SIERRA CLUB
MAINE CHAPTER

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To: Members of the Joint Committee on Environment and Natural Resources
From: John M. Fitzgerald, for Sierra Club Maine
Date: April 5, 2023
Re: **Testimony in Support of LD 1246**: *An Act to Include Endangered and Threatened Species Habitat in the Definition of "Significant Wildlife Habitat" Under the Natural Resources Protection Act*

Senator Brenner, Representative Gramlich, and the members of the Joint Committee on Environment and Natural Resources,

I am testifying on behalf of Sierra Club Maine, representing over 22,000 supporters and members statewide. Founded in 1892, Sierra Club is one of our nation's oldest and largest environmental organizations. We work diligently to amplify the power of our 3.8 million members nation-wide as we work towards combating climate change and promoting a just and sustainable economy. To that end, we urge you to vote 'ought to pass' on **LD 1246: *An Act to Include Endangered and Threatened Species Habitat in the Definition of "Significant Wildlife Habitat" Under the Natural Resources Protection Act.***

We urge the Committee to report the vote 'ought to pass' with the recent amendment. We also suggest that the Committee amend the bill if necessary to ensure that the interagency consultation process it would enhance is further strengthened to reflect the very effective but flexible process that the Federal Government has had for decades with respect to Federally listed species.

In my personal capacity as a former legislative aide to a member of Congress who served on the Committee amending the ESA in 1982 and as chief counsel at Defenders of Wildlife from 1984-94, with similar work after that, I am quite familiar with the Federal ESA and the interagency consultation process under §7(a)(2) of the ESA. We worked with Congress to enhance the ESA in 1988 by suggesting that Congress require objective and measurable criteria in recovery plans and more frequent reports on progress so as to reassure all parties as to what recovery would take as §4 now requires, and what is now §11(d) to provide rewards to aid enforcement and for providing that the fines imposed on those who harm listed species should be redirected to help pay for recovery work by the states. The ESA is seen as a model for all the world with 193 nations now committed to adopting procedures based on it as they implement the 1992 Convention on Biological Diversity, which the US signed but has not yet ratified due to our requirement of a super-majority of the Senate for such ratifications. L.D. 1246 will take Maine one important step closer to the Federal ESA, however there is still room for major improvement in Maine's Natural Resource Protection Act and its interface with Maine's ESA to bring us closer to Federal ESA standards.

A further amended bill, developed as suggested in recommendations below, will enhance both the recovery of listed species and the confidence of landowners and investors that they can proceed with greater assurance to use their properties without running afoul of the law after they have invested in improvements or alterations. As with the habitat conservation planning processes under

Section 7(b)(4)[1] or 10(a)(2)[2] of the Federal Endangered Species Act (ESA) , there is usually a way forward that does not result in limitations that deny a reasonable return on investment. In fact, properties covered by such plans are often more attractive to buyers given that the assurances already received in writing ensure a way forward as well as providing a natural setting that enhances the value for humans and wildlife alike.

Within the time allowed I will summarize our recommendations that are listed below but in essence they are:

1) That you include the Department of Marine Resources in the interagency consultation as well as the DIFW; and
2) That you add a provision providing affected citizens standing to sue in state court to enforce the Maine ESA and the Maine NRPA after providing 60 days notice of intent to sue, and awarding attorneys' and expert witness' fees to the citizens upon their securing substantial relief; and
3) That you recommend enactment as amended and note in your Committee report that the assurances provided by this process are investment friendly as well as wildlife friendly in providing guidance early on as to proper habitat management.

Thank you for the opportunity to submit testimony in support of this important improvement in efficient conservation management. Please see detailed recommendations and context below for future amendments to this bill or future legislation, and I'd be happy to discuss with the committee at a future time or during the work session. Again we urge you to vote 'ought to pass' on L.D. 1246.

Sincerely,

John M. Fitzgerald
Sierra Club Maine
Legislative Team Co-Chair

Recommendations for further strengthening the Maine Natural Resources Protection Act:

1. **Regarding an amendment to the interagency consultation process**:

   The question of whether such an amendment is necessary depends on the ability of the DEP and MDIFW and affected persons to assist landowners and enforce protections in a way that will be sufficient to accomplish the conservation of habitat in sufficient quality to support a recovering population or population segment of state-listed species. We suggest amending the bill to state that this bill augments and does not replace existing provisions of the State Endangered Species Act (ESA).

   Maine's ESA provides for habitat conservation and plans for incidental take like the Federal ESA. Therefore, this bill, if enacted, <u>should clearly state that it is in addition to and not instead of existing conservation laws and regulations</u> of the State and local governments of Maine.

[1] https://www.fws.gov/laws/endangered-species-act/section-7#:
[2] https://fws.gov/laws/endangered-species-act/section-10

Maine's ESA forbids state agencies and municipal governments from harming listed species' habitat but does not include the interagency consultation that this bill would require to make that provision more effective. See current statute here: https://www.mainelegislature.org/legis/statutes/12/title12sec12806.html

Our allies at the Maine Audubon have noted that for proposed development on more than 20 acres, MDEP is required to consult with MDIFW on strategies to avoid and minimize the impacts to endangered and threatened species. A jurisdictional gap between the agencies often prevents the consideration of these impacts in the review of applications for the smaller projects that make up the majority of development applications.

Lawmakers can close this gap by modifying the Natural Resource Protection Act (NRPA) to ensure endangered and threatened species habitat is treated as a "Significant Wildlife Habitat," just as lawmakers modified NRPA to better conserve vernal pools, waterfowl and wading bird habitat, and shorebird habitat approximately 15 years ago[3].

Sierra Club Maine agrees. We believe that the Committee and Legislature would position the state well to fulfill this purpose and also place it in an even better position to receive and use "Section 6" funding from the US Fish and Wildlife Service for work on Federally-listed species by having a more thorough process in place for protecting habitat that can benefit both state and Federally listed species.

One question is, To what extent will this bill as written, and in expressly augmenting the existing duties under the state ESA, provide the DEP and the DIFW as well as the Department of Marine Resources for shoreline or state waters species that are listed, with the duty to block developments that would significantly reduce recovery, such as we have in the Federal ESA? The State ESA, by the way, seems to give some conservation authority for marine species to the Department of Marine Resources so this bill could recognize that.

Here is the language from the Federal ESA from Section 7(a)(2) – (2) *Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.*

The 7(a)(2) and (b)(4)) process and parallel Section 10 processes are enhanced by the requirement that the action agency or permit seeker provide information in advance to the wildlife agency on the affected lands and species and proposed conservation plans. Under Section 7 that initial report from the action agency is called a "Biological Assessment". After consulting with the action agency, the Federal wildlife agency renders its written "Biological Opinion". The Committee could consider ensuring that the action agency provides similar information by ascertaining from the agencies whether it is already required by law and applied in practice.

[3]https://protectmaine.org/assets/factsheets/Conserve-Endangered-Threatened-Species-Habitat_2023-03-17-193006_kduf.pdf

From my review of the State ESA and the law this bill would amend and the bill itself it would appear that those authorities and duties would exist with the enactment of this bill. The follow up question is, if that is not clearly provided by this bill or the regulations that would be issued due to its enactment, then we might propose a friendly amendment to enhance that power. As with the habitat conservation planning processes under Section 7(b)(4) or 10(a)(2) of the Federal ESA, there is usually a way forward that does not result in restrictions that deny the landowner a reasonable return on investment.

The core of the Federal power to protect listed species are the two prohibitions of Sections 7 and 9. Section 9 prohibits unpermitted taking by any person, just like any game law, but it also includes serious harming of habitat. Section seven requires each action agency to consult with the appropriate wildlife agency (FWS or NMFS) to ensure that any action it is considering taking, e.g., permitting or subsidizing directly, will not be likely to lead to the extinction of any endangered or threatened species. That process has been held to be such that the wildlife agency has near veto power over an action agency permit or subsidy so the Congress created a process to approve limited incidental taking with an incidental taking statement under Section 7(b)(4), and 10)(a)(2)(b)(4) for private actions not dependent on Federal agency action, to allow action agencies or private developers to move ahead with some harm as long as "(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild".

Recovery plans must have objective and measurable criteria to guide that process and the process of delisting since 1988.

The 7(a)(2) and (b)(4)) process and parallel Section 10 process are enhanced by the requirement that the action agency or permit seeker provide information in advance to the wildlife agency on the affected lands and species and proposed conservation plans.

Maine seems to have a similar incidental taking permit process. Our hope and expectation is that this bill will, as reported, provide the DEP and the DIFW as well as the Marine Resources Commission for shoreline or state waters species that are state-listed, with the duty and power to guide developments and prevent those that would substantially curtail or reduce recovery, such as we have in the Federal ESA.

2. The Bill And the State ESA Reflect the Wisdom of Using "Critical Habitat" as a Guide

One tool that the Federal agencies have is to designate as critical well in advance of any particular development plans such habitat as is essential for the survival and recovery of listed species, so that Federal agencies may not harm that critical habitat. That means there is more assurance that the species will have some base from which to expand and return to viable status and that all parties will have advance notice of habitat that is critical. This provision does not deny protection for other areas but simply starts with the core habitat known early on to be critical to recovery. The State ESA appears to have similar protections under §12806 as printed above. The Committee may want to ask the agencies for a brief report on how they administer that section.

We would be happy to work with you on crafting any amendments needed to ensure the effective protection of Maine's state-listed species. One in particular follows here:

a. The Enforcement of Protection for Listed Species Needs to be Enhanced

The current state ESA provides for the Attorney General to institute injunctive proceedings which would augment the power of the agencies to issue fines or take other enforcement actions. What is lacking however, is a citizen suit provision like the one the Federal ESA and other main conservation laws have had since the beginning. Those provisions recognize the budget constraints of agencies and the political pressures under some administrations not to enforce the law.

§12809. Judicial enforcement
1. General. *In the event of a violation of this subchapter, any rule adopted pursuant to this subchapter or any license or permit granted under this subchapter, the Attorney General may institute injunctive proceedings to enjoin any further violation, a civil or criminal action, or any appropriate combination of those proceedings without recourse to any other provision of law administered by the department.*

3. Providing Citizen Support

We recommend adding a provision to this bill to correct that gap based on Federal law such as the section of the Federal ESA which we provide here in part which could be revised and adapted for state law as an amendment to allow enforcement of both the Maine ESA and its Natural Resource Protection Act:

g) CITIZEN SUITS.—(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.
The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.