

To: The Legislative Committee on Administrative Rules  
From: Michael O'Grady, Office of Legislative Council  
Re: Department of Fish and Wildlife Authority to Authorize Use of Snares or Cable Restraints  
Date: May 23 2019

The members of the Legislative Committee on Administrative Rules (LCAR) asked whether the Commissioner of Fish and Wildlife can authorize the use of cable restraint devices to take wild animals in Vermont. Statute and rules specifically address the use of snares, but statute and rules are silent on the use of cable restraint devices. Similarly, to my knowledge no Vermont court has addressed the question of whether the Commissioner may authorize a person to take wild animals with a cable restraint device.

Consequently, the question of whether the Commissioner of Fish and Wildlife can authorize a person to take wild animals with a cable restraint is subject to interpretation. As indicated by an April 22, 2019, letter from Commissioner of Fish and Wildlife Louis Porter to LCAR, some authority exists in statute to support the assertion that the Commissioner may authorize the use of snares or cable restraint devices to take wild animals. However, this authority is conditional and not unfettered, and the conditions imposed on the Commissioner could be construed as limiting any authority to allow the taking of wild animals by cable restraint device.

In addition, because statute or rule does not speak generally to the authority of the Commissioner to authorize the use of cable restraint devices, the Commissioner likely could only exercise the authority he may have as enforcement discretion—addressing specific issues and determining whether and how to enforce. Although the Commissioner's letter does not explicitly state that he will allow nuisance wildlife trappers to generally use snares or cable restraint devices, it should be noted that exercise of enforcement discretion as a blanket policy could be construed as undermining or encroaching on the General Assembly's constitutional authority to establish law and policy for the State.

## **A. STATUTORY AUTHORITY TO AUTHORIZE THE USE OF CABLE RESTRAINTS**

### **1. Use of Snares**

Under 10 V.S.A. § 4708, a “person shall not take an animal by snaring nor shall he or she possess a snare with intent to use the same.” Similarly, the rules of the Fish and Wildlife Board provide that “[a] person shall not use toothed foothold traps or snares when trapping under this section.”<sup>1</sup> Thus, no person shall use a snare to take wildlife under statute or rule. However, neither the statute nor the rules define the term “snare.”

The Commissioner's letter indicates that: there are valid scientific, mechanical and legal distinctions” between snares and non-lethal cable restraints. Thus, the Commissioner states that “[t]he Department intends to continue to authorize the use of cable restraints; in accordance with the scientific evidence and proven best management practices.” However, the question becomes

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<sup>1</sup> Fish and Wildlife Board Rules § 44, 4.6.

whether the Commissioner has authority to allow the use of cable restraints in light of the prohibition on the use of snares under statute or rule.

## 2. What Constitutes a Cable Restraint Device and Is it Regulated

Neither statute nor rule specifically addresses the use of “cable restraint devices.” Statute or rule also does not define what constitutes a “cable restraint device.” As statute or rule also does not define a snare, it is not readily apparent under law whether there is a distinction between snares and cable restraint devices.

The Vermont Supreme Court has held that “[o]ur primary goal, when interpreting a statute, is to give effect to the Legislature's intent. If the legislative intent is clear from the plain language of the statute, we enforce the statute according to its terms. If the statute is ambiguous, however, ‘legislative intent must be determined through consideration of the entire statute, including its subject matter, [and its] effects and consequences.’<sup>2</sup>

### *(a) Plain Language and Other States*

As noted above, Vermont statutes and rules do not define the term “snare.” The plain meaning of “snare” according to Meriam Webster’s dictionary is that a “snare” is “a contrivance often consisting of a noose for entangling birds or mammals.” There are no definitions of cable restraint device in statute, rules, or plain language dictionaries that distinguish it from a “snare.”

Commissioner Porter’s letter dated April 22, 2019, indicates that “[c]able restraints are currently allowed in 38 states, and most Canadian Provinces. Missouri (2004), Wisconsin (2004), Michigan (2005), Pennsylvania (2005), and more recently Ohio and West Virginia legalized cable restraints.” Review of provisions in these states may be helpful in determining if there is distinction between a “snare” and a “cable restraint device.” In many cases, these states define a “cable restraint device” as a snare, some form of a snare, or substantially similar to a snare as to be difficult to determine a distinction from a plain language reading.

### I. Delaware. Title 7 Natural Resources & Environmental Control 3900 Wildlife, §1

“Cable Restraint” formerly referred to as “snare”, shall be considered a trapping device made of stranded steel cable with a minimum diameter of 5/64 inches. Cable restraints must be equipped with a relaxing-type lock. The cable may not exceed 7 feet in length from the anchor point to the relaxing lock and must be equipped with at least one swivel device, which allows for 360° rotation, between the loop and the anchor. The cable restraint must have stops affixed to the cable to ensure that the cable that makes up the loop may not have a circumference greater than 38 inches when fully open, or a circumference less than 6 ¼ inches when fully closed. Cable restraints with a maximum loop circumference of 12 ½ inches do not require cable stops. Cable restraints must be maintained in good condition so that all components operate properly.

### II. Missouri. Wildlife Code 10 C.S.R. § 10.20.805

(7) Cable restraint device: A device for the live-capture of certain furbearers in a non-water set by use of a cable loop made of stranded steel cable, not greater than five feet (5') long (not including extensions), with a diameter of not less than five sixty-fourths inch (5/64") and

<sup>2</sup> *Brownington Center Church of Brownington, Vermont, Inc. v. Town of Irasburg*, 87 A.3d 502, 504 (Vt. 2013).

equipped with a commercially manufactured breakaway rated at three hundred fifty pounds (350 lbs.) or less, a relaxing-type lock, a stop device that prevents it from closing to less than two and one-half inches (2 1/2") in diameter, and an anchor swivel, but shall not be equipped with a compression-type choke spring, or be otherwise mechanically-powered. (7) Cable restraint device: A device for the live-capture of certain furbearers in a non-water set by use of a cable loop made of stranded steel cable, not greater than five feet (5') long (not including extensions), with a diameter of not less than five sixty-fourths inch (5/64") and equipped with a commercially manufactured breakaway rated at three hundred fifty pounds (350 lbs.) or less, a relaxing-type lock, a stop device that prevents it from closing to less than two and one-half inches (2 1/2") in diameter, and an anchor swivel, but shall not be equipped with a compression-type choke spring, or be otherwise mechanically-powered.

(51) Snare: A device for the capture of furbearers in a water-set by use of a cable loop. Snares must be constructed of cable that is at least five sixty-fourths inch (5/64") and no greater than one-eighth inch (1/8") in diameter, and must be equipped with a mechanical lock and anchor swivel.

### III. Ohio Administrative Code

#### i. Ohio Administrative Code. 1501:31-1-02 Definitions of Terms

(YYYY) "Relaxing lock" means a lock that stops tightening the snare loop when the captured animal stops pulling against the snare.

(IIII) "Snare" means a device used to capture or restrain an animal by means of a loop which closes under the force of the animal pulling against it.

#### ii. Ohio Administrative Code § 1501:31-15-03 Nuisance wild animal control.

##### (d) Snares

(i) It shall be unlawful to use any snare that is constructed of any material other than multi or single strand steel cable.

(ii) It shall be unlawful for a person to set, use, and maintain snares, except for a spring-loaded, or spring-assisted or a snare with a mechanical device to assist in capturing or closing around a wild animal, for the purpose of taking a nuisance wild animal that does not have:

(a) A relaxing lock and a stop to prevent the opening of the snare from closing to a diameter of less than two and one half inches in diameter, or,

(b) A relaxing lock system with a breaking point of not greater than three hundred fifty pounds.

(iii) It shall be unlawful to set a snare with a loop diameter of greater than fifteen inches.

(iv) It shall be unlawful to use a snare attached to a drag.

(v) It shall be unlawful for any person, except a licensed commercial nuisance wild animal control operator, to have attached to or use a spring-loaded, spring-assisted or mechanical device on a snare to assist the snare in capturing or closing around a nuisance wild animal.

#### IV. Pennsylvania Code of Regulations § 141.63

*Cable restraint*—A galvanized stranded steel cable with a minimum diameter of 3/32 inches. The cable must be constructed of either 7 bundles comprised of 7 wires per bundle, 7 bundles comprised of 19 wires per bundle or 1 bundle comprised of 19 wires. The cable may not exceed 7 feet in length from the anchor point to the lock contacting the fully closed loop stop, must be equipped with at least one swivel device (which allows for 360° rotation) between the loop and the anchor and must have stops affixed to the cable to ensure that the circumference of the cable which makes up the loop may not be greater than 38 inches when fully open, or less than 8 inches when fully closed. Cable restraints must be equipped with an approved lock. The lock may not be constructed with moving parts. A cable restraint must include a breakaway device affixed between the lock and cable or at the end of the cable that is rated at 375 pounds or less. The cable must be maintained in good condition so that all components operate properly.

*Snare*—A looped galvanized or stainless stranded steel cable 3/32 inches in diameter equipped with a mechanical sliding metal release lock. A metal ferrule shall be crimped on the cable to prevent the snare loop from closing to a circumference less than 7 inches.

#### V. Wisconsin; Wisconsin Trapping Regulations

**Cable Restraint:** a cable noose used for restraining furbearing animals which does not allow the device or trapped animal to reach unfrozen water.

**Snare:** a wire noose used for restraining furbearing animals in a water set.

### 3. General Conclusion

Because there are no definitions of “snare” or “cable restraint device” under State law and because in other states there arguably is no or little difference between a snare and a cable restraint device, it is difficult to conclude that use of a cable restraint device would not be prohibited under 10 V.S.A. § 4708 or rule. As defined in other states, a cable restraint is a snare, and the prohibition on snaring under section 4708 cannot be circumvented by labeling a snare under a different name.

However, the Fish and Wildlife Board has authority under 10 V.S.A. § 4084 to regulate the manner and means of taking wild animals. Arguably, because both the term “snare” and the term “cable restraint device” are not defined, the Fish and Wildlife Board could in rule define those terms to provide a meaningful distinction under State law. With a meaningful distinction of snare and cable restraint device, the Board arguably could then authorize the taking of wild animals with a cable restraint device as statute only prohibits the taking of wild animals with a snare.

#### **B. Statutory Authority to Allow Use of Snares by Persons Trapping for Compensation**

The Commissioner’s letter indicates that it has always been the Department’s position that the statutory authority under 10 V.S.A. § 4828 to defend property from rabbits or fur-bearing species exempts landowners and the other persons specified, from the prohibition against using snares to take furbearers in defense of property. The Commissioner does have statutory support for this assertion. Specifically 10 V.S.A. § 4828(a) provides the following:

(a)(1) The provisions of law or rules of the Board relating to the taking of rabbits or fur-bearing animals shall not apply to:

(A) an owner, the owner's employee, tenant, or caretaker of property protecting the property from damage by rabbits or fur-bearing animals; or

(B) a member of the selectboard of a town protecting public highways or bridges from such damage or submersion with the permission of the owner of lands affected.

(2) A person who for compensation sets a trap for rabbits or fur-bearing animals on the property of another in defense of that property shall possess a valid trapping license.

However, 2017 Acts and Resolves No. 170, Sec. 13 directed the Fish and Wildlife Board to adopt rules for persons trapping for compensation. Specifically, Act No. 170 directed the Fish and Wildlife Board to “adopt by rule those requirements of Fish and Wildlife Board Rule 44 regarding the trapping of fur-bearing animals that shall apply to persons trapping for compensation under 10 V.S.A. § 4828.” Thus, the General Assembly directed the Board to designate sections of rule that apply or do not apply under § 4828 to persons trapping for compensation. Act No. 170 does not authorize the Board to specify those “statutes” that apply or do not apply to persons trapping for compensation.

The Commissioner may argue that the language of 10 V.S.A. § 4828(a)—the law or rules do not apply—control. But, the Vermont Supreme Court has held that where a conflict or doubt exists regarding controlling authority, specific authority controls over a general grant of authority.<sup>3</sup> The Act No. 170 directive to the Board as to what provisions of rule should apply to persons trapping for compensation is specific and likely would control over the general grant in § 4828. Thus, the prohibition under 10 V.S.A. § 4708 on the taking of wild animals with a snare likely cannot be waived or held inapplicable by rule or decision of the Commissioner to the taking of animals for compensation.

## C. AUTHORITY TO AUTHORIZE TAKE OF WILDLIFE

### 1. Commissioner Authority to Take

Commissioner Porter in his letter states the following:

In accordance with 10 V.S.A. § 4138 (a), the Commissioner has broad authority to permit the taking of wild animals doing damage. The language of the statute is as follows:

(a) The Commissioner may take, permit, or cause to be taken at any time from any waters, and in any manner, fish which hinder or prevent the propagation of game or food fish and may take, permit, or cause to be taken at any time wild animals which are doing damage.

This is an accurate quote from section 4138. I believe by quoting this language the Commissioner is arguing that this language allows a Commissioner to authorize the taking of wild animals “in any manner,” including with the use of a snare or cable restraint device.

An alternate reading, and perhaps more plausible reading, is that “in any manner” only references the taking of “fish” as there are two clauses in subsection 4138(a). One clause

<sup>3</sup> See *City of Burlington v. Fairpoint Communications, Inc.*, 186 Vt. 332 (2009).

addresses the taking of “fish” and does include the “in any manner” language. One clause addresses the taking of wild animals and does not include the “in any manner” phrase. Thus, under § 4138, the Commissioner may not have authority to take wild animals “in any manner.”

With this said, it is reasonable that the Commissioner of Fish and Wildlife would be granted general authority to take a wild animal especially when public health, safety, or other public purpose provides. However, section 4138 is not as clearly determinative as asserted by the Commissioner, especially in light of the sentence in subsection 4138(a) that follows the sentence quoted by the Commissioner. Specifically, the authority to take fish or wild animals under subsection 4138(a) is conditioned by the statement that: “Such removal or taking and the possession and disposition of such fish or wild animals shall be under such regulations as the Commissioner may prescribe.”

As noted above, there are no rules or regulations authorizing the use of snares or cable restraint devices to take wild animals. In fact, statute and rule prohibit the taking of wild animals by snare. And, without a definition of “cable restraint” that provides a meaningful distinction from a “snare,” a rule authorizing the use of a cable restraint device may be indistinguishable from authorizing the use of a snare.

In addition, the definition of “take” that applies to all fish and wild animal requirements may further limit the authority of the Commissioner to authorize the use of cable restraints to take wildlife. “Take,” is defined under 10 V.S.A. § 4001 as follows:

Take and taking: pursuing, shooting, hunting, killing, capturing, trapping, snaring, and netting fish, birds, and quadrupeds and all lesser acts, such as disturbing, harrying or worrying, or wounding or placing, setting, drawing, or using any net or other device commonly used to take fish or wild animals, whether they result in the taking or not; and shall include every attempt to take and every act of assistance to every other person in taking or attempting to take fish or wild animals, provided that when taking is allowed by law, reference is had to taking by lawful means and in lawful manner. (emphasis added)

Thus, to “take” a wild animal does not require killing the animal, as the Commissioner argues is a key difference between a snare and a cable restraint device.

Moreover, the definition of take provides that when “taking is allowed by law, reference is had to taking by lawful means and in a lawful manner.” Reading this statement in context with the Commissioner’s authority to authorize the taking of wild animals under 10 V.S.A. § 4138, it is a reasonable interpretation to conclude that the Commissioner may only allow the taking of wild animals under section 4138 by lawful means, and that the Commissioner may not allow the taking of wild animals by unlawful means, such as by snaring.

## 2. Policy Allowing the Use of Cable Restraint Devices

The Commissioner’s letter states that “[t]he Department intends to continue to authorize the use of cable restraints. This could be read as a statement of general policy applicable to all taking of wild animals, for compensation and otherwise. In light of the lack of distinction in law between a “snare” and a “cable restrain device,” such a policy declaration may be constitutionally problematic.

Under the Vermont Constitution, the General Assembly holds the “Supreme Legislative power,” and is the lawmaking branch of government.<sup>4</sup> which includes the power to “prepare bills and enact them into laws.” The authority of the Executive Branch, such as the Commissioner or the Fish and Wildlife Board, is to execute or carry out the laws of the State.<sup>5</sup> However, the execution by the Executive Branch of the law cannot alter the law unless authorized by the General Assembly through a delegation of authority, such as rulemaking.

However, there are no rules of the Commissioner authorizing the use of cable restraint devices and there is no grant of rulemaking authority to the Commissioner to adopt such rules. The Commissioner may argue that authorization to take wild animals with cable restraints devices is an exercise of enforcement discretion. The Vermont Constitution, under the Take Care Clause, does give the Executive Branch some discretion in the execution and enforcement of state law.<sup>6</sup>

Enforcement discretion does not allow the Executive to alter legislatively created law on a generally applicable basis. In short, decisions on whether and how to enforce the prohibition on snaring on a case by case are arguably within the discretion of the Commissioner. But, the decision never to enforce the prohibition generally or to authorize a class of persons to generally engage in statutorily prohibited language could be construed as usurping the lawmaking authority of the General Assembly.<sup>7</sup>

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<sup>4</sup> Vt. Const. Ch. II, §§ 2 and 6.

<sup>5</sup> See Waterbury v. Melendy, 109 Vt. 441, 451–453 (1938).

<sup>6</sup> Vt. Const. Ch. II, § 20.

<sup>7</sup> See, e.g. Association of Irrigated residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007); see also Texas v. United States, 809 F.3d 134 (5<sup>th</sup> Cir. 2015), affirmed 136 S. Ct. 906 (2016); but see Alger v. Department of Labor & Industry, 917 A.2d 508 (2006).