

1 H.552

2 Introduced by Representative Sheldon of Middlebury

3 Referred to Committee on

4 Date:

5 Subject: Conservation and development; fish and wildlife; threatened and
6 endangered species

7 Statement of purpose of bill as introduced: This bill proposes to amend
8 requirements related to the conservation and recovery of threatened or
9 endangered species. The bill would authorize the Secretary of Natural
10 Resources to designate critical habitat that is necessary for the conservation or
11 recovery of a threatened or endangered species. The bill clarifies how
12 threatened or endangered plants are regulated. In addition, the bill would
13 authorize the Secretary of Natural Resources to issue a permit for the
14 authorized or incidental taking of a threatened or endangered species.

15 An act relating to threatened and endangered species

16 It is hereby enacted by the General Assembly of the State of Vermont:

17 Sec. 1. 10 V.S.A. § 5401 is amended to read:

18 § 5401. DEFINITIONS

19 As used in this chapter:

20 (1) “Agency” means the Agency of Natural Resources.

1 (2) “Secretary” means the Secretary of Natural Resources.

2 (3) “Species” ~~includes all subspecies of~~ means wildlife or wild plants
3 and any subspecies or other group of wildlife or wild plants of the same
4 species, the members of which may interbreed when mature.

5 (4) “Wildlife” means any member of a nondomesticated species of the
6 animal kingdom, whether reared in captivity or not, including, without
7 limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean,
8 arthropod or other invertebrate, and also including any part, product, egg,
9 offspring, dead body, or part of the dead body of any such wildlife.

10 (5) “Plant” means any member of the plant kingdom, including seeds,
11 roots, and other parts thereof. As used in this chapter, plants shall include
12 fungi.

13 (6) “Endangered species” means a species listed ~~on the state endangered~~
14 ~~species list~~ as endangered under this chapter or ~~determined to be an~~
15 ~~“endangered species”~~ under the federal Endangered Species Act. The term
16 generally refers to species whose continued existence as a viable component of
17 the State’s wild fauna or flora is in jeopardy.

18 (7) “Threatened species” means a species listed ~~on the State~~ as a
19 ~~threatened species list~~ under this chapter or determined to be a “threatened
20 species” under the federal Endangered Species Act. The term generally refers

1 to species whose continued existence as a viable component of the State's wild
2 fauna or flora is in jeopardy.

3 (8) "Endangered Species Act" and "federal Endangered Species Act"
4 means the Endangered Species Act of 1973, Public Law 93-205, as amended.

5 (9) "Habitat" means the physical and biological environment in which a
6 particular species of plant or animal lives.

7 (10) "Conserve," "conserving," and "conservation" mean to use and the
8 use of all methods and procedures ~~both~~ for increasing or maintaining:

9 (A) the number of individuals within a population of a species;

10 (B) the number of populations of a species; and

11 (C) populations of wildlife or wild plants to the optimum carrying
12 capacity of the habitat, ~~and for maintaining those numbers.~~

13 (11) "Optimum carrying capacity" for a species means a population
14 level of that species which, in that habitat, can ~~indefinitely~~ sustainably coexist
15 with healthy populations of all wildlife and wild plant species normally
16 present.

17 (12) "Methods" and "procedures" means all activities associated with
18 ~~scientific~~ natural resources management, including, without limitation,
19 scientific research, census, law enforcement, habitat acquisition and
20 maintenance, propagation, live trapping, and transplanting. The terms also
21 include the periodic or continuous protection of species or populations, where

1 appropriate, and the regulated taking of individuals of the species or population
2 in extraordinary cases where population pressures within a habitat cannot be
3 otherwise relieved.

4 (13) "~~Possession~~" ~~of a member of a species~~ means ~~the state of~~
5 possessing, exporting, importing, processing, selling, offering to sell,
6 delivering, carrying, transporting, or shipping by any means a member of ~~that a~~
7 species.

8 (14) "~~Taking~~," "Take" or "taking":

9 (A) ~~with~~ With respect to wildlife ~~means "taking" as defined in~~
10 ~~section 4001 of this title, and~~ designated a threatened or endangered species,
11 means:

12 (i) pursuing, shooting, hunting, killing, capturing, trapping,
13 harming, snaring, and netting wildlife;

14 (ii) an act that creates a risk of injury to wildlife, whether or not
15 the injury occurs, including disturbing, harassing, wounding, or placing,
16 setting, drawing, or using any net or other device commonly used to take
17 animals; or

18 (iii) attempting to engage in or assisting another to engage in an
19 act set forth under subdivision (A)(i) or (ii) of this subdivision (14).

20 (B) ~~with~~ With respect to wild plants designated a threatened or
21 endangered species, means uprooting, transplanting, gathering seeds or fruit,

1 cutting, injuring, or killing or any attempt to do the same or assisting another
2 who is doing or is attempting to do the same.

3 (15) "Critical habitat" for a threatened species or endangered species

4 means:

5 (A) a delineated location within the geographical area occupied by
6 the species that:

7 (i) has the physical or biological features that are concentrated and
8 decisive to the survival of a population of the species;

9 (ii) is necessary for the conservation or recovery of the
10 species; and

11 (iii) may require special management considerations or
12 protection; or

13 (B) a delineated location outside the geographical area occupied by a
14 species at the time it is listed under section 5402 of this title that:

15 (i)(I) was historically occupied by a species; or

16 (II) contains habitat that is hydrologically or physically
17 connected to occupied habitat;

18 (ii) contains habitat that is decisive to the continued survival of a
19 population of the species; and

20 (iii) is necessary for the conservation or recovery of the species.

1 (16) “Destroy or adversely impact” means, with respect to critical
2 habitat, a direct or indirect alteration that negatively affects the value of critical
3 habitat for either the survival or recovery of a listed species.

4 (17) “Harming,” as used in the definition of “take” or “taking” under
5 subdivision (14) of this subsection, means:

6 (A) an act that kills or injures wildlife or wild plants; or

7 (B) the destruction or imperilment of habitat that kills or injures a
8 wild plant or wildlife by significantly impairing continued survival or essential
9 behavioral patterns, including reproduction, feeding, and sheltering.

10 Sec. 2. 10 V.S.A. § 5402 is amended to read:

11 § 5402. ENDANGERED AND THREATENED SPECIES LISTS

12 (a) The Secretary shall adopt by rule a State-endangered species list and a
13 State-threatened species list. The listing for any species may apply to the
14 whole State or to any part of the State and shall identify the species by its most
15 recently accepted genus and species names and, if available, the common
16 name.

17 (b) The Secretary shall determine a species to be endangered if it normally
18 occurs in the State and its continued existence as ~~wildlife or a wild plant in the~~
19 State a viable component of the State’s wild fauna or flora is in jeopardy.

20 (c) The Secretary shall determine a species to be threatened if:

21 (1) it is a viable component of the State’s wild fauna or flora;

1 (2) it is reasonable to conclude based on available information that its
2 numbers are ~~significantly declining because of loss of habitat or human~~
3 ~~disturbance~~; and

4 (3) unless protected, it will become ~~an~~ endangered species.

5 (d) In determining whether a species is endangered or threatened, the
6 Secretary shall consider:

7 (1) the present or threatened destruction, degradation, fragmentation,
8 modification, or curtailment of the range or habitat of the species;

9 (2) taking or over-utilization of the species for commercial, sporting,
10 scientific, educational, or other purposes;

11 (3) disease or predation affecting the species;

12 (4) the adequacy of existing regulation;

13 (5) actions relating to the species carried out or about to be carried out
14 by any governmental agency or any other person who may affect the
15 species; ~~and~~

16 (6) climate change;

17 (7) competition with other species, including non-native invasive
18 species;

19 (8) the decline in the population;

20 (9) cumulative impacts; and

1 (10) other natural or ~~man-made~~ human-made factors affecting the
2 continued existence of the species.

3 (e) In determining whether a species is endangered or threatened or
4 whether to delist a species, the Secretary shall:

5 (1) use the best scientific, commercial, and other data available;

6 (2) notify and consult with interested ~~state or~~ State and federal agencies,
7 other states having a common interest in the species, affected landowners, and
8 any interested persons at least 30 days prior to commencement of
9 rulemaking; and

10 (3) notify the ~~governor~~ appropriate state officials and agencies of any
11 state contiguous to Vermont in which the species affected is known to occur.

12 Sec. 3. 10 V.S.A. § 5402a is added to read:

13 § 5402a. CRITICAL HABITAT; LISTING

14 (a) The Secretary may adopt by rule a critical habitat designation list for
15 threatened or endangered species. Critical habitat may be designated in any
16 part of the State. The Secretary shall not be required to designate critical
17 habitat for every State-listed threatened or endangered species. When the
18 Secretary designates critical habitat, the Secretary shall identify the species for
19 which the designation is made, including its most recently accepted genus and
20 species names, and, if available, its common name.

1 (b) In determining whether and where to designate critical habitat for a
2 State-endangered or -threatened species, the Secretary shall consider physical
3 and biological features that are decisive to the survival of the species,
4 necessary to the conservation or recovery of the given species, and special
5 management considerations and strategies for the protection and restoration of
6 the species; including the following:

7 (1) the current or historic use of the habitat by a listed State-endangered
8 or -threatened species;

9 (2) the extent to which the habitat is decisive to the survival and
10 restoration of a listed State-endangered or -threatened species, at any stage of
11 its life cycle;

12 (3) the space necessary for individual and population growth;

13 (4) whether the habitat is physically or hydrologically connected to
14 occupied habitat and is necessary for the continued survival or recovery of the
15 species;

16 (5) food, water, air, light, minerals, or other nutritional or physiological
17 requirements;

18 (6) cover or shelter for the species;

19 (7) sites for breeding, reproduction, rearing of offspring, germination, or
20 seed dispersal; migration corridors; and overwintering;

1 (8) the habitat that meets the physical and biological requirements of the
2 species or are representative of the historic geographical and ecological
3 location of a species;

4 (9) the present or threatened destruction, degradation, fragmentation,
5 modification, or curtailment of the range or habitat of the species;

6 (10) the adequacy of existing regulation;

7 (11) actions relating to the species carried out or about to be carried out
8 by any governmental agency or any other person who may affect the species;

9 (12) cumulative impacts; and

10 (13) natural or human-made factors affecting the continued existence of
11 the species.

12 (c) In determining whether to designate critical habitat for a State-listed
13 threatened or endangered species, the Secretary shall:

14 (1) use the best scientific, commercial, and other data available;

15 (2) notify and consult with interested State and federal agencies, other
16 states having a common interest in the species, affected landowners, and any
17 interested persons at least 30 days prior to commencement of rulemaking; and

18 (3) notify the appropriate state officials and agencies of any state
19 contiguous to Vermont in which the species affected is known to occur.

1 Sec. 4. 10 V.S.A. § 5403 is amended to read:

2 § 5403. PROTECTION OF ENDANGERED AND THREATENED SPECIES

3 (a) Except as authorized under this chapter, a person shall not:

4 (1) take, possess, or transport wildlife or plants that are members of an
5 endangered or threatened species; or

6 (2) destroy or adversely impact critical habitat, including destroying or
7 adversely impacting an endangered or threatened species use of or access to
8 the critical habitat.

9 (b) Any person who takes a threatened or endangered species shall report
10 the taking to the Secretary.

11 (c) The Secretary may, with advice of the Endangered Species Committee,
12 adopt rules for the protection ~~and~~ conservation, or recovery of endangered and
13 threatened species.

14 (e)(d) The Secretary may bring a ~~civil~~ an environmental enforcement action
15 against any person who violates subsection (a) or (b) of this section or rules
16 adopted under this chapter in accordance with chapters 201 and 211 of this
17 title.

18 (d)(e) Instead of bringing a ~~civil~~ an environmental enforcement action for a
19 violation of this chapter or rules adopted under this chapter, the Secretary may
20 refer violations of this chapter to the Commissioner of Fish and Wildlife for
21 criminal enforcement.

1 ~~(e)~~(f) A In a criminal enforcement action, a person who violates a
2 requirement of this chapter or a rule of the Secretary adopted under subsection
3 ~~(b)~~(c) of this section shall be fined not more than ~~\$500.00~~ \$5,000 and
4 imprisoned not more than five years, or both, and the person shall pay
5 restitution under section 4514 of this title.

6 ~~(f)~~(g) Any person who violates subsection (a) or (b) of this section by
7 knowingly injuring a member of a threatened or endangered species or
8 knowingly destroying or adversely impacting critical habitat and who is
9 subject to criminal prosecution may be required by the court to pay
10 restitution for:

11 (1) actual costs and related expenses incurred in treating and caring for
12 the injured plant or animal to the person incurring these expenses, including
13 the costs of veterinarian services and Agency of Natural Resources staff
14 time; or

15 (2) reasonable mitigation and restoration costs such as: species
16 restoration plans; habitat protection; and enhancement, transplanting,
17 cultivation, and propagation ~~for plants.~~

18 Sec. 5. 10 V.S.A. § 5404 is amended to read:

19 § 5404. ENDANGERED SPECIES COMMITTEE

20 (a) A ~~Committee~~ committee on endangered species is created to be known
21 as the “Endangered Species Committee,” and shall consist of nine members,

1 including the Secretary of Agriculture, Food and Markets, the Commissioner
2 of Fish and Wildlife, the Commissioner of Forests, Parks and Recreation, and
3 six members appointed by the Governor from the public at large. Of the six
4 public members, two shall be actively engaged in agricultural or silvicultural
5 activities, two shall be knowledgeable concerning flora, and two shall be
6 knowledgeable concerning fauna. Members appointed by the Governor shall
7 be entitled to reimbursement for expenses incurred in the attendance of
8 meetings, as approved by the Chair. The Chair of the Committee shall be
9 elected from among and by the members each year. Members who are not
10 employees of the State shall serve terms of three years, except that the
11 Governor may make appointments for a lesser term in order to prevent more
12 than two terms from expiring in any year.

13 (b) The Endangered Species Committee shall advise the Secretary on all
14 matters relating to endangered and threatened species, including whether to
15 alter the lists of endangered and threatened species ~~and~~, how to protect those
16 species, and whether and where to designate critical habitat.

17 (c) The Agency of Natural Resources shall provide the Endangered Species
18 Committee with necessary staff services.

1 Sec. 6. 10 V.S.A. § 5405 is amended to read:

2 § 5405. CONSERVATION PROGRAMS

3 The Secretary, with the advice of the Endangered Species Committee, may
4 establish conservation programs and establish recovery plans for the
5 conservation or recovery of threatened or endangered species of wildlife or
6 plants or for the conservation or recovery of critical habitat. The programs
7 may include the purchase of land or aquatic habitat and the formation of
8 contracts for the purpose of management of wildlife or wild plant refuge areas
9 or for other purposes.

10 Sec. 7. 10 V.S.A. § 5406 is amended to read:

11 § 5406. COOPERATION BY OTHER AGENCIES

12 All agencies of this State shall review programs administered by them
13 which may relate to this chapter and shall, in consultation with the Secretary,
14 utilize their authorities only in a manner which does not jeopardize the
15 threatened or endangered species, critical habitat, or the outcomes of
16 conservation or recovery programs established by this chapter or by the
17 Secretary under ~~its~~ his or her authority.

1 Sec. 8. 10 V.S.A. § 5407 is amended to read:

2 § 5407. ~~ENFORCEMENT~~ AUTHORITY TO SEIZE THREATENED OR
3 ENDANGERED SPECIES

4 In addition to other methods of enforcement authorized by law, the
5 Secretary may direct under this section that wildlife or ~~wild~~ plants ~~which~~ that
6 were seized because of violation of this chapter be rehabilitated, released,
7 replanted, or transferred to a zoological, botanical, educational or scientific
8 institution, and that the costs of the transfer and staff time related to a violation
9 may be charged to the violator. The Secretary, with the advice of the
10 Endangered Species Committee, may adopt rules for the implementation of
11 this section.

12 Sec. 9. 10 V.S.A. § 5408 is amended to read:

13 § 5408. ~~LIMITATIONS~~ AUTHORIZED TAKINGS; INCIDENTAL
14 TAKINGS; DESTRUCTION OF CRITICAL HABITAT

15 (a) Authorized taking. Notwithstanding any provision of this chapter, after
16 obtaining the advice of the Endangered Species Committee, the Secretary may
17 permit, under such terms and conditions as the Secretary may prescribe by
18 rule, the taking of a threatened or endangered species, the destruction or
19 adverse impact of critical habitat, or any act otherwise prohibited by this
20 chapter if done for any of the following purposes:

21 (1) scientific purposes;

1 (2) to enhance the propagation or survival of a threatened or endangered
2 species; ~~economic hardship~~;

3 (3) zoological exhibition;

4 (4) educational purposes;

5 (5) noncommercial cultural or ceremonial purposes; or

6 (6) special purposes consistent with the purposes of the federal
7 Endangered Species Act.

8 (b) Incidental taking. The Secretary may permit, under such terms and
9 conditions as the Secretary may prescribe by rule, the incidental taking of a
10 threatened or endangered species or the destruction or adverse impact of
11 critical habitat if:

12 (1) the taking is necessary to conduct an otherwise lawful activity;

13 (2) the taking is attendant or secondary to, and not the purposes of, the
14 lawful activity;

15 (3) the impact of the permitted incidental take is minimized; and

16 (4) the incidental taking will not impair the recovery of any endangered
17 species or threatened species.

18 (c) Transport through State. Nothing in this chapter shall prevent a person
19 who holds a proper permit from the federal government or any other state from
20 transporting a member of an endangered or threatened species from a point
21 outside this State ~~to another point within or without this~~ through the State.

1 ~~(e)~~(d) Possession. Nothing in this chapter shall prevent a person from
2 possessing in this State wildlife or wild plants which are not determined to be
3 “endangered” or “threatened” under the federal Endangered Species Act where
4 the possessor is able to produce substantial evidence that the wildlife or wild
5 plant was first taken or obtained in a place without violating the law of that
6 place, provided that an importation permit may be required under section 4714
7 of this title or the rules of the Department.

8 ~~(d)~~(e) Interference with agricultural or silvicultural practices. No rule
9 adopted under this chapter shall cause undue interference with normal
10 agricultural or silvicultural practices. This section shall not be construed to
11 exempt any person from the provisions of the federal Endangered Species Act.
12 The Secretary shall not adopt rules that restrain agricultural activities without
13 first consulting with the Secretary of Agriculture, Food and Markets. The
14 Secretary shall not adopt rules that restrain silvicultural activities without first
15 consulting with the Commissioner of Forests, Parks and Recreation.

16 (f) Consistency with State law. Nothing in this chapter shall be interpreted
17 to limit or amend the definitions and applications of necessary habitat in
18 chapter 151 of this title or in 30 V.S.A. chapter 5.

19 ~~(e)~~(g) Effect on federal law. Nothing in this section permits a person to
20 violate any provision of federal law concerning federally protected threatened
21 or endangered species.

1 (h) Permit application. An applicant for a permit under this section shall
2 submit an application to the Secretary that includes the following information:

3 (1) a description of the activities that could lead to a taking of a listed
4 endangered or threatened species or the destruction or adverse impact of
5 critical habitat;

6 (2) the steps that the applicant has or will take to avoid, minimize, and
7 mitigate the impact to the relevant endangered or threatened species or critical
8 habitat;

9 (3) a plan for ensuring that funding is available to conduct any required
10 monitoring and mitigation, if applicable;

11 (4) a summary of the alternative actions to the taking or destruction of
12 critical habitat that the applicant considered and the reasons that these
13 alternatives were not selected, if applicable;

14 (5) the name or names and obligations and responsibilities of the person
15 or persons that will be involved in the proposed taking or destruction of critical
16 habitat; and

17 (6) any additional information that the Secretary may require.

18 ~~(i)~~ Permit fees.

19 (1) Fees to be charged to a person applying to take a threatened or
20 endangered species or destroy or adversely impact critical habitat under this
21 section shall be:

1 (A) ~~To~~ take for scientific purposes, to enhance the propagation or
2 survival of the species, noncommercial cultural or ceremonial purposes, or for
3 educational purposes or special purposes consistent with the federal
4 Endangered Species Act, \$50.00;

5 (B) ~~To~~ take for a zoological or botanical exhibition ~~or to lessen an~~
6 ~~economic hardship~~, \$250.00 for each listed animal or plant taken up to a
7 maximum of \$25,000.00 ~~or, if the Secretary determines that it is in the best~~
8 ~~interest of the species, the parties may agree to mitigation in lieu of a monetary~~
9 ~~fee;~~ and

10 (C) for an incidental taking, \$250.00 for each listed animal or plant
11 taken up to a maximum of \$25,000.00.

12 (2) The Secretary may require the implementation of reasonable
13 mitigation strategies, and may collect reasonable mitigation funds, in lieu of or
14 in addition to the permit fees, in order to mitigate the impacts of a taking, the
15 adverse impact on habitat, or destruction of habitat.

16 (3) Fees ~~or~~ and mitigation payments collected under this subsection and
17 interest on fees and mitigation payments shall be deposited in the Threatened
18 and Endangered Species Fund ~~within the Fish and Wildlife Fund, which Fund~~
19 ~~is hereby created~~ and shall be used solely for expenditures of the Department
20 of Fish and Wildlife related to threatened and endangered species.

21 Expenditures may be made for monitoring, restoration, conservation, recovery,

1 and the acquisition of property interests and other purposes consistent with this
2 chapter. Where practical, the fees collected for takings shall be devoted to the
3 conservation or recovery of the taken species or its habitat. Interest accrued on
4 the Fund shall be credited to the Fund.

5 ~~(g)~~(j) Permit term. A permit issued under this section shall be valid for the
6 period of time specified in the permit, not to exceed five years. A permit
7 issued under this section may be renewed upon application to the Secretary.

8 (k) Public notice. The Secretary shall establish rules for public notice of
9 draft permit decisions based on incidental take and for initial and amended
10 general permits. The rules shall provide for public notice, no fewer than
11 30 days of public comment, and the opportunity to request a public
12 informational hearing. The rules shall also provide for posting permit
13 applications, permit decisions, and the initial or amended general permits on a
14 publicly accessible website, as well as for allowing persons to request
15 notification of permit decisions. The rules may set application requirements
16 for general permits that deviate from subsection (g) of this section and
17 establish best management practices for different types of general permits.

18 (l) General permits. The Secretary may issue general permits for activities
19 that will not affect the continued survival or recovery of a species. A general
20 permit issued under this chapter shall contain those terms and conditions
21 necessary to ensure compliance with the provisions of this statute. These terms

1 and conditions may include the implementation of best management practices
2 and the adoption of specific mitigation measures and required surveying,
3 monitoring, and reporting. In determining whether an activity warrants a
4 general permit, the Secretary shall consider only those cases where:

5 (1) an imminent risk to human health and safety exists;

6 (2) a proposed action enhances the overall long-term survival of the
7 species; or

8 (3) best management practices or guidelines, or both, have been
9 developed and applied to minimize take to the greatest extent possible.

10 Sec. 10. 10 V.S.A. § 5410 is amended to read:

11 § 5410. LOCATION CONFIDENTIAL

12 ~~All~~ Except for critical habitat designated under section 5411 of this title, all
13 information regarding the location of threatened or endangered species sites
14 shall be kept confidential in perpetuity except that the Secretary shall disclose
15 this information to the owner of land upon which the species has been located,
16 or to a potential buyer who has a bona fide contract to buy the land and applies
17 to the Secretary for disclosure of threatened or endangered species information,
18 and to qualified individuals or organizations, public agencies and nonprofit
19 organizations for scientific research or for preservation and planning purposes
20 when the Secretary determines that the preservation of the species is not
21 further endangered by the disclosure.

1 Sec. 11. EFFECTIVE DATE

2 This act shall take effect on July 1, 2016.