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**STATE OF VERMONT**

Legislative Committee on Administrative Rules (LCAR)

October 6, 2023

**SENT VIA ELECTRONIC MAIL ONLY**

Catherine Gjessing
General Counsel
Vermont Fish and Wildlife Department
1 National Life Drive, Davis 2
Montpelier, VT 05620
Catherine.Gjessing@vermont.gov

***Re: 23-P15 – 10 V.S.A. Appendix § 44, Furbearing Species***

Dear Ms. Gjessing:

This letter is to formally memorialize the three requests that members of the Legislative Committee on Administrative Rules (LCAR) made of the Vermont Fish and Wildlife Department at its meeting on October 5, 2023. Please provide the following in a submission to Charlene Dindo, at Charlene@leg.state.vt.us, not later than 12:00 noon on Monday, October 16, 2023:

1. a response to the memorandum from Michael O'Grady and Anthea Dexter-Cooper to Reps. Sheldon, Bongartz, and Squirrell and Sen. Bray previously provided to you on September 22, 2023, and enclosed in this letter;
2. a response to Sen. Bray's request for more information on how trapping is used for wildlife management; and
3. a response to Rep. Bongartz's request for more information on the Board's decision to add "hunt" to the definition of "trapping" in Sec. 3.20 in the final proposed rule.

LCAR understands that some of the Department's response may be limited by the fact that the Fish and Wildlife Board is not meeting until October 18, 2023. To the extent that a fully comprehensive response will not be possible prior to the Board meeting, this further reinforces the need for an extension on LCAR's 45-day review period, which LCAR is optimistic will be granted.

Please let Michael O'Grady, Deputy Chief Counsel, and me know if you have any questions.

Sincerely,

/s/ Anthea Dexter-Cooper

Anthea Dexter-Cooper
Committee Counsel
Legislative Committee on Administrative Rules

Enclosure

cc: Charlene Dindo, Committee Assistant, Legislative Committee on Administrative Rules
Members, Legislative Committee on Administrative Rules
Michael O'Grady, Deputy Chief Counsel, Office of Legislative Counsel

To: Reps. Sheldon, Bongartz, and Squirrell and Sen. Bray

From: Michael O'Grady; Anthea Dexter-Cooper

Re: Fish and Wildlife Board; Furbearing Species Rule

This memorandum summarizes some of the potential issues that the Office of Legislative Counsel has identified in the amendments proposed by the Fish and Wildlife Board to the Furbearing Species Rule.

## I. Best Management Practice for Trapping Furbearers

Act 159 of 2022 required the Fish and Wildlife Board (Board) to adopt best management practices (BMPs) to modernize trapping and improve the welfare of animals subject to trapping.

### 1. Questions on Setbacks, Rules 3.0 and 4.14

Act 159 required the BMPs to include:

> requirements for the location of traps, including the placing of traps for purposes other than nuisance trapping at a safe distance, from public trails, class 4 roads, playgrounds, parks, and other public locations where persons may reasonably be expected to recreate;

The Board's proposed rules proposed trapping setbacks from legal trails, public trails, and public highways. No setbacks are proposed for playgrounds, parks, and other public locations where persons may be reasonably expected to recreate.

### A. <u>Limitation of Setbacks to Legal Trails, Public Trails, or Public Highways</u>

Why did the Board not comply with the legislative directive to include setbacks for playgrounds, parks, and other public locations where persons may reasonably be expected to recreate? Act 159 clearly stated that the rules shall include requirements for the location of traps including placing of traps at a safe distance from playgrounds, parks, and other public locations where persons may reasonably be expected to recreate.

Similarly, why did the Board not respond to specific public comments that the scope of the setbacks in the proposed rules were too narrow? There were multiple comments from the public that the proposed setbacks were too narrow and did not meet legislative intent (see, e.g. pp. 288, 397, 406, and 408 of the public comments document). Appendix G of the Board's responsiveness summary doesn't respond to the multiple comments that setbacks should be required for additional public spaces and the Administrative Procedure Act requires that "[w]hen an agency decides in a final proposal to overrule substantial arguments and considerations raised for or against the original proposal . . . the final proposal shall include a description of the reasons for the agency's decision." 3 V.S.A. § 841(b)(2).

The responsiveness summary in Appendix G does state that ANR's current policy on State lands is that people who are trapping stay 500 feet from State park buildings and other designated buildings. However, that is a policy of another department that is not a rule and not included in these rules. As a policy of another department, it is unenforceable under these rules and would not subject a person trapping in violation of the 500 foot policy to penalty under trapping statutes or rules. In addition, the 500 foot policy does not eliminate all potential risks related to State park buildings and other spaces (see Silver Lake State Park playground example).

i. Silver Lake State Park Playground Example

The picture above is the playground at Silver Lake State Park in Barnard. The boundary of the State Park is just to the left of the playground and likely closer than 50 feet and definitely closer than 500 feet. The land to the left of the playground is private property. There are beaver at Silver Lake as noted by the Department of Forests, Parks and Recreation. Thus, it is very possible for the owner of the private property bordering Silver Lake State Park to allow trapping on that property. There would be no 50 foot setback from the playground for that trapping, and the 500 foot State policy would not apply as the trapping would occur on private property. You can find a map to Silver Lake State Park at the following link, but it is not to scale; you can get a better perspective from Google maps. https://vtstateparks.com/assets/pdf/silver.pdf

## B. Scope of Definition of Legal Trails and Public Trails

The Board's proposed setbacks apply to legal trails and public trails. A "public trail" is defined as a pedestrian foot path on Vermont State-owned land, open to the public, and designated and mapped by the managing agency or department. A "legal trail" is defined as a public right of way designated as a trail by a municipality that is not a highway but is shown on the highway map of the respective town made by the Agency of Transportation (AOT) and was: a previously designated town highway; or is a new public right-of-way laid out as a trail by a selectboard for the purposes of providing recreational use or access to abutting properties. These definitions lead to questions regarding where the trapping setbacks will apply and whether they are consistent with legislative intent, as highlighted by the following questions.

i. Town Trails

A town has a town forest with multiple pedestrian paths. The town allows trapping in the town forest. As town-owned land, it would not be a public trail under the definition proposed by the Board. The AOT highway map for the town has one trail or path demarcated in the town forest. It is unclear from the map as to whether the path is a highway or a trail as the map simply lists the path as "gravel." Considering this factual scenario, is there a 50-foot setback in the town forest from the mapped gravel path/road. There would be no setback from the multiple pedestrian paths in the town forest. If so, why are the setbacks for "public trails" limited to State-owned land?

ii. Green Mountain National Forest and Other Federal Lands

Trapping is allowed in the federally owned Green Mountain National Forest[1] and on other federal lands in the State. Much of the town of Hancock consists of land within the Green Mountain National Forest. One popular trail in the Town of Hancock is the trail to Texas Falls. On the AOT map for Hancock, part of the trail to Texas Falls appears to possibly be a town highway, but that highway ends and the map shows a trail that runs along Texas Brook. The trail is listed as a discontinued trail and does not appear to have a legal trail designation—i.e. the letters LT with a number. Is the trail along Texas Brook a public right of way even if it is discontinued? Do the setbacks apply to the mapped trail along Texas Brook if the trail is not indicated with a number in a dashed square with the letters LT?

In addition, it seems likely from the definitions that the setbacks will not apply to well-known, well-travelled trails in the Green Mountain National Forest. The Long Trail runs along the border of Lincoln and Warren, with much of the trail on the Lincoln side. The AOT map of Lincoln, does not show the Long Trail. Where the Long Trail crosses Lincoln Gap Road is a significant, well-known recreation area. The Sunset Ledge Trail is to the south of the road, and the trail to Mount Abraham is to the north of the road. As proposed, the setbacks under the Board's rules would not apply to any of the Long Trail in the town of Lincoln, except for the 50 feet in proximity to Lincoln Gap Road?

iii. Limitation to Pedestrian Foot Paths

The Board Rules propose defining a public trail as a pedestrian foot path on State lands. There are mountain bike trails and horse trails on State-owned land. Are the proposed setbacks not applicable to bike and horse trails on State lands?

iv. Public Notice of Trails Subject or Not to Setback

Considering the possible factual distinctions that could render some trails subject to the setbacks but not others (see above), how will people know what trails are subject to setbacks and what are not? Will the Department post signage or will they publish maps or guidance such as how the Department publishes limitations on fishing for certain river and stream segments? The proposed rules include a map of where setbacks apply, but it is at a State-wide level and not useful for specific trails. Will the Department publish town or park related maps, or will the public need to rely on the AOT town highway maps?

v. Legislative Intent

If there are no setbacks on municipally or federally owned trails or recreation areas, is such a lack of regulation consistent with legislative intent requiring setbacks from public trails, parks, and other public locations where persons may reasonably be expected to recreate?

vi. Wildlife Management Areas

The rule excepts public trails on Wildlife Management Areas from the setback requirements. What is the statutory authority for the Department to establish any requirements or exemptions within Wildlife Management Areas? I do not see an appropriate statute cited in

[1] See USDA Forest Service, https://www.fs.usda.gov/detail/gmfl/recreation/hunting/?cid=fseprd1069643

the authority for the rules. The only statutory authority that I think would be applicable would be 10 V.S.A. §§ 4144 and 4145.[2] If that is the case, then Wildlife Management Areas (WMAs) would be subject to the rule governing use of Fish and Wildlife Department Lands, 10 V.S.A. App. Ch. 1, § 15. That rule allows for trapping on Department lands.

The response to comments provides that the WMAs were exempted from setbacks because the areas were specifically purchased for hunting, fishing, trapping, and bird watching. However, because these lands can have a high volume of public access, aren't setbacks from trails more necessary on these lands in order to protect the public? For instance, Dead Creek Wildlife Management Area is a major attraction for bird watchers and waterfowl hunters. Although parts of Dead Creek are closed to the public, there are areas that bird watchers and hunters can freely access. Why wouldn't the safety protections of setbacks be afforded to the users of Dead Creek in the same manner as they would apply to users of other State lands?

**2. Miscellaneous Questions**

**A. <u>Rule 4.13</u>**

Rule 4.13 strikes the current prohibition on taking fur-bearing animals with the use of poisonous mixtures. Why? Can a person now take a fur bearer with poison? Or is this being deleted because of perceived duplication with the prohibition in Rule 4.14 on the use of chemicals? However, aren't some poisons biologics and not chemicals? See list of biologic toxins potentially dangerous to animals: https://jcesom.marshall.edu/media/57851/list-of-biological-toxins.pdf

**B. <u>Rule 4.23</u>**

Rule 4.23 amends current law requiring any person who obtains a trapping license to complete an annual survey and replaces that requirement with a requirement that any person who traps any animal must submit the survey. Could you explain this change? First, it seems like the change would require a person trapping without a license to complete a survey. Second, it applies to the trapping of any animal. Only furbearers can be legally trapped. Is this to require a person who incidentally traps a non-target species to complete the survey? If so, it could be clearer.

[2] The statutory authority for the Furbearing Rule does not list 10 V.S.A. §§ 4144 and 4145 as authority for the rule. Those sections likely should be cited as they are they authority to set conditions on hunting, fishing, or trapping on Department lands.

## II. Best Management Practice for Trapping Furbearers

Under Act No. 165 of 2021, the General Assembly required the Fish and Wildlife Board to adopt a rule regarding the pursuit of coyote with the aid of dogs, either for the training of dogs or for the taking of coyote.

### 1. Standard for Control of Dogs

Act 165 required the Fish and Wildlife Board rules on the pursuit of coyote with the aid of dogs to address multiple, particular subjects, including the definition of "control" of dogs pursuing coyote. Specifically, Act 165 required the Board's proposed rules to include:

> (4) a definition of control to minimize the risk that dogs pursuing coyote:
>
> (A) enter onto land that is posted against hunting;
>
> (B) enter onto land where pursuit of coyote with dogs is not authorized;
>
> (C) harass or harm people or domestic animals; and
>
> (D) cause other unintentional damages to people or property

In addition, Act 165 included a legislative intent statement regarding what the General Assembly intended as the result of the Fish and Wildlife Board's rules. That intent statement includes the following:

> The General Assembly through the rules required under this section intends to reduce conflicts between landowners and persons pursuing coyote with the aid of dogs by reducing the frequency that dogs or persons pursuing coyote enter onto land that is posted against hunting or land where pursuit of coyote with dogs is not authorized.

#### i. Definition of "Control"

The Board's proposed rules include the following definition of "control" for the purposes of pursuing coyote with dogs:

> 3.6 "Control of dogs(s)" means the transportation, loading, or unloading of dogs from vehicle(s); and the handling, catching, restraining, or releasing dogs to take coyote with the aid of dogs. GPS collars with track log and training/control functions or separate GPS and training/control collars shall be required to locate and track dogs at all times while taking coyote with the aid of dogs. At no time shall dogs be in pursuit of coyote without a GPS track log being maintained by the permit holder.

The first sentence of the Board's proposed definition of "control" is substantially the same as the definition of "control" of dogs under the Bear Management Rule, § 7(3.6). The definition of "control" proposed for the pursuit of coyote does require the use of GPS collars on dogs, where the Bear Management Rule does not require GPS collars. However, Appendix D of the responsiveness summary states that "almost all the hunters who hunt coyotes with dogs are already using some form of GPS equipment."

Consequently, if most hunters already use GPS equipment, how does the proposed definition of "control" for the pursuit of coyote with dogs meet the legislative directive in Act 165 to minimize the risk that: dogs enter onto land, enter land where pursuit of coyote with dogs is not authorized; harass or harm people or animals and cause other unintentional damage?

Similarly, how does the proposed definition of "control" meet the legislative intent stated in Act 165 that the rules are intended to reduce conflicts between landowners and persons pursuing coyote with the aid of dogs? If the required use of GPS collars is already the normal practice when a person pursues coyote with dogs, how will the risk of conflict between landowners and hunters be reduced? At the very least, it is likely that the risk of conflict will remain the same.

The submitted responsiveness summary does acknowledge that the definition of "control" was the most controversial issue during rulemaking. The responsiveness summary further acknowledges that requiring leashes for dogs would be a de facto ban on the use of dogs to hunt coyote, and Act 165 did not direct the Board to ban the use of coyote to pursue dogs. Appendix D of the responsiveness summary does explain how use of GPS collars allows hunters to track dogs in real time and that the tracking log will assist Fish and Wildlife Warden in reviewing the location of dogs during a hunt. Nevertheless, the responsiveness summary does not address how the definition of "control" or the required use of GPS collars would minimize the likelihood that dogs will enter land that is posted against hunting or where the pursuit of coyote without dogs is not authorized. There were multiple public comments that raised this concern (See, e.g., the following pages of the public comment document, pp. 1018, 1072, 1106, 1172, 1182, 1189, 1202, 1218, 2008, and 2025).

ii. Trespass/Landowner Permission

Act 165 requires the Board's proposed rules to include provisions to encourage persons pursuing coyote with dogs to seek landowner permission before entering or releasing dogs into land that is not legally posted. Many of the public comments asserted that allowing dogs to pursue coyote would result in trespass on private property that is posted against hunting or where hunting with dogs is prohibited. (See, e.g., the following pages of the public comment document, pp. 1018, 1072, 1106, 1172, 1182, 1189, 1202, 1218, 2008, and 2025).

The responsiveness summary indicates that Act 165 addressed these issues in statute and, implicitly, the rules do not include any reference to these requirements. As Act 165 required the rules to include such provisions, there is an argument that the rules do not meet the legislative directive or legislative intent of Act 165.

**2. Seasons for Training and Hunting Coyote with Dogs**

The legislative intent statement in Act 165 provided that the General Assembly intends that the rules for pursuing coyote with dogs should support the humane taking of coyote and the management of the population in concert with sound ecological principles. As part of the rules, Act 165 required the Fish and Wildlife Board rules to consider seasonal restrictions on pursuing coyote with dogs.

The Board's proposed rules do include a training season of June 1 through September 15. The rules also include a hunting season from December 15 through March 31. In the responsiveness summary, the Board noted that the dates for the seasons were based on observation and hunter input based on the fact that proposed seasons are the primary times when persons hunted coyote with dogs prior to the current moratorium established by Act 165. The response to comments also noted that the proposed training season is the same season as for training dogs to take other species.

There were public comments or questions regarding the establishment of a coyote season. Comments advised on setting the seasons based on science or the breeding season for coyote.

(See, e.g., pp.390, 889). The responsiveness summary does not address the ecological principles for setting the seasons, and the summary does not appear to respond to the public comments that the seasons be based on science or the breeding season for coyote. As a result, there is an argument that the proposed seasons are in conflict with the legislative directive and legislative intent of Act 165, and that the Board did not adequately address comments made by the public in its responsiveness summary.