

**Vermont Endangered Species Committee (ESC)  
4-22-2021 Meeting Minutes**

**Attendees:**

**ANR Secretary:** Julie Moore

**ESC Members:** Allan Strong (Chair), Liz Thompson (Vice Chair), Bryan Pfeiffer, Jim Shallow, Alan Calfee, 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), Bill Kilpatrick (Mammal SAG), Kent McFarland (Invertebrate SAG), Matt Peters (Flora SAG), Mark LaBarr and Sally Laughlin (Bird SAG), Rich Langdon (Fish SAG), Mason Overstreet (VT Law School), Jeff Parsons (Arrowwood Environmental), Chris Fastie (Salisbury, Forest Ecologist), Samantha Morrison, Jon Kart (FWD Permit Administrator and WAP Coordinator), Catherine Gjessing (FWD General Counsel), Bob Popp (FWD Botanist), Penny Percival (ANR Executive Assistant), Steve Parren (FWD Wildlife Diversity Manager)

**Scheduled ESC Meetings for 2021:**

9:00 AM – 2 PM (online)

16 September 2021

**Call to Order:**

Allan Strong opened the online Microsoft Teams meeting at 9:03 AM. Thanks to Penny Percival for setting up the online meeting. The meeting was recorded.

**Comments from the public not related to the agenda:**

None

Jim Shallow shared the sad news of the passing of Marty Illick. The ESC paused to remember her important conservation work.

**Additions, deletions, or changes to the agenda:**

None

**Approval of minutes from the 1/14/2021 meeting:**

**MOTION:** *By Bryan Pfeiffer, seconded by Alan Calfee, to approve the 14 January 2021 minutes with suggested revisions.* Minutes were approved.

**Approval of minutes from the 2/26/2021 meeting:**

**ACTION:** Bryan Pfeiffer asked that we include the ESC memo on pesticide spraying that was sent to the ANR following 2/26 meeting with the 4/22/2021 minutes.

**Note:** The ESC memo is included at the end of these minutes.

**MOTION:** *By Bryan Pfeiffer, seconded by Jim Shallow, to approve the 26 February 2021 minutes.* Minutes were approved.

**Secretary's Report – ANR Secretary Julie Moore:**

This was a challenging legislative session. Remote meetings offer strengths such as watching recordings but are also challenging in that there is the expectation that one can keep up with all the meetings in a timely manner. Legislature topics included wood chip plants, bottle bill, water quality certification, and conversations on vessel proposed to be reefed. The American Rescue Plan Act will provide \$2.7 billion in funding to Vermont. One million has flexibility for economic recovery actions including outdoor recreation, housing, broadband, climate action, water and sewer infrastructure. Vermont's Climate Council recommendations are due 12-1-2021

The memo from the ESC regarding spraying is being reviewed with staff. ANR is also working with AAFM so their permit considers possible impact to bats.

Bryan Pfeiffer asked about recreation funds being available to FWD. The Secretary indicated that funds would be provided to communities as well as FWD and FPR, who will make repairs and improvements to state lands, including improved access. The CARES Act allowed some of this work on state lands already. Jim Shallow suggested encouraging people at Access Areas to purchase the Habitat Stamp. Maybe use QR codes on signs. FWD has been promoting the Habitat Stamp and has developed a user phone app. Allan Strong asked about timeline on hearing back on the spraying issue. Cary Giguere responded that a municipality will need a pesticide permit, and this is in process now. The spray district gets four permits now, and a fifth for adulticides is being developed. A permit will not be required for private properties or schools. Permits will be required for pesticide use along roads. Jim Shallow asked about T&E permitting. The Secretary stated that ANR is still considering the ESC recommendation but also working with AAFM on their permitting.

Bob Popp asked Commissioner Porter about CARES Act funding that could lead to impacts to sensitive areas. These areas would benefit from signage and rerouting of trails. FWD does this now and will continue to do so. Public land use does create damage and needs to be managed. Mark Scott mentioned FWD staff discussing where is the point where too much use is occurring and it is being considered by the Lands and Habitat Program. Bryan Pfeiffer acknowledged that bird watchers impact Spruce Grouse and he indicated he was glad to hear FWD is considering these sorts of issues.

**Acknowledgement of Steve Parren's contributions to T&E species conservation:** Long-time ESC member Sally Laughlin read a Bird SAG tribute to Steve and several other members of the ESC or SAGs spoke kindly of Steve's contributions over the years. Steve will be retiring in couple of weeks.

**Commissioner's Report – FWD Commissioner Louis Porter:**

The Wanton Waste Bill is a good bill addressing hunting and trapping. Outside funds are having an influence on the FWD budget.

Allan asked about the replacement of Liz Thompson as an ESC member representing flora. Commissioner Porter stated that choosing a replacement will occur by the next ESC meeting. Allan also asked about Act 250 changes. The Commissioner replied that a proposal would have provided for

funding FWD engagement in Act 250, but it was not supported by the House Natural Resources, Fish, and Wildlife Committee. Allan also asked about T&E rulemaking. All the listings are supported by ANR/FWD. Mark Scott shared the FWD effort to comply with required notifications and discussions of the rule. Catherine added details on notifications and revision of bee language in the rule. ANR/FWD will file with ICAR in June at the latest. Commissioner Porter stated there was a delay due to Houghton's Sedge being added. Catherine thought the iterative process is helpful and avoids challenges later. Kent McFarland asked about bee language changes. Catherine explained that the wording is now less specific, more consistent with statute, and involves consultations.

(Secretary Moore and Commissioner Porter needed to leave the meeting due to other commitments)

**Annual Report – Flora SAG, Matt Peters:** Matt introduced himself and is now Chair of the Flora SAG. Flora SAG is a large and active group. Houghton's sedge was proposed as State-Endangered with only a single known location in Vermont. The SAG has a systematic process for evaluating a species' status. The SAG also addressed five takings events, three with listed species, two with rare species. Litigation challenges rare species protection under Section 248. Permitting for four species was considered. Management of Champlain beachgrass and Prairie redroot was discussed. Bryophytes were evaluated thanks to Dorothy Allard. Green Mountain College's herbarium collection was reviewed. S-Ranks are being reviewed thanks to Aaron Marcus. Art Gilman is the author of the Flora of Vermont and keeps updating what we know. Propagation of Tulip tree raises issues of rare species conservation and assisted migration.

Liz Thompson commented that Flora SAG addresses a large number of species. Should the group become more than one group? Matt was not aware of any proposal to do this. Bob Popp reminded the ESC that in the past there was a Bryophyte group. Bryan Pfeiffer pointed out that invertebrates are more numerous than plants. He then asked about the Beach Heather taking. Bob Popp replied that the taking was due to lack of knowledge by a nearby property owner and this has been addressed.

#### **T&E Permitting Overview:**

Mark Scott introduced the subject. Some permits are routine and do not require ongoing review. There is a process to change what permits are reviewed. Jon Kart is the FWD Permit Administrator. [He explained the permitting process for T&E species.](#) The T&E law defines take for both plants and animals. "Authorized" versus "Incidental" take are different. Incidental take is an action that does not focus on the species, but the species may be impacted. "Economic Hardship" was a category for take in the past and this has been replaced by "Incidental". The goal of "Authorized" take is work focused on a species is the purpose of the take. Jon Kart provided examples of both "Authorized" and "Incidental" take actions. Runoff, shading, and other changes to the environment could eventually impact a listed species. How likely is a taking and under what timeframe, and should a permit be required are questions that may need to be asked.

Di Minimus is an "Authorized" permit for an action with little to no impact to a listed species (e.g., display of a specimen of an already dead individual of a listed species). These permits are prepared and issued by the Permit Administrator usually without prior review by the ESC. The ESC reviews these permits as a class annually.

Non-Di Minimus is an “Authorized” permit for actions that may have some impacts, and are generally for research, management, and education. The first time a permit application is encountered it is reviewed by the ESC in advance of issuing a permit. Renewals of existing permits are often not reviewed again by the ESC in advance of issuing a permit if there are no substantive changes. The reason for this is to not burden the ESC with bothersome tasks. Permits for approved mussel and bat surveyors and the surveys conducted would be reviewed annually. Bryan Pfeiffer in chat stated that we need to get Jon in for a review of past permits. “Incidental” and other permits are a third permit category. Application comes to Permit Administrator Jon Kart. Jon may request staff review. Permit needs to be considered complete administratively. Depending on the substance of the application it may require SAG and ESC review. A hearing may be requested by the ESC. Jon provides a draft permit is for review if the permit type requires this. Jon provided a flow chart for the permitting process.

Allan Strong asked about how permit violations are addressed. Jon Kart responded that a permit violation is considered when a renewal is requested. FWD management is informed. Catherine Gjessing stated that she has sent out formal notices of violations in the past and the permittee needs to come into compliance. We keep track and enforcement is an option. Under statute we have the option of Civil or Criminal enforcement. Bryan Pfeiffer thanked Jon for the presentation. He asked if anything should be changed to improve the system. Jon responded that although time consuming, it does seem to work. Permit fees do not cover all the staff time needed. Mark Scott spoke to the challenges of state capacity needed to do an adequate job. Bryan asked would it help to have one ESC member be the point of contact on permitting? Allan Strong has largely served that role and indicated he is willing to continue. Bryan commented that the mosquito district did not request a permit. Jon shared that once in a while FWD may learn of an action that might require a permit and FWD will reach out to learn more.

**Action:** Jon’s PowerPoint will be available on the Google Drive site. Hyperlink above.

**Annual Report – Bird SAG, Mark LaBarr:**

Mark reported that the SAG reviewed the bird portion of Vermont Conservation Design. This will be revisited. Common Tern Critical Habitat, listing of Eastern Meadowlark and delisting of Bald Eagle are part of the current rule-making process. Loons and other delisted species seem to be doing well. Eagle did very well in 2020 also. Common Tern’s had 230 fledglings in 2020. Solar walkway lighting seems to have reduced predation. The SAG will be revisiting the Common Tern Recovery Plan. Whip-poor-wills were surveyed and about 100 birds were documented in the targeted area. Jim Shallow asked why the focus area seems to be a hotspot for Whip-poor-wills? Mark speculated that the open woodlands may be a factor. Jim Andrews asked about an abandoned Bald Eagle nest. Mark has noticed some nests are abandoned and it could be due to the pair moving or the loss of a pair.

**Annual Report – Fish SAG, Rich Langdon:**

Lampricide applications were reviewed by the SAG. Recommended permit requirement of nontarget surveys within 36 hours of treatment was too long and would allow for scavenging of nontargets or storm waters dispersing nontargets. USFWS was already doing surveys in a timelier manner. SAG also recommended conducting treatments as late in the fall as possible to protect young Lake Sturgeon. The SAG discussed 2019 Stonecat and darter studies. No Channel Darters were collected in the Poultney River. No Mudpuppies were collected in Lewis Creek, and this is the sixth treatment where Mudpuppies were not documented. Jim Shallow asked if the SAG has had a role in FERC relicensing of dams? The SAG has not been involved with FERC in the past but could be in the future. Jon Kart pointed out that FWD staff members Mark Ferguson, Bernie Pientka,

Lael Will, and Hannah Phelps have worked on relicensing. Jim Andrews said he has been contacted about FERC relicensing directly, not through the SAG process.

**Annual Report – Invertebrate SAG, Kent McFarland:** Kent reported their SAG has four new members. The SAG worked on proposal for *Bombus pensylvanicus* (American Bumble Bee). This species has been reported from New York/Quebec. The SAG is starting to examine Lady Beetles. New York is raising some rare species and releasing. The Tiger Spiketail dragonfly was found in Vermont. Elktoe mussel is found in one Vermont river. Sedge wetland skippers are tied to these wetlands and we would like to do more survey work. Champlain wetland restoration may provide benefit to these skippers. The SAG is working on Critical Habitat proposals (Brook Floater and tiger beetles). In 2013 SAG did a white paper on lampricide impacts to mussels and this will be updated. Seventeen invertebrates are currently listed. There are perhaps 21,000 invertebrate species in Vermont, so we are concerned about our level of knowledge. Wild bee survey work is ongoing and 48 new species have been discovered. Eight were in collections, but previously unidentified. It is important to restore the UVM zoological collections.

Allan Strong brought up structured decision making and the possibility of a retreat meeting to examine many of the issues the ESC and SAGs struggle with. Kent McFarland thought it could help but we also could use some help with the latest research on lampricide and impacts to mussels. Rich Langdon indicated he was supportive of a retreat discussion.

**Annual Report – Mammal SAG, Bill Kilpatrick:** Bill reported that a bat cave Critical Habitat proposal had been developed and is part of the T&E proposed rule. The SAG reviewed and made recommendations on a bat radio telemetry permit application. The mosquito spraying issue was discussed and the SAG recommended the need for a permit 4:1. Martens are being found in Vermont and habitat is protected on the Green Mountain National Forest. There is a possibility that a relic population of Martens contributed to the genetics being detected, but it is also possible that escaped captives from Massachusetts may have had some impact. Non-SARS coronavirus has been found in US bats, and bat handling research is not currently being permitted due to the risk of human to bat transmission. High levels of rodenticide are showing up in carnivores. Some bat populations are holding steady. Northern Long-eared Bats may still be declining. There seems to be some resistance in Little Brown Bats to White-nose Syndrome. No lynx sightings were reported.

**Annual Report – Reptile and Amphibian SAG, Jim Andrews:** Jim informed the ESC that Bill Barnard has gone off the SAG. He served on the ESC and other SAGs over the years and deserves recognition for this. FWD biologists trapped and translocated Mudpuppies in spring 2020 to try to establish a second population. Mudpuppies were collected during the Lamoille River lampricide treatment and survivors were also translocated upstream. Mudpuppy nontarget lampricide collections included 21 in the Lamoille 26 in the Winooski, and one in the Missisquoi rivers. Jim shared his concern that nongame species can be legally shot if the person has a hunting license. The SAG will continue discussing this and may develop recommendations. The issue of captive and then released turtles was also discussed. The SAG is considering the native status of the Eastern Box Turtle. The SAG is wrestling with what is needed to determine if native or not. Mention of Wood Turtles in FWD Wildlife Management Area PDFs was discouraged because of the risk of collection. The Atlas map for Wood Turtle was changed from town level to county level to make it less likely a collector could target Wood

Turtles. Canadian efforts to introduce Boreal Chorus Frog is ongoing. The SAG reviewed permit applications for FWD staff.

Bryan Pfeiffer asked about Mudpuppy mortality from lampricide and if we should devote more attention to protecting Mudpuppy during treatment rather than requesting a T&E permit? Jim responded that the SAG is promoting both avenues of protection. Bryan Pfeiffer wondered if more conditions could be applied in the Aquatic Nuisance Control Permit.

**T&E permit review:**

Bob Popp addressed a subdivision application that would impact Low bindweed. The plant may be moved to a common area along with soil with potential seed. Bryan Pfeiffer asked if plants are still there? Bob thought it was likely to still be present. There was discussion about follow-up monitoring, possibly moving to another site with more plants, and having volunteers care for the plant.

**MOTION:** *By Allan Strong, seconded by Bryan Pfeiffer, to accept the Flora SAG proposal (move plant from current location, but remain within the subdivision) and have permit include condition that the developer find volunteers to care for the plants.* Al Strong, Alan Calfee, Bryan Pfeiffer, Jim Shallow, and Cary Giguere voted in favor, none opposed, Becca Washburn abstained. Motion passed.

There is a University of Maine graduate student proposal to collect cuttings of *Diapensia lapponica*. The SAG did not support the proposal as written. Not enough justification and details on methods were provided. A revised proposal would be welcomed. UVM owns the land and requested more information for their permitting process. Becca Washburn asked if the graduate student contacted FPR. Bob responded not yet but indicated the SAG was unlikely to approve collection on FPR land.

**MOTION:** *By Allan, seconded by Liz Thompson, to deny the proposal as written to collect Diapensia lapponica in Vermont.* Allan Strong, Alan Calfee, Bryan Pfeiffer, Jim Shallow, and Cary Giguere voted in favor to deny, none opposed, Becca Washburn abstained. Motion passed.

A Hairy bush clover permit application was recently resubmitted to open an abandoned 28-acre quarry in Vernon. Hairy bush clover numbers 648 plants and 499 (77%) would be taken. The applicant would translocate half of the plants along an old ATV trail onsite and the rest to state land nearby. The applicant would provide heavy equipment for management. This discussion will be continued by email. Jim Andrews mentioned the possibility of the presence of the North American Racer at this quarry site.

**ACTION:** Jon will check in with other FWD staff members concerning snakes and other listed animals.

**Adjourn:**

*The meeting adjourned at 2:10 PM*

Respectfully submitted: 4/23/2021, revised 4/29/2021

Steve Parren  
Fish & Wildlife Department

Approved:

Allan Strong, Chair Endangered Species Committee

## MEMORANDUM

**From:** Appointed members of the Vermont Endangered Species Committee (Allan Strong [chair], Alan Calfee, Elizabeth Thompson, Bryan Pfeiffer, Jim Shallow, Paul Wiczorek)

**To:** Julie Moore, Secretary of the Agency of Natural Resources

**Date:** 2 March 2021

**Re:** Recommendation favoring an Incidental Takings Permit to protect listed bat species in the Brandon, Leicester, Salisbury, Goshen, Pittsford Insect Control District

### Summary

The Vermont Endangered Species Committee (ESC) on 26 February 2021 voted unanimously (with one abstention and two not present) to recommend that you require the Brandon, Leicester, Salisbury, Goshen, Pittsford Insect Control District (the District) to seek an incidental takings permit — protecting five threatened and endangered bat species — before using adulticides to control mosquitos. The ESC has considered evidence and opinions from scientists, legal scholars, policy makers, its own Scientific Advisory Group on Mammals (Mammal SAG), and the Vermont Fish and Wildlife Department (the Department). After discussion at three meetings (reflected in our minutes and in supporting documents), we find that the weight of evidence supports your requiring the district to apply for a permit. We do so based on (but not limited to) the following reasons:

- **Risk** — The Arrowwood Environmental review and our Mammal SAG have offered sufficient evidence that the use of these two adulticides by the District poses a risk of injury to listed bat species. Although the Department finds no demonstrable risk, we find that its review of the Arrowwood assessment was nonetheless not dispositive regarding risk.
- **Precedent** — The Department’s additional argument — likening this case to requiring a permit for felling of a tree, driving a car, or power-washing a house, for example — is unwarranted. Unlike the ordinary acts of people, the thermal fogging of adulticides is by its very nature a deliberate and foreseeable action. There are few, if any, instances of ordinary activities by Vermonters warranting a takings permit, and the ESC is not inclined to recommend a permit for such activities under the department’s scenarios.
- **Burden of Precaution** — The ESC heard conflicting interpretations of the Vermont Endangered Species Law statute. In support of a permit in this case, one interpretation holds that unlike the federal law, Vermont’s law is designed to anticipate and *prevent* injury whether or not an actual taking occurs. Arguing to the contrary, the Department’s legal counsel asserts, among other points, that to warrant a permit, a taking must exceed the “theoretically possible” and instead become “reasonably likely.” The ESC is unable to rule on these interpretations of Vermont

statute. Even so, our inability to judge does not prevent us from acting based on risk and prudence alone.

- **Prudence** — As you know, an incidental takings permit is just that: it permits the District's spraying program with the possible incidental taking of listed bat species; *it is not intended to halt the District's legitimate control program*. Moreover, it is the mission of the Agency of Natural Resources, through its Fish and Wildlife Department, to protect threatened and endangered species, and species of greatest conservation need. Accordingly, an incidental takings permit would allow you to set prudent conditions on the spraying program designed to minimize risk to bats. The Agency of Agriculture, Food and Markets, responsible for oversight of mosquito control, has not demonstrated an ability to act in ANR's place in this regard, and the ESC is unaware of other options for reducing these risks to bats.

In summation, the ESC recognizes that the statute sets a high bar for requiring an incidental takings permit — and the evidence in this case exceeds that threshold. Indeed, the ESC's *not* suggesting a permit in this instance would itself set a troubling precedent, undermining our duty to help safeguard imperiled species in Vermont.

Therefore, the ESC, by a vote of 6-0 (with one abstention and two not voting), recommends that you require the District to apply for an incidental takings permit protecting threatened and endangered bats.