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STATE OF NEW HAMPSHIRE
Inter-Department Communication

DATE: July 18, 2018

FROM: Christina R. Muñiz
Committee Attorney

AT (OFFICE): Legislative Services

SUBJECT: Objection Response 2018-39 Wildlife Seasons Biennial Rulemaking

To: Joint Legislative Committee on Administrative Rules

At the June 15, 2018 JLCAR meeting the Committee issued a preliminary objection to Final Proposal 2018-39. The preliminary objection was based on the grounds that the rule was contrary to the public interest because the Department failed to fully consider all public comment pursuant to RSA 541-A:11. Further, the Committee recommended that the Department hold another public hearing on the rule and work with Committee staff to ensure the Department considers all public comments submitted to the Committee during this rulemaking process. Attached to this cover letter is a copy of the preliminary objection letter, dated June 15, 2018, to Executive Director Normandeau explaining the grounds for the preliminary objection. The Department held a fourth public comment hearing on June 20, 2018, and the Fish and Game Commission held their public regular meeting on July 2, 2018. A copy of the Department's consideration of the public's comments and of the Fish and Game Commission meeting minutes are attached to the rule text of the Objection Response 2018-39.

I have attached my original memo on Final Proposal 2018-39, in which I laid out the various possible reasons for objection brought to my attention from public testimony at that time, to this cover letter. The memo is attached for informational purposes only. The current public testimony includes issues of authority and legislative intent. However, these issues were raised in the public testimony for the June 15th JLCAR meeting, and the Committee objected based only on the concern that the Department did not fully consider public comment.

At this time, the only issue is whether the Department has shown that it fully considered all public comment. There is no new basis for objection. The Committee did not issue a preliminary objection for any other reason, and the new text of the proposed rule in the Department's Objection Response 2018-39 does not raise any new basis for objection.

RSA 541-A:13, V(f) states: "If the agency responds [to a preliminary objection] but the basis for the committee's preliminary or revised objection has not been removed or the response creates a new basis for objection, the committee may, by majority vote of the entire committee, file a final objection." This means the Committee may object only if it concludes that the Department has not shown that it fully considered all public comment.



STATE OF NEW HAMPSHIRE
JOINT LEGISLATIVE COMMITTEE ON ADMINISTRATIVE RULES

ROOM 219

25 CAPITOL STREET

CONCORD, NEW HAMPSHIRE 03301-6312

June 15, 2018

Glenn Normandeau, Executive Director
Fish and Game Department
11 Hazen Drive
Concord, NH 03301-6500

Re: Preliminary Objection to Final Proposal 2018-39

Dear Executive Director Normandeau:

At its meeting on June 15, 2018, the Joint Legislative Committee on Administrative Rules (Committee) voted, pursuant to RSA 541-A:13, IV, to enter a preliminary objection to Final Proposal 2018-39 containing various rules of the Fish and Game Department (Department) regarding the wildlife seasons biennial rulemaking.

The Committee's preliminary objection was based on the grounds that the rule is contrary to the public interest because the Department failed to fully consider all public comment pursuant to RSA 541-A:11. Further, the Committee recommended that the Department hold another public hearing on the rule and work with Committee staff to ensure the Department considers all public comments submitted to the Committee during this rulemaking process. A copy of the final proposal, as annotated by Committee staff, and all public testimony received by Committee staff regarding Final Proposal 2018-39 is enclosed for your review.

You may respond to the Committee's preliminary objection by amending the rules to resolve the bases for objection, by withdrawing the rules, or by making no changes. You are required to respond in writing to the Committee's preliminary objection within 45 days of the date on which it was made, which was June 15, 2018. In this instance, the 45th day is Monday, July 30, 2018.

After the Committee has received your response, the Committee may take further action ranging from approval of the objection response to voting to support the sponsorship of a joint resolution to address the issues remaining with the proposal. Pursuant to RSA 541-A:13, VII(b), the Committee will have up to 50 days after the end of your response period to take action concerning a joint resolution, although the Committee can take action prior to that date. In this instance the 50th day is Tuesday, September 18, 2018. Please note that there is no deadline by which the Committee must act to approve the rules or to enter a final objection, and the Committee may do so even after the adoption of the rules by the Department.

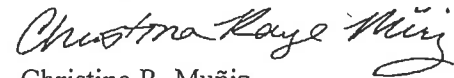
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Please be advised that, pursuant to RSA 541-A:14, I, you may not adopt the rules until one of the following has occurred: 1) the expiration of the objection response review period without the Committee having taken action with respect to voting to support the sponsorship of a joint resolution; or 2) the Committee has taken action that is specifically in lieu of voting to support the sponsorship of a joint resolution.

If you have any questions concerning the provisions in RSA 541-A relative to objections, responses, or adoptions, please call me at 271-3680.

Sincerely,



Christina R. Muñiz
Committee Attorney

Enc.

cc: Paul Sanderson, Esq., Legal Coordinator

JLCAR STAFF COMMENT REGARDING PUBLIC TESTIMONY IN OPPOSITION TO FP 2018-39

The Voices of Wildlife in NH (Wildlife) and several members of the public have commented in opposition to FP 2018-39. Most of the comments relate to Fis 806.05 concerning the live-capture of snowshoe hares by beagle clubs in the state for purposes of training the dogs to hunt, and Items 1-4 below will discuss these comments. (See p. 32 – 34 for the rule text in question. See Attachment p. 33-34 for the letter from The Voices of Wildlife in NH establishing the 4 main arguments in opposition to Fis 806.05).

A few members of the public have raised a separate reason for their opposition to Fis 806.05 which is discussed in Item 5. (See Attachment p. 78 and 83 for testimony regarding opposition to Fis 806.05 different from the arguments made by Wildlife).

The other comments are in opposition to the hunting of predators, specifically red and gray fox, fishers, and coyotes and relate to Fis 303.03, Fis 303.04, Fis, 307.01(e), Fis 307.05, and Fis 1102.11. These comments are discussed in Item 6 below. (See p. 24, 26-31, and 36 for the rule text in question. See Attachment p. 64-66 and 70-77 for testimony regarding the opposition to predator hunting).

The Humane Society of the United States (Humane Society) also submitted testimony, which is echoed by some members of the public. (See Attachment p. 87-91). However, this testimony is not relevant to the proposed rules before the JLCAR at this time. Item 7 briefly discusses this testimony.

The JLCAR is not a policy committee, and may make a preliminary objection only pursuant to RSA 541-A:13, IV and further explained by the JLCAR's own rules.

1. Wildlife argues that the JLCAR should object to Fis 806.05 because, pursuant to JLCAR rules 401.05(a)-(c), the rule is beyond the agency's authority because there is a lack of specific statutory authority for the agency to adopt this rule.

JLCAR rule 401.05(a) reads: "The Committee may object to a proposed rule as being beyond the agency's authority if it is prohibited under RSA 541-A:22, III because there is no specific statutory authority for the rules." (See Attachment p. 20). JLCAR rules 401.05(b) and (c) added additional areas where, based on JLCAR experience, specific authority is needed.

RSA 541-A:22, III and JLCAR rules 401.05(b) and (c) list the areas in which specific statutory authority is required. This means only these situations, in the view of JLCAR, need specific statutory authority, and none of the items in the list apply to Fis 806.05. (See Attachment p. 17). Wildlife argues that RSA 206:10, RSA 207:12-a, RSA 207:58, and RSA 212:25, the statutes listed as granting the authority to promulgate Fis 806.05, do not give the specific authority to live-capture snowshoe hare. (See Attachment p. 2, 5, 8, and 9 respectively).

However, both RSA 206:10 and RSA 212:25 offer general authority to the Department to promulgate rules concerning the method of taking game animals and the method of harvesting

those animals held for propagation respectively. (See Attachment p. 2 and 9 respectively). Further, RSA 207:56 establishes the authority of the Executive Director to “after consultation with the commission... open and close the seasons for the taking of small game...to fix the number and sex limitations for small game, and any other conditions governing the methods and manner of taking and reporting the same”. (See Attachment p. 7).

Conclusion: There does not appear to be a basis for objection under JLCAR rules 401.05(a)-(c) because Fis 806.05 only needs a statute that gives general statutory authority and not specific statutory authority.

2. Wildlife and several members of the public argue that Fis 806.05 is contrary to legislative intent because, pursuant to JLCAR rule 402.02(a), it “conflicts with the intent of the state’s animal cruelty law, RSA 644.8.” (See Attachment p. 21).

RSA 644:8 does prohibit a person from abandoning an animal, including a wild animal which was held in captivity, and leaving it “without supervision or adequate provision for its care, sustenance or shelter”. The statute also prohibits a person from allowing an animal in his or her possession to “be subjected to cruelty, inhumane treatment or unnecessary suffering of any kind.” Violation of this statute is a class B felony. (See Attachment p. 18-19).

The argument is that Fis 806.05 allows beagle clubs to violate the animal cruelty statute which would be a reason for objection by the Committee. However, there is another statute, RSA 207:13, (see Attachment p 6) which allows for field trials based on the rules and regulations of the American Kennel Club. This statute is not explicit, but it does essentially incorporate by reference the American Kennel Club rules on the use of hares in field trials of hunting dogs.

RSA 644:8 became effective in 2008, and RSA 207:13 became effective in 2015, which means a court is likely to find the later-in-time statute shows the intention of the legislature. In this case that would mean that, because the statute allowing for field trials came after the statute prohibiting animal cruelty, a court might find that the legislature’s intent was to allow the use of hares in field trials without violating the animal cruelty law. However, it is unclear how a court would find in terms of the practice of using hares for the training of the hunting dogs. A court might find that, because there is no specific statute allowing for this practice during the training of dogs, the animal cruelty law prevails.

Conclusion: The JLCAR may object to Fis 806.05 on the grounds that Fis 806.05 is contrary to legislative intent by conflicting with a state statute, pursuant to JLCAR rule 402.02(a), if it determines that Fis 806.05 violates or otherwise conflicts with the statute, specifically RSA 644:8.

3. Wildlife and several members of the public argue that the JLCAR should object to Fis 806.05 because the Department did not allow sufficient time to consider public comment before the final proposal was established, pursuant to JLCAR rule 403.01(a)(1). (See Attachment p. 22).

Wildlife states that the Fish and Game Commission, and the Department, received over 60 comments in opposition to the proposed rule, but then voted to approve the rule proposal after only a brief discussion at its regular meeting on April 18th. However, what is not made clear is the full timeline of the notice and comment period. The following is a timeline of the process as understood by JLCAR staff:

- March 1 – The Department filed the Initial Proposal with OLS.
- March 30 – The first public hearing on the proposal was held in Lancaster, NH.
- April 2 – The second public hearing on the proposal was held in Keen, NH.
- April 3 – The third public hearing on the proposal was held in Concord, NH.
- April 11 – The written submission deadline occurred for the Initial Proposal.
- April 18 – The Commission held its regular meeting to vote on the Final Proposal rule text.
- May 9 – The Department filed the Final Proposal with OLS.

It is unclear when the 60 plus comments were received by the Commission and the Department, but, if it was at the April 18th meeting, then this was after the written submission deadline and after 3 earlier hearings on the rule proposal. If the comments were received before the April 11th written submission deadline, then it appears the Commission and the Executive Director likely did have sufficient time to consider all of the public comments pursuant to RSA 541-A:12, I. (See Attachment p. 12) It is the Executive Director of the Fish and Game Department and not the Commission who maintains the authority to promulgate rules, pursuant to RSA 206:10. (See Attachment p. 2). Thus, it is the Executive Director who must consider the comments from the public. However, the timeline still appears to allow the Executive Director the time to consider the testimony.

Conclusion: Unless the JLCAR feels the complexity of the issue is such that the Commission, and the Department, did not have time to consider fully the public comments received, then it does not appear the JLCAR has a basis for objection that the rules are contrary to the public interest under JLCAR rule 403.01(a)(1).

4. Wildlife argues that the JLCAR should object to Fis 806.05, pursuant to RSA 541-A:13, IV(d) and JLCAR rule 404.01(a)(4), because there is a substantial adverse economic impact on the agency that is not recognized in the fiscal impact statement. (See Attachment p. 14 and 24).

Wildlife states that the “expansion of the area in which snowshoe hare may be trapped and the increase in the number of persons permitted to capture them will require substantial unreimbursed expenditures by the agency not addressed in the fiscal impact statement.” However, the fiscal impact statement (FIS) states the following:

“The Department notes that all administrative costs will be covered by existing appropriations, and that if additional enforcement actions result in convictions for fish and game violations, there could be an indeterminable increase in revenue to the Fish and Game Fund.”

It does not appear that the FIS is overlooking a substantial economic impact, but rather it appears to clearly consider how the Department will pay for the enforcement of the expanded rules.

Conclusion: Unless the JLCAR determines that the FIS is incomplete or incorrect in a way that would lead to a substantial economic impact not recognized in the FIS, then there does not appear to be a basis for objection regarding the accuracy of the FIS of the proposed rule pursuant to RSA 541-A:13, IV(d) and JLCAR rule 404.01(a)(4).

5. Some members of the public argue that Fis 806.05 conflicts with another Fish and Game rule and thus is contrary to the public interest because, pursuant to JLCAR rule 403.02(b)(2), the rule cannot be uniformly applied. (See Attachment p. 26 for JLCAR rule and Attachment p. 78 and 83 for relevant public testimony).

In this case, the argument is that Fis 806.05 conflicts with Fis 804.16 which requires those in possession of wildlife to “handle the wildlife in a manner to prevent any injury or stress to the wildlife and protect the well being of the wildlife at all times.” (See Attachment p. 26). However, Fis 814.02(h) establishes that a person who has a permit to hold a field trial, as defined in Fis 814.01, must adhere to the rules in Fis 804.16. (See Attachment p.27-29). These rules were all promulgated at the same time in 2016. This implies that the Department did not intend to preclude the process of a field trial with the requirements of Fis 804.16. The rules might benefit from some clarification, but Fis 804.16 and Fis 814 are not currently before the JCLAR.

Conclusion: There does not appear to be a basis for objection regarding the possible conflict between existing Fish and Game rules and the proposed Fish and Game rules. The JLCAR could recommend that the Department clarify the existing rules in a future rulemaking process if it determines that there is a clarity issue with the rules that are not before the committee at this time.

6. Finally, there are also public comments that appear to be attempting to establish that the Department is violating its statutory purpose clause and that the JLCAR should object to FP 2018-39 as contrary to legislative intent pursuant to JLCAR rules 402.01(b) and (c). (See Attachment p. 21).

There are two members of the public who have submitted testimony in opposition to the hunting of predators in general and of specifically red and grey fox, fishers, and coyotes. The relevant rules are Fis 303.03, Fis 303.04, Fis, 307.01(e), Fis 307.05, and Fis 1102.11. (See p. 24, 26-31, and 36 for the rule text in question. See Attachment p. 64-66 and 70-77 for testimony regarding the opposition to predator hunting). These comments make several policy arguments, many of which hinge on the conservation and management duties of the Commission. It appears that the essential argument is that the Commission has violated its statutory purpose clause.

RSA 206:4-a establishes the duties of the Commission by stating that the Commission has the duty “as the citizens’ representatives, to be the stewards of the fish, wildlife, and marine resources of the state of New Hampshire and to set general policy” in a few areas including “conservation, protection, and management of wildlife populations and habitats, the collection of necessary scientific information, and the enforcement of fish and game laws for the purpose of

sustaining healthy populations of fish, wildlife, and marine resources” and “the overall management of the fish and game department.” (See Attachment p. 1).

RSA 207:58 is the purpose clause for the Department, which the Commission has the duty to oversee. The Department’s purpose clause reads:

“The legislature finds it is in the best interests of the state and its citizens to regulate, protect, restore, and conserve the wildlife resources of the state under a uniform scheme of management through the fish and game department. It is the intent of the general court to explicitly reaffirm the state’s long-standing exclusive authority and jurisdiction over the wildlife of the state as established by title XVIII. The general court further finds that it is in the best interest of the state and its citizens that the fish and game department recognize, preserve, and promote our special heritage of hunting, fishing, trapping, and wildlife viewing by providing opportunities to hunt, fish, trap, and view wildlife in accordance with title XVIII.” (See Attachment p. 8).

It appears that, because RSA 206:4-a gives the Commission direct authority to manage the Department and RSA 207:58 establishes the purpose of the Department, then RSA 207:58 also becomes the purpose of the Commission.

Conclusion: Unless the JLCAR finds that the proposed rules violate the purpose clauses of the Commission or the Department, then there is no basis for objection that the rules on predators are contrary to legislative intent pursuant to JLCAR rules 402.01(b) and (c).

7. The Humane Society makes additional arguments that do not appear to be relevant to the rules before the committee. (See Attachment p. 87-91).

The Humane Society and some members of the public argue that the proposed rules are “contrary to the public interest because they are not responsive to the public need.” Specifically, the Humane Society is concerned with how the Commission dealt with public testimony at a meeting in January to determine what to include in the initial proposed rule. It appears the Voices of Wildlife in NH petitioned the Department to change the coyote hunting season rules. There was over 100 public comments in support of this petition. Department Staff has informed JLCAR Staff that this petition was properly denied, pursuant to Fis 214.01. (See Attachment p. 25a).

Members of the public wanted Fis 303.06(a), regarding the open season for hunting coyote, to be amended, but the Department did not include Fis 303.06 in its proposed rule. However, it appears this took place at a meeting before the rulemaking process was officially started. RSA 541-A:11, I(b) (see Attachment p. 10) only requires a public comment period after the initial proposal is filed and before the final proposal is completed.

Further, the Humane Societies argument is unclear. It argues that the Commission “restricted and prevented submission of testimony”. However, it is not the Commission that has the rulemaking authority. The Executive Director is the entity within the Department with rulemaking authority, although the Executive Director must consult with the Commission on certain rulemaking. (See

Attachment p.1 for the Commission's duties, Attachment p. 2 for the Executive Director's rulemaking authority, and Attachment p. 2 and 7 for examples of when the Executive Director must consult with the Commission). It is the Executive Director who must not ignore public testimony at the relevant public hearings, pursuant to RSA 206:10, I, RSA 541-A:11, I, and Fis 102.03. (See Attachment p. 2, 10, and 25 respectively). It is unclear if the Humane Society is mistakenly using "the Commission" when it means "the Executive Director". Regardless, if the petition was properly denied by the Executive Director, then the Department did not have to include Fis 303.06 in this rulemaking procedure.

The Humane Society makes an argument that the rules are "contrary to the public interest because they are incapable of uniform application", pursuant to JLCAR rule 403.02(b)(4). (See Attachment p. 23). JLCAR rule 403.02(b)(4) states that the JLCAR may object on the grounds that a rule is contrary to the public interest if it cannot be uniformly applied because "the rule does not treat like entities in a similar manner." The Human Society argues that, because coyotes are furbearing animals, there should be a closed season for them because all the other furbearing animals have a closed season.

Again, this argument is irrelevant to this rulemaking proceeding as it appears to apply to Fis 303.06(a) which is not currently before the JLCAR. Further, it is likely that a court would find coyotes to be separate entities from the other furbearing animals they are classified with. It does not appear that the Human Society is attempting to argue the other rules concerning coyote should be objected to for this reason. However, if it is, then it should be noted that the night hunting of coyote is allowed by statute, pursuant to RSA 208:1-e, and the baiting of furbearing animals in addition to the coyote is allowed by other rules.

Finally, the Humane Society argues that the rule should be objected to as contrary to legislative intent because it conflicts with a specific statute. JLCAR Staff is not going to further elaborate on this argument further for two reasons. First, it appears to be regarding a rule not currently before the JLCAR. Second, it argues that the Commission did not consider scientific evidence, pursuant to RSA 206:4-a, when determining which rule to promulgate, but the Commission does not hold rulemaking authority. (See Attachment p. 1-2).

Conclusion: Fis 303.06 is not currently before the JLCAR, and thus there is no authority to object to it.