

Fish & Wildlife Board
Approved Meeting Minutes
Wednesday, January 16, 2008

The Fish & Wildlife Board convened a meeting at 5:00 p.m. on Wednesday, January 16, 2008 in the Skylight conference room at the State Office Building in Waterbury, Vermont.

Attendees

Board Members: Dana Kittell, Chair; Bruce Therrien, Vice Chair; Brian Ames; R. Keith Armstrong; Wayne Barrows; Walt Driscoll; Ed Gallo; Cyndy Jones; Craig Lefevre; Claude Rainville; John Roy; and Robert Shannon.

Absent: Jeremy Baker and Michael Popowski.

Department Employees: Commissioner Wayne Laroche, Col. Robert Rooks, Major David LeCours, Lt. Ken Denton; Warden Chris Clark; Eric Palmer, Tom Decker, David Englander, Shawn Haskell, John Austin, Shawn Good, and Cathy Merrill.

Chair Kittell called the meeting to order at 5:00 p.m.

Visitors

Jon Valsangiacomo, Esq., representing Doug Nelson; and Roy Kilburn, Berlin.

Approval of December 19, 2007 Minutes

Rainville made a motion to accept the minutes, which was seconded by Jones. Therrien noted that the results of the vote on page 4 were incorrect. Therrien said he was in favor of the proposed regulation to close three tributaries to the Winooski during spring spawning, not opposed. Ames said it was he who was opposed.

The minutes were unanimously approved as corrected.

Update and Third Vote: Importation and Possession of Animals for Taking by Hunting

David Englander, General Counsel for the Department, informed the Board that the Legislative Committee on Administrative Rules (LCAR) voted unanimously to object to the Board's final proposal regarding the Importation and Possession of Animals for Taking by Hunting, at its meeting that morning, January 16, 2008. LCAR ruled the proposed rule was arbitrary in that it lacked clear standards, was contrary to the legislative intent, and exceeded the scope of the Board's authority. Englander said the Department recommends the Board vote down the proposed rule on its third vote. The Department would then start anew under 10 V.S.A. section 4714, and present a new proposal for the Board's consideration at its next meeting.

Shannon asked if a copy of the LCAR minutes were available; Englander said he didn't believe minutes were taken, but would inquire about the availability of CD recordings of the meeting.

Chair Kittell asked what the legal ramifications would be if the Board voted in favor of the rule. Englander said the Department could enforce the rule, but without LCAR's approval, the rule would not have the presumption of legality if challenged. The Department would then have the burden of proving the rule was legal; however, Englander said he believed the rule already met the requirements of 10 V.S.A. §§ 4714 and 4081.

There was discussion about the Board's options, and whether the Board would deviate from its position in order to receive LCAR approval.

Englander said the Department would investigate how protective other states are and if there is a useful model that would strictly adhere to the mandate of the statutes. Chair Kittell said he believed this outcome was not the result of the Board doing something wrong, that it was a political statement being made by LCAR.

Driscoll suggested separating the rule into two separate rules: 1) hunting native species behind fences; and 2) hunting domestic animals (bison, elk, red deer, fallow deer) behind fences.

Col. Rooks said any moose and white-tailed deer currently behind fences are the property of the State of Vermont, and can be removed by the State without a new rule. Driscoll asked what was preventing the Department from removing the moose at Nelson's now. Col. Rooks said there was nothing preventing the State from removing those animals now, other than it would be better if a rule was in effect.

Col. Rooks went on to say that LCAR had asked for specificity in the rule; however, some language was purposely left vague to allow for grandfathering the existing facilities. Also, the Agriculture Agency's rules were referenced for consistency as requested by the industry.

Lefevre said he listened to the CD of the LCAR hearing on the original proposed rule, and the Chair of LCAR at that time stated that the charge of section 4714 had been met. Lefevre is concerned that any time the Board comes up against public opposition and LCAR doesn't politically like a proposal, then LCAR becomes arbitrary.

Commissioner Laroche said if the Board starts the public process again, the politics could be very different the next time around. Commissioner Laroche said the Department and Board are trying to implement a regulation in accordance with the statute to be protective of the natural resources of the state of Vermont.

Roy said he hoped LCAR understood that the Board proposed the regulation for CWD (Chronic Wasting Disease) control.

Chair Kittell said he thought the Board had been fair and generous; the issue was not elk. He also said the Board could go back to the beginning if the Board felt confident that it did not want this around; that it was time to take a stand.

Lefevre questioned Col. Rooks how the wardens would feel if the Board went ahead with a rule that was rejected by LCAR. Col. Rooks answered that he would not feel comfortable charging someone under this regulation, and the State would probably lose in court if challenged, due to the lack of LCAR's approval.

Gallo said when he visited the Nelson facility last winter there were fallow deer, sika deer, elk, six or eight moose, and the Nelsons estimated there were 40-45 whitetails in the enclosure. Gallo thought there was an existing CWD concern due to the current concentration of animals, and with the animals propagating; the Board should not wait to take action. Englander said Nelson's attorney stated at the LCAR meeting today that there were 100 whitetails in the enclosure.

At this point, Jon Valsangiacomo introduced himself as an attorney representing Doug Nelson. Valsangiacomo took issue with Chair Kittell's comments alleging LCAR's ruling was due to political pressure. He said his law firm did not receive the revised rule until last week, which did not allow them time to review it thoroughly.

Chair Kittell countered that meetings had been held on this issue over the past year-and-a-half, and meetings were held where the rule was reviewed item-by-item. Chair Kittell said that it was his personal belief that LCAR was lobbied by those against the rule. He went on to say that there were two choices for the Board: 1) go back and re-work the rule, which would take at least a year; or 2) pass a rule, without teeth, on a third vote. Shannon made a motion to vote on the proposed rule; which was seconded by Ames.

Chair Kittell asked for a show of hands of those in favor of upholding the rule as proposed. No one raised their hands; 11 were against upholding the rule.

Gallo asked for clarification of the vote.

Chair Kittell asked again for those in favor of the rule to raise their hands. There were no hands raised, meaning 11 were opposed. The rule was unanimously defeated.

Roy made a motion to have the Department proceed to work on a new rule regarding captive hunts. Shannon seconded.

Lefevre asked if a new rule would include native animals. Roy said native animals do not need to be included in the new rule, as existing law states they belong to the State of Vermont; they do not belong to the Nelsons.

Discussion continued and concern was expressed about the continually expanding fawn crop in Mr. Nelson's hunting facility.

Therrien said the vote on the floor was more of a statement and it was not within the Board's authority to tell the Department what to do. Chair Kittell agreed; the Board is making a statement of record that the Board wants to continue to move forward on this issue.

Driscoll asked for a definitive answer on the legislative intent of section 4714. Englander said he would provide that at the next Board meeting.

Armstrong said he needs more information on CWD. The Department will provide the newer members of the Board (Jones, Armstrong, and Popowski) additional written information on CWD.

Shannon stated that during the last two years of the Board discussing this issue, many states have amended their regulations to be more strict or eliminated captive hunting facilities altogether. Commissioner Laroche said the Department will give updated presentations on this issue as the Board proceeds.

Barrows clarified with Valsangiacomo that he did not receive the rule until last Wednesday. Valsangiacomo said his clients opposed the final version of the regulation and gave his account of LCAR's meeting.

Chair Kittell said the Board could have been a lot harsher; that the Board was trying to work with the facilities, and now that LCAR found the rule to be arbitrary, the next time around, the Board would put forth a rule with some teeth in it.

Valsangiacomo said Mr. Nelson wants to sit down in a working group with the Department and Board to discuss this issue and reach common ground. Englander said the parties would have to sit down in good faith. Commissioner Laroche said his door has always been open.

Roy asked to retract his motion [to vote on having the Department proceed] and defer to Driscoll's suggestion [to get a definitive answer on the legislative intent of section 4714].

Chair Kittell said the Board is making a statement to the Department to draft a new rule and proceed as soon as possible. There was unanimous agreement.

Shannon asked if there could be a first vote tonight; however, it was pointed out that there was no rule to be voted on. Englander advised against having a first vote tonight as that would be contrary to the statutory intent. Chair Kittell asked to have something by the next meeting. Englander said that was the Department's intent, and he would also outline the Board's authority under section 4714.

Vote: New Emergency Baitfish Rule

Eric Palmer addressed the Board regarding the emergency baitfish rule that expires on February 19, 2008, and outlined the Board's options:

1. vote on a new emergency rule, which mirrors the existing emergency rule, and which would take effect immediately. This would allow the emergency regulations to run through regular rulemaking without a gap in between;
2. wait until the next Board meeting, after the public hearings have been held, allow the Department to sift through the public input, and take a second vote on the original rule; or
3. not enact another emergency rule, which would result in a month-and-a-half gap until the third vote and final rule would be in place.

Palmer said it was the Department's recommendation that the Board vote on a new emergency rule, that mirrors the existing emergency rule, and which would run for another 120 days.

There was discussion on the Board's options, and on changes that might be made to the emergency rule based on the public response received by both the Board and the Department.

Ames made a motion to vote on a new emergency baitfish rule that would mirror the existing emergency rule. Shannon seconded.

The vote was 9 (Ames, Gallo, Driscoll, Therrien, Shannon, Roy, Armstrong, Barrows, and Rainville) in favor; and 2 (Lefevre and Jones) against.

Palmer said that before the expiration of the existing emergency rule, the Department will publicize that the emergency rule has been renewed.

Commissioner Laroche explained the measures the Department was taking in anticipation of the arrival of VHS.

Discussion: Board Representation at Public Hearings Regarding Fish Regulations

Chair Kittell distributed a schedule of baitfish rule hearings and asked to have two or three Board members at each hearing. Palmer explained the public hearing process and provided the Board with an outline of the process. Due to time constraints regarding the public notification process, the Muskie-Walleye-Winooski River proposal will not be a part of the five public hearings or the February 20 meeting. The February 20 Board meeting will be considered the official APA hearing for the baitfish regulation.

It was decided the February 20 public hearing would begin at 4:00 p.m. and the regular Board meeting would start at 5:00 p.m. in the Skylight conference room at the State Office Complex in Waterbury.

Shawn Good distributed and discussed a summary of the public comments received to date. The most frequent concerns include: 1) anglers want the ability to use bait longer than 48 hours after purchase without movement; 2) anglers want to be able to catch and use their own bait in the same waters without transport; and 3) anglers need clarity on the disposal requirements.

Board Member Roundtable

Chair Kittell informed the Board that he had testified before the House Fish & Wildlife Committee on House Bill 557 regarding the extension of the Board's authority over the management of the deer herd to the year 2014. The Department had included the definition of "loaded muzzleloader" in the Bill and proposed to

amend the point section to be consistent with the Appendix. It appeared to Chair Kittell that the number of Board members will remain at 14, and the control of the deer herd will remain with the Board until 2014. Chair Kittell said it was nice to hear from the Committee that the Board was doing a very good job.

Jones asked what was being done with leftover duck stamps, how they were being disposed of, and if there was a possibility of selling them to stamp collectors. Decker thought they were currently being shredded, however, he would check and get back to the Board on the possibility of selling them.

Rainville questioned why the otter and muskrat trapping seasons start on the same day, but the otter season ends a month earlier. Rainville was looking for consistency by having all three trapping seasons (otter, muskrat, and beaver) end on the same date. Decker said that river otter have low reproductive rates, muskrats have high reproductive rates, and the allowable harvests are adjusted accordingly. The Furbearer Team has looked at the issue and recommended a shorter season for those animals with lower reproductive rates. The beaver season had recently been extended into March.

Barrows questioned if electronic/battery-operated muzzleloaders are allowed in Vermont. Col. Rooks responded that they are, except the batteries must be removed during transport. Barrows asked the status of the deer harvest for the recently-ended seasons. Commissioner Laroche said there were 14,600 +/- total deer taken; of which approximately 8,700 were antlered bucks. Commissioner Laroche thought that once the figures were final the total would approach 15,000 with 9,000 being antlered bucks. Those results exceeded the Commissioner's prediction last year of a 1,000 increase over the 2006 harvest.

Lefevre complimented Shawn Good on his work on the baitfish rule.

There was a question on the requirement in section 4742 for the Department to collect information on the youth hunting season. Englander will review the statutory requirements and respond at the next Board meeting. Decker said a statewide survey was just completed on youth hunts, and the Department would brief the Board on those results.

There was discussion on marketing moose hunting and the lack of restrictions on subpermittees once they have a successful hunt. Therrien may make a proposal to remove the waiting period restrictions altogether, and suggested broadening the scope of public involvement.

Decker said the Moose Team met yesterday, and information should be coming soon about the recent hunt. There was a 58% success rate. The Department's intent is to cut the moose population in half in certain zones to address browse forestry generation; however, that goal has not been fulfilled. Commissioner Laroche said the Department would not be able to undertake thermal imaging on the moose herd this year, due to trouble finding vendors with the right equipment.

Ames asked if an archery season for moose had been discussed within the Department. Commissioner Laroche said he heard a petition might be coming to the Board on that issue.

Commissioner Laroche announced a call-in show on Vermont Public Television on February 7 that will kick-off public input on a number of Fish & Wildlife Department initiatives.

Commissioner Laroche will appoint a group to discuss wanton waste that will engage constituent groups. Chair Kittell said the Board would decide who would be the Board's representatives on the committee at its next meeting.

Roy asked if the walleye limit on Lake Carmi had been lowered to three. Commissioner Laroche said the Lake Carmi regulations had not been changed and the creel limit remains at five.

Commissioner Laroche said license sales have been increasing, and are 4% higher than last year, which he thought was a result of the antler restrictions and the trophy trout program. On-line license sales have almost doubled compared to the same period last year.

Gallo moved to adjourn the meeting, which was seconded by Rainville. The meeting adjourned at 7:50 p.m.

Respectfully submitted,

/s/cpm

Catherine Pirie Merrill