



Animal Welfare Institute

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BY ELECTRONIC AND REGULAR MAIL

Submitted via comments@wildlife.nh.gov & patty.houde@leg.state.nh.us

The Honorable Carol M. McGuire
Representative Merrimack District 29
Chair, Judicial Legislative Committee on
Administrative Rules
25 Capitol Street, Room 219
Concord, NH 03301-6312

Re: Bobcat Trapping and Hunting Seasons Proposal (Fis. 303.05, 303.051, 303.052, 303.11)

Dear Representative McGuire:

On behalf of the Animal Welfare Institute (AWI), the Center for Biological Diversity (the Center), and Voices of Wildlife in New Hampshire (VOW), please accept the following comments on the above-referenced New Hampshire Fish and Game Department (“NHFGD” or “department”) proposed rule to establish bobcat (*Lynx rufus*) hunting and trapping seasons. The rule would allow the issuance of 50 bobcat permits and establish separate seasons for trapping and hunting. In addition, baiting and hounding of bobcats would be allowed.

AWI and the Center submitted substantive comments to the NHFGD on its proposed rules. Those comments are attached as Exhibit A and are hereby incorporated in their entirety into this letter. We respectfully request that members of the Joint Legislative Committee on Administrative Rules (“JLCAR”) carefully review the attached comments. Furthermore, based on the evidence contained in Exhibit A and as articulated below, we strongly urge you not to approve the proposed rules.

I. The Proposed Rule is a Violation of the Endangered Species Act (“ESA”)

Given the similarity of appearance and behavior, hunters are likely to confuse federally protected Canada lynx with bobcats. In addition, as long as the state allows bobcat trapping in occupied lynx areas, it is certain that trappers will unintentionally catch protected lynx. As such, and as explained below, the bobcat hunting and trapping seasons are certain to result in violations of the ESA.

In the case of the Canada lynx and other species designated as threatened or endangered, the ESA prohibits trapping which *could* result in actual injury or death to a listed species. Trapping that does result in the death of the animal violates the prohibition against “taking” [killing] a listed species while, even if the animals doesn’t die, trapping violates the ESA’s prohibition of “harassment” and “harm.” Similarly, permitting the use of hounds to pursue bobcats in the lynx

protection zone could result in the direct pursuit of lynx resulting in the illegal take through harassment, harm, and/or death of the animal.

As a federally protected threatened species, the ESA requires that lynx be afforded the highest of priorities, with their protection and recovery paramount for those with management responsibility. Their take prohibited unless allowed by the US Fish and Wildlife Service (USFWS) through, for example, an Incidental Take Permit (“ITP”), which New Hampshire does not have and would need to develop with the USFWS. The protections afforded to species under the ESA are mandatory and not subject to agency (federal or state) discretion, concern about convenience or inconvenience to user groups, or to inherent biases in support of or opposition to hunting or trapping.

In regard to the issue at hand and the relevance of the ESA, it is indisputable that bobcat and Canada lynx are similar both in appearance and in the habitats that they occupy. In New Hampshire, the NHFGD established a lynx protection zone in the northern section of the state in 2012 when it created a fisher trapping season. Within this zone, which includes wildlife management units A, B, C1, C2, D1, D2 (portion), E1, E2, E3, and F), additional restrictions have been imposed on trappers in an attempt to reduce the take of lynx. Notably, these restrictions were imposed long before the NHFGD proposed a bobcat trapping season.

Yet, in its proposed rules currently under review by JLCAR, the NHFGD has proposed no revisions to its trapping regulations in the lynx protection zone, despite the increased risk to lynx posed by broadening trapping to include bobcat. The NHFGD is proposing to authorize the annual killing of 20 bobcat by hunters or trappers within the area delineated as the lynx protection zone out of the 50 bobcats it proposes to allow to be killed statewide.

If these proposed rules are approved and implemented, even if hunters were to not kill a lynx treed by their hounds or even if a trapper were to release a captured lynx, these actions still represent an illegal “take” under the ESA as a result of the harassment, capture, and potential injury to the lynx. In such cases, not only would the hunter or trapper be subject to prosecution for violating the ESA but by authorizing the activity (i.e., bobcat hunting and trapping) that lead to the illegal “take” of a lynx, the NHFGD would also be in violation of federal law exposing it to potential legal action.

The NHFGD is well aware of the risk of trapping to Canada lynx. First, if there was no risk it would not have established the lynx protection zones. Second, in Appendix A to its Wildlife Action Plan (“Plan”), the NHFGD concedes that the threat to lynx as a result of body gripping and leghold traps is “high” and “medium,” respectively.

To prevent a violation of the ESA in regard to the proposed rules under review, the NHFGD could have decided not to allocate 20 bobcat permits to allow the hunting and trapping of bobcat within the lynx protection zones in northern New Hampshire. This wouldn’t entirely remove the potential threat of litigation, since its current trapping program, as NHFGD itself concedes, presents a medium to high risk to lynx, but it would prevent the exacerbation of such risks. Alternatively, absent a decision by the NHFGD to prohibit all trapping that may result in the incidental capture of lynx in lynx-occupied habitat, it would have to apply for and receive an

Incidental Take Permit (“ITP”) from the USFWS so that both it and its hunters/trappers would be protected from prosecution under the ESA as long as the terms of the ITP were met. At a minimum, AWI, the Center, and VOW recommend that the JLCAR suspend its consideration of the proposed rules pending the NHFGD’s receipt of an ITP.

II. No scientific justification exists for the proposed bobcat hunting and trapping seasons

While bobcats have been studied for a number of years in New Hampshire, the proposed hunting and trapping season is based nearly entirely on recent theses published by students affiliated with the University of New Hampshire (i.e., Broman 2012, Reed 2013, and Mahard 2014). As explained in Exhibit A, while such theses may have been subject to review by a panel of experts assembled by the student, they are not subject to the same level of rigorous peer review as studies published in the scientific literature.

Notably, while each of these theses utilized telemetry data, bobcat sightings data, and the development of different types of habitat suitability models, none adequately considered all of the anthropogenic (i.e., human population density, development causing habitat fragmentation and habitat loss, road density and traffic volume) or natural limiting factors (i.e., snow depth, coyote density, prey availability) when attempting to develop estimates of the bobcat populations. In addition, the theses were a product of bobcat telemetry studies conducted only in study sites in the southwestern and southeastern portions of the state, extrapolation was used to assess the suitability of habitat for bobcats throughout the entire state.

Indeed, astonishingly, the bobcat population estimates noted in the theses were based on a mere 18 bobcats that were collared as part of these studies (11 in the southwestern study site and 7 in the southeastern study site). From those few bobcats--along with sighting data of questionable veracity--the development of habitat suitability models, an assumption of a 50:50 sex ratio, and the use of mortality rates for bobcat adults and kittens, the students calculated estimates of nearly 2300 bobcats immediately after the birth season in the spring and 1400 in the fall (largely due to kitten mortality).

Given the significant potential for variability in these measures, the assumptions made, and the potential for error in developing these estimates, the NHFGD acted irresponsibly in contemplating a bobcat hunting and trapping season at this time and should not consider such seasons until and unless it obtains far more data on which to base a credible estimate of bobcat population numbers and trend by undertaking relevant studies throughout all regions of the state.

While the theses were flawed to one degree or another, they all generally concluded that the habitat in the northern section of New Hampshire and in the White Mountains was poor for bobcats and that, therefore, it was expected (largely due to snow depth) that bobcat numbers in those areas were lower compared to the southwestern and southeastern portions of the state.

These concerns about the reliability of the state's analysis are disclosed by Reed (2013):

*Observations on exclusive home-range size requirements, coupled with the scale integrated habitat suitability map enabled me to make predictions about the potential bobcat population for the state. These methods utilize a variety of assumptions and can be difficult to verify. Furthermore, this estimate is of the potential number of bobcats the state **could** support given the current habitat configuration, **not an actual census of the population**. Without determining if bobcats are present in territories estimated to be occupied, **I cannot say for certain what the actual population is in New Hampshire.** (Emphasis added)*

In fact, the UNH biologist who oversaw the studies which provided a basis for the season described the current bobcat population estimate as “not very rigorous” and a product of a lot of assumptions because bobcats are very secretive and difficult to count. Therefore, because additional data and analysis are required, the proposed bobcat hunting and trapping seasons have not been adequately justified, especially in the northern zones of New Hampshire. Given the risk to lynx in the northern sections, JLCAR should, at a minimum, recommend that no permits for bobcat be issued for these northern zones.

III. The Proposed Rule Conflicts with the Legislative Intent of RSA 541¹:

RSA 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 was raised by staff of the Joint Legislative Committee on Administrative Rules (“JLCAR”) in their comments on the proposed rules.² Specifically, under RSA 541-A:11, "(a) Each agency shall hold at least one public hearing on all proposed rules filed pursuant to RSA 541-A:3 and shall afford all interested persons reasonable opportunity to testify and to submit data, views, or arguments in writing." Further, RS 541-A: 12 provides that the agency must “fully” consider public comment.

Consequently, as JLCAR staff reported in comments on the proposed rules, failure to fully consider public opinion violates the legislative intent of RA 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)."

Various sources indicate that, in addition to opposition voiced at the public hearing, the department received more than 5,000 comments on the proposed rule by the February 10, 2016 deadline for public comment.^{3,4} Yet, within a mere seven calendar days (or only four working days given the President's Day holiday on February 15), the New Hampshire Fish and Game Commission narrowly voted (5 in favor/4 opposed) on February 17, 2016 to permit bobcat hunting and trapping. It is inconceivable, given the number of comments which likely included a

¹ <http://www.gencourt.state.nh.us/rsa/html/nhtoc/NHTOC-LV-541-A.htm>

² <http://www.gencourt.state.nh.us/rules/Fish%20and%20Game/finalproposal2015-206withstaffcomments.pdf>

³ <http://nhpr.org/post/nh-fish-and-game-commissioners-ok-bobcat-hunt>

⁴ <http://www.boston.com/news/local-news/2016/02/15/bobcat-hunting-and-trapping-proposal-in-nh-draws-more-than-5000-comments-most-against>

number of substantive comments, that the NHFGD could have adequately reviewed and considered all public comments (as required under RSA 541-A:11) over the course of just four working days.

Notably, under JLCAR rules, the NHFGD has the opportunity to submit evidence to demonstrate that it adequately considered 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 substantive input in response to said comments, AWI and the Center respectively request that JLCAR suspend its consideration of the proposed rule 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 based on the high likelihood that the NHFGD could not have sufficiently reviewed such a large number of public comments over such a short time period.

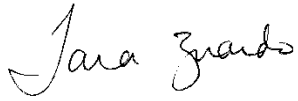
IV. Conclusion

AWI, the Center, and VOW respectfully urge the members of the JLCAR to reject the proposed rule establishing bobcat hunting and trapping seasons. The majority of the citizens of New Hampshire who participated in this planning process have clearly voiced their objection to this proposal, the NHGFD has failed to adequately consider public comment on the proposed rule, and there is no scientific justification for the seasons based on the best available scientific evidence. Indeed, if anything, bobcat hunting and trapping could derail the ongoing recovery of the state's bobcat population. Furthermore and, perhaps, most importantly, the JLCAR should reject the proposed rule on the grounds that it violates the ESA.

We encourage the JLCAR to heed the criticisms of the proposed rules and render its disapproval of the rules at its meeting on April 1, 2016. Alternatively, and at an absolute minimum, the JLCAR should suspend its consideration of the proposed rules pending further review by the NHFGD of the potential adverse impacts to Canada lynx, its disclosure of its responses to public comments including evidence that it adequately considered said comments, and until the NHFGD obtains an ITP from the USFWS.

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 the proposal and/or bobcat hunting and trapping in New Hampshire to Ms. Tara Zuardo, Wildlife Attorney, Animal Welfare Institute. She 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.

Respectfully,



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