

**From:** [Steve Duke](#)  
**To:** [Hilary Cooley](#); [Kathleen Rapley](#); [Dennis Mackey](#); [Brian T Kelly](#)  
**Subject:** Fw: Maine incidental take of lynx from trapping  
**Date:** 02/08/2012 03:20 PM  
**Signed by:** CN=Steve Duke/OU=ESBO/OU=R1/OU=FWS/O=DOI

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To all: For our Friday conversation.

5 USC 552 (b)5.7(b)

[REDACTED]

Stephen D. Duke  
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----- Forwarded by Steve Duke/ESBO/R1/FWS/DOI on 02/08/2012 02:05 PM -----

**Steve  
Duke/ESBO/R1/FWS/DOI**

02/07/2012 11:35 AM

To Eric.Nagle@sol.doi.gov  
cc Kathleen Rapley/R1/FWS/DOI@FWS  
Subject Fw: Maine incidental take of lynx from trapping

Good morning Eric,

5 USC 552 (b)5.7(b)

[REDACTED]

Thanks

Steve

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----- Forwarded by Steve Duke/ESBO/R1/FWS/DOI on 02/07/2012 11:26 AM -----

**Kathleen  
Rapley/R1/FWS/DOI**

To Hilary Cooley/R1/FWS/DOI@FWS, Steve  
Duke/ESBO/R1/FWS/DOI@FWS

02/07/2012 09:13 AM

cc

Subject Fw: Maine incidental take of lynx from trapping

I have not read yet.....

Kathleen G. Rapley  
Branch Chief-Candidate Conservation and Conservation Partnerships  
U.S. Fish and Wildlife Service-Idaho Fish and Wildlife Office  
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----- Forwarded by Kathleen Rapley/R1/FWS/DOI on 02/07/2012 09:13 AM -----

**Mark  
McCollough/R5/FWS/DOI**

To Kathleen Rapley/R1/FWS/DOI@FWS

cc Shawn Sartorius/R6/FWS/DOI@FWS, Laury  
Zicari/R5/FWS/DOI@FWS

02/07/2012 07:04 AM

Subject Maine incidental take of lynx from trapping

Kathleen -

Maine covered much of the same ground concerning incidental trapping of lynx in the years shortly after the lynx was listed (2000). We advised Maine Inland Fisheries and Wildlife to pursue a Section 10 permit/HCP for their trapping and snaring programs via letter in 2002. Our state agency explored use of Sect 6, Sect 7 on Federal Aid, and 4(d) rules for incidental take coverage:

- Section 6. Sect 6 has been used to allow incidental take of grizzlies (perhaps in MT during black bear hunting, can't recall all the details?). Our region's solicitors reviewed this and determined Sect 6 is not suitable to permit incidental take by trapping. Sect 6 covers take associated with

- recovery, conservation and research through cooperative agreements with states. Recreational trapping is not a recovery activity.
- Section 7 on federal aid allotments. Maine Inland Fisheries and Wildlife pursued this briefly. Our Federal Aid program was not supportive. Federal Aid does not provide funds to the state to support trapping-related activities so the nexus was unclear. Also, a number of groups litigated the state on incidental trapping of lynx and granting incidental take through a biological opinion did not seem to be a defensible way to provide incidental take coverage under litigious circumstances.
  - 4(d). Many state agencies (including Maine) vigorously opposed the listing of the lynx, in part, because they could foresee the issue with incidental take from trapping. Prior to listing, there was a draft 4(d) rule to address incidental take from trapping. This never was completed (Shawn or Lori Nordstrom will be able to recall all the details.) MDIFW briefly resurrected this possibility (I believe with a trip to our WO.). However, it didn't seem to go anywhere.

After exhausting these alternatives, MDIFW discontinued snaring in the state ~2004 and initiated work on a trapping Incidental Take Plan in ~2005 and submitted a final ITP in 2008. Both the state's draft ITP and our EA are out for a 90-day public review and comment (deadline is today). We've received 6500+ comments as of yesterday. The state's draft ITP was determined not to meet Sect 10 issuance criteria. We suggested they withdraw and revise to address our comments, but they refused. So we are in the difficult position of noticing an ITP with major deficiencies, which are identified in our FR notice. You can view all documents at our field office website <http://www.fws.gov/mainefieldoffice/>

There have been lawsuits against the states of ME (two suits) and MN regarding incidental take of lynx without a permit. Maine lost their first suit, paid damages to the plaintiffs, and entered into an agreement with the judge and plaintiffs on new trapping regulations to further protect lynx. The plaintiffs lost the second case, appealed in superior court and lost there as well. The appeals court upheld the judge's opinion that the state was indeed taking lynx without a Sect 10 permit, but that they had submitted an ITP, and conditions were in place to further protect lynx until such time the Service determined what "minimizes and mitigates to the maximum extent practicable." The court cases are way more complex than this, but this gives you a sense of what has happened.

After losing their court case, MN DNR wrote a draft HCP two or three years ago, but I don't know where review of the HCP stands (seems to be inactive), and perhaps everyone is waiting to see what happens in Maine.

We are under pressure to conclude this ITP, but it is going to take substantial work and is the highest priority in our office. We hope to resolve by the beginning of the 2012 trapping season, but there is a lot to do between now and then. The state's ITP will require substantial work. We may receive substantive comments that we should prepare an EIS. If substantive changes occur to the EA or ITP we may have to re-notice them and repeat the process.

I would be glad to discuss further. As the lynx BioTeam revises the LCAS we just learned about lynx takes by trapping in MT and now ID (none in WA? or CO?). Lynx have recently been documented in NH and VT, but as far as we know, there have been no incidental takes from trapping.

Hopefully, the work in Maine will help others in the Service with this issue.

thanks, Mark

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▼ Kathleen Rapley/R1/FWS/DOI

**Kathleen  
Rapley/R1/FWS/DOI**

To Mark McCollough/R5/FWS/DOI@FWS  
cc

02/06/2012 04:04 PM

Subject Fw: "Take " of Lynx in Idaho

Hi Mark

I got your name from Shawn Sartorius in MT. He said you had the joyous task of developing an HCP for take of lynx from trapping. We have an issue with take of a lynx in Idaho due to a state permitted trapper catching it in a legal trap. The lynx survived. We are getting pressure about what 'coverage' the state has for take of lynx from their action of permitting trapping; they have attempted to use a section 6 cooperative agreement they have with us to justify this coverage but it is clear that the coop agreement without as associated section 7 consultation does not provide coverage. In speaking with Shawn, he said that Maine and Minnesota both pursued an HCP as part of litigation, so gave me your number. Is there any other route you pursued other than the HCP? Thanks

Kathleen

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----- Forwarded by Kathleen Rapley/R1/FWS/DOI on 02/06/2012 01:46 PM -----

**Steve  
Duke/ESBO/R1/FWS/DOI**

02/06/2012 01:20 PM

To Brian T Kelly/R1/FWS/DOI@FWS, Hilary  
Cooley/R1/FWS/DOI@FWS  
cc Dennis Mackey/ESBO/R1/FWS/DOI@FWS, Kathleen  
Rapley/R1/FWS/DOI@FWS  
Subject "Take " of Lynx in Idaho

Brian and Hilary,

Here is what we have found regarding ESA coverage (or lack of) for the take of lynx from otherwise legal state authorized trapping.

- The Section 6 Cooperative agreement as a stand alone document, with IDFG, does not provide ESA take coverage for lynx (or any other listed species) for activities that do not have an "intended benefit to that species..." and where a section 7 consultation has been completed.
- With the exception of Maine and Minnesota (completed or proposed HCPs for this very activity due to litigation), for all remaining States where Canada lynx occur, any incidental take associated with otherwise lawful trapping is not covered.
- There are CFR regulations (50 CFR 17.40) for captive lynx, but not wild lynx. The FWS in its 2000 and 2003 listing determinations described a process for promulgating a 4(d) rule, but has never followed through.
- Options for Idaho: 1) encourage the FWS to propose an expanded 4(d) rule to include permitted trapping; or 2) pursue an HCP with FWS.

Cheers,

Steve

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