

WHY HABITAT DESIGNATION AUTHORITY MATTERS

Concern - Habitat designation authority is unnecessary.

ANR – Habitat designation is necessary.

- Species need habitat to survive. Destruction of habitat is the biggest threat to all species particularly threatened and endangered species.
- Habitat designation and protection is the most effective tool for protecting and securing recovery of threatened and endangered species. This is consistent with the experience and professional opinions of Vermont Fish and Wildlife Department (VFWD) biologists and it is reflected in the November 22, 2015 Vermont Wildlife Action Plan.
 - The Wildlife Action Plan, a conservation blueprint for all of Vermont’s wildlife, is the largest planning effort of its kind in Vermont’s history. It pools the knowledge of those who know Vermont’s wildlife best—the representatives of our local, state and national agencies, sportsmen and conservation groups, academics, land managers and other wildlife experts. The needs of more than 1,000 amphibian, bird, fish, invertebrate, mammal, plant and reptile species (including all threatened and endangered species) were investigated. The most common, widespread and serious problems affecting these species is habitat loss and degradation. The Plan identifies habitat protection as one of the most critical actions for keeping Vermont wildlife intact and for keeping at risk species from being listed.
- Researchers have found that species that had critical habitat designated under the federal law for two or more years were more than twice as likely to have an improving population trend in the late 1990s, and less than half as likely to be declining in the early 1990s, compared to species without habitat designation. The Effectiveness of the Endangered Species Act: A Quantitative Analysis, Martin F.J. Taylor, Kieran F. Suckling, and Jeffrey J. Rachlinski, BioScience, April 2005, Vol. 55 No. 4.
- Waiting for an egregious incident of threatened or endangered species habitat destruction in order to justify habitat designation is contrary to sound recovery planning.
- Despite real successes, Vermont is listing species faster than we are delisting them. We hope to reverse this trend. Habitat designation is a critical tool in achieving the goal of delisting species. See examples of where designation could make a difference in Vermont, page 5.

Concern - Regulatory habitat protection is counterproductive and will discourage landowners from coming forward and protecting the species.

ANR – We strongly disagree.

- Listing is a regulatory tool that has allowed the Agency to protect and recover listed species – we could not have made the progress we have made without listing. This is

because listing provided a forum for notice to the public along with authority to protect the species through permitting.

- There is significant public support for the protection of endangered species. A recent public survey found that 96% of the general public agrees (81% strongly agree) that threatened and endangered species must be protected and 81% of respondents agreed that wildlife habitat must be protected even it reduces the options of developers and landowners. Responsive Management. 2015. Opinions on Fish, Wildlife, and Land Use Among Vermont Residents, Hunters, and Anglers.
- Critical Habitat designations will provide the Agency with one of the most effective tools for successful recovery.
- Habitat designation can also provide justification for additional funding for recovery and help to prioritize land and habitat acquisition.
- The presence of wildlife is one of the most important reasons Vermonters value owning land, and one of the driving reasons for their decisions about how to manage that land. This holds true for threatened and endangered species as well as more common species, and in addition there are economic incentives for landowners who have those rare species on their property.
 - In the past the Vermont Fish & Wildlife Department has applied for a federal grant called LIP (Landowner Incentive Program) to help landowners economically protect their land. A ten-year program that provided federal funding to private landowners to conserve land for rare, threatened and endangered species and state-significant natural communities in Vermont. During the decade long grant, LIP brought 1,875 acres in Vermont under conservation easement, and helped create habitat and forest management plans for the federally-endangered Indiana bats on an additional 3,500 acres of privately owned land. A total of \$1,835,801 was spent to purchase these easements and assist with the forest management plans. This proved to be a win for the landowner as well as for the state's endangered species.
 - In the future, if a landowner has critical habitat, they might qualify for a Recovery Land Acquisition Grant. These grants will help landowners plan, manage and conserve federally-listed species through the USFWS. RLA grants are awarded through a competitive process annually to acquire land to recover federally-listed species. Vermont has been successful in receiving three of these awards over the last 5 years, totaling \$1.125 million in federal funding and leveraging an additional \$906,643 in state and private funds. These funds have gone towards the acquisition of seven parcels totaling 1,380.12 acres located in five towns to support the recovery of either Indiana bat or Northeastern bulrush, both federally endangered species.
 - Lastly, Vermont landowners with endangered species habitat can participate in Use Value Appraisal, or current use. This program now allows enrolled landowners to manage their land for the benefit of rare, threatened or endangered species without penalty. The new UVA process provides flexibility for enrolled landowners to help keep rare, threatened and endangered species

habitat on their land, while still receiving all the benefits of reduced property taxes under the program. This is an important change to the UVA process in that it prevents a disincentive which could have been penalizing private landowners for owning and managing threatened or endangered species habitat. Now they can manage to the unique requirements of those species and still receive lower property taxes, benefiting both landowners and all Vermonters who do not want to see these species extirpated from the state.

- Not all Vermont citizens will cooperate and engage in voluntary protection. A purely voluntary approach rewards uncooperative people at the expense of threatened and endangered species and at the expense of the citizens and business who are cooperative.
- There is misinformation and confusion about this proposed statutory update relating to the federal implementation of critical habitat protection. Here are the reasons why Vermont is different:
 - Critical habitat is more narrowly defined in this proposed statute. Unlike the federal definition, the Vermont definition does not allow the designation of large undefined areas of Vermont land. This is because under the proposed definition the habitat must be identifiable, concentrated, and decisive to the survival of the species.
 - The proposed statute does not require the Secretary to designate habitat for each listed species and the Secretary will not be designating habitat for all or even most listed species.
 - Before rulemaking for the designation of critical habitat, the Secretary must provide notice to affected landowners and state and federal agencies, as well as interested parties.
 - Critical habitat can only be designated after the rulemaking process in accordance with 3 VSA Chapter 25. This process requires the following: Interagency Committee on Administrative Rulemaking approval; public notice, hearing(s) and public comment; and approval by the Legislative Committee on Administrative Rulemaking. See the sample timeline for Designation of Bat Hibernacula on page 6.
 - Vermont has a proven track record of administering the state statute for more than 30 years, in a manner that appropriately balances the protection for the species with the interests of landowners and the need for public infrastructure.
 - The existing and proposed Vermont statute provides that the Secretary cannot regulate threatened and endangered species in a manner that unduly interferes with the traditional land activities of farming and silviculture.
- Healthy landscapes support healthy economies, human communities and our quality of life, and ensure that wildlife and the places they live will be there for future generations to enjoy. The economic return on conservation investment in U.S. states ranges from 4:1 to 11:1. Conserved and working lands provide valuable services to the economy and are cost effective in preserving the quality of life in the state, including providing clean air, water, and recreation. Roman, J. and J. Erickson. 2015. Economics of Conservation in Vermont. Gund Institute for Ecological Economics. University of Vermont.

- The ANR database for threatened and endangered species shows that threatened and endangered species occupy about 2.9% of Vermont and about 1.3% of Vermont when lynx and northern long-eared bat locations are excluded. Large areas are mapped for these two species because of the uncertainty regarding habitat extent. Note that these large areas do not meet the definition of critical habitat proposed in H552. Of the 1.3% of Vermont with threatened and endangered species mapped, about half (0.6% of Vermont) is open water. These figures overestimate the land mass involved because the mapping database generally depicts a location on the map and include uncertainty regarding the extent of habitat. As such, our mapping staff estimate that a more accurate figure for estimating threatened and endangered species habitat is significantly less than .2% of Vermont land. And finally, many of the mapped areas are already on conserved land (common tern and lynx for example).
- The Agency will continue to work with landowners on a voluntary basis, providing technical assistance and acquiring property to protect habitat. The Secretary is open to inserting language that requires the Secretary to work with landowners prior to designating habitat. For example, the following language could be added to §5402(b):
 - **The Secretary shall work cooperatively with landowners to protect habitat before initiating rulemaking to designate critical habitat.**

Concern - If Habitat protection is necessary no sector or activity should be exempt or provided with special consideration.

ANR – From a public policy perspective, special consideration of agricultural and silvicultural activities makes sense.

- The undue interference language found in Section 5408 (e) of the latest version of H552 is not an exemption. However, it does provide that the Secretary cannot unduly interfere with farming and silviculture. This is a policy issue. The Administration is recommending that the legislature adopt this approach for several reasons. These traditional land uses play an important economic and aesthetic role in Vermont. Both silvicultural and agricultural activities have the potential to be subject to special management practices that protect and in some cases, enhance the survival of threatened and endangered species. In addition, farming and forestry entail activities that potentially allow for the restoration of habitat, as opposed to the permanent destruction of habitat.
- Prior to designation of critical habitat, the Agency is willing to consult with all state agencies that have a role in statewide land use issues.

Concern - Permit fees for impacts to critical habitat are unfair.

ANR is willing to examine this issue during our fee bill year.

- The proposed statutory revision requires a permit for activities that destroy or adversely modify habitat.

- The Agency has not recommended changes to the permit fees and this is not a fee bill year. We are amenable to ensuring that fees are fair and consistent and that small landowners are not burdened by this statutory proposal.

Concern - New regulations will take more resources to administer.

ANR – The designation authority will provide another tool that will be subject to agency prioritization.

- The Agency currently prioritizes work and will continue to do so if provided with the authority to designate habitat. As noted previously, habitat protection is one of the most effective tools for protecting threatened and endangered species.

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Examples - Where habitat designation could make a difference in Vermont

Bat hibernacula –There are approximately 30 hibernacula in Vermont, none of which are under state ownership. TNC owns two, USFS owns two, and the rest are private or corporate owned. Many of the private landowners are sensitive to bats, but are very worried about liability. As such, there is growing pressure to fence, gate, or even block the entrances so people won't go in.

- A mine in Dover VT is now surrounded completely by ski trails and a half-pipe that were developed long ago. The mine continues to hold a small number of bats, but the development of the ski trails and half-pipe have influenced the quality of the hibernacula, including water levels and temperatures. With this law, the landowner would have been notified about the presence of the hibernacula and the Agency would have had clear authority to protect the integrity of the cave. This would likely have resulted in greater buffers between the ski trails, half-pipe and the hibernacula.
- Cavers often like to explore caves and look for opportunities to “dig” to find new, unexplored portions of a cave. This can result in changes to airflow and water levels. Aeolus Cave, New England’s largest bat hibernacula, was the site of cave digging that opened up a significant passageway further into the cave. Fortunately this digging does not appear to have altered airflow or cave temperatures at Aeolus Cave but, it could have. Designation as a critical habitat would prohibit this activity without some oversight by the Agency and the Secretary would then have the authority to direct the

caving community to avoid impacting the cave environment. Note that this is also a cave where vandalism occurred in the 1980s resulting in the gating of the cave.

- More recently, a BED notification was submitted to the VFWD to harvest trees on a property with a bat hibernacula. The VFWD was concerned that the logger might not know where the cave entrance was and that felling trees on top of or skidding over the entrance could preclude access by bats to the cave. Fortunately, the logger did not skid over the cave entrance. Again, designation of critical habitat would have informed the landowner and the logger of the hibernacula and the best means of maintaining it when conducting the logging activity.

Spiny Softshell Turtle

Even though VFWD staff installed a rope barrier and obvious signage explaining the presence of threatened turtle nesting sites, a contractor took down the line and drove a tracked backhoe across the beach crushing turtle nests. The camp owner who hired the contractor allegedly did not want the contractor to drive over a cement pad on the camp property in order to access the construction site. The process of designation would have entailed notification to adjoining landowners, provided the Secretary with greater authority to work with landowners, erect temporary protective barriers on the habitat, and pursue mitigation.

Plants

Vermont has lost more than 80% of its rare sandplain forests in Chittenden County. Approximately 20 threatened and endangered species exist in and depend on this habitat. Our staff have experience working with people who have avoided Act 250 jurisdiction in order to circumvent requirements related to the protecting these rare natural areas. The Agency would need to do a lot of research and outreach to landowners and others to list and define this habitat. Only sandplain natural communities that are considered to be state significant and contain threatened and endangered species could be considered for designation. Listed sandplain plants are already protected, but designation would allow for the recovery of these plants. Designated critical habitat would not preclude activities such as forest management, which could still occur with specific guidelines. Maintaining utility ROWs would occur under Best Management Practices. Developers of sandplains in critical habitat designations would likely need to get a permit to “take critical habitat” if the alteration was permanent. Developers are currently subject to regulation under Act 250 and Section 248: 8A - Rare and Irreplaceable Natural Areas however, a designation could potentially reach more projects

Timeline

Bat Hibernacula as Critical Habitat

This theoretical timeline outlines the recommended process for designating critical habitat. The timeline includes landowner notification and communication during the designation process with the goal of securing informed consent regarding the critical habitat designation. A

guidance document would be prepared to define the critical habitat, identify the activities that threaten the integrity of the habitat, and provide feasible means of avoiding or minimizing impacts to the habitat. This guidance document would then serve as a working foundation for the pending rule.

Each of the steps listed below identifies tasks that would need to be accomplished to advance through the process. The estimated timeline provided below contemplates an 18 month duration from the initial stages to the onset of public hearings. At this time, it is known where all 30 of Vermont's bat hibernacula are located.

Step 1: Define bat hibernacula as critical habitat

- Identify the features to be included as critical habitat.
- Review critical habitat designations for Indiana bats by the USFWS.

Duration: 1 Month

Step 2: Draft guidance document for protecting bat hibernacula

- Identify specific activities that likely impact the integrity of the hibernacula.
- Identify measures to minimize or avoid impacts to the integrity of the hibernacula

Duration: 2 Months

Step 3: Mammals Scientific Advisory Group review

- Work with Mammals Scientific Advisory Group (SAG) for their review of the guidance document

Duration: 1 Month, but SAGs do not regularly meet but twice per year.

Step 4: Endangered Species Committee review

- Mammals SAG presents critical habitat designation and guidance document to ESC for their review

Duration: 1 Month, but ESC meetings, if needed, are not regular

Step 5: Review by Secretary of Agency of Natural Resources

- The Secretary will have the opportunity to review, revise the draft guidance document

Duration 1 Month

Step 6: VFWD redraft of guidance document

Duration: 1 Month

Step 7: Simultaneous Landowner identification and notification, and affected state, federal and Canadian entities identification and notification

- Identify all 30 or more landowners affected by the designation. In most instances, this will involve visiting town offices to research landowners and their contact information.
- Notify landowners of the potential designation and future opportunities for input.

- Identify and notify appropriate affected and interested state federal and Canadian entities. Meet and coordinate as necessary.

Duration: 3 Months

Step 8: Meet with landowners (landowners to be apprised and notified of each subsequent step) & with affected state agencies

- Vermont Fish & Wildlife Department (FWD) staff will meet with landowners, either in group meetings or individually to discuss the implications of the critical habitat designation and review the draft guidance document.

Duration: 3 Months

Step 9: Review guidance document and redraft as a rule

- VFWD staff review feedback from landowners and revise guidance document into a rule format.
- Rule to be written by VFWD legal counsel

Duration: 2 Months

Step 10: Mammals Scientific Advisory Group review

- Work with Mammals SAG for their review of the draft rule

Duration: 1 Month, but SAGs do not regularly meet but twice per year.

Step 11: Endangered Species Committee review

- Mammals SAG presents critical habitat designation and draft rule to ESC for their review
- ESC makes a recommendation to the Secretary to advance to public hearings.

Duration: 2 Months

Step 12: If approved by the Secretary, commence rulemaking

- File with the Interagency Committee on Administrative Rulemaking
- If approved, file with the Secretary of State – Press releases, social media outreach and Public notice commence, Public informational hearings are scheduled, and public comment is accepted.
- Review Public Comment, finalize rules, and draft Responsiveness Summary.
- File with the Legislative Committee on Administrative Rulemaking.
- If approved, file with the Secretary of State.

Duration: 4 to 8 Months or more