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Sent: Sunday, February 23, 2020 5:07 PM
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Subject: [External] Audubon VT Reaction to Enforcement Discretion Language in H.683

[External]

Dear Chair Sheldon: Since I was unable to participate in the Committee's discussion on Friday, Representative Dolan suggested that I share my thoughts regarding a sentence in the most recent proposal from Louis Porter, which I understand led to some additional discussion and possible disagreement. The relevant sentence reads as follows:

“For purposes of this title, the Commissioner has authority to exercise enforcement discretion, including refraining from taking any enforcement action for the incidental take of migratory birds.”

My understanding is that committee members were concerned that the reference to “title” may extend the department's enforcement discretion beyond the provisions relating to migratory bird protections. I appreciate that concern but, based on my experience with the law regarding enforcement, I am fine with the language offered by the Commissioner. I do not see a risk that this provision will affect the department's broader range of enforcement authorities one way or the other.

In support, I offer two observations, based on my review of the legal authority of both federal and state executive branch agencies, as interpreted by the courts, including Vermont's:

- (1) As a matter of statutory construction, courts generally look to the location of a statutory provision within the larger code within which it nests to determine the extent of its applicability. Courts tend to find that a provision in a sub-section of a statute only applies within that subsection. Courts are unlikely to find that the legislature inadvertently changed the whole statutory code by embedding a sentence within one portion of the statute, unless it does so expressly. The location of the proposed sentence above, embedded as it is within a chapter related to restrictions on taking wildlife, and the fact that the same sentence specifically references migratory birds, makes it unlikely that a court would find that the legislature had modified the nature of the department's enforcement authority more broadly. More likely, a court would find that the reference to the entire conservation “title” was intended to describe the need for the migratory bird provision to work in concert with other enforcement provisions within that title; and,
- (2) Perhaps more importantly, and as I testified last week, the department's discretion to refrain from taking enforcement action is inherent in any statute, independent of express language stating so. The executive branch's authority not to act is well-established in federal and state law. The case most frequently referenced in this context is the U.S. Supreme Court's decision in Heckler v.

Chaney from 1985 (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”). Even without the provision suggested by the department, the department has the authority to refrain from taking enforcement under all of its various authorities. The proposed language above is, for that reason, not necessary, but neither does it deviate from the current state of the law. I appreciate the reasons that the department is seeking an express statement of discretion (i.e. to avoid being called to respond to reports of activities that may be numerous, but not significant from a species management perspective) and do not object to the inclusion of the recommended language.

As a general matter, the issue of how the legislature can exercise oversight over a lack of agency enforcement is a larger question, not easily resolved through minor adjustments in the scope of the language in any event. Legislatures can address an agency’s failure to take enforcement through (a) oversight hearings, (b) the addition of more specific criteria, or (c) the creation of a public cause of action. For the present matter involving migratory birds, since the primary effect we are seeking is to replace the historic deterrent effect of the MBTA through a general threat of enforcement, it is not necessary for the legislature to take any additional steps to constrain the department’s enforcement authority in this bill.

I am happy to discuss further if helpful. Sincerely, David

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