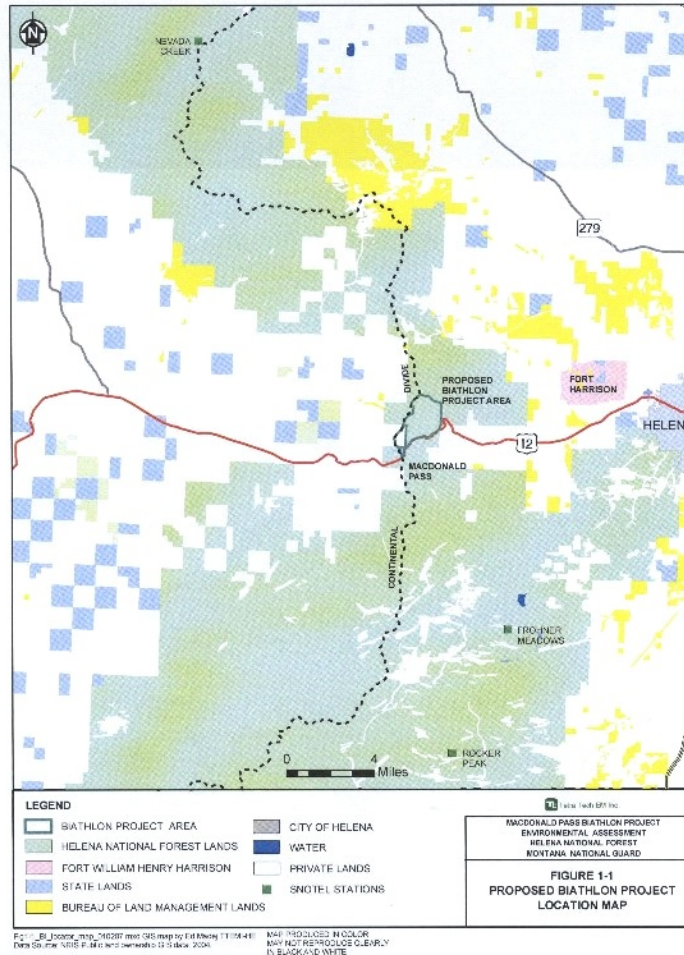


**ADMINISTRATIVE APPEAL OF THE U.S. FOREST SERVICE'S DECISION
NOTICE AND FINDING OF NO SIGNIFICANT IMPACT FOR THE BIATHLON
PROJECT, MACDONALD PASS**



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INTRODUCTION

The Western Environmental Law Center (WELC) hereby submits this timely administrative appeal of the U.S. Forest Service's (USFS's) Decision Notice and Finding of No Significant Impact for the construction, maintenance, and operation of the Biathlon Project on MacDonald Pass (hereinafter "decision" or "DN/FONSI").

This appeal is submitted by WELC *on behalf of*: (1) the Helena Hunters & Anglers; (2) Margaret Regan; (3) American Wildands; (4) Ken Wallace; (5) the Alliance for the Wild Rockies; (6) Defenders of Wildlife; (7) Diane Boyd; (8) Native Ecosystem Council; and (9) the Wild Divide Chapter of the Montana Wilderness Association (collectively "the Appellants"). Additional appeals of the USFS's decision may also be submitted separately by individual members of these organizations, their employees and/or officers, and other members of the public.

This appeal is filed pursuant to, and in compliance with, 36 C.F.R. § 215. Pursuant to § 215.13, the Appellants submitted timely substantive comments on the USFS's scoping notice for the Biathlon Project, the draft environmental assessment (draft EA), and/or the Montana Army National Guard's (MANG's) draft finding of no significant impact (draft FONSI). The USFS's decision either failed to adequately respond to these comments and/or disagreed with the recommendations in the Appellants' comments. Pursuant to 36 C.F.R. § 215.15 this appeal is being filed with the Appeal Deciding Officer within the mandatory 45 day time period. This appeal includes all the

required contents of an appeal specified by 36 C.F.R. § 215.14.

Outlined below are the specific reasons why the USFS's decision to authorize the construction, maintenance, and operation of the Biathlon Project is being appealed along with the related evidence and rationale on why the decision is in violation of the applicable laws and regulations and should be remanded and reversed.

For the purposes of this appeal use of the term "Biathlon Facility," "facility," "Biathlon Project," or "project" refers to all aspects of the proposed action including: (1) the building a new 0.4 mile/20 foot-wide access road with two gates; (2) the building five new facilities (i.e., a latrine with two fault toilets, a target storage facility, a two-story warm up facility, a maintenance building, and a spectator deck); (3) a new 50 vehicle parking lot; (4) a shooting range on top of a concrete "lip" pad (shooters will use of .22 caliber lead bullets); (5) electrical power lines; (6) 2.2 miles of new trails and 7.7 to 8.4 miles of rebuilt trails that will be widened and/or reconstructed; (7) both summer (June-September) and winter (December -February) use as well as maintenance use in October/November; (8) the disruption of approximately 32 acres of National Forest land; (9) approximately 18 acres of tree removal; (10) ATV and snowmobile use; (11) approximately 16 stream crossings; and (12) the disruption of over 3 acres of wetlands.

APPEAL POINTS

I. NEPA VIOLATIONS

NEPA “promotes its sweeping commitment to ‘prevent or eliminate damage to the environment’ . . . by focusing Government and public attention on the environmental effects of proposed agency action.” Marsh v. ONRC, 490 U.S. 360, 371 (1989). By so doing, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” Id. Similarly, the “broad dissemination of information mandated by NEPA permits [the] public and other government agencies to react to the effects of a proposed action at a meaningful time.” Id. “Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action.” 40 C.F.R. § 1500.1 (c).

As outlined below, the USFS’s DN/FONSI approving the construction, maintenance, and operation of the Biathlon Project on MacDonald Pass in the Helena National Forest (HNF) violates NEPA in a number of significant respects.

A. Locating The Biathlon Facility On MacDonald Pass Will Not Meet The “Purpose and Need” Of The Project

Pursuant to NEPA, the USFS must “specify the underlying purpose and need” of the proposed action. 40 C.F.R. § 1502.13. According to the USFS, the underlying purpose of the Biathlon Project is to “provide a high quality National Guard biathlon facility in the western region which would compliment two existing National Guard

biathlon facilities in Vermont and Minnesota.” In addition, the National Guard determined that any proposed a biathlon facility *must* meet the following needs: (1) be located near National Guard facilities; (2) have support from the state Guard bureau; (3) have *adequate snowfall during December through February* for use as a biathlon training and competition facility; (4) have adequate terrain for reasonable construction costs; (5) have the availability of trail grooming; (6) provide access during the winter months; and (7) provide limited conflict with other winter activities.

According to the USFS’s and MANG’s environmental assessment (EA), “adequate snowfall” for the Biathlon Facility is having at least 10-12" for the three month period from December through February. The best scientific and commercial data available, however, suggests that the selected location of the facility on MacDonald Pass typically does not receive, and will likely not receive, the requisite 10-12" of snowfall during the month of December. See Attachment Number (“Attach. No.”) 31 (Declaration of Bruce Anderson); Attach. No. 36 (snow pack data from Chessman Reservoir); Attach. No. 37 (Mote et al.). According to Bruce Anderson, a Senior Hydrologist in Missoula, Montana who reviewed the USFS’s snow fall predictions and the best available data from numerous SNOTEL sites in the region:

The long term record of the Chessman snow course (which measures actual snow depths) indicates that snow depths *are expected to fall well below the 10-12" required in December*. December snow depths exceeded 10 inches only once from 2003-2007. Chessman (elevation 6250ft.) is the nearest location with direct snowpack data and is at an elevation comparable to the proposed Biathlon site (6100ft). Both have SE aspects.

Attach. No. 31 (emphasis added); see also Attach. No. 36 (Chessman data).

In an eleventh hour Hydrology Supplemental Information Report (HSIR) that was not included in the EA or submitted for public review and comment, the USFS attempts to discount the Chessman data by relying on Montana Department of Transportation (MDT) data (3 years of precipitation data) to argue that *much higher* elevation SNOTEL sites (Nevada, Rocker) are more representative than Chessman Reservoir. The USFS is wrong.

First, as explained by Mr. Anderson, the “MDT station at MacDonald pass was not designed to provide regionally representative meteorology data. The station is located in an exposed position on the pass adjacent to the road and is intended to provide data specific to road conditions. The station does not provide a direct measure of snowfall.” Attach. No. 31 at 2. The “comparability of the MDT station to other temperature and precipitation data” is also not documented and the “representativeness of the MDT station relative to the proposed Biathlon site is not demonstrated.” Id. As such, the application of the MDT station and extrapolation of this data “cannot be assumed to be representative of regional conditions, or the Biathlon site specifically. Id.”¹

Second, the USFS’s attempt to discredit the Chessman data by de-emphasizing the

¹ Notably absent from the USFS’s MDT station data is precipitation data from November. If the Biathlon Facility requires 10-12" of snow fall for a three month period *starting* on December 1st and ending February 29th, then November precipitation data needs to be included to assess whether adequate snowfall will exist on December 1st.

importance of elevation in selecting a weather station appropriate for comparison to the Biathlon site is in conflict with the best science. The USFS maintains that “elevation is but one of several factors that influence snow accumulation and persistence. Weather patterns in the complex mountainous terrain of this region result in widely varying patterns of snow deposition, even at similar elevations. Given this high degree of variability, *proximity becomes more important in comparing sites.*” HSIR at p.2 (emphasis added). The USFS, however, provides no support for this conclusion. In fact, the paper cited by the USFS, Knowles et al. (2007), contradicts the USFS’s own conclusion by determining that the similarity in elevation is of greater importance than geographical proximity. “Selecting a nearby grid cell with the *closest elevation* is more likely to give a more accurate result than selecting the grid cell with the closest geographic coordinates.” Attach. No. 31 at 3 (emphasis added).

Third, the USFS fails to take a hard look at the climate analysis literature which predicts increasing temperatures and decreasing mountain snowpack. See Attach. No. 37 (Mote et al. (2005a)). The USFS selects citations from Mote et al. to present the impression that snowfall decline in the Rockies is small in magnitude and isolated. In the USFS’s own words: “At cold, higher elevation sites these studies have found smaller declines in snow depth or no significant trend of the last five decades.”

This quoted language suggests to the reader that little or no change is occurring in the study region. However, a reading of the full Mote et al. article (see Attach. No. 37) states

that for the period of 1950-1997 a “decrease in SWE in the northern Rockies are mostly in the range of 15%-30%.” In other words, the comparison “of declining snow depths at cold, high elevations to the [] larger declines elsewhere does not diminish the magnitude of the change observed in the Rockies.” Attach. No. 31 at 5; see also Attach. No. 37 (Mote article).

Moreover, the USFS’s predictions are premised on the mistaken assumption that MacDonald Pass qualifies as a “cold, high-elevation site.” In relation to the much higher Sierra Nevada and Colorado Rocky sites referenced by the USFS in the HSIR, MacDonald Pass is only moderate in elevation. See Attach No. 31 at 5. Indeed, in Mote et al. the mean elevation of “moderate-elevation” sites is 1900 meters while the mean elevation for “high-elevation” sites averages 2600 meters. At “1920 meters, MacDonald Pass falls clearly into the moderate-elevation classification.” Id. at 5-6. The USFS’s suggestion, therefore, that MacDonald Pass is a high-elevation site that is less susceptible to declining snow depth is extremely misleading and incorrect.²

In sum, the existing data and analysis “does not support the [USFS’s] assertion that 10-12" of snowpack is consistently available at the Project site in December.

² As further evidence that the USFS’s comparison of MacDonald Pass to cold, high elevation sites is flawed, temperature data from Mote et al. (Figure 2d) shows the mean December-January-February temperatures for study sites in the Rocky Mountains to be predominately cooler than the average December-January-February temperature of 5.3 degrees C recorded at the MacDonald Pass weather station during 2003-2008. Attach. No. 31 at 6.

Furthermore, trends in temperature and snowfall records suggest that attaining 10-12" of December snowpack at the proposed site in future years may be an unrealistic scenario. The more logical conclusion based on existing data is that the site will have a diminishing and less predictable snowpack in future years." Attach. No. 31 at 6.

Thus, while the USFS concedes in the HSIR that the "Biathlon project should proceed only with the acknowledgment that there will almost certainly be years over the next three decades when early-season snowpack may be insufficient for the operation of trail-grooming equipment," according to Bruce Anderson, an additional conclusion is warranted: "Given the trends in existing data and warming climatic conditions, *the risk of insufficient snow is likely to increase over the life of the project.*" Attach. No. 31 at 6 (emphasis added).

B. The USFS Failed To Take A Hard Look At *Direct* Impacts Of The Biathlon Project

Pursuant to NEPA, the USFS is required to assess the direct impacts of its proposed action – in this case its decision to issue a 25 year Special Use Permit (SUP) to the MANG to construct, maintain, and operate the Biathlon Project – on the environment. Direct impacts are caused by the action and occur at the same time and place. See 40 C.F.R. §1508.8. Under NEPA, the direct impacts of an action must be analyzed based on the affected interests, the affected region, and the locality in which they will occur. 40 C.F.R. § 1508.27 (a). Here, the USFS failed to take a hard look at the direct impacts of

the Biathlon Project on a key wildlife corridor, wetlands, and soils.

1. Wildlife corridor

The USFS's EA for the Biathlon Project fails to properly assess the impacts of constructing, maintaining, and operating the Project on MacDonald Pass' unique status as a biological corridor or "linkage zone" for wildlife as required by NEPA. See e.g., Marble Mountain Audubon Society v. Rice, 914, F. 2d 179 (9th Cir. 1999) (USFS's failure to discuss the importance of maintaining a biological corridor in the Klamath National Forest violated NEPA); ONRC Fund v. Goodman, 505 F. 3d 884, 892 (9th Cir. 2007) ("Where the [USFS] concludes that a project will not jeopardize a wildlife corridor, it must support that conclusion with at least some study or analysis of how the reduced corridor will affect the species at issue").

All of the construction, operation, and maintenance of the Biathlon Project is slated to occur *in the middle* of a very narrow biological corridor used by lynx, bobcats, wolves, wolverine, mountain lion, and grizzly bears within the Helena National Forest on MacDonald Pass. The current proposal calls for the building of the facility in the middle of a narrow "pinch zone" of public land on the spine of the Continental Divide just west of Helena, Montana and in between two inventoried roadless areas (IRAs) and two large wild ecosystems to the north and south: the Northern Rockies ecosystem and the Greater Yellowstone ecosystem. See Attach. No. 6 (Map of Land Ownership); Attach. No. 9 (Vegetation Data). In fact, the most intensive portion of the proposed project (i.e., all

buildings, the access road, spectator deck, shooting range, etc. . .) would occur in the narrowest point (1 ½ mile wide) and extend across the entire width of the narrow public land segment, effectively removing it from wildlife use.

The best scientific and commercial data available – including federal, state, and private wildlife biologists – demonstrates that this area of the Continental Divide is an extremely important biological corridor or “linkage area” for the region’s wildlife.³

According to the Montana Department of Fish, Wildlife, and Parks (MFWP), MacDonald Pass is “recognized as crucial wildlife habitat and as a fundamental corridor for the movement of wildlife throughout the region. The importance of the Continental Divide as a genetic conduit through the landscape for rare and uncommon wildlife species [i.e., grizzly bears, wolves, and lynx] cannot be overstated.” Attach. No. 2 at 1; see also Attach. No. 2 at Appendix B (Map of the Wildlife Movement Corridor); Attach. No. 32 (County Resolution recognizing area as a “critical wildlife corridor”).

Indeed, American Wildland’s (AWL’s) analysis of wildlife corridors in the Northern Rockies identified MacDonald Pass as having some of the best wildlife habitat connectivity potential between the Northern Continental Divide and Greater Yellowstone Ecosystems. See http://wildlands.org/1_priority.html#macpasscpa; see also Helena

³ The area is also the headwaters for several local drainages, including Ten Mile Creek which is municipal water source for Helena. The headwaters occur as springs, seeps, wet meadows, and a variety of sub-irrigated sites that support a wide array of productive vegetation, i.e., riparian forbs, sedges, and grasses, as well as aspen and willows.

Independent Record, June 16 2006 (Opinion Editorial from Lance Craighead, Executive Director of Craighead Environmental Research Institute, discussing the importance of MacDonald Pass as a wildlife corridor). According to AWL, the area provides “critical wildlife linkage habitat between the Northern Continental Divide and the Greater Yellowstone Ecosystems.” Attach. No. 8; see also Attach. No. 23 (Three Maps depicting “Important Wildlife Areas – Lewis & Clark County”); Attach. No. 24 (Map depicting wildlife tracking data, 2007-2008); Attach. No. 29 (latest survey data from July, 2008); Attach. No 34 (furbearer data); Attach. No. 35 (2006-2008 survey data).

The USFS (outside of this decision) agrees, classifying the Continental Divide area as a “key linkage area” for wildlife. See Attach. No. 5 (Restoration of Carnivore Habitat Connectivity in the Northern Rocky Mountains). In the USFS’s Wildlife Specialists Report for three nearby grazing allotments (MacDonald Pass, Austin, and Empire) the Agency notes that this area is “important [because] it is part of a wildlife linkage zone – sometimes characterized as a travel corridor – through which species such as elk, moose, wolves, grizzly bears, bobcats, lynx, mountain lions, wolverines, and others move between large wildland ecosystems to the north and south.” Attach. No. 18 at 3 (USFS, Wildlife Specialists Report (September, 2006)); see also Attach. No. 8 (“Species of interest that occur in this area include grizzly bear, lynx, wolves, wolverine, mountain lions, black bears, elk, mule deer, and moose.”).

While the entire spectrum of National Forest land in the region does provide room

for many of these animals to traverse it is the wide-array of productive wet sites, i.e., wetlands, seeps, springs, and wet meadows just off both sides of the MacDonald Pass area, that “serves to concentrate a lot of activity in this area.” Id.; see also Attach. No. 5; Attach. No. 9; Attach. No. 35 (survey data).

With respect to grizzly bears, MacDonald Pass is just south of the Northern Continental Divide grizzly bear “recovery zone.” Nonetheless, there are large blocks of grizzly bear habitat in the action area and grizzly bears are known to use and inhabit the area. See Attach. No. 3 at 9-10; Attach. No. 4 (Map, Grizzly Bear Habitat on MacDonald Pass). Grizzly bear “reports in the project area have come to MFWP on several occasions and have been recorded.” Attach. No. 3 at 10. As of 2006, MFWP records show: (1) regular patterns of reports of grizzly bears present east of Elliston in the Spotted Dog drainage (6 miles west of MacDonald Pass); (2) a female with offspring in the upper Little Blackfoot drainage over several consecutive years; (3) grizzly bear sightings over the last 8 years in the upper Little Prickly Pear Creek; (4) a grizzly female and cubs in the Lyons Creek-Flesher Pass-Rogers Pass area; (5) a dead grizzly bear on Mount Hagen near Butte in 2005 (in a area thought to be devoid of grizzlies); and (6) reports of grizzlies along the Rimini Road. See id. These observation reports “confirm grizzly use along this segment of the Continental Divide and the Divide’s function in allowing [grizzly bear] passage north and south. Id.”

Wolves are also present in the action area. According to the USFS, the

Continental Divide area was formerly part of the home range of the Great Divide wolf pack – a small pack centered in the vicinity of Mullan tunnel to the north. Apparently, the pack dissolved after the alpha female was killed on Highway 12 in 2002 on the east side of MacDonald Pass. See Attach. No. 3 at App. 10 (Photos of wolf kill). It is not uncommon, however, for wolves to settle in an area where a pack previously existed. The USFS notes that this area does provide suitable habitat for wolves and includes a diverse array of native prey species for wolves. As such, the “MacDonald Pass region of the Continental Divide is productive enough as a summer habitat for large herbivores that it will continue to attract new wolves moving down from the north.” Attach. No. 18 at 3 (USFS, Wildlife Specialists Report (September, 2006)).

Lynx also use MacDonald Pass. See Attach. No. 27 (map depicting location of lynx in Montana); Attach. No. 29 (tracking data); Attach. No. 28 (Northern Rocking lynx planning area). In fact, the Project area is included in the U.S. Fish & Wildlife Service’s (FWS’s) proposed critical habitat for lynx (see 73 Fed. Reg. 10860, 10890) which means that the area is “essential to the conservation of the species.” 16 U.S.C. § 1532 (5) (A). Notably, the FWS only designates critical habitat for lynx “on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533 (b). The area is also considered core, “occupied lynx habitat” pursuant to the USFS’s Northern Rockies Lynx

Management Direction and included within a designated lynx analysis unit (LAU).⁴

At present, lynx are known to move through the Project area and reside north and south of MacDonald Pass along the Continental Divide. See Attach. No. 7 (Map of Lynx Habitat); Attach. No. 24 (2007-2008 tracking data showing lynx in vicinity of project); Attach. No. 27 (map depicting lynx locations in Montana); Attach. No. 28 (Map of the Northern Rockies Lynx Planning Area); Attach. No. 29 (latest survey data); Attach. No. 34; Attach. No. 35. This is why the USFS and MFWP recognize the “MacDonald Pass area . . . as potential linkage habitat for Canada lynx.” Attach. No. 3. at 11; see also USFS’s Lynx Linkage Zones, <http://www.fs.fed.us/r1/wildlife/carnivore>. The USFS notes that “maintaining connectivity with Canadian populations and between mountain ranges may be an important consideration in lynx conservation in the Northern Rocky Mountains.” Attach. No. 5.⁵

Recently, winter wildlife tracking surveys were completed in the MacDonald Pass area. See Attach. No. 12; Attach. No. 29; Attach. No. 35. The surveys revealed

⁴ According to the USFS, an area is considered “occupied lynx habitat” when: (1) there are at least 2 verified lynx observations or records since 1999 on the national forest (unless they are verified to be transient individuals); or (2) there is evidence of reproduction on the national forest. See NRLMD (ROD) at 29; Conservation Agreement (2006).

⁵ The lynx’s primary prey – snowshoe hare – are abundant in the MacDonald Pass area. Just last January, a Certified Professional Ecologist from AWL visited the MacDonald Pass area and noted “profuse wildlife evidence throughout the area, [including] abundant evidence of prey species; snowshoe hare tracks approximately every twenty yards and exposed squirrel caches.” Letter to Mr. Kevin Riordan (January 17, 2007).

“documented activity of nine carnivore species, three ungulate species, and eight additional prey species” indicating that “presence of relatively high quality wildlife habitat within and adjacent to the [Biathlon Project Area on MacDonald Pass].” Id. at 4. The data indicates that “coyotes, bobcats and weasels were relatively common in the [area], and that lynx and red fox occasionally moved through the area. Densities of snowshoe hare tracks (generally low to moderate, and occasionally high) and red squirrel tracks (moderate throughout), along with numerous detections of prey species, suggested the presence of a good food supply for resident and transient mid-sized carnivores. The presence of resident mule deer and moose plus transient elk also represents potential food for carnivores in the form of carrion.” Id.; see also Attach. No. 24 (2007-2008 tracking survey); Attach. No. 16 (Map depicting elk locations in the vicinity of MacDonald Pass); Attach. No. 17 (Biotelemetry records for female elk in vicinity of MacDonald Pass).

The survey concludes that the observation of “lynx tracks leading to and crossing Highway 12 from the south, into the [Biathlon Project Area on MacDonald Pass] is evidence that the [area] lies within *an important wildlife travel corridor*. A previous documentation (MFWP, July 2003) of a road-killed lynx approximately 2.5 km west of the [area] adds further support to the importance of the MacDonald pass area as a wildlife corridor. Our observations of considerable lynx activity south of Highway 12 and the [Biathlon Project Area], along with sightings of a lynx by Jason Lay on December 16, 2006 suggest the presence of one or more resident lynx in close proximity to the [area].”

Id.; see also Attach. No. 13 (Map depicting lynx tracks and movement on MacDonald Pass); Attach. No. 14 (data, results of tracking surveys); Attach. No. 15 (Map depicting wildlife tracking locations); Attach. No. 24 (2007-2008 data); Attach. No. 34 (furbearer trapping data).⁶

Additional surveys for lynx and other carnivores in the MacDonald Pass area are currently underway. According to the wildlife biologist conducting these surveys, he is seeing “consistent lynx activity” near the proposed Biathlon Project. In fact, earlier this month the latest tracking survey results were released. See Attach. No. 29; Attach. No. 35 (summary of 2006-2008 surveys). These surveys indicate consistent wildlife movement over the past two winters in the project area and north and south of the proposed project area. Notably, these tracking surveys were conducted by Wild Things Unlimited (WTU), which is currently under a 5-year contract with the USFS to conduct similar rare carnivore surveys in the Gallatin National Forest. The study methodology used for those surveys is largely the same used for the tracking studies at MacDonald Pass. As the maps indicate, there is widespread use of wildlife – including lynx – throughout the proposed project

⁶ Attach. No. 34 is the GIS overlay of MFWP furbearer trapping data from for both Canada lynx and wolverine onto a land ownership map in the MacDonald Pass area. Each orange and yellow circle represents a trapped animal. There is a clear, overwhelming pattern of trapping incidences along the area surrounding the Continental Divide as compared to surrounding private lands. What is interesting is that the EA, in disclosure of its sources, cited the furbearer database. It is unclear how the USFS would not be able to discern this pattern in its discussion of data indicating wildlife use of the proposed project area.

area in the wintertime.⁷

The tracking surveys also confirm the presence of wolverine in the Project area. See Attach. No. 29 (map depicting wolverine); Attach. No. 30 (wolverine studies and inclusion of MacDonald Pass as “linkage habitat” for wolverine); Attach. No. 34 (furbearer data); Attach No. 35 (tracking surveys).

In sum, there is an ample amount of evidence from the USFS, FWS, MFWP, and tracking surveys demonstrating the significance of this area as a wildlife corridor for grizzly bears, wolves, lynx, wolverine, and other species (i.e., mountain lion, bobcat, marten elk, moose).

Despite this fact, the USFS’s DN/FONSI authorizes the Project smack *in the middle* of MacDonald Pass’ narrow biological corridor. See Attach. No. 7 (depicting proposed location of the Project in the narrow corridor). The impacts of this decision on the region’s wildlife will likely be significant. Habitat fragmentation, for instance, is one of the major factors affecting lynx conservation and recovery in the contiguous United States. Habitat fragmentation impedes lynx movement which has “negative effects by isolating lynx and/or prey populations, or by retarding movements to other areas.” Attach. No. 19 at 2-18 (LCAS). According to the Federal Lynx Biology Team – the best

⁷ The winter surveys contradict the USFS’s statements in the DN/FONSI that “the majority of potential wildlife use and movement occurs from late spring through early fall.” In part, this statement is based on elk telemetry data that was more than a decade old. The MFWP repeatedly cautioned the USFS and others that this data was not collected for the purpose and was not thorough in its evaluation of wildlife use.

available science on lynx – “[c]ontiguous tracts of land in public ownership (national forests, national parks, wildlife refuges, and BLM lands) provide an opportunity for management that can maintain lynx habitat connectivity. Throughout most of the lynx range in the lower 48 states, connectivity with habitats and source populations in Canada *is critical to conservation* of populations in the U.S.” Id. (emphasis added).

This is precisely why the Federal Lynx Biology Team mandates that for all project planning such as the proposed Biathlon Project, the USFS “maintain habitat connectivity within and between LAUs.” Attach. No. 19 at 7-4. In lynx habitat, the USFS is to “ensure that federal actions do not degrade or compromise landscape connectivity when planning and operating new or expanded recreation developments.” Id. at 7-9. The USFS must “[m]aintain and, where necessary and feasible, restore habitat connectivity across forested landscapes.” Id. at 7-14.

Indeed, in the LCAS, the USFS is directed to identify “key linkage areas that may be important in providing landscape connectivity within and between geographic areas, across all ownerships . . . [and] [d]evelop and implement a plan to protect key linkage areas on federal lands from activities that would create barriers to movement.” Id. at 7-14. MacDonald Pass has been identified as one of those key linkage areas and, as such, an area critical to lynx conversation and survival in the lower 48. See Attach. No. 28 (map depicting areas); see also Ruggiero, L.F. et al., 2000. Ecology and Conservation of Lynx in the United States. University Press of Colorado, Boulder, CO. 480 p. (known as the

“Science Report” at available online at:

<http://www.fs.fed.us/r1/planning/lynx/background.htm>)).

According to MFWP, the “grizzly bear’s long-term survival may [also] be contingent in part upon connectivity between currently occupied habitats in the Greater Yellowstone Ecosystem and wildlands to the north. [A wide array of human activities in the region] may be a direct threat to that connected survival.” Attach. No. 3 at 9. Responsible “management of grizzly bears *must* include prevention of habitat fragmentation and corridor disruption.” Id.

This finding is shared by the Interagency Grizzly Bear Committee (ITGB): “habitat fragmentation is one of the issues complicating the conservation of grizzly bears and many other species of wildlife . . . If we do not maintain the opportunities for linkage of wildlife populations across these areas of human development, we will have difficulty securing the future of wildlife species such as the grizzly.” Attach. No. 26; see also Soule, Michael E. et al., 1999. Continental Conservation. Scientific Foundations of Regional Reserve Networks. Island Press. 227 p.; Hilty, Jodi A. et al., 2006. Corridor Ecology. The Science and Practice of Linking Landscapes for Biodiversity Conservation. Island Press. 323 p.; Crooks, Kevin R. et al., 2006. Conservation Biology 14. Connectivity Conservation. Cambridge University Press. 712 p.

Likewise, the best science on wolverine concludes that maintaining linkage areas/corridors is extremely important to the conservation and survival of the species.

According to the Wolverine Status Review (Inman, August 6, 2007):

The first, and by far the foremost . . . threat to wolverine persistence in the contiguous Rocky Mountain States is modification of “linkage” habitat . . . used by wolverine during dispersal movements between islands of primary habitat. Functional linkage habitat is critical for wolverines in the contiguous U.S. due to their metapopulation structure. . . The issue of modification of linkage habitat is of foremost concern because of the relatively permanent nature of these modifications . . . once permeability has been modified . . . it is highly unlikely that these effects can be reversed.

Attach. No. 30 (wolverine studies and reports).

In this case, despite the significant and obvious ramifications of placing the Biathlon Project in the middle of a key wildlife corridor on MacDonald Pass, the USFS’s EA and DN/FONSI ignores and downplays the impacts to the corridor. See e.g., EA at 3-86 (MacDonald Pass “*may* have the potential to function as linkage habitat”); at 3-86 (refusing to apply grizzly bear management guidance from Appendix E of the Forest Plan because of a “lack of repeated verified grizzly bear activity at or near the project area”); at 3-85 (stating merely that it would “not be unexpected for wolves to occur in the project area”); at 3-88 (MacDonald Pass is “tentatively mapped” as potential linkage habitat . . . and *may be* important to the movement of lynx between larger blocks of suitable habitat”); at 3-88 (while there are verified records of lynx in the vicinity of the project . . . there are no known resident lynx . . . and there are no records or historic accounts of denning or reproduction”).

Indeed, in the DN/FONSI the USFS refuses acknowledge the findings of the wildlife surveys (see Attach. No. 35) or its own failure to take a hard look at impacts to

the wildlife corridor in the EA. In the USFS's own words, "the alleged lack of information for animal movement through or adjacent to this biathlon project area is not relevant to my decision."⁸

The USFS also relies on "evidence of Highway 12 mortality information and other sightings" for the proposition that wildlife movements across the highway by various species are occurring over "a much broader area." In making this statement, the USFS also suggests that the existence of Highway 12 undermines wildlife use of the corridor. The intent of the USFS is to lead the reader of the EA to conclude that Highway 12 has prevented wildlife movement through the linkage zone and, as such, there is no reason to be concerned about any further compromise of the public land or corridor. Yet, just the opposite is true.

Highway 12 does create a hazard for wildlife movement but wildlife are still able to cross the highway. While wildlife are killed on the road (i.e., deer, bear, lynx, wolves, moose, elk, coyotes, fox, and rabbits) these are merely the individuals that are found. In fact, data from the MFWP confirms that wildlife routinely cross Highway 12. Moreover,

⁸ Notably, when the USFS prepared the EA they conceded that there was a paucity of data regarding wintertime wildlife use: "the region of public land between Rogers Pass and MacDonald Pass has potential to serve as a linkage area due to low human use and contiguous forested habitat (Servheen, c., personal communication, August 2005) (pg. 3-94)." The USFS notes that "[c]urrently, there are no animal movement data supporting the concept of the Continental Divide functioning as a linkage habitat in the vicinity of the MacDonald Pass area, but efforts are underway to secure funding to collect presence-absence information on wildlife using the area."

the USFS’s suggestion that only one wolf was killed on Highway 12 (west of the Divide) is incorrect. A collared wolf was also killed at the entrance to the Highway Department maintenance shop (visible in photograph) within the project area. See Attach. No. 3 at Appendix 3 (photo of wolf). A photograph of this wolf was sent the HNF on numerous occasions.

The USFS also notes that “[d]ocumented records of lynx north of HWY 12 in the vicinity of the project area and beyond are lacking.” Yet, neither the USFS or MANG hired consultants conducted *any level* of field reconnaissance for the project. In other words, no effort on the USFS or MANG’s part was made to determine the presence of lynx in the area. With respect to wolverine, the USFS concluded that the impacts would be “inconsequential.” This finding, however, is unsupported by any evidence in the record and directly contradicted by the relevant scientific literature. See Attach. No. 30.⁹ The USFS also failed consider impacts to wildlife during the winter months. Given the increasing numbers of recreationists using MacDonald Pass in the winter and the overlap in time and now space between winter recreationists and wildlife use of the area (especially lynx and wolverine) there is reason for concern that disturbance from recreation could negatively impact these species. See e.g., Attach. No. 30 (discussing

⁹ As mentioned below (see “best science” section), *every statement* made in the DN/FONSI to downplay the impacts to wolverine are either wrong, unsubstantiated, or squarely refuted in the scientific literature.

impacts from winter recreation on wolverine). None of these winter impacts, however, are addressed in the USFS's NEPA documents.

In fact, the USFS has failed to conduct any of the requisite field surveys to adequately assess impacts to wildlife, including threatened, endangered, sensitive, and MIS species in the Helena National Forest (HNF). Nor does the USFS address the impacts (including displacement) of the Project on goshawk or pileated woodpecker. There is also no discussion in the EA on the consequences of the Biathlon Project on grizzly bears. The USFS did contact the Montana Natural Heritage Program (MNHP) for information on wildlife use and distribution in the MacDonald Pass area. See Project File (D69). The MNHP cautioned, however, that the information provided to the USFS:

[is] not intended to substitute for field-collection data, nor are they intended to be the sole bases for natural resource management decisions. We do not portray our databases as exhaustive or comprehensive inventories of rare species or of significant natural features. Field verification of the absence or presence of sensitive species will always be an important obligation of users of our data.

Project File (D69).

The USFS also notes in the DN/FONSI that if the MacDonald Pass area is a wildlife corridor, there are plenty of areas on private lands (and outside the Project area) for the animals to move. Yet, unlike National Forest land under the USFS's control, these private lands come with no assurances that they will remain undeveloped. In fact, private lands on either side of MacDonald Pass have not been secured from development which is precisely why maintaining the biological integrity of public land on the Divide is so

important.¹⁰ Earlier in the NEPA process, the USFS recognized this fact: “The MacDonald Pass area represents an isthmus of public land that is bisected by Highway 12...the limited amount of public land and uncertainty of future development on private land in this area accentuates the potential importance of wildlife linkage habitat in the area.” (draft EA at p. 3-95).

In sum, without question, the USFS’s dismissive approach and attempt to downplay the impacts to the wildlife corridor in the absence of any field studies or scientific literature is a direct and blatant violation of NEPA. As explained by the courts, “[w]here the Forest Service concludes that project will not jeopardize a wildlife corridor, it must support that conclusion with at least *some study or analysis* of how the reduced corridor will affect the species at issue.” ONRC Fund, 505 F. 3d at 892; see also Marble Mountain Audubon Society, 914 F. 2d at 182 (USFS’s failure to discuss importance of maintaining a biological corridor violated NEPA). No such study or analysis supporting the USFS’s conclusion exists in this case. On the contrary, the best available science, studies, and reports all suggest that MacDonald Pass is an extremely important linkage zone/corridor for the region’s wildlife.

2. Wetlands and streams

The USFS’s EA and DN/FONSI fail to take a hard look at impacts to the wetlands

¹⁰ In the DN/FONSI, the USFS concedes that “. . .Forested stands to the south exhibit habitats that are much less contiguous, have more human disturbance, includes numerous roads, and have highly variable land ownership...”

and streams in the Project area. Instead, the USFS simply notes that “no filling of material or new construction would occur in either of the identified wetlands within the project area. The only modification of the identified wetlands would be removal of some overstory vegetation for new trail construction.” The USFS is wrong.

First, the USFS has yet to delineate, map, and determine the “jurisdictional” status of all wetlands in the Project area. In fact, according the Army Corps of Engineers (Corps), no determination has been made for the site and they have not received any project material or application from the USFS or MANG to address impacts to wetlands and streams in the Project area. Nor has the Corps received and reviewed the draft or final EA. According the Corps, they have received more information about the Project from the MFWP than from the USFS or MANG. Regardless, the USFS cannot adequately assess impacts to wetlands that have yet-to-be properly identified and classified. Moreover, the USFS should not have approved the Project and issued its DN/FONSI *before and until* the wetlands’ status is resolved.

Second, the Biathlon Project will impact perennial and intermittent streams and two well-defined wetlands – a 3.7 acre wetland located near the proposed shooting range and parking lot (and below the proposed penalty loop and trails) and a .5 acre wetland area along an open bench area next to a perennial stream. Construction of the Project includes clearing, grubbing, and grading for the access road, a parking lot, a spectator deck, a range area, new trail construction, improving existing trails, and associated

buildings. With respect to grading, the MANG plans to grade all trails to a width of 20' which will result in the “fill” of wetlands and streams. These trails “*would not* be designed constructed or maintained to established Forest Service standards to accommodate non-winter use.” Additional trails and the penalty loop will also be placed on top of the 3.7 acre wetland and over the perennial and intermittent streams (approximately 14 stream crossings). Approximately 2.2 miles of trail will be placed in the wetlands and streams. Once built, summer use of the facility and trails will be allowed. The USFS’s EA, however, fails to address the impacts of this activity on the area’s wetlands and streams.

3. Soils

Much of the 2.2 miles of new trails for the Project will be on Typic Cryoboralfs wetland soils that are subject to severe erosion hazard. At present, there is some question whether such soils can sustain summer use including summer running and biking. The EA, however, fails to address impacts to the area’s sensitive soils. The USFS also fails to apply its own Forest Service Region 1 Soil Quality Standards (USDA 1999) for evaluating impacts to soils. In fact, the USFS’s supplemental information report (SIR) for soils (which was not included in the EA) indicates that soils are fragile and that compliance with Region 1 Soil Quality Standards is necessary.

C. The USFS Failed to Take a Hard Look at the *Indirect* Impacts of the Biathlon Project

The EA fails to take a hard look at the “indirect effects” of the proposed Biathlon

Project. Indirect effects of a proposed action are effects that are caused by the action but occur later in time or are further removed in distance. 40 C.F.R. § 1508(b). Indirect effects “may include growth inducing effects or other effects related to induced changes in pattern of land use; population density or growth rate; and related effects on air, water, and other natural resources.” Id.

Here, the EA completely fails to address the indirect impacts of providing increased access (both summer and winter) and development to this sensitive wildlife corridor and the indirect impacts of providing more trails and snow compaction to an area occupied by lynx and snowshoe hare. The Federal Lynx Biology team, for instance, notes in the LCAS that the packed trails created by the proposed Biathlon Project “may serve as travel routes for potential competitors and predators of lynx, especially coyotes. See Attach. No. 19 at 2-6.

In addition, the USFS fails to address the indirect impacts associated with allowing summer activities at the Biathlon facility. At present, there is no limit on summer activity in the area. Once built, the area will become an attraction to the public and there will likely be more use than in the past. Letters in the MFWP file confirm that local ski, runner, and bike clubs will engage in expanded use of the area after the Project is completed.

D. The USFS Failed To Take A Hard Look At The *Cumulative* Impacts Of The Project

Cumulative impacts are “the impacts on the environment which result from the

incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. Cumulative impacts can result from “individually minor but collectively significant actions taking place over a period of time.” Id.; see also Attach. No. 1 (CEQ’s “Considering Cumulative Effects Under the National Environmental Policy Act” (January 1997)).

Under NEPA, properly analyzing cumulative effects includes: (1) identifying the significant cumulative effects issues associated with the proposed action; (2) establishing the proper geographic scope for the analysis; (3) establishing an appropriate time frame for the analysis; and (4) identifying other actions affecting the resources, ecosystems, and/or human communities of concern. See Attach. No. 1 at 11.

1. Failure to establish the proper geographical scope

In this case, establishing the proper geographic scope or boundary for a cumulative impacts analysis is extremely important because the proposed action will have direct, indirect, and an “additive” affect on wildlife populations *beyond the immediate* area. In this circumstance, to determine the appropriate geographic boundaries for a cumulative effects analysis, the USFS is directed to: (1) determine the area and resources (i.e., wildlife populations) that will be affected by their proposed action (the “project impact zone”); (2) make a list of resources within that area or zone that could be affected by the proposed action; and (3) determine the geographic areas occupied by those resources

outside the immediate area or project impact zone. In most cases, the largest of these areas will be the appropriate area for the analysis of cumulative effects. See Attach. No. 1

By way of example, for resident or migratory wildlife, the appropriate geographic area for the cumulative impacts analysis should not be an artificial political boundary (i.e., state or county line), highway, “management areas” of a Forest Plan, or even lynx analysis units (LAUs) but the “species habitat” or “breeding grounds, migration route, wintering areas, or total range of affected population units.” See e.g., NRDC. v. Hodel, 865 F.2d 288, 297 (D.C. Cir. 1988) (agency violated NEPA by failing to consider the synergistic effect of simultaneous development on migratory whales). As explained by the Federal Lynx Biology Team, a LAU “may not provide a large enough analysis area within which to address direct, indirect, and cumulative effects of particular actions.” Attach. No. 19 at 7-2 (LCAS).

Indeed, because the proposed Biathlon Project is in the middle of a “key” wildlife corridor for wolves, wolverine, lynx, and grizzly bears, the scope of the cumulative impacts analysis needs to encompass the entire corridor along the Continental Divide. This includes areas of the Continental Divide both south and north of the project area. It is not acceptable, for instance, to limit the scope of the Project’s cumulative impact on lynx to the LAU as proposed in the EA.

2. Failure to establish the proper time frame

As mentioned earlier, cumulative impacts are “the impacts on the environment which result from the incremental impact of the action when added to other *past*, present, and *reasonably foreseeable future* actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7 (emphasis added).

Here, the USFS’s EA fails to properly take into account the impacts of its own “past” actions by failing to establish the proper baseline and failing to conduct the requisite “trends analysis”—an assessment of the environmental impacts to wildlife on MacDonald Pass over an extended period of time—preferably from the earlier, pre-development stages to the present. See Attach. No. 1 at A-24. Only by engaging in this trends analysis can the USFS get a real sense of the changes that have occurred to the wildlife populations and habitat on MacDonald Pass overtime. Id. According to the CEQ, “trends in the abundance and distribution of habitats are one of the most important indicators of cumulative effects problems.” Id. at A-26.

With respect to the impacts of “past actions” on wildlife in the area, the EA merely provides a laundry list of some actions that have occurred in the MacDonald Pass area. Without question, this is not enough. An actual analysis of how such past actions add to the cumulative impacts of the proposed action is required under NEPA. For instance, the USFS needs to carefully analyze the cumulative effects of other past actions that have taken place in the area, including the construction and operation of the existing cross-

country ski trails.¹¹ The USFS must also recognize and account for the pre-existing, fractured, and fragile nature of the public lands on MacDonald Pass and how this existing condition may already be impacting wildlife movement in the corridor. The whole idea of a wildlife corridor is to connect island habitats so those habitats remain useable and available to disjunct populations (metapopulations) of wildlife. The more fractured and fragile the corridor, the greater the importance to maintain land on both sides of the Highway.

In terms of “reasonably foreseeable future actions,” the USFS acknowledged at public meetings that once established, the facility would be eligible for expansion. These statements are consistent with the MANG’s own acknowledgment that additional development may be required or desired in the future. See Project File (A20). Both the Minnesota and Vermont biathlon facilities have expanded from their initial proposals. Indeed, in Minnesota, the facility was expanded into a full fledged “Winter Warfare Training Center.” No analysis of such expansion, however, was included in the EA. There is also reasonably foreseeable private land development on the Continental Divide (both north and south of the Project) that needs to be taken into account (see below).

¹¹ The existing cross-country ski trails were constructed in 1978-79 without the benefit of a NEPA analysis (an EA was prepared four years after-the-fact – in 1983). But for these existing trails, the Biathlon Project would probably have never been considered in this wet, narrow site.

3. Failure to analyze the impacts of the proposed Biathlon Project in conjunction with other activities taking place in the wildlife corridor

There are a number of activities (i.e., grazing, mine cleanup, water development, hunting, recreational use, travel planning, real-estate development, timber harvesting, trail work, etc.) that are having a cumulative impact on wildlife and on MacDonald Pass.

Pursuant to NEPA, *all* of these activities need to be addressed and analyzed in the EA's cumulative impacts analysis. See e.g., Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir.1988) (Forest Service cannot consider environmental impacts of logging in isolation but must address cumulative effects of past and reasonably foreseeable logging in watershed); Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372 (9th Cir.1998) (Forest Service must address impacts of future timber sales); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) (impacts of project must be viewed in conjunction with other past, present and reasonably foreseeable future actions); Sierra Club v. U.S. Forest Service, 46 F.3d 835 (S.D. 1991) (EA must recognize impacts of activities reasonably expected to occur on private lands); Resources Ltd., Inc. v. Robertson, 35 F.3d 1300 (9th Cir.1993) (cumulative impacts from non-Federal actions needs to be analyzed by the Forest Service).

According to CEQ, the “most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.” The requirement to consider cumulative

impacts, therefore, is designed to avoid the “combination of individually minor” effects situation – to avoid the “tyranny of small decisions” or “death by a thousand cuts” scenario. Grand Canyon Trust v. FAA, 290 F.3d 339, 346 (D.C. Cir. 2002).

Moreover, it is not enough to merely include a “cumulative impacts” section in an EA and provide a laundry list of activities in an easily viewable table (as the USFS has attempted to do in this case). An actual analysis of how these activities will impact the wildlife corridor on MacDonald Pass is required under NEPA. As explained by the Ninth Circuit, a consideration of “cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look.” Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971 (9th Cir. 2006). The analysis of cumulative impacts “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects . . . Defendants must do more than just catalogue ‘relevant past projects in the area.’”Id. (citations omitted). The agency must provide “an adequate analysis about how these projects, and the difference between the projects, are thought to have impacted the environment.” Id.

To date, the USFS has failed to take a hard look and analyze how a number of state, private, and other federal actions as well as natural occurrences or events will cumulatively impact wildlife and the wildlife corridor on MacDonald Pass. See Attach. No. 3 (partial list of activities taking place in the area from the MFWP that may impact

wildlife).

For instance, in addition to the proposed Biathlon Project, threats to secure wildlife habitat and movement in the area include “increasing levels of traffic on Highway 12 and the Rimini Road, private inholdings on forest service land development, subdivisions on private lands . . . increasing ATV use on public lands, mine waste clean-up on the crest of the divide (and subsequent improvement of forest service roads and potential for increase use).” Attach. No. 8 ; see also Attach. No. 10 (Map depicting various activities in the area that affect “wildlife movement in the MacDonald Pass corridor”); Attach. No. 11 (Map depicting incidents of wildlife being killed on Highway 12). The USFS’s EA, however, fails to actually analyze these cumulative impacts.

Indeed, the USFS’s EA completely ignores the cumulative impacts to the wildlife corridor. Specifically, the EA’s cumulative impacts section fails to: (1) address the EPA and USFS’s mine waste hauling projects and road expansions that are disrupting and displacing wildlife and diminishing the linkage zone;¹² (2) the federal government’s plan to transform previously uninhabitable private sites contaminated with mine waste into

¹² According to EPA, the mine waste hauling work includes: (1) using the crest of the Continental Divide as a conduit to haul mining waste; (2) cleaning up three drainages that come together at the crest of the Continental Divide (Tenmile, Basin Creek, and the Little Blackfoot); and (3) expanding routes to full size roads capable of allowing 18 yard belly dump trucks, as well as 2 wheeled drive passenger cars. According to residents along Tenmile Creek, dump trucks run as often as every 7 minutes during the daylight hours from July through October. Hauling has occurred annually since 1999. In Tenmile alone, there are 150 mine waste sites and 75 are slated for clean up.

private home developments with upgraded, expanded roads (such development leads to fragmentation, increased road densities, increased mortality for wildlife); (3) travel planning along the Continental Divide; (4) other permitted MANG activities taking place on the Continental Divide and in the vicinity of the Project (the EA mentions other helicopter, winter survival, and land navigation reconnaissance activities); (5) climate change; (6) livestock grazing (Empire, Austin, and MacDonald Pass allotments); (7) Continental Divide Trail reconstruction; (8) the Cromwell Dixon campground and associated campground development directly across from Highway 12; (9) Trailhead facilities; (10) the actual operation of the Biathlon Project; (11) pine beetle infestation (and the need to remove dead and dying trees on both private and public land); and (11) the Western Federal Lands Recreational Highway construction (Rimini Road).¹³

Individually, each of these threats – though serious – may not rise to the level of posing a significant risk to the biological integrity of the wildlife corridor. Collectively, however, the impacts of all of these and other activities – whether conducted by private individuals, state agencies, or other federal agencies – may be significant and must be analyzed in relation to the proposed Biathlon Project. See e.g., Grand Canyon Trust, 290

¹³ Evidence in the project record reveals that the USFS recognized that the Rimini Road Project would impact wildlife. Nevertheless, the USFS chose not to include the Rimini Project in the EA’s cumulative impacts analysis because they needed “to draw the line somewhere.” The Rimini Project was superficially discussed in the SIR but as mentioned in this appeal, SIRs are not NEPA documents submitted for public review and comment and cannot be used to correct deficiencies in the USFS’s EA.

F.3d at 346 (discussing collective impacts to Zion National Park); NRDC v. Hodel, 865 F.2d 288 (D.C. Cir. 1988) (discussing collective impacts to migratory whales). As the D.C. Circuit Court noted, federal agencies must “give a realistic evaluation of the total impacts [of the action] and cannot isolate the proposed project, viewing it in a vacuum.” Grand Canyon Trust, 290 F.3d at 342. Even “a slight increase in adverse conditions . . . may sometimes threaten harm that is significant. One more factory . . . may represent the straw that breaks the back of the environmental camel.” 290 F.3d at 343 (quoting Hanly v. Kleindienst, 471 F.2d 823 (2nd Cir. 1972)).

E. The USFS’s Failure To Consider A Reasonable Range Of Alternatives

NEPA “mandates that agencies ‘study, develop, and describe appropriate alternatives to recommended course of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.’” Pit River Tribe v. U.S. Forest Service, 469 F. 3d 768, 785 (9th Cir. 2006) (quoting 42 U.S.C. § 4332 (E)); see also 42 U.S.C. § 4332 (2)(C)(iii) (must consider “alternatives to the proposed action”).

The courts have referred to an NEPA document’s alternatives analysis as “the heart” of the environmental analysis because it presents “impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options.” 40 C.F.R. § 1502.14. The alternatives analysis guarantees that “agency decisionmakers ‘[have] before [them] and take [] into proper account all possible approaches to a particular project (including total abandonment of the

project) which would alter the environmental impact and the cost-benefit balance.” Bob Marshall Alliance v. Hodel, 852 F. 2d 1223,1228 (9th Cir. 1988) (citations omitted).

“Informed and meaningful consideration of alternatives . . . is thus an integral part of the statutory scheme” and “critical to the goals of NEPA even where a proposed action does not trigger the EIS process.” Id. at 1228-29.

Here, the USFS’s EA for the Project fails to consider a reasonable range of alternatives by narrowly defining the “purpose and need” of the Project. The USFS limits the purpose and need of the proposed project to sites “on the Helena National Forest” and “within 30 minutes” of Fort Harrison. EA at 2-1, 2-2. In the USFS’s own words, “[t]o meet the purpose and need for the proposed action, any alternative considered for this EA must . . . Be *located on land managed by the Helena National Forest* as appropriate for the biathlon recreational use . . . [and] [b]e located *within 30 minutes* of Montana National Guard billeting facilities (Fort Harrison)” EA at 2-2 (emphasis added).

Without question, placing the proposed Biathlon Project on Helena National Forest (HNF) land and within 30 minutes of Fort Harrison is not integral to meeting the purpose and need of the Project. In other words, placing the Project on HNF land and within 30 minutes of Fort Harrison is not necessary in order to “provide a high quality National Guard biathlon facility in the western region.” The MANG could just as easily “provide soldiers and regional biathletes with training and competition opportunities” and “further the mission of the National Guard Biathlon program” by building a facility on another

National Forest, BLM, State, and/or private lands.

Indeed, correspondence in the project file (May 23, 2003 e-mail) suggests that initially the MANG was “evaluating several locations *in Montana* for this course.” Attach. No. 20 (meeting notes and correspondence re: Biathlon Project) (emphasis added). It is unclear why the scope of available sites in Montana was narrowed to sites on the HNF. Based on this and the “within 30 minutes of Fort Harrison” criteria, the MANG and USFS also rejected a number of viable alternative locations including the Stemple Pass Ski Trail Area that is 45 minutes from Fort Harrison. Yet, the MANG’s own IBU Handbook provides for some flexibility on location: “[T]he competition facility *should* be no more than 30 minutes travel from the teams’ living accommodations, *unless otherwise approved.*” EA at 2-2 (emphasis added). Finally, the EA states that the Great Divide Snowsports Area “was not considered for detailed analysis because the area is currently dedicated to downhill skiing and does not have the space to accommodate cross-slope ski trails.” EA at 2-4. The evidence in the project file, however, reveals that the USFS and MANG failed to carefully explore potential sites in the area to verify this conclusion.

F. The EA Needs to Include More Information in Order for the Public to Submit Meaningful Public Comment

The goal of NEPA, and the very purpose of preparing a document like an EA is to “provide a full and fair discussion of significant environmental impacts [of a proposed action]” and to “inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human

environment.” 40 C.F.R. § 1502.1. All agencies, including the USFS, “shall insure the professional integrity, including scientific integrity, of the discussions and analyses in [NEPA documents.]” 40 C.F.R. § 1502.24.

In this case, information in the USFS’s EA is not presented in a straight-forward or honest manner. The USFS originally told the public in the draft EA that they would issue an SUP to the MANG for up to 20 years. Now, it is a 25 year SUP. There is no discussion or map in the EA devoted to displaying the relative locations of public land, Highway 12, Campgrounds, communication towers, residences, private lands, or the fact that MacDonald Pass provides the *only* public land crossing of Highway 12 along its entire length. Moreover, the public notices of the Project in the local paper and in the postcards also mischaracterized the proposal as a trail improvement project and shooting range. No notice of the new buildings, roads, etc. . . was given. The project went from the use of “ski tents or huts” to a two-story 2,000 square foot building.

There was also no mention of summer use. Even in the EA, there is very little to no information (let alone impacts analysis) on summer use of the facility. The stated “purpose and need” of the Project, for instance, fails to disclose that use of the facility will occur during the summer months (the area is not capable of sustaining summer use due to fragile soils and wetlands).

Also absent from the EA is a climate change analysis discussing whether or not there will be adequate snow depths in the Project area over the next 25 years (the length

of the SUP). This information (which is misused by the USFS) is only included in the USFS's eleventh hour Hydrology Supplemental Information Report (HSIR) which was never submitted for public review and comment (the very purpose of NEPA).

Moreover, in the EA (Table 2-1) the USFS states that “[m]ost of the cross-country ski trails on MacDonald Pass are groomed as described by a cooperative agreement” but fails to tell the public which trails are remain ungroomed. Nor does the USFS provide a map displaying groomed vs. ungroomed trails. In fact, from information presented in the EA there is no way to corroborate information about the total miles of trails in lynx habitat to ensure compliance with the LCAS. A map of potential lynx habitat is included in the project record. This map, however, should have been included in the EA for public review and comment. Inconsistent lengths of trails are also used in the EA and certain trails are not displayed (i.e., trails from the shooting range to the penalty loop).

The EA also fails to disclose the construction and maintenance costs of the Project (based on current market rates).¹⁴ Funding sources for this project have also not been disclosed. In the EA, the USFS simply notes that the MANG will pursue funding options to construct and operate the facility. A USFS memo in the project file (D111) states that as of December, 2007 MANG was still pursuing funding for the Project.

The EA also downplays the use of the area by wildlife and fails to acknowledge

¹⁴ No maintenance costs are listed in the EA and the NEPA document uses the original 2004 cost estimates of \$1.5 million. Since 2004 fuel costs alone have gone from less than \$3 a gallon to more than \$4 a gallon.

the presence of threatened and endangered species in the Project area, wetlands, soil disturbance, climate change, public controversy, inadequate snow conditions, and cumulative impacts. There are also major differences between the contour lines on the maps included in the draft EA and final EA. The upper elevation of the wetlands shifts from 6035' in the draft EA to 6026' in the final EA.

The EA also repeatedly refers to “supporting information” that is not included in the NEPA document itself but the “project record.” See e.g., EA at 3-79 (noting that the Wildlife Specialist Report for the biathlon project is located in the project record). Placing key documents in the project record makes it incredibly difficult (if not impossible) to obtain and review such documents during the 30 day public comment period. One cannot submit meaningful comments on important decisions affecting public land when key documents that form the basis for such decisions are not made available for public review and comment in a timely manner.

G. The USFS’s Failure To Rely On, Discuss, Or Even Consider The Best Available Scientific Data

Pursuant to NEPA, information included in NEPA documents “must be of high quality” and “accurate scientific analysis [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). While an EA may not be expected to reference or rely on every study or opinion, the state of scientific knowledge on a particular subject must be fairly represented in a balanced manner. Moreover, an EA must contain a reasoned analysis in

response to conflicting data or opinions on environmental issues.

As written, the EA fails to include or incorporate the best science on managing for lynx and wolverin, global warming, snowfall data, and the importance and use of the area as a wildlife corridor. Instead, the USFS relies entirely on its own self-serving, unsubstantiated conclusions. The USFS, for instance, concludes that “habitat loss associated with the biathlon project and the Rimini Road improvement projects are minimal . . .” The scientific literature, however, suggests that a donut effect happens when development occurs. Wildlife avoid an area of differing sizes around development depending upon the species.¹⁵

Notably, with respect to use of the area as a wildlife corridor, the USFS failed to conduct *any of its own* field studies to evaluate the use of the area as a linkage zone/corridor. Rather, the USFS spends its time trying to denigrate other surveys and sources of information, including information from the MFWP, WTU surveys, and even other USFS findings. It appears the USFS would rather base its decision on no data than on any of these data sources all of which conclude that the MacDonald Pass area of the Continental Divide is a crucial linkage area for wildlife.

Moreover, *every statement* made in the DN/FONSI to downplay the impacts to wolverine are either wrong, unsubstantiated, or squarely refuted in the scientific literature.

¹⁵ The USFS’s General Technical Report INT-303 (Christensen et al. 1993) points out that elk habitat effectiveness drops to 50 percent with less than 2 miles of road per square mile.

The USFS mentions the “low population density” of wolverines in the area but fails to mention that such low density is normal for wolverines and is precisely why placing a biathlon facility in the middle of a wolverine linkage zone would be problematic. The USFS talks about the absence of modeled denning habitat in the project area but fails to understand that linkage habitat is important for movement and is not contingent upon the presence of denning habitat. The USFS points to the proximity of the project to Highway 12 but the scientific literature indicates that wolverines do cross highways having less than certain vehicle use levels. See Attach. No. 30. The USFS states that there will be minimal use associated with the proposed Biathlon Project during the key reproductive and dispersal periods but provides no data to support this conclusion.

In terms of its snow pack analysis and the impacts of global warming, the USFS draws erroneous conclusions that are contradicted by the very references they cite. See Attach. No. 31 (Declaration of Bruce Anderson). The USFS, for instance, relies heavily on the Mote et al. (2005) article (see Attach. No. 37) to draw the conclusion that snowfall decline in the northern Rockies is small in magnitude and isolated. As mentioned earlier, however, the Mote article, states exactly the opposite:

[E]ven after accounting for the role of known patterns of climate variability, there is substantial downward trend in overall snowpack in the West that is consistent with the observed warming. Even a conservative estimate (0.3 degrees C/decade 1) of the likely warming rate for western mountains in winter . . .[would place] most of the westernmost mountains . . .in the transient snow zone, in which snow accumulates and melts repeatedly during the snow season . . .In other words, the more it warms, the more the warming will affect snowpack even at higher elevations.

Attach. No. 37; see also Section I.A. above (discussing Mote article); Attach. No. 31; Attach. No. 25; The Rocky Mountain Climate Organization’s “Less Snow, Less Water: Climate Disruption in the West.”¹⁶ In fact, the USFS’s refusal to consider 73 years of snow *pack* data from the nearest collection site at roughly the same elevation as the Project (Chessman Reservoir) illustrates the USFS’s lack of commitment to utilizing the best available science. See Attach. No. 31.

H. The Biathlon Project is a “Significant” Action That Warrants the Preparation of an Environmental Impact Statement (EIS)

Under NEPA, the USFS must prepare an EIS because the proposed action – the issuance of a 25-year SUP to the MANG to build, maintain, and operate a Biathlon Project in the middle of a key wildlife corridor on the Continental Divide – is a “major federal action that *significantly* affects the quality of the human environment” as those terms are defined and understood under NEPA and relevant Ninth Circuit case law.

According to the CEQ, the “significance” of an action is determined by considering the context and the intensity of the action. 40 C.F.R. § 1508.27. In terms of context, the action must be analyzed based on the affected interests, the affected region, and the locality in which it would occur. 40 C.F.R. § 1508.27(a). Intensity refers to the severity of the impact. 40 C.F.R. § 1508.27(a). In determining the severity of the impact,

¹⁶ A copy of this report is available on line at: www.rockymountainclimate.org/website%20pictures/Less%20Snow%20Less%20Water.pdf.

the USFS must consider, inter alia, a number of factors such as: (1) the unique characteristics of the geographical area, such as “ecologically critical areas;” (2) the degree of controversy surrounding the proposal; (3) the degree of unique or unknown risk; (4) the cumulative effect of the project; (5) the degree to which the project may adversely affect endangered or threatened species or its habitat; and (6) whether the action threatens to violate federal, state, or local law, or a requirement imposed for the protection of the environment. 40 C.F.R. § 1508.27(b).

Applying these factors to the proposed Biathlon Project, there is no question that the issuance of a 25 year SUP to the MANG to construct, maintain, and operate the Biathlon Project on MacDonald Pass is a major federal action “significantly” affecting the quality of the human environment.

First, as mentioned earlier, the proposed Biathlon Project is located in the middle of a narrow, unique wildlife corridor or “linkage zone.” This is an area determined by the best science to be ecologically critical to the movement and ultimate survival of the region’s wildlife. According to the USFS, while the entire spectrum of the HNF provides room for many of these animals to traverse, it is the wide-array of productive wet sites, i.e., wetlands, seeps, springs, and wet meadows just off both sides of the MacDonald Pass area, that “serves to concentrate a lot of activity in this area.” Attach. No. 18. Indeed, there are a number of wetlands, wet meadows, and perennial and intermittent streams in the project area. The project area is also included in the lynx’s proposed critical habitat

which means it is “essential to the conservation” of the species.

Second, the degree of controversy surrounding the Project cannot be overstated. A “proposal is highly controversial when there is ‘a substantial dispute about the size, nature, or effect of the major federal action rather than the existence of opposition to use.” Anderson v. Evans, 371 F.3d 475, 489 (9th Cir. 2004) but see National Parks and Conservation Assoc. v. Babbitt, 241 F. 3d 722, 736 (9th Cir. 2001) (opposition from public deemed relevant by court).

Here, there is a substantial amount of controversy and uncertainty surrounding the size of the project, the ground-disturbing activity needed to build the Project, use of the facility, the USFS’s snowfall data (and whether the proposed location will provide adequate snow amounts over the next 25 years to meet the purpose and need of the Project), and the Project’s overall impacts to the region’s wildlife populations, corridor, and habitat. The controversial nature of the Project is also highlighted by Lewis & Clark County’s opposition to the location of the Biathlon Project on MacDonald Pass. See Attach. No. 32 (Resolution 2008-57 to “Protect and Promote the Conservation of Wildlife Habitat and Corridors on the Continental Divide”). The Project is also at odds with the Western Governors Association’s (WGA’s) June, 2008 Wildlife Corridors Initiative and February 27, 2007 Policy Resolution to protect wildlife migration corridors and crucial wildlife habitat in the West. See Attach. No. 33.

Third, as outlined earlier, the Project will have a significant cumulative impacts on

the wildlife corridor. Fourth, the Project will adversely impact grizzly bears, lynx, and wolves – three species on the federal threatened and endangered species list (the wolf was recently placed back on the list and the wolverine may be listed by the end of the year).

Fifth, as detailed below, the Biathlon Project – as proposed – will violate the National Forest Management Act (NFMA), Clean Water Act (CWA), Endangered Species Act (ESA), Executive Order 11990, the National Historic Preservation Act (NHPA), and is inconsistent with the Helena Forest Plan and the LCAS.

In sum, therefore, when viewed individually or in aggregate, the proposed Biathlon Project will have a significant effect on the environment requiring preparation of an EIS. See Ocean Advocates, 402 F. 3d at 865 (the existence of only one intensity factor “may be sufficient to require preparation of an [EIS]”). The new trails, road, parking lot, five facilities, summer and winter use, shooting range, tree removal, wetland impacts, and increase in motorized use and access will “significantly” affect the human environment as that word is defined and understood under NEPA. See 40 C.F.R. § 1508.27.

Notably, the trigger for preparation of an EIS in the Ninth Circuit is low. To force completion of an EIS, a party need not demonstrate that the proposed Biathlon Project will in fact result in significant impacts requiring preparation of an EIS. Rather, the trigger is whether “*substantial questions are raised* as to whether [the proposed Biathlon Project] . . . may cause significant degradation of some human environmental factor.” Ocean Advocates, 402 F. 3d at 864 (emphasis added). Without question, this “low

standard” is satisfied in this case. Klamath Siskiyou Wildlands Center v. Boody, 468 F. 3d 549, 562 (9th Cir. 2006).¹⁷

In fact, minute notes from the project file suggest that in the absence of resistance from the MANG (they refused to pay for an EIS) the USFS felt that preparation of an EIS for the proposed Biathlon Project was required and warranted under NEPA. See Attach. No. 20 (Meeting Notes). Larry Cole (Helena National Forest) notes in a July 12, 2004 meeting that the “level of analysis [was] determined to be EIS by [USFS]. [The MANG] contests this, wants to go with EA.” Attach. No. 20. The USFS “wants [an] EIS to ‘1) be responsive to possible lynx issues, 2) eliminate appeal/litigation. . . .Funding [however] is the question here. [The MANG] won’t apparently pay for EIS under the current situation.” Id.

I. The USFS Cannot Use Supplemental Information Reports (SIRs) To Correct Deficiencies Or Present Information And Analysis That It Was Required To Include In The Original EA

It is well-established that there is a limited role for supplemental information reports (SIRs) within NEPA’s procedural framework. Courts have recognized and upheld agency use of SIRs, environmental re-evaluations and other “non-NEPA” documents for the “purpose of determining whether *new information or changed circumstances* require

¹⁷ While the MANG and USFS did prepare an EA to assess the impacts and alternatives to the Biathlon Project “no matter how thorough . . .[an EA] can never substitute for preparation of an EIS if the proposed action could significantly affect the environment.” Anderson, 371 F. 3d at 494.

the preparation of a supplemental EA or EIS.” Idaho Sporting Congress v. Alexander, 222 F. 3d 562, 566 (9th Cir. 2000) (emphasis added); Price Road Neighborhood Ass’n v. U.S. Department of Transportation, 113 F. 3d 1505, 1510 (9th Cir. 1997) (“when faced with a project change, the agency may conduct a re-evaluation to determine the significance of the new design’s environmental impacts and the . . . validity of its initial EA.”).

Here, however, the USFS is not using an April, 2008 Hydrology SIR (HSIR) and May, 2008 Wildlife SIR (referred to as a “supplement to the Wildlife Specialists Report”) wholly for the purpose of evaluating the significance of *new* information or *changed* circumstances. Instead, the USFS is attempting to use the two SIRs to “present information and analysis that it was required,” but failed to include in its original NEPA documentation. Idaho Sporting Congress, 222 F. 3d at 566-567.

The USFS’s HSIR, for instance, includes information and analysis from the MDT station and Chessman Reservoir that existed at the time the EA was prepared. Indeed, the USFS concedes that the purpose of the HSIR is not to evaluate the significance of new information or changed circumstances but rather to correct deficiencies in the original EA’s snowpack analysis. According to the USFS:

Potentially informative snow data sources *not assessed in the final EA* include the NRCS Chessman Reservoir snow course, the Montana Department of Transportation (MDT) weather station at MacDonald Pass, as well as on-site qualitative information from the Last Chance Nordic Club. . .In this report, analysis of information from these sources *will be added* to that of the three SNOTEL sites evaluated in the final EA.

HSIR at 1-2 (emphasis added). Neither the NRCS Chessman Reservoir snow course data,

the MDT weather station data, or the “qualitative” information from the Last Chance Nordic Club (LCNC) is new information that was not available at the time the USFS submitted a draft EA for public review and comment or issued a final EA. On the contrary, the USFS “knew or should have known that it needed to provide this information and analysis at the time it prepared the original EA[.]” Idaho Sporting Congress, 222 F. 3d at 567.¹⁸

The same is true with respect to the USFS’s Wildlife SIR. The USFS concedes in the SIR that the new report is only being prepared to address impacts that were “not previously considered” in the EA, including the Rimini Road Improvement Project and the potential impacts associated with climate change. Both the Rimini Project and climate change are issues that the USFS knew about (or should have know about) at the time it prepared the EA for public review and comment.

In sum, the USFS’s attempt to correct the deficiencies of its original EA for the Biathlon Project with these two new, internal SIRs is a violation of NEPA. As explained by the Ninth Circuit, “[i]t is inconsistent with NEPA for an agency to use an SIR, rather than a supplemental EA or EIS, to correct this type of lapse.” Idaho Sporting Congress, 222 F. 3d at 567. “NEPA is a procedural statute, and we have held that ‘agency action

¹⁸ Providing the Chessman Reservoir snow course data, MDT weather station data, and even the LCNC’s information in the draft EA would have afforded members of the public, including local residents and home owners, state, and other federal agencies the opportunity to review and submit meaningful public comment on, the USFS’s snow pack and climate change analysis – the very purpose of NEPA.

taken without observance of the procedure required by law will be set aside.” Id.

(citations omitted). As recognized by the courts, if the USFS were permitted to “correct deficiencies in an EA or EIS by means of an SIR or another non-NEPA procedure, the regulations governing the supplementation of NEPA documents promulgated by CEQ, as well as the [USFS’s] . . . own rules on the issue, would be superfluous.” Id. (citing 40 C.F.R. § 1502.9 (c)(4), FSH 1909.15).

J. The USFS Failed to Provide Sufficient Public Notice

The goal of NEPA, and the very purpose of preparing a an EA or EIS is to “provide a full and fair discussion of significant environmental impacts [of a proposed action]” and to “inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. §1502.1. To satisfy this purpose, it is imperative that the MANG and USFS provide the public with complete and accurate information about all aspects of the project in order to solicit meaningful feedback and comment. This, however, has not occurred.

From the start, the MANG and USFS withheld important information from the public on the overall size, magnitude, and scope of the proposed Biathlon Project. In the scoping notice, for instance, the MANG and USFS do not mention the building of five new facilities, the new road, parking lot, power lines, wetlands impacts, or tree removal needed to construct the Project. Nor does the notice mention both the summer and winter

use of the area. Instead, the notice downplays and attempts to “sell” the Project to the public by only mentioning constructing and reconstructing additional ski trails. The same is true with respect to the June 1, 2005 and July 11, 2006 Open House notices. The USFS’s description of the project on their website isn’t much better. See http://www.fs.fed.us/r1/helena/projects/biathlon_project.shtml.

Moreover, the EA notes that the USFS and MANG were “joint lead agencies” in its preparation (p. 1-1). Given that the MANG has a clear interest in the proposed action going forward its involvement indicates bias in favor of the action alternative, which violates the NEPA. A similar partnership between the Bridger-Teton National Forest and Stanley Energy Corporation recently resulted in a flawed environmental analysis discovered after the intervention of the Wyoming governor’s office.

II. NFMA VIOLATIONS

A. Inconsistency with the Helena National Forest LRMP

NFMA mandates that all site-specific decisions on the Helena National Forest – including the decision to issue a 25-year SUP for the proposed Biathlon Project – be consistent with the Helena National Forest Land and Resource Management Plan (“LRMP” or “Forest Plan”). 16 U.S.C. § 1604 (i).

Before authorizing the Biathlon Project, therefore, the USFS must ensure that such decisions are consistent with the LRMP’s forest-wide and management-area direction. As currently proposed, the Biathlon Project is inconsistent with the plain language and

spirit of:

(1) the forest-wide goal of maintaining and improving habitat over time to support big game and other wildlife species;

(2) the forest-wide goal of maintaining or enhancing sufficient grizzly bear habitat to meet the population recovery goals established in the Grizzly Bear Recovery Plan for the Helena Forest;

(3) the forest-wide goal of maintaining high quality water to protect fisheries habitat . . .and municipal water supplies and to meet or exceed state and Federal water quality standards;

(4) the forest-wide objective of meeting the recovery target of 18 grizzly bears on the essential habitat, and the maintenance or enhancement of elk and coldwater fish habitat throughout the forest;

(5) the forest-wide standard and specific monitoring requirement (Chapter IV, part D) to monitor populations of management indicator species (MIS) to “measure the effect of management activities on representative wildlife habitats with the objectives of ensuring that viable populations of existing native and desirable non-native plant and animal species are maintained;

(6) Appendix D’s guidelines for managing grizzly bear habitat;

(7) Appendix E’s grizzly bear management guidelines outside recovery areas (contrary to the USFS’s statement in the EA, Appendix E does apply because there is

“known grizzly bear activity” in the project area);

(8) forest-wide standards for managing grizzly bears (i.e., field studies, open road density standards);

(9) forest-wide standards for riparian area and municipal watershed management;

(10) the specific management area (MA) direction and monitoring requirements for MA-T5;

(11) forest plan standards for thermal and hiding cover for big game species;¹⁹

(12) forest plan standards for roads and trails in big game habitat and the MFWP’s guidelines (which the USFS states it comply with); and

(13) the specific management direction in the Forest Plan, Northern Rockies Lynx Management Direction (see section III. below), and the LCAS.

The Biathlon Project is contrary to the Forest Plan’s specific management direction for MA-T5 because the new trails and facilities needed to build the Project: (1) would not increase production and quality of forage; (2) would not provide for healthy stands of timber and timber products consistent with increasing quality and quantity of forage; (3) does not emphasize cost-effective timber production, while protecting the soil

¹⁹ Elk summer range is to be maintained at 35% or greater hiding cover and areas of winter range are to be maintained at 25% or greater thermal cover in drainages or elk herd units. Evidence in the project file (D104-105 details efforts by the USFS to negotiate with MFWP to agree to change herd unit boundaries so that Forest Plan standards for thermal cover and security can be met for the project. MFWP did not agree to the boundary changes.

productivity; (4) does not maintain water quality and stream bank stability; or (5) provide for other resource uses that are compatible with the other goals.

With respect to the LCAS, the USFS's decision fails to comply with the following requirements and standards: (1) on federal lands in lynx habitat, the USFS is prohibited from allowing a "net increase in groomed or designated over-the-snow routes and snowmobile play areas by LAU;" (2) if more than 30 percent of lynx habitat in a LAU is currently in unsuitable condition, no further reduction of suitable conditions shall occur as a result of vegetation management activities by federal agencies; (3) the USFS must maintain habitat connectivity within and between LAUs; (4) in lynx habitat, the USFS must "not degrade or compromise landscape connectivity when planning and operating new or expanded recreation developments;" (5) maintain, and where necessary and feasible, restore habitat connectivity across forested landscapes;" (6) identify key linkage areas that may be important in providing landscape connectivity within and between geographic areas, across all ownerhips;" and (7) develop and implement a plan to protect key linkage areas on federal lands from activities that would create barriers to movement." See Attach. No. 19.²⁰

In terms of the prohibition against allowing a "net increase in groomed or

²⁰ Based on recent lynx surveys along MacDonald Pass, and pursuant to the direction outlined in the LCAS, the USFS should delineate a new LAUs along MacDonald Pass and/or increase the size of the current LAU to encompass lynx use north of Highway 12. See Attach. No. 19 at 7-3.

designated over-the-snow routes and snowmobile play areas by LAU” the USFS concedes that that the Project would “add about 2.2 miles of groomed cross-country ski trails to an existing trail system.” The Agency counters, however, that there will be no net increase in groomed trails because of various off-site closures. The USFS is wrong.

First, the USFS fails to take into account the “grooming” and routes needed for other aspects of the Project, such as the parking lot, buildings/structures, and various pathways connecting the facilities in the project area. Second, the USFS’s figures do not take into account trails connecting the shooting range to the penalty loop. Third, the USFS states that portions of the communications towers facility road that extends from Highway 12 to the Divide will no longer be groomed for the sake of “mitigation” but this road will continue to be regularly used by snowmobilers (both recreational and by entities that service the communications tower). Thus, why technically not groomed by the USFS, this road will be snow-compacted.

In addition to being inconsistent with the guidelines, conservation measures, and monitoring requirements of the LCAS (see Attach. No. 19), the proposed project is in conflict with the USFS’s and FWS’s May, 2005 Canada Lynx Conservation Agreement (see Attach. No. 21) and the USFS’s and FWS’s October 25, 2000 Biological Opinion (“BiOp”) on the implementation of forest plans and the interrelated actions of implementing the conservation agreement. See Attach. No. 22.

Moreover, the USFS’s decision is inconsistent with the Forest Service standard

that SUPs only be issued when “they comply with the goals of the management area affected.” In this case, the USFS’s decision approving the Biathlon Project would result in the issuance of two more SUPs (construction and operation). Currently there are at least 24 SUPs in the MacDonald Pass area.

Finally, the USFS’s decision not meet the criteria under Forest Service Manual (FSM) 2711 because the project *permanently* commits National Forest System resources to build the Project. See FSM 2711. In this respect, it is inconsistent with the Forest Plan for the USFS to classify the building of the Biathlon Project as “dispersed recreation.” The project includes permanent facilities and centralized activity around such facilities.

B. Failure to manage for viable populations of management indicator species

The EA for the proposed Biathlon Project reveals that the USFS is failing to comply with its procedural and substantive obligations under NFMA and NFMA’s implementing regulations to manage for viable populations of marten, goshawks, piliated woodpecker, hairy woodpecker, grizzly bears, wolves, elk, peregrine falcon, bald eagle, and mule deer.

Under NFMA and the implementing regulations, the USFS is required to manage wildlife habitat on the Helena National Forest to maintain viable populations of management indicator species (MIS). See Idaho Sporting Congress v. Rittenhouse, 2002 WL 31056605 (9th Cir. 2002). MIS are animals or plants that are selected by the USFS to represent the needs of various types of wildlife throughout the Forest.

In this way, an MIS acts as a “indicator” – a proxy – for many other species. While the USFS retains some flexibility with respect to the appropriate methodology used to achieve and comply with this viability mandate (i.e., using population data on MIS and/or habitat data as a proxy for MIS population data) the mandate to maintain viable populations of MIS cannot be ignored.

In terms of methodology, the plain language of the NFMA regulations as well as Ninth Circuit law suggest that the USFS must obtain and analyze population numbers of MIS (both actual and trend) as a means of ensuring viability. NFMA’s implementing regulations state that the USFS is required to evaluate site-specific projects (i.e., the authorization of a 25 SUP for the Biathlon Project) that affect MIS species “in terms of both the amount and quality of habitat and of animal population trends of the management indicator species.” 36 C.F.R. § 219.19 (a)(2). The USFS must also analyze and monitor the population trends of MIS and determine how those changes relate to changes in habitat that result from site-specific projects. 36 C.F.R. § 219.19 (a)(6); see also Forest Guardians v. U.S. Forest Service, 180 F.Supp.2d 1273 (D.N.M. 2001) (population data on MIS required).

The Ninth Circuit has “encouraged” the use of population data (actual and trend) as a means of ensuring viability but have not gone so far as to require such analysis. Rather, in the Ninth Circuit, the USFS can rely solely on habitat data as a proxy for population numbers (i.e., the “proxy on proxy approach”). Instead of actually monitoring

the population of each MIS to determine if viable populations are being maintained, the USFS can designate certain types and quantities of habitat as sufficient to maintain viable populations. This habitat can then be monitored to determine what population changes, if any, are induced by management activities. By adopting this “habitat trends analysis” or “proxy on proxy” approach, the USFS avoids having to acquire and analyze population data (actual and trend) on MIS species. This limited exception, however, is only allowed if the habitat methodology employed by the USFS “reasonably ensures” that viable populations of MIS are being maintained.

Before relying on this approach therefore, the USFS needs to: (1) determine the amount and distribution of habitat in the National Forest needed to maintain viable populations of the MIS; and (2) accurately document the actual existence and trend of the habitat within the National Forest. Accurate habitat data (both actual and trend) is imperative to using this proxy on proxy approach. Indeed, without such data, the USFS cannot reasonably ensure that is managing for viable populations of MIS.

At present, the USFS is failing to “reasonably ensure” that it is maintaining viable populations of MIS species on the HNF.

III. VIOLATION OF THE NORTHERN ROCKIES LYNX MANAGEMENT DIRECTION

The USFS’s decision to authorize the Biathlon Project violates the following objectives, standards, and guidelines of the Northern Rockies Lynx Management Direction (NRLMD):

(1) **Objective ALL O1:** Maintain or restore lynx habitat connectivity in and between LAUs, and in linkage areas. The proposed new site development is directly within a designated lynx linkage area, it is designated both “occupied” and “core” lynx habitat by the USFS, and within the area currently proposed as lynx “critical habitat” by the U.S. Fish and Wildlife Service (FWS). Yet in this decision the USFS fails to demonstrate how the proposed action will “maintain or restore lynx habitat connectivity” in this area. In fact, the evidence (see Section I.A above) clearly demonstrates that the facility will destroy habitat connectivity for lynx in the LAU and linkage area.

(2) **Standard ALL S1:** New or expanded permanent development and vegetation management projects must maintain habitat connectivity in an LAU and/or linkage area. The USFS fails to demonstrate how the proposed action fulfills its obligation to maintain habitat connectivity in this area that is both in an LAU and a lynx linkage area. Instead, the USFS simply states that “Highway 12 likely serves as the most significant impediment to lynx movements through the project area.” The presence of Highway 12 does not mean that the USFS can ignore its obligation to manage its own lands to maintain habitat connectivity for lynx. On the contrary, the impact of Highway 12 makes it even more important that the USFS maximizes wildlife security on its own lands adjacent to the highway to ensure that its obligation to maintain habitat connectivity is met. This decision clearly fails to do this.

Notably, in its Biological Assessment (BA) for the Project, the USFS

acknowledges that a decision to proceed with the development would not maintain lynx habitat connectivity in this linkage area. See BA at p. 33 (“ development of the biathlon facility may diminish the future linkage potential of the area”); BA at p. 35 (“Management activities may detract from future linkage habitat potential”). The USFS initially echoes this finding in its EA but then dismisses it with unsupported assertions that lynx can continue to use the area and their movements will not be obstructed. See EA at p. 3-104 (“... the Continental Divide trailhead and other projects in the vicinity of MacDonald Pass, in conjunction with the biathlon project could further detract from linkage potential by increasing human activity in the area.”); EA at p. 3-105 (the “proposed activities could still potentially displace transient lynx in the area. While there may be diminution of future linkage potential of the area by implementing Alternative 3, this alternative would neither preclude lynx use of the area nor obstruct movements of lynx.”).²¹

(3) Standard VEG S6: The Standard: Vegetation management projects that reduce snowshoe hare habitat in multi-story mature or late successional forests may occur only: (1) Within 200 feet of administrative sites, dwellings, outbuildings, recreation sites, and special use permit improvements, including infrastructure within permitted ski area boundaries; (2) For research studies or genetic tree tests evaluating genetically improved

²¹ The USFS does not explain or justify its use of the qualifier “transient,” “future,” or “potential” when discussing lynx in the area and the Appellants do not believe such qualifiers are appropriate.

reforestation stock; or (3) For incidental removal during salvage harvest (e.g. removal due to location of skid trails). The USFS's decision to issue a SUP for the Biathlon Project reduces snowshoe hare habitat due to clearing new ski trails and constructing new structures, outside of the exceptions provided above, and thus in violation of this standard.

(4) Guideline VEG G5: Habitat for alternate prey species, primarily red squirrel, should be provided in each LAU. The USFS's decision fails to demonstrate compliance with this guideline.

(5) Objective HU O1: Maintain the lynx's natural competitive advantage over other predators in deep snow, by discouraging the expansion of snow-compacting activities in lynx habitat. The USFS's decision violates this objective, since it expands snow-compacting activities in lynx habitat. Currently, winter tracking studies indicate carnivores such as coyotes and bobcat may already be present in the area. Expanding ski trails and human use in this area will further exacerbate the issue of interspecific competition for prey.

(6) Objective HU O2: Manage recreational activities to maintain lynx habitat and connectivity. The USFS fails to demonstrate how the decision fulfills this objective. The decision provides some limits on the use of the proposed new development, but provides no evidence that these limits are sufficient to maintain lynx habitat and connectivity. For example, the new development is likely to generate increased informal use of the area by

skiers, mountain bikers, trail runners, and other recreationists, which may have as much or more impact on lynx use and movement through the area than the organized competitions. The USFS, however, fails to demonstrate that it will ensure that the informal uses of the area will not harm lynx.

(7) Objective HU O3: Concentrate activities in existing developed areas, rather than developing new areas in lynx habitat. The USFS's decision clearly violates this objective. Although the proposed action takes advantage of existing trails, there is extensive new permanent construction development associated with this project. It was noted in a public forum (The Helena Independent Record) that the owner of the Great Divide Ski Area where there is already existing infrastructure was willing to work with the MANG in development of a biathlon facility. Relocation of the development to the Great Divide Ski Area would not violate this objective, but the USFS failed to take a hard look at this alternative.

(8) Objective HU O4: Provide for lynx habitat needs and connectivity when developing new or expanding existing developed recreation sites or ski areas. The USFS's decision fails to fulfill this objective.

(9) Objective HU O5: Manage human activities, such as special uses, mineral and oil and gas exploration and development, and placement of utility transmission corridors, to reduce impacts on lynx and lynx habitat. The USFS's decision fails to manage this "special use" to reduce impacts on lynx and their habitat, in violation of this objective.

(10) Objective HU O6: Reduce adverse highway effects on lynx by working cooperatively with other agencies to provide for lynx movement and habitat connectivity, and to reduce the potential of lynx mortality. As mentioned above, the impacts of Highway 12 only increase the USFS's obligation to manage its own lands to ensure safe use and travel through the area by lynx. This decision fails to do this and thus violates this objective.

(11) Guideline HU G1: When developing or expanding ski areas, provisions should be made for adequately sized inter-trail islands that include coarse woody debris, so winter snowshoe hare habitat is maintained. The USFS's decision fails to ensure that there will be adequately sized inter-trail islands to maintain snowshoe hare habitat within this new ski area development, in violation of this guideline.

(12) Guideline HU G2: When developing or expanding ski areas, lynx foraging habitat should be provided consistent with the ski area's operational needs, especially where lynx habitat occurs as narrow bands of coniferous forest across mountain slopes. There is no discussion of mitigation associated with the acknowledged loss of habitat associated with this proposed action. The USFS decision fails to provide lynx foraging habitat associated with this new ski area development, in violation of this guideline.

(13) Guideline HU G3: Recreation developments and operations should be planned in ways that both provide for lynx movement and maintain the effectiveness of lynx habitat. The USFS fails to demonstrate how this new development was planned to

provide for lynx movement and maintain lynx habitat effectiveness. On the contrary, the new development sits squarely on top of a narrow “bottleneck” of National Forest land along the Continental Divide and adjacent to a major east-west highway, which threatens to fragment lynx populations and habitats north and south of the project area.

(14) Guideline HU G6: Methods to avoid or reduce effects on lynx should be used in lynx habitat when upgrading unpaved roads to maintenance levels 4 or 5, if the result would be increased traffic speeds and volumes, or a foreseeable contribution to increases in human activity or development. The USFS fails to demonstrate that the road upgrades associated with the new development comply with this guideline.

(15) Guideline HU G7: New permanent roads should not be built on ridge-tops and saddles, or in areas identified as important for lynx habitat connectivity. New permanent roads and trails should be situated away from forested stringers. The USFS fails to demonstrate that the new roads and trails associated with the new development comply with this guideline.

(16) Guideline HU G10: When developing or expanding ski areas and trails, consider locating access roads and lift termini to maintain and provide lynx security habitat, if it has been identified as a need. The USFS fails to demonstrate that the location of the access roads associated with the new development will maintain and provide lynx security habitat, in violation of this guideline.

(17) Guideline HU G11: Designated over-the-snow routes or designated play

areas should not expand outside baseline areas of consistent snow compaction, unless designation serves to consolidate use and improve lynx habitat. This may be calculated on an LAU basis, or on a combination of immediately adjacent LAUs. The USFS decision fails to comply with this guideline, since the new and expanded ski trails and access roads will expand snow compaction outside of baseline areas, and this expansion will not consolidate use nor will it improve lynx habitat.

(18) Guideline HU G12: Winter access for non-recreation special uses and mineral and energy exploration and development, should be limited to designated routes or designated over-the-snow routes. The Biathlon Project could be defined as a non-recreation special use, to the extent that its primary purpose is to train military personnel in skills useful for winter combat. In this case, the USFS decision fails to comply with this guideline, since it fails to ensure that winter access will be limited to designated routes.

(19) Objective LINK O1: In areas of intermingled land ownership, work with landowners to pursue conservation easements, habitat conservation plans, land exchanges, or other solutions to reduce the potential of adverse impacts on lynx and lynx habitat. The USFS's decision fails to provide any evidence that it is working with landowners in the MacDonald Pass area to protect lynx and their habitat, as described in this objective.

(20) Required Monitoring: Map the location and intensity of snow compacting activities and designated and groomed routes that occurred inside LAUs during the period

of 1998 to 2000. The mapping is to be completed within one year of this decision, and changes in activities and routes are to be monitored every five years after the decision.

The is no evidence in the project file that the USFS has complied with this mapping and monitoring direction. The USFS's decision also fails to describe monitoring of snow compaction activities in the project area as required by the FWS in its Biological Opinion on the NRLMD.

IV. INCONSISTENCY WITH THE WESTERN GOVERNOR'S ASSOCIATION'S WILDLIFE CORRIDOR INITIATIVE AND POLICY RESOLUTION

The Western Governors (including Montana's Governor Schweitzer) are committed to protecting wildlife migration corridors and crucial habitat throughout the West. In furtherance of this commitment, they adopted a new report on June 29, 2008 entitled the "Wildlife Corridors Initiative" and are creating a Wildlife Habitat Council to implement recommendations adopted the June, 2008 report.²²

The Governors also adopted a related policy resolution on February 27, 2007 entitled "Protecting Wildlife Migration Corridors and Crucial Wildlife Habitat in the West." See Attach. No. 33. In the policy resolution, the Western Governors recognize that:

Large intact and functioning ecosystems, healthy fish and wildlife populations, and abundant public access to natural landscapes are a significant contributing factor to the West's economic and in-migration boom as well as quality of life. Critical

²² A complete copy of the WGA's June, 2008 report (approx. 140 pages) is available online at: <http://www.westgov.org/>

wildlife migration corridors and crucial wildlife habitats are necessary to maintain flourishing wildlife populations.

Attach. No. 33. Based on this recognition, the Governors resolved to “identify key wildlife migration corridors and crucial wildlife habitats in the West and make recommendations on needed policy options and tools for preserving those landscapes.”

Attach. No. 33 at 2.

In this case, because MacDonald Pass is a key wildlife migration corridor (as recognized by the best scientific and commercial data available) the USFS’s decision to approve a Biathlon Project in the middle of this corridor is entirely inconsistently with the Governors’ wildlife corridor initiative and policy statement.

V. INCONSISTENCY WITH LEWIS & CLARK COUNTY RESOLUTION AND EXECUTIVE ORDER 13352

On June 5, 2008 the Lewis & Clark County Commission passed Resolution No. 2008-57: Resolution to Protect and Promote the Conservation of Wildlife Habitat and Corridors on the Continental Divide. See Attach. No. 32.

In the Resolution, the County recognizes the Continental Divide (MacDonald Pass) as one of the most critical wildlife corridors in the contiguous U.S.. In response, the County resolved to: (1) formally recognize the unique and priceless value of the Continental Divide’s wildlife populations and wildlands to the residents of Lewis & Clark County; (2) advocate for the continued conservation of wildlife populations, habitat, and movement corridors on the Continental Divide; and (3) urge all federal and state land and

wildlife management agencies to protect and enhance wildlife populations, habitat, and movement corridors on the Continental Divide in Lewis & Clark County. See Attach. No.

32

Without question, the USFS's decision to issue a 25 SUP to the MANG to construct, maintain, and operate the Biathlon Project in the middle of a narrow wildlife corridor on the Continental Divide in Lewis & Clark County is inconsistent with Resolution No. 2008-57 and an affront to the interests and wishes of Lewis & Clark County's residents as reflected in Resolution No. 2008-57.

The USFS's decision also violates Executive Order 13352 (Facilitation of Cooperative Conservation). Executive Order 13352 provides that the USFS shall engage in "cooperative conservation" with county governments, properly "accommodate local participation" in all federal decision making, and ensure that all projects are "consistent with protecting public health and safety." Lewis & Clark County Resolution No. 2008-57 explicitly states that protecting and promoting the conservation of wildlife habitat and corridors on the Continental Divide is in the "general welfare" of the County's residents.²³

VI. ESA VIOLATIONS

On August 31, 2006 the FWS reviewed the USFS's biological assessment (BA) for the proposed Biathlon Project and issued a written concurrence on the USFS's "not likely

²³ A copy of Executive Order 13352 is available online at: <http://www.whitehouse.gov/news/releases/2004/08/print/20040826-11.html>

to adversely affect” determination on lynx, grizzly bears, and wolves. Based on this determination, both the USFS and FWS agree that formal consultation pursuant to section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, is not required.

As such, the USFS is proposing to issue a 25 year SUP to the MANG to construct and operate a Biathlon Facility – including the building of a new road, new facilities, shooting range, wetland destruction, tree removal, and a new 50 vehicle parking lot – in a narrow wildlife corridor used by grizzly bears, lynx, and wolves *without first* obtaining a Biological Opinion (BiOp) and corresponding incidental take statement (ITS).

Without question, the USFS’s findings in the BA and decision not to initiate and complete formal consultation and obtain a BiOp for the Project is a violation of section 7 of the ESA and arbitrary and capricious. The proposed Biathlon Project – including the construction and operation of the Facility over the next 25 years (the life of the SUP) – “may affect” or is “likely to adversely affect” lynx, grizzly bears, and wolves. Likewise, the FWS’s concurrence with the USFS’s finding is a violation of section 7 and arbitrary and capricious.

Specifically, the USFS’s and FWS’s “not likely to adversely affect” determination for grizzly bears, wolves, and lynx: (1) fails to take into account all relevant, up-to-date information and science on the importance and use of MacDonald pass as a wildlife corridor from MFWP, Lance Craighead, and AWL, including the most recent (winter 2007-2008) survey results; (2) fails to take into account the best scientific and commercial

data available on lynx, wolves, and grizzly bear use of MacDonald Pass and the importance of maintaining connectivity between core habitats for these species (see Section I above); (3) fails to take into account that the proposed action is for issuance of a 25 year SUP to construct and operate the Biathlon Project; (4) violates the USFS's and FWS's duty to "conserve" lynx, grizzly bears, and wolves; (5) fails to consider the environmental baseline (see 50 C.F.R. § 402.02) including how the proposed Biathlon Project may directly, indirectly, or cumulatively affect grizzly bears, wolves, or lynx or their habitat; (6) fails to consider impacts to lynx, grizzly bears, and wolves in the "action area" as defined by FWS's section 7 regulations; (7) fails to consider how past, present, or anticipated future activities in the action area (i.e., the building of a Biathlon Facility, timber sales, mine cleanup, new trails and roads (and winter grooming), grazing, private development, highway improvements, target ranges, motorized access/travel planning, snowmobile trails, developed recreational sites, etc..) may individually or in the aggregate affect grizzly bears, wolves, and lynx or the listed species' prey species; and (7) fails to comply with the conservation measures outlined in the LCAS, NRLMD, Conservation Agreement for lynx, and Forest Plan BiOp for lynx.

Moreover, the Project area is proposed critical habitat for lynx. See 73 Fed. Reg. 10860). In areas where critical habitat is proposed for a listed species conferencing with FWS is required for any federal action that may harm the ability of the habitat to support listed species. See 16 U.S.C. § 1536 (a)(4); 50 C.F.R. § 402.10 (conference on proposed

species or proposed critical habitat). At present, there is no evidence in the record demonstrating that the USFS has complied with this conferencing requirement.

VII. CWA VIOLATIONS

As documented in correspondence with the U.S. Army Corps of Engineers (Corps), the MANG and USFS must apply for and obtain a dredge and fill permit pursuant to section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344, before starting construction on the proposed Biathlon Project.

At present, the EA reflects some uncertainty and confusion regarding whether a 404 permit will be required for the larger, 3.7 acre wetland located near the proposed parking lot and shooting range (there is no dispute that the stream channel crossed by the proposed access road and trails, as well as the smaller 0.5 acre wetland in a perennial drainage that flows into and is hydrologically connected with Litte Porcupine Creek – a water of the U.S. – are covered by 404).

Tetra Tech. reported in a January 7, 2008 memorandum that the Corps has “*verbally stated . . . that the [3.7 acre] wetland area near the range appears to be an isolated wetland and therefore would not be under the jurisdiction of the [Corps].*” Likewise, in the EA, the USFS similarly states that this “wetland area meets the criteria for a wetland area but is not situated within a defined stream drainage [so it is] . . . *likely an isolated wetland area.*” EA at 3-74. Either way, *no final jurisdictional determination* on the 3.7 acre wetland site has been made. The USFS confirmed this fact in the

DN/FONSI: “follow-up concurrence [on whether the wetlands are isolated] is forthcoming.”

With this appeal, therefore, the MANG, USFS, and Corps are hereby put on notice that *until* such a determination is made, no dredging and filling activity may take place in the wetland or any waters located within the Project area, including the perennial and intermittent streams. Moreover, the 3.7 acre wetland that will be most directly impacted by the Project – while physically “isolated” – falls within the jurisdiction of the Corps because it is a wetland located on federal, National Forest land. As such, this wetland is distinguishable from the isolated wetlands at issue in the most recent U.S. Supreme Court decisions and a “water of the United States” that Congress clearly intended to regulate under the Federal CWA. To the extent that the U.S. Supreme Court or other Federal courts have approached the isolated wetland issue by engaging in a Commerce Clause analysis, such an inquiry is wholly irrelevant and inapplicable to waters on Federal land which fall squarely within federal jurisdiction under the Property Clause.

As such, in addition to the various stream channels (small tributaries, little and big porcupine creeks, etc.) and 0.5 acre wetland, the 3.7 acre wetland is also a “waters of the U.S.” subject to regulation under section 404 of the CWA. Section 404 of the CWA, in turn, prohibits the dredging or filling of such stream channels and wetlands without a permit from the Corps authorizing the dredge or fill activity. See 33 U.S.C. § 1344 (a), (d).

Relevant here, the Corps may not issue a 404 permit if there is a “*practicable alternative* to the proposed discharge which would have *less adverse impact on the aquatic ecosystem*, so long as the alternative does not alter other significant adverse environmental consequences.” 40 C.F.R. § 230.10 (a) (emphasis added). A “practical alternative” is one that is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the *overall project purposes*.” Id. at § 230.10 (a)(2) (emphasis added).

In considering such alternatives, the Corps is required to “take into account the objectives of the applicant’s project . . . as long as [the] objective is legitimate.” Greater Yellowstone Coalition v. Flowers, 359 F. 3d 1257, 1270 (10th Cir. 2004) (citations omitted). The Corps should not permit the applicant to “artificially constrain the Corps’ alternatives analysis by defining the projects’ purpose in an overly narrow manner.” NWF v. Whistler, 27 F. 3d 1341, 1346 (8th Cir. 1994).

Here, the overall purpose of the Project is to “provide a high quality National Guard biathlon facility . . .to improve physical fitness, markmanship, and skills that combine endurance, speed, and strength.” This broad purpose defines the scope of both the impacts and alternatives analysis that the Corps must undertake under the CWA and NEPA. In other words, any and all available alternatives that will have less of an impact on the area’s aquatic ecosystem yet still achieve the purpose and need of the project must be carefully evaluated and explored by the Corps.

To date, such a “practicable alternatives” analysis pursuant to section 404 of the CWA has yet to occur. When it does, the Corps burden in finding the least damaging practicable alternative to the overall project will be particularly heavy because the proposed Biathlon Project is a non-water dependent project. As explained by the Courts, the Corps’ burden in finding the least damaging practicable alternative is “heaviest for non-water dependent projects planned for a ‘special aquatic site,’ such as a wetlands area.” Greater Yellowstone Coalition v. Flowers, 359 F. 3d 1257, 1269 (10th Cir. 2004) (citing Holy Cross Wilderness Fund v. Madigan, 960 F. 2d 1515, 1524 (10th Cir. 1992)). In this circumstance, the “presumption is that there are ‘practicable alternatives that do not involve special aquatic sites’ and that these alternatives do ‘have less adverse impact on the aquatic ecosystem.’” Id. (quoting 40 C.F.R. § 230.10 (a)(3)). These presumptions hold unless “clearly demonstrated otherwise.” Id.

As such, the Corps may not issue the MANG and USFS the requisite 404 permit unless they provide “with independent verification by the Corps . . . detailed, clear and convincing information *proving* that an alternative with less adverse impact is ‘impracticable.’” Id. at 1269 (emphasis in original). To date, the MANG and USFS have failed to meet this burden. In fact, just the opposite is true: there is an ample amount of evidence suggesting there are a number of practicable, less harmful alternatives that achieve the purpose(s) of the project without destroying any stream channels or wetlands.

VIII. VIOLATION OF EXECUTIVE ORDER 11990

Executive Order 11990 was specifically enacted to “avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support for new construction in wetlands wherever there is a practicable alternative.” EO 11990. The goal is two fold: (1) avoid the destruction and modification of wetlands; and (2) avoid new construction in wetlands.

In order to meet these two goals, EO 11990 mandates that the USFS: (1) “take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities”; and (2) “avoid undertaking or providing assistance for new construction in wetlands” unless there is no practicable alternative and the action includes “all practicable measures to minimize harm to wetlands which may result.” EO 11990 §§ 1, 2. This mandate applies to all wetlands (i.e., ephemeral, temporary, seasonal, and semipermanent). The USFS is hereby put on notice that the proposed Biathlon Project – which will result in the destruction and degradation of two wetlands – is inconsistent with the plain language and spirit of EO 11990.

IX. NHPA VIOLATIONS

The National Historic Preservation Act (NHPA) requires the USFS to inventory and evaluate cultural resources within the HNF (16 U.S.C. § 470h-2 (a)) and before approving the Biathlon Project to “take into account the effect of the *undertaking* on any

district, site, building, structure, or object that is included in or eligible for inclusion in the National Register” and “afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.” 16 U.S.C. § 470f (emphasis added).

The USFS’s decision to issue the MANG a 25 year SUP to construct and operate a Biathlon Project on MacDonald Pass is such an undertaking requiring consideration of all cultural and historic properties. Under the NHPA’s implementing regulations, therefore, the USFS is to make a reasonable, good-faith effort to identify historic properties, determine whether identified properties are eligible for listing on the National Register (based on various criteria), assess the effects of an undertaking on any eligible historic properties found, and determine whether the effect will be adverse, and if so, avoid or mitigate any adverse effects. See 36 C.F.R. § 800. In addition, in carrying out its NHPA obligations, the USFS is to “consult with any Indian Tribe . . . that attaches religious and cultural significance” to any identified properties. 16 U.S.C. § 470 a. Executive Order 13287 (Preserve America) also requires the USFS to “prepare an assessment of the current status of its inventory of historic properties.”

In terms of identifying historic properties within the analysis area – or the area of potential effect (APE) – the USFS is to: (1) review all existing information on historic properties within the APE, including any data concerning possible historic properties not yet identified; (2) seek information, as appropriate, from other parties, organizations, and

individual likely to have knowledge of, or concern with, historic properties in the area (especially the local Tribes); (3) gather information from any Indian tribe to assist in identifying properties; and (4) take reasonable steps necessary to identify all historic properties within the analysis area. 36 C.F.R. § 800.4. Taking “reasonable steps” necessary to identify all historic properties in the analysis area includes conducting background research, consultation, oral history interviews, sample field investigations, and field surveys. Id.

In the USFS’s NEPA documentation, there is no indication that such “reasonable steps” to identify historic properties in the analysis area have been undertaken in this case. The USFS notes in the DN that approximately 32 acres of National Forest land will be disturbed. Yet, the USFS only included 16 acres in the APE:

A total of 16 acres of National Forest land would be directly affected by this project. In historic preservation terminology, these 16 acres comprise the . . . APE. This 16-acre area would be the focus of a compliance-level pedestrian inventory, as required under the National Historic Preservation Act.

Project File (D1). As such, only 50% of the APE has been inventoried for NHPA compliance. Under the NHPA, more is needed. At the very least, the USFS needs to complete a systematic inventory for all historic properties, including cultural sites, in the 32 acre APE.

CONCLUSION

In closing, thank you in advance for taking the time to carefully consider the issues raised in this administrative appeal. If you have any questions or comments, or wish to discuss the issues in greater detail, please do not hesitate to contact me or the Appellants listed below. We look forward to discussing and exploring these issues further during the informal appeal resolution meeting process.

Sincerely,

WESTERN ENVIRONMENTAL LAW CENTER

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