

## MEMORANDUM

To: Chair Sen. Christopher Bray and Members of the Senate Committee on Natural Resources and Energy

From: Devin G. Brennan

Date: February 22, 2024

Re: S.258, An Act Relating to the Management of Fish and Wildlife

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Good morning! My name is Devin Brennan. I am a student at Vermont Law and Graduate School, where I am a candidate for a Juris Doctor with a Concentration in Animal Law and a Master of Animal Protection Policy. My partner and I live in South Royalton. I am thankful to speak on my own behalf in support of S.258.

I have three main reasons for supporting S.258. First, the bill normalizes the Fish & Wildlife Board (“the Board”). Second, the bill improves oversight over rulemaking. And third, the bill helps to recognize Vermont’s public trust duties. Normalizing the Board, improving oversight over rulemaking, and helping to recognize Vermont’s public trust duties motivate me to support this bill.

S.258 amends the authority of the Fish & Wildlife Board and makes the Board’s capacity like that of almost all other state administrative boards: advisory only.<sup>1</sup> Vermont laws tend to presume boards are only advisory.<sup>2</sup> The current statutory scheme constituting the Board, however, seems to discourage efficient rulemaking.<sup>3</sup> Making the Board’s capacity advisory

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<sup>1</sup> See, e.g., 3 V.S.A. §§ 2203, 2403, 2803, 3003.

<sup>2</sup> *Id.*

<sup>3</sup> In October 2023, I testified before the Legislative Committee on Administrative Rules (LCAR) and encouraged LCAR to object to the Fish & Wildlife Board’s Proposed Furbearing Species Rule, which the Fish & Wildlife

only—like Vermont statutes tend to presume for agencies’ boards—will likely encourage more efficient rulemaking.<sup>4</sup>

S.258 allows a qualified, informed Board to advise on rules the Fish & Wildlife Department proposes.<sup>5</sup> Under this bill, the Board advises the Department on whether the Department’s proposed rules satisfy certain statutory requirements (e.g., whether a proposed rule is designed to maintain the best health of a regulated species).<sup>6</sup> As currently constituted, the governor’s appointees to the Board need neither satisfy any specific statutory requirements (e.g., “a history and involvement with and dedication to fish and wildlife”) nor receive any training on matters affecting fish and wildlife, and the Board itself must promulgate rules satisfying those certain statutory requirements.<sup>7</sup> This bill sets a standard for appointees to the Board, educates members appointed to the Board, and consequently improves oversight over rulemaking.

S.258 helps to recognize Vermont’s duties to hold the fish and wildlife of the state in trust for the benefit of the citizens of the state.<sup>8</sup> Such duties are part of Vermont’s public trust duties.<sup>9</sup> Vermont’s public trust duties require the state regulate in recognition of that trust.<sup>10</sup> More

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Department’s General Counsel defended before LCAR. The Department’s General Counsel then brought LCAR’s objections to the Board’s proposed rule, of which the Board rejected consideration. This back-and-forth occurred a few times. Anecdotally, this process seemed inefficient.

<sup>4</sup> See, e.g., 3 V.S.A. §§ 2203, 2403, 2803, 3003.

<sup>5</sup> 10 V.S.A. § 4041(b)(3)–(4), (d) (1.2 ed. Feb. 20, 2024).

<sup>6</sup> 10 V.S.A. § 4041(d) (1.2 ed. Feb. 20, 2024).

<sup>7</sup> 10 V.S.A. §§ 4041, 4082. Cf. 10 V.S.A. § 4041(b)(3)–(4), (d) (1.2 ed. Feb. 20, 2024).

<sup>8</sup> 10 V.S.A. §§ 4081(a)(1), (b); *City of Montpelier v. Barnett*, 49 A.3d 120, 128 (Vt. 2012) (citing Vt. Const. § 67 and quoting Richard Brooks, *Speaking (Vermont) Truth to (Washington) Power*, 29 Vt. L. Rev. 877, 885 (2005) (“Since 1777, the public trust doctrine has been entrenched in the Vermont Constitution.... ‘This provision [Vt. Const. § 67] has been [taken] to establish a public trust in Vermont’s natural resources which is now recognized in her statutes and regulations.’”)).

<sup>9</sup> *City of Montpelier v. Barnett*, *supra* note 7.

<sup>10</sup> *City of Montpelier v. Barnett*, 49 A.3d 120, 128 (Vt. 2012) (“This trusteeship... demand[s] that regulation have a special public character, both in its aims and in its formation. See J. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 558–60 (1970) (describing the role of the public trust doctrine as one of ‘democratization’ whereby the courts ‘thrust[ ] decision making upon a truly representative body’).”).

efficient, informed rulemaking under this bill helps recognize the public trust duties, which the state must fulfill with “a constant and continual vigilance.”<sup>11</sup>

These three reasons mainly motivate me to support S.258. This bill is larger than any one issue affecting fish and wildlife. Because this bill normalizes the Board, improves oversight over rulemaking, and helps recognize Vermont’s public trust duties, I encourage the Committee to advance this bill. Thank you for your time and attention!

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<sup>11</sup> 10 V.S.A. § 4081(a)(2).