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July 3, 2013

Montana Fish, Wildlife & Parks
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COMMENTS TO SUPPLEMENTAL EA FOR CHURCH SLOUGH

Attached you will find comments regarding the Environmental Assessment that the District Court remanded to your care. Judge Curtis clearly described your course of action, but reminded you of the detail required to meet the requirements of 12.2.431 in determining the significance of impacts. Emphasis was made on the need to consider “the severity, duration, geographic extent, and frequency of occurrence of the impact.” Right out of the book!

Judge Curtis instructed DFWP to take a “hard look” with the implicit instruction to recognize your “obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data.”

You were also instructed that the “...matter must be remanded for consideration under the additional evidence...”, but instead you chose to back up to the date of the initial 124 permit EA, thus eliminating the experience of 2 years of full activity, and one of limited activity.

The order advised you that you simply did not make the effort to determine the impacts from increased boat use, which is the primary focus of the EA. *“It appears to the Court, as discussed above, that the most significant evidence not adequately considered or addressed by FWP pertains to the potential impacts of an increase in the size and quantity of boats and personal watercraft engendered by the construction of a concrete boat ramp and turn-around.”* And you have failed again in exactly the same way—by saying you don’t have enough information, so you will wait and see if further problems develop and then hopefully the DFWP or Flathead County will try to mitigate them. The EA Rule mandates that you assess the impacts and not just pass the buck.

From the DFWP WEB SITE:

This permit EA is done in conjunction with the Montana Stream Protection Act.

Purposes of the Law

• To protect and preserve fish and wildlife resources. • To maintain streams and rivers in their natural or existing state.

Comments Attached,

Dennis Carver

**COMMENTS TO SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT
CHURCH SLOUGH JULY 3, 2013
DENNIS CARVER**

Rule: 12.2.432

Rule Title: PREPARATION AND CONTENTS OF ENVIRONMENTAL ASSESSMENTS

(3) To the degree required in (2) above, an EA must include:

(a) a description of the proposed action, including maps and graphs;

Construction Drawings that are the basis of the 124 permit are not included. It is unlikely that that any of the public comments will understand what the proposal is.

(b) a description of the benefits and purpose of the proposed action. If the agency prepares a cost/benefit analysis before completion of the EA, the EA must contain the cost/benefit analysis or a reference to it;

The Environmental Assessment does not describe the benefits of the proposed action. They cannot be assumed.

(c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action and the permits, licenses, and other authorizations required;

It seems likely that the United States Fish and Wildlife Service must be included in issues regarding the disturbance of Bald Eagles.

Input from law enforcement agencies is not included regarding activity in the park area.

Ordinance no. 7 of Flathead County applies, but enforcement provisions are not included from contact with local authoritative agencies

(d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including, where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

See detailed comments

(e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including where appropriate, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances;

Evaluation of the impacts “.....on the human population in the area to be affected by the proposed action.” Is minutely covered. Surely RULE 12.2.2.432 is more important.

(f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented;

Alternates A, B, and C are not the only alternates that are reasonably available

(g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency:

No mitigation at all throughout the document. In the determination of the need for an EIS the statement is made that that any negative impacts can be “directly mitigated by design or action taken by the FWP Commission or Flathead County”. No stipulations, and no recognition of controls by the agency or another government agency have been provided.

(h) a listing of other agencies or groups that have been contacted or have contributed information:

(i) the names of persons responsible for preparation of the EA; and

(j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis.

PREFACE COMMENTS:

“The time period of the additional analysis is preconstruction of the boat ramp and associated improvements, relying on information and research available when Flathead County’s 124 permit application was originally reviewed by FWP.”

Comment: You have taken an “in your face” attitude to the District Court Order. The order clearly states that the *facts and evidence presented in court are to be considered*. It appears FWP sees itself above the court in disregarding the order and considering only information available prior to 2010, It cannot be considered a “hard look” when you have disregarded information from 3 years of activity and AN ENORMOUS AMOUNT OF INFORMATION PROVIDED TO THE COURT.

From the Court’s order:

IV. Conclusion.

The decision of FWP fails to comply with the requirements of applicable statutes and regulations; additionally, there are facts and evidence, which the applicant and FWP failed to consider, but which have now been presented to the Court. Therefore, the matter must be remanded for consideration under the additional evidence and a full review of all reasonable and prudent alternatives, pursuant to Section 75 - 1-201(6), MCA.

Further, while the Court is not directing FWP to prepare an EIS, it is clear that a more comprehensive analysis must be undertaken, or the permit will be unsupportable. FWP is to take a "hard look" at the project and consider all pertinent data and relevant factors.

Also from the District Court Order:

In addition to the statutory and regulatory criteria, the Montana Supreme Court has articulated criteria, which the agency and the Court must consider in evaluating projects such as this:

An agency must take a "hard look" at the environmental impacts of a given project or proposal. Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data [W]hile a court is not to substitute its judgment for that of the agency, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. In other words, the Court looks closely at whether the agency has taken a hard look at the question presented. The Court does not take a hard look itself but requires that the agency does so. The Court focuses on the validity and appropriateness of the administrative decision making process without intense scrutiny of the decision itself. In this way, the Court examines the elements of the decision without interfering with the administrative authority over the decision itself.

Clearly, you admit that you did not consider all pertinent data. Instead, you chose to disregard any information presented in court and any information gained from 3 years of activity. The information provided in the time frame is critical and valuable in determining the environmental impacts of greatly increased boat traffic at Church Slough.

AFFECTED ENVIRONMENT & PREDICTED ENVIRONMENTAL CONSEQUENCES

3.1 Land Use:

The primitive access area was never 300 feet from the shoreline. What is a practical access? The entire shoreline was surveyed and private property was held for the entire length between the old county road right of way and the high water mark of Church Slough. Any water access was historically permissive. The length referred to is 2,400 feet and not 3,400 feet.

The threat of a lawsuit by Flathead Wildlife is not a basis for consideration. The public's right to access was never established. The entire basis for this concept comes from one statement by Warren Ili threatening a lawsuit if He and Flathead Wildlife did not get their way.

PRESCRIPTIVE EASEMENTS AND WAYS OF NECESSITY

***Prepared for the Eminent Domain Subcommittee of the Environmental Quality Council
by Gregory J. Petesch***

Recreational use.

Only one Montana statute specifically addresses prescriptive easements. Section 23-2-322(1), MCA, provides that a prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years. The statutory provisions are consistent with the holding in cases such as Garrett and Stamm v. Kehrer, 222 Mont. 167, 720 P.2d 1194 (1986), in which the Court held that to establish a prescriptive easement, the owner of the purported dominant tenement (prescriptive easement) must establish open, notorious, exclusive, adverse, continuous, and unmolested use of the servient tenement (other person's property) for the full statutory period of 5 years required to acquire title by adverse possession. Section 23-2-322(2), MCA, precludes the public from gaining a prescriptive easement pursuant to the stream access laws. That provision is also consistent with judicial decisions, such as Granite County v. Komberec, 245 Mont. 252, 800 P.2d 166 (1990), in which the Supreme Court determined that recreational use alone was not enough to establish a prescriptive easement. However, in Komberec, there was other evidence of use that was determined sufficient to establish the easement. In Medhus v. Dutter, 184 Mont. 437, 603 P.2d 669 (1979), the Supreme Court determined that the occasional use of a road by hunters, hikers, and neighbors (recreational use) was insufficient to raise a presumption of adverse use and did not represent the distinct and positive assertion of a hostile right notifying the owner of the property, which is necessary to transform the originally permissive use into adverse use. The court stated that in order to find a prescriptive easement, those claiming the easement must make a distinct and positive assertion of a right to use the property that is hostile to the owner's rights. The person claiming the easement must also show that the right was brought to the attention of the owner and that there was continued use of the easement for the full statutory period.

Again the court's order dictates consideration of Dr. Elliot's comments: "Under the description of the No Action Alternative, the EA states that, 'This alternative may result in risk of lawsuits against Flathead County to replace access that existed prior to abandonment of the road easement.' There appears to be no basis for this statement as the previous access was through trespass on private land. The EA needs to elaborate on why there would be risk of lawsuits. Without further explanation of this statement, the public could infer that the abandonment of the road easement was in some way illegal, which it was not."

3.2 SOILS

AND AGAIN FROM THE COURT ORDER:

The Court will not determine how FWP should have analyzed the potential erosion impacts from boat wakes, but it had clear mandate to determine "the probability that the [would] occur" in determining its significance. 12. 2. 4 31 (1) (b) . There is no determination of probability in the EA. In fact, FWP itself describes its determination in the following equivocal terms: "possible erosion from boat wakes is a secondary effect that could happen, and may cause erosion."

(FWP response, doc. #89, at 11.) It further seems clear that FWP could not have analyzed "the severity, duration, geographic extent, and frequency of occurrence of th[is] impact,"

ARM 12. 2. 431(1)(b), if it did not even determine whether the impact was likely to occur. FWP seems to justify its superficial analysis of possible impacts from increased boat use by noting that the area is currently used by boaters who own property on the slough or who enter the slough from the river. However, this ignores the requirement that cumulative impacts from the project be considered. ARM 12.2.429(7).

The EA did not quantify any soil erosion because you failed to use existing data accumulated since 2010 identifying the gross increased soil erosion from boat wakes following the opening of the boat ramp until its closure by the Court. However the EA does admit "...but some general predictions can be made based on published scientific research." It appears that you have limited the contribution from Mark Lorang (Yellow Bay) to a conversation on 4-12-13. Yet he co-authored the referenced article "Estimating Boat-Wake-Induced Levee Erosion using Sediment Suspension Measurements". A study of boat wake induced erosion in Church Slough, to be conducted by Mark Lorang was proposed to the Flathead County Parks and Recreation Board in 2010 by Jim Vashro of DFWP, but apparently never consummated.

After lengthy quotes from Mark Lorang's co-authored document, you concluded, "These measurements were not used as a basis for estimating erosion rates at the slough because the site's features were considerably different to those at Church Slough . . .". After reading this article, it seems apparent that his knowledge may have been used to greater advantage.

Again FWP intentionally has failed to analyze "*the severity, duration, geographic extent, and frequency of occurrence of this impact.*" FWP has done nothing in three years except to recommend the denial to their Commission of a no-wake proposal in 2011. In that EA, the attitude of the Department recognized the impact of increased erosion:

1. d. Adopting a no-wake boat speed on Church Slough will reduce the size and energy of boat wakes, which will reduce the rate of bank erosion. The soil type around the slough is primarily a silt loam, which is a soil comprised primarily of silt (diameter of 0.05 to 0.002 mm) with some sand and clay particles. These are small particles that may be suspended or displaced by wave action. Reduced wave size would reduce erosion of the banks and be a **beneficial impact to the shoreline** and existing vegetation.

3. a and e. No-wake boating speeds would reduce bank erosion and associated turbidity. **This would be a beneficial impact.**

4. a. Adopting a no-wake boat speed on Church Slough will reduce the size and energy of boat wakes, which will reduce the rate of bank erosion, including erosion of riparian habitats. **This would be a beneficial impact.**

4. f. Adopting a no-wake boat speed on Church Slough will reduce the size an energy of

boat wakes, which will reduce the rate of bank erosion, including erosion of wetland habitats. **This would be a beneficial impact.**

6. a and b. No-wake boating speed would reduce the noise associated with boats operated at high speeds. **This would be a beneficial impact.**

7. b. The entire shoreline along the inside half of the slough is owned by one landowner, who has placed a conservation easement on the property where 227 acres were set aside to conserve fish and wildlife values and riparian habitat. Adoption of the proposed boating rules **would have a beneficial impact**, increasing protection of these lands and values by reducing shoreline erosion, maintaining riparian habitat and improving migratory bird habitat.

And further, the EA comments include:

“Boat wakes cause accelerated bank erosion, including private property. On Church Slough, river current and wind waves have relatively little influence on erosion rates since there is almost no river current in the slough and the narrow widths of the slough reduce the potential for large wind waves to form. Also much of the slough banks are vegetated, although the vegetated widths are narrow in some reaches. Bank soils consist of fine material, silt, sand and clay particles. The no-wake rule would reduce the size of boat wakes and thus reduce their erosive potential. **This would be a benefit** and meet one of the purposes of the no-wake rule petition.”

And, from the Flathead Beacon regarding a boat ramp nearby:

Mark Deleray, a fisheries biologist with Montana Fish, Wildlife and Parks, said the increased boat traffic from the storage facility could negatively affect the river banks.

“The banks are mostly comprised of sand and silt,” he said. *“There’s no natural armament to protect them from the energy of a wave breaking on them.* What landowners are experience are beyond the natural erosion rates.”

And now you say that you cannot determine the impact????

You say in the EA under Erosion and Boats: “...if there is not enough water to float the boat, then no launch could occur.” And “not all boats would follow the restriction”

The cumulative impacts are described: *“it is not possible to determine the magnitude of future possible impacts”* your EA states. The information is available.

I noted the boating for the last 8 days of June and I promise you that the number of boats entering from the river has been greatly exaggerated by DFWP. Although numbers have not been present, the reference of lack of knowledge is frequently used to underline that boats enter from the river. The 8 days from June 22 through June 29, 2013 included the following:

7	Kayaks	
8	Small fishing boats (less than 50 HP)	
2	Inflatable Pontoon Boats	
3	Jet Boats	Left after 20 min.
1	Canoe	
9	Eagles	

A normal 8 days during peak use periods in 2010 and 2011 when the ramp was fully open, I have commonly observed (and photographed) 6-8 boats entering the water and leaving about 3-4 times per day. The traffic is constant on heavy use days. Some stay 3-4 hours, and a few stay more than 8 hours. So, that comparison would be 18 to 32 boats per day for 8 days, and that is a total of 144 to 256 boats and no eagles, compared to 22 boats without the ramp and 9 eagles. That is a 7 to 12 multiple use increase. Almost all boats entering from the ramp are jet boats or large boats (98%). Comparing motorized craft from an open ramp (144-256) to a closed ramp (12) is a 12-20 to 1 increase. We all know that it is a huge impact. The ramp was open the two summers of 2010 and 2011, more than an adequate period of time to witness the quantity of impacts. It can be mitigated, but you can't just say it is difficult to determine! The court has already chastised the FWP for that specific previous action.

And remember, most ski boats or wake boats or wave runners entering Church Slough from the river are transient and do not stay in the slough for a very long period of time. As stated above, those using the ramp have no other place to be for the day so stay around and these boaters are far different than fishing boats. Some run from one end of the Slough to the other at high rates of speed 20-50 times in a day and frequently with high impact from skiers or wake boats that intentionally create huge wakes.

Again, you only have to look on a busy day to see cloudy water resulting from intense activity in shallow water overlying fine-grained soils. The entire slough becomes murky! Take a look.

3.4 Wildlife Species:

Grizzly Bear: It is interesting to note that you have dealt with the Grizzly bear in 2 sentences by merely saying "there have been no recorded observations of grizzlies near Church Slough." I just don't get it. On the EA for North Shore State Park August 27, 2008:

The draft EA included a description of grizzly bear use in Section 3, Affected Environment, because FWP is aware of seasonal grizzly bear use of the riparian corridor along the Flathead River and sloughs in the late summer and fall when fruits ripen.

***Grizzly Bears:** Listed by the USFWS as threatened and a Tier 1 mammal species, grizzly bears are known to frequent the Flathead Valley river sloughs*

In this North Shore EA document, locations of radio-collared grizzly bears are shown to be within one-quarter mile of Church Slough.

So, clarify please: Are they or aren't they??

Bald Eagles:

And From Joe Elliot, whose comments the Court Order instructs you to regard:

"Church Slough is an important foraging area for bald eagles. Increased boating use on the slough could displace bald eagles from foraging activities and adversely affect their ability to obtain prey to feed their chicks."

Perhaps the most fatal flaw in the EA is FWP's complete disregard of Church Slough as an important foraging Area for Bald Eagles. Roosting Trees are directly across the slough from the boat ramp The ¼ mile and ½ mile concepts do not include Secondary and Cumulative Effects!! Of course the

construction of the site probably contributed very little, if any cause of disturbance. But now add 20+ boats, wave runners, jet-ski's, and wake-boats daily, each making numerous tracks from one end of the slough to the other, all with loud and intense maneuverings for water skis, and just turning in circles for hours for jet skis, etc. This is an observed action that has repeatedly been intensive enough to turn the clear, shallow waters murky.

Church Slough at the north end is ¼ mile from two of the eagle nests that are at the confluence of the slough and the Flathead River. Boats pull skiers at random in this area, and many boats turn upstream under the eagle nests and proceed upriver under the nests. Water skiing frequently occurs within vision of eagle nest from boats entering the water at the county boat ramp. While the eagles do not see the boats entering the water, they are visible within less than one minute.

I have many observations of Bald Eagle Foraging in Church Slough. Recent Pictures attached. Now, I really don't think these events would be possible, or at least likely, in the midst of water skiing and jet skiing activity of the level experienced in 2010. You can mitigate this, and methods should be part of your EA. Eg. Limited parking, horsepower restrictions.

In three EA's (No Boat Wake Proposal, the 1st 124 Permit EA, and the Supplemental EA ordered by District Court) you have displayed wanton disregard for secondary and cumulative effects of proposed action. The first two EA's totally disregarded BGEPA, and the supplemental EA does not even discuss secondary and cumulative effects to the foraging and roosting habits of resident Bald Eagles.

By the court's order: *Cumulative impact is defined as collective impact on the environment when considered in conjunction with other past and present actions. ARM 12.2.429 (7).*

Incredibly, you do not even mention that the water body of Church Slough is impacted, but rather say the terrestrial habitat won't change.

By the court's order: *Secondary impact is defined as further impact to the environment that may be "stimulated or induced by or otherwise result from a direct impact of the action." ARM 12.2.429 (18).*

Your "secondary" impacts statement merely states that the action of constructing a boat ramp may "increase the number of wildlife viewers..." The water body and the foraging area of the slough is immensely impacted as a result of the installation of the ramp for increased public use. Come on FWP; what is the impact for an estimated large increase in boat traffic as a secondary impact.

So let's take a look at the Bald and Golden Eagle Protection Act (BGEPA).

MONTANA GUIDELINES:

Although compliance with federal and state guidelines is voluntary, disturbance of eagles is prohibited by law. These guidelines are recommendations based on the best available science and proven conservation measures that minimize disturbance to bald eagles. They are designed to provide land management agencies, land use planners, biologists, developers, and others with recommendations for minimizing the potential of violating federal and state regulations. Compliance with these guidelines does not remove liability if bald eagles are disturbed while completing an activity or project. However, federal and state agencies may focus on investigating and prosecuting individuals and companies that disturb bald eagles without regard for their actions or fail to implement conservation measures recommended in these guidelines.

The definition of “disturb” includes any activity that will cause, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior. Civil penalties for violation of BGEPA start at \$100,000 or two years imprisonment or both for a first violation. Felony convictions carry a maximum fine of \$250,000 or two years imprisonment or both. Fines are doubled for organizations.

Any activity that disrupts breeding, feeding, sheltering, and roosting behavior and causes, or is likely to cause, nest abandonment or reduced productivity, is considered disturbance and is a violation of the BGEPA and state regulations.

The recommended primary seasonal restriction is from approximately February 1 through August 15th.

These concentrated foraging areas and associated roost sites, when used, should receive similar protection as nest sites during the appropriate season of use.

Foraging area means an area where eagles regularly feed during one or more seasons.

A foraging area is defined as “an area where eagles feed, typically near open water such as rivers, lakes, reservoirs, and bays where fish and waterfowl are abundant, or in areas with little or no water (i.e., rangelands, barren land, tundra, suburban areas, etc.) where other prey species (e.g., rabbits, rodents) or carrion (such as landfills) are abundant”. (National Bald Eagle Management Guidelines, May 2007).

RECOMMENDATIONS FOR AVOIDING DISTURBANCE AT FORAGING AREAS AND COMMUNAL ROOST SITES

1. Minimize potentially disruptive activities and development in the eagles’ direct flight path between their nest and roost sites and important foraging areas.
2. Locate long-term and permanent water-dependent facilities, such as **boat ramps** and marinas, away from important eagle foraging areas.
3. Avoid recreational and commercial boating and fishing near critical eagle foraging areas during peak feeding times (usually early to mid-morning and late afternoon), except where eagles have demonstrated tolerance to such activity.
4. Do not use explosives within 1/2 mile (or within 1 mile in open areas) of communal roosts when eagles are congregating, without prior coordination with the U.S. Fish and Wildlife Service and your state wildlife agency.
5. Locate aircraft corridors no closer than 1,000 feet vertical or horizontal distance from communal roost sites.

Other items referenced:

[Federal Register Volume 74, Number 175 (Friday, September 11, 2009)]
[Rules and Regulations]
[Pages 46836-46879]

Below are examples of what is not programmatic take:

1. Construction of a boat ramp, with or without long-term indirect effects that take eagles (boat traffic).

For example, the installation of a boat ramp 500 feet from an important eagle foraging area may not disturb eagles during the construction phase, but the ensuing high levels of boat traffic through the area during peak feeding times may cause disturbance.

Disturbance may also result from human activity that occurs after the initial activities (boat-launching ramps referenced)

Usually, whoever has the authority to affect the level of take will be the entity responsible for the take.

The Service focuses its enforcement resources on investigating and prosecuting individuals and companies that take migratory birds without regard for the consequences of their actions and the law, especially when available conservation measures have not been implemented.

3.4 Aesthetics and Recreation Opportunities

FWP completes angling pressure surveys every two years. So why is it not included? Again the EA was to analyze “additional information”. You may contend that this was not information presented to the court, so it doesn’t count. Oh well, you have six years. But don’t you think the last 4 would have been valuable for this EA instead of just including the data through 2008?

Old Steel Bridge Fishing Access Site is upstream and not downstream. It would be a rare event to ever see a boat entering at this point to end up in Church Slough.

Alternative B: (no information to predict and quantify increase in boating use) Again, contrary to the Court Order:

“It appears to the Court, as discussed above , that the most significant evidence not adequately considered or addressed by FWP pertains to the potential impacts of an increase in the size and quantity of boats and personal watercraft engendered by the construction of a concrete boat ramp and turn-around “

Alternative B: (Leave it up to the Commission if a negative impact occurs) Again, contrary to the Court Order:

“FWP 's after-the-fact insistence that it could not really do anything about the concern of increased boat usage is simply not credible. Its approach, to just permit the project, including the concrete boat ramp, anyway, and then, if deterioration occurs, impose boating, fishing

and/or hunting restrictions seems contrary to the entire analytical framework set up in the Stream Protection Act .”

Alternative B: (Secondary: Trees “planned” to be planted by the County). The County planted 6 trees 3 years ago. Seems like they are done.

3.5 Water Resources

As stated before, one only has to visit the Slough on a busy, active day when the ramp is open to a large number of intense boaters, pursuing water skiing and circling jet skis. The water quality is greatly impacted. Just take a look. The Slough is shallow with fragile soils. The water turns to a cloudy mess.

And, the only Secondary impact to No Action is that “...more private ramps may be built along the shoreline...” ? And this compares with the only Open Ramp secondary impact that some localized flood may occur at the boat ramp area??

*Alternative A (No Action) - Secondary: A potential consequence of the No Action Alternative is that without a permit the county would not have the opportunity to build the boat ramp, **which could lead to an increase in the number of private boat ramps being built along the shoreline of Church Slough.** An increase in private boat ramps may contribute to negative impacts from water quality within the slough attributed to a decrease in shoreline vegetation from construction of ramps and increase sediment from shoreline erosion into the water.*

*Alternative B (Open Ramp) - Secondary: A minor secondary impact to water resources would be that the breaching of the channel bank would create an opening for floodwater to extend into the interior of the property. As previously noted, portions of the property are designated within a 100-year floodplain. **The boat ramp, parking area, and turn-around may become inundated with water if a flood event occurs.***

An similarly, you find the only cumulative impacts to Water Resources to be that for the No Action Alternative is an “... incentive for private landowners adjacent to the slough to construct their own ramps.”?? And the only cumulative effect to Water Resources for and open and active ramp is that this action “...may decrease the potential for private landowners adjacent to the slough from building their own boat ramps...”???

*Alternative A (No Action) Cumulative: Use of the water resources of the slough may be impacted in the future by additional development of residences and associated infrastructure (private boat ramps, septic systems, etc.). **The lack of a formal boat ramp may be an incentive for private landowners adjacent to the slough to construct their own ramps.** The slough would continue to be a destination for anglers and wildlife viewers in watercraft who access the slough from the Flathead River or private property.*

*Alternative B (Open Ramp) Cumulative: **The construction of a public ramp on Church Slough may decrease the potential for private landowners adjacent to the slough from building their own boat ramps,** thus decreasing potential for the channel bank’s height from being disturbed in numerous locations. Numerous bank breaches may contribute to the increased flooding of low-lying areas close to the slough.*

And I comment that these are really not relevant factors and are merely fragmented, capricious thoughts without basis. I believe you will find no record of any property owner on Church Slough requesting a boat ramp permit or constructing a boat ramp in the era of current permitting requirements. And, it is extremely remote that you will in the future. Please speculate realistically if you will, or kindly elaborate on your speculation.

4.0 Need for an Environmental Impact Statement.

You state that the assessment has identified a “limited number of minor negative impacts from the evaluation of all the alternatives”. But you sorely failed to present the secondary and cumulative impacts. One more time from the District Court from the previous EA and carrying through to this supplemental EA:

“It appears to the Court, as discussed above, that the most significant evidence not adequately considered or addressed by FWP pertains to the potential impacts of an increase in the size and quantity of boats and personal watercraft engendered by the construction of a concrete boat ramp and turn-around “

Your suggestion that any negative impacts can be “directly mitigated by design or action taken by the FWP Commission or Flathead County” is simply a continuation of denial of responsibility, and a quote from the court again:

Its [FWP’s] approach, to just permit the project, including the concrete boat ramp, anyway, and then, if deterioration occurs, impose boating, fishing and/or hunting restrictions seems contrary to the entire analytical framework set up in the Stream Protection Act .”

THE SEVERITY, DURATION, GEOGRAPHIC EXTENT, AND FREQUENCY OF OCCURRENCE OF THE IMPACT have not been presented as required. FWP is required to articulate a rational connection between the facts found and the choice made.

GENERAL DISREGARD TO THE DISTRICT COURT ORDER

The Court will not determine how FWP should have analyze the potential erosion impacts from boat wakes, but it had clear mandate to determine "the probability that the impact [would] occur" in determining its significance. ARM 12. 2.431 (1)(b). There is no determination of probability in the EA. In fact, FWP itself describes its determination in the following equivocal terms: " possible erosion from boat wakes is a secondary effect that could happen, and may cause erosion." (FWP response, doc. #89, at 11.) It further seems clear that FWP could not have analyzed "the severity, duration, geographic extent, and frequency of occurrence of th[is] impact," ARM 12.2.431 (1) (b), if it did not even determine whether the impact was likely to occur . FWP seems to justify its superficial analysis of possible impacts from increased boat use by noting that the area is currently used by boaters who own property on the slough or who enter the slough from the river. However, this ignores the requirement that cumulative impacts from the project be considered. ARM 12.2.429(7).

The District court clearly understood that the FWP’s analysis was “**superficial**”, yet the supplemental EA has used this same phrase approximately 18 times in it’s text.

By the court:

“Therefore, FWP must first properly assess the significance of impacts identified by Noble and Elliott.”

Noble and Elliott conclude that a traffic study should have been complete as a part of the analysis of the

permit application.

By the court:

In determining whether or not impacts are significant, the pertinent criteria include the severity, duration, geographic extent, and frequency of occurrence of the impact, the probability that the impact will occur, the quantity and quality of each environmental resource or value that would be affected, and the importance to the state and society of each environmental resource or value that would be affected. 12. 2. 431, ARM.

By the court:

FWP 's subsequent EA lists all such " possible impacts" as minor or non-existent, and gives no explanation for this shift, despite its responsibility to provide "a statement of reasons why potential impacts are non-significant," and to " articulate a rational connection between the facts found and the choice made." Clark Fork Coalition , supra at P 47 - 48.

By the court:

FWP 's after-the-fact insistence that it could not really do anything about the concern of increased boat usage is simply not credible. Its approach, to just permit the project, including the concrete boat ramp, anyway, and then, if deterioration occurs, impose boating, fishing and/or hunting restrictions seems contrary to the entire analytical framework set up in the Stream Protection Act.

By the court:

It appears to the Court, as discussed above, that the most significant evidence not adequately considered or addressed by FWP pertains to the potential impacts of an increase in the size and quantity of boats and personal watercraft engendered by the construction of a concrete boat ramp and turn-around.

By the court:

Given FWP 's concerns about this area expressed as far back as 2007, it seems doubtful that a complete analysis of all available information will lead to the conclusion that the project is "a routine action with limited environmental impact" ARM 12. 2.432(2).