



June 15, 2018

BY ELECTRONIC (comments@wildlife.nh.gov) AND REGULAR MAIL

The Honorable Carol M. McGuire
Chair, Judicial Legislative Committee on Administrative Rules
25 Capitol Street, Room 219
Concord, NH 03301-6312

Re: Fis 806.05 regarding the live capture of snowshoe hare by sporting clubs

Dear Chair McGuire:

On behalf of the Animal Welfare Institute (AWI) and Voices of Wildlife in NH, please accept the following comments on the above-referenced New Hampshire Fish and Game Department (“NHFGD” or “department”) proposed rule to extend the season for capture and for increasing the number of wild snowshoe hares to use as live tools for training dogs.

As proposed, Fis 806.05 would a) increase the number of permits to live-capture snowshoe hares from six to 10 per club; b) no longer limit the open season for taking hares from January 1 through March 31; and c) allow for live capture of snowshoe hares on all private land.¹ We respectfully request that members of the Joint Legislative Committee on Administrative Rules (“JLCAR”) not approve the proposed rules for the following reasons:

I. NHFGD does not have the authority to adopt this rule

NHFGD does not possess the legislative authority to establish rules to permit snowshoe hares to be captured live and held in captivity for propagation and training purposes. In its Rulemaking Notice Form, the department identifies four state statutes that it claims provide it the authority to adopt rules allowing for activities such as live-capture of snowshoe hares for hound hunting training purposes.² None, however, authorize the department to allow members of a private club to live-capture snowshoe hares. Specifically:

R.S.A. Section 206:10 only provides the executive director of the department with the general authority to adopt rules regarding the regulation of the fish, game, bird, and wildlife resources in the state;

¹ www.wildlife.state.nh.us/legislative/documents/fis-300-ip.pdf

² <https://www.wildlife.state.nh.us/legislative/documents/fis-300-rn.pdf>

R.S.A. Section 207:12-a, II only provides the department with the authority to issue training permits for hunting dogs during the closed season on wildlife and set the period for bear dog training;

R.S.A. Section 207:58 only provides the department with the general authority to regulate the wildlife resources of the state and to preserve and promote opportunities to hunt, fish, trap, and view wildlife;

R.S.A. Section 212:25 only provides the department with the authority to regulate the propagation and sale of wildlife and the operation of hunting preserves.

II. The proposed rule could violate other state laws

The proposed rule is also contrary to the legislative intent of the state's animal cruelty law, R.S.A. Section 644:8. This statute makes it illegal to abandon a wild animal in captivity without proper provision for its subsequent care, sustenance, protection, or shelter. The proposed rule would allow members of sporting clubs to live-trap snowshoe hare, keep them in captivity, propagate them, and release them to train hunting dogs. It violates the intent of the cruelty statute by failing to require those who release trapped hare to provide for the released animal's subsequent sustenance, protection, and shelter.

III. The agency cannot provide the committee with evidence that public comment was overruled on the merits, as required by law

The proposed rule would be contrary to the public interest if the agency fails to provide the Committee with evidence that the public comment was overruled on the merits. It is unlikely that the agency will be able to provide the Committee with such evidence.

During the public comment period, the agency received 58 comments in opposition to the proposed rule and none in favor.³ Subsequently, at its April 18, 2018 public hearing on the proposed rule, agency officials failed to provide legally sufficient reasons to overrule the comments it received in opposition to the rule.

R.S.A Section 541 requires NHFGD to receive, consider, and give substantial weight to public comment on proposed rules. This is clear from the plain language of the law and has been raised by staff of the JLCAR in their comments on previous proposed rules. Specifically, under R.S.A. Section 541-A:11, "(a) Each agency shall hold at least one public hearing on all proposed rules filed pursuant to R.S.A. Section 541-A:3 and shall afford all interested persons reasonable opportunity to testify and to submit data, views, or arguments in writing." Further, R.S.A Section 541-A:12 provides that the agency must "fully" consider public comment.

Consequently, as JLCAR staff have reported in comments on previously evaluated proposed rules, failure to fully consider public opinion violates the legislative intent of R.S.A Section 541-A:11. JLCAR further notes that if the "department can't provide evidence that it overruled the public's views based on merits, then a basis for objection exists under legislative intent and public interest pursuant to JLCAR rules 402.02(b) and 402.01(a)."

Notably, under JLCAR rules, the NHFGD has the opportunity to submit evidence to demonstrate that it did adequately consider public comment in this case. It is not known if such evidence has been submitted and, if so, the content and veracity of such evidence. Considering that the opportunity for the public to participate in the state's rulemaking process is a cornerstone of the New Hampshire Administrative Procedures Act, if the NHFGD has submitted evidence explaining how it adequately considered public comment in this case or other

³ Personal communication with Mr. Paul Sanderson, NHFGD attorney.

substantive input in response to said comments, AWI and Voices of Wildlife in NH respectively request that JLCAR suspend its consideration of the proposed rules and direct the NHFGD to make its submission to JLCAR available for public review. Absent providing an opportunity for the public to review such evidence, we ask that the JLCAR reject the proposed rules for the reasons detailed in this letter.

IV. The proposed rule is contrary to the public interest

The proposed rule is contrary to the public interest because its enforcement would have an adverse fiscal impact on the agency. Enforcing the snowshoe hare rules including by issuing permits, enforcing season limits, and ensuring that hunters are complying with permitted methods of take and captured hare propagation requirements will incur substantial expenditures by the agency without generating revenue sufficient to cover these costs.

V. The proposed rule could lead to a violation of the Endangered Species Act (“ESA”)

Snowshoe hares are the primary food source for Canada lynx, which are listed as threatened under the ESA.⁴ In 2016, JLCAR voted against a proposed bobcat hunting and trapping season in New Hampshire due to the documented presence of Canada lynx in the state.⁵ A state facilitating “take” of habitat or prey that is relied on by a listed species can constitute “take” of the species itself under the ESA.⁶

The ESA requires that lynx, as a federally protected threatened species, be afforded the highest of priorities. Their protection and recovery must be paramount for all with management responsibility and their intentional or incidental take prohibited unless allowed by the US Fish and Wildlife Service (“USFWS”) through, for example, an Incidental Take Permit (“ITP”). Take, under the ESA, includes mortality but it also encompasses any harm or harassment done to a protected species. The protections afforded to species under the ESA are mandatory and not subject to agency (federal or state) discretion, impacts to user groups, or to inherent biases in support of or opposition to hunting or trapping.

VI. There is no scientific justification for an expansion in the snowshoe hare live capture rule

The NHFGD acted irresponsibly in proposing a year round trapping season with additional permits at this time. It should not even consider such seasons until and unless it obtains far more data on which to base a credible estimate of snowshoe population numbers and trends by undertaking relevant studies throughout all regions of the state.

At present, according to its own 2015 snowshoe hare assessment, the NHFGD admits that it “does not have the information necessary to make an estimate on the number of hare we have in any part of the state...” and that “deficiencies exist in our knowledge of snowshoe hare population for this assessment.”⁷ While snowshoe hare populations are known to be cyclic, hunter observation data collected by the NHFGD suggest that the state’s snowshoe hare numbers in 2013 may have declined to the lowest level since 1999. In 2013 (the year for which the most recent data is available), the NHFGD reported only 21.01 snowshoe hares observed per 100 hunter hours compared to a high of 48.7 in 2007.⁸

⁴ <http://www.enr.gov.nt.ca/en/services/lynx/lynx-snowshoe-hare-cycle>

⁵ <https://www.realtree.com/predator-hunting/news/4-canada-lynx-in-new-hampshire>

⁶ *Babbitt, Secretary of the Interior v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

⁷ Bordeau, K.A. 2014. New Hampshire Snowshoe Hare Assessment 2015. New Hampshire Fish and Game Department (available at: <https://wildlife.state.nh.us/hunting/documents/nh-snowshoe-hare-assessment-2015.pdf>).

⁸ *Ibid.*

In New Hampshire, snowshoe hares prefer early to mid-successional softwood forest habitat (Litvaitis et al. 1985)⁹ and are, at present, most numerous in the state's northern three counties.¹⁰ While much of the state remains forested, the amount of forested lands, including preferred snowshoe hare habitat, is declining. Between 2001 and 2011, for example, an analysis of land cover assessment and forest inventory data by NHFGD revealed a loss of 151, 380 acres of snowshoe hare habitat in New Hampshire.¹¹ Furthermore, Sunquist (2010)¹² predicts that loss of 225,000 acres of forest land by 2030 as a result of human population growth in the state which will likely further reduce available habitat for snowshoe hares.

Furthermore, the changing climate may also adversely impact snowshoe hares as a consequence of changes in the amount and timing of snow events in New Hampshire and the duration of snow cover in the spring. As snowshoe hares molt twice per year, changing color from white to brown and vice-versa, as a predator avoidance mechanism. Absent an evolutionary response to changing snow conditions, the phenological mismatch of snowshoe hare coat color to the background environment could increase the risk of predation during the transition periods in the spring and fall.

VII. Conclusion

AWI and Voices of Wildlife in NH respectfully urge members of the JLCAR to reject the proposed rule to a) increase the number of permits to live-capture snowshoe hares from six to 10 per club; b) no longer limit the open season for taking hares from January 1 through March 31; and c) allow for live capture of snowshoe hares on all private land.¹³

The majority of the citizens of New Hampshire who participated in this planning process have clearly voiced their objection to this law. Nevertheless, the NHFGD has failed to adequately consider public comments on the proposed rule. Moreover, there is no scientific justification for the seasons based on the best available scientific evidence particularly given the lack of any credible estimate as to the number of snowshoe hares in New Hampshire or an indication of population trend. Furthermore and, perhaps, most importantly, the JLCAR should reject the proposed rule on the grounds that it could violate the ESA.

Thank you in advance for providing this opportunity to comment on the proposal and for considering these comments. Please send any future correspondence or information about this proposal to:

Ms. Linda Dionne, President, Voices of Wildlife in New Hampshire, who can be contacted via email at voicesofwildlifeinnh@gmail.com, by telephone at (603) 895-2440, or by mail at PO Box 5802, Manchester, NH 03108.

Ms. Tara Zuardo, Senior Wildlife Attorney, Animal Welfare Institute, who can be contacted via email at tara@awionline.org, by telephone (202) 446-2148, or by mail at 900 Pennsylvania Avenue, SE, Washington, DC 20003.

⁹ Litvaitis, J.A., J.A. Sherburne, and J.A. Bissonette. 1985. Influence of understory characteristics on snowshoe hare habitat use and density. *Journal of Wildlife Management* 49:866-873.

¹⁰ Bordeau, K.A. 2014. New Hampshire Snowshoe Hare Assessment 2015. New Hampshire Fish and Game Department (available at: <https://wildlife.state.nh.us/hunting/documents/nh-snowshoe-hare-assessment-2015.pdf>).

¹¹ Ibid.

¹² Sundquist, Dan. 2010. New Hampshire's changing landscape, Executive Summary. Society for the Protection of New Hampshire Forests. Concord. 15pp.

¹³ www.wildlife.state.nh.us/legislative/documents/fis-300-ip.pdf

Respectfully submitted,



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