

**Vermont Endangered Species Committee (ESC)
9-17-2020 Meeting Minutes**

Attendees:

ANR Secretary: Julie Moore

ESC Members: Allan Strong (Chair), Liz Thompson (Vice Chair), Bryan Pfeiffer, Paul Wieczorek, Jim Shallow, Louis Porter (Commissioner of Fish & Wildlife (FWD)), Mark Scott (FWD Commissioner's designee), Cary Giguere, (Secretary of Agriculture, Food, and Markets designee), Becca Washburn (FPR Commissioner's designee)

Non-members: Jim Andrews (Reptile and Amphibian SAG), Mark LaBarr (Bird SAG), Bill Kilpatrick (Mammal SAG), Rich Langdon (Fish SAG), Kent McFarland (Invertebrate SAG), Mason Overstreet and Jordon Stone (VT Law School), Jeff Parsons (Arrowwood Environmental), Chris Fastie (Salisbury, Forest Ecologist), Patti Casey (Agriculture, Food, and Markets), Penny Percival (ANR Executive Assistant), Steve Parren (FWD Wildlife Diversity Manager), Catherine Gjessing (FWD General Counsel), Bob Popp (FWD Botanist), Will Duane (FWD Executive Assistant)

Scheduled ESC Meetings for 2021:

9:00 AM – 2 PM (online)

14 January 2021

22 April 2021

16 September 2021

Call to Order: Allan Strong opened the online Microsoft Teams meeting at 9:04 AM. Instructions about online process and introductions were made. Thanks to Penny Percival for setting up the online meeting.

Approval of 4-23-2020 Minutes:

MOTION: *By Jim Shallow, seconded by Paul Wieczorek, to accept the minutes.* The vote was in favor of the motion. Bryan Pfeiffer abstained.

Secretary's Report (ANR Secretary Julie Moore):

The Legislature is still meeting but they hope to end next week. Act 250 criteria for forest fragmentation will be addressed by rule. Recreational trail jurisdiction is being considered in the Senate. FY21 budget was challenging due to a 3% reduction and special fund impacts. The FY22 budget was passed by the House. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provided 14 million in funding to ANR. State lands received 3 million in funding for sustainable recreation.

Allan Strong asked if the CARES Act funds must be spent by the end of the year. The Secretary confirmed this was the case. ANR is scanning files so there is better remote access. Sanitization of facilities on state lands is being addressed. Mark Scott stated that some CARES Act funding is going toward scanning regulatory process records and Natural Heritage related information at the FWD.

Jim Andrews just received a letter from Secretary Moore about Mudpuppies and other species. He responded the morning of the ESC meeting and the Secretary had not had time to respond. He asked shouldn't ANR require the applicant to provide better data when the issue of harm to a species is in question? The Secretary responded that the statutory framework needs to be considered. Commissioner Porter suggested we continue this discussion when there is more time and stated that permits are not issued for every action that could impact a species. Our approach is to issue a permit when there is a realistic expectation of a take.

Action: Continue conversation about permitting and take at a future time.

Commissioner Porter suggested we should hear more from Allyssa Bennett, Mark Scott, and Catherine Gjessing. Bryan Pfeiffer indicated that he would like to participate in these discussions. Commissioner Porter stated that the definition of take is very broad, and it also requires interpretation for game species.

Allan Strong asked about the Governor's veto of the Global Warming Solutions Act. The Secretary responded that the framework of the bill, not the purpose, was the issue. The act would create a 23-member Climate Council with an aggressive time frame with limited funding that is not consistent with the scope of work. The act would create a new cause-of-action that allows lawsuits to be filed, which introduces uncertainties. The Climate Council replaces the Legislatures role. ANR would be held accountable for implementation but ANR covers only 20-30% of greenhouse gas inputs and cannot address auto reductions. This could come at the cost of building resiliency. Nobody is taking issue with the goals of addressing global warming. Commissioner Porter indicated that he thinks the bill could make it harder to do something good about climate change. The process does not adequately include the Legislature and it under funds the work. It could be a real misstep that will make it harder to address global warming.

Commissioner's Report (FWD Commissioner Louis Porter):

CARES Act requires work in the fall, a time when the FWD usually avoids infrastructure work on state land due to recreation activities on those lands. The funding did not address staff capacity. The Migratory Bird Bill passed by state legislators this year provides some FWD enforcement ability. Federal courts have limited the federal rollback of the Migratory Bird Treaty Act. There is a bill that would ban the sale of some wildlife species parts. None of the bills come with funding for the FWD. This further stresses staff capacity.

Jim Shallow asked about Wildlife Restoration Act/Pittman-Robertson (PR) wildlife funding. Gun and ammunition sales are increasing, but PR excise tax payments have been delayed. The Federal Aid in Sport Fish Recreation Act/Dingell-Johnson Act (DJ) funding for fishing has declined. Liz Thompson asked about hunting and fishing participation. Commissioner Porter stated that it is hard to separate participation impacts from regulation changes and Covid-19. The Department has seen an uptick in license sales since COVID struck.

The value of volunteer match for helping with the FWD federal State Wildlife Grant for T&E and other Species of Greatest Conservation Need was stressed, and meeting participants were thanked for supporting the Habitat Stamp.

Update on potential timeline for rule-making – Allan Strong, FWD staff:

The ESC recommended three critical habitat designations, one new endangered species, one up listing to endangered, one new threatened species, one down listing to threatened, and delisting of one species. We now have a package for rule making. We had been waiting for in-person hearings, but that now seems unlikely. We will probably have a virtual hearing in December or January. Catherine Gjessing and Steve Parren will lead this effort. We hope to have the public hearing before the next ESC meeting on January 14th. Commissioner Porter stated that the Eastern Meadowlark and the American bumble bee might generate landowner concerns. Catherine suggested that we need to do some outreach on the proposals. Mark stated that we will develop an outline of needed actions and share that with the ESC. It would be helpful to let others in support of the proposals know. Commissioner Porter reinforced the idea that supporters need to make their voices heard.

(Note: Secretary Moore needed to leave the meeting)

Logistics for the presentation of the Sally Laughlin Award for Conservation of Endangered and Threatened Species – Liz Thompson:

Liz Thompson stated that we are looking for ideas about a venue for presenting the award this calendar year. Commissioner Porter said he was uncertain what events will be in person. We could always do the presentation at a virtual meeting. Jim Andrews thought many who know Warren King would join virtually and a smaller in person event could occur. Commissioner Porter said it is more difficult to do a hybrid meeting but doable. Mark Scott mentioned the art contest award being done about WMAs for celebrate the 100th year anniversary planned as an in-person event in October at Dead Creek.

(Note: Date is November 6, 2020)

Action: Mark will check on the feasibility of presenting the Sally Laughlin Award for the Conservation of Endangered and Threatened Species at Dead Creek and he will report back to the ESC.

Action: The ESC subcommittee will work on acquiring the award plaque.

Proposal to list the American bumble bee as endangered

Kent McFarland stated that drastic declines have been documented in portions of the range. Information is limited compared to that for birds. Collections provided historical data. We have data for the Champlain Valley. We could not find the American bumble bee at historic locations during the two-year bee atlas effort. The Vermont decline occurred in the 1980s. It is a grassland species that nests above ground. Land-use practices could have impacted the species. We know how to raise bumble bees, so reintroduction and recovery is possible.

Allan Strong asked about bumble bee dispersal and recolonization. Kent replied that workers forage up to 10 km. Some American bumble bees are still in Ontario, but it is not known if they could reach Vermont. Three bumble bees have already been listed, and it has not seemed problematic. Some people are implementing practices that could help. Mark Scott asked if college insect collections could be killing listed bees. Kent did not think the collection of workers would be a problem, but early spring collection of queens might. Mark Scott asked if the habitat is similar to that of the already listed bees. Kent responded that this species is more focused on larger grasslands. It is the Bobolink of the bee

world. Mark stated that interest in Monarch butterflies and other pollinators has increased habitat that benefits pollinators. It would be good to acknowledge agency land management activities for pollinators on the listing documentation. Bryan Pfeiffer asked if listing would be influenced by it being extirpated. Commissioner Porter thought listing a species that is not here any longer is challenging but restoration potential argues for trying. Mark Scott acknowledged that it was possible we might still locate the species. Catherine Gjessing stated that the species listing criteria is broader for species and more specific for habitat. Liz Thompson shared that a plant thought to be extirpated was later found at a location in abundance. She suggested we be cautious about assuming extirpation. Commissioner Porter stated that with climate change range shifts it begs the question of why we list species, and this may be worth a discussion. Paul Wiczorek thought partners could assist recovery of insect species to augment state resources. Commissioner Porter replied that we work with partners now, but responsibility remains with the state agency. Recover America's Wildlife Act would certainly help. Bill Kilpatrick stated that the UVM entomology course students do continue to collect. Extirpation has been debated by the SAGs and ESC in the past. Collections of species remain limited and there is a lot we still do not know. Kent added that the UVM collections are very important and need better support.

Action: ESC will consider how to urge UVM to better support collections.

Motion: *By Bryan Pfeiffer, seconded by Liz Thompson, to recommend listing the American bumble bee as endangered.* Vote was in favor. ANR staff did not vote.

Mammal SAG deliberation on the revised Arrowwood Report on mosquito spraying and endangered and threatened bats and mosquito spraying – Bill Kilpatrick:

Key question to address: Does the (adulticide) spraying constitute a take and consequently, should an incidental take permit be required?

(18) "Take" or "taking":

(A) With respect to wildlife designated a threatened or endangered species, means:

(i) pursuing, shooting, hunting, killing, capturing, trapping, harming, snaring, or netting wildlife;

(ii) an act that creates a risk of injury to wildlife, whether or not the injury occurs, including harassing, wounding, or placing, setting, drawing, or using any net or other device used to take animals;

Bill Kilpatrick highlighted that the adulticide is an aerosol that can remain in the air for up to two hours. An estimated 4000 acres are treated. Permethrin, which bioaccumulates, and Malathion are used. Bats flying would be exposed to inhaling the adulticide. Grooming is thought to increase risk, as well as feeding on insects exposed to spray. Both lethal and sub-lethal impacts are possible. Exposure could interact with WNS impacts. Four of five Mammal SAG members thought take was occurring and recommended a permit. One member thought there was no evidence of direct take. There is the alternative of using only larvicide.

Commissioner Porter shared state biologist Alyssa Bennett's comments: lack of actual evidence that bats are being taken here or elsewhere or provided in the report. Permits are issued when there is a likelihood of take. Commissioner Porter recommended that the ESC hear directly from Alyssa. The SAG has never before been asked about what requires the issuance of a permit. Allan Strong stated that the ESC is charged to give advice on endangered species. Cary Giguere stated that the state recommends larvicide use. Cary and Patti Casey could work with spray district if a take is actually occurring. As a state agency

they would need a justification to change what is currently in place. Allan Strong stated that the definition of take is an issue the ESC is grappling with. Commissioner Porter responded that the FWD relies on staff expertise and judgment to determine if a take is occurring. For game species staff need to decide if a prosecution could be sustained. FWD staff and the ESC should be cautious in how take is applied. We need strong evidence of a likely take. Cary Giguere stated that burden of proof assessment could influence a permit issued by Agency of Agriculture, Food, and Markets. Bryan Pfeiffer stated that he did not think we should compare spraying pesticides to driving a car and striking a bat. The literature does seem to indicate that there is a risk of impact to bats from the pesticides. Commissioner Porter referenced the letter from Patrick Parenteau and Zygmunt Plater. If the standard for a take is the potential of take, this would be a significant change for how permitting is currently implemented by the FWD. Commissioner Porter said he would like to have Alyssa address the ESC. Allan Strong shared that EPA documents he reviewed showed a risk of injury to bats from Malathion. Jim Shallow asked about the Agency of Agriculture, Food, and Markets permit for adulticide application. Cary said application on private property does not require a permit but is covered by a General Permit. The spray district is required to manage against resistant mosquitoes. Permethrin is preferred. Bill Kilpatrick stated that in a lab setting the chemicals do have impacts on bats. The Mammal SAG would benefit from more information on bat behavior in the spray area or results from examining bats for the presence of the pesticides. Jim Andrews commented that SAGs could help ANR and FWD by reviewing data to determine risk of take. Reptiles and amphibians are taken by road traffic but permitting is not expected. Commissioner Porter responded that he did not think it was the role of SAGs to determine if a permit is needed. Allan Strong stated that the ESC is normally not involved in this sort of discussion.

Mason Overstreet respectfully responded that Professors Parenteau and Plotter are scholars who have followed Vermont's Endangered Species Law. He disagreed with the analogy of driving a car and striking a bat. The issuance of a permit for spraying does not set a precedent that would need to be applied broadly. Commissioner Porter responded that the FWD is asking for evidence of take. Bryan Pfeiffer stated that a permit does not prevent a take. Bryan pointed out that he himself has been required to obtain a federal special use permit merely to catch and release invertebrates that face nowhere near the threats these adulticides would pose to bats.

Mason stated that this is a situation where there is evidence that a take is likely. Commissioner Porter agreed that a statutory limitation of the definition of take might be helpful. Allan Strong asked if it might be helpful to add Professor Parenteau to the discussion. Bryan asked about limiting the definition of take. Commissioner Porter stated that he thought bringing the issue to the Legislature would likely result in a narrowing of the definition of take.

Action: Continue discussion of take and burden of proof at the January ESC meeting.

(Note: Commissioner Porter needed to leave the meeting)

ESC Business – Allan Strong:

- Expectations of ESC members

It would be helpful if members let Allan Strong know that an email request from him is received. Responses are often last minute and that prevents preparation for an ESC discussion. More responsiveness was requested.

- Updating SAG membership spreadsheets

Allan Strong would like to have the SAG membership list updated. Penny Percival is willing to assist updating the spreadsheet.

Action: SAG chairs were asked to revisit their list of members and update.

- ESC subcommittee membership (need representative on Permit and Listing subcommittees)

The ESC needs a member on the Permitting Subcommittee. Bryan Pfeiffer indicated he is willing.

Steve Parren gave a brief update on Mudpuppy trap and transfer efforts in the Lamoille. After one week, traps needed to be pulled due to the Governor's Stay at Home order. Otherwise two more weeks of trapping would have occurred when river conditions were expected to be suitable. A Lake Champlain Basin Program grant was awarded, and funds should be made available by the end of the year. A rescue of Mudpuppies during the lampricide treatment of the Lamoille River is planned. Trapping will resume next spring. A draft Aquatic Nuisance Control Permit recommended a mark and recapture study of Mudpuppies in the Lamoille River, which is very different than the current work plan.

Bob Popp discussed an abandoned quarry restarting operations that supports a large population of Hairy bush-clover. The proposal would result in a take of 197 plants, which represents 77% of the population. It is a S1 species listed as state endangered. There was no offer of minimization of impacts in the proposal. Seed collection and transplantation was suggested. A logging road onsite and a WMA are possible transplantation sites. Both would need active management. The Flora SAG is concerned about the magnitude of the take but have not yet provided comments to the ESC.

Regarding the earlier discussion on bats, Bryan Pfeiffer suggested that representatives from the ESC and the Fish and Wildlife Department continue discussions, and then prepare a written status summary, including a written response to the Vermont Law School letter, prepared for the ESC before it takes up the issue again. Allan Strong stated it is difficult to respond at a meeting without summary materials. Bill Kilpatrick said the take definition seemed clearly defined in statute.

Adjourn:

The meeting adjourned at 12:10 PM

Respectfully submitted: 9/19/2020, revised 10/5/2020

Steve Parren

Fish & Wildlife Department

Approved: 1/14/2021

Allan Strong, Chair Endangered Species Committee