



## H.552 – An act relating to threatened and endangered species Areas of Support & Concern January 21, 2016

We appreciate the opportunity to speak with you today about this proposed legislation and have spent considerable time working with the Department of Fish and Wildlife over the summer and fall discussing issues that are unique to the utility industry. We have a great working relationship with the Department and have demonstrated that our work is actually critical to protecting and maintaining Threatened and Endangered Species and their habitat in Vermont. We would like to build upon this success.

### Areas of Support:

- Overall effort to update this statute
  - The current law seems outdated and in need of updates
- The inclusion of critical habitat
  - Provided it is warranted for the species, limited in extent, strategically based on the nature of the species, and based on known scientific facts.
- The secretary shall **not** be required to designate critical habitat for every State-listed threatened or endangered species.
  - This effort should not be rushed or be based on inconclusive or unsubstantiated information. ANR has indicated that its intent is to use this authority in a very limited and strategic manner for species such as the spiny softshell turtle and to protect bat hibernacula. If that is the case, then much of the language that creates regulatory uncertainty described below is unnecessary.
- Increased enforcement
  - Provided the taking of a listed species or impacting of the critical habitat was **known/intentional**.
- Addition of incidental taking as allowable activity to be permitted
  - Several past projects were required to show an economic hardship in order to obtain a takings permit, this seems like a much more appropriate rationale to permit takings that could not otherwise be reasonably avoided.
- The implementation of a general permit or permit(s)
  - Several activities are so minor or may ultimately not have any impact on threatened or endangered species or critical habitat that a general permit for an incidental taking would be an effective and appropriate option.
- References to best management practices

## Areas of Concern:

- The definition of take or taking should include language to the effect of “knowingly” or “intentionally”.
- The definition of critical habitat is too broad. Examples include:
  - Page 5, line 13 - *A delineated area outside the geographical area occupied by a species*—if the area is not occupied by the species, than it should not be considered critical habitat for the species. This seems as though it would be considered potential critical habitat.
  - Page 5, line 15 - *Historically occupied by a species*—Define historically. What is the definitive timeline?
  - Page 5, line 16 - *Contains habitat that is hydrologically or physically connected to occupied habitat*—this could mean almost anywhere.
- The definition of destroy or adversely impact is too broad. Examples include:
  - Page 6, line 2 - *Specifically an indirect alteration that negatively affects the value of the critical habitat*—who would determine this? The term “indirect impacts” is too open to interpretation.
  - Page 11, line 7 – *or access to the critical habitat*—Access to critical habitat could be interpreted to mean that activities outside of the critical habitat could also be regulated, if they were viewed to “adversely impact” access to critical habitat.
- The enforcement actions seem severe, unless the individual knowingly or intentionally violated the rule.
  - This comment is not intended to lower the penalties, but rather to key it back to known/intentional violations.
- Page 17, line 16 – *Consistency with State Law*.
  - The primary concerns with the addition of critical habitat as it relates to Title 10 Chapter 151 (Act 250) and Title 30 Chapter 5 (Section 248) are:
    1. If the Agency of Natural Resources feels the habitat of a species warrants protection, than a critical habitat designation should be presented through the rulemaking process as described in the proposed bill and not on a case-by-case basis through an Act 250 or Section 248 proceeding.
    2. The last concern is jurisdictional “creep”. In several Section 248 proceedings, the Agency has required buffer zones for deer wintering areas during certain times of the year. These buffer zones have been up to 300 feet from the boundary of the mapped deer wintering areas. The concern here is that the Agency could require additional buffer zones around previously designated critical habitat boundaries during Act 250 or Section 248 proceedings. If the Agency feels a buffer is required for the critical habitat, then that should be outlined in the rulemaking

process during the designation of the critical habitat and not during subsequent proceedings.

### **General Observations/Discussion:**

Vermont utilities have worked extensively with the Agency of Natural Resources staff and have developed a set of Best Management Practices (BMP's) for vegetation management and operations and maintenance activities when Threatened and Endangered Species are present. The BMP document focuses on specific practices and how to avoid impacts to threatened and endangered species to maintain compliance with the existing Threatened and Endangered Species statute. In addition, and just as important, the document highlights how existing utility practices have maintained, promoted, and enhanced early successional habitats. Early successional habitats are essential for many of the listed T&E species, many of which also thrive in disturbed environments. As such, the general maintenance and work activities associated with utility work actually promote the existence of T&E species and their necessary habitat.

Currently it is unclear to VELCO how the bill as proposed, specifically associated with the inclusion of critical habitat, will affect utilities required work activities when areas of corridors are designated as critical habitat. Given this uncertainty, the bill should build upon the work that has already been performed by relying upon the BMP's used by VELCO and ensure that additional restrictions that may be necessary with the designation of critical habitat not adversely affect utilities' work practices and potentially negatively affect the existing habitat of the T&E species. The use of a general permit that relies upon the existing BMPs utilized by VELCO will continue to protect Threatened and Endangered Species and the habitat that is necessary to protect them.