

MEMORANDUM

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