

## **PUBLIC INPUT RESPONSE FOR PROPOSED RULE AMENDMENT ON 10 APP. V.S.A. § 2. REPORT, BIG GAME**

***The Board and the Department have the following response to comments expressing concern that the rule is too broad, too vague and constitutes an impermissible delegation of authority to the Commissioner.***

- The proposed rule amendment does not change the requirement that big game hunters report the successful harvest of big game within 48 hours. The proposed rule amends the provision that a turkey and deer carcass must be displayed to a game warden, an official reporting station or another designated person; and instead permits the Commissioner to allow electronic reporting and exhibition, as well as to require or waive in-person exhibition of turkey and deer carcasses unless requested by a warden.
- During an emergency, the proposed rule also allows the Commissioner to authorize any person who harvests bear and moose to report and exhibit the carcass in the manner required by the Commissioner. The common meaning of emergency is “a serious, unexpected, and dangerous situation requiring immediate action.” That is what is contemplated by this rule. A global pandemic that poses a threat to public health is an emergency.
- The rule still requires reporting within 48 hours however, under the rule, the Commissioner has the discretion to determine the manner of reporting. This rule only changes the potential mechanism for reporting and exhibition of a turkey and deer game carcass, and the mechanism for reporting and exhibition of a bear and moose carcass during an emergency.
- Note that the proposed reporting rule has no effect on the tagging requirements of big game or the provisions of the Board rules that require biological collection. For example, robust biological collection is still required by the Board rules as follows:
  - 10 App. V.S.A. § 7 subsection 9.1 of the Bear Management Rule requires the submission of a premolar bear tooth.
  - 10 App. V.S.A. § 33 subsection 14.4 of the Moose Management Rule requires the submission of both complete central incisors. In addition subsection 14.5 requires that the hunter bring the following to a biological check station: (a) The lower jaw, including incisors, one of which shall be taken for aging purposes; (b) The intact antler rack on an antlered moose; (c) The portion of the skull on a male antlerless moose where antlers would be attached; (d) The female reproductive tract including both of the ovaries; (e) The udder; and (f) All edible portions of the moose not including organs.

Here, the Board is not relinquishing its rule making authority or delegating that authority to the Commissioner. The proposed amended rule does not allow the Commissioner to decide whether to require reporting or biological collection. The rule only gives the Commissioner the authority to determine the means of reporting and the exhibition of the big game carcass. Part 4 of Title 10 sets forth rulemaking authority for the Board and, management and administration authorities for the

Commissioner. 10 V.S.A. Chapter 103. The proposed rule is entirely consistent with the statutory scheme and does not constitute sub delegation.

Even if the rule is interpreted as a delegation of Board authority, there is caselaw to support subdelegation. The Vermont Supreme Court has held that the delegation of authority to issue a permit, by the Secretary of the Agency of Natural Resources to the Commissioner of the Department of Environmental Conservation is not an impermissible delegation of authority and is entirely appropriate. *In re Vermont Marble Company*, 162 Vt 355 (1994); see also *Secretary, Vermont ANR v. Henry*, 161 Vt. 556 (1994). An Agency has the power to subdelegate specific authority when it is necessary and consistent with overall legislative intent, even if power involves the exercise of discretion. *Vermont Marble*, at 360-364. Title 3 V.S.A. § 214 states that an agency or board may delegate its “authority, power or duty other than a specific statutory authority . . . except those necessary to its rulemaking and quasi-judicial functions.”

The Court recognized an implied power to “subdelegate” and specifically finds that the exercise of discretion is permissible when necessary, provided that the delegation conforms with legislative intent and is not essential to “rulemaking and quasi-judicial functions.” The court looks to whether there is specific statutory authority to delegate and if not, whether the authority to subdelegate is implied and is consistent with the functions of the agency or board and the nature of the delegated responsibility as related to that function. *Id* at 364-365. There is no explicit delegation directive or prohibition in Title 10 Part 4, and the legislature has been inconsistent with respect to subdelegation mandates for the Agency of Natural Resources. This fact supports implied delegation here. *Id*.

Here, as noted by the Court, the most important factors are the functions of the Board and the Commissioner. *Id* at 363. In accordance with Title 10 Part 4, the 14 member voluntary Board is appointed by the Governor and has the authority to promulgate rules for “the regulation of fish and wild game and the taking thereof.” 10 V.S.A. §§ 4041(b), 4082(a) and 4084. “The rules shall be designed to maintain the best health, population, and utilization levels of the regulated species and of other necessary or desirable species which are ecologically related” and “shall be supported by investigation and research conducted by the Department on behalf of the Board.” V.S.A. § 4082(a). In addition, Part 10 states that fish and wildlife are public trust resources and that the “Commissioner of Fish and Wildlife shall manage and regulate the fish and wildlife of Vermont in accordance with the requirements of this part and the rules of the Fish and Wildlife Board.” 10 V.S.A. § 4081. The primary function of the board is to promulgate rules that regulate fishing, hunting, and trapping. The functions of the Commissioner are to administer and manage fish and wildlife and the operation of the Department. Again, the Board is not delegating its authority to make rules to the Commissioner in this proposed rule.

The Courts will also look to the “nature and degree of the need to delegate functions.” *Id*. at 363. The Vermont Supreme Court noted in the *Vermont Marble Company* decision that mandating “the Secretary to decide whether to issue specific permits, and what conditions to impose on those permits,” would significantly overburden the Secretary and interfere with his or her core functions. *Id*. citing *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122–23, 67 S.Ct. 1129, 1135, 91 L.Ed. 1375 (1947); *Fremont RE–1 School Dist. v. Jacobs*, 737 P.2d 816, 819 (Colo.1987). The Board consists of 14 members meets approximately once a month, and conducts additional public hearings as needed with the assistance of the Department. The Board clearly has no capacity to manage, administer and enforce reporting requirements. Furthermore, the authority to administer and manage fish and wildlife, and

direct the operations of the Department is the responsibility of the Commissioner. As such, there is a compelling need for the Commissioner to administer the means and methods of reporting and the exhibition of the carcass particularly in emergency situations such as the COVID-19 pandemic.

The Court has also noted that the identity of the person who exercises the sub delegation is also a factor. *Id.* at 364-365. The court has deemed that a subdelegation is appropriate to a Commissioner, who serves at the pleasure of the Secretary and is appointed with the approval of the Governor and the advice and consent of the Senate. *Id.*

Finally, the Courts look to whether the delegation is “ad hoc” and is accomplished without any formal process or standards to guide the scope or details of the delegation. *Id.* at 365. Here the scope of the delegation in this case is very narrow and only relates to the manner and means of reporting within 48 hours and to the display of a carcass. The court has specifically found that subdelegation by rule is permissible and this is exactly what the Board is seeking to accomplish with this rule. *Id.*

***The Board and the Department have the following response to comments expressing concern that electronic reporting and the waiver of carcass exhibition will affect the validity of harvest data and increase noncompliance.***

In other jurisdictions where online reporting or other alternatives to in-person reporting have been adopted, similar concerns about non-compliance and data quality have been expressed. After years of experience with these alternative reporting techniques, evidence of increased non-compliance or diminished data quality has not been observed by these jurisdictions, demonstrating that these concerns are unfounded. In fact, results from a 2017 Northeast Upland Game Bird Technical Committee survey of regional biologists indicated that reporting rates may have actually increased as a result of adopting such alternative reporting options and no significant declines in data quality were observed. At the time of this survey, Connecticut, Maryland, Massachusetts, New York, Pennsylvania and Virginia all allowed online reporting of big game and all survey respondents from these states expressed satisfaction with and confidence in the data these alternative harvest reporting systems provided.

Assuming the proposed big game reporting requirement rule is implemented, the Department is committed to monitoring the quality and accuracy of the harvest data it collects using these reporting alternatives through the future. In this manner, the Department can draw upon decades of previous experience and compiled data to assess these datasets and identify any potential data quality concerns resulting from erroneous data entry and/or non-compliance with reporting requirements. For example, a comparison of the daily harvest totals for the 2020 spring turkey season, during which all harvest data were collected via online reporting, to the average daily harvest totals for the previous five-year period (Figure 1) reveals daily harvest trends for this past spring season which reflect the normal distribution indicating accurate and complete harvest reporting. Furthermore, the data entry controls afforded by these well-developed, sophisticated online reporting tools allows us to minimize the potential for inadvertent data entry mistakes that are inherent with all data collection processes. Data controls such as value lookups, dropdown lists, validations, and range of value limitations can all be integrated into the data entry form to ensure data integrity. From limiting the Wildlife Management Units to the correct choices for the selected town of harvest to providing a drop down list of date choices for a particular hunting season, the use of this technology to collect harvest data in this way both increases hunter convenience and safeguards data integrity.

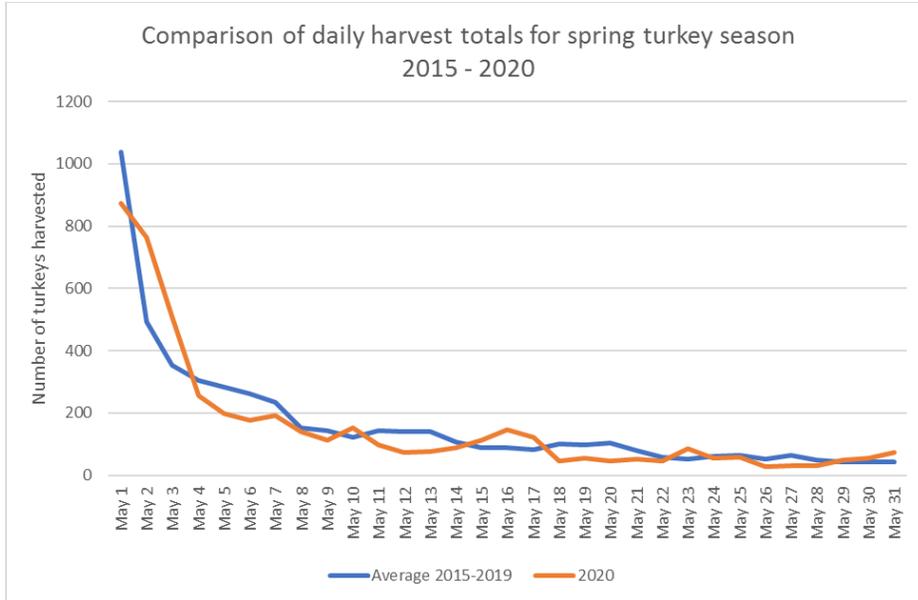


Figure 1. A comparison of the 2020 spring turkey season daily harvest totals to the average daily harvest totals for the previous five years.

With respect to hunter compliance with harvest reporting requirements, it is important to note that the Department employs 36 specially trained and skilled Game Wardens who are highly motivated to safeguard the integrity of our data collection processes, to maintain high public regard for hunters and hunting by curtailing miscreant behavior, and to protect and conserve our shared wildlife resources. While we recognize that the vast majority of hunters share these motivations and will continue to report their harvest with due diligence, there will always be a few who will not and it is these few who become the unenviable focus of our wardens. Indeed, it is these few who have always been the focus of our wardens as they have been just as unlikely to report their harvest in-person to a check station as we would expect them to be with online reporting. Beyond the fact that the increased conveniences gained through online harvest reporting are expected to actually improve reporting rates (i.e. reduce non-compliance), online reporting will also benefit wardens in their efforts to detect and root out criminal behavior by providing readily accessible, real-time data upon which to build their cases and act in a timely fashion.