

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-5285-134-T4

ON APPEAL FROM FINAL ADMINISTRATIVE ACTION

SAT BELOW: RULEMAKING BY
NEW JERSEY FISH AND GAME COUNCIL
NEW JERSEY DIVISION OF FISH AND WILDLIFE
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Animal Protection League of New
Jersey, Animal Welfare
Institute, Unexpected Wildlife
Refuge, Born Free USA, Sierra
Club, Lawyers in Defense of
Animals, and Associated Humane
Societies,

Appellants,

v.

New Jersey Fish and Game
Council, New Jersey Division of
Fish and Wildlife, and New
Jersey Department of
Environmental Protection,

Respondents.

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

This case concerns an agency's attempt to impermissibly circumvent New Jersey's broad statutory ban on animal traps of the steel-jaw leghold type (hereinafter "leghold type" traps) through the agency's use of rulemaking.

New Jersey's ban on leghold type traps goes back over thirty years. Leghold type traps are considered inhumane and are currently banned in more than 80 countries worldwide (including the European Union) and in various states in the U.S. Aa51. In 1984, New Jersey enacted a sweeping statutory ban on all leghold type traps. N.J.S.A. 23:4-22.1 through 22.8. The ban is broad, prohibiting the manufacture, sale, offer for sale, possession, importation, transportation, or use of an animal trap of the steel-jaw leghold type. N.J.S.A. 23:4-22.1 and 22.2. The ban is absolute except for one narrow exception: it exempts mouse and rat traps designed for use in or under buildings from the definition of steel-jaw leghold type trap. N.J.S.A. 23:4-22.4.

In passing the Act, the Legislature did not put an end to all trapping but banned all leghold type traps because it deemed their use to constitute an unacceptable method of trapping. Leghold type traps have jaws designed to clamp closed on animals' appendages so tightly that the frantic animals cannot pull free. The legislature found this repugnant, calling the

leghold trap "the most inhumane and cruel of traps used on wild furbearing animals," functioning mainly as a "holding device," which "does not usually kill its victim, resulting in hours or even days of excruciating pain."

In 1985 the Council attempted to promulgate a regulation that would have legalized modified leghold traps (called "padded" traps because they put hard rubber strips on the jaws), however, the traps, were found to be leghold type traps banned by the Act by AG Kimmelman and the courts in the South Jersey Fur Farmers case.

Enclosed leghold traps, including the so-called "enclosed foothold traps" in the challenged regulation, (hereinafter "enclosed" traps) have been in existence since before enactment of the Act. Like other leghold type traps, enclosed traps have jaws that snap closed on the appendages of animals to restrain them. They are referred to as "enclosed" because they have an enclosure made of metal or plastic encompassing the trigger, spring and jaws of the leghold trap mechanism. An animal puts a leg (foot, paw, etc.) through a hole in the enclosure to access the bait which triggers the jaws to slam closed on the animal's leg.

In 2015, in response to increased lobbying by some trapping interests, the Council attempted once again to use rulemaking to

circumvent the Act's ban and bring the use of leghold type traps back in New Jersey. It adopted the challenged regulation and announced publicly that enclosed traps were "now legal."

However, it is settled that an agency only has the authority delegated to it by the Legislature and that an agency regulation is invalid when it conflicts with a statute. Here, the challenged regulation conflicts with the Act and is therefore invalid. First, enclosed traps are a type of leghold trap, as established by the enclosed traps' own patents. The patents provide that that the traps use "jaws" to "grasp" the "paw or leg" to "restrain" the animal. Second, the express language and plain meaning of the Act clearly and unambiguously ban all leghold type traps. Third, the Act establishes only one narrow exemption to the ban for mouse/rat traps designed for use in or under buildings. This exemption does not apply to the enclosed traps, which are designed for use on raccoons in the wild. Fourth, the Act bans modified leghold type traps, not only by its language, but by virtue of the AG Kimmelman opinion and the court opinions in the South Jersey Fur Farmers case. Finally, the Act does not establish an acceptable level of injury or pain in an animal trap but instead unequivocally bans all leghold type traps. For all these reasons, the enclosed traps are prohibited and the regulation is invalid.

PROCEDURAL HISTORY

On June 9, 2015 the New Jersey Fish and Game Council voted to adopt the 2015-2016 Game Code, including the regulation challenged in this appeal. Aa40.

On July 23, 2015, Appellants filed a Notice of Appeal and Case Information Statement in this matter.

On or about August 24, 2015, Respondents posted a notice on the Division of Fish and Wildlife website the 2015-16 Hunting and Trapping Digest which stated that enclosed traps are "now legal for trapping." Aa67.

On August 27, 2015, Appellants filed with the Chairman of the Fish and Game Council and Commissioner of the NJDEP a motion for a stay pending appeal.

On September 8, 2015, Respondents published the challenged regulation in the New Jersey Register, to be operative September 13, 2015. Aa71.

On September 8, 2015, the same day Respondents published the rule in the New Jersey Register, Appellants wrote to the Chairman of the Council asking for a decision on the pending stay motion.

On September 9, 2015, the Council voted to deny the stay motion.

On September 10, 2015, Appellants filed an application for

permission to file an emergent motion for a stay with the Appellate Division.

On September 11, 2015, an Appellate Division emergent judge denied permission to file an emergent motion for a stay with the Appellate Division.

On September 13, 2015, the challenged regulation became operational. Aa71.

On September 23, 2015, Appellants filed a stay motion to the Appellate Division on a regular motion schedule.

On October 13, 2015, the Appellate Division denied the motion by order without an opinion.

On October 27, 2015, Appellants filed a motion to compel Respondents to file a Statement of Items Comprising the Record on Appeal. The motion was withdrawn when the Statement was filed by Respondents.

On November 4, 2015, Appellants filed a motion with the Supreme Court seeking leave to appeal the denial of the motion for a stay pending appeal.

On December 2, 2015, Appellants filed a motion to settle and supplement the record.

On December 14, 2015, Respondents filed an Amended Statement of Items Comprising the Record on Appeal, adding additional documents.

On December 15, 2015, the Supreme Court denied Appellants motion for leave to appeal the denial of the motion for a stay.

On December 24, 2015, the Appellate Division denied the motion to settle and supplement the record.

On January 8, 2015, Respondents filed a Second Amended Statement of Items Comprising the Record on Appeal, which added an additional document.

STATEMENT OF FACTS

The 1984 statutory ban on leghold type traps

Leghold traps are considered inhumane and are banned in more than 80 countries worldwide (including the European Union) and in various states in the U.S. Aa51. New Jersey banned steel-jaw leghold type traps in 1984.¹ N.J.S.A. 23:4-22.1 through 22.8. The ban is broad, prohibiting the manufacture, sale, offer for sale, possession, importation, transportation, or use of an animal trap of the steel-jaw leghold type. N.J.S.A. 23:4-22.1 and 22.2. The ban is absolute, except for one narrow exception: it exempts mouse and rat traps designed for use in or under buildings from the definition of steel-jaw leghold type trap. N.J.S.A. 23:4-22.4.

1 The terms "leghold trap" and "steel-jaw leghold trap" were used interchangeably in 1984 by both the sponsors of the Act's progenitor bill A-3207, and the Division of Fish and Wildlife in its position statement and testimony before the Assembly and Senate.

Prior to enactment of the Act, the use of leghold type traps was already prohibited in certain areas of the state (counties of the first and second class). Trappers flouted the law and the Division of Fish and Wildlife failed to enforce it. When the Act was enacted, it banned the use of leghold traps in every part of the State.

In passing the Act, the Legislature did not put an end to all trapping; however, it banned all leghold type traps because it deemed them an unacceptable method of trapping. The Committee statement to A-3207, which was the predecessor of the bill that was ultimately enacted into law, succinctly set forth the rationale for the Legislative intent to ban all leghold type traps:

The steel-jaw leghold trap is the most inhumane and cruel of traps now used on wild furbearing animals. Used mainly as a holding device, it does not usually kill its victim, resulting in hours or even days of excruciating pain. Aal.

In a public statement issued on April 27, 1984, in conjunction with his signing of the Act, Governor Kean referred to the need for the ban as "overwhelming" and cited its importance in protecting both wildlife and companion animals. He stated:

The evidence supporting the abolition of the leghold trap is overwhelming... It does cause undue pain and suffering needlessly and it has, in many instances, snapped shut on the legs of dogs, cats, and other

domesticated pets; maiming and seriously injuring them. Aa2.

The 1985 proposed regulations, AG Kimmelman Opinion and Court Opinions

In 1985, as today, six hunters and three farmers control the eleven member New Jersey Fish and Game Council, and license fees are an indispensable source of revenue. See N.J.S.A. 13:1B-24; N.J.S.A. 23:3-1 and 3-4. In 1985, the Fish and Game Counsel and the Division proposed rules that would have allowed "padded" leghold traps.

On July 12, 1985, Attorney General Kimmelman issued a formal opinion by letter addressed to Council Chairman Anthony DiGiovanni, in which he stated:

It has come to our attention that the Fish and Game Council has proposed an amendment to the Game Code, which would permit the use of a rubber padded or cushioned steel-jawed leghold trap as a substitute for traditional unpadded steel-jawed leghold traps.

...

[T]he unambiguous language of L. 1984, c. 37 bans the use of traps of the steel-jawed leghold type.

...

The legislative history of the enactment supports this conclusion.

...

For these reasons, you are advised that the use, manufacture, sale or possession of a 'soft catch' or 'cushion hold' steel-jawed leghold trap after October 27, 1985 is prohibited by the terms of L. 1984, c. 37. The proposal to amend the Game Code to authorize the use of the 'Soft-Catch Trap' is inconsistent with the statute and should not be adopted. Aa4-Aa6.

The Council subsequently withdrew its proposed regulations.

However, a significant Council stakeholder, the South Jersey Fur Farmers, filed a lawsuit seeking a declaration that "padded" traps were outside the scope of the statutory ban. The Attorney General and animal welfare groups opposed the suit. The AG took the position stated in his July 12, 1985 letter to the Council Chairman. The AG further took the position that the Council and its staff at the Division of Fish and Wildlife were so biased in their support of leghold traps (to support certain trapping interests) that the Legislature did not trust them on the subject. In explaining the Legislature's creation of a one-year alternatives study, the Attorney General wrote:

The Legislature made a specific delegation of the authority to identify an alternative to a trap of the steel-jaw leghold type to Rutgers University and not the Fish and Game Council. N.J.S.A. 23:4-22.4 (provision for Rutgers study). The rationale for avoiding the Division of Fish and Game, and the Fish and Game Council clearly must have been the Legislature's awareness of the opposition of these agencies to bans on traps of the steel-jaw leghold type as reflected in the lobbying efforts and position statements of these agencies to S831 and prior legislation of a similar purpose. Aa70.

On October 3, 1986, after a full plenary trial, the Court held that the statutory ban extended to all types of jawed leghold traps except for the specific exemption contained in N.J.S.A. 23:4-22.4. The Court stated:

The padded or cushion hold trap, while similar in appearance and operation, employed various modifications such as specially constructed padding,

off-set jaws, swivel and chain modifications, lessened spring tension, etc., for the purpose of reducing trauma inflicted on trapped animals.

...

What can't be disputed is that all of these traps, cushioned or otherwise, function by the jaws closing on the animal's leg and, therefore, are all jawed leghold traps. The issue simply stated is whether the legislation bans the use of all such traps.

...

In interpreting statutes Courts are guided by one unaltering principle, the expressed intention of the legislature. Courts are not free to substitute their judgment for that of the legislature or to interpret on the basis of what they feel the law should be; to do so would violate our entire governmental scheme.

...

The first interpretive step is to look to the language of the statute and if the plain meaning is clear and unambiguous on its face the process is over. State v. Valentin, 208 N.J. Super. 536, (1986), N.J.S.A. 1:1-1.

...

It is difficult if not impossible to read an ambiguity into the statutory prohibition imposed on traps of the steel-jaw leghold type.

...

[Discussion of legislative actions] ...These legislative actions clearly outline the legislative intent to extend its prohibitory ban to all jawed leghold traps.

...

For these reasons the Court holds that the provisions of N.J.S.A. 23:4-22.1 extend to all types of jawed leghold traps except for the specific exemptions contained in N.J.S.A. 23:4-22.4. Aa7.

On April 27, 1988, the Appellate Division affirmed the trial court's ruling. Aa20. For approximately thirty years since the Act became effective, leghold type traps have been banned in New Jersey.

Enclosed traps are not new and date back to 1897

Enclosed traps are not a new idea; in fact, the first designs date back to 1897.² In 1982, a conversion kit invented by Jack Isborn was marketed which allowed trappers to modify their leghold traps to work as enclosed traps. Two years later, in 1984, Isborn patented and sold enclosed leghold traps.³ With regard to the enclosed traps specifically referenced as examples of enclosed traps in the challenged rulemaking, the Egg trap was patented and introduced in 1987 (a time when the Superior Court ruling invalidating the padded traps was still on appeal), the Duffer trap was introduced in 1995, and the Lil Grizz trap in 2001. Currently there are a dozen different types of enclosed traps on the commercial market. There are conversion kits that modify leghold traps into "dog-proof traps," which are enclosed traps.⁴ Enclosed traps are also made by using a metal can and a leghold trap.

Since enactment of the Act in 1984, there has been no repeal or legislative modification in the statutory ban on leghold type traps.

2 http://www.furfishgame.com/featured_articles/Archived/2011-01/antique_traps_2011_01.php

3 http://www.furfishgame.com/featured_articles/Archived/2011-01/antique_traps_2011_01.php

4 For example of marketed conversion kit for "dog-proof " style enclosed trap see:

http://www.furfishgame.com/featured_articles/Archived/2011-01/antique_traps_2011_01.php

Despite the existence of enclosed traps since the 1800s and the availability of the Egg trap since 1987, the Council did not attempt to legalize enclosed traps until the challenged rulemaking. From the Act's enactment to September 13, 2015, when the challenged regulation became operational, enclosed traps were not in use in New Jersey.

From the repudiation of the proposed "padded trap" regulation in the 1980s until the current rulemaking was formally commenced in June 2014, the Council did not attempt another rulemaking to circumvent the ban.

2009 - 2015 Leghold trap interests ramp up new effort to circumvent the Act with regulation

Leghold trapping interests generally prefer enclosed traps over box traps as a matter of convenience (less bulky to carry through the woods) and slightly lower cost (e.g. One can buy an Egg trap for about \$15 and a box trap for about \$30).⁵ Aa71.

Between 2009 and 2015 Leghold trap interests ramped up a new effort to circumvent the Act with regulation. They increased their level of involvement in state politics.⁶ They

5 Egg trap see http://theeggtrapcompany.com/ordering_info.htm
Box trap see <http://www.ebay.com/itm/Medium-26-x9-x12-Humane-Live-Animal-Trap-Collapsible-Raccoon-Cat-Squirrel-Cage-/371248249146>

6 On October 24, 2009, a political action committee (PAC) called the New Jersey Outdoor Alliance held a rally for then gubernatorial candidate Chris Christie. The PAC represents

achieved a greater voice in the Administration by getting a representative appointed to the NJDEP transition team.⁷ And they succeeded in getting the Administration to give priority to their interests.⁸

With an Administration that was openly friendly to fur trapping, leghold trapping interests and the Council set in

hunters, trappers, and, among other industry interests, the National Animal Interest Alliance, whose "[a]gendas include financial interests, legislation and public relations for animal agribusiness, commercial breeding, hunting, fishing, trapping, fur ranching, animal testing, and animals in entertainment." Sourcewatch, The Center for Media and Democracy, http://sourcewatch.org/index.php?title=National_Animal_Interest_Alliance (accessed Jan 2015).

7 After the November 2009 election, the Governor-elect made the unprecedented move of appointing the chairman of the PAC to the Department of Environmental Protection Transition Team: "We also were the only conservation organization to endorse, and aggressively promote Gov. Christie during his campaign for Governor. This was a bold and unusual step since most organizations will hide behind a policy of "only endorsing incumbents." We held a rally in New Egypt for then candidate Christie. The NJOA was also chosen to represent anglers, hunters, trappers, foresters and marine biologists on the DEP Transition team last year." <http://www.thebassbarn.com/forum/12-dry-dock/213823-rfa-trips-over-feet-rush-make-endorsement.html#post2241226>; 04-12-2010, 12:29 PM #11, apmauros (accessed Ap 2015).

8 In a news release for another "Governor Christie Sportsmen's Rally" held on November 13, 2013, the PAC advised: "Governor Christie will recognize the importance of conservationists -- anglers, hunters, trappers, and outdoors enthusiasts -- at a rally to be coordinated by the New Jersey Outdoor Alliance. Governor Christie has prioritized the importance Division of Fish and Wildlife. Join in the tradition! Say "thanks"! Join in the rally!" NewJerseyhunter.com, NJOA: Gov Christie Sportsmen's Rally Nov. 3, 2013

<http://www.newjerseyhunter.com/forums/92-political-action-tools-information/157813-njoa-gov-christie-sportsmen-s-rally-nov-3-2013-a.html> (accessed Ap 2015)

motion a process to promulgate a new regulation that would legalize enclosed traps. An important initial step was to generate a study that the Council could then cite in support of the rulemaking. The New Jersey Fur Harvesters, one of two statewide trapping organizations, requested that the NJ Division of Fish and Wildlife study enclosed traps for the purpose of allowing the traps in the state.

In or around October 2013, the Division of Fish and Wildlife produced such a report titled "Enclosed Foothold Traps, a Report to New Jersey Fish and Game Council on the Performance of new Trapping Systems as an Alternative to Steel-Jaw Leghold Type Traps." The report referred to enclosed traps as "new trapping systems" even though enclosed traps pre-dated the Act and had already been banned by the Act for approximately 30 years.

Also, the principal biologist selected as lead author on the report, Andrew Burnett, was an individual whose work duties included staffing the Council, and who personally was referred to by the New Jersey Fur Harvesters (a pro-leghold trap organization) as a "guest speaker/member" and "our state fur bearer biologist."¹⁰

¹⁰ The New Jersey Fur Harvesters has referred to Mr. Burnett as follows: "Our guest speaker/member Andrew Burnett (our state fur bearer biologist) gave his report, which covered the states

In addition, the October 2013 report relied on biased studies. Studies and so-called Best Management Practices of the Association of Fish and Wildlife Agencies and hunter and trapper organizations bear an institutional bias in favor of the institutional interests of their stakeholders— hunters and trappers.

The report acknowledged that while the Legislature has delegated authority to the Council to designate that taking of wildlife, the Legislature may at any time reclaim such authority or prohibit specific means, and expressly referenced statutory bans on the use of: pole traps; leghold type traps in counties of the first and second class (in prior legislation); and leghold type traps throughout the state (in the Act). However, given the strong stakeholder interests and bias described above, the report predictably concluded that enclosed traps conform to the legislative intent of the Act and should be legalized via rulemaking.

approved bear hunt, species specific traps, beaver seasons, coyote numbers, and many of the members' questions. Thanks Andy." Posted by: New Jersey Fur Harvesters September 2010 Report Categories: Article Index New Jersey Fur Harvesters admin. <http://www.newjerseyhunter.com/forums/84-small-game-action/101259-dog-proof-traps.html> (accessed Ap 2015).¹¹ The rule alternatively refers to the enclosed traps as "foot encapsulating traps" because an animal's leg/foot is "encapsulated" by the enclosure surrounding the trap when the animal places a leg through a hole in the enclosure to get at the bait and thus gets the leg caught by the jaws of the leghold type trap mechanism.

On July 8, 2014, the Council approved a rule proposal to permit the use of enclosed traps (thus commencing the rulemaking that 14 months later ultimately resulted in the regulation's adoption in September 2015).

2015 Adoption of the regulation that purports to legalize enclosed traps

On June 9, 2015, again at the urging of leghold trapping interests, the Fish and Game Council voted to adopt a game code that includes a regulation at N.J.A.C. 7:25-5.12g that would permit the use of leghold type traps that the regulations refer to as "enclosed foothold traps."¹¹ Aa40; Aa38. As set forth in the rule proposal, the purpose was to "[l]egalize foot encapsulating traps" as "an alternate trapping tool." The "justification" cited a fur industry report that discussed the attributes of enclosed traps and specifically identified three examples of traps that would be permitted by the rule proposal: Egg Trap™, Lil' Grizz Get'rz™ and Duffer Trap™. Aa65-66. The challenged regulation allows any enclosed trap, including other commercially available traps and home-made models.

As set forth in their own patent and promotional documents,

¹¹ The rule alternatively refers to the enclosed traps as "foot encapsulating traps" because an animal's leg/foot is "encapsulated" by the enclosure surrounding the trap when the animal places a leg through a hole in the enclosure to get at the bait and thus gets the leg caught by the jaws of the leghold type trap mechanism.

the Egg trap, Lil Grizz trap and Duffer trap are in design and function steel-jaw, leghold type traps. They have triggers. Aa25 Claim #9b4; Aa31 Claim #2; Aa38 Item 8. They use steel springs to operate jaws. Aa25 Claim #4; Aa24 Claim #1b2; Aa31 Claim #2; Aa33 para.4; Aa37 Items #5, 6 & 8. They snap shut with up to 60-pounds of force.¹² They close shut on and grasp the leg (including foot, paw, wrist, or toes). Aa23, 30, 36. Enclosed traps are leghold traps encased in an enclosure made of either metal (e.g. Lil Grizz or Duffer traps) or plastic (e.g. Egg trap). Aa23, 30, 36. One particularly apt description refers to the Egg trap as "a leg-hold trap encased in an egg-shaped plastic cover."¹³

Harm to animals caused by the enclosed traps has included death, physical injury, pain and distress. The traps exert up to 60-pounds of force as the jaws snap closed on an animal's limb.¹⁴ The powerful clamping force of the enclosed traps is strong enough to inflict trauma and pain, as can be seen in

12 Even the pro-trapping associations relied upon by the Council admit the force exerted by enclosed traps. See Association of Fish and Wildlife Agencies, Progress Report, Midwest Region, 1998. p 29.

13 Fox, Camilla H., Cull of the Wild, 2004, p.33.

14 Association of Fish and Wildlife Agencies, Progress Report, Midwest Region, 1998. p 29. Appellants do not accept the AFWA reports because of the pro-leghold trapping bias but have cited to the report because even the pro-leghold trapping report admits the tremendous force exerted by the jaws.

videos of animals caught in the traps.¹⁵ Animals trapped in the enclosed traps are held by one or sometimes both front feet (which are hyper-sensitive in raccoons). The clamped jaws of the trap restrict blood flow, which leads to severe swelling and gangrene. Animals, particularly raccoons, try to gnaw off their own limb in an effort to escape.

Trapped animals almost always struggle to free themselves, often violently against the trap, sometimes for hours. See video.¹⁶ In the end, fatigue and shock set in. Studies have shown that raccoons captured in Egg traps for 12 hours fought against the trap and/or against the trap's surroundings for approximately seven hours.¹⁷ In one study, at the 24-hour mark, all raccoons captured in the Egg traps had evidence of injury, including four tendon lacerations.¹⁸

Physical injury suffered by the animal on impact and while struggling to get free from the trap has been documented. For example, field studies have shown swelling, broken bones,

15 <https://www.youtube.com/watch?v=k2ba4-TVwf0>

16 <https://www.youtube.com/watch?v=LylN83sW0x8>

17 Proulx, Gilbert, et. al., Injuries and Behaviors of Raccoons (*Procyon Lotor*) Captured in the Soft Catch and the Egg Traps in Simulated Natural Environments, *Journal of Wildlife Diseases*, 29(3), 1993, pp. 447-452. New Jersey regulations do not require a trapper to check a trap for 24 hours.

18 Proulx, Gilbert, et. al., Injuries and Behaviors of Raccoons (*Procyon Lotor*) Captured in the Soft Catch and the Egg Traps in Simulated Natural Environments, *Journal of Wildlife Diseases*, 29(3), 1993, pp. 447-452

fractured teeth, subluxations, tendon lacerations, and partially amputated limbs in animals trapped in the Egg trap.¹⁹ The Duffer trap, even according to the New Jersey Fish and Game Council's own report on the performance of traps, exceeds the limit for cumulative injury score.²⁰ The traps restrain the live animals for an extended period of time until the trappers return to kill (euphemistically called "dispatch") the animals, which is often accomplished by shooting, drowning, or beating to death. See videos.²¹ As established by research, physical injury and pain comprise only one facet of the distress associated with trapping: the anxiety, physical exertion from struggling, and the psychological and physical distress negatively affect the welfare of the animal. Aa50.

The Duffer trap also includes a drowning lock which would hold the trapped, traumatized and struggling raccoon or opossum

19 Hubert, et al., 1996; Evaluation of two restraining traps to capture raccoons. Wildlife Society Bulletin 24:699-708.

20 According to the Best Management Practices ("BMP"), out of a sample size of 35 opossum, the Duffer trap had a cumulative injury score of 62.6, which exceeds the limit of 55. See New Jersey Enclosed Foothold Traps: A Report to the New Jersey Fish and Game Council on the performance of new trapping systems as an alternative to steel-jaw leghold traps (Page 7) (2014). Note: Appellants take the position that the BMPs are biased, among other things, because they are developed by agencies and staff that have opposed any ban on leghold traps and rely heavily on unpublished data. Therefore, it is significant that even under the BMPs, the Duffer trap was found to exceed permissible cumulative injury score.

21 https://www.youtube.com/watch?v=J_6l1bytAqE ;
https://www.youtube.com/watch?v=rxWLLWS_rzI

under water until the animal drowns, a protracted and inhumane process. Death by drowning-induced hypoxia is not considered an acceptable method of euthanasia by veterinary and laboratory researchers. Aa44.

There are essentially no published studies on either the Duffer or the Lil Grizz traps relating to trauma and effects on opossums, a species the rule explicitly allows to be trapped using the enclosed traps.²² This leaves opossums particularly vulnerable to the effects of these traps. What little information is available on the Duffer trap indicates that it does not even meet the pro-leghold trap BMP standards for opossum.

In terms of harm to companion animals, domestic cats have already been documented being trapped by the Egg trap.²³ Similarly, the Lil Grizz trap patent only claims that it excludes "dogs and other larger animals," thus presenting a risk to other domestic species below that cut-off. Aa34 Last full paragraph.

Neuroscience supports the Legislature's declaration that leghold traps are an unacceptable method of trapping. As noted in the 1983 testimony of Samuel M. Peacock, Jr., M.D., associate

22 Animal Welfare Institute Rule Comment p.10.

23 Hubert, et al., 1996; Evaluation of two restraining traps to capture raccoons. Wildlife Society Bulletin 24:699-708, at page 704.

professor of neurophysiology at Thomas Jefferson University School of Medicine, in favor of passage of a leghold ban in New Jersey:

The leghold trap is a primitive, uncivilized method of trapping animals. It inflicts maximal pain for it not only involves the superficial pain receptors of the skin and muscle but also the deep receptors of tendon and bone. Struggling intensifies this stimulation and the animal quickly learns this but the pain remains and produces maximal stress for long periods of time including at best a state of helplessness or shock not to be confused with sleep except by the most primitive observer. Aa59.

The purpose of the "enclosed" portion of the leghold trap is not to prevent injury or pain, but rather to lessen the risk to dogs, particularly hunting dogs, and to try to prevent raccoons from gnawing off their trapped legs to escape. Aa26-27. The Egg trap patent recognizes that raccoons have been documented trying to gnaw off the trapped portion of the leg to escape. Nevertheless, a 1996 study has shown that adding an enclosure is not necessarily successful in preventing animals from chewing limbs off in an attempt to escape.²⁴ In fact, the Egg trap has been shown to cause one of the most traumatic

24 Hubert, et al., 1996; Evaluation of two restraining traps to capture raccoons. Wildlife Society Bulletin 24:699-708, at p. 704 (Of the raccoons trapped by the Egg trap during the study, over 3% self-mutilated, and did so by chewing their legs where the trap held the limb.) With an enclosed trap, when a trapped animal tries to gnaw off its leg it must do so high on the leg close to the body which causes more intense pain, blood loss, and injury to the animal.

injuries inflicted on trapped animals: because the animal can't chew on its limb below the trap's jaws (the enclosure prevents it), the animal attempts to chew off its own trapped limb above the trap, close to the shoulder.

Appellants hereby file their merits brief requesting that the Court invalidate the challenged regulation.

ARGUMENT

I. THE REGULATION IS INVALID BECAUSE IT CONFLICTS WITH A STATUTORY PROHIBITION

The New Jersey Fish and Game Council erred in adopting an amendment to the 2015-2016 Game Code allowing the use of enclosed traps. The challenged regulation is in clear violation of a statute prohibiting the use of such traps. N.J.S.A. 23:4-22.2. Accordingly, the regulation is invalid.

A. The standard of review is de novo and the agency is not entitled to deference because the issue presented is primarily an issue of law

Administrative agencies like the New Jersey Fish and Game Council and NJDEP "are creatures of legislation." N.J. Dep't of Labor v. Pepsi-Cola Co., 170 N.J. 59, 61 (2001). They "must act only within the bounds of the authority delegated to [them]." Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 499 (1957). "[I]t is the court's function to interpret an agency's enabling statute to determine whether the agency's actions are consistent with the policy established by the Legislature or

exceed the scope of the agency's jurisdiction." Dragon v. N.J. Department of Environmental Protection, 405 N.J. Super. 478, 493 (App. Div. 2009), certif. denied, 199 N.J. 517 (2009). In performing this function, "a court is not bound by the agency's legal conclusions." Ibid. See also Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973) ("An appellate tribunal is . . . in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue."). Where, as here, an agency acts beyond the scope of the authority granted to it by the legislature and reflected in its own regulations, it is the court's duty to reverse that agency's unauthorized action. See Crema v. N.J. Dep't of Env'tl. Prot., 94 N.J. 286, 295-98 (1983) (overturning the issuance of a permit by NJDEP because it was unsupported by statutory or regulatory authority).

This issue presents a clear question of law: whether the regulation purporting to legalize enclosed traps such as the Egg trap, Duffer trap and Lil Grizz trap is in contravention of the clear and unambiguous language of the relevant Act. This court owes the NJ Fish and Game Council and NJDEP no deference in deciding this issue. "[B]ecause questions of law are the province of the judicial branch, we are in no way bound by an agency's interpretation of a statute or its determination of a strictly legal issue[.]' Russo v. Bd. of Trs., Police and

Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (internal citations and quotation marks omitted). "A court will not permit an agency's legal determination to stand if the court believes it to be error." Ibid (citation and internal quotation marks omitted). 'Like all matters of law, we apply de novo review to an agency's interpretation of a statute or case law.' Ibid. Because the present appeal involves a 'strictly legal issue,' the applicable standard of review is de novo. Ibid (citation and internal quotation marks omitted).'" In re Board's Main Extension Rules N.J.A.C. 14:3-8.1, 426 N.J. Super. 538, 548 (App. Div. 2012).

In interpreting a statute, the court's "overriding goal has consistently been to determine the Legislature's intent in enacting [the] statute." Roig v. Kelsey, 135 N.J. 500, 515 (1994). See also DiProspero v. Penn, 183 N.J. 477, 492 (2005) ("The Legislature's intent is the paramount goal when interpreting a statute"). While a court must start its analysis with the language of the statute, "[i]f the statute suggests more than one interpretation, the broader legislative scheme, its history, and relevant sponsor statements may also inform the Court's interpretation in light of the statute's overall policy and purpose." Frugis v. Bracigliano, 177 N.J. 250, 280 (2003). See also Cherry Hill Manor Assoc. v. Faugno,

182 N.J. 64, 75 (2004) ("In order to ascertain legislative intent, the Court may look to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction."). The clear and unambiguous language of the Act bans all steel-jaw leghold type traps.

It is established that courts are not free to substitute their judgment for that of the legislature or to interpret on the basis of what they feel the law should be; to do so would violate our entire governmental scheme. The first interpretive step is to look to the language of the statute; if the plain meaning is clear and unambiguous on its face, the process is over. State v. Valentin, 208 N.J. Super. 536 (1986). See also Renz v. Penn Central Corp., 87 N.J. 437, 440 (1981) (a statute written in clear, unambiguous language is to be accorded its plain meaning); In re Jamesburg High School Closing, 83 N.J. 540, 547-548 (1980) (Where a statute is clear and unambiguous on its face any resort to legislative intent is unwarranted; a court is not at liberty to presume that the Legislature intended something other than what it expressed by its plain language).

Moreover, an agency is not entitled to deference in interpreting an express statutory provision. Mack Cali Realty v. Bergen County, No. 000037-2008 (N.J. Tax 2009) (Where a matter is required by the express language of a statute, the issue of

whether a regulation conflicts with the statute is a question of law determinable by the court without particular deference to the agency). Here, the plain meaning of the Act prohibits enclosed traps because the clear and unambiguous language of the Act: bans all steel-jaw leghold type traps; establishes only one narrow exemption to the ban for mouse/rat traps designed for use in or under buildings; and bans modified steel-jaw leghold type traps.

B. The Legislative intent of the Act can be established by the plain meaning of its language which clearly and unambiguously bans all traps of the steel-jaw leghold type, including enclosed traps which are leghold type traps with an added enclosure surrounding the leghold trap mechanism

1. The Act bans all traps of the steel-jaw leghold type

The wording of the Act clearly and unambiguously bans the manufacture, sale, possession, importation, distribution or use of an animal trap of the steel-jawed leghold type. N.J.S.A. 23:4-22.1 provides, "No person shall manufacture, sell, offer for sale, possess, import or transport an animal trap of the steel-jaw leghold type" and N.J.S.A. 23:4-22.2 provides, "No person shall take or attempt to take any animal by means of a trap of the steel-jaw leghold type." Thus, the plain meaning of the Act is to impose an absolute prohibition on steel-jaw leghold type traps.

The plain meaning of the statutory ban is supported by the

July 12, 1985, formal opinion by Attorney General Kimmelman. The General issued a formal opinion interpreting the Act in response to an attempt by the New Jersey Fish and Game Council to propose a rule that would permit the use of so-called "soft catch" traps-- leghold traps that had been modified by the addition of a thin strip of hard rubber on the steel jaws. In the formal opinion, the AG concluded that the plain meaning of the Act was to impose an absolute prohibition on the use of the steel-jawed leghold type traps irrespective of rubber padding or other technical modification. The AG stated:

It is a fundamental maxim of statutory construction that a statute written in clear, unambiguous language is to be accorded its plain meaning. Renz v. Penn Central Corp., 87 N.J. 437, 440 (1981). Thus, the first task in ascertaining the meaning and intent of a statute is to examine the evident wording of the statute. As stated earlier, the unambiguous language of L. 1984, c. 37 bans the use of traps of the steel-jawed leghold type. See sections 1, 2, 3, 7, 8 and 9 of the act. Measured against this clearly written language, it is obvious that the proposed "soft catch" trap regulation must fail because such traps are a leghold type, rather than a snare, box, or other different type of trap, and because the traps have steel jaws, albeit lined with rubber. The act in its very first section states that "animal trap[s] of the steel-jaw leghold types" are prohibited. The plain intended meaning of that provision is to impose an absolute prohibition on the use of the steel-jawed leghold type traps irrespective of rubber padding or other technical modification. Aa5.

That the plain meaning of the statute imposes an absolute ban on leghold traps and is further supported by the trial and

appellate courts in South Jersey Fur Farmers v. Fish and Game Council. As stated by the Appellate Division:

Following an extensive plenary hearing, Judge Farrell rendered a formal opinion in which he determined that ... "the provisions of N.J.S.A. 23:4-22. 1 extend to all types of jawed leghold traps except for the specific exemptions contained in N.J.S.A. 23:4-22.4... The judgment is affirmed." Aa21-22.

Here, by design and function, the enclosed traps are steel-jaw leghold type traps. Steel-jaw leghold traps come in various designs, including but not limited to: jaws of various designs, sizes, shapes, alignments and numbers; springs of various sizes, strengths, sizes and numbers; with or without padding; and with or without an exterior enclosure. Aa51. However, the defining feature of steel-jaw leghold traps is that they use jaws to grasp animals by their legs (paws, feet, or other parts of their limbs) to restrain them.

The enclosed traps grasp the animal by the leg. The Oxford English Dictionary defines "leghold trap" as: "A type of trap with a mechanism that catches and holds an animal by one of its legs."²⁵ The enclosed traps clearly fit this definition. For example, the Egg trap uses jaws to "grasp" the "paw or leg" of an animal. Aa23 Abstract. Similarly, the Lil Grizz trap uses the two parts of its jaws (the "restraint member" and "fixed

²⁵ <http://www.oxforddictionaries.com/definition/english/leghold-trap?q=leghold+trap>

gripping member fixed to the housing") to "engage the extremity of the animal." Aa31 Claim #2. In addition, the enclosed traps are of leghold type because they do not belong in any other recognized category of restraint trap—namely, box, snare or pitfall.²⁶

The enclosed traps undeniably use jaws. In its September 8, 2015 rule adoption, the Council claimed that the enclosed traps do not have "jaws."²⁷ However, this claim is meritless given the plain meaning of the word "jaw"; the Egg trap manufacturer's statement that its trap has jaws; and the patent documents of the enclosed traps.

Webster's Third New International Dictionary defines "jaw" as: "something resembling the jaw of an animal in form or action: as ... b: either of two or more opposing parts (as of a vise, measure machine, pair of pliers, stone crusher) movable so as to open and close for holding, grasping, clamping, cutting or crushing something between them . . . " Similarly, the American

²⁶ Animal traps come in various recognized types. The main categories are killing traps (which are designed to kill the trapped animal) and restraining traps (which are designed to restrain the animal until the trapper returns to the trap). Aa41. The most common restraining traps are (1) box traps (a.k.a cage traps), (2) snares (or cable traps), (3) pitfall traps, and (3) leghold traps. Aa45. The enclosed traps are designed to restrain, and do not operate by virtue of boxes, snares, or pitfalls. Rather, they clamp down on an animal's leg to restrain it. Aa46. As such, they are leghold traps.

²⁷ September 8, 2015 Rule Adoption, p.65.

Heritage Dictionary of the English Language (1973) defines jaw to include: "Either of two opposed hinged parts in a mechanical device" Here, all the enclosed traps have two opposable parts - a moveable metal bar operated by a steel spring and an edge of the enclosure -- movable so as to open and close for holding, grasping, clamping, cutting or crushing the animal's appendage between them. As such, the enclosed traps function the same as the movable jaw of a vise against the fixed body of the vise, or the mandible bone in the human jaw against the fixed skull, both of which are prototypical jaws. If this were not sufficient, the Egg trap patent expressly states that it has "jaws."²⁸

Moreover, the patents establish that the enclosed traps-- in their mechanisms, design and function-- have the essential characteristics of steel-jaw leghold type traps.²⁹ The Egg trap has a "coil spring, one end of which terminates in a straight portion that serves as [a] trap arm." Aa25 Claim #4. The trap

28 The Egg trap patent describes the trap as follows: "A trap assembly for capturing small animals formed from a housing that encloses a jaw assembly for grasping the paw or leg of the animals. The jaw assembly is formed from a trap plate having an aperture and a resiliently biased arm that is movable from an open position to a closed position where it coacts with side edges of the plate aperture to form a pair of jaws for grasping the animal." Aa23

29 Note also that the enclosed traps unquestionably have "steel jaws" because they have steel parts which serve to open and close the mouth of the trap, and, when closed, serve to clamp down and restrain the animal's leg.

contains a "trigger operable by said animal" when said animal "stick[s] one of its paws and associated leg into said housing" through "an inlet opening" in the exterior plastic housing. Aa25 Claim #9b4. A moveable arm and "a portion of the side edges of the aperture serve as coacting jaws." Aa24 Claim #1b2. The jaws "grasp" the "paw or leg" of an animal. Aa23 Abstract. Given that the Egg trap uses a steel spring with a straight portion that serves along with the edge of the housing to create jaws to grasp the paw or leg of an animal, the Egg trap is prohibited by the Act.

The Lil Grizz trap is "an animal trap designed to restrain a raccoon." Aa30 Abstract. "The trap has a spring trigger on which the bait is placed and a double swivel anchor chain to hold the trap." Aa30. "A movable restraint bar actuated by the release of the trigger and an internal fixed grip bar hold the paw of the raccoon inside the housing." Aa30. The trap has a "trigger latch." Aa31 Claim #2. It has a "torsion spring." Aa31 Claim #5. It has an upper restraint bar with a "U-shaped bight portion" that forms jaws to snap down on the animal's paw. Aa33 para.4. "The trigger latch causes the release of the restraint member which is spring biased to engage a fixed gripping member fixed to the housing to engage the extremity of the animal." Aa31 Claim #2. Given that the Lil Grizz trap uses

a torsion spring and trigger to actuate a movable restraint bar that forms jaws with the side of the housing, and snaps closed to restrain the animal's paw, the trap is prohibited by the Act.

The Duffer trap is a metal box with an access hole, and inside of the box it has a "spring," a "latch arm," and a "trigger engaged with the latch arm" that snaps down on the leg of a raccoon that puts a leg through the hole to get the bait. Aa37 Items 5, 6, & 8. Given its spring-operated latch arm that forms jaws with an edge of the box and snaps down upon the leg of the raccoon to restrain the animal, the trap is prohibited by the Act.

For these reasons, the enclosed traps are steel-jaw leghold type traps and as such are banned by the Act.

2. The Act establishes only one narrow exemption to the ban for mouse/rat traps designed for use in or under buildings

The clear and unambiguous language of the Act provides a sole exemption for mouse/rat traps designed for use in or under buildings. N.J.S.A. 23:4-22.4. Specifically, it provides that:

For the purposes of this amendatory and supplementary act, the steel-jaw leghold type animal trap does not mean mouse and rat traps designed for use in or under buildings.

N.J.S.A. 23:4-22.4

Case law further establishes this as the sole exemption. In South Jersey Fur Farmers v. New Jersey Fish and Game Council,

N.J. Superior Court, Trial Division, 1986, Docket No. L-75029-85, a case in which the Court interpreted the Act, the Court held that "padded" leghold traps were prohibited by the Act. Specifically, Judge Farrell held that the Act's ban extended to "all types of jawed leghold traps except for the specific exemptions contained in N.J.S.A. 23:4-22.4." Aa11. This ruling and holding was affirmed by the Appellate Division in A-1247-86T8. Aa20.

The enclosed traps do not fall within the narrow statutory exemption for mouse/rat traps designed for use in or under buildings. The enclosed traps are designed to catch raccoons. Aa30; Aa37. Therefore, the exemption for mouse/ rat traps does not apply. Moreover, the enclosed rule purports only to authorize the trapping of furbearing animals in the wild.³⁰ Mice and rats are not furbearing species, and enclosed traps are designed for use in the wild, as opposed to in buildings or under them. Therefore, the enclosed traps do not fall within the single, narrow exemption to the broad statutory ban.³¹

30 July 8, 2014 Rule Proposal at 5.12(g) ("Enclosed foothold traps may be used to harvest furbearing animals during the prescribed open seasons").

31 In addition, a general rule of statutory interpretation provides that when the legislature enumerates an exception to a rule, one can infer that there are no other exceptions. Accordingly, the Legislature's creation of one exception for certain mouse/rat traps supports the conclusion that the Legislature intended no other exception, such as for steel-jaw

3. The Act bans modified steel-jaw leghold type traps

The plain language of the Act bans all leghold traps, including modified ones. First, the use of the word "type" in the statute when prohibiting traps of the steel-jaw leghold type is significant. The word "type" is commonly understood to mean all things of a kind, class or group.³² Here, the relevant group of traps are the ones that grasp an animal's limb with jaws to restrain it. The naming of the enclosed traps as "foothold" rather than "leghold" is mere semantics and does not remove the traps from the designated type. Similarly, placing an enclosure around a steel-jaw leghold trap mechanism does not exempt the trap from the Act's ban.³³

Second, the opinions of the Appellate Division, Law Division and Attorney General Kimmelman confirm that the plain meaning of the Act bans all leghold type traps, and prohibits any modifications. In the South Jersey Fur Farmers case, the Appellate Division upheld the decision of the Law Division, holding that "the provisions of N.J.S.A. 23:4-22.1 extend to all types of jawed leghold traps except for the specific exemptions contained in N.J.S.A. 23:4-22.4." This holding is broad and

leghold traps with enclosures.

32 Merriam Webster online dictionary.

33 Trapping manuals describe how a trapper can make a homemade external housing for a leghold trap. However, whether commercially manufactured or homemade, any modified steel-jaw leghold trap would violate N.J.S.A. 23:4-22.1 et seq.

absolute and leaves no room for modified leghold type traps. The case is on point and controlling in this case. Even if the court case opinions were not dispositive, the Kimmelman opinion provides ample support for the conclusion. The AG concluded that the plain intended meaning of the Act is to impose an absolute prohibition on leghold type traps "irrespective" of "technical modification." Aa5. The AG went on to find that "the unambiguous language of L. 1984, c. 37 bans the use of traps of the steel-jawed leghold type" and rejected a proposed modified trap with rubber on the jaws. Taken alone or with the support of the AG opinion, the Appellate Division ruling compels the conclusion that all leghold type traps are banned, including modified ones.

Third, the Act's ban on all leghold type traps is not limited to traps in use at the time of enactment. This is clear from the language of the ban that makes no mention of traps "at the time of enactment." See N.J.S.A. 23:4-22.1. It is further established by the trial court opinion in the South Jersey Fur which provided:

"Assemblyman Herman's proposed amendments allowing study of traps which could serve as an alternative to or modification of the steel-jaw leghold trap then currently in use, were amended to exclude the words "modification of" and "currently in use." These legislative actions clearly outline the legislative intent to extend its prohibitory ban to all jawed leghold traps. (Emphasis added) Aa11.

Therefore, it is clear that the ban applies to leghold type traps no matter when put into use and no matter how modified. This is significant because, given the plethora of modifications to leghold traps, if a modification could create an exemption, the Act would be so severely limited as to render it useless.

For these reasons, to the extent that an enclosed trap is a modified leghold type trap, it is banned by the Act.

4. The Act does not establish an acceptable level of injury or pain but rather bans all steel-jaw leghold type traps

The Act does not establish an acceptable level of injury or pain caused by traps of the steel-jaw leghold type. N.J.S.A. 23:4-22.1 & 22.2. Moreover, that would have permitted the feature which the Committee focused on as particularly objectionable -- its use as a holding device which "does not usually kill its victim, resulting in hours or even days of excruciating pain." Thus, leghold type traps are prohibited per se, and no level of pain is acceptable. Accordingly, because enclosed traps are leghold type traps, they are prohibited by the Act even if the Council's spurious claim were true that the traps reduce injury or pain to some degree.

- C. The Legislative intent need not be determined by extrinsic evidence because the plain meaning of Act is clear, but if examined, the extrinsic evidence supports the statute's overall policy and purpose of banning all leghold traps

While a court must start its analysis with the language of the statute, "[i]f the statute suggests more than one interpretation, the broader legislative scheme, its history, and relevant sponsor statements may also inform the Court's interpretation in light of the statute's overall policy and purpose." Frugis v. Bracigliano, 177 N.J. 250, 280 (2003). See also Cherry Hill Manor Assoc. v. Faugno, 182 N.J. 64, 75 (2004) ("In order to ascertain legislative intent, the Court may look to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction.").

Here, the clear and unambiguous language of the Act bans all leghold type traps, and because the plain meaning is clear and unambiguous on its face, the process is over, and the analysis does not need to reach "extrinsic evidence." State v. Valentin, 208 N.J. Super. 536 (1986)

However, assuming arguendo that extrinsic evidence were to be examined in this case, that evidence is fully in accord with the plain meaning of the Act in establishing that the Legislative intent is to ban all leghold traps. The extrinsic evidence consists of the following: the committee statement to A-3207, the progenitor bill; Governor Kean's bill signing statement; AG Kimmelman's opinion; the AG's brief in the South Jersey Fur Farmers case; Judge Farrell's opinion in that case;

and the Appellate Division's affirmance in that case.

The committee statement to A-3207 clearly established that the Legislative intent was to ban all leghold traps, stating: "This bill prohibits the manufacture, transportation, sale, possession and use of the steel-jaw leghold trap throughout the State. It repeals a section of the law which permits certain individuals to use this type of animal trap within particular areas." Aa1. The statement further explained that a leghold trap functions as a "holding device" which the Legislature determined was inhumane and cruel. The statement stated: "The steel-jaw leghold trap is the most inhumane and cruel of traps now used on wild furbearing animals. Used mainly as a holding device, it does not usually kill its victim, resulting in hours or even days of excruciating pain." Aa1. Here, an enclosed trap violates the Legislative intent because it is a leghold type trap, and in this regard generally does not immediately kill, but holds the animal in its jaws in pain for hours or days.

The bill signing statement of Governor Kean further establishes that the Legislative intent was to ban leghold type traps. The Governor stated that he today "signed legislation to ban the manufacture, use and sale of the steel jaw leghold trap in New Jersey." Aa2. He found the "evidence supporting the

abolition of the leghold trap" to be "overwhelming" and "praised the efforts of humane organizations and animal welfare groups in seeking enactment of the ban." Aa2. Clearly, in enacting a "ban" and effecting the "abolition" of leghold type traps, the Legislative intent was to ban all leghold type traps.

The contemporaneous formal legal opinion of Attorney General Kimmelman further establishes that the Legislative intent of the Act was to ban all leghold traps. The General concluded that both the "unambiguous language of L. 1984, c. 37" and the legislative history of the enactment "bans the use of traps of the steel-jawed leghold type." Aa4-Aa6. The issuance of an Attorney General's opinion, shortly following the effective date of a statute, coupled by the absence of any amendment to the statute following the Attorney General's opinion, strongly suggests that the views expressed therein were consistent with the legislative intent. State v. Son, 179 N.J. Super. 549, 555 (App. Div. 1981). See also Scheff v. Township of Maple Shade, 149 N.J. Super. 448, 456-7 (App. Div. 1977); State v. Grant, 196 N.J. Super. 470, 481 (App. Div. 1984); and Fasching v. Kallinger, 211 N.J. Super. 26, 43-44 (App. Div. 1986).

The South Jersey Fur Farmers case provides additional contemporaneous extrinsic evidence on Legislative intent and

well as precedential effect in this case. The case was commenced on the heels of the Act's enactment and the Council's first effort to circumvent the Act by regulation. In the Law Division, Judge Farrell held that the Legislative intent of the Act was to ban all leghold type traps, finding no ambiguity in the statutory prohibition imposed on traps of the steel-jaw leghold type. Aa7. This finding was upheld by the Appellate Division. Aa20.

All of the foregoing extrinsic evidence comports with the Act's overall policy and purpose of banning all leghold traps. Therefore, the regulation must be declared invalid.

In defense of its rulemaking, the Council raises various claims, none of which has merit because none comports with the Legislative intent to ban all leghold type traps. First, in this rule promulgation, the Division has argued that the enclosed traps reduce injury to raccoons and therefore "conform to the legislative intent of the Act." However, the Act's express language and intent was to ban all traps of the steel-jaw leghold type, not to allow leghold type traps if they have been modified to reduce injury. Moreover, the Legislature did not give Respondents a role in determining whether a future type of leghold trap could be legally allowed. Thus, it is legally irrelevant whether the enclosed traps do or do not cause reduced

injury, and Respondents have no legal authority to permit the use of any leghold type trap. Also, in 1985, the Council tried to use the claim of "more humane" to adopt regulations permitting "padded" traps, as the South Jersey Fur Farmers contended that "the padded trap has been demonstrated to substantially reduce injury to muskrats and foxes, and therefore satisfies that legislative objective." These arguments were rejected by the Courts which held that the Act banned all leghold type traps.

Second, Respondents claim that the enclosed traps catch fewer non-target species because the traps have an enclosure with a hole, and a trigger that fires when pulled upwards. However, it is irrelevant whether or not fewer non-target animals are caught, the trap uses a modified trigger, or has an enclosure around the trap mechanism. As held by Judge Farrell, and affirmed by the Appellate Division, the ban applies to all traps of the leghold type.

Third, in the September 8, 2015 rule adoption document, Respondents claimed that the enclosed traps "do not result in death." However, the function of the leghold trap as a "holding device" was expressly cited as unacceptable in the committee statement to the bill- this was found unacceptable irrespective of whether the animal ultimately died or not. Moreover,

enclosed traps can ultimately result in death: as documented in scientific studies, raccoons have died in the Egg trap from predators and hypothermia.³⁴

Fourth, Respondents argue that the use of leghold type traps is appropriate in order to address potential concerns about rabies. However, the Legislative intent to ban leghold traps provides no exemption that would allow the Council to use a leghold trap to address rabies or any other health issue. In addition, in passing the Act, the Legislature determined that rabies was a red herring issue, stating: "The leghold trap has little value for preventing the spread of diseases like rabies among wild animals. Many nations have banned the leghold trap without adverse effects." Aa1.

Finally, Respondents argue that box traps are not a viable alternative to leghold traps, and that they are more expensive and less efficient for trappers. However, box traps are among the most widely used trapping techniques, are successful in trapping raccoon and opossum, and subject the animals to fewer traumas than those captured in leghold traps. Aa51. Box traps have not been banned by the Legislature, are available for use by trappers, and are used by researchers. In addition, that enclosed traps are more perhaps convenient for trappers and

34 See Hubert, et al., 1996; Evaluation of two restraining traps to capture raccoons. Wildlife Society Bulletin 24:699-708, p.703

slightly lower cost do not provide legal authority under the Act for the Council to override the Legislature and permit the use of enclosed traps.

For all of the foregoing reasons, the Council lacks the legal authority to legalize enclosed traps.

- D. The remedial and humanitarian purpose of the Act requires that its ban on leghold type traps be given a broad scope and any exemption from its reach - such as an exemption for a leghold type trap with an enclosure - be narrowly construed

The remedial and humanitarian purpose of the Act requires that its ban on leghold traps be given a broad scope and any exemption from its reach be narrowly construed. Where the purpose of legislation is "remedial and humanitarian," its remedial provisions are to be construed liberally and any exemption from the reach of the act is to be narrowly construed, giving due regard to the plain meaning of the language and the legislative intent. Service Armament Co. v. Hyland, 70 N.J. 550, 558-559 (1976). Here, the Act is remedial and humanitarian in nature because it serves to protect wildlife and domestic animals. Therefore, the Act's broad prohibition on leghold type traps must be construed broadly to prohibit all leghold type traps, including enclosed traps, and the sole legislative exemption from the ban for certain mouse/rat traps must be construed narrowly to exclude enclosed traps. Therefore, the

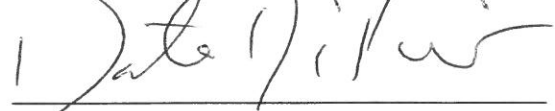
regulation is invalid.

CONCLUSION

For all of the foregoing reasons, the Court should declare the challenged regulation invalid.

Respectfully submitted,

LAW OFFICE OF DANTE DI PIRRO

A handwritten signature in dark ink, appearing to read "Dante DiPirro", is written over a horizontal line.

By: Dante DiPirro, Esq.
Attorney for Appellants

Dated: 2/22/2016