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May 28, 2008

VIA E-MAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

Roland D. Martin, Commissioner
Maine Department of Inland Fisheries & Wildlife
284 State Street
41 State House Station
Augusta, Maine 04333-0041

Dirk Kempthorne, Secretary
U.S. Department of the Interior
1849 C. Street, N.W.
Washington, D.C. 20240

John Baldacci, Governor
Office of the Governor
#1 State House Station
Augusta, Maine 04333-0001

Steve Rowe
Attorney General
6 State House Station
Augusta, Maine 04333

Re: ILLEGAL TAKE OF CANADA LYNX IN MAINE BY TRAPPING

Dear Sirs:

We are writing to request that you take immediate action to remedy the Maine Department of Inland Fisheries and Wildlife's (DIFW) ongoing violations of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*. In particular, by authorizing a trapping program that directly results in the "take" of Canada lynx, a federally listed threatened species, DIFW is violating Section 9 of the ESA's prohibition of the take of listed species. This letter serves as an official 60-day notice from the Animal Welfare Institute and the Wildlife Alliance of Maine of intent to sue Commissioner Roland Martin over these violations, as required under the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

The ESA's Statutory Framework

Under Section 9 of the ESA, it is illegal for any person¹ to "take" any endangered species except when permitted under a conservation plan. 16 U.S.C. § 1539. "Take" as defined by the ESA means to "harass, harm, pursue, shoot, wound, kill, trap, capture, collect, or attempt to engage in

¹ "Person" is defined as "any individual, corporation, partnership, trust, association, or other private entity; or any officer, employee, agent, department, or instrumentality of the Federal government, of any State, municipality, or political subdivision of any State..." 16 U.S.C. § 1532(13).

any such conduct.” 16 U.S.C. § 1532(19).² As the courts have held, “take” includes “every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” *Defenders of Wildlife v. Environmental Protection Agency*, 882 F.3d 1294, 1300 (8th Cir. 1989). The person “taking” (i.e., trapping) an animal listed as a threatened or endangered species does not need to know that the animal he/she is trapping is listed to violate the ESA. *See U.S. v. McKittrick*, 142 F.3d 1170, 1177 (9th cir. 1998) *citing United States v. St. Onge*, 676 F.Supp. 1044 (D. Mont. 1988).

A person violates the ESA if he/she “attempt[s] to commit, solicit[s] another to commit, or cause[s] to be committed, any offense...” 16 U.S.C. § 1538(g). Thus, the ESA prohibits the regulatory acts of a state governmental agency “that bring about the acts that exact a taking...” *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (Court found state agency that licensed fishermen to use certain nets that resulted in taking of endangered whale guilty of take). “[G]overning agencies cause a taking under ESA if such agency authorizes activities that result in said taking.” *Animal Protection Institute et al. v. Holsten*, Civ 06-cv-03776-MJD-RLE (D. Minn. March 31, 2008) *citing Defenders of Wildlife v. EPA*, 882 F.2d at 1300, 1301.

Identical to the situation here, in *Animal Protection Institute* the Court held that the Commissioner of the Minnesota Department of Natural Resources violated ESA Section 9’s prohibition on unauthorized take because the agency’s trapping program was the proximate cause of numerous lynx takings. *Id.* The Court stated:

In order to legally engage in trapping in Minnesota...one must obtain a license and follow all governmental regulations governing trapping activities. Thus, for purposes of determining proximate cause, the DNR’s licensure and regulation of trapping is the “stimulus” for the trappers’ conduct that results in incidental takings. Accordingly, the trappers conduct is not an independent intervening cause that breaks the chain of causation between the DNR and the incidental taking of lynx.

API v. Holsten, at 13.

Unlawful Taking of Lynx

The U.S. Fish and Wildlife Service (FWS) listed Canada lynx as a threatened species in 2000. The lynx is also listed as a state Species of Special Concern in Maine. Maine’s resident lynx population is estimated at only 200-500 individuals. However, according to the FWS, recent evidence indicates that Canada lynx populations may be on the decline in Maine. One of the reasons for the lynx’s threatened status is trapping, which continues to be a significant source of lynx take throughout the country, including in Maine where lynx are taken in traps set for other animals. Thus, DIFW’s authorized trapping program continues to result in the take of Canada lynx in violation of Section 9 of the ESA.

² The ESA’s “take” prohibition applies equally to threatened species unless otherwise stated in a species-specific rule promulgated by the FWS. 16 U.S.C. § 1533(d).

This take of lynx in traps intended for other animals continues to occur even after the October 4, 2007 consent decree entered into by another conservation organization, the Animal Protection Institute (API) and Commissioner Martin. The consent decree was entered to settle a lawsuit filed by API concerning the unlawful take of lynx arising out of DIFW's trapping program. This consent decree imposes certain restrictions on trapping activities in Wildlife Management Districts (WMDs) 1, 2, 3, 4, 5, 6, 8, 9, 10, and 11. The consent decree does not cover WMDs 7 and 12 through 29. One such restriction prohibits the use of foothold traps (also known as leghold traps) that have an inside jaw spread of more than 5 3/8 inches unless such traps are fully or partially covered by water at all times. Leghold traps with an inside jaw spread of 5 3/8 inches or less,³ however, are still allowed for use in land and water sets under the consent decree within the core lynx area.

During the 2007 trapping season, between the dates of October 15, 2007 through November 13, 2007, at least eight (8) lynx were caught in leghold traps authorized by DIFW's trapping program. Six of them were caught in leghold traps of 5 3/8 inches or less – under the consent decree's size requirement. In addition, one lynx was caught in WMD 18 and another in WMD 7, neither of which are included in the area covered by the consent decree. There is no data confirming the animals' survival post release. Nor do these numbers account for additional numbers of lynx that were likely trapped but not reported.

Importantly, more lynx were trapped in the one month period after the consent decree was entered into and trap restrictions put in place than during entire trapping seasons in previous years. In 2005 at least five (5) lynx were reported trapped in traps set for other species; in 2006 at least four (4) lynx were reported trapped in traps set for other species; and in 2007 - after the consent decree and implementation of trapping restrictions - that number increased to eight (8) reported lynx trapped in a twenty-nine day time period; this is equivalent to one lynx trapped every 4 days during the trapping season. Again, these figures include only the reported lynx taken in traps and do not include unreported take.

Hence, the trap restrictions included in the consent decree have failed to protect lynx from traps set for other species in Maine. By continuing to permit and regulate trapping that results in the illegal take of the threatened lynx, DIFW is guilty of violating the ESA. *See API v. Holsten*, holding that the state agency's licensure of trapping and the regulations concerning trap use directly resulted in the take of lynx and that additional takes were likely to continue in the future, in violation of Section 9 of the ESA.

Requested Action

The limits established by the consent decree have not worked to protect lynx from traps. Lynx are still being taken illegally in traps set for other animals, in traps smaller than those covered by the consent decree, and in areas not covered by the consent decree. If DIFW refuses to take immediate action to protect lynx from traps more lynx will be illegally taken, further violating the ESA, and thus we will be forced to pursue legal action before the start of the upcoming

³ In Maine's Trapper Information Booklet and its trapping reports leghold traps are referred to by trap size. For example, a leghold trap with a jaw spread of 5 3/8 inches equates to a size #2 trap.

trapping season. An injunction is an appropriate remedy in this instance because any threatened harm to a listed species is “per se irreparable harm,” and in such cases the public interest always favors the imposition of an injunction. *Loggerhead Turtle v. County Counsel of Volusia County*, 896 F.Supp. 1170, 1178 (M.D. Fla. 1995).

We are hopeful that DIFW will remedy the situation of the illegal take of lynx due to its trapping program. Please contact us if you believe that any of the above analysis of fact or law is in error or if you wish to discuss this letter further.

Sincerely,

/s/ Judith M. Brawer

Judith M. Brawer

Attorney for Animal Welfare Institute
and Wildlife Alliance of Maine

cc: Camilla H. Fox, Animal Welfare Institute
Daryl DeJoy, Wildlife Alliance of Maine