



Testimony from Jamey Fidel, General Counsel/Forest and Wildlife Program Director,
Vermont Natural Resources Council on H.26

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Thank you for the opportunity to testify on H.26. We strongly support updating Vermont's threatened and endangered species act (10 V.S.A., Chapter 123), but it is important to do it in a way that ensures the protection of threatened and endangered species.

We are concerned that H.26, as introduced, would abolish the Endangered Species Committee (ESC). The ESC is made up of experts in the field of the state's flora and fauna. Through various Scientific Advisory Groups (SAGs), the ESC creates a network of professionals who advise the Agency of Natural Resources (ANR) on issues involving the listing, protection, and recovery of threatened and endangered species. The ESC and SAGs provide a critically important role. It would not be sound policy to abolish the committee and the technical expertise it provides the state, especially since the ANR benefits from the breadth of knowledge that comes from the expertise of the members of the ESC and SAGs.

The proposed language from the Agency of Natural Resources provides a more comprehensive and necessary update to the state's threatened and endangered species act. Importantly, the ANR's proposed language allows for the designation of critical habitat, and provides statutory authority to establish recovery plans for the conservation of threatened or endangered species of wildlife or plants, and critical habitat. These are two extremely important updates to the law.

VNRC strongly supports the proposed language that would allow the Secretary of ANR to designate critical habitat. There has been a long-standing void in the act's ability to designate critical habitat. Like the federal Endangered Species Act, the designation of critical habitat is an important mechanism for ensuring the protection of species that are threatened and endangered. The proposed language by the ANR clarifies that the Secretary shall not be required to designate critical habitat for every threatened or endangered species, but it provides the Secretary with the authority to designate critical habitat after considering an appropriate list of criteria.

There has been a suggestion by Associated Industries of Vermont (AIV) to remove two important factors that could influence whether to list threatened and endangered species and/or designate critical habitat: fragmentation and climate change.

The Vermont Fish and Wildlife Department's Wildlife Action Plan (WAP) provides a blueprint for addressing the conservation of Vermont's Species of Greatest Conservation

Need. The WAP describes key problems that may affect species and their habitats. In particular, the WAP prioritizes ten “Habitat Related Problem Categories” and lists among the categories “climate change” and “habitat fragmentation” (See page 4:10 of Chapter 4).

Climate change and fragmentation are legitimate threats that can contribute to the decline of species in Vermont. These factors should not be removed from the proposed Sections 5402(d)(1) and 5402(e). If the concern is that harvesting activities may contribute to habitat fragmentation, then a definition should be added to Section 5401 clarifying that fragmentation is intended to deal with the breaking up of habitats from housing and commercial development.

In Section 5403, the Committee must decide what level of impact will be acceptable to designated habitat. The proposed language by the ANR originally tracked the federal endangered species act and proposed that a person shall not prohibit destroy or “adversely impact” critical habitat without a permit, but AIV has suggested that this standard should be relaxed to only prohibit destroying or “significantly imperiling” critical habitat without a permit.

The AIV standard would raise the bar and allow adverse impacts to critical habitat. Only actions that “significantly imperil habitat” would be prohibited, short of outright destruction of habitat. This means all impacts up to significant imperilment would be allowed. We believe this standard is too relaxed and the Committee should structure the law so adverse impacts to critical habitat are not allowed. Our concern is that if critical habitat only protects against the significant imperilment of habitat, there will be an incremental chipping away of habitat from adverse impacts, and this will be allowed until an action is finally found to significantly imperil the habitat.

In regards to the other sections of the proposed language from ANR, we support the following concepts:

- Adding “harm” to the definition of “take” as proposed in Section 5401(18). This has the positive outcome of regulating the destruction or imperilment of habitat that kills or injures wildlife by significantly impairing essential behavioral patterns.
- Allowing the Secretary to bring a civil enforcement action against a person who violates the statute, or the rules adopted under the statute. This would ensure that there are adequate penalties and would give the ANR discretion to pursue criminal or civil administrative law enforcement actions (would allow for injunctive relief, pursuing an assurance of discontinuance of a violation, etc.).
- Allowing the issuance of general permits for activities that will not affect the continued survival or recovery of a species.
- Allowing the Secretary to require the implementation of reasonable mitigation strategies, and the collection of reasonable mitigation funds to mitigate the impacts of a taking.