Appendix K

Federal Threatened and Endangered Species Correspondence

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Twin Cities Field Office
4101 American Blvd E.
Bloomington, Minnesota 55425-1665

December 19, 2008

Ms. Cheryl Martin
Federal Highway Administration
U.S. Department of Transportation
175 5th Street East (Galtier Plaza)
Suite 500
St. Paul, Minnesota 55101-2901

Dear Ms. Martin:

This responds to your September 3, 2008 letter requesting reinitiation of section 7 consultation for the reconstruction of Trunk Highway 371 from County Road 18 in Nisswa, Crow Wing County to County Road 9/42 in Pine River, Cass County. In 2004, the Federal Highway Administration (FHWA) entered into consultation with the Service due to potential impacts to the Canada lynx (*Lynx canadensis*). At that time, we issued a Biological Opinion on Canada lynx and concurred with your determination that the project would not likely affect both the bald eagle (*Haliaeetus leucocephalus*) and the gray wolf (*Canis lupus*).

Since the Record of Decision, which was signed in 2004, the project was changed to re-route TH 371 to a corridor east of the City of Pequot Lakes. On July 16, 2008, a field review was conducted by biologists among the Minnesota Department of Transportation (MNDOT) and the various reviewing agencies, including the Service, and the Corps of Engineers. Both the FHWA and the Service concluded that although the 2004 Biological Opinion remains valid and those changes to the proposed action do not meet any of the four re-initiation criteria. For clarity in the administrative record, the FHWA determined it would voluntarily reinitiate section 7 consultation with the Service.

As described in your letter, the FHWA determined that modifications and selection of the revised bypass alternative would not result in any additional impacts to listed species, nor in any deviation to the implementation of the terms and conditions of the Biological Opinion. Therefore, we concur with your determination that the proposed modifications to reroute TH 371 to a corridor east of the City of Pequot Lakes would not adversely affect any federally listed species in any manner not already contemplated in our 2004 Biological Opinion, nor result in adverse modification of proposed or existing critical impact.

This concludes section 7 consultation for proposed construction at the above location. Thank you for your cooperation in meeting our joint responsibilities under section 7 of the Endangered Species Act. If you have any further endangered species questions, please contact me at (612) 725-3548 x2201 or Nick Rowse of my staff at x2210.

Sincerely,

Tony A. Sullins,
Field Supervisor

Cc: Mr. Jason Alcott, Minnesota Department of Transportation, St. Paul, MN
Mr. John Mackner, Minnesota Department of Transportation, Baxter, MN

U.S. Department of Transportation
Federal Highway Administration
Minnesota Division
Phone (651) 291-6100

Galtier Plaza
380 Jackson Street, Suite 500
St. Paul, Minnesota 55101-2904
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July 30, 2004

Mr. Dan P. Stinnett
Field Supervisor
Fish and Wildlife Service
Twin Cities Field Office
4101 East 80th Street
Bloomington, MN 55425-1665

Re: Request for Formal Consultation Under
Section 7 of the Endangered Species Act
For the Canada lynx (*Lynx canadensis*),
Bald eagle (*Haliaeetus leucocephalus*) and
Gray wolf (*Canis lupus*)
On TH 371, From CR 18 in Nisswa
To CR 42 in Pine River
Crow Wing and Cass Counties
S.P. 1116-22

Dear Mr. Stinnett:

The Minnesota Department of Transportation (Mn/DOT) is proposing to reconstruct Trunk Highway (TH) 371 from a two-lane to a four-lane highway on its existing alignment from County Road 18 in Nisswa to County Road 42 in Pine River, a distance of approximately sixteen miles, in Crow Wing and Cass Counties, Minnesota. The segments of highway between the communities will generally be rural in design with grass medians and ditches used for drainage. Typical right-of-way width in the rural areas will be 300 feet. Through the communities, the highway will be an urban design, which includes raised medians, drainage conveyed through storm sewers, and a typical minimum right-of-way width of 150 feet. Efforts will be made to widen within the existing Mn/DOT right-of-way to the extent practical. The existing right-of-way width varies from 80 feet to over 225 feet. Several additional design options may be included to reduce, avoid or minimize adverse social, economic, and natural environmental impacts.

Canada lynx

According to survey work and the resulting summary (last updated June 2004) by Rich Baker and Yvette Anderson, Minnesota Department of Natural Resources, there is a record of Canada lynx (*Lynx canadensis*) in Cass County. Therefore, based on the survey

information provided, discussions with United States Fish and Wildlife Service (USFWS) staff, and given the nature and location of the proposed project, we have determined that the project *may affect* the Canada lynx.

Gray Wolf

It is understood that Cass and Crow Wing Counties are within the distribution range of the gray wolf (*Canis lupus*), and that the habitat surrounding TH 371 may be suitable for wolves. The proposed project occurs within both Zone 4 and Zone 5 of the Federal Gray Wolf Management Zones, neither of which are designated as critical habitat. Therefore, based on the information provided above, discussions with USFWS staff, and given the nature and location of the proposed project, we have determined that the project *may affect, but is not likely to adversely affect*, the gray wolf.

Bald Eagle

According to the information provided by the Natural Heritage Database (updated July 1, 2003) maintained by the Minnesota Department of Natural Resources, there is a bald eagle (*Haliaeetus leucocephalus*) nest located approximately 100 - 125 feet west of existing TH 371 near Nisswa Lake. The legal description of this location is Township 135N Range 29W Section NENW 11. The occurrence number identified in the Natural Heritage Database is 1196. The Mn/DOT District 3 Environmental Coordinator conducted a field evaluation in the spring of 2004 and confirmed the location of the nest site and found it to be active.

After communications with the Mn/DOT Project Engineer, the Mn/DOT District 3 Environmental Coordinator, and the USFWS Field Biologist, it has been established that construction activities will not occur within ¼ mile of the nest site between the dates of February 15 to July 15. If a need arises during construction to work in closer proximity to the nest site, the Project Engineer will contact the USFWS Field Biologist for guidance. These commitments will be drafted into the special provisions of the construction contract. Therefore, as result of the coordination and resulting decisions described above, we have determined that the project *may affect, but is not likely to adversely affect,* the bald eagle.

We, in cooperation with Mn/DOT, request that formal consultation under Section 7 of the Endangered Species Act commence for the Canada lynx. In addition, we request concurrence regarding the *may affect, but is not likely to adversely affect* determinations for the gray wolf and the bald eagle. If you have any questions regarding the proposed project or require additional information, please contact me at (651) 291-6120.

Sincerely yours,

Cheryl B. Martin

Cheryl B. Martin
Environmental Engineer

U.S. Department
of Transportation

Federal Highway
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Minnesota Division

380 Jackson Street
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September 3, 2008

Tony Sullins, Field Supervisor
U.S. Fish and Wildlife Service
Twin Cities Field Office
4101 East 80th Street
Bloomington, MN 55425

Re: Re-initiation of Section 7 Consultation
Trunk Highway 371
Nisswa to Pine River
State Project 1116-22
Crow Wing and Cass Counties, Minnesota

Dear Mr. Sullins:

The Federal Highway Administration (FHWA) is requesting to re-initiate consultation for the above referenced action due to recent changes to the proposed project. This Federal Class 1 action was evaluated in an Environmental Impact Statement (EIS) with the Record of Decision (ROD) signed in 2004. Due to the potential impacts to the Canada lynx (*Lynx canadensis*), the FHWA entered into formal consultation with the U.S. Fish and Wildlife Service (Service) in accordance with Section 7 of the Endangered Species Act of 1973, as amended (Act).

Project Description

The FHWA and the Minnesota Department of Transportation (Mn/DOT) are proposing to reconstruct a segment of Trunk Highway (TH) 371 from County Road 18 in Nisswa to County Road 2/42 in Pine River. The action will involve the expansion of the existing two-lane roadway to a four-lane divided facility. The segments of highway between the communities will generally be rural in design with grass medians and ditches used for drainage. Typical right-of-way width in the rural areas will be 300 feet. Through the communities, the highway will be an urban design, which includes raised medians, drainage conveyed through storm sewers, and a typical minimum right-of-way width of 150 feet. Several additional design options may be included to reduce, avoid or minimize adverse social, economic, and natural environmental impacts.

AMERICAN
ECONOMY

Minnesota
Federal Highway Administration

Changes in the Proposed Action Since the ROD

After the ROD was signed in 2004, in-depth negotiations began with each of the affected communities in order to further develop the project details from conceptual level drawings, used in the EIS, to detailed layouts suitable for use during the Municipal Consent process.

During these negotiations with the City of Pequot Lakes, it became increasingly difficult for the City and Mn/DOT to agree on the details of the future through-town configuration of TH 371. Most of the discussion related to implementation of access management controls required by Mn/DOT and safety concerns related to projected traffic levels of a through-town alignment.

In June 2006, the Pequot Lakes City Council adopted resolution 06-23 in support of re-routing TH 371 to a corridor east of town (bypass), along an alignment similar to Alternative 3 identified in the Draft EIS. This resolution was in contrast to city resolution 04-002 adopted during the Draft EIS phase that identified Alternative 2, or the through-town alternative as the City's preference.

In January of 2007, the City Council established the TH 371 Study Group consisting of members of the City Council and the Planning Commission. This group was established for the purpose of studying the issues and impacts of a bypass route for Highway 371, so as to develop the best corridor alignment possible and provide an equal comparison with the already developed through-town alignment.

This study group met nine times between February and August 2007, to hear expert testimony and receive public feedback regarding a bypass alignment. During these proceedings, Mn/DOT actively participated by developing conceptual bypass alignments, providing general guidance related to Mn/DOT highway design standards, and participated in a public forum to discuss a possible bypass alignment.

Throughout this process, Mn/DOT upheld the findings of the original Final EIS, and continued to recognize Alternative 2 as the preferred and selected alternative. Mn/DOT continued to objectively participate in the City's study of a bypass alignment, and advised the City Council that a change in the preferred alternative would require an official supplement to the already completed EIS process.

Following the City initiated evaluation of the alternate route; the TH 371 Study Group issued its report to the Pequot Lakes City Council entitled "Highway 371 Alternate Route Study Group Report". It captured all the discussion and testimony during the nine meeting sessions. The findings of the report stated "the Alternate Route Study Group identified no issues or impacts that would cause the City to alter the decision to route TH 371 east of downtown and in fact found many factors that favor an alternate alignment."

On December 18th 2007, the Pequot Lakes City Council passed resolution 07-32 accepting the findings of the Alternate Route Study Group. It also rescinded previous resolutions 04-002 and 06-23, and reaffirmed the City's preference for a Highway 371 bypass around Pequot Lakes.

After the Pequot Lakes City Council passed resolution 07-32 in December 2007, reaffirming its preference for the bypass option and requesting a change to the original preferred alternative, Mn/DOT was placed in a position to determine whether to accept this recommendation or move forward with the original through-town alternative.

Although accepting a change in the preferred alternative could mean an increase in potential environmental impacts for this section of TH 371, Mn/DOT believes that it is prudent to align with the City Council's desire to build a Pequot Lakes bypass.

It was determined that building the bypass would not detract from the established project goals of improved safety and reduced congestion. Mn/DOT also recognized that a bypass option would be beneficial by increasing mobility through this segment of Highway 371.

Agency Involvement/Consultation History

- In October of 2002, the FHWA sent a letter requesting the Service to serve as a cooperating agency for the TH 371 EIS. The Service has been closely involved during the environmental review/project development process.

- On July 30, 2004, the FHWA requested to enter formal consultation with the Service under Section 7 of the Act following the determination that the proposed action may affect the Canada lynx. In addition, the FHWA requested concurrence that the proposed action "may affect but is not likely to adversely affect" the bald eagle or gray wolf.

- The Service participated in several meetings with project staff and on two occasions was involved with on-site field evaluations. Throughout the process there was frequent direct communications between the agencies.

- On September 22, 2004, the Service issued a biological opinion addressing the "may affect" determination for the Canada lynx and concurred with the "may affect not likely to adversely effect" determinations for the bald eagle and gray wolf. The issuance of the biological opinion concluded the Section 7 consultation process.

- On July 16, 2008 a field review was conducted with the FHWA, Service, U.S. Army Corps of Engineers and Mn/DOT staff to discuss the bypass alternative and to determine next steps in re-initiating the consultation process. Both the FHWA and the Service concluded that although the 2004 Biological Opinion remains valid and the changes to the proposed action do not meet any of the four re-initiation criteria, for clarity in the administrative record, the FHWA would reinitiate consultation with the Service.

Changes in Listings/Designated Critical Habitat since the ROD

Gray wolf

- On March 12, 2007, the Department of the Interior announced the removal of the gray wolf (*Canis lupis*) in the Western Great Lakes Region from the Federal List of Endangered and Threatened Wildlife and Plants.

Bald Eagle

- On June 28, 2007, the Department of the Interior announced the removal of the bald eagle (*Haliaeetus leucocephalus*) from the Federal List of Endangered and Threatened Wildlife and Plants. The bald eagle remains protected under several federal laws including the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.

Canada Lynx/Designated Critical Habitat

- On July 20, 2007, the Service announced that they would review the November 9, 2006 final rule designating critical habitat for the Canada lynx (*Lynx canadensis*) after questions were raised about the integrity of scientific information used, and whether the decision made was consistent with the appropriate legal standards. Based on their review, the Service determined that it was necessary to revise the previous designation. On January 15, 2008, the U.S. District Court for the District of Columbia issued an order stating the Service's deadline for a proposed rule to revise critical habitat by February 15, 2008, and a final rule for revised critical habitat by February 15, 2009.

- The project corridor is outside of both the original, and currently proposed, designated critical habitat areas for the Canada lynx.

Terms and Conditions of the 2004 Biological Opinion

Below are the Terms and Conditions prescribed by the Service in the 2004 Biological Opinion. **The modifications and selection of the revised bypass alternative will not result in any deviation to the implementation of the Terms and Conditions.**

Habitat Continuity Measures

- Site 1 (Cullen Brook)
  The current plan is to replace the existing box culvert with a single span bridge. The bridge height would accommodate small recreational boats and the bridge width would provide wildlife passage opportunities by pulling back the abutments, thus providing a land shelf.

- Site 6 and 7 (Hay Creek and Stream South of Hay Creek)
  The current plan is to replace the existing water structures with oversized box culverts. The oversized structures would provide wildlife passage opportunities.

- Site 8 (Pine River)
  The bridge was built in 1992, and the existing condition does allow for wildlife passage. It is not known at this time whether or not the existing bridge will be replaced. The Service requires that Mn/DOT investigate ways of making the existing bridge more suitable for wildlife passage (i.e. smaller riprap, level passage shelf, etc.). If the structure is replaced, the Service recommends it be designed to accommodate wildlife passage.

- Site 9 (Norway Brook)
  The existing structure is a triple box culvert in good working condition. It has not yet been determined whether or not this structure will be replaced. The Service requires that Mn/DOT provide wildlife passage opportunities. For example, if the culvert is to remain in place, a dry box could be inserted at one or both ends to provide passage opportunities. If the culvert is removed, the Service recommends that a bridge be designed to accommodate wildlife passage by providing a land shelf.

Monitoring and Reporting Measures

- As a term of the biological opinion, the requirement of wildlife crossing monitoring will be included. The monitoring can be accomplished in a number of ways. For example, recent work in this area has involved the use of motion-detecting cameras that record each event by location, time and species. Another tool is the implementation of track boxes to help determine species-specific use. There may be other potential information gathering techniques available. However, the monitoring plan and its technical aspects will be at the discretion of the FHWA. The duration of the monitoring effort will be a minimum of three years. A final report on the design of the monitoring effort will be made available for review within one year of the date of this opinion.

- As a term of the biological opinion, at the end of each predetermined one year interval, the production of an annual report is required. The report should contain a reasonable comprehensive description of the use of the wildlife crossing features. The information should include, but is not limited to, species, date, and location. Species-specific information on vehicle/wildlife collisions should also be incorporated. One year after the completion of the three-year monitoring effort, a comprehensive final report shall be made available. This report should be a compilation of all data gathered during the monitoring effort. It is hoped that the information contained in the final report can then be used to improve the site selection process and to suggest modifications to the design recommendations.

Potential Impacts to Listed Species due to Changes in the Proposed Action

- The modifications to the proposed action will not result in impacts to the Canada lynx; that were not previously identified and addressed in the 2004 Biological Opinion.
- The changes to the proposed action do not meet any of the four re-initiation criteria articulated in the 2004 Biological Opinion.
- The 2004 Biological Opinion remains valid. The Terms and Conditions will not be affected by any of the project modifications and will be implemented as initially described.

For clarification of the administrative record, we are requesting that the Service respond indicating that the 2004 Biological Opinion remains valid, thus concluding the consultation process as defined under Section 7 of the Act. If you have any questions or require further information, please contact me at 651-291-6120.

Sincerely yours,

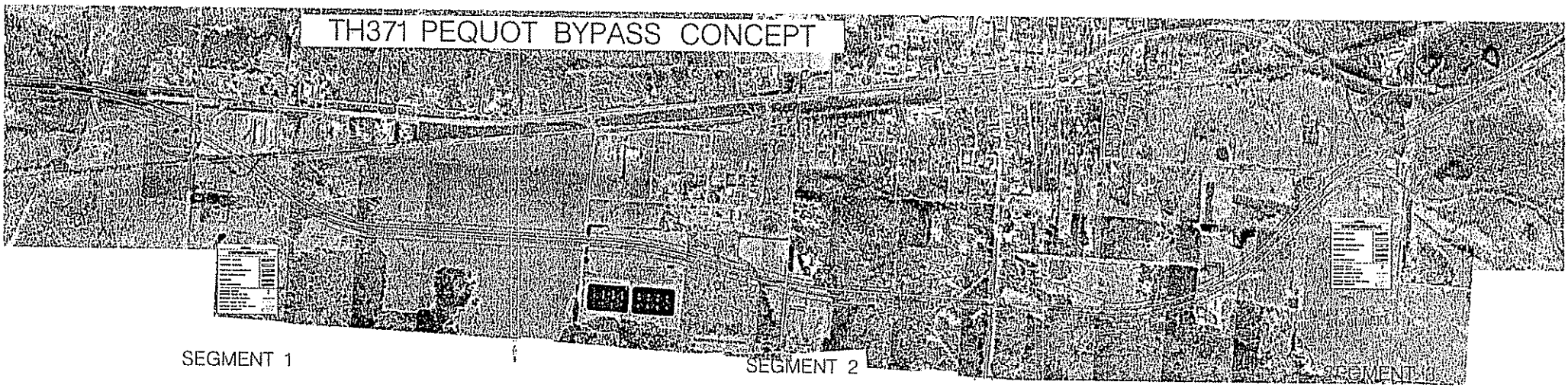
Cheryl B. Martin

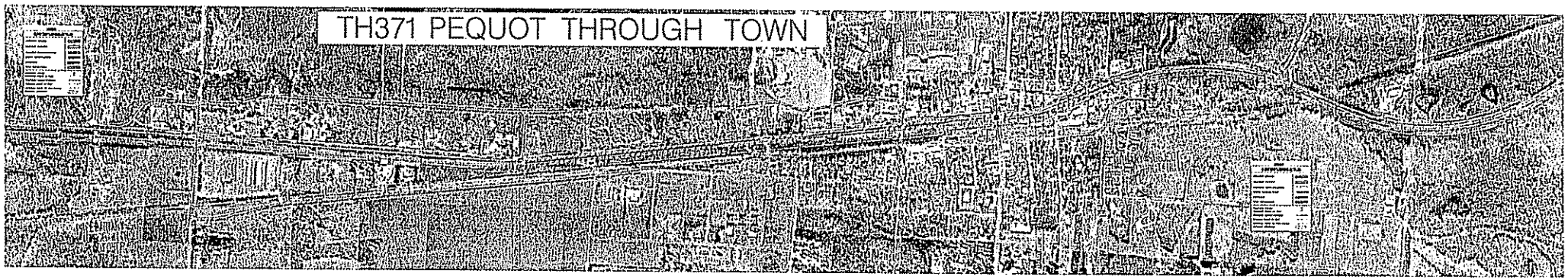
Cheryl B. Martin
Environmental Engineer

Enclosures

CBM/jer

cc: 1 USFWS – Nick Rowse
1 Mn/DOT - Jason Alcott, MS 620
1 Mn/DOT – John Mackner, MS 030
1 RF
DMS – "TH 371 Section 7 Consultation Reinitiation"


TH371 PEQUOT BYPASS CONCEPT
SEGMENT 1
SEGMENT 2
SEGMENT 3


TH371 PEQUOT THROUGH TOWN