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Legislative Committee on Administrative Rules
Rep. Trevor Squirrell, Chair
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Fish & Wildlife Board's Definition of Trapping as Hunting

In a memo to the Legislative Committee on Administrative Rules ("the Committee"), the Fish & Wildlife Department ("the Department") stated that defining trapping as hunting in the Furbearing Species Rule "is not arbitrary or inconsistent with the intent of Act 159."[1] To support that definition, the Department cited the history of trapping, the history of the Constitution's language, and legal precedent in Vermont case law. Neither the history of trapping, the history of the Constitution's language, nor legal precedent in Vermont case law support defining trapping as hunting.

The history of trapping does not support the Fish & Wildlife Board's ("the Board's") definition of trapping as hunting. The legal term "take" has historically included trapping (as well as hunting, capturing, killing, etc.).[2] Although trapping and hunting are both instances of take, this does not mean trapping is hunting.[3] If the plain meaning of "hunting" is abandoned, stretched, and made synonymous with "take," however, then hunting might constitute trapping under such an expansive interpretation of "hunting." But given the plain, historical meaning of

[1] *Department of Fish and Wildlife*, "Furbearing Species Rule" 5–6 (Nov. 13, 2023).
[2] *See*, *e.g.*, 10 V.S.A. § 5401(18)(A)(i) ("[P]ursuing, shooting, hunting, killing, capturing, trapping, harming, snaring, or netting wildlife"); 16 U.S.C. § 1151(m) ("'Take' or 'taking' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill."); 16 USC § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *State v. Mobbs*, 740 A.2d 1288 (Sept. 9, 1999) ("As defined by 10 V.S.A. § 4001(23), 'taking' an animal means 'pursuing, shooting, hunting, killing, capturing, trapping [or] snaring.'"); Take, Am. Dictionary of the English Language (1828) ("8. To get into one's power by engines or nets; to entrap; to ensnare; as, to take foxes with traps; to take fishes with nets, or with hook and line.").
[3] Consider an analogy: although cats and dogs are both kinds of mammals, this does not mean cats are dogs.

"hunting" as an activity involving pursuit and given the lack of pursuit inherent in the plain, historical meaning of "trapping," defining trapping as hunting does not make sense.[4] Since the history of trapping does not support the Board's definition of trapping as hunting, such a definition seems arbitrary.[5]

The history of § 67 of Vermont's Constitution does not support the Board's definition of trapping as hunting. The language of Vt. Const. § 67 derives from William Penn's Frame of Government of 1683.[6] For over three hundred years, this language has explicitly concerned hunting, fowling, and fishing.[7] Even supposing the Department's and Board's authority to regulate trapping, such authority does not permit those entities to arbitrarily define trapping as hunting. Since nothing about the history of Vermont's Constitution apparently supports the Board's definition of trapping as hunting, such a definition seems arbitrary.[8]

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[4] *See* ANTONIN SCALIA & BRIAN, *Ordinary-Meaning Canon* in READING LAW 69–77 ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense…. The ordinary-meaning rule is the most fundamental semantic rule of interpretation."); 3 V.S.A. § 801(13)(A)(iii) ("'Arbitrary,' when applied to an agency rule or action, means … [t]he decision made by the agency would not make sense to a reasonable person.").

[5] 3 V.S.A. § 801(13)(A)(iii), *supra* note 4.

[6] ERIC FREYFOGLE et al., WILDLIFE LAW 43–44 (2nd ed., 2019) ("William Penn's Frame of Government of 1683, for instance, protected the liberty of all citizens 'to fowl and hunt upon the land they hold, and all other lands therein not enclosed.' …. This language was borrowed nearly verbatim by lawmakers elsewhere. In its constitution, Vermont similarly protected the right of all inhabitants 'to hunt and fowl on the lands they hold, and on other lands not enclosed.' This right in Vermont also included the right to fish on all 'boatable waters,' without regard to ownership rights."); *Frame of Government of Pennsylvania*, Yale Law School Lillian Goldman Law Library XXII. (Feb. 2, 1683), https://avalon.law.yale.edu/17th_century/pa05.asp ("And that the inhabitants of this province and territories thereof may be accommodated with such food and sustenance, as God, in His providence, hath freely afforded, I do also further grant to the inhabitants of this province and territories thereof, liberty to fowl [and] hunt upon the lands they hold, and all other lands therein not inclosed; and to fish, in all waters in the said lands, and in all rivers and rivulets in, and belonging to, this province and territories thereof, with liberty to draw his or their fish on shore on any man's lands, so as it be not to the detriment, or annoyance of the owner thereof, except such lands as do lie upon inland rivulets that are not bootable, or which are, or may be hereafter erected into manors.")

[7] *Cf.* ANTONIN SCALIA & BRIAN, *Omitted-Case Canon* in READING LAW 93–100 ("Nothing is to be added to what the text states or reasonably implies… That is, a matter not covered is to be treated as not covered.").

[8] 3 V.S.A. §§ 801(i), (ii) ("'Arbitrary,' when applied to an agency rule or action, means that one or more of the following apply: (i) [t]here is no factual basis for the decision made by the agency [or] (ii) [t]he decision made by the agency is not rationally connected to the factual basis asserted for the decision.").

Legal precedent in Vermont case law does not apparently support the Board's definition of trapping as hunting. Despite the Department's assertion—sans citations—that Vermont case law supports the Board's definition of trapping as hunting, no Vermont case law of which I am aware defines trapping as hunting. In *Hunters, Anglers & Trappers Ass'n of Vermont, Inc. v. Winooski Valley Park Dist.*, Vermont's Supreme Court mentioned Vt. Const. § 67 and trapping.[9] But the Supreme Court clarified that "those rights are not necessarily implicated in this case."[10] Since the Supreme Court did not and did not need to decide whether trapping is hunting in that case, such mention seems like *obiter dictum*—non-precedential, judicial commentary unnecessary to the case's resolution.[11] Since legal precedent in Vermont case law does not apparently support the Board's definition of trapping, such a definition seems arbitrary.[12]

Thus, given that the history of trapping, the history of § 67 of Vermont's Constitution, and legal precedent in Vermont case law do not support the Board's definition of trapping as hunting, 3.20 of the Board's proposed rule seems arbitrary.[13] Further, an unelected body of officials seemingly seeks to surreptitiously constitutionally enshrine a niche activity through its rulemaking authority. Such action seems to me to violate basic democratic principles. For these reasons and others, I urge the Committee to consider objecting to the Board's proposed rule.

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[9] *Hunters, Anglers & Trappers Ass'n of Vermont, Inc. v. Winooski Valley Park Dist.*, 913 A.2d 391, 395 (Vt., Nov. 17, 2006) ("We agree with HAT that this provision provides constitutional hunting rights, but those rights are not necessarily implicated in this case. Section 67 vests the Legislature with the power to regulate hunting and trapping even on privately held lands…"). *N.b.*, Vt. Const. § 67 may authorize the Legislature to regulate trapping, but this does not necessarily mean that trapping is hunting.
[10] *Id*.
[11] Dictum, Black's Law Dictionary (11th ed., 2019).
[12] *See* 3 V.S.A. §§ 801(ii).
[13] *See* 3 V.S.A. §§ 801(i)–(iii).