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## Third Annual Conference on Animals and the Law

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LISA WEISBERG

“The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment . . . in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being. It shall further be the policy of the state to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations. . . .”<sup>1</sup>

This statement, which is set forth in Article 1 of the New York State Environmental Conservation Law (ECL), in part, comprises the declaration of policy of the state regarding its wildlife, and sets forth the mandate of the Department of Environmental Conservation (DEC). One might think that as stewards of the environment and its inhabitants our responsibility is to preserve all species for their innate value, and to foster a viable and sustainable environment for them and their future generations. This is not entirely the case. As with animal protection laws in general, wildlife protection laws and policy represent a balancing of interests between mankind and the animals.

Many of today’s environmental conservation laws can be traced back to the early 1900s when hunting and trapping went unregulated. These laws are a reflection of mankind’s traditional consumptive management of the species for recreation and commercial purposes or as a means to eradicate those species we have deemed undesirable or a nuisance. This historical balancing of wildlife preservation laws with human use and pursuit of the species, however, is becoming increasingly less a reflection of the majority of modern day

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1. NY. Env'tl. Conserv. Law § 1-0101 (McKinney 1997).

people both in New York and in states across the country. This can be seen through the recent defeat of harmful legislation in New York, last year's approval of progressive ballot initiatives in various states, and the mounting demands on our national parks for recreation and enjoyment. Yet, as we will see, deficiencies in the legislative process combined with the current composition and structure of conservation agencies and their funding base continue to perpetuate a primarily consumptive based wildlife philosophy and programs.

### General Functions, Powers, Duties and Funding of the DEC

Like many other state environmental conservation agencies across the country, New York State's Department of Environmental Conservation is mandated to "provide for the propagation, protection and management of wildlife and the preservation of endangered species. . ."<sup>2</sup> Within the DEC is the Division of Fish, Wildlife and Marine Resources whose specific purpose is "the efficient management of the fish and wildlife resources of the states."<sup>3</sup> In developing and implementing this management directive, the Division is "(a) to promote [the] natural propagation and maintenance of desirable species in ecological balance," (b) observe "sound management practices. . ." and (c) have regard for "the compatibility of production and harvesting of fish and wildlife crops and the importance of fish and wildlife resources for recreational purposes. . ."<sup>4</sup> Of paramount significance in the formulation and implementation of DEC wildlife management policies and programs, is the establishment of the Conservation Fund Advisory Board, formerly the Conservation Fund Advisory Council.<sup>5</sup> As we will see, this advisory board greatly influences how sound management practices are implemented and how recreational purposes are defined.

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2. *Id.* § 3-0301(1)(c).

3. *Id.* § 11-0303(1).

4. *Id.* § 11-0303(2).

5. *See id.* § 11-0327(1).

The Conservation Fund Advisory Board was created by an act of the New York State Legislature in 1994, and was established within the DEC.<sup>6</sup> The board is composed of eleven members, each one a resident of the region he or she is representing.<sup>7</sup> Of particular significance under section 11-0327 of the Environmental Conservation Law is the directive that the board be representative of individual and organized sportsmen's interests in each region of the state.<sup>8</sup> In fact, the law requires that any person designated or appointed to the board "shall have demonstrated a long-standing interest, knowledge and experience in fish and wildlife management including hunting or fishing, as evidenced in part by the holding of a valid New York State hunting, fishing or trapping license" at that time.

Among its duties, the board makes recommendations to state agencies on DEC's "plans, policies and programs affecting fish and wildlife."<sup>9</sup> In particular, it reviews the "allocations and expenditures of the department for fish and wildlife purposes," and makes reports to both the commissioner and the legislature, and to sportsmen regarding its findings on the allocations and expenditures of the conservation fund and the fish and wildlife program.<sup>10</sup> Finally, it works to "encourage both residents and non-residents to hunt, fish and trap in New York."<sup>11</sup>

The source of DEC's funding is another integral component to how policies are formulated and what programs are supported and implemented. In the fiscal years of 1995-96, sportsmen contributed \$43.2 million to support New York State's fish and wildlife program. Of that money, \$34 million was income derived from hunting and trapping licenses. The remaining \$9.7 million consisted of New York's apportionment of Federal Aid in Fish and Wildlife Restoration. These monies represent approximately 75% of the total expendi-

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6. *See id.*

7. *See id.*

8. *Id.*

9. *Id.*

10. *Id.* § 11-0327(3).

11. *Id.* § 11-0327(3)(f).

tures for New York's fish and wildlife program. It is also estimated that several million dollars is generated each year for the state in hunting and trapping activities.

Given the large proportion of license fee monies that comprise the fish and wildlife budget and the tremendous amount of revenues generated to the state from these activities, it should come as no surprise that the majority of New York State's environmental conservation laws addressing wildlife pertain to hunting and trapping as a management tool.

The hunting laws can be found in sections 11-0901 through 11-0931 of Title 9 of the ECL.<sup>12</sup> Generally, they represent a mandate by the legislature authorizing DEC to set in each region of the state the open hunting seasons, the manner of taking, whether by firearm, bow and arrow or muzzleloaders, and the "bag" or take limit per person for each species.<sup>13</sup> The species are categorized by either big game, small game or game birds which includes migratory game birds and upland game birds.<sup>14</sup>

In New York, big game consists of "deer, bear, moose, elk [other than] captively bred and raised North American elk . . . caribou and antelope."<sup>15</sup> Small game is defined as "black, gray and fox squirrels, European [and] varying hares, . . . rabbits, frogs, land turtles, box and wood turtles, and the bog turtle . . . , coyotes, red [and] gray fox except [those captively bred], raccoon, opossum, weasel, skunk, bobcat, lynx, muskrat, mink [other than farm raised], fisher, otter, beaver, sable and marten . . ."<sup>16</sup>

In determining the open seasons and bag limits for each species in each region DEC's overriding objective is the "proper management of that particular species." What does that mean? In order to maintain what is considered a desirable population in ecological balance, as the declaration of policy tells us, consideration is to be given to the compatibility of

12. *See id.* §§ 11-0901 to 11-0931.

13. *See id.*

14. *See id.*

15. *Id.* § 11-0103(2)(b).

16. *Id.* § 11-0103(3).

production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, and public safety. Traditionally, the practice has been to allow the species to overpopulate to justify a hunting season, and at times to expand the open season and allow additional bag limits.

Nowhere has this been more evident than with big game hunting regulations for deer. Historically, preference has been given to the taking of the males for the trophy value of their antlers. Until recently, this left the females thriving and continuing to reproduce. Given the mounting political pressure by both homeowners, whose shrubbery was being consumed by exploding deer populations, and public safety concerns over increasing numbers of vehicular accidents involving deer, special deer licenses recently have been authorized to lower and control the deer population. To adapt to fluctuations in conditions and population levels, every year DEC issues proposed rule makings in the *New York State Register* to which the public has forty-five days to submit comments. It is interesting to note that under the alternatives section of the regulatory impact statement, DEC invariably will state that any deviation from or alternative to its proposed harvesting plan, would "make it more difficult to appropriately manage that species." As we will later see, non-consumptive management programs, like the deer contraceptive program implemented on Fire Island has met with great success; maybe too successful for DEC.

### Recent Legislation

Although some inroads are being made, the majority of recently proposed and enacted legislation generally maintains the traditional philosophy of the consumptive use of wildlife.

Typical legislation in New York State consists of re-authorizing DEC's power to regulate the various species, and to expand the open season and the manner of taking, consistent with the need to maintain the ecological balance. However, in this era of downsizing and streamlined government regulations, we are witnessing the introduction of measures to elim-

inate any and all controls on the management of certain species, especially predator animals or those deemed undesirable. Attempts to invoke an all year open season on nuisance or “dangerous” animals, such as the coyote, continue to be made, despite questionable evidence of the damage or injury they caused to livestock or people.

Another such attempt was made this past session regarding beavers. Despite the streamlined permitting procedure, implemented by DEC a few years ago, that allows landowners to obtain a permit from DEC over the telephone to take a “nuisance” beaver on his or her property, legislation was introduced and aggressively lobbied for the last three sessions that would have eliminated even this meager control. Instead, it would have obfuscated the need for a landowner experiencing a problem to obtain any permit to take a beaver, nuisance or not, provided the landowner resided in a specially designated beaver nuisance zone of the state. The bill also would have legalized the snare trap for underwater use on beaver. Although some limited parts of the state were experiencing flooding problems associated with beaver dams, overall, DEC reported beaver nuisance complaints were consistently and markedly down over the last few years. In addition, inexpensive non-lethal alternatives, such as water-leveling devices and culverts, that have met with great success in Maine and other New England states, did not seem to be seriously considered by DEC. One cannot help but wonder whether the recent increase in beaver pelt prices, and the current moratorium on the European ban to import fur caught with the leghold trap, may have something to do with the continued efforts to pass the beaver legislation.

Another particularly interesting DEC program is the stocking and shooting of pheasants. These birds, which are non-indigenous to New York State, are captively bred and raised by people who hold a domestic game bird permit issued by DEC. Owners or lessees of enclosed lands can obtain a shooting preserve license from DEC to conduct commercial hunts for those people who wish to flush out and shoot these tame birds.

Other evidence of state programs to promote and expand hunting and trapping can be seen in recently enacted legislation that allows hunting on Sundays in the Southern tier of New York, the lowered hunting age from fourteen years old to twelve years old, the creation of a new harassment statute for unlawfully interfering with lawful hunting and trapping, and the attempted repeal of the current prohibition on the use of bait or hounds to hunt bear.

### Deficiencies in the Legislative Procedure

To fully understand and appreciate how and why laws pertaining to wildlife are enacted, and why they are not necessarily in the best interest of the species, one must look to the deficiencies in the legislative process. Unlike legislation that may have potential fiscal implications to the state, and must be set forth as such in the justification statement of the bill sponsor's memorandum of support, legislation pertaining to wildlife is not subject to any analysis for its potential environmental impact until after it becomes law. In fact, legislation is specifically exempted under the regulations of the New York State Environmental Quality Review Act, better known as SEQRA.<sup>17</sup> This is just the opposite of proposed actions by agencies outside of DEC whose plan may have a substantial impact on the environment and generally must comply with the requirements of SEQRA prior to such program going forward. Legislation affecting wildlife is not reviewed pursuant to SEQRA until it becomes law and DEC is mandated to promulgate regulations to implement it. However, the newly enacted environmental conservation law which directly affects a species, may have just as much, if not more, of an impact on the species' population and survival as a proposed action by the Department of Transportation (DOT).

An example of this can be seen with legislation introduced in 1992 that has greatly expanded bear hunting in New York State. The 1992 bill would have repealed the prohibition on the use of bait and hounds to hunt bear and the

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17. State Environmental Quality Review Act, N.Y. Env'tl. Conserv. Law §§ 8-0101-0117 (McKinney 1997).

taking of cubs less than one year old, and it would have allowed the issuance of unlimited permits to hunt bear and permit the trade in bear parts. Although the bill was amended and passed in 1993 without the provision strictly allowing for baiting and hounding and the taking of cubs that appear under one year of age, as enacted it directed DEC to “fix by regulation the possession and disposition of bear parts, the intentional and incidental feeding of bear, and the manner of taking bear.”<sup>18</sup> Based on this broad mandate, DEC promulgated regulations that now allow the sale of bear parts with little oversight by DEC, the training of dogs to track bear, and the tracking of nuisance bear by dogs. Although, technically, the dogs are not allowed to tree a bear for a hunter to shoot, also known as “hound hunting,” in practice there is a very little difference on the effect trained tracking dogs will have on the bear.

Upon issuing its proposed regulation, DEC cited its compliance with SEQRA pursuant to its generic environmental impact statement entitled “Wildlife Game Species Management Program.” This generic impact statement, which was issued back in 1980, was based on studies conducted in the late 1970s. To my knowledge it has not been updated, although under section 3-0303 of the ECL, DEC is required to periodically revise a “statewide environmental plan for the management and protection of the quality of the environment and the natural resources of the state and its habitat.”<sup>19</sup> Certainly, the populations of species and their habitat have changed since then. One cannot help but question the basis upon which DEC can rely on this report to justify implementing any management program, such as the expanded bear hunting program, that will have such a substantial impact on the species.

### Promising Legislative Efforts and Reforms

Legislation to preserve the species and foster the non-consumptive enjoyment of wildlife is certainly in abundance

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18. N.Y. Evtl. Conserv. Law § 11-0903 (McKinney Supp. 1997).

19. *See id.* § 3-0303

on both the state and federal levels, and receives widespread public support. Recent examples of this in Congress are the "Captive Exotic Animal Protection Act,"<sup>20</sup> which would prohibit the interstate or foreign commerce in tame, exotic mammals for the purpose of killing or injuring the animal for entertainment or the collection of a trophy, also known as "canned hunts," and the "Bear Protection Act,"<sup>21</sup> which would ban all interstate and foreign commerce in these traps and in the furs from animals caught in them. Comparable measures are pending in the New York State Legislature and state legislatures across the country.

Many of these bills are strongly supported by the public, yet either fail to pass both houses to become law, or become so watered down as to be of questionable effectiveness. Unfortunately, this is a testament to the clout of the still powerful and financially resourceful hunting and trapping lobby, and the conservation agencies that are greatly influenced by them. It is because of these political impediments that ensue during the legislative process, that citizen initiatives have been launched recently in many states, and with great success. In bypassing the legislative process, issues affecting wildlife are presented directly to the people to decide, and the people have spoken loud and clear. Last year in Massachusetts sixty four percent of the people voted to prohibit bear baiting and hound hunting, and to ban the leghold trap. Fifty two percent of the people in Arizona took the lead in 1994 to ban trapping on public lands. Colorado followed by a fifty two percent margin with a similar ban in 1996 by amending its state constitution. The people of Oregon, also in 1994, widely supported Measure 18 that banned bear baiting and hounding, and despite subsequent attempts by the hunting lobby, Oregonians defended the ban by defeating a 1996 measure to overturn it. Again in 1996, Washington State, through its initiative, prohibited the use of baiting and hounding to hunt bear, bobcat and cougar. Finally, California celebrated two victories, that would not have been possible to achieve

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20. H.R. 1202, 105th Cong. (1996).

21. H.R. 618, 105th Cong. (1996).

through the legislative process, by prohibiting in 1990 the trophy hunting of mountain lions, and again preserving this ban last year, by defeating Proposition 197.

Unfortunately, the initiative process is primarily restricted to western states. However, it is a tool that clearly allows for the establishment of wildlife policies and practices, which accurately reflects the majority of the people in those states. Although the initiative process is not available in New York State, it is important to note that less than one percent of New York State residents are licensed hunters and trappers. Consistent with this figure, the majority of New Yorkers support many beneficial conservation projects through the Return a Gift to Wildlife program. This program, which is funded with hundreds of thousands of state income tax return dollars, makes possible projects, such as the New York Heritage program which collects and provides information on rare and endangered species to protect the state's biological diversity, the Marine Mammal and Sea Turtle Stranding Network, which helps save and rehabilitate injured or stressed whales, seals, dolphins, and sea turtles, the Long Island Endangered Species Management project and others.

Further evidence of the tremendous public support by a majority of the American people for the non-consumptive enjoyment of wildlife and our natural resources, can be seen in the increasing numbers of visitors to our state and national parks, and their willingness to pay user fees to maintain them. For example, in 1996, the Forest Service recorded 829 million visits to 191 million acres run by the agency. This represents an all time high. The Forest Service expects to take in thirteen million dollars in user fees by the end of this year. According to Interior Secretary Bruce Babbitt, "Overall, the whole (user fee) experiment is a home run. It has exceeded our best expectations."<sup>22</sup>

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22. Timothy Egan, *Adapting to Fees for Enjoying Public Lands*, N.Y. TIMES, Aug. 21, 1997, at A1.

### Conclusion

Vehicles, like the Return a Gift to Wildlife, ballot initiatives and user fees, are just some of the ways to establish and promote wildlife policies and programs that reflect the majority vote on these issues. Certainly, they and others like them, can, and should be developed and enhanced. However, if we are to continue in this direction and prevent destructive wildlife measures from continuing to be pursued, it is imperative that fundamental changes be made in both the way laws are enacted and policies formulated.

To this end, the funding basis for state and federal programs must change. Rather than be predominantly funded by hunting and trapping licenses, user fees and other non-consumptive generating revenue needs to be developed. In conjunction with this, and partly because of it, more representation by environmental and wildlife advocates in state agencies like DEC, and on conservation advisory boards, like the Conservation Fund Advisory Board, must occur.

The introduction of natural predators back into the state will also vitiate DEC's argument justifying the need for hunting to keep wildlife populations in proper ecological balance. You will undoubtedly hear more about this today with the proposed re-introduction of the wolf.

Finally, procedural changes must be implemented in how legislation affecting wildlife and habitat are considered in the legislature. In this regard, this committee has drafted legislation, which we hope to have introduced in Albany during the 1998 session, which would establish an office of the Wildlife Advocate. Through the Wildlife Advocate, pertinent legislation will contain a preliminary assessment of how it could affect the targeted species, their population, habitat, and the overall ecological balance. In this way, our legislators who presumably represent the interests of their constituents can make informed, sensible decisions. It is through these innovative measures and initiatives that we can see a more humane and respectful preservation of our wildlife and the environment, which has been entrusted to us.