

**REPORT BACK ON
L.D. 640
PROVIDED BY THE
DEPARTMENT OF INLAND FISHERIES AND WILDLIFE
BEFORE THE JOINT STANDING COMMITTEE ON INLAND
FISHERIES AND WILDLIFE**

DATE OF HEARING: January 12, 2016

L.D. TITLE: "Resolve, To Establish a Working Group To Review the Incidental Take Permitting Process under the Endangered Species Laws"

SUBJECT: A report back to the Committee regarding conservation measures for bats listed under the Maine Endangered Species Act relating to timber harvesting and forest management practices.

Good afternoon Senator Davis, Representative Duchesne and honorable members of the Inland Fisheries and Wildlife Committee. I am Judy Camuso the Wildlife Division Director for the Department. I am here to update you on the progress made relating to conservation measures for bats listed as threatened or endangered and how the timber harvesting and forest management practices will be impacted.

In May, 2015 the 127th Maine Legislature passed LD 807 to amend the Maine Endangered Species Act (ESA) and adopt changes recommended by the Department. Governor LePage approved the measure as Public Law Chapter 121. At the close of the First Regular Session, another bill related to Maine ESA (LD 640) was carried over as a Resolve. IFW Committee Chairs requested that the Department meet with representatives of industrial forest landowners, small woodland landowners, and statewide conservation organizations to review concerns of the forestry community in response to new listings of three bat species under Maine ESA and report back by January 15, 2016. This letter responds to correspondence dated June 24, 2015 directing a report back to the Committee during the Second Regular Session as to "... whether the Department has all of the tools it needs to manage these listed species in regard to this activity."

Effective October 15, 2015 Maine law now designates the little brown bat and the northern long-eared bat as Endangered and the eastern small-footed bat as Threatened. Maine's forests had long supported widespread populations of these bats until a recent, dramatic population decline resulted in the deaths of more than 5 million bats across 30 states and provinces after exposure to a pathogenic, exotic fungus that impacted over-wintering bats aggregated in cave hibernacula. Timber harvesting was not a contributing factor to the sudden crash of cave-dwelling *Myotis* bats in Maine. Unlike many other land use activities, most timber harvesting generally does not require a permit subject to environmental review policies that typically facilitate Maine ESA compliance.

Maine foresters were concerned by legal uncertainties as a result of these listings. Some assurances were outlined when the northern long-eared bat was federally listed under the U.S. Endangered Species Act. The U.S. Fish and Wildlife Service published an “interim rule under section 4(d)” of the Act concurrent with the final listing rule effective on May 4, 2015 (Federal Register 80:17974-18033).

On December 1, 2015 the Department hosted a formal meeting with representatives of Maine’s forestry community as requested. On December 4, 2015 a second stakeholders meeting focused primarily on construction activities, transportation, and renewable energy interests. Discussions emphasized bat conservation strategies and options for implementation. The conclusions below summarize both the December meetings as well as the collective input from 15 other meetings or consultations pertaining to MESA bat listings since July, 2014 involving the following organizations: Maine Forest Products Council, Small Woodland Owners Association of Maine, Professional Logging Contractors of Maine, Maine Audubon Society, Maine Chapter of The Nature Conservancy, Maine Dept. of Transportation, Associated General Contractors of Maine, Maine Renewal Energy Association, Natural Resources Conservation Services - U.S. Dept. of Agriculture, National Park Service, Society of American Foresters, Forest Resources Association, Maine Health and Environmental Testing Lab, Maine Bat Working Group, and U.S. Fish and Wildlife Service in addition to input from state wildlife agencies in New Hampshire, Vermont, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, and West Virginia.

Conclusion 1: Bats pose a unique dilemma for endangered species conservation. The three *Myotis* bats now designated as Endangered or Threatened were recently widespread across the State; current distributions are now uncertain; they are indistinguishable from five other bat species not subject to special Maine ESA protection without handling or acoustic monitoring of their ultrasonic calls; and the cryptic, nocturnal behavior of bats handicaps both our understanding of their biology and management needs.

Conclusion 2: These challenges warrant special assurances to forestry practices, maintenance of existing rights-of-way for transportation or utility corridors, and other minimal tree removal projects. All parties agree that alignment of state and federal policies on the previously mentioned subjects are desirable. The federal “interim 4(d) ESA rule” outlines four key precautions that, in their current form seem prudent and reasonable in Maine. Harvesting activities have minimal risks to listed bats if (a) located more than 0.25 miles from documented winter hibernacula - only 3 “cave” sites are known in Maine; (b) roost trees used by bats are not cut during the maternity / pup-rearing season (June 1 - July 31) - none are currently documented; (c) harvesting activities avoid areas within 0.25 miles of documented (if any) roosts during the maternity / pup-rearing season; and (d) any expansions of existing, cleared corridors and rights-of-way are less than 100 feet in width.

Conclusion 3: A revision of the federal guidelines published as the “interim 4(d) rule” is drafted and now under review by the U.S. Fish and Wildlife Service. MDIFW should review and adapt (if appropriate) similar standards once the “final rule” standards are published. The revisions should be publicized later this winter. Final regulatory proposals are not advisable prior to this step.

Conclusion 4: Maine ESA offers three options for implementing safeguards:

1. Cooperative agreements (12 MRSA §12805)
2. An incidental take plan (12 MRSA §12808.3)
3. Protection guidelines (12 MRSA §12804.3)

Conclusion 5: The Department is choosing to adopt protection guidelines via rulemaking after consulting with Assistant Attorney General Mark Randlett on January 6, 2016. Out of the three options this affirms the best mechanism under Maine ESA (12 MRSA §12804) to implement a conservation measure for bats. An “enforcement policy” of Maine ESA standards is being drafted as an interim measure to minimize uncertainties until rule-making can be initiated using similar language.

Conclusion 6: Other precautions that mirror current standards outlined in the federal “interim 4(d) ESA rule” could be adopted as exemptions from Maine ESA “protection guidelines” (12 MRSA § 12804.3) during the rulemaking process. These include: (a) removal of hazard trees for the protection of human life and property; and (b) removal of bats from human-inhabited living spaces and submission for rabies testing in accord with “Maine’s Rabies Management Guidelines” (see <http://www.maine.gov/dhhs/mecdc/infectious-disease/epi/zoonotic/rabies/documents/maine-rabies-management-guide.pdf>).

In summary, MDIFW recognizes the concerns of stakeholders following the recent listing of three bat species as Endangered or Threatened under Maine ESA. A sudden change in status of these bats in combination with their secretive habits complicates some conservation strategies. This is a unique situation in the 40-year history of the Maine Endangered Species Act. There are several options in the statute to implement appropriate conservation measures. “Protection guidelines” (12 MRSA §12804.3) seem to be the prudent option, but rule-making procedures should await the outcome of federal ESA standards now under revision.

This listing process has pointed out some other potential ways to improve Maine’s process regarding endangered species. For example, we may want to provide additional communications to the public as listing actions are being developed. Additionally, we may need to provide more authority to the Department via a process that mirrors the federal 4(d) process. At this point, we do not have legislative language developed but it may be coming to the Committee in 2017 based on our recent experience.