ESA and should be rejected by the USFWS by a decision to deny the requested ITP.

This project is of significant importance to the threatened Canada lynx, its recovery, and how or if trapping can be permitted in occupied or potential lynx habitat. As a federally protected threatened species, the Endangered Species Act (ESA) requires that lynx be afforded the highest of priorities, that their protection and recovery be paramount for all with management responsibility, and that their take be prohibited unless allowed by the US Fish and Wildlife Service (USFWS) through, for example, an ITP. The protections afforded to species under the

ESA are mandatory and not subject to agency (federal or state) discretion, concern about convenience or inconvenience to user groups, or to inherent biases in support of or opposition to trapping. The ESA prohibits the intentional or incidental "take" of a protected species. Take includes mortality but, as defined in the ESA, includes any harm or harassment done to a protected species.

Despite an absolute obligation to comply with the ESA, the analysis in the revised ITP demonstrates that the IFW is far more concerned about preserving and expanding recreational trapping opportunities within those wildlife management districts (WMDs) occupied by lynx instead of focusing its efforts on protecting lynx and lynx habitat and only allowing trapping, if at all, that will not result in the take of lynx. While IFW can attempt to ignore its responsibilities under the ESA, the USFWS cannot countenance such an attitude by completing this current decision-making process and issuing the requested ITP.

The USFWS is not merely an innocent bystander in this case. Not only has it worked for years with the IFW to create an ITP that is inadequate but its own REA contains a number of inadequacies and, therefore, is not consistent with the requirements of the National Environmental Policy Act (NEPA). Specifically, it has failed to: A) provide credible evidence to substantiate the purpose and need for the project; B) include analysis of a reasonable range of alternatives and has eliminated alternatives from consideration that warranted more careful review. It has also failed to properly assess the full range of direct, indirect, and cumulative environmental consequences of the proposed action and alternatives but the limited opportunity for public comment has prevented discussion of these deficiencies.

Instead, the USFWS includes data and evidence in the REA that undermines the claims made by the IFW yet it essentially ignores that information in concluding that an REA is the appropriate level of NEPA review in this case. Indeed, as documented in this letter, an REA is not sufficient to fully evaluate the direct, indirect, and cumulative impacts of this project; an Environmental Impact Statement (EIS) must be prepared.

Ultimately, based on the legal standards and scientific evidence, Alternative 2 (the no permit-no action) alternative will best protect lynx as required by the ESA. Hopefully, the USFWS will recognize the value of Alternative 2 as well and will concede that, under the ESA, this is the only Alternative that will provide maximum protection to lynx.

Before addressing specific deficiencies in the revised ITP and REA, AWI, ESC, and PC must raise concerns about the inadequacy of the public comment period provided in this case. Despite the clear intent of NEPA to encourage and facilitate public participation in agency decision-making and the USFWS' policies indicating that, at a minimum, this revised ITP and REA must have been subject to a 60 day comment period, the USFWS has inexplicably rejected two requests to extend the comment period in order to facilitate greater public participation – by all interested parties -- in this decision-making process (see Attachments 1, 2, and 3). The arguments made by the USFWS to justify its rejection of these requests are irrelevant, exceedingly weak, or easily refuted by existing law and policy yet it has remained steadfast in

its opposition to demonstrating any flexibility in providing additional time for the public to fully digest and analyze the revised ITP and REA. Consequently, while these comments raise important issues they are not as comprehensive as they would have been had the USFWS granted the requested 30 or, preferably, 60 day extension in the comment deadline. To remedy this error, AWI, ESC, and AWI request that the USFWS publish a notice reopening the comment period on the revised ITP and REA for, at a minimum, an additional 30 days.

Furthermore, though not explicitly stated in the REA, the USFWS should make clear that the administrative record in this case includes all of the comments submitted in response to the previous ITP and EA that were available for public comment in 2011. To be safe, in case that is not the intent of the USFWS, the comments submitted in 2011 by AWI are appended to this letter as Attachment 4. While the 2014 revised ITP and, consequently, the REA cover issues that weren't addressed in the 2011 iterations of these documents, many of the concerns identified by AWI in 2011 remain valid and have not been adequately addressed by either the IFW or the USFWS.

The remainder of this comment letter will address deficiencies in the revised ITP and REA. In some cases, these deficiencies are applicable to both documents while, in other instances, the deficiencies are specific either to the revised ITP or REA.

1. The Revised ITP Does Not Fully Comply with the ESA:

The revised ITP is the most recent effort by the IFW to qualify for an ITP that is required under the ESA to permit the incidental take of lynx during Maine's trapping season. Unlike previous iterations of the document, this revised ITP expands its scope to include animal damage control efforts conducted by either state or federal employees and predator management activities conducted by private trappers under contract with the State of Maine, in addition to state permitted recreational fur trapping.

In order to obtain the requested ITP, the ESA is very explicit as to the obligations of the party requesting the ITP. Specifically, to qualify for the ITP, the USFWS must determine that the applicant has satisfied the general permitting criteria in 50 CFR Part 13 and that:

a) The taking will be incidental;
b) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings;
c) The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided;
d) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
e) The measures, if any, required under paragraph (b)(1)(iii)(D) of this section will be met; and
f) He or she has received such other assurances as he or she may require that the plan will be implemented. See ESA Section 10(a)(2)(A).

Those attempting to obtain an ITP are not allowed to select which of these standards they choose to comply with but, rather, they must comply with all of them. In this case, however, the IFW has failed to meet several of these standards. Specifically, the revised ITP does not minimize and mitigate the impacts of any takings to the maximum extent practicable, the IFW does not ensure that there is adequate funding for the conservation plan, and it is not adequately demonstrated that takings will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. Notwithstanding these deficiencies, there are other provisions in the revised ITP that are appropriate and protective of lynx but need to be strengthened. These protective standards cannot compensate for (legally or practically) other provisions that are not sufficiently protective of lynx. To make matters worse, the IFW is also proposing to alter or amend existing standards which will increase threats, both lethal and non-lethal, to lynx in clear violation of the ESA and the standards that must be met to obtain an ITP.

Indeed, if the ITP is issued and these changes are made, the incidental take of lynx will inevitably increase in direct contradiction to the requirements contained in the ESA. Instead of proposing standards that would provide maximum protections for lynx, the IFW is reversing course by proposing allowing activities that will increase the risk of incidental take to lynx while relying on so-called contingency measures to respond to any documented increase in take. The IFW supports these proposed revision claiming that trapping opportunities should not be limited based on alleged threats to lynx which have not been demonstrated to be real based on the IFW's own data. In other words, the IFW is asserting that if the data doesn't prove that a threat is significant or even exists, the threat should be allowed until a take occurs and a lynx is killed or severely injured under the proposed new standards. This reflects a reactive rather than a proactive approach to the conservation of a threatened species that is intended to promote trapping while compromising the protections afforded to lynx. Instead of embracing a "no problem – permit it" attitude the ESA mandates a "prevent, minimize, and mitigate it – it could be a threat" approach.

In regard to the ESA requirement that funding for the project be ensured in order to qualify for an ITP, the IFW fails to provide the requisite assurance. Instead, it promises to do its best in collaboration with the legislature in Maine, other state agencies, foundations, and private partners to find the funding necessary to implement the program throughout it duration. In the event that funding is short, the IFW concedes that it would consider less expensive options to implement the minimization measures that are contained in the ITP. Mere promises that the money will be found should not be sufficient to justify the issuance of the ITP.

In regard to proving that any takings will not appreciably reduce the survival and recovery of lynx in the wild, the IFW also has not met this standard. Both the IFW and USFWS claim that the requested level of take in the ITP (3 lynx killed, 9 lynx moderately to severely injured, and 183 lynx trapped but released with minor or no injuries) over 15 years will not harm the state's lynx population and that annual trapping mortality would have to exceed 75 to 150 lynx (or 10 to 20 percent of the population) in order to adversely impact the lynx population. REA at 57. For this analysis to be correct, the total lynx population in Maine would have to number

between 750 to 1,500 animals yet there is no current estimate of population size in excess of 1,000 and, because studies estimating the population size are conflicting, the more likely statewide population estimate is over 500. REA at 38.

At present, Maine's lynx population is considered to be in decline after its peak population size was reached in 2007. Moreover, as disclosed in the REA, it is anticipated that the habitat for lynx will decline in quantity and quality over the next 5 to 20 years. REA at 38. In addition, lynx habitat is projected to shift southward as a result of forest management practices. As this occurs, lynx will experience greater competition with bobcats and fisher. REA at 38. Overall, lynx populations are projected to decline by 65 percent by 2032 if existing silviculture trends continue. REA at 38. Indeed, even under the best case scenario, lynx density may decline by 55 percent by 2032. REA at 38.

Considering that the population is in decline, the most biologically reckless action that could be taken is to authorize any human-caused actions that could result in the mortality of any lynx or their removal from the ecosystem due to a severe injury attributable to trapping. Consequently, while the IFW and USFWS evaluated the impact of the ITP on the lynx population, that analysis did not consider other factors, anthropogenic or natural, direct, indirect, or cumulative, which may impact the survival and recovery of lynx in Maine.

While the local extinction of lynx in Maine would not jeopardize the survival and recovery of all lynx, many of these same anthropogenic and natural factors adversely affecting lynx in Maine are affecting other lynx populations. Furthermore, if the Maine lynx population were lost there would be one less population that could constitute the foundation for a recovery stock if populations elsewhere are compromised or extirpated whether by the hand of humans or due to natural factors. The relevant in this case should be to take all actions to protect and ensure the survival and recovery of the Maine population of lynx by reducing those threats most under the control of humans.

AWI, ESC, and PC commend the IFW for retaining or proposing several measures that we believe are appropriate and protective of lynx including: restricting the placement of visible baits near foothold and killer-type traps; requiring the reporting of trapped lynx; requiring IFW personnel (when it is safe to do so) to inspect trapped lynx for injuries and treat any injuries prior to release; mandating staff training on how to assess lynx injuries; developing and updating injury assessment forms and instructions with a licensed veterinarian; requiring care for injured lynx that cannot be released; trapping and holding or trapping and collaring juvenile lynx to monitor their well-being if orphaned as a result of a trapping mortality of their mother or if the mother requires treatment for a trapping related injury; inspecting trap lines to determine compliance with trapping regulations; prohibiting the use of traps containing jaws with teeth, and conducting outreach and education efforts to educate trappers on how to reduce the risk of trapping lynx (including the proposed production of a training DVD).

While these are appropriate and seemingly useful provisions that should benefit lynx, some could be improved. For example, there remains concerns that the physical inspection of a

trapped lynx may not reveal all underlying injuries, including physiological damage and potential consequences from elevated stress levels, so requiring the placement of GPS collars on any trapped lynx that is released in order to monitor the animal's well-being at least for three months post release would be an appropriate improvement to this provision. The collars could be programmed to drop off the animal after a set period of time in order to reuse the collar on other trapped lynx.

The development and updating of lynx injury evaluation forms and instructions provision could be improved by involving more than one veterinarian and ensuring that both wildlife veterinarians and veterinarians with specialized training in assessing acute and chronic injury in felines, including specialists in capture myopathy, are involved in the process.

The proposed monitoring of the well-being of lynx kittens/juveniles if their mothers fall victim to trapping (either as a mortality or serious injury) is well intentioned but it is unclear who will conduct the monitoring, how frequently any collared animals will be monitored, and what criteria will be used to determine if they need to be captured for extra care prior to release. Disclosing such details would improve this provision.

Though not mentioned above, the IFW also proposes to have a veterinarian accompany IFW biologist to check 15 trapped lynx over the 15 year duration of the plan. While a positive provision, having a veterinarian check only 15 lynx over 15 years is not sufficient. Instead the IFW should establish a goal of having a veterinarian accompany IFW biologists to check at least 50 percent of lynx trapped each year.

Finally, while checking trap lines to ensure compliance with trapping regulations is appropriate, the criteria of 90 percent compliance could result in a large number of traps that are set in violation of state rules. If there were 100 trappers setting 100 traps each, an acceptable compliance rate of only 90 percent would mean that 1,000 traps were set in violation of state requirements. This criterion should be elevated to at least 98 percent to be meaningful. Trappers should not object to since, by purchasing a trapper's license they are, effectively, indicating their intent to comply with state trapping laws.

Prior to examining those IFW provisions or proposals that are of great concerns as to their potential impact on lynx, some comments on the mitigation proposal are warranted. In this case, the IFW proposes to mitigate the mortality of up to three lynx over the 15 year duration of the ITP by working with the Maine Division of Parks and Public Lands (MDPPL) to manipulate forested habitat within the Seboomook Unit primarily through the use of timber harvest techniques to create ideal habitat for snowshoe hare, the primary prey of lynx. While there are questions about the appropriateness of intentionally manipulating the environment in order to benefit lynx versus allowing natural regulation to determine lynx numbers, density and range, setting aside those questions, this plan will not actually mitigate for the potential loss of three lynx over the duration of the ITP.

First, there is no current forest management plan for the Seboomook Unit in place yet and it won't be in place for at least three years and, second, even if the planned manipulation could begin today, it would be a minimum of 10-18 years before the altered habitat would be suitable for snowshoe hares. Furthermore, because of an anticipate lag time before the management activities create optimal lynx habitat, habitat created through this mitigation plan would not be in a suitable condition to support lynx until 2052-2064 (REA at 33); not until well after the current ITP has expired.

Moreover, it is unclear if the proposed forest manipulation plan will actually benefit snowshoe hare and, subsequently, the lynx. Snowshoe hare populations go through a natural cycle of boom and bust. It is not clear from the evidence presented in the REA or revised ITP if this cycle is tied to habitat conditions (i.e., conditions that can be manipulated by humans), or it is part of the evolutionary biology of the snowshoe hare that is not affected by human actions. If the latter, then manipulating the forest habitat may not achieve the desired objective -- at least not immediately -- if the snowshoe hare is at its low ebb in its natural cycle when the habitat is at its most beneficial to hares.

Furthermore, it is entirely inconsistent with the concept of mitigation that the proposed mitigation site, the Seeboomook Unit, would be open to trapping, including trapping activities that can pose a direct threat to lynx. If this is to be used as a mitigation site, the USFWS should mandate that it immediately be closed to trapping upon issuance of the ITP.

Since the current mitigation plan will not actually provide any mitigation, assuming it even works, for over 30 years, the USFWS must require the IFW to develop a more immediate mitigation strategy if it intends to issue the ITP. It's unclear what that immediate mitigation strategy would be but it could entail a combination of restricting or prohibiting trapping in primary lynx occupied habitat along with an effort to develop agreements with private landowners, including timber companies, to manage all or a portion of their lands within lynx occupied habitat to benefit snowshoe hares and, ultimately, lynx.

The following IFW provisions and proposals are of greater concern because they will weaken or rescind existing standards or result in new standards that will compromise the protections for lynx. These proposals (discussed in no particular order below) are unacceptable as they cannot satisfy the ESA requirement that requires taking to be minimized and mitigated to the maximum extent practicable. These provisions and proposals alone provide the USFWS ample justification to reject the revised ITP and to deny issuance of the requested ITP.

<u>Trapping with the aid of visible baits:</u> Currently, the IWF prohibits the setting of foothold or killer-type traps within 50 yards of bait visible from above. This is intended to reduce incidental take of lynx that may be attracted to bait and of birds, including eagles and other raptors, as well as other wildlife species. It is unclear how the 50 yards standard was developed but, at present, a foothold trap can be legally placed within 51 yards of bait visible from above. While the IFW claims that most lynx captured in foothold traps are released with no or minor injuries, there have been lynx captured in foothold traps that have been killed, died, or suffered more

severe injury both in Maine and elsewhere. Whether the use of bait, regardless of its placement 50 yards away from the trap had anything to do with these captures, the use of any bait, visible or not from above, will increase the potential risk to lynx and should, therefore, be prohibited to be proactive in preventing a risk instead of allowing a take to occur, even if that take does not result in a mortality.

Restricting the setting of kill traps to lean poles, aquatic sets, blind sets, or on streambanks: At present the IFW requires that kill-type traps be set four feet off the ground on lean poles that must be at a 45 degree angle or more, in blind sets (where no bait or other attractants are used), as aquatic sets, or on streambanks.

As an initial matter, though IFW may not have previously received any reports of lynx being caught in a blind set or in a kill-type trap set on a streambank, which does not mean that lynx cannot be trapped in such sets. Indeed, though the IFW requires trappers to report the incidental trapping of lynx (a standard that shockingly is not required for other species), there is no evidence to demonstrate compliance with this standard. Given the popular concept of "shoot, shovel, and shut up" that is commonly bantered about by trappers and hunters who may mistakenly or intentionally kill a protected species, it is unfathomable that such a mentality does not pervade a segment of Maine's trapping community.

The IFW claims that its own lynx trapping study demonstrates that there is not a significant problem with non-reporting yet it is unclear how that conclusion can be drawn without some means of randomly checking private fur trapper trap lines to compare lynx incidental trapping rates to corresponding reports. Furthermore, considering that the very purpose of obtaining the ITP is to eliminate the potential liability a trapper would face if a lynx was trapped, the IFW and USFWS presume that an ITP will increase the incentive to report trapped lynx. If that is correct then, in effect, the agencies concede that there presently is an incentive not to report lynx incidentally caught in a trap. Even if the ITP is granted, however, there still may be incentive not to report a trapped lynx, particularly if the lynx is dead, since that would represent one of only three lethal takes allowed under the 15 year duration of the plan. Since trappers have an interest in trapping, it is not difficult to understand a trappers desire to not report a trapped lynx for fear of exceeding the incidental take limits and potentially triggering restrictions on recreational trapping.

Since there is no mechanism presently available to accurately determine trapper compliance with incidental lynx trapping reporting requirements, if the IFW were adopting a precautionary approach in its ITP, it should have developed a correction factor to apply to its lynx trapping data to reflect the proportion of trapped lynx that are never reported and are simply buried or discarded.

Beyond this, the requirement that kill traps set on lean poles will prevent the incidental take of lynx is, at best, wishful thinking. As documented in the REA, there is evidence of a lynx being trapped in such a set (while the lynx was standing on the ground) and that lynx in captivity climbing poles, including vertical poles, to obtain a bait. Moreover, as indicated in the REA, lynx

are curious animals, easy to trap, are able to climb trees, and have been documented ascending lean poles far narrower and steeper than the lean poles required to be used by Maine trappers to obtain bait. REA at 68.

Because kill-type traps represent a threat to lynx regardless of how or where they are placed, prohibiting them in lynx occupied habitat is the most certain method to reduce their threat to lynx. Though not ideal, an alternative to this would be to allow their use only on lean poles, if placed five feet off the ground, and only if they are used in conjunction with a lynx excluder device.

Trap tending requirements: At present, the IFW requires that foothold and cage traps be visited every 24 hours, that killer-type traps set in an organized or incorporated place be visited every 3 days, and that killer-type traps set in any unorganized place be visited every 5 days.

For killer-type traps set within lynx occupied habitat, whether in an organized, unorganized, or incorporated place, these trap check times are completely inadequate. Even if trappers set killer-type traps in a way to reduce the likelihood for a lynx to be incidentally trapped, since these killer-type traps are designed for smaller animals (i.e., martens, fisher) if a lynx were to be trapped and depending on how the lynx was captured (i.e., by which part of the body), it is unlikely that the trap would kill the lynx and, most assuredly, it would not result in a rapid death. Consequently, given these lengthy trap check times for killer-type traps, a lynx could remain alive in a trap for up to five days before the trap would be checked. During that time, any injuries caused by the trap would likely become far worse, the lynx could have been attacked by other predators, it could be dehydrated and malnourished, and/or it could have suffered exposure related injuries due to the duration of time in the trap without access to shelter.

At a minimum, if killer-type traps are to be allowed in lynx occupied habitat, the trap check times must be reduced to 24 hours for all sets (regardless of where they are placed – in an organized, unorganized or incorporated place). Ideally, killer type traps would be prohibited in lynx occupied areas in order to avoid this potentiality altogether. However, if this option is not selected then, preferably, in addition to mandating a 24 hour trap check time, the IFW should require trappers to equip their traps with electronic devices that signal the trapper when a trap has been sprung in order to expedite efforts to check the trap and to either kill or release the trapped animal. The incorporation of a tranquilizer tab requirement could also aid in reducing injuries and suffering to target or non-target wildlife by administering a dose of a safe tranquilizing agent when the animal is first trapped.

Cage traps: At present, cage traps are not permitted to be used within lynx occupied habitat except for animal damage control purposes, wildlife research, and to capture bears. If the ITP is granted, the IFW proposes to authorize the use of cage traps statewide without size restrictions except that case style cage traps will be prohibited for use during the beaver trapping season except for select purposes. Since it is possible for lynx to be captured in cage traps (primarily set for bobcats) as indicated in the REA, this proposal represents a step backwards in regard to

reducing the potential incidental capture of lynx. Though injuries in cage traps are often not as severe as injuries in restraining traps, damage to paws, claws, teeth and gums have occurred in animals captured in cage traps. To avoid this potential take altogether, at a minimum, if an ITP is granted, cage traps must be prohibited from use in lynx occupied habitat.

Foothold trap size: At present, under the 2007 Consent Decree, only foothold traps with a jaw spread of less than 5 3/8 inches are allowed to be used in lynx-occupied habitats. If the ITP is granted, the IFW proposes to allow for the use of any size foothold trap in lynx occupied habitat. The IFW justifies this by claiming that incidental lynx trap data demonstrate no difference between numbers of lynx trapped prior to the Consent Decree when larger foothold traps were permissible and after the Consent Decree when the larger trap sizes were prohibited.

As indicated in the REA, however, the larger the size of the foothold trap the more powerful the trap springs, the higher the impact velocity, and the greater the force restraining the leg or other body part caught in the trap. These characteristics of larger traps make them more likely to cause injury. In addition, larger trap inevitably will trap an animal higher on his/her leg which also increases the chance for injury. REA at 74. The REA also reports that the allowance to use larger foothold trap will likely increase the use of these larger traps during the month of December when, if an animal is trapped, it is at an increased risk of injury as a result of frostbite or related conditions due to exposure during colder ambient temperatures. Regardless of whether lynx are more or less likely to be caught in smaller or larger-sized traps, this proposal is not consistent with maximizing protections for the lynx as is required by the ESA and, therefore, if the ITP were issued it should prohibit this rule change and, ideally, should prohibit the setting of any foothold traps in lynx occupied habitat.

Use of non-lethal cable restraints: Non-lethal cable restraints or snares are not presently permitted for use within Maine including in lynx occupied habitat.

If the ITP is granted, the IFW proposes to allow the use of non-lethal cable restraints/snares in lynx occupied habitat by fur trappers if, based on preliminary use in animal damage control and predator management programs, it can be determined that such restraints will not pose an increased risk to lynx. Even if such data is obtained, suggesting these non-lethal cable restraints were used without problems in animal damage control and predator damage management programs, this does not mean that these restraints may not pose a risk to lynx if used by fur trappers. Indeed, as explained in the REA, such non-lethal cable restraints have been known to kill wildlife as a result of entanglement in vegetation, a failure of the loop closure stop, or as a result of injuries sustained as the animals struggles to free him/herself from the restraint. REA at 74. Moreover, as indicated in the REA, lynx are highly susceptible to strangulation. REA at 74.

The IFW also claims that if non-lethal cable restraints are permitted it does not believe that trappers will set these traps in addition to other trap types yet it provide no evidence to substantiate this claim. Indeed, considering that non-lethal cable restraints are light, easy to a number of such restraint devices in a pack, and easy to set, it is more likely that the use of such

restraint devices will be additive to the setting of other trap types which will increase the potential risk to lynx. If an ITP is granted, under no circumstances should the USFWS permit the IFW to allow for the use of non-lethal cable restraints in lynx occupied habitat. This proposal is another example of the IFW attempting to promote and expand trapping opportunities instead of emphasizing actions that protect lynx.

Animal damage control: In the previous iteration of the ITP, animal damage control activities were not proposed to be covered by the requested ITP. The IFW has now asked that animal damage control practices be included under the ITP in order to protect those conducting such activities from liability should they incidentally capture a lynx. As indicated in the revised ITP and REA, the vast majority of animal damage control work (61 percent) statewide in Maine involves the trapping of beavers to address beaver-human conflict. REA at 16. The remainder of the animal damage control efforts focus on small mammals (i.e., squirrels, raccoons, opossums, porcupines) and so called home-garden pests (i.e., pigeons, skunks, deer, bear, and fox). Neither the IFW nor USFWS indicate what proportion of animal damage control work occurs in lynx occupied habitat. Nevertheless, by including animal damage control within the requested ITP, this introduces a new threat to lynx and increases the potential for lynx to be incidentally taken in traps used in the animal damage control program. Consequently, should the ITP be issued, it must not cover animal damage control activities which, presumably, would result in the termination of such activities – at least those activities that could result in the incidental take of lynx – within lynx occupied habitat.

Predator damage management: In the previous iteration of the ITP, predator damage management activities were not proposed to be covered by the requested ITP. The IFW has now asked that predator management activities be included under the ITP in order to protect those conducting such work should they incidentally capture a lynx. This program, started in 2010, involves the IFW paying private fur trappers to trap coyotes near deer winter yards for the purpose of attempting to reverse the ongoing decline in the number of deer under the theory that predators and specifically coyotes are harming deer populations. The program permits both trapping and hunting of coyotes and some of the deer winter yards of concern are located in lynx occupied habitat.

The merits of this program are questionable since, as even the IFW concedes, nearly forty years of lethal coyote control including the last four year of the predator management program has not resulted in a reversal in the decline of deer (which IFW admits is linked to a decline in the quantity and quality of deer habitat). Moreover, since the program permits coyotes to be hunted, trapping coyotes is not essential to achieve the program's dubious objectives. Consequently, if an ITP were to be granted, the USFWS should not cover predator damage management under the ITP since the IFW can advise those program participants working within lynx occupied habitat that they are only authorized to shoot, not trap, coyotes. By doing this, fewer traps will be set on the landscape and, therefore, the potential for the incidental take of lynx will be reduced.

There are other deficiencies in the revised ITP but given the inadequacy of the comment period those deficiencies cannot be addressed in this letter. Nevertheless, the analysis above regarding how the IFW is proposing to weaken, not strengthen, regulations and policies to protect lynx is the primary flaw in the revised ITP, should be the basis for the USFWS to reject the revised ITP, and provides ample evidence of violations of the ESA.

2. The REA Fails to Substantiate the Purpose of and Need for the Issuance of an ITP:

The REA reveals that its purpose is to "evaluate the effects of issuance of an incidental take permit and implementation of the MDIFW's revised ITP, and alternatives to the issuance of this permit, on the quality of the human environment." REA at 20. The stated need is "for the Service to respond to the MDIFW's incidental take permit application." REA at 20.

The ITP application has been submitted by the IFW in order to permit trapping in lynx occupied habitat while removing the liability – to the State of Maine and to individual trappers – of taking a lynx. In other words, if the IFW did not permit trapping in lynx occupied habitat in Maine, there would be no need for the requested ITP. Consequently, for the ITP to be necessary and for the purpose and need included in the REA to be legitimate, the USFWS must demonstrate that trapping is required in lynx occupied habitat. The USFWS has not met this standard. As indicated in the REA and revised ITP, the IFW permits trapping primarily for recreational purposes. It claims that trapping is also used as a wildlife management tool but has provided no evidence to substantiate this claim. For example, there's no data or analysis in the REA or revised ITP suggesting that, if trapping in lynx occupied habitat were ended, population of animals subject to trapping would suddenly explode numerically. To the contrary, as indicated in the REA:

> In the absence of trapping, furbearer populations (most of which are predators) would likely increase until they become naturally regulated through density-dependent mechanisms (i.e., increased intra-specific competition, reduced fitness and reproduction, increased incidence of disease and parasites, and increased dispersal). Populations would be expected to increase to an environmental carrying capacity. REA at 63.

The IFW claims that beavers need to be controlled to reduce human-beaver conflicts but does not specify what those conflicts are, the severity of such conflicts, or whether they can be resolved using non-lethal tools. Even if there is evidence to substantiate this specific need, it is clear from the documents that beavers are primarily trapped by animal damage control agents to address such conflicts suggesting that fur trappers are primarily trapping for recreation and/or financial reasons.

The IFW has also instituted an ill-conceived and, as even the IFW admits, ineffective paid predator management program which hires private trappers to trap coyotes in and near deer wintering areas but, again, it has provided no proof that such trapping is necessary and clearly ignores all of the scientific evidence documenting that lethal control of coyotes can actually

exacerbate, not ameliorate, such conflicts. Not only is this program costing the state money but, as reported in the REA, the deer population continues to diminish primarily due to an ongoing decline in the quality and quantity of deer habitat despite the predator management program. REA at 74. Again, even if the IFW could prove that the predator management program was legitimate, it still has not provided an iota of evidence to justify the need for fur trapping except for the self-serving arguments that it's a valued recreational activity and that it brings in money to the IFW.

If the USFWS and/or IFW cannot legitimately and credibly demonstrate a need for trapping in lynx occupied habitat, Alternative 2 must be selected, trapping in that area must be discontinued in order to maximize protection for the lynx, and this process should be concluded. Only if evidence is presented documenting the biological and ecological need for trapping in lynx-occupied habitat, can the USFWS substantiate purpose and need for the REA.

3. The USFWS has Failed to Consider a Reasonable Range of Alternatives and has Inappropriately Eliminated Legitimate Alternatives from Serious Consideration:

NEPA requires agencies to consider a reasonable range of alternatives. In the REA, four alternatives are subject to analysis; Alternative 1 (the status quo alternative); Alternative 2 (the no action alternative); Alternative 3 (the proposed action); and Alternative 4 (the no predator management/animal damage control alternative). While four alternatives is often sufficient to represent a reasonable range of options, in this case it is not. There are any number of other alternatives that should have been seriously evaluated (some of which were eliminated from consideration) that would have limited the duration of the trapping season, the number of trappers authorized to trap in lynx occupied habitat, the number of WMDs in which trapping is allowed, the type of traps permitted to be set, and/or the number of traps authorized to be set at any one time.

While, again, AWI, ESC, and PC don't support recreational trapping, if trapping is to be permitted in lynx occupied habitat in Maine, the type and number of traps authorized to be set, the number of trappers, the species permitted to be trapped, and the duration of the trapping season all will influence the potential for lynx to be incidentally taken in a trap. For example, if the trapping season were two months long instead of three months, the chances of a lynx being incidentally taken would be less. If foothold traps of all sizes and kinds were not permitted to be set in lynx occupied areas, the chances of a lynx being incidentally taken would be less. If only, for example, 25 trappers were allowed to set 25 traps each within lynx occupied habitat, the chances of a lynx being incidentally trapped would be less than it is at present. Or, if only five of the total WMDs that are occupied by lynx were open to trapping that would reduce the chances of a lynx being incidentally trapped. Any alternative created that included a combination of these restrictions could have – and should have – been subject to comprehensive consideration in the REA as a means to provide some trapping opportunities to placate the IFW and trappers while reducing risks to the lynx.

Instead, the USFWS eliminated such alternatives from consideration.

For example, an alternative that would have prohibited foothold trap use in December was rejected because of there have been no reports of lynx being captured in foothold traps in December and because USFWS claims the impacts of this option would be evaluating in comparing the environmental consequences of Alternatives 1 and 3 (REA tat 38), yet no such comparison was provided except to indicate that if larger foothold traps were permitted to be used, as the IFW has proposed, then there would be an increase in trap use in December. REA at 38. The concern here is that an increase in the use of larger traps in December will pose a larger threat to lynx because such traps have more powerful springs, stronger gripping and holding pressure, and can trap an animal higher on his/her leg potentially causing more severe injury. In addition, an animal trapped in December is more likely to suffer frostbite or similar injuries due to the colder ambient temperatures.

An alternative that would have limited the number of trappers or traps in lynx occupied habitat was eliminated from serious review because the IFW has incorporated these options in its contingency plans. In other words, if the contingency plans are triggered by an unexpected level of take, for example, one option that IFW could consider would be to limit the number of trappers or traps in lynx occupied habitat. While this may be relevant as a contingency option, this doesn't excuse the USFWS from considering this option as a free-standing alternative to the proposed action and subjecting it to careful scrutiny.

Yet another alternative that would have discontinued trapping for select furbearer species was not subject to serious consideration because it would reduce the trapper kill rates for those select species, it would reduce trapper opportunity, and it would reduce the killing of certain species that could negatively affect lynx populations through predation. However, this alternative would not result in the loss of all trapping opportunities nor would it necessarily reduce trapper opportunity for select species. It would, however, reduce the incidental take of lynx by eliminating trapping for those species where the trap types pose the greatest threat to lynx.

The reasons for rejecting these alternatives are entirely illegitimate and reflect a clear bias on the part of the USFWS in favor of the IFW and its alleged needs to permit and expand trapping opportunities in lynx occupied habitat instead of advancing protections for the lynx.

While AWI, ESC, and PC believe that the current list of alternatives is incomplete, as previously stated they support Alternative 2 or a modified version of Alternative 4. For Alternative 4 to be worthy of any consideration, in addition to not covering animal damage control and predator management, it would have to be modified to prohibit the setting of any foothold trap of any type or size within lynx occupied habitat, prohibit the use of non-lethal cable restraint and cage traps, prohibit the placement of killer trap sets on the ground, and require that any killing trap sets only be allowed on leaning poles, 5 or more feet off the ground, and only if inside of lynx excluder devices. This should not be interpreted as support for trapping but, rather, as a compromise intended to allow limited trapping to placate the IFW and trappers while maximizing protections for lynx.

4. The REA is Insufficient to Properly and Comprehensively Evaluate the Full Range of Environmental Impacts of the Proposed Action; An EIS is Required:

As indicated in the REA, an environmental assessment can act as a stand-alone document to evaluate the environmental impacts of a proposed action or it can be used to determine if an EIS is required. In this case, for a number of reasons, this project should be subject to analysis in an EIS.

NEPA requires that federal agencies consider the context and intensity of the impacts of an action in determining if an EIS is the correct level of review. The analysis of a project's context refers to "the significance of an action … (to) society as a whole…, the affected region, the affected interests, and the locality." 40 CFR 1508.27(a). Here, the context is not solely limited to Maine but it is national in scope because lynx are found in other parts of the country, because lynx throughout the country are all threatened with extinction, and because the results of this ITP process will establish a precedent for similar situations where protected species may be taken as a result of regulated trapping or hunting activities in other states.

The intensity of an action refers to the "severity of impact." Id. at 1508.27(b). In assessing the severity of an impact, NEPA identifies 10 factors for consideration. If a project satisfies even one of these factors, the project may qualify to be evaluated in an EIS. In this case, the proposed issuance of an ITP to Maine to facilitate trapping within lynx occupied habitat, meets or exceeds five of the 10 factors.

For example, the issuance of the ITP may have both beneficial and adverse impacts. Both the USFWS and IFW recognize that the diversity of impacts if the ITP is granted with many of those impacts, both adverse and beneficial, captured in the analysis contained in the REA. Such impacts are also likely to be highly controversial and will involve unique or unknown risks. As both the USFWS and IFW are aware, this project is highly controversial not only in regard to differences in opinions between conservationists/animal welfare advocates and trappers but there's also a scientific dispute as to its impacts on lynx. Indeed, if such scientific disputes did not exist, surely this process would have been concluded years ago.

Moreover, the ITP, if issued, will indisputably establish a precedent for future actions both in Maine and throughout the nation when conflicts between protected species and regulated trapping/hunting are present. Maine is not the only state grappling with the conflict between trapping and its impact on protected species, including lynx. Idaho, Minnesota and other states have and are confronting similar issues related to lynx and other states are also confronting such situations involving regulated trapping/hunting and other protected species.

Finally, ITP issuance, in combination, with other factors, anthropogenic and natural, that affect lynx and lynx habitat, will have cumulatively significant impacts. As is documented in both the revised ITP and REA, trapping is not the only threat to lynx in Maine. Indeed, habitat loss, climate changes, and forest management practices may represent even greater threats to lynx

which are exacerbated by incidental take related to trapping; the threat factor that is most easily regulated by humans.

Conclusion:

Despite the passing of three years since the last iteration of the ITP, the revised ITP remains inadequate and fails to meet the basic standards required by the ESA. The REA also failed to satisfy the requirements of NEPA as articulated in some detail above. Consequently, the USFWS has a single choice to make which is to reject the revised ITP and withdraw the REA. If, at that point, the IFW elects to continue to work with the USFWS to develop yet another draft of the ITP it is certainly at the liberty to do so but, pending the release of a new document, it should terminate trapping within lynx occupied habitat in Maine.

Thank you in advance for considering these comments. Should you have any questions or require clarification on any issues raised in this letter, please contact me at dj@awionline.org or, by telephone, at (609) 601-2875.

Sincerely,

DJ Schubert
Wildlife Biologist