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Agency Of Natural Resources

December 28, 2021

Legislative Committee on Administrative Rules
Vermont State House
115 State Street
Montpelier, VT 05633-5301

Re: 21-P28, 10 V.S.A. Appendix § 10, Vermont Endangered and Threatened Species Rule

Dear Committee members:

I am writing to provide additional information regarding the exemption language in Section 5.1 (c) of the proposed amended Endangered and Threatened Species Rule pending before LCAR. Specifically, the Department was asked to propose an “alternative strategy” and outline “the conditions, authorities, and process to maximize the Vermont Department of Health’s ability to respond in a timely manner to a public health emergency while also ensuring appropriate precautions to minimize environmental and human health risks due to exposure to toxins.” The Department is not able to provide such a plan without the additional process required by the statutes related to threatened and endangered species and permitting. As such, the Department will simply delete Section 5.1 (c) and eliminate the exemption for pesticide applications associated with an Emergency Health Order issued in accordance with 18 V.S.A. § 127 by the Department of Health.

It is our understanding that Emergency Orders related to pesticide applications are rare and are implemented by the Commissioner of the Department of Health. In addition, the Department has no information that indicates that such Orders have ever resulted in the taking of (or harm to) a threatened and endangered species.

In accordance with 10 V.S.A. § 5403 (a) it is unlawful to “take” any species listed as threatened or endangered without a permit. The term “take” is defined broadly and includes any action that harms a listed species. See 10 V.S.A. § 5401 (18). Pursuant to 10 V.S.A. § 5408 (b), the Secretary may issue an incidental permit to take a listed species if these requirements are met:

- (1) the taking is necessary to conduct an otherwise lawful activity;
- (2) the taking is attendant or secondary to, and not the purpose of, the lawful activity;
- (3) the impact of the permitted incidental take is minimized; and
- (4) the incidental taking will not impair the conservation or recovery of any endangered species or threatened species.

In addition, the Secretary has the authority to issue a General Permit for taking a threatened or

endangered species provided that the permitted activity “will not affect the continued survival or recovery” of a species and when “necessary to address an imminent risk to human health.” 10 V.S.A. § 5408 (1)(1) and (4)(A).

When the Secretary receives an application for an Incidental Takings Permit or develops new type of General Permit, Department staff review the application and proposed activities, and consult with the appropriate Scientific Advisory Group (SAG). SAGs are comprised of both Department staff and volunteers with relevant scientific and environmental experience. The SAG(s) will make a recommendation to the Endangered Species Committee (ESC). The ESC in turn makes a formal recommendation to the Secretary regarding whether to issue a permit and the ESC also often specifies conditions that should be included in the permit, including avoidance and minimization, mitigation, monitoring, and reporting. Both an Incidental Permit and a new General Permit require a thirty-day public notice and comment period. See 10 V.S.A. § 5408 (k) and (1)(6). As such, there is a process of consultation and public input for issuing these kinds of permits and the Department is unable to formulate an alternative plan under these circumstances.

However, the deletion of Section 5.1 (c) and the elimination of the exemption, will satisfy any potential objection to the rule on the basis that the exemption in the proposed amended rule is beyond the authority of the Department.

Thank you for your thoughtful review of the rules. Please do not hesitate to contact me at catherine.gjessing@vermont.gov or (802) 595-3331 with any questions or concerns you may have.

Sincerely,

/s/ Catherine Gjessing

Catherine Gjessing
General Counsel

Cc: Christopher Herrick, Commissioner, Department of Fish and Wildlife
Mark Scott, Director of Wildlife