December 4, 2023

Dear LCAR Members,

I am writing in response to the November 30, 2023 letter from the Fish & Wildlife Department (Department) to LCAR.

The Department's response on behalf of the Fish & Wildlife Board (FWB) to LCAR's objections to the furbearer rule asserts that LCAR is incorrectly determining intent of legislative Acts 159 and 165. The Department seeks to control LCAR's interpretation of legislative intent in the formulation of a regulation by citing judicial cases about how intent can be determined. In effect, the Department wants to limit how a legislative body can interpret its own legislation.

The Department justifies resistance to accommodate LCAR's objections by emphasizing the "plain language" in Acts 159 and 165 as the sole basis for determining legislative intent. The Department cites several legal cases related to the Vermont Supreme Court's interpretation of various regulations (e.g., worker's compensation, liquidation of an insurance company, false report to an enforcement officer and expungement of prior offenses).

There are two main issues with the Department's interpretation:

First, while the Department is correct that the Vermont Supreme Court has an approach to determine legislative intent, it is not based solely on "plain language" of a statute as the Department states. When referencing the case Cyr v. McDermott's Inc., the Department selectively cites findings when in fact the Court clearly stated in this case that intent is not determined just from statutory language:

> ¶ 15. The manner in which we interpret statutes is well established. "[T]he bedrock rule of statutory construction is to determine and give effect to the intent of the Legislature." *Delta Psi Fraternity v. City of Burlington*, 2008 VT 129, ¶ 7, 185 Vt. 129, 969 A.2d 54 (quotation omitted). To determine legislative intent, we first presume that the Legislature intended the plain meaning of the statute. *In re Ambassador Ins. Co.*, 2008 VT 105, ¶ 18, 184 Vt. 408, 965 A.2d 486. Where "the literal meaning of the words is inconsistent with legislative intent" and the "precise wording of a statute produces results which are manifestly unjust, absurd, unreasonable or unintended, or conflicts with other expressions of legislative intent," legislative intent must prevail. *Delta Psi*, 2008 VT 129, ¶ 7 (quotations omitted). ***We can determine intent "from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences.***" *Id.* (quotation omitted). [1]

Second, the application of "plain language" by the Court was used in cases interpreting existing regulations. There are no citations where the Court applied "plain language" to the drafting of new regulations or LCAR's review of a rule.

[1] Cyr v. McDermott's, Inc., 187 Vt. 492 https://casetext.com/case/cyr-v-mcdermotts-inc

With respect to FWB's response to LCAR's specific objections:

Control of Hounds

The measures that the Department cites to minimize or reduce the risk of hounds or hunters entering posted land are either part of current practice or will have no effect. Registering hounds, prohibitions on replacing hounds and specifying training and hunting seasons will not reduce the likelihood of hounds entering posted property. A tremendous reliance is now being placed on training collars, adding "audible tones" to electrical stimulation (i.e., shocks) as a requirement, without any solid evidence that these measures will indeed effect the "remote recall" required by the rule. GPS collars with training functions are already in use, yet instances of transgression of hounds onto posted property still occur.

Penalties for allowing hounds to enter posted property sound good but are not enforceable. There are no provisions by which a property owner can request GPS location data to prove a transgression has occurred within the 30-day window required for hunters to retain location data. The difficulty of identifying hounds who may be racing in pursuit of prey across private property is not addressed.

The Department misstates LCAR's objection as a ban on coyote hounding. The Department states that LCAR's objection to language related to control of hounds "directs the Board (FWB) to impose a ban on hunting coyotes with dogs" and that LCAR's October 26, 2023 memo suggested using leashes as a means of control. Neither is accurate. LCAR requested methods in addition training collars and suggested "visual site or under voice control or both".

The Department implies that the concerns about control of hounds are valid when coming from legislators but not public stakeholders. The Department expresses concern that no legislator ever communicated issues about control of hounds prior to LCAR's Oct 26th memo. What the Department fails to acknowledge is that the concerns expressed by LCAR were also expressed by stakeholders in the working group meetings, but were not responded to.

Definition of Trails

The Department continues to propose an overly complicated system for identifying what constitutes a trail and exempts motorized recreation trails such as VAST. The definition of "public trail" now has three parts, and still relies on a trail being "designated, managed, maintained ***and*** clearly marked" (the use of "and" rather than "or" requires all conditions to be met). Here is where "plain language" should be used. It will be hard for both trappers and the public to understand where setbacks are required.

The definition of public trail could be simplified by using language from neighboring states proposed by LCAR. This definition encompasses all trails (motorized and non-motorized). If a trapper cannot distinguish between a wildlife trail and one used by the public, they should not be setting traps.

The Department also justifies its definition based on a concern for application of setbacks to private trails. To address these concerns, an exemption can be made for private trails on property where landowners allow trapping

Additionally, the Department insists on applying the definition only to non-motorized trails which exempts trail systems such VAST, which are used for both motorized and non-motorized recreation.

The Department's website includes conflicting information about what roads are subject to setback requirements.[2] The document *11.30.23 VFWD letter to Legislative Committee on Administrative Rules*

[2] https://vtfishandwildlife.com/trapping-bmps-and-coyote-hunting-regulations-updates

(LCAR) defines and references setbacks for public highways. A second document (with the same date) *Proposed Revisions to Furbearer Species Rule (11.30.23)* deletes the definition and references to public highways and defines setbacks only for Class 3 and 4 roads. It is unclear which definition FWD is proposing. Setbacks should be for all roads – public highways and Class 3 and 4 roads.

The Department wrongly asserts criminal penalties could apply to setback violations. The Department raises concerns that a broader definition of public trails would expose a violator of the setback requirements to a criminal violation. Violation of trapping and other wildlife regulations involve license suspension, points and civil penalties. Therefore it is unclear how the case cited regarding criminal penalties applies in this instance.

Exemption for Trapping in the Water or Under Ice

Exempting traps set in water from setbacks significantly undermines the intent of public safety. Water sources are among the best places to set traps as they are a drinking water source for wildlife. Water that is within 50 feet of a trail or road is accessible to the public, regardless of the time of year. The Department's assertions that people are not expected to recreate near water between October and March in a state known for outdoor winter sport activities has no basis in fact. Similarly, the Department has insufficient data to assign a level of risk posed by traps in water or under ice. Act 159 did not instruct the Department to use its own assessment of risk to determine where traps could be set, but rather was clear in stating that traps should be restricted from "public locations where people may reasonably be expected to recreate".

The Department conflates recreational and nuisance trapping in an attempt to justify the exemption for trapping in water. Traps are set in water for a variety of species, e.g., beaver, otter, mink, raccoons and muskrats. Nonetheless, the Department raises alarm that nuisance instances with beavers will increase if setbacks from water sources are imposed. This fails to acknowledge that there are proven measures for addressing nuisance issues from beavers that do not rely on trapping.

Definition of Trapping

The merits of the Department's argument as to why trapping is a form of hunting are not relevant to the passage of the rule. Revisions to the definition of trapping were not requested as part of Act 159.

The definition change has constitutional implications and so is more than an "administrative efficiency" as the Department disingenuously claims. Such a change should be handled through a separate regulatory process. As noted in other testimony, if trapping is a form of hunting, it can be construed that permission is not needed to trap on unposted property.

The FWB and the Department have offered no credible reasons for dismissing LCAR's objections and failing to make changes to the furbearer rule to accommodate the objections. Rather, the FWB rigidly maintained serving hunter and trapper interests as its primary purpose.

I urge LCAR to sustain its objections.

Sincerely,

Barbara Felitti

Barbara Felitti
Huntington, VT