

STATE OF VERMONT
SUPERIOR COURT
ENVIRONMENTAL DIVISION

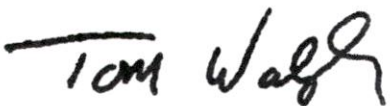
NRB v CWI Manchester Hotel, LLC

23-ENV-00136

AOD ORDER

The Assurance of Discontinuance, signed by the Respondent(s) on the 25th day of September, 2023 and filed with the Superior Court, Environmental Division, on the 22nd day of November, 2023, is hereby entered as an order of this Court, pursuant to 10 V.S.A. 8007(c).

Dated on this the 8th day of December, 2023

A rectangular box containing a handwritten signature in black ink that reads "Tom Walsh".

Vermont Superior Court, Judge
Environmental Division

STATE OF VERMONT

Superior Court

**Environmental Division
Docket No.**

**Natural Resources Board,
Petitioner,**

v.

**ASSURANCE OF
DISCONTINUANCE**

**CWI Manchester Hotel, LLC,
Respondent.**

VIOLATION

1. Failure to comply with Permit Conditions 1, 4, and 6 of Land Use Permit 8B0313-22; and
2. Failure to obtain a Land Use Permit amendment pursuant to Act 250 Rule 34(A)

ASSURANCE OF DISCONTINUANCE

Pursuant to the provisions of 10 V.S.A. § 8007, the Natural Resources Board (“Board”) and CWI Manchester Hotel, LLC (“Respondent”) hereby enter into this Assurance of Discontinuance (“Assurance”), and stipulate and agree as follows:

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

1. On March 19, 2020, the District #8 Environmental Commission (the Commission) issued Land Use Permit Amendment 8B0313-22 (the Permit) to CWI Manchester Hotel, LLC (Permittee and, here, Respondent) authorizing the removal of the structure known as the Music Hall on Union Street in Manchester Village (the Project).
2. This Permit applies to the lands identified in Book 326, Page 171, of the land records of the Town of Manchester, Vermont, as the subject of a deed to CWI Manchester Hotel, LLC.

Construction Site Waste Removal

3. Condition 1 of the Permit states:

“The project shall be completed, operated and maintained in accordance with the conditions of this permit, the permit application, plans, and exhibits on file with the Commission, and other material representations. The approved plan is: ‘Construction

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Site Waste Removal Plan', (Exhibit 011)."

3. Condition 4 of the Permit states:

"No change shall be made to the design, operation or use of this project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required."

4. On April 6, 2021, Respondent notified the Agency of Natural Resources Solid Waste Program that the project would not include salvage of materials as required in the approved plan after finding asbestos in part of the building known as the Music Hall (the Building).
5. On April 8, 2021, the Agency of Natural Resources Solid Waste Program and Vermont Department of Health notified the Natural Resources Board of the proposed changes to the Project.
6. On April 9, 2021, Respondent was warned via email that the proposed changes to the Project may result in a violation of the Permit.
7. On April 10, 2021, Respondent received Vermont Department of Health Permit to Operate #421092 and conditions for the controlled demolition of the Building. Respondent was notified via email by Vermont Department of Health that the controlled demolition workplans may not be consistent with the existing Act 250 permit.
8. On April 11, 2021, Respondent provided a modified Construction Site Waste Removal Plan to the Natural Resources Board Enforcement Officer and the Agency of Natural Resources Solid Waste Program. Respondent did not provide the modified plan to the Commission or seek to obtain a permit amendment authorizing the modified plan.
9. On April 12, 2021, Respondent was warned by phone that the proposed changes to the Project may result in a violation of the Permit and to contact the District 8 Coordinator and/or Environmental Commission as required in Condition 4 of the Permit. Additionally, Respondent was twice warned in writing that the proposed changes to the Project may result in a violation of the Permit.
10. On April 13, 2021, Respondent was informed by the District 8 Coordinator that the Project must comply with the conditions of the Permit and Exhibit 011, the approved plan.
11. On April 14, 2021, Respondent requested a Jurisdictional Opinion for the modified Construction Site Waste Removal plan. Jurisdictional Opinion #8-268 was issued the same day determining that the modified plan was a material change of a critical condition to the Permit requiring a permit amendment. Respondent did not appeal Jurisdictional Opinion #8-268 and it is thus final and binding.

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12. Act 250 Rule 34(A) states, in relevant part, that:

“An amendment shall be required for any material change to a permitted development or subdivision, or any administrative change in the terms and conditions of a land use permit. Commencement of construction on a material change to a permitted development or subdivision without a permit amendment is prohibited.”

13. On April 14, 2021, Respondent commenced the Project as modified in the unapproved Construction Site Waste Removal Plan dated April 11, 2021 without receiving a permit amendment and continued the project after receiving Jurisdictional Opinion #8-268, in violation of Conditions 1 and 4 of the Permit and Act 250 Rule 34(A).

14. On April 15, 2021, Respondent continued the violation of Conditions 1 and 4 of the Permit and Act 250 Rule 34(A) and was notified by phone that the Board would be issuing a Notice of Alleged Violation with compliance directives including cessation of activities alleged to be in violation of the Permit.

15. On April 16, 2021, Respondent was issued a Notice of Alleged Violation directing Respondent to cease demolition activities except what may be required to stabilize the Building in its then current condition. Respondent continued demolition activities after receiving the Notice of Alleged Violation.

State Endangered Bat Habitat

16. Condition 6 of the Permit states:

“The Permittee shall not demolish the building between April 15 and October 31 without first obtaining a takings permit or other written authorization from the Vermont Fish and Wildlife Department and the District Commission.”

17. The Agency of Natural Resources Fish and Wildlife Department requested the inclusion of Condition 6 to the Permit to ensure the Project did not destroy or significantly imperil little brown bats, a species listed as endangered under 10 V.S.A. Chapter 123, after observing evidence of little brown bats in the Building.

18. On April 15, 2021, Respondent conducted demolition activities without receiving a permit amendment and without receiving a takings permit or other written authorization from Vermont Fish & Wildlife and the Commission for conducting demolition activities between April 15 and October 31. Respondent was notified by phone that the Board would be issuing a Notice of Alleged Violation with compliance directives including cessation of activities alleged to be in violation of the Permit.

19. On April 16, 2021, Respondent was issued a Notice of Alleged Violation directing Respondent to cease demolition activities except what may be required to stabilize the

Building in its then current condition. Respondent continued demolition activities after receiving the Notice of Alleged Violation.

20. Respondent represents that it voluntarily undertook research into remediation efforts including installing bat houses on the property which shall continue to be maintained.

Description of Violations:

18. By modifying the Project with an unapproved Construction Site Waste Removal Plan; operating the Project in a manner inconsistent with the permit application, plans, and exhibits on file with the Commission without first obtaining a permit amendment, or jurisdictional opinion finding that a permit amendment is not required; and conducting the demolition between April 15 and October 31, Respondent failed to comply with Conditions 1, 4, and 6 of the Permit and Act 250 Rule 34(A).
21. Respondent admits the factual findings described above, solely for purposes of resolving this case.
22. The parties now resolve the above claims and agree that this settlement will avoid the costs and uncertainties of litigation, is a just resolution of the disputed claims and is in the public interest.

AGREEMENT

Based on the aforementioned Statement of Facts and Description of Violations, the parties hereby agree as follows:

- A. Respondent shall comply with Permit series 8B0313-22.
- B. **No later than thirty (30) days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondents shall pay, by separate checks, the following:
 1. pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of **\$9,900.00**, for the violations related to the construction site waste disposal described herein, by check made payable to the "State of Vermont."
 2. pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of **\$24,225.00**, for the violations to the state endangered bat described herein, by check made payable to the "State of Vermont."

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In lieu of this civil penalty and pursuant to 10 V.S.A. §8007(b)(2), Respondents may instead contribute **\$19,380.00** to a Supplemental Environmental Project (SEP), that will fund mist netting and associated radio telemetry and emergence surveys in a few targeted locations to investigate the demographics of the little brown bat population within Bennington County (the SEP is more fully described in Exhibit A, attached hereto). In this case, the check shall be made payable to “Vermont Fish and Wildlife” (the Recipient) and sent to:

Attn: Elizabeth Stratton
Vermont Fish and Wildlife Department
1 National Life Drive, Dewey Building
Montpelier, Vermont 05620

If, at the end of the 30-day period following the entry of this Assurance as an Order by the Environmental Court, the SEP payment has not been paid by Respondent, the original civil penalty amount of **\$24,225.00** shall be immediately due and payable to the State of Vermont.

3. pursuant to 10 V.S.A. §8010(e)(2), the amount of **\$1,610.00**, to reimburse the Natural Resources Board for the costs of this enforcement action by check made payable to the “State of Vermont.”
 4. the amount of **\$15.00**, for the purpose of paying the recording fee for the filing of a notice of this Assurance in the Town of Manchester land records, by check made payable to the “Town of Manchester, Vermont.”
- C. Without formally admitting or denying wrongdoing or liability, Respondent agrees to this settlement of the violations alleged above to resolve all outstanding disputes.
- D. Respondent agrees that the violations alleged are deemed proved and established as a “prior violation” in any future state proceeding that requires consideration of Respondent’s past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010.
- E. **No later than thirty (30) days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondent shall mail the Board notarized, written acknowledgement of receipt of the Court’s Order.
- F. All payments and documents required by this Assurance shall be sent to the following

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address unless otherwise noted:

Natural Resources Board
10 Baldwin Street
Montpelier, Vermont 05633-3201

- G. Respondents are jointly and severally liable for all obligations under the Assurance.
- H. Respondent shall not deduct, nor attempt to deduct, any payment made to the State or a SEP pursuant to this Assurance from Respondent's reported income for tax purposes or attempt to obtain any other tax benefit from such payment.
- I. Recipient of the afore-described SEP funds agrees:
 - 1. to provide the Board a final accounting of all receipts and expenditures of funds paid by Respondent within thirty (30) days of the completion of the SEP; and
 - 2. that SEP funds may not be used for litigation or lobbying purposes, nor may they be used in the preparation or presentation of matters before any state agency or board.
- J. In the event Respondent funds the SEP in lieu of the payment of a civil penalty, if the Respondent publishes by any means, directly or indirectly, the identity or result of a SEP that Respondent has funded, the Respondent shall also include in that publication a statement that the SEP is a product of the settlement of an environmental enforcement action brought by the Natural Resources Board. If Recipient publishes by any means, directly or indirectly, the source or result of the SEP that Respondent has funded, the Recipient shall also include in that publication a statement that the SEP is a product of the settlement of an environmental enforcement action brought by the Natural Resources Board.
- K. The State of Vermont and the Natural Resources Board reserve continuing jurisdiction to ensure compliance with all statutes, rules, and regulations applicable to the facts and violations set forth herein.
- L. Nothing in this Assurance shall be construed as having relieved, modified, waived or otherwise affected the Respondent's continuing obligation to comply with applicable state or local statutes, regulations or directives.
- M. This Assurance shall become effective only after it is signed by all parties and entered as an order of the Superior Court, Environmental Division. When so entered by the Superior Court, Environmental Division, this Assurance shall become a judicial order pursuant to 10 V.S.A. § 8007(c). In the event that such order is vacated, the Assurance shall be null and void.

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- N. Pursuant to 10 V.S.A. § 8007(d), the Respondent shall not be liable for additional civil or criminal penalties with respect to the specific facts set forth herein, provided that the Respondent fully complies with this Assurance.
- O. The Board reserves the right to make reasonable extensions of any deadline contained herein, upon prior request by the Respondents, for good cause beyond either Respondent's control.
- P. This Assurance sets forth the complete agreement of the parties, and except as provided herein, may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and incorporated in an order issued by the Superior Court, Environmental Division.
- Q. Alleged representations not set forth in this Assurance, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall have no legal force or effect.
- R. When this Assurance is entered as a judicial order, violation of any provision of this Assurance shall be deemed to be a violation of a judicial order and may result in further enforcement action, including contempt proceedings, the imposition of injunctive relief, and/or the imposition of penalties, including penalties under 10 V.S.A. chapters 201 and/or 211.
- S. This Assurance is subject to the provisions of 10 V.S.A. §§ 8007 and 8020.

SIGNATURES

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted. Dated at , Vermont, this 25th day of September, 2023.

CWI MANCHESTER HOTEL, LLC

By 
Paul Fisher, Duly Authorized Agent

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated in _____, Vermont, this 17th day of November, 2023.

Natural Resources Board

By: Sabina Haskell
Sabina Haskell, Chair

.....
As to Paragraph I, only (SEP Recipient):

Dated in Montpelier, Vermont, this 21st day of November, 2023.

Agency of Natural Resources

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

EXHIBIT A (four pages total)

Supplemental Environmental Project Proposal

Composed by Alyssa Bennett, Small Mammals Biologist, Vermont Fish and Wildlife Department
14 September 2021

The little brown bat, *Myotis lucifugus*, is a state endangered species with a long history of occupancy in Vermont. The species is also currently undergoing species status review by the USFWS for potential protections under the federal Endangered Species Act. This small, insect-eating species hibernates underground in suitable caves and mines during the winter, with the largest known overwintering population in New England both historically and presently existing at Aeolus Cave in East Dorset, Vermont. Little brown bats at this winter site have been studied since the 1930s, with a 1960s population estimate of 300,000 or more bats and banded individuals found to migrate to summer locations throughout New York and New England, including recaptures in Bennington County (Figure 1). Despite 90% of Vermont's little brown bat population perishing due to the deadly fungal disease White-nose Syndrome (WNS) beginning in 2008, recent mark-recapture work indicates and estimated 70-90,000 bats remain at this cave, while other hibernation sites in New England, New York, and Pennsylvania have declined more severely and many have been extirpated entirely. Little brown bats banded in East Dorset in recent years have still been found summering as far away as Rhode Island and Massachusetts. This species is known to be a moderate-distance migrant and can live into their 30s, moving from their winter site to the same summer homes up to a few hundred miles away, then returning each winter to hibernate again through the long New England winters. Female little brown bats gather in large groups of typically 100-500 bats in the summer (though these colonies were estimated to include hundreds to a few thousand bats prior to WNS), preferentially roosting in structures such as attics, barns, and bat houses.

Despite the historic presence of little brown bat maternity colonies, recent acoustic detections of little brown bats in Bennington County during the summer, extensive investigation of over 1,200 reports of bats roosting in structures after the White-nose Syndrome declines, and the discovery of a few dozen remaining maternity colonies of little brown bats in other parts of Vermont, the Vermont Fish and Wildlife Department (VFWD) has been unable to find any maternity colonies of little brown bats remaining in Bennington County (Figure 2). In addition, regional recapture data suggests that some maternity and winter colonies may be coalescing to remain in large, thermo-energetically beneficial colonies. This is evidenced by bats who normally have very high site-fidelity throughout their lives to be found many miles away. One such example was a reproductive female bat captured in Manchester, Vermont pre-WNS, suggesting that she lived within a few miles of the capture site at that time, who was later captured nearly 100 miles north at a persisting maternity colony in Milton, Vermont post-WNS. This leads to the question: Why are little brown bats flying so far away to summer colonies in Massachusetts and Rhode Island rather than migrating shorter distances to stay in Bennington County for the summer? Are there no longer maternity colonies in Bennington County near the

largest known hibernation site for the species in New England, or are current survey methods (acoustic surveys which cannot determine sex or verify maternity colony presence, incidental reporting of bats in structures by the public, and environmental review investigations of bat guano in structures slated for demolition) not detecting the presence of maternity colonies due to the limitations of these methods?

To answer these questions, the VFWD proposes mist netting and associated radio telemetry and emergence surveys in a few targeted locations to investigate the demographics of the little brown bat population within Bennington County. Mist netting surveys and concurrent stationary acoustic surveys would be conducted on suitable weather nights between May 15 and July 31 of 2021, with work targeted for May 15 to June 10 or July 1 to 25 to avoid capturing very pregnant females that would be unsuitable for radio telemetry work. Locations could include areas of suitable habitat where little brown bats were historically captured as well as locations where little brown bats have been detected in recent acoustic surveys on state lands. This work would be contracted out to a qualified, permitted, consulting bat biologist or firm to ensure the completion of the work within the time frame indicated, with consultation and assistance on the ground from bat experts at the VFWD. Up to five reproductive female bats would be fit with a radio transmitter and tracked back to daytime summer roosts for the life of the transmitter, which is typically 7-14 days. Nightly emergence counts would be conducted to determine the size of the maternity colony. Little brown bats switch roosts every few days on average and use a network of structures and sometimes trees within a few-mile radius of the capture site.

The results of this survey work would help determine how little brown bats are using the landscape in Bennington County and could result in the important discovery of little brown bat maternity colonies for targeted conservation work. The VFWD would then work with landowners hosting these maternity colonies to ensure their continued viability and roost stability through technical assistance to safely evict the bats from undesirable locations in structures if needed, to provide alternative roost structures using successful bat house designs at the colony site, and to focus habitat conservation efforts on riparian corridors and habitat connectivity that these bats need to successfully forage and commute while avoiding predation close to their maternity roosts. Finally, this information could help inform the VFWD's investigations of building demolitions for bats through the environmental review process.

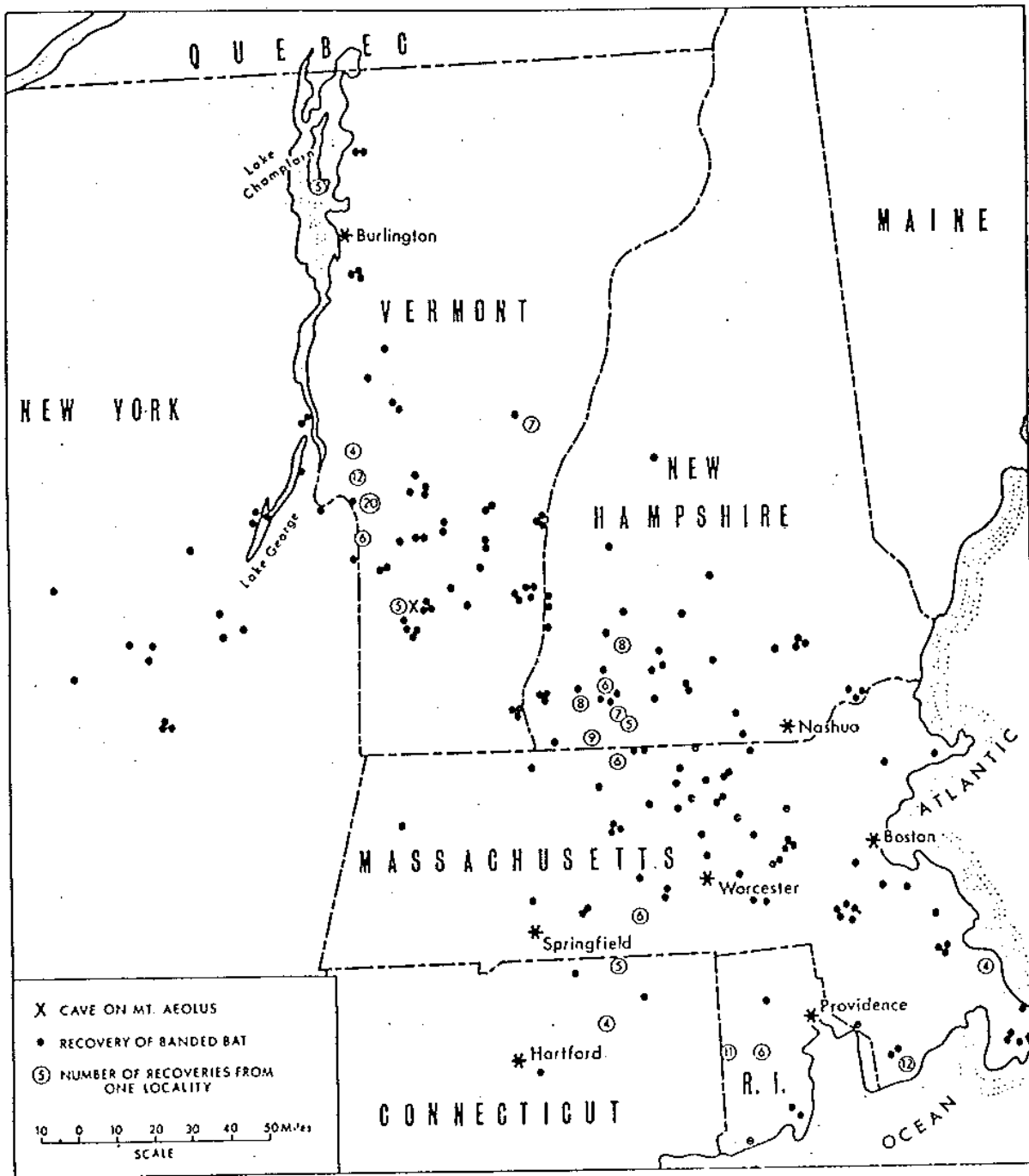


Figure 1: Map showing dispersal of bats banded at Aeolus Cave that were recovered in summer colony locations throughout New England and New York through extensive banding by Davis and Hitchcock in the early 1960's (from Davis and Hitchcock 1965).

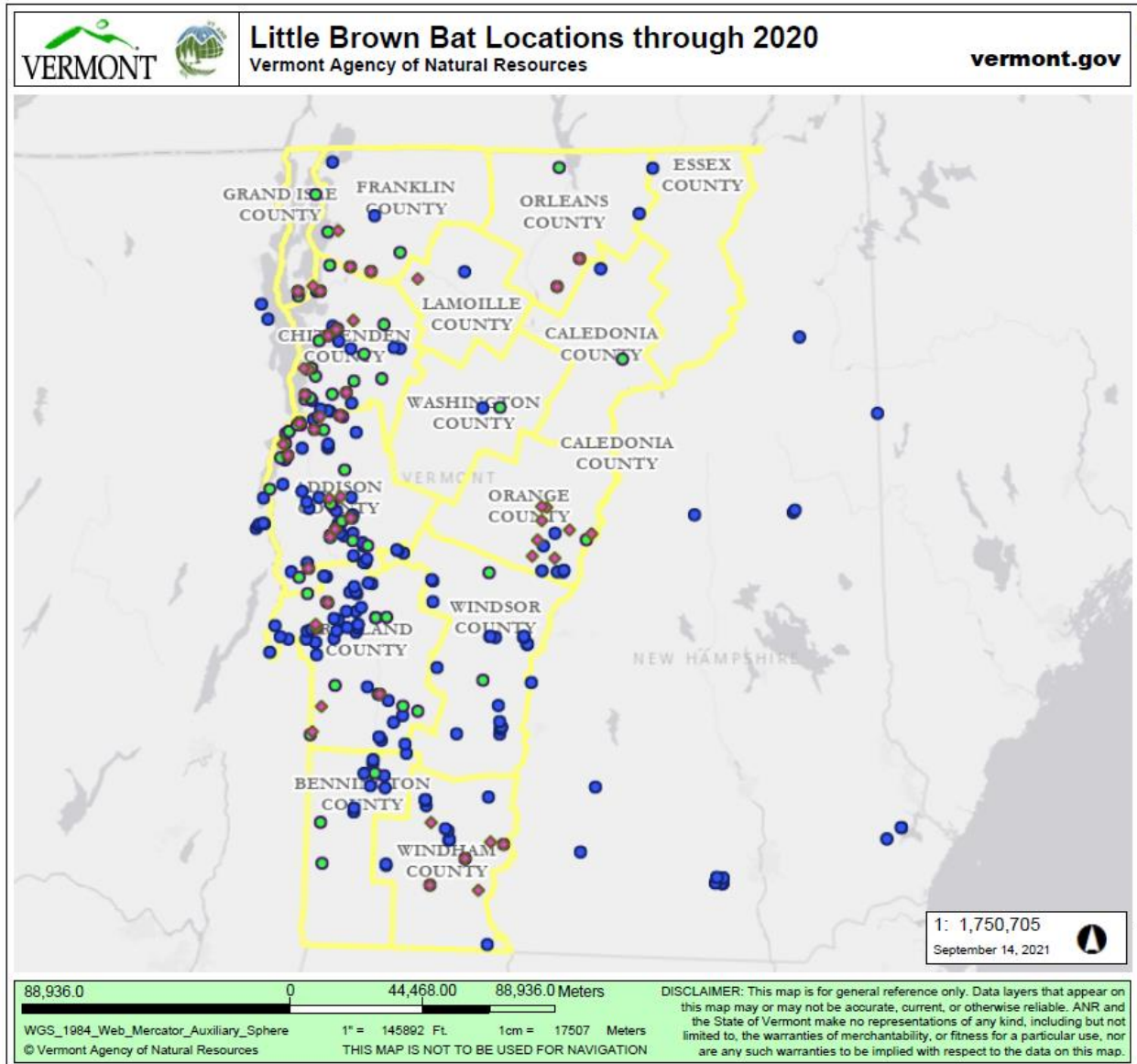


Figure 2: Blue circles are little brown bat capture locations through 2020; Green circles are confirmed public reports of little brown bats roosting in structures post-White-nose Syndrome; Pink diamonds are little brown bat maternity colony locations post-White-nose Syndrome.