



Testimony from Jamey Fidel, General Counsel/Forest and Wildlife Program Director,
Vermont Natural Resources Council on H.552

January 27, 2016

Thank you for the opportunity to testify on H.552. By way of background, I participated on the stakeholder group that met this summer to provide the Fish and Wildlife Department input on the proposed bill. I provided testimony on H.522 in the House Committee on Fish, Wildlife and Water Resources on January 13, 2016, and I wanted to follow up with written testimony.

VNRC strongly supports updating Vermont's threatened and endangered species act (10 V.S.A., Chapter 123) to authorize the designation of critical habitat. The proposed bill 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.

We would support having the proposed rule go even farther to require the actual designation of critical habitat and recovery planning for threatened and endangered species, but we understand that the Fish and Wildlife Department has limited resources and is trying to take an acceptable and reasonable approach to critical habitat designation.

We support the criteria and factors that should be considered to determine whether to list threatened and endangered species and/or designate critical habitat, including the consideration of fragmentation, climate change and cumulative impacts. The Vermont Wildlife Action Plan provides extensive background on current threats to Vermont's wildlife species. In particular, habitat fragmentation and climate change are recognized as important factors to consider in the management and conservation of species.

In addition, we support the standard of protection as outlined in proposed 10 V.S.A. § 5403(2) that a person shall not “destroy or adversely impact critical habitat” without a permit.

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

- Adding “harm” to the definition of “take.” This has the positive outcome of regulating the destruction or imperilment of habitat that kills or injures wildlife by significantly impairing essential behavioral patterns, including reproduction, feeding, and sheltering.
- Allowing the Secretary to bring criminal or environmental 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 environmental enforcement actions, which would allow for injunctive relief, or pursuing an assurance of discontinuance of a violation, etc. In regards to the maximum suggested fine of \$5,000 as provided in a criminal enforcement action, we believe the penalty should be severe enough so that a person does not intentionally destroy critical habitat and simply absorb the penalty as part of the cost of doing business. The imprisonment of up to five years for a criminal enforcement action should provide a good backstop for this concern.
- Allowing the issuance of general permits for activities that will not affect the continued survival or recovery of a species. We understand this will allow for certain routine activities to follow best management practices. We believe the Endangered Species Committee should play an advisory role in reviewing general permits before they are issued, and it will be important to conduct monitoring to ensure that the best management practices are working and not undermining the survival 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.
- Clarifying in statute that “nothing in this chapter shall be interpreted to limit or amend the definitions and applications of necessary wildlife habitat in chapter 151 of this title or in 30 V.S.A. chapter 5. We support this language because it would ensure that the Fish and Wildlife Department could participate in an Act 250 permit proceeding and offer the opinion that certain habitat is “necessary wildlife habitat” that is decisive to the survival of a species, even if that habitat hasn’t been listed as critical habitat for a threatened or endangered species. There are many reasons why the ANR may not designate certain habitat as “critical habitat.” The ANR may not be aware that the habitat exists, or the ANR may choose to focus on specific areas for designation, even though additional areas of habitat could potentially be deemed critical habitat. In addition, the ANR may not have adequate resources to

initiate a critical habitat rulemaking, even though there is habitat that is worthy of being designated as critical habitat. These situations, and potentially others, should not preclude the ANR from making a determination in the Act 250 context that a certain project may impact habitat that is decisive to the survival of a species.

In regards to interference with agricultural or silvicultural practices, we do not believe this section of the bill should be interpreted to prohibit rulemaking that could affect agricultural or silvicultural practices. As the bill outlines, the utilization of a general permit could allow for the continuation of agricultural or silvicultural practices through the utilization of best management practices, and we believe it makes sense to require the Secretary of ANR to consult with the Secretary of Agriculture, Food and Markets or the Commissioner of Forests, Parks and Recreation before adopting rules that may restrain activities. If the bill is interpreted to prohibit any interference with agricultural or silvicultural practices, then it is possible a species could literally be extirpated through agricultural or silvicultural practices. As important as these practices are to the state, this kind of result would not be good public policy.

Finally, we are aware that the Fish and Wildlife Department has recently conducted polling with Vermont residents. The results show very strong support for wildlife conservation, including the protection of threatened and endangered species, even if the protection affects certain land use activities. We believe this bill is consistent with landowner attitudes as expressed through public polling, and we encourage the Committee members to read the results of this polling data.