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*Agency Of Natural Resources*

December 14, 2021

Charlene Dindo, Committee Assistant  
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 Ms.Dindo:

Enclosed for filing please find for the LCAR agenda on December 16, 2021, an updated highlighted annotated Proposed Rule entitled 10 V.S.A. Appendix § 10, Vermont Endangered and Threatened Species Rule.

In response to the comments of legislative counsel we are requesting that LCAR approved the following additional changes to the rule:

- Sec. 1.0 – Consistent with the quoted statute “State” is capitalized and the hyphen before “endangered” or “threatened” is deleted.
- Sec. 2.0 – The colon in the first sentence is deleted and “take” is amended to “taking” in the second sentence.
- Sec. 3.2 – “10 V.S.A. § 5402” replaces “section 5402 of this title.”
- Sec. 3.5 – “subdivision 6001(22) of this title” is replaced with “10 V.S.A. § 6001(22).”
- Sec. 3.9 – “chapter” is replace with “rule.”
- Sec 3.13 – The phrase “or, a species determined to be a "threatened species" under the federal Endangered Species Act” has been added so that the definition of threatened species in 10 V.S.A. § 5401(19) is included, consistent with the approach of 3.4 relating to “endangered species” which includes both the determination standard and the statutory definition.
- Sec. 5.1(b) – “(ANR)” is deleted.
- Sec. 5.1(d)(1) – “Agency of Agriculture” is replaced with “AAFV.”
- Sec. 5.0 (listing) – This numbering of this section is corrected to be 6.0, 6.1, 6.2, etc. . .

In addition, legislative counsel inquired about the language of Section 5.1 (c) which essentially exempts pesticide applications associated with an Emergency Health Orders issued in accordance with 18 V.S.A. § 127, from obtaining a threatened and endangered takings permit. This language was requested by the Department of Health based on the broad authority to issue Emergency Health Orders to address “an imminent and substantial public health hazard, or to mitigate an imminent and substantial significant public health risk.” A significant public health risk is defined in 18 V.S.A § 2 (12) as "a public health risk of such magnitude that the

Commissioner or a local health officer has reason to believe that it must be mitigated. The magnitude of the risk is a factor of the characteristics of the public health hazard and the degree and the circumstances of exposure to such public health hazard.” Emergency Health Orders related to pesticide applications are initiated by the Commissioner of Health in response to the discovery of an imminent and substantial public health threat, such as the discovery of West Nile Virus and Eastern equine encephalitis (EEE) in mosquitos in Vermont, the transmission of which can be fatal in humans.

Thanks to legislative counsel for the careful and thoughtful reading of the rules! Please do not hesitate to contact me at [catherine.gjessing@vermont.gov](mailto:catherine.gjessing@vermont.gov) or (802) 595-3331 with any questions you may have.

Sincerely,

***Catherine Gjessing***

Catherine Gjessing  
General Counsel

Cc: Christopher Herrick, Commissioner, Department of Fish and Wildlife