

4/20/92

FULL AUTHORITIES

COOPERATIVE AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NATIONAL MARINE FISHERIES SERVICE AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION FOR THE CONSERVATION OF THREATENED AND ENDANGERED SPECIES

This Cooperative Agreement is entered into pursuant to Section 6(c)(1) of the Endangered Species Act of 1973, as amended (hereinafter referred to as "the Act"), between the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS), and the New York State Department of Environmental Conservation. Hereinafter, the parties shall be referred to as NMFS and the NYSDEC, respectively.

I

WHEREAS, the Congress of the United States has found that there are resident species of fish or wildlife which are in danger of extinction and that these species of fish or wildlife are of aesthetic, ecological, educational, scientific, economic, and other value to the Nation and its people;

II

WHEREAS, the purposes of the Act are to provide a means whereby the ecosystems upon which endangered or threatened fish or wildlife depend may be conserved, to provide a program for the conservation of such species, and to take such steps as may be appropriate to achieve the purposes of the various treaties and conventions related to the conservation of fish or wildlife;

III

WHEREAS, the Congress of the United States has declared that encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in its fish or wildlife;

IV

WHEREAS, the Secretary of Commerce has delegated her responsibilities under the Act to the Assistant Administrator for Fisheries;

V

WHEREAS, the Assistant Administrator for Fisheries desires to enter into this cooperative agreement for the purpose of assisting in the implementation of the endangered and threatened fish or wildlife conservation program of New York for those species under his jurisdiction pursuant to Reorganization Plan Number 4 of 1970;

VI

WHEREAS, the State of New York, acting through the Department of Environmental Conservation, wishes to administer its programs for the conservation of endangered or threatened fish or wildlife in harmony with the terms and spirit of the Act;

VII

WHEREAS, the parties agree that programs of NYSDEC are designed to assist resident endangered or threatened fish or wildlife and that it is the mutual desire of NYSDEC and NMFS to work in harmony for the common purposes of planning, developing and conducting programs to protect, manage and enhance populations of all resident endangered or threatened fish or wildlife within this state;

VIII

WHEREAS, the Assistant Administrator for Fisheries has the statutory and administrative responsibility to establish programs for the conservation of endangered or threatened species which are under his or her jurisdiction pursuant to Reorganization Plan Number 4 of 1970; to reach agreement with the State of New York as to which resident endangered and threatened species are most urgently in need of a conservation program in the State; to provide periodic review of the State program at no greater than annual intervals; to provide funding to that program as such funding is available and in accordance with the terms of the Act; to provide coordination among the programs of the various States; and to exchange with the NYSDEC such biological data or other information which may result in the enhancement of the opportunities for the continued survival of endangered or threatened fish or wildlife;

IX

WHEREAS, the NYSDEC has accepted the responsibility to conserve endangered or threatened fish or wildlife which are resident in the State of New York and are most urgently in need of a conservation program; and

X

WHEREAS, the NYSDEC (a) has the authority to conserve resident fish or wildlife determined by the NYSDEC or the Secretary to be endangered or threatened; (b) has established an acceptable conservation program, consistent with the purposes and policies of the Act, for all resident fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such a program together with all pertinent details, information and data requested by the

Secretary; (c) is authorized to conduct investigations to determine the status and requirements for survival of resident fish or wildlife; (d) has the authority to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened fish or wildlife; and (e) provides for public participation in the designation of resident fish or wildlife as endangered or threatened.

Now, therefore, the parties agree as follows:

1. Cooperative Program

(a) The NYSDEC shall carry out the activities identified in its conservation programs for the benefit of the endangered or threatened fish or wildlife which are resident in the State of New York.

(b) The Assistant Administrator for Fisheries may agree with the NYSDEC to provide financial assistance for the implementation of an acceptable project for the conservation of endangered and threatened fish or wildlife. Such financial assistance will require the submission of an Application for Federal Assistance and Grant-In-Aid Award and the successful negotiation of a Project Agreement.

(c) As a part of this cooperative program, the law enforcement authorities of NMFS and the NYSDEC shall cooperate in the detection, apprehension, and prosecution of violators of the Act or State laws which are intended to conserve endangered and threatened fish or wildlife. This cooperative agreement does not grant Federal enforcement authority to State enforcement officers or State enforcement authority to NMFS enforcement officers.

(d) As additional species of resident fish or wildlife in the State of New York are listed as endangered or threatened by NMFS, the parties agree to cooperate in the development of programs and projects for the benefit of such species.

(e) It is understood that any Federal funding pursuant to Section 6(d) of the Act is contingent on the continued implementation of an adequate and active program for the conservation of Federally listed endangered and threatened fish or wildlife which are resident in the State of New York. If the program for the conservation of such fish or wildlife is determined by the Assistant Administrator for Fisheries to be inadequate or inactive, this Agreement and funding shall be terminated in accordance with sections 5 and 7 of this Agreement.

(f) As part of the consultation process, provided for by Section 7 of the Act for the determination of critical habitat for Federally listed endangered or threatened fish or wildlife, the parties agree to exchange biological and other data as necessary to facilitate such determination by the Assistant Administrator for Fisheries.

(g) All activities affecting endangered and threatened marine mammals must be consistent with the Marine Mammal Protection Act of 1972, as amended.

2. Permits, exceptions.

General Rule.

(a) Except as authorized in subsection 2(b), (c), (d) or (f) of this Agreement, the NYSDEC agrees not to engage in, or issue a permit authorizing the taking of resident Federally listed endangered or threatened fish or wildlife as listed at 50 CFR 216.3 and 227.4 which are under the jurisdiction of the Assistant Administrator for Fisheries pursuant to Reorganization Plan Number 4 of 1970 without the prior issuance of a permit to the applicant by the Assistant Administrator.

Marine Mammals.

(b) The State of New York or an official, employee, or designee of the State is authorized to take in a humane manner endangered or threatened marine mammals in the course of his or her duties without Federal Permit only if such taking is for (a) the protection or welfare of the marine mammal, (b) the protection of the public health and welfare, or (c) the non-lethal removal of nuisance animals.

Endangered Species.

(c) Any employee or agent of the NYSDEC who is designated by the Agency for such purposes may, when acting in the course of his official duties and under the general permit authority of the NYSDEC, take any resident Federally listed endangered fish or wildlife, other than marine mammals which are subject to subsection 2(b), for conservation purposes that are consistent with the purposes of the Act and this Cooperative Agreement, or any Project Agreement attached thereto, provided that such taking is not reasonably anticipated to result in:

- (1) the death or permanent disabling of the specimen;
- (2) the removal of the specimen from the State of New York;
- (3) the introduction of the specimen or any of its progeny into an area beyond the historical range of the species; or
- (4) the holding of the specimen in captivity for a period of more than 45 consecutive days.

Threatened Species.

(d) Any employee or agent of the NYSDEC who is designated by the NYSDEC for such purposes may, when acting in the course of his official duties under the

general permit authority of the NYSDEC, take any resident Federally listed threatened fish or wildlife, other than marine mammals, for conservation purposes of the Act and this Cooperative Agreement, or any Project Agreement attached thereto.

(e) The authority conveyed under paragraphs (c) and (d) may, at any time, be temporarily suspended for a particular project or part of a conservation program by written notification from the NMFS Regional Director, upon his receipt of substantial evidence demonstrating the use of this authority for purposes inconsistent with the purposes of this Act. Upon notification of the temporary suspension and the reasons therefore, the NYSDEC may request from the Assistant Administrator for Fisheries an opportunity to demonstrate compliance with the purposes of the Act. The Assistant Administrator for Fisheries shall promptly consider the evidence so submitted by the NYSDEC and either reaffirm the conclusion of the NMFS Regional Director, and revoke the authority temporarily suspended pursuant to this subsection, or reverse the conclusion of the NMFS Regional Director and reinstate the authority temporarily suspended.

Emergency Provisions.

(f) Any employee or agent of the NYSDEC who is designated by the NYSDEC for such purposes may, when acting in the course of official duties and under the general permit authority of the NYSDEC, take Federally listed endangered and threatened fish or wildlife if such action is necessary to:

- (1) aid a sick, injured, or orphaned specimen; or
- (2) dispose of a dead specimen; or
- (3) salvage a dead specimen which may be useful for scientific study; or

(4) remove specimens which constitute a demonstrable, but non-immediate, threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area; or

- (5) defend his or her own life or the lives of others.

Any taking pursuant to this subsection 2(f) must be reported in writing within 5 days to the NMFS Regional Director, for transmission to the NMFS Office of Enforcement. The specimen may only be retained, disposed of, or salvaged in accordance with the directions from NMFS.

3. Records

The NYSDEC shall maintain records of: (1) its Federally-funded projects for the conservation of endangered and threatened fish or wildlife in accordance with the Federal Aid Manual; and (2) the number of specimens of each species of Federally listed endangered and threatened fish or wildlife listed on Appendix A to this Agreement taken by State employees or agents pursuant to Subsections 2(c) and (d) of this Agreement, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries resulting from the taking.

4. Notification

The NYSDEC agrees to inform NMFS of any change in circumstances which could cause the program to be out of conformance with the requirements of Section 6(c) of the Act, including changes in the NYSDEC's relevant constitutional, statutory, or regulatory authority. The NYSDEC shall promptly furnish NMFS with an assessment of the effect of such a change on the State's ability to remain in compliance with the requirements of Section 6(c) of the Act. The Assistant Administrator for Fisheries agrees to notify the NYSDEC of all regulations and rulemakings, in accordance with Section 4 of the Act, which might affect the adequacy and effectiveness of the NYSDEC program.

5. Effective Date and Renewal.

(a) This Agreement shall become effective when signed by the Assistant Administrator for Fisheries and the Commissioner of the NYSDEC and may be renewed in the following manner: No later than June 30 of each year the NYSDEC will submit to the Assistant Administrator for Fisheries the following: (1) an updated list of Federal and State listed endangered and threatened fish and wildlife which are resident in the State and a statement of any modifications the State wishes to propose for the list of fish or wildlife species in Appendix A which are most urgently in need of immediate attention; (2) a memorandum of law analyzing any changes in the NYSDEC statutory authority for endangered and threatened fish or wildlife which were made since the date of the previous program submission. This memorandum shall also analyze the application of State law to any resident fish or wildlife which have been added to the Federal endangered and threatened species list since the date of the previous program submission; (3) a list of any substantial changes in the NYSDEC programs for the resident endangered or threatened fish or wildlife which are being proposed or which have occurred since the date of the previous program submission; (4) a detailed description of the number of specimens of each species of Federally listed endangered and threatened fish or wildlife taken by the NYSDEC employees or agents pursuant to Subsections 2(c) and (d) of this agreement, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries resulting from the taking; and (5) copies of such reports the NYSDEC may have prepared since the previous program submission which discuss its conservation program accomplishments for

listed endangered and threatened fish or wildlife.

(b) The Assistant Administrator for Fisheries will notify the NYSDEC in writing on or before October 1 of each year that: (A) the Cooperative Agreement is renewed effective October 1 of that year; or (B) the NYSDEC programs or authorities are not in compliance with the criteria of Section 6(c) of the Act. Such notification in the latter situation shall also state that unless appropriate changes are made by June 30 of the following year, this Agreement shall be terminated. If the NYSDEC has not received notification concerning the renewal of this Agreement by October 1 of each year, it shall continue in force and effect as if it had been renewed.

(c) For purposes of the Agreement, the phrase "previous program submission" means either the program submission of (1) the original Cooperative Agreement or (2) the most recent renewal application for the Cooperative Agreement, whichever is later in time.

6. This Agreement may be amended at any time with the concurrence of the signatory parties.

7. This Agreement may be terminated: (a) by mutual agreement; (b) by the NYSDEC upon 60 days written notice to the Assistant Administrator for Fisheries; or (c) notwithstanding the renewal provision of subsection 5(b) of this cooperative agreement, by NMFS upon 60 days written notice to the NYSDEC from the Assistant Administrator for Fisheries stating reasons why the NYSDEC's conservation programs are no longer in compliance with the criteria of Section 6(c) of the Act or that the NYSDEC has violated a provision of this agreement. The NYSDEC may submit a written request for review to the Secretary of Commerce within 30 days of receipt of the termination notice. The Secretary will consider all evidence submitted by the NYSDEC in its request for review and either reaffirm the conclusion of the Assistant Administrator for Fisheries and terminate this agreement at the end of the 60-day notification period, or reverse the conclusion of the Assistant Administrator for Fisheries and revoke the notice of termination. All Federal funds which have been obligated to, but not expended by, the NYSDEC as of the date of the termination notice shall be retained by NMFS for reallocation pursuant to Section 6(d) of the Act, unless: (1) those funds are specifically approved for expenditure before the date of actual termination; or (2) the notice of termination is revoked by the Assistant Administrator for Fisheries.

(for) Michael F. Tillman
Assistant Administrator for Fisheries
National Marine Fisheries Service

3/5/92
Date

Thomas G. ...
Comissioner,
New York State Department of Environmental Conservation

4/20/92
Date