

§ 5401. Definitions

As used in this chapter:

- (1) "Agency" means the Agency of Natural Resources.
- (2) "Secretary" means the Secretary of the Agency of Natural Resources, unless otherwise specified.
- (3) "Species" means wildlife or wild plants and any subspecies or other group of wildlife or wild plants of the same species, plants or animals that are capable of interbreeding and producing fertile offspring.

The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

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

The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

- (5) "Plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

The Federal definition of plant is identical. The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

- (6) "Endangered species" means a species listed on the state endangered species list under this chapter or determined to be an "endangered species" under the federal Endangered Species Act. The term generally refers to species whose continued existence as a viable component of the state's wild fauna or flora is in jeopardy.

- (7) "Threatened species" means a species listed on the state threatened species list under this chapter or determined to be a "threatened species" under the federal Endangered Species Act. The Secretary may list a federally threatened species as an endangered species if warranted in accordance with § 5402 (b) of this Chapter.

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

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

(10) "Conserve," "conserving", and "conservation" mean to use and the use of all methods and procedures both for increasing the number of individuals within species and populations of wildlife or wild plants to the optimum carrying capacity of the habitat, and for maintaining those numbers.

The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

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

(12) "Methods" and "procedures" means all activities associated with natural resources management, including, without limitation, scientific research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping and transplanting. The terms also include the periodic or continuous protection of species or populations, where appropriate, and the regulated taking of individuals of the species or population in extraordinary cases where population pressures within a habitat cannot be otherwise relieved.

Defined under conserve in the federal statute - Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

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

(14) "Take or taking," with respect to wildlife means: pursuing, shooting, hunting, killing, capturing, trapping, harming, snaring and netting animals and all other acts, such as disturbing, harassing or wounding or placing, setting, drawing or using any net or other device commonly used to take animals, whether they result in the taking or not; and shall include every attempt to take and every act of assistance to every other person in taking or attempting to take animals.

(15) "Take or taking," with respect to wild plants means uprooting, transplanting, taking seeds or fruit, cutting, injuring or killing or any attempt to do the same or assisting another who is doing or is attempting to do the same.

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(16) "Critical habitat" for a threatened or endangered species means

(i) the site specific areas within the geographical area occupied by the species, listed in accordance with the provisions of section 5402 of this chapter, on which are found those physical or biological features decisive to the survival of the species, **necessary for the conservation of the species** and which may require special management considerations or protection; or

The term “critical habitat” for a threatened or endangered species means— (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) the site specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 5402 of this chapter, upon a determination by the Secretary that such areas are **necessary for the continued survival, conservation and recovery of the species.**

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(17) **“Destroy or significantly imperil” with respect to critical habitat** means a direct or indirect alteration that **eliminates or significantly imperils** the value of critical habitat for **either** the survival or recovery of a listed species. Such alterations include, but are not limited to, **an undue adverse modification any of those physical or biological features that are decisive to the survival of the species, as well as an undue adverse impact on the use of the habitat by the species.**

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. *

NOTE: this definition comes from the regulations rather than the federal statute.

(18) “Harm” in definition of “take” means an act which actually kills or injures wildlife **or wild plants.** Such act may include **the destruction or imperilment of habitat which** kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, sheltering **and in the case of plants, continued survival.**

Harm in the definition of “take” in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. * NOTE: this definition comes from the regulations rather than the federal statute.

§ 5402. Critical Habitat, and Endangered and Threatened Species Lists

(a) The Secretary shall adopt by rule a state-endangered species list, ~~and~~ a state-threatened species list, and may adopt by rule a critical habitat designation list. The Secretary shall not be required to designate critical habitat for every state listed threatened or endangered species. The listing for any species may apply to the whole state or to any part of the state and shall identify the species by its most recently accepted genus and species names and, if available, the common name. Except as necessary as determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(b) The Secretary shall determine a species to be endangered if it normally occurs in the state and its continued existence as wildlife or a wild plant in the state is in jeopardy.

The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

(c) The Secretary shall determine a species to be threatened if it is reasonable to conclude based on available information that its numbers are either so low or are significantly declining, and unless protected the species will become an endangered species.

The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(d) In determining whether a species is endangered or threatened, the Secretary shall consider one or more of the following:

- (1) the present or threatened destruction, degradation, modification, or curtailment of the range or habitat of the species;
- (2) taking or over-utilization of the species for commercial, sporting, scientific, educational, or other purposes;
- (3) disease or predation affecting the species;
- (4) the adequacy of existing regulation;
- (5) actions relating to the species carried out or about to be carried out by any governmental agency or any other person who may affect the species; ~~and~~
- (6) competition with other species, including non-native invasive species;
- (7) the decline in the population; and
- (8) other natural or man-made factors affecting the continued existence of the species.

The 5 Factors under the federal statute are:

- **the present or threatened destruction, degradation, modification, or curtailment of its habitat or range;**
- **over-utilization for commercial, recreational, scientific, or educational purposes;**
- **disease or predation;**
- **the adequacy of existing regulation; or**
- **other natural or man-made factors affecting its continued existence.**

(e) In determining whether and where to designate critical habitat for a state endangered or threatened species, the Secretary shall consider physical and biological features that are **necessary** to the conservation of the given species and; special management considerations and strategies for the protection and restoration of the species; including but not limited to the following:

- (1) the current or historic use of the habitat by a listed state-endangered or threatened species;
- (2) the extent to which the habitat is necessary to the survival and restoration of a listed state-endangered or threatened species, at any stage of its life cycle;
- (3) the space necessary for individual and population growth;
- (4) food, water, air, light, minerals, or other nutritional or physiological requirements;
- (5) cover or shelter;
- (6) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; **migration corridors**, overwintering;
- (7) the habitat(s) that meet the physical and biological requirements of the species or are representative of the historic geographical and ecological location of a species;
- (8) the present or threatened destruction, degradation, modification, or curtailment of the range or habitat of the species;
- (9) the adequacy of existing regulation;
- (10) actions relating to the species carried out or about to be carried out by any governmental agency or any other person who may affect the species; and
- (11) natural or man-made factors affecting the continued existence of the species.

In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are **essential** to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

- ***Space for individual and population growth, and for normal behavior;***

- *Food, water, air, light, minerals, or other nutritional or physiological requirements;*
- *Cover or shelter;*
- *Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;*
- *Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. (similar to 5 above)*

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(f) In determining whether a species is endangered or threatened, whether to designate critical habitat for a state listed threatened and endangered species, and whether to delist a species or habitat, the Secretary shall:

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

shall designate critical habitat and make revisions thereto . . . on the basis of the best scientific and after taking into consideration the economic impact and any other relevant impact.

Use the best scientific and commercial data available

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

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

§ 5403. Protection of endangered and threatened species

(a) Except as authorized in accordance with this chapter a person shall not,

- (1) take, possess or transport wildlife or plants that are members of an endangered or threatened species, or
- (2) destroy or significantly imperil critical habitat, or its use or accessibility by an endangered or threatened species.

(b) The Secretary may, with advice of the Endangered Species Committee, adopt rules for the protection and conservation of endangered and threatened species.

(c) The Secretary may bring a civil enforcement action against any person who violates subsection (a) of this section or any rules adopted under this chapter, in accordance with Chapters 201 and 211. Instead of bringing a civil enforcement action, the Secretary may refer violations of this chapter to the Commissioner of the Fish and Wildlife Department for criminal enforcement.

(d) Any person who violates subsection (a) or (b) of this section by knowingly injuring a member of a threatened or endangered species, or knowingly destroying or adversely modifying critical habitat; and is subject to criminal prosecution, may be required by the court to pay restitution for:

(1) actual costs and related expenses incurred in treating and caring for the injured plant ~~bird~~ or animal to the person incurring these expenses, including veterinarian and staff time, or

(2) for reasonable mitigation and restoration costs such as; habitat protection and enhancement, transplanting, cultivation and propagation for plants.

§ 5404. Endangered Species Committee

(a) A committee on endangered species is created to be known as the "Endangered Species Committee," and shall consist of nine members, including the Secretary of Agriculture, Food and Markets, the Commissioner of Fish and Wildlife, the Commissioner of Forests Parks and Recreation, and six members appointed by the governor from the public at large. Of the six public members, two shall be actively engaged in agricultural or silvacultural activities, two shall be knowledgeable concerning flora, and two shall be knowledgeable concerning fauna. Members appointed by the governor shall be entitled to reimbursement for expenses incurred in the attendance of meetings, as approved by the chairman. The chairman of the committee shall be elected from among and by the members each year. Members shall serve terms of three years, except that the governor may make appointments for a lesser term in order to prevent more than two terms from expiring in any year.

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

(c) The Agency shall provide the Endangered Species Committee with necessary staff services.

§ 5405. Conservation programs

The Secretary, with the advice of the Endangered Species Committee, may establish conservation programs and establish recovery plans for the conservation of threatened or endangered species of wildlife or plants, and critical habitat. The Fish and Wildlife Department also has authority to establish conservation and recovery programs for listed species. The programs may include the purchase of land or aquatic habitat and the formation of contracts for the purpose of management of wildlife or plant refuge areas or for other purposes.

§ 5406. Cooperation by other agencies

All agencies of this state shall review programs administered by them which may relate to this chapter and shall, in consultation with the Secretary, utilize their authorities only in a manner which does not jeopardize the listed species or the outcomes of conservation programs established by this chapter or by the Secretary under his or her authority.

§ 5407. Authority to Seize Threatened and Endangered Species

In addition to other methods of enforcement authorized by law, the Secretary may direct under this section that wildlife or plants which were seized because of violation of this chapter be rehabilitated, released, replanted or transferred to a zoological, botanical, educational or scientific institution, and that the costs of the transfer and staff time related to the violation may be charged to the violator. The Secretary, with the advice of the Endangered Species Committee, may adopt rules for the implementation of this section. (Added 1981, No. 188 (Adj. Sess.), § 2.)

§ 5408. Limitations

(a) Notwithstanding any provision of this chapter, after obtaining the advice of the Endangered Species Committee, the Secretary may permit, under such terms and conditions as the Secretary may prescribe by rule, any act otherwise prohibited by this chapter if done for any of the following purposes: scientific purposes; to enhance the propagation or survival of a species; economic hardship; zoological exhibition; educational purposes; noncommercial cultural or ceremonial purposes; or special purposes consistent with the purposes of the federal Endangered Species Act.

(a) The Commissioner may issue a permit to take an endangered or 6 threatened species that is otherwise prohibited by section 5403 of this title for one of the following purposes:

- (1) scientific purposes;
- (2) to enhance the propagation or survival of a species; or
- (3) when the taking is necessary to conduct an otherwise lawful activity and the taking is incidental to, and not the purpose of, the lawful activity.

(b) Nothing in this chapter shall prevent a person who holds a proper permit(s) from the federal government, the state, or any other state from transporting a member of an endangered or threatened species from a point within or outside this state to another point within or without this State.

(c) Nothing in this chapter shall prevent a person from possessing in this State wildlife or wild plants which are not determined to be "endangered" or "threatened" under the federal Endangered Species Act where the possessor is able to produce substantial evidence that the wildlife or wild plant was first taken or obtained in a place without violating the law of that place.

(d) No rule adopted under this chapter shall cause undue interference with normal agricultural or silvicultural practices. This section shall not be construed to exempt any person from the provisions of the federal Endangered Species Act. The Secretary shall not adopt rules that restrain agricultural activities without the consent of the Secretary of Agriculture, Food and Markets and shall not adopt rules that restrain silvicultural activities without the consent of the Commissioner of Forests, Parks and Recreation

(e) Nothing in this section permits a person to violate any provision of federal law concerning federally protected endangered species.

(f) An applicant for a permit under this section shall submit an application to the Secretary which includes the following information:

- (1) a description of the activities that could lead to a taking of a listed endangered or threatened species;
- (2) the steps that the applicant will take to avoid, minimize and mitigate the impact to the relevant endangered or threatened species;
- (3) a plan for ensuring that funding is available to conduct any required monitoring and accomplish the steps in subsection (2);
- (4) a summary of the alternative actions to the taking that the applicant considered and the reasons that these alternatives were not selected;
- (5) the name or names and obligations and responsibilities of the persons that will be involved in the proposed taking; and
- (6) any additional information or conditions that the Secretary may require to be necessary or appropriate.

An applicant for an incidental take permit under subdivision (a)(3) of this section shall submit to the Commissioner a proposed conservation plan. The proposed conservation plan shall include the following:

- (1) a description of the impact that will likely occur as a result of the taking of a listed endangered or threatened species;**
- (2) the steps that the applicant will take to minimize and mitigate the impact to the relevant endangered or threatened species;**
- (3) a summary of the funding available to the applicant to implement the steps identified under subdivision (2) of this subsection;**
- (4) a summary of the alternative actions to the taking that the applicant considered and the reasons that these alternatives will not be implemented;**
- (5) the name or names and obligations and responsibilities of the persons that will be involved in the proposed incidental taking; and**
- (6) any additional information or conditions that the Commissioner may require to be necessary or appropriate.**

* NOTE The primary difference is that a recovery plan is required for all permits under the Federal language.

(g) Application and Mitigation Fees

(1) Fees to be charged to a person applying to take a threatened or endangered species or, to destroy or significantly imperil critical habitat, under this section shall be:

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

(B) To take for a zoological or botanical exhibition or to lessen an economic hardship, \$250.00 for each listed animal or plant taken up to a maximum of \$25,000.00.

(C) The administrative permit fee to destroy or adversely impact critical habitat is \$250.00. Additional mitigation fees or mitigation strategies may be imposed by the Secretary to mitigate the loss of critical habitat. The Secretary shall promulgate rules to determine fair and reasonable mitigation fees based on impact. The mitigation fees may be based on the fair market value of habitat replacement.

(D) If the Secretary determines that it is in the best interest of the species, the Secretary may require the implementation of reasonable mitigation strategies, and may collect reasonable mitigation funds, in lieu of or in addition to the permit fees, in order to mitigate the impacts of a taking.

(i) The application fee for a permit under this section shall be \$150.00.

(2)(j) Fees or mitigation payments collected under this subsection shall be deposited in the Threatened and Endangered Species Fund within the Fish and Wildlife Fund, which Fund is hereby created. Expenditures may be made for monitoring, restoration, conservation, and the acquisition of property interests and other purposes consistent with this chapter. Where practical, the fees collected for takings shall be devoted to the conservation of the taken species or its habitat. Interest accrued on the Fund shall be credited to the Fund.

(2) Fees and mitigation payments collected under this subsection shall be deposited in the Threatened and Endangered Species Fund within the Fish and Wildlife Fund, which Fund is hereby created. Expenditures may be made for monitoring, restoration, conservation, and the acquisition of property interests and other purposes consistent with this chapter. Where practical, the fees collected for takings shall be devoted to the conservation of the taken species or its habitat. Interest accrued on the Fund shall be credited to the Fund.

(h) An applicant for an incidental take permit under this section may satisfy the mitigation requirements of subdivision (d)(2) of this section by payment of a mitigation payment to the Threatened and Endangered Species Fund under subsection (j) of this section. A mitigation payment provided by an applicant shall be used to fund habitat management or the protection of land or other appropriate mitigation for the species subject to the incidental take permit. The amount of the mitigation payment shall be determined based on a formula established by the Commissioner by rule that considers the impact on the affected species, the number of individual animals or plants of the affected species that may be taken, and the impact on the habitat of the affected species.

(h) A permit issued under this section shall be valid for the period of time specified in the permit, not to exceed five years. A permit issued under this section may be renewed upon application to the Secretary.

Identical permit duration language. (g)(k) A permit issued under this section shall be valid for the period of time specified in the permit, not to exceed five years. A permit issued under this section may be renewed upon application to the Secretary.

(i) The Secretary shall establish rules for public notice of draft permit decisions based on economic hardship and, for initial and amended general permits. The rules shall provide for no less than thirty days of public notice and the opportunity to request a public informational hearing. The rules shall also provide for posting permit applications, permit decisions, and the initial or amended general permits on

a publically accessible website, as well as for allowing persons to request notification of permit decisions.

(c) Upon receipt of an application for an incidental take permit under subdivision (a)(3) of this section and the accompanying conservation plan, the Commissioner shall provide public notice of the application. The Commissioner shall adopt a procedure for receipt of public comment on the proposed taking. NOTE that the primary difference between the state and federal language is the state requirement for rules rather than a procedure.

(j) The Secretary may issue general permits for activities which will not affect the continued survival or recovery of a species or destroy critical habitat. A general permit issued under this chapter shall contain those terms and conditions necessary to ensure compliance with the provisions of this statute. These terms and conditions may include best management practices and mitigation measures.

§ 5410. Location confidential

All information regarding the location of threatened and endangered species sites shall be kept confidential in perpetuity except that the Secretary shall disclose this information to the owner of land upon which the species has been located, or to a potential buyer who has a bona fide contract to buy the land and applies to the Secretary for disclosure of threatened and endangered species information, and to qualified individuals or organizations, public agencies and nonprofit organizations for scientific research or for preservation and planning purposes when the Secretary determines that the preservation of the species is not further endangered by the disclosure.

(c) Upon receipt of an application for an incidental take permit under subdivision (a)(3) of this section and the accompanying conservation plan, the Commissioner shall provide public notice of the application. The Commissioner shall adopt a procedure for receipt of public comment on the proposed taking.

(d) After receipt and consideration of the public comment received on the proposed incidental taking under subdivision (a)(3) of this section, the Commissioner shall issue the permit if the Commissioner determines, based on the permit application and the conservation plan, that the proposed taking will meet all of the following requirements:

(1) The proposed taking will not be the purpose of, but will be only incidental to, the carrying out of a lawful activity.

(2) The applicant will, to the maximum extent practicable, minimize and mitigate the impact caused by the taking.

(3) The applicant will ensure that adequate funding for the conservation plan will be provided.

(4) The taking will not appreciably reduce the likelihood of the survival or recovery of the endangered or threatened species in the State, the whole plant-animal community of which the species is a part, or the habitat that is critical to the species' existence.

(5) The applicant has or will satisfy any requirement of the Commissioner under subdivision (b)(5) of this section.

(e) The Commissioner may require additional permit terms or conditions necessary to ensure that the requirements of subdivisions (d)(1)–(5) of this section will be satisfied. Terms or conditions under this subsection may include reporting and monitoring requirements.

(f) The Commissioner may, at any time, revoke, modify, or suspend a permit issued under this section upon finding that the permit holder violated the terms and conditions of the permit.
(g) An incidental take permit under this section is not required if a person has been issued a federal permit under 16 U.S.C. § 1539.