

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date March 23, 1976

To Maynard F. Marsh, Commissioner

Dept. Inland Fisheries & Wildlife

From Joseph E. Brennan

Dept. Attorney General

Subject State Authority to Conserve Endangered or Threatened Species

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You have asked that this Department supply you with a Memorandum of Law certifying that, and detailing precisely how, Maine law meets the four criteria set forth in section 6(c) of the Federal Endangered Species Act, 16 U.S.C. §1535, so as to permit the Secretary of the Interior to enter into a cooperative agreement with the State for the conservation of endangered or threatened species. I am happy to report that I am able to so certify. The Maine Endangered Species Act, 12 M.R.S. §§ 3201, et. seq., passed in 1975 for the express purpose of providing the Commissioner of Inland Fisheries and Wildlife with the necessary legal authority to enter into such agreements, meets each of the four criteria in the following manner:

I. Authority to Conserve Resident Endangered or Threatened Species. Section 6(c)(1) of the Federal Act, 16 U.S.C. §1535(c)(1), requires that under the State program

"authority resides in the State agency to conserve resident species of fish or wild-life determined by the State agency or the Secretary to be endangered or threatened."

Two requirements are thereby imposed. First, the State agency must have the authority to "conserve," as that term is defined by Section 3(2) of the Federal Act, 16 U.S.C. §1532. Second, such authority must extend to all species determined by either the State or the Secretary to be endangered or threatened. The Maine Act meets both of these criteria.

A. Authority to Conserve. The Federal Act defines the term "conserve" to include the following management techniques:

"research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, . . . regulated taking." 16 U.S.C. §1532(2).

Section 3203 empowers the Commissioner to utilize the first two of these techniques:

"The Commissioner may conduct investigations in order to develop information relating to population size, distribution, habitat needs, limiting factors and other biological and ecological data relating to the status and requirements for survival of any resident species of fish and wildlife whether endangered or not; and may develop programs to enhance or maintain those populations."

Sections 3207, 3208 and 3209 satisfy the Federal Act's "law enforcement" requirement by respectively prohibiting the exportation, harming, or possession of endangered or threatened species; providing penalties for the violation of such prohibitions; and providing for the enforcement of such prohibition by game wardens, state police or police officers. Finally, Section 3205 of the Maine Act authorizes the Commissioner to employ the remaining techniques enumerated in the Federal Act:

"The Commissioner may establish such programs as are necessary to bring any endangered or threatened species to the point where it is no longer endangered or threatened. These programs may include the acquisition of land or aquatic habitat or interests therein, propagation, live trapping, transportation and, in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, regulated taking."

I note also that in a letter of August 29, 1974 from the Directors of the National Marine Fisheries Service and the United States Fish and Wildlife Service to the Governor of Maine, it is further requested that this Memorandum outline restrictions on taking; importation into the state and export from the state. Sections 3207(2) and 3207(1) satisfy the first and third of these requirements and Sections 3207(2) and (3) together, prohibiting transportation and possession generally, provide sufficient legal basis for the conviction of anyone importing an endangered or threatened animal across the Maine border.

B. Scope of Conservation Authority. Section 1535(c)(1) of the Federal Act requires that the scope of the state agency's authority extend to "resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened." In satisfaction of this provision, Section 3202 of the Maine Act defines an endangered or threatened species to be one so designated by either the Commissioner or the Secretary.

II. Authority to Conduct Investigations. Section 1535(c)(3) requires that the state agency be authorized:

"to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife."

Section 3203 of the Maine Act, quoted above, explicitly confers this authority on the Commissioner.

III. Authority to Establish Conservation Programs. Section 1535(c)(4) requires that the state agency be authorized:

"to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered species or threatened species."

Section 3205 of the Maine Act, quoted above explicitly confers this authority on the Commissioner.

IV. Provision for Public Participation. Section 1535(c)(5) requires that the state program make:

"provisions. . . for public participation in designating resident species of fish or wildlife as endangered or threatened."

Section 3204 of the Maine Act sets forth the procedures whereby the Commissioner may designate endangered or threatened species, and specifies that:

"no species shall be added to or deleted from [the] list unless notice of such change is published and a public hearing thereon has been held in accordance with the procedures established in Section 1960-A."

This Section, 12 M.R.S. §1960-A, provides for notice by publication of such hearings at least two weeks in advance, except in emergency circumstances in which the time may be shortened to five days. The rights of the public to participate in the decision making process are thereby guaranteed.

I hope the above adequately demonstrates the basis for my conclusion that Maine Law meets the criteria set forth in the Federal Act. If anything should require further amplification, please let me know.

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JOSEPH E. BRENNAN  
Attorney General