S T A T E O F N E W Y O R K

3318

2009-2010 Regular Sessions

I N S E N A T E

March 16, 2009

Introduced by Sen. OPPENHEIMER -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to protecting essential habitats of endangered and threatened species

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The legislature hereby finds and declares that the protection and perpetuation of endangered and threatened species contribute significantly to the general welfare of the state; endangered and threatened species provide ecological, educational, scientific, aesthetic, and public health benefits. Habitat damage or destruction is a primary cause of species' becoming endangered or threatened. Unless protective measures are taken, additional species may become extirpated or extinct.

It is further declared to be the policy of the state and the purpose of this legislation to conserve endangered and threatened species and species of special concern by protecting their habitats on publicly owned land.

S 2. Section 11-0535 of the environmental conservation law, as amended by chapter 706 of the laws of 2005, is amended to read as follows:

S 11-0535. Endangered and threatened species, species of special concern.

1. DEFINITIONS AND EXCLUSIONS. For the purposes of this section[, "endangered]: A. "ENDANGERED species" shall mean those species of fish, shellfish, crustacea and wildlife designated by the department, by regulation filed with the [Secretary of State] SECRETARY OF STATE, as seriously threatened with extinction, "threatened species" shall mean those species of fish and wildlife designated by the department, by regulation filed with the [Secretary of State] SECRETARY OF STATE, which are likely to become endangered species within the foreseeable future throughout

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD08678-02-9

all or a significant portion of their range, and "species of special concern" shall mean those species of fish and wildlife designated by the department, by regulation filed with the [Secretary of State] SECRETARY OF STATE, which are found by the department to be at risk of becoming threatened in New York. Such regulation shall include, but not be limited to, endangered and threatened species as so designated by the [Secretary] SECRETARY of the [Interior] INTERIOR, provided, however, that such regulation shall take effect sixty days after it has been filed with the [Secretary of State] SECRETARY OF STATE, and provided, further, that the commissioner may exclude any such species as the commissioner may determine after investigation to be no longer endangered or threatened from the restrictions of this section. FOR PURPOSES OF SUBDIVISIONS THREE AND FOUR OF THIS SECTION REGARDING DESIGNATION OF ESSENTIAL HABITAT, "ENDANGERED SPECIES" SHALL ALSO MEAN PLANTS WHICH ARE ENDANGERED, THREATENED, OR RARE SPECIES PURSUANT TO SECTION 9-1503 OF THIS CHAPTER.

B. "ESSENTIAL HABITAT" SHALL MEAN THE SPECIFIC, MINIMUM GEOGRAPHIC AREA VITAL TO ENSURE CONTINUED OCCUPATION BY AN INDIVIDUAL OR POPULATION OF AN ENDANGERED OR THREATENED SPECIES, INCLUDING THE IMMEDIATE PHYSICAL AND BIOLOGICAL FEATURES REQUIRED BY THE SPECIES FOR CONTINUED USE OF THE HABITAT. IT INCLUDES HABITAT USED FOR YEAR-ROUND OR SEASONAL RESIDENCE; REPRODUCTION, INCLUDING BREEDING, SPAWNING, NESTING, REARING OF YOUNG; WINTERING HABITAT IN WHICH A SPECIES SPENDS AN EXTENDED AMOUNT OF TIME EACH YEAR; OR MAJOR CONCENTRATION AREAS OF DOCUMENTED CURRENT USE.

C. "ESSENTIAL HABITAT" DOES NOT MEAN: (1) INCIDENTAL AREAS PASSED IN MIGRATION, OTHER AREAS OF CASUAL USE, OR POTENTIAL HABITAT; OR

(2) LAND IN AGRICULTURAL PRODUCTION FOR AT LEAST TWO OF THE LAST FIVE YEARS THAT THE OWNER INTENDS TO MAINTAIN IN AGRICULTURAL PRODUCTION. LAND IN AGRICULTURAL PRODUCTION IS LAND PRODUCING FIELD CROPS, FRUITS, VEGETABLES, OR HORTICULTURAL SPECIALTIES AND LAND USED INTENSIVELY FOR PRODUCING LIVESTOCK THROUGH REGULAR AND FREQUENT GRAZING OR REGULAR AND FREQUENT HARVESTING OF HAY, WHERE SUCH LAND IS A PART OF AN AGRICULTURAL OPERATION OF NOT LESS THAN TEN ACRES WITH AN ANNUAL GROSS SALE VALUE OF NOT LESS THAN TEN THOUSAND DOLLARS. SUCH LAND IN AGRICULTURAL PRODUCTION DOES NOT INCLUDE WOODLAND OR LAND USED FOR PROCESSING OR RETAILING FARM PRODUCTS.

D. "ACTIVITY" SHALL MEAN ANY LAND USE, SUBDIVISION, CONSTRUCTION, OR ACTION WHICH AFFECTS WILDLIFE OR ALTERS VEGETATION, LANDS, SOIL, WATER, OR ECOLOGICAL STABILITY OF AN ESSENTIAL HABITAT OF ENDANGERED OR THREATENED SPECIES.

2. Notwithstanding any other provision of this chapter, the taking, importation, transportation, possession or sale of any endangered or threatened species of fish, shellfish, crustacea or wildlife, or hides or other parts thereof, or the sale or possession with intent to sell any article made in whole or in part from the skin, hide or other parts of any endangered or threatened species of fish, shellfish, crustacea or wildlife is prohibited, except under license or permit from the department.

3. DESIGNATION. A. WITHIN ONE YEAR OF THE EFFECTIVE DATE OF THIS SUBDIVISION, THE DEPARTMENT SHALL PUBLISH A NOTICE OF PROPOSED RULEMAKING AND CONDUCT PUBLIC HEARINGS ON PROPOSED REGULATIONS DEALING WITH ESSENTIAL HABITATS ON LANDS OWNED BY THE STATE OR ANY MUNICIPAL OR PUBLIC CORPORATION AS PROVIDED IN THIS SUBDIVISION. SUCH REGULATIONS SHALL INCLUDE, BUT NOT BE LIMITED TO: CRITERIA FOR THE DESIGNATION OF ESSENTIAL HABITATS; ACTIVITIES LIKELY TO RESULT IN DESTRUCTION OR ADVERSE MODIFICATION OF ESSENTIAL HABITATS; CRITERIA FOR DETERMINING WHETHER OR NOT AN ACTIVITY IS CONSISTENT WITH THE PURPOSES OF THIS

SECTION; AND PROCEDURES FOR APPROVAL OF ACTIVITIES. TIMBER HARVESTING, AND ASSOCIATED ACTIVITIES NECESSARY TO CONDUCT IT, SHALL BE CONSIDERED TO BE CONSISTENT WITH THE PURPOSES OF THIS SECTION, EXCEPT IN SPECIFIC AREAS WHERE SUCH ACTIVITIES WOULD CAUSE THE DESTRUCTION OR ADVERSE MODIFICATION OF SUCH HABITAT. IN SUCH AREAS, ONLY THE SPECIFIC ACTIVITIES THAT WOULD CAUSE DESTRUCTION OR ADVERSE MODIFICATION SHALL BE DEEMED INCONSISTENT WITH THIS SECTION.

B. FOLLOWING PROMULGATION OF THE REGULATIONS, THE DEPARTMENT MAY INITIALLY DESIGNATE AN AREA WHICH IT JUDGES TO MEET THE DEFINITION OF AN ESSENTIAL HABITAT. SUCH INITIAL DESIGNATION SHALL BE MADE BY PUBLISHING A NOTICE OF PROPOSED RULEMAKING AND CONCURRENTLY NOTIFYING, BY FIRST CLASS MAIL, EACH PUBLIC OWNER OF RECORD. SUCH NOTICE SHALL LOCATE THE AREA ON A STANDARD TOPOGRAPHIC MAP AND SHALL ALSO INCLUDE A COPY OF THE MAP AND GUIDELINES AND STANDARDS FOR USE SPECIFIC TO THE PARTICULAR AREA. SUCH INITIAL DESIGNATION, GUIDELINES, AND STANDARDS SHALL TAKE EFFECT IMMEDIATELY UPON RECEIPT OF NOTICE THEREOF BY THE PUBLIC OWNER OF RECORD.

C. THE DEPARTMENT MAY MAKE A DESIGNATION PERMANENT BY PUBLISHING A NOTICE OF ADOPTION IF AN AFFECTED PUBLIC OWNER OF RECORD DOES NOT WITHIN FORTY-FIVE DAYS OF NOTIFICATION REQUEST A PUBLIC HEARING. IF AN AFFECTED OWNER OF RECORD REQUESTS A PUBLIC HEARING, THE DEPARTMENT SHALL HOLD A HEARING WITHIN THREE MONTHS OF THE REQUEST. THE DEPARTMENT SHALL GIVE NOTICE OF SUCH HEARING TO EACH AFFECTED PUBLIC OWNER OF RECORD OF LANDS AND WATERS INITIALLY DESIGNATED AS ESSENTIAL HABITATS AND TO THE CHIEF ADMINISTRATIVE OFFICER AND, FOR LAND NOT OWNED BY A LOCAL GOVERNMENT, THE CLERK OF THE LOCAL GOVERNMENT WITHIN THE BOUNDARIES OF WHICH ANY SUCH INITIAL DESIGNATION IS LOCATED, BY FIRST CLASS MAIL, NOT LESS THAN THIRTY DAYS PRIOR TO THE DATE SET FOR SUCH HEARING. THE DEPARTMENT SHALL ALSO GIVE NOTICE OF SUCH HEARING BY PUBLICATION OF NOTICE, NOT MORE THAN THIRTY DAYS NOR FEWER THAN TEN DAYS BEFORE THE DATE SET FOR SUCH HEARING, IN AT LEAST ONE NEWSPAPER HAVING GENERAL CIRCULATION IN THE AREA INVOLVED AND IN THE ENVIRONMENTAL NOTICE PUBLICATION PROVIDED FOR UNDER SECTION 3-0306 OF THIS CHAPTER, AND SHALL ENSURE THAT A COPY OF THE INITIAL DESIGNATION IS AVAILABLE FOR PUBLIC INSPECTION AND EXAMINATION AT THE REGIONAL OFFICE OF THE DEPARTMENT FOR THE REGION IN WHICH THE INITIAL DESIGNATED ESSENTIAL HABITATS ARE LOCATED AND IN THE OFFICE OF THE CLERK OF EACH LOCAL GOVERNMENT IN WHICH SUCH ESSENTIAL HABITATS ARE LOCATED. WITHIN THREE MONTHS OF THE CONCLUSION OF THE PUBLIC HEARING, THE COMMISSIONER, AFTER REVIEWING THE HEARING RECORD, SHALL RENDER A DECISION. THE DEPARTMENT SHALL, BY FIRST CLASS MAIL, PROVIDE THE CHIEF ADMINISTRATIVE OFFICER AND CLERK OF THE LOCAL GOVERNMENT WITHIN WHICH THE ESSENTIAL HABITAT IS LOCATED WITH A COPY OF THE DECISION.

D. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE PROCEDURES FOR INITIAL AND PERMANENT DESIGNATIONS ARE GOVERNED BY THIS SECTION; NO PROVISION OF THE STATE ADMINISTRATIVE PROCEDURE ACT EXCEPT PARAGRAPH (D) OF SUBDIVISION ONE OF SECTION TWO HUNDRED TWO OF SUCH ACT SHALL APPLY; AND THE PROVISIONS OF ARTICLE FIVE OF THIS CHAPTER SHALL NOT APPLY.

E. THE DEPARTMENT SHALL REVIEW EACH PERMANENT DESIGNATION AT LEAST EVERY FIVE YEARS TO DETERMINE WHETHER TO CONTINUE, RESCIND, OR MODIFY IT. IF THE DEPARTMENT DETERMINES THAT THE HABITAT IS NO LONGER AN ESSENTIAL HABITAT, THE DESIGNATION SHALL BE VACATED BY THE DEPARTMENT BY REGULATION FILED WITH THE SECRETARY OF STATE AND GIVING NOTICE BY FIRST CLASS MAIL TO THE AFFECTED LANDOWNER. THE DISCONTINUATION BY THE DEPARTMENT OF DESIGNATION OF A SPECIES OR PLANT AS ENDANGERED OR THREATENED BECAUSE OF A FINDING BY THE DEPARTMENT THAT THE SPECIES OR PLANT HAS

BEEN RESTORED TO SUFFICIENT LEVELS WILL CONCURRENTLY RESCIND THE DESIGNATION OF ESSENTIAL HABITAT FOR THAT SPECIES OR PLANT.

F. THE DEPARTMENT SHALL MAINTAIN MAPS ON WHICH DESIGNATIONS ARE SHOWN AND MAY MODIFY BY MINISTERIAL ACTION SUCH MAPS TO CLARIFY THE BOUNDARIES OF ANY DESIGNATED ESSENTIAL HABITAT, TO CORRECT ANY ERRORS, TO EFFECT ANY MINOR ADDITIONS, DELETIONS, OR TECHNICAL CHANGES ON SUCH MAPS, AND TO REFLECT ANY CHANGES THAT MAY HAVE OCCURRED.

4. REGULATION. A. AFTER THE INITIAL DESIGNATION BY THE DEPARTMENT, AND CONTINUING AFTER A DESIGNATION IS MADE PERMANENT, OWNERS OR OTHER PERSONS MUST, PRIOR TO COMMENCING ANY ACTIVITY, AS DEFINED IN PARAGRAPH D OF SUBDIVISION ONE OF THIS SECTION, CONSULT WITH THE DEPARTMENT PURSUANT TO REGULATIONS ADOPTED UNDER SUBDIVISION THREE OF THIS SECTION AND DEMONSTRATE TO THE SATISFACTION OF THE DEPARTMENT THAT THE PROPOSED ACTIVITY WILL NOT DESTROY OR ADVERSELY MODIFY THE ESSENTIAL HABITAT.

B. THE REQUIREMENTS OF THIS SECTION SHALL NOT APPLY TO: (1) ANY ACTIVITY PHYSICALLY COMMENCED PRIOR TO THE EFFECTIVE DATE OF THIS SUBDIVISION; OR (2) ANY ACTIVITY FOR WHICH EITHER A DETERMINATION OF NO SIGNIFICANT IMPACT OR FINDINGS WERE MADE PURSUANT TO ARTICLE EIGHT OF THIS CHAPTER, WHERE SUCH DETERMINATION OR FINDINGS GAVE FULL CONSIDERATION TO THE IMPACT OF THE PROPOSED ACTIVITY UPON THE HABITAT OF AN ENDANGERED OR THREATENED SPECIES; PROVIDED, HOWEVER, THAT NOTHING IN THIS PARAGRAPH SHALL PRECLUDE THE DEPARTMENT FROM TAKING ACTION TO MAKE DESIGNATIONS UNDER THIS SECTION BASED ON HABITAT INFORMATION DISCOVERED AFTER THE OCCURRENCE OF ACTIVITY DESCRIBED IN EITHER SUBPARAGRAPH ONE OR TWO OF THIS PARAGRAPH.

C. NOTHING IN THIS SUBDIVISION SHALL REQUIRE A LANDOWNER TO REHABILITATE AN ESSENTIAL HABITAT ALTERED BY NATURALLY OCCURRING EVENTS OR TO UNDERTAKE AFFIRMATIVE MANAGEMENT TO IMPROVE HABITAT FOR ENDANGERED OR THREATENED SPECIES. THE ONLY CIRCUMSTANCES IN WHICH THE COST OF RESTORING AN ESSENTIAL HABITAT MAY BE REQUIRED OF A LANDOWNER OR OTHER PERSON CONDUCTING AN ACTIVITY IS AS A SANCTION IN RESPECT TO A VIOLATION OF THIS PART OR ANY OTHER PROVISION OF THIS CHAPTER.

5. Notwithstanding any other provision of this chapter, the department may promulgate regulations to the taking, importation, transportation, possession or sale of any species of special concern as the department deems necessary for the proper protection of such species.

S 3. Subdivision 13 of section 71-0925 of the environmental conservation law, as amended by chapter 706 of the laws of 2005, is amended to read as follows:

13. If the violation was an act prohibited by subdivision two of section 11-0535 or by section 11-0536 of this chapter, or by any lawful rule or regulation of the department promulgated pursuant thereto, not more than two thousand dollars, and an additional penalty of not more than three hundred fifty dollars for each fish, shellfish, crustacea, wildlife or part thereof involved in the violation. IF THE VIOLATION WAS AN ACT PROHIBITED BY SUBDIVISION FOUR OF SECTION 11-0535 OF THIS CHAPTER OR BY ANY LAWFUL RULE OR REGULATION OF THE DEPARTMENT PROMULGATED PURSUANT THERETO, THE COST OF RESTORING THE ESSENTIAL HABITAT TO ITS CONDITIONS BEFORE THE VIOLATION OR, IF THE HABITAT CANNOT BE RESTORED, NOT MORE THAN FIFTY THOUSAND DOLLARS. If the violation was an act prohibited by any regulation of the department promulgated pursuant to subdivision [three] FIVE of section 11-0535 of this chapter, then such penalty shall be not more than one thousand dollars, and an additional penalty of not more than two hundred dollars for each fish, shellfish, crustacea, wildlife or part thereof involved in the violation.

S 4. Section 71-0921 of the environmental conservation law is amended by adding two new subdivisions 14 and 15 to read as follows:

14. ANY PERSON WHO KNOWINGLY VIOLATES ANY OF THE PROVISIONS OF SUBDIVISION FOUR OF SECTION 11-0535 OF THIS CHAPTER OR OF ANY LAWFUL RULE OR REGULATION PROMULGATED PURSUANT THERETO SHALL BE GUILTY OF A MISDEMEANOR PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN NINETY DAYS OR BY A FINE OF NOT MORE THAN TWO THOUSAND DOLLARS, OR BY BOTH SUCH IMPRISONMENT AND FINE.

15. (1) ANY PERSON WHO KNOWINGLY OR INTENTIONALLY VIOLATES ANY OF THE PROVISIONS OF OR WHO FAILS TO PERFORM ANY DUTY IMPOSED BY SECTION 11-0535 OF THIS CHAPTER OR ANY RULES AND REGULATIONS PROMULGATED THEREUNDER OR ANY FINAL DETERMINATION OR ORDER OF THE COMMISSIONER RELATED THERETO SHALL BE GUILTY OF A MISDEMEANOR PUNISHABLE BY IMPRISONMENT OF NOT MORE THAN ONE YEAR OR BY A FINE OF NOT MORE THAN TEN THOUSAND DOLLARS OR BOTH SUCH IMPRISONMENT AND FINE.

(2) ANY PERSON WHO KNOWINGLY OR INTENTIONALLY VIOLATES ANY OF THE PROVISIONS OF OR WHO FAILS TO PERFORM ANY DUTY IMPOSED BY SECTION 11-0535 OF THIS CHAPTER, OR ANY RULES AND REGULATIONS PROMULGATED THEREUNDER, OR ANY FINAL DETERMINATION OR ORDER OF THE COMMISSIONER RELATED THERETO, AND WHOSE ACTIVITY THEREBY RESULTS IN PERMANENT DESTRUCTION OF A HABITAT SUCH THAT THE HABITAT CANNOT BE RESTORED, SHALL BE GUILTY OF A MISDEMEANOR PUNISHABLE BY IMPRISONMENT OF NOT MORE THAN ONE YEAR OR A FINE OF NOT MORE THAN FIFTY THOUSAND DOLLARS OR BOTH SUCH FINE AND IMPRISONMENT.

S 5. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.