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I. Introduction

Consistently, courts in the United States have held that the sovereign states hold wildlife in trust for the benefit of all the people.[1] The legislatures, responding to a public concern that uncontrolled hunting was threatening the survival of indigenous species, invoked the states' police powers to enact restrictions on when, where, and to what extent an individual may legally kill wildlife.[2]

Over the years, however, the state agencies responsible for wildlife management adopted a narrow perspective, disproportionately reflecting the views of the small minority of the population which still benefits from wildlife by hunting and trapping it for recreation.[3] Thus, a major goal of state wildlife agencies has been to "manage" wildlife by increasing the population levels of so-called "game" animals for hunting and trapping. This has resulted in ecological imbalances as

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1. *See infra* text accompanying notes 8-16. For a full discussion of wildlife law, see generally M. Bean, The Evolution of National Wildlife Law (1983); T. Lund, American Wildlife Law (1980); Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 Envtl. L. 241 (1979).

2. J. Trefethen, An American Crusade for Wildlife 69-75 (1975).

3. *See infra* text beginning with note 30 for a discussion of the N.Y. Department of Environmental Conservation (DEC), Div. of Fish and Wildlife, Bureau of Wildlife, as an example of an agency reflecting the hunting and trapping minority's views.

well as disproportionate fiscal investment in this facet of wildlife planning and activity.[4] This narrow focus has developed because of several complex factors including state and federal laws which provide irresistible financial incentives to increase the consumption of wildlife.[5] This, in turn, results in inappropriately manipulated ecosystems with artificially high populations of some animals sustained for the benefit of the hunters and trappers, to the detriment of other wildlife and the environment in general.[6]

New York State, where hunters and trappers killed approximately 3.7 million wild animals last year, will be used as a concrete example of this problem.[7] After examining specific wildlife management dynamics within New York, the article concludes with a number of proposals designed to get the state out of the business of promoting the killing of wildlife. The proposals would require the state to implement mechanisms more reflective of modern day concerns for the protection of both wildlife and the environment in general.

II. Development of Ownership by All the People

A. *Invoking the Police Power to Control the Killing of Wildlife*

Since the Middle Ages, English royalty and the aristocracy had appropriated to themselves the right to shoot game, making it a crime for the unlanded classes to carry firearms, and incidentally protecting themselves against those among the unlanded with more than wild animals on their minds.[8] The American colonials, rebelling against class-based privilege, transformed the concept of fish and game ownership by

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4. *Id.*

5. *See infra* text accompanying notes 34-38 for a discussion of the Federal Aid in Wildlife Restoration Act, 16 U.S.C. §§ 669-669i (1982 & Supp. III 1985) and N.Y. State Fin. Law § 83 (McKinney 1974 & Supp. 1987).

6. *See infra* text Section III for a discussion of New York State's programs.

7. *See infra* text accompanying notes 52-56 for an explanation of how the number of animals killed was calculated.

8. T. Lund, *supra* note 1, at 5-7.

the sovereign king to ownership by the sovereign people.[9] Ultimately, this resulted in year-round and virtually unrestricted pursuit of the continent's wild animals for sport, and particularly, for profit on the open market.[10]

By the late 19th century, a bitter schism had developed between sport hunters and market hunters (the former fearing the long term effects upon their sport of the unchecked killing) which inspired a nationwide campaign for what came to be known as conservation laws.[11]

In an 1894 case, *Lawton v. Steele*,[12] a New York statute for the appointment of fish and game protectors[13] was challenged on constitutional grounds. The Supreme Court confirmed that the police power of the state includes the right to contain the "unrestrained exercise" of the destruction of wildlife: "[I]t is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game. . . . The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question."[14]

In addition, the doctrine of ownership of wildlife by all the people was eloquently articulated in the 1896 landmark ruling of *Geer v. Connecticut*,[15] upholding a Connecticut statute prohibiting the possession of game birds with intent to remove them from the state. Tracing in meticulous detail the status of wild animals throughout history, the Court stated:

> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for

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9. *Id.* at 24-27.

10. J. Trefethen, *supra* note 2, at 69-75.

11. *Id.*, and T. Lund, *supra* note 1, at 60-64, 101-105.

12. 152 U.S. 133 (1894).

13. Act for the Appointment of Game and Fish Protectors, 1880 N.Y. Laws ch. 591 *amended by* 1883 N.Y. Laws ch. 317.

14. *Lawton*, 152 U.S. at 139.

15. 161 U.S. 519 (1896).

> the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this Court in *Martin v. Waddell*, 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the State, is thus stated in a well considered opinion of the Supreme Court of California: "The wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good."[16]

The New York State Legislature as early as 1705 enacted a provision prescribing seasons for the hunting of deer.[17] A long series of subsequent conservation enactments have ensued.[18]

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16. *Id.* at 529, *citing* Ex Parte Maier, 103 Cal. 476, 483, 37 P. 402, 404 (1894). The Court also cites a Minnesota case, State v. Rodman, 58 Minn. 393, 59 N.W. 1098 (1894), which held that "the correct doctrine in this country [is] that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common." *Id.* at 400, 59 N.W. at 1099. Subsequent cases have modified the state ownership doctrine when a state has been faced with a competing sovereign interest, such as that of a foreign country as expressed in a treaty, Missouri v. Holland, 252 U.S. 416 (1920); a pre-emptive federal provision, Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977); or an obstruction to commerce among the states, Hughes v. Oklahoma, 441 U.S. 322 (1978). In the absence of these, however, there are no rulings which have eroded the concept that wildlife belongs to the people.

17. An Act for the Preservation of Deer, 1 Colonial Laws 585 (1664-1719).

18. These include the Act of April 3, 1849, 1849 N.Y. Laws ch. 194, § 13 and the Act of April 15, 1886, 1886 N.Y. Laws ch. 141 prohibiting the taking of fish; Act of April 26, 1871, 1871 N.Y. Laws ch. 721 amending and consolidating a series of acts on the preservation of moose, wild deer, birds and fish; The Game Law, 1892 N.Y. Laws ch. 488; the Fisheries, Game and Forest Law, 1895 N.Y. Laws ch. 395; the Forest, Fish and Game Law, 1900 N.Y. Laws ch. 20 amended in 1902 and again in 1904; the Conservation Law, 1911 N.Y. Laws ch 647; and the Environmental Conservation Law, 1972 N.Y. Laws ch. 664.

Writing in 1875 about an 1871 statute on the preservation of game,[19] the court of appeals held that the legislature could pass many laws which might impair and even destroy the rights of property since "private interests must yield to the public advantage."[20] It further held that all legislative powers not restrained by express or implied provisions of the Constitution could be exercised. The court observed that the protection and preservation of game had been secured by law in all civilized countries and could be justified on many grounds.[21]

Similarly in 1917, the court held with respect to a statute prohibiting the hunting or trapping of the then nearly decimated beaver:

> [T]he general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed. . . . The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved, not for its use, but for its beauty.[22]

B. *Current Statutory Provisions*

Much of the substance of New York's current body of fish

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19. Act of April 26, 1871, 1871 N.Y. Laws ch. 721.

20. Phelps v. Racey, 60 N.Y. 10, 14 (1875).

21. *Id.*

22. Barrett v. State, 220 N.Y. 423, 427-28, 116 N.E. 99, 100-101 (1917). *See also* People v. Bootman, 180 N.Y. 1, 8, 72 N.E. 505, 507 (1904), upholding the Forest, Fish and Game Law of 1900, 1900 N.Y. Laws ch. 20 (stating that "[t]he game and the fish within the boundaries of the state belong to the people in their unorganized capacity."); In Re Delaware River at Stilesville, 131 A.D. 403, 412, 115 N.Y.S. 745, 751 (1909) (stating that "the general right and ownership of [wild game] . . . is in the people of the State.").

and wildlife law was enacted in 1911.[23] The Conservation Law itself was periodically revised throughout the next sixty years and in 1970, was recodified as the Environmental Conservation Law (ECL) and further recodified in 1972.[24] In 1972, the ECL declared it was the policy of the state to "conserve, improve and protect its natural resources and environment and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being."[25] The ECL has been further amended; however, a considerable portion of the 1911 Fish and Wildlife law is still in effect.

ECL § 11-0105 is New York's current provision placing fish and wildlife under the state's control. It declares: "[t]he State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership."[26]

As an example of how the police power is translated into current statutory law, it is instructive to examine the specificity with which the New York State Legislature has set forth restrictions on the killing of deer and bears, the so-called "big game." The legislature has divided the state into eight areas, and in tabular form the statute identifies the days on which the hunting seasons open and close, permissible weapons (generally rifle, pistol, shotgun, or long bow) and bag limits — the number of animals which may be killed (generally one deer and one bear in a license year).[27]

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23. The Conservation Law, 1911 N.Y. Laws ch. 647, art. V. The law with respect to fish in public waters is analogous to that of wildlife, but goes beyond the scope of this article. Generally, fish and wildlife are only treated as a single entity when case law and documentary material discussed herein do not distinguish between the two groups.

24. N.Y. Envtl. Conserv. Law, 1970 N.Y. Laws ch. 140. This act establishes a state policy for the protection of the environment, and enacts a consolidated law creating a department of environmental conservation, a state environmental board, and a council of environmental advisers. The Environmental Conservation Law (ECL) was revised again in 1972, 1972 N.Y. Laws ch. 664, for the purpose of including all the statutory law which had been transferred to the Department of Environmental Conservation by the laws of 1970.

25. N.Y. Envtl. Conserv. Law § 1-0101(1) (McKinney 1984).

26. N.Y. Envtl. Conserv. Law § 11-0105 (McKinney 1984).

27. N.Y. Envtl. Conserv. Law § 11-0907 (McKinney 1984 & Supp. 1987). Certain

The New York State Legislature has delegated to it's Department of Environmental Conservation (DEC or the Department) responsibility for establishing "by order" the open seasons and bag limits for some birds and small game animals including raccoons, wild turkeys, hares, bobcats, lynx, coyotes, foxes, opossums and weasels.[28] Statutes also permit DEC to set seasons by departmental orders for the trapping of small game animals, to set bag limits, if any, and methods of killing.[29]

III. Purposes and Goals of the State Agencies

A. *Hunting: Policy to Increase Hunting through Game Management*

The term "conservation" as commonly used by the wildlife agencies was not developed, nor is it currently used, to mean the protection of individual wild animals for their intrinsic worth.[30] To the Department, conservation is the practice of attempting to insure in perpetuity a sufficient supply of

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exceptions are allowed by statute such as the hunting of antlerless deer or a second deer of either sex pursuant to special permit. *Id.* § 11-0907(1)(a).

28. N.Y. Envtl. Conserv. Law § 11-0905 (McKinney 1984).

29. N.Y. Envtl. Conserv. Law § 11-1103 (McKinney 1984). N.Y. Comp. Codes R. & Regs. tit. 6, § 2.20 (hunting small mammals), § 2.25 (hunting upland game birds), § 2.30 (hunting migratory game birds), § 6.11 (on trapping) (1986).

30. *See* Dep't Envtl. Conservation, Final Programmatic Impact Statement on Wildlife Game Species Management Program (1980) [hereinafter Game Management Impact Statement]:

> In the context of game population biology, man's role as a resource manager and *conservationist* is to enhance . . . features of a population's growth pattern which insure the continued success of the species and at the same time provide a maximum of sport hunting or other type of harvest for human benefit (Richmond 1973), while protecting the species' habitat and avoiding conflicts with other resource management. (emphasis added).

Id. at 45.

> Studies of population numbers coupled with life history information that will allow predictions of rates of increase are extremely important to wildlife biologists and managers. It is the population's welfare and the production of surplus individuals that managers key upon for making management and harvest decisions. In this regard individual animals are of lesser importance unless they can be studied to provide information about their group as a whole.

Id. at 41.

game for those wishing to hunt and trap it, while at the same time attempting to keep the total population of a species from dropping below a given size.[31] "Game management" is a term for the techniques traditionally employed by government wildlife agencies for the conservation of game animals which are, by definition, the quarry of recreational hunters and trappers.[32] The Department claims to calculate the length of hunting seasons and bag limits through the "science and art" of game management.[33]

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31. *Id.* at 41, 45.

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> [T]he wildlife game species management program activities of the Bureau of Wildlife Division of Fish and Wildlife, New York State Department of Environmental Conservation . . . include[] the interpretation and adjustment of the characteristics of selected wildlife populations, and the regulation of people's actions, to achieve specific goals and objectives for the recreational, aesthetic, scientific and commercial uses of wildlife resources.

Id. at S-1.

33.

> The science and art of wildlife management . . . have an influence on three factors which affect the population cycle. . . . Environmental resistance [predation, food scarcity, weather, disease, competition] . . . can be manipulated to some degree to reduce the effects of impinging factors. Food and cover enhancement and reduction of competition are often attainable goals of the resource manager. The predictable results of such management are an enhanced population growth rate and a level of productivity that allows for a larger surplus of individuals that can be harvested prior to the normal seasonal decline. Another key area of concern to the manager is protection or improvement of the habitat that will result in either increased carrying capacity [the limit to population growth imposed by the habitat] . . . or harvestable surplus . . . or both.

Id. at 44 (emphasis omitted).

"Harvesting" is the term used by game management personnel for the word "killing." This has prompted at least one court to write, "[a]lthough the defendants use the word 'harvest' to describe the taking of bobcat, we use the more candid term 'killing.'" Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth., 659 F.2d 168, 172 n.3 (D.C. Cir. 1981) *cert. denied* 454 U.S. 963 (1981). Fish and wildlife jargon is replete with similar euphemisms. Wildlife jargon uses "enjoyed" and "utilized" rather than "hunted" and "trapped." Similarly, "using wildlife for recreation" means hunting and trapping it. Indeed, animals are rarely referred to as animals, but as "wildlife resources," "renewable resources" or "the resource." Game Management Impact Statement, *supra* note 30, at 18, 35-38. Animals trapped for their fur are routinely "the furbearers" or the "furbearer resource." *See* Dep't of Envtl. Conservation, Trapping in New York: Some Questions Answered at (unnumbered) 5 (Jan. 13, 1984) (position paper). Available from Department of Environmental Conservation, Wildlife Bureau, Game Farm Rd., Delmar, NY 12054.

Prompted by federal and state laws which contain compelling financial incentives to increase the number of hunters and trappers, over the years state wildlife agencies have developed a commitment to increase the number of game animals available for hunting. In 1937, Congress enacted the Federal Aid in Wildlife Restoration Act, generally called the Pittman-Robertson Act[34] after its initial sponsors. The Act's purpose is to assure some regularity of funding for state wildlife programs.[35]

The Pittman-Robertson Act created a fund raised through excise taxes on the sale of firearms, shells, cartridges, and bows and arrows that is allocated among the states. Allocation is conditioned upon enactment by the states of provisions that require hunting license revenues to be used only for fish and wildlife programs:

> [N]o money apportioned under this chapter to any State shall be expended therein until its legislature, or other State agency authorized by the State constitution to make laws governing the conservation of wildlife . . . shall include a prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said State fish and game department.[36]

Apparently, the Act's financial incentives were sufficient to subordinate the states' interest in deciding for themselves how to allocate license revenues, as every state has enacted such a provision.[37]

The Pittman-Robertson Act further provides that upon application for funding of wildlife projects, the federal government can award grants up to seventy-five percent of the total state costs of each project with a ceiling imposed by a calculation of the following: one-half of total Pittman-Robertson

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34. 16 U.S.C. §§ 669-669i (1982 & Supp. III 1985).

35. *See* M. Bean, *supra* note 1, at 217. An analogous enactment with respect to fish, the Federal Aid in Fish Restoration Act, is codified at 16 U.S.C. §§ 777-777k (1982 & Supp. III 1985) and is commonly referred to as the Dingell-Johnson Act.

36. 16 U.S.C. § 669 (1982).

37. M. Bean, *supra* note 1, at 218.

funds in a proportion based on the geographical area of each state, and a proportion of the other half of the funds based on the number of a state's hunting license holders, compared to their number in every other state.[38] Thus, state wildlife agencies are in competition with each other for federal funds, and the only way in which a state can raise the ceiling on its potential federal funding is to increase the number of people it licenses to hunt. The agencies have a dual financial incentive for increasing hunting: a chance for more Pittman-Robertson funds, and their statutory right to all state hunting license revenues as required by the Act. These incentives, in turn, provide further incentives to increase the number of animals available to hunt, and to increase their accessibility to hunters.

In New York, the provisions enacted pursuant to the Pittman-Robertson Act which allocate hunting license revenues to the administration of the fish and game program, are codified at section 83 of the State Finance Law, and amend an earlier statute establishing the "Conservation Fund."[39] As will be shown, it is significant for New York's wildlife and environment in general, that section 83 goes beyond the dictates of

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38. 16 U.S.C. § 669c (1982).

39. N.Y. State Fin. Law § 83 (McKinney 1974 & Supp. 1987). The Conservation Fund includes all money received by the DEC from the sale of licenses for hunting, trapping, and for fishing; all money received from penalties and fines under articles eleven and thirteen of the Environmental Conservation Law (ECL) and from the operation of real property under the jurisdiction of the Division of Fish and Wildlife. The Fund also includes all other moneys arising out of the application of any provisions of articles eleven and thirteen of the ECL.

> These moneys . . . shall be available to the . . . [DEC] for the care, management, protection and enlargement of the fish, game and shellfish resources of the state and for the promotion of public fishing and shooting. In the accomplishment of these objects the moneys . . . shall be devoted to the . . . acquisition of lands, lands under water, waters, or rights therein as required . . . and to all other proper expenses of the [DEC] in the administration and enforcement of the provisions of articles eleven and thirteen of the . . . [ECL].

Id. § 83(a)(i).

An earlier provision, enacted in 1925 had added the requirement that half of all money from the sale of state hunting, trapping, or fishing licenses was to be used only to establish and maintain a statewide system of fish and game refuges, to promote public fishing and shooting and to demonstrate forest management. 1925 N.Y. Laws ch. 592.

Pittman-Robertson. Section 83 requires that trapping, as well as hunting license fees, be allocated to the fund. It permits an enlargement of the game resources of the state, and requires the promotion of "public shooting" (hunting).[40]

New York's fish and wildlife program is administered by the Fish and Wildlife Division of DEC. Situated within the Division of Fish and Wildlife is the Bureau of Wildlife which administers the wildlife game species management program.[41]

In fiscal year 1985-86, the fish and wildlife program was funded at more than forty-five million dollars; the federal and state Conservation Fund revenues provided two-thirds of this funding (five and one-half million dollars and over twenty-six million dollars, respectively).[42] It is significant, however, that the final third of the fish and wildlife budget, over thirteen million dollars, comes from state tax revenues raised from the general public.[43] It is important to scrutinize this thirteen million dollars from general tax revenues, because the DEC admits that in 1984-1985 the total amount spent on both nongame animals and the endangered species program (as opposed to expenditures on its game animal programs) was only about $1.3 million.[44] This is only ten percent of the thirteen million dollars in general tax revenues allocated to fish and wildlife programs in 1985-1986. The remaining ninety percent of fish and wildlife funds raised from the general public are applied by the DEC to game management for recreational use and thus benefit only a small minority of New Yorkers, currently less than nine percent (less than 1.46 million license holders out of New York's seventeen million people), who en-

40. *Id.* § 83(a)(1).

41. Game Management Impact Statement, *supra* note 30, at S-1. N.Y. Envtl. Conserv. Law § 3-0107 (McKinney 1984) authorizes the Commissioner of DEC to set up necessary divisions and bureaus within the Department.

42. Conservation Fund Advisory Council 1985-86 Fiscal Report, N.Y.S.'s Fish and Wildlife Program, (1987). Available from Department of Environmental Conservation, 50 Wolf Road, Albany, N.Y. 12233.

43. *Id.*

44. Fiscal Summary of New York State Dep't of Envtl. Conservation, Fiscal Year 1984-85, 19. Available from Department of Environmental Conservation, 50 Wolf Road, Albany, N.Y. 12233. Figures for 1985-86 were not available at time of publication.

gage in these activities.[45]

Conversely, the ninety-one percent of the public in whose name wildlife is held have only ten percent of their general fish and wildlife tax dollars applied to protect the remaining non-game and endangered species portion of the state's wildlife. Still unexplored is the possibility that in addition to not engaging in hunting and trapping, a healthy portion of that ninety-one percent does not want such activity permitted regardless of how it is funded, and, instead, wants its wildlife tax dollars applied to protect the lives of game animals as well. In either case, it is clear that the investment of even general wildlife tax dollars is grossly disproportionate to the relatively small number of people who benefit from it. As discussed below, it is unlikely that the injustice will be redressed without an adjustment of the federal and state incentives which have contributed so substantially to the problem.

B. *Hunting: Impression and Reality*

Strongly militating against a public outcry about the yearly wildlife destruction is the DEC's campaign to persuade the public that environmental imperatives, and not mere recreation, necessitate hunting and trapping. The DEC's success in persuading the public is evidenced by the widely held belief that game management for sport hunting and trapping is necessary to reduce wildlife populations to prevent massive death by starvation, and to protect the environment in general. However, it will be shown that, often, it is the Department's "managing" of game animals that has created any overpopulation.

Citing its statutory mandates to manage New York's wildlife and make it accessible to the people of the state,[46]

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45. The U.S. Census Bureau estimated New York State's 1985 population at over 17 million. Bureau of the Census, U.S. Dept. of Commerce, State Population and Household Estimates to 1985, with Age and Components of Change, Series P-25, No. 998 (1985). The 1985-86 Fiscal Report, *supra* note 42, Details of Sporting License Sales, reports 1,452,348 resident sporting licenses sold. As several different types of licenses may be issued to the same person, these figures probably overstate the number of actual consumptive users in the state.

46. Game Management Impact Statement, *supra* note 30, at 4, citing N.Y. Fish

DEC employs three traditional game management techniques, each of which is designed to help it achieve a "surplus" of animals.[47]. These techniques are game species population manipulation, habitat management to increase food and cover for target species, and public use development to open up inaccessible areas of the state for hunting and trapping.[48] Pursuant to requirements of the New York State Environmental Quality Review Act (SEQRA),[49] the Department has devel-

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and Wildlife Law in general, and N.Y. Envtl. Conserv. Law § 11-0303 (McKinney 1984) in particular.

47. *See* Game Management Impact Statement, *supra* note 30, at 44.

48. *Id. See also,* Div. of Fish & Wildlife, N.Y. Dep't of Envtl. Conservation, Final Programmatic Environmental Impact Statement on Habitat Management Activities (1979) [hereinafter Habitat Management Impact Statement], and Div. of Fish & Wildlife, N.Y. Dep't of Envtl. Conservation, Final Programmatic Impact Statement on Public Use Development Activities (1979) [hereinafter Public Use Impact Statement].

49. N.Y. Envtl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1984), enacted in 1975, sets forth its purposes as follows:

> It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

Id. § 8-0101. In his commentaries to this section of the Environmental Conservation Law in McKinney's Statutory Compilation, Professor Weinberg has written:

> The purpose of . . . SEQRA, as Article 8 is universally dubbed, is innocuous as set forth in this section. But the substantive provisions of § 8-0109, requiring state and municipal agencies to prepare environmental impact statements, consider alternatives and mitigate harm, infuse the Act with prodigious strength.

P. Weinberg, *Commentaries*, N.Y. Envtl. Conserv. Law § 8-0109 (McKinney 1984). Section 8-0109 requires an environmental impact statement for *any action which may have a significant effect on the environment* (emphasis added), and reads as follows as in pertinent part:

> Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

Id. at § 8-0109(1). For a discussion of SEQRA and the use of the environmental impact statement in New York, not as a "mere disclosure statement but rather as an aid in an agency's decision making process to evaluate and balance the competing factors," see P. Weinberg, *Commentaries*, N.Y. Envtl. Conserv. Law § 8-0109 (McKinney 1984) citing Town of Henrietta v. Dep't of Envtl. Conservation, 76 A.D.2d 215,

oped environmental impact statements addressing each of these techniques.[50] In these documents, which are not readily accessible to the general public, DEC admits unambiguously that "[t]he predictable results of such management are an enhanced population growth rate and a level of productivity that allows for a larger surplus of individuals that can be harvested. . . ."[51]

The DEC's game management program is extremely effective. In 1986-87 about 3.7 million of New York's wild animals were legally hunted or trapped. This includes the hunting of 783,888 squirrels, 735,855 rabbits, 257,161 raccoons, 118,089 hares, 18,634 foxes, 383,829 ducks, 335,796 ruffed grouse, 159,127 pheasants,[52] 141,149 geese, 37,487 woodcocks, and 5,486 wild turkeys. Another one-half million were reported to have been trapped including 304,313 muskrats, 114,314 raccoons, 43,092 opossums, 27,385 foxes, 23,754 beavers, 15,307 minks, 10,291 skunks, 1,003 fishers, 895 otters; and, hunted and trapped, 1503 coyotes and 199 bobcats.[53] In addition, 178,713 deer (including almost 40,000 fawns)[54] were killed by gun, or bow and arrow, and 747 bears were killed.[55] The Department does not report current figures for woodchucks, weasels, crows, frogs, snipe, rails, gallinules, and quails, which are also legally hunted or trapped. In the late 1970's however, the Department reported that an annual twenty-year average of members of these species killed by hunters totaled an additional approximately 1.09 million

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222, 430 N.Y.S.2d 440, 446 (4th Dep't 1980).

50. Game Management Impact Statement, *supra* note 30; and Public Use Impact Statement and Habitat Management Impact Statement, *supra* note 48.

51. Game Management Impact Statement, *supra* note 30, at 44.

52. The DEC itself produces by artificial propagation 30,000 ringneck pheasants for release as well as 50,000 day-old chicks which are distributed to sportsmen's clubs and 4-H children for rearing and release for hunting opportunity. *Id.* at 13.

53. N.Y. Dep't of Envtl. Conservation, 1986-87 Small Game Hunter Survey. On file a Pace Envtl. Law Rev. office.

54. N.Y. Dep't of Envtl. Conservation News Release [on deer], March 2, 1987 [hereinafter News Release - Deer].

55. N.Y. Dep't of Envtl. Conservation News Release [on bears] March 2, 1987. [hereinafter News Release - Bear]. *See also*, Big Game Unit, N.Y. Dep't of Envtl. Conservation, N.Y. State Black Bear Harvest 1986, at (unnumbered) 4. Available from Wildlife Resources Center, Delmar, N.Y. 12054.

animals.[56]

For an example of how a surplus of animals is created, one can examine the reality behind the widely claimed annual overpopulation "problems" of the white-tail deer as managed by the DEC. The Department reports that during the 1986 hunting season 178,713 deer were killed.[57] This equals almost one quarter of the state's estimated herd of about 725,000 before the opening of hunting season in late fall.[58] According to the Department, 90,719 of these deer were bucks; and its promotional literature claims that about eighty percent of the herd's "legal" bucks are killed each hunting season.[59]

For the following reasons, killing such a large number of bucks just before the winter tends to increase the size of the herd. The increase occurs because the removal of so many animals of either sex lowers the stress on the food supply which then provides proportionately more food over the winter for the remaining deer. When so many bucks are removed, more food is available for the remaining females. As a result, in a herd already disproportionately high in females (the fetal sex ratio is close to one to one with a slightly higher number of males, [60] while DEC's game management has produced a ratio of four legal bucks to every seven or eight adult does),[61] more females survive the winter to produce more fawns in the spring. Since deer are polygamous, a small number of bucks

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56. Game Management Impact Statement, *supra* note 30, at 173.

57. News Release - Deer, *supra* note 54.

58. The Department derives this figure by multiplying by eight the number of legal bucks killed by hunters; last year it was 90,719. Telephone interview with DEC Senior Wildlife Biologist N. Dickenson, March 6, 1987.

59. News Release - Deer, *supra* note 54, and N.Y. Dep't of Envtl. Conservation 1986 Deer Take by County and Town, at (unnumbered) 4). A legal buck is a buck whose antlers are over three inches long. Div. of Fish & Wildlife, N.Y. Dep't of Envtl. Conservation, I Love New York Big Game Hunting (brochure) at 5.

60. The sex ratio of the full herd may change, but without hunting or other severe herd or habitat manipulation, the number of females would not be so disproportionately high. *See* Letter from animal physiologist, Anne Katz, Ph.D., Assoc. Dean College of Natural Sciences & Mathematics, Indiana Univ. of Pennsylvania, Indiana, Pa., to the author, Jolene Marion (Sept. 1, 1987). Letter is on file at Pace Envtl. Law Rev. office.

61. Telephone interview with N. Dickenson, DEC Senior Wildlife Biologist (Jan. 21, 1987).

can fertilize a large number of does. The surviving females, having access to more food, are healthier, so they mature faster and are capable of producing more offspring. Thus, while there will be a reduction in the herd at the end of the hunt, by the following summer the population will be at least as high as it was before the hunt.[62]

Clearly, DEC's game management is not calculated to "solve" an overpopulation problem in any permanent sense of the term. It is solving an immediate purported problem, while insuring an exploded population for the following year.[63]

It is instructive to look at New York's Catskill Mountain bears as another example of how the Department takes deliberate measures to increase a given population of animals. In a 1981 article by DEC wildlife biologists in their technical publication, the *New York Fish and Game Journal*, concern was expressed about the "marked" decrease in the number of bears which had been killed by hunters in the Catskill region from 1950 to 1970. DEC's investigation disclosed that from 1970 to 1975 a "low but stable population of about 300 bears inhabited the Catskill region" and that conflicts with humans were relatively low.[64] Expressing interest in developing a "long range bear management plan to perpetuate the resource, provide for its maximum beneficial use and maintain populations at levels compatible with the public interest,"[65] the DEC studied the animals' habitat, and, in 1976 launched a program designed to increase the number of bears. Ultimately, the De-

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62. *See* Game Management Impact Statement, *supra* note 30, at 42; J. Schmidt & D. Gilbert, Big Game of North America, Ecology and Management 50-54 (1978); Hesselton & Hesselton, *White-tailed Deer*, in Wild Mammals of North America 882-83 (J. Chapman, & G. Feldhamer eds. 1982); Affidavit of J. Kirsch, then Assoc. Prof. of Biology, Harvard Univ., and Assoc. Curator of Mammology Harvard Museum of Comparative Zoology submitted in Committee to Abolish Sport Hunting v. Palisades Interstate Parks Comm'n, 84 A.D.2d 798, 444 N.Y.S.2d 161 (2d Dep't 1981). Affidavit is on file at Pace Envtl. Law Rev. office.

63. It is of particular interest that DEC biologist C.W. Severinghaus, cited in the Game Species Impact Statement, acknowledges that "[w]hite-tailed deer have restricted productivity and survival in New York, with population size generally limited by forage availability." Game Management Impact Statement, *supra* note 30, at 23.

64. Decker, Brown, Hustin, Clark, O'Pezio, *Public Attitudes Toward Black Bears in the Catskills*, 28 N.Y. Fish and Game J. 1, 3 (1981).

65. *Id.* at 2-3.

partment decided to attempt "to stabilize the population at higher levels."[66] DEC reports its success in its *1984-85 Program Report* which states that "[t]he Division has successfully stabilized the Catskill black bear population at a level about 80% higher than existed in the early 1970's."[67]

Regardless of its claims to the general public about the "need" for sport hunting to control the deer and bear population, one can conclude that the DEC's own documentation shows that the Department itself has helped to engineer the claimed adverse consequences of overpopulation by working to create the surplus of animals that it publicly deplores.

C. *Sport Hunting: Clash with Modern Ecological Values*

In its Habitat Management Impact Statement, the DEC states:

> In managing . . . wildlife resources, we are responsible to the public as a whole. But we also have a particular responsibility to work in the interests of consumptive users as long as there are no conflicts with the general public interest in the long-term maintenance and welfare of the resource.[68]

Apart from the candor with which the DEC states its bias, this statement reveals the Department's myopia with respect to what it considers the extent of the public interest. In addition to public concern that a given game species not be decimated, there is arguably a strong public interest in protecting the lives of individual game animals from death by sport hunting and trapping. Moreover, the public has an interest in the protection of the environment in general with which, as will be shown, the consequences of the Department's game management program clash head-on. The DEC is charged by law with responsibility for protecting all wildlife

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66. *Id.* at 4.

67. Div. of Fish and Wildlife, N.Y. Dep't of Envtl. Conservation, *1984-85 Program Report* 11.

68. Habitat Management Impact Statement, *supra* note 48, at 19.

and the environment in general, as well as for game management.[69] Yet this article will demonstrate that the well-being of wildlife and the environment necessarily suffer because of the Department's bias, and because so much of its time, energy, and budget is invested in game management.[70] Consequently, as no other state agency is similarly obligated to protect wildlife and the environment, a decided vacuum exists. Wildlife is virtually unprotected in the real sense of the word.

The DEC's game management program affects the environment adversely in a number of significant ways. In its impact statements, the Department states candidly that the "[m]aintenance of wildlife populations at levels optimum for recreational purposes can have unwanted side effects."[71] For example, it cites the maintenance of high population levels as causing damage to agriculture and forest crops, an increase in road kills,[72] nuisance animals complaints,[73] property damage, and injury to humans.[74] Yet it is generally believed that these problems occur naturally and are the reasons that annual hunting and trapping seasons are necessary.

Other adverse effects of game management described by the DEC include the accidental killing by hunters and trappers of threatened or endangered species. "Every loss of an endangered or threatened individual animal must be recognized as potentially detrimental to the perpetuation of the species. Their status is so precarious that any killing of bald eagle, osprey, and peregrine falcon is definitely detrimental to the perpetuation of these species in New York State."[75] Also, diseases can be introduced into new areas because of trap and transfer programs implemented to increase the supply of game throughout the state.[76]

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69. N.Y. Envtl. Conserv. Law, arts. 8, 11 (McKinney 1984 & Supp. 1987). See discussion of art. 8, *supra* note 49 and art. 11, *supra* notes 25-29.

70. *See supra* text accompanying notes 42-44.

71. Game Management Impact Statement, *supra* note 30, at 81.

72. *Id.*

73. Habitat Management Impact Statement, *supra* note 48, at 36.

74. Game Management Impact Statement, *supra* note 30, at 81.

75. *Id.* at 80.

76. *Id.* at 81.

When the Department manipulates habitats to provide more food and cover for game species, it clears trees,[77] sprays herbicides, burns to control vegetative growth,[78] and traps, hunts, and poisons members of some species to encourage the increase of others.[79] This also results in a reduction in food and cover for some non-target species,[80] and in severe damage to the land.

The DEC concedes that "[w]hile target wildlife will benefit from program practices, it is inevitable that some species will be adversely affected. Either their numbers may be decreased or they may be completely eliminated from a particular area."[81]

The DEC further states that its impoundment of water can adversely affect water chemistry, quality, and temperature; soil productivity can be lowered, and rare and endangered plants can be destroyed by the mowing, cutting, clearing, burning, and flooding done when new areas of the state are opened up for hunting and trapping.[82] These activities also cause soil erosion from the use of unimproved trails and shorelines, an increase in gas and oil pollution from cars, boats, and other motorized vehicles, and damage to or destruction of critical wildlife habitat.[83]

Moreover, hunters and trappers themselves adversely affect the environment by trampling vegetation and compacting soil on trails (which affects burrowing animals), and by introducing toxic substances, for example, lead shot (which is ingested by waterfowl feeding in marshes).[84] Attracting more hunters and trappers to an area also increases littering, noise, damage to vegetation and increased pressure on surrounding private lands.[85] An increase in noise can have a negative im-

77. Habitat Management Impact Statement, *supra* note 48, at 5.
78. *Id.* at 8.
79. *Id.* at 9.
80. *Id.* at 44.
81. *Id.* at 36.
82. *Id.*
83. Public Use Impact Statement, *supra* note 48, at 41, 42, 47.
84. Game Management Impact Statement, *supra* note 30, at 81.
85. Habitat Management Impact Statement, *supra* note 48, at 36.

pact on wildlife, particularly during winter when their energy must be conserved, because loud noises produce stress which raises animal metabolism.[86] The Department similarly acknowledges that its trap and transfer program is stressful to animals.[87]

The DEC's recognition of the stress suffered by individual animals under these circumstances is ironic. The impact statements completely ignore the much greater stress necessarily inflicted upon 3.7 million animals who flee in terror, and are shot by guns and arrows, or trapped alive in steel jaws.

Furthermore, in the author's opinion, these adverse impacts upon the environment are in no way offset by any beneficial impacts of game management for sport hunting. For example, the Department claims that hunting is a population density control measure used to maintain habitat quality when a species destroys its own environment because of excessive population.[88] But, as described above, the game management program itself not only contributes to the problem, but also insures its perpetuation. It is disingenuous of the DEC to claim credit for its purported resolution.

The Department also credits sport hunting with minimizing opportunities for disease outbreaks and epidemics.[89] Perhaps this is true in the sense that at the end of the hunting and trapping season there will be fewer animals left to contract disease. It is not true, however, that hunters and trappers kill the weak and the sick as natural predators do. Natural predators, at least, have the effect of strengthening the species. On the contrary, and often with DEC encouragement, the biggest and healthiest animals are generally sought by hunters and trappers. For example, the DEC collaborates with private hunting groups to sponsor trophies for the largest buck.[90] The author has been unable to find that the Depart-

86. Public Use Impact Statement, *supra* note 48, at 42.

87. Game Management Impact Statement, *supra* note 30, at 80.

88. *Id.* at 79.

89. *Id.*

90. The DEC encourages the killing of the largest, healthiest bucks by promoting New York's Big Buck Club. "Each year hunters in New York State take many trophy antlered bucks which may qualify sportsmen for membership. . . . An annual award is

ment has produced any credible data to sustain its claims that the killing of 3.7 million animals annually is ecologically warranted.

In another interesting glimpse of its sports hunting bias, the DEC also claims as a benefit to the environment, satisfaction of man's "inherited biological urge . . . to be a hunter/predator/provider. . . ."[91]

> The most profound and rewarding benefits accrue to the individual. Through the nature, location or personal demands of the resource [for which read 'animal'], mental and physical health is fostered. In contrast to the pressures and continuum of the technological and crowded environs of the majority of New Yorkers, the fisheries and wildlife resources and their environments offer diversity of pastime and surroundings, the facilities for learning, relaxing, meditating and recreating the spirit; an emotional and mental outlet, and often, a remote setting of needed silence and solitude. Healthful outdoor recreation and exercise, and personal challenge and skill are implicit to the degree that each person is capable. Observation or study of the fisheries and wildlife resources impart a uniquely personal and aesthetic experience which transcends mere resource utilization [for which read 'killing of the animal']. All of society benefits from the resulting

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presented by the club to the hunter whose deer head has the highest . . . score." N.Y. Dep't of Envtl. Conservation, N.Y. State Big Game Hunting Map (1985-86). Each year, DEC's Conservationist magazine prominently features the Big Buck Club winners in both gun and bow and arrow categories. *See* 42 The Conservationist 46-47 (1987).

The DEC Biologist Peggy Sauer corroborates that the larger the antlers, the more vigorous the animal, and that the size of a buck's antlers depends both on age and nutritional intake.

> The second rack will be bigger than the first and when nutrition is adequate each successive rack will grow even bigger until the buck passes his prime. On good range in New York State, three year old bucks produce an average of eight points - a potential trophy size rack. On poor range, bucks require an additional year to produce antlers equivalent in size to those of deer of the same age on good range.

Sauer, *Physical Characteristics*, in White-Tailed Deer, Ecology and Management 85 (L. Halls ed. 1984). "Whitetail antler dimension depend on such factors as age, virility and diet." Baker, *Origin, Classification and Distribution. Id.* at 16.

91. Game Impact Statement, *supra* note 30, at 79.

mental and physical health of its citizens.[92]

The Game Management Impact Statement further states that the value of meat alone does not even begin to sustain the popularity of hunting. It is the physical, emotional and often spiritual rewards associated with a day out-of-doors that attract many and maintain hunting as a traditional recreational endeavor. The Statement adds that unless personally involved, "few can appreciate the identification of man with the land that occurs when a person enjoys a solitary hunt in a natural habitat where wildlife can thrive."[93]

In a brochure entitled *Trapping New York Wildlife*,[94] the DEC describes trapping as a form of recreation that is not always understood. It defines "recreation" as something which "restores, refreshes, creates anew; something which restores or refreshes body or mind." It asserts that that is exactly what hunters and trappers do each time they go afield. They restore and refresh themselves "through creating anew the ancient, true role of man in nature — a predator who evolved and survived for 99% of his time on earth through hunting, trapping and fishing."[95] The brochure continues: "Our highly urbanized society has largely disassociated itself from this direct dependence on nature. However, many persons still need and desire to fulfill this direct role. For them, hunting or trapping are direct ways for man to 'get back into nature.' "[96]

The Department also claims that an additional benefit of its game management program is its research, monitoring, and surveillance activities for the welfare of the animals studied.[97] Clearly, however, such activities can be conducted without killing as an endpoint, and can be more consistent with concern for the animals' welfare. Further, the DEC admits that management for the well-being of non-game species is "far

92. Habitat Management Impact Statement, *supra* note 48, at 19.

93. Game Management Impact Statement, *supra* note 30, at 38.

94. N.Y. Dep't of Envtl. Conservation, Trapping New York Wildlife, Why People Still Trap (unnumbered) 5.

95. *Id.*

96. *Id.*

97. Game Management Impact Statement, *supra* note 30, at 80.

less likely" to cause impacts to the environment than its game management program.[98]

What is particularly startling about the DEC's recognition of the adverse impacts of sport hunting is its failure to follow through on the implications of this recognition. It would seem axiomatic that once it recognized the adverse impacts of game management, the Department would support measures to phase out or at least explore alternatives to its current program. But the author's research has disclosed no such attempt.

Arguably, as the custodians of the state's wildlife and the environment, and uniquely staffed with enough experts to have identified the problems caused by game management, the DEC is obligated to advise the legislature as to why and how the statutes should change. In fact, the Department is frequently in the vanguard of efforts to persuade the legislature to increase hunting and trapping, and is a vigorous opponent of efforts by environmental and humane groups to obtain legislation to contain or reduce it.[99]

Even more troubling, despite its recognition of the general adverse impacts of sport hunting, the DEC has promulgated regulations which permit it to avoid monitoring its specific adverse impacts as they develop.[100] The DEC neither requires nor develops site-specific hunting or trapping impact evaluations. Despite the vast number of environmentally diverse, specific hunting and trapping sites in New York, the Department has insulated itself from emerging problems by promulgating regulations which deem hunting and trapping to be "minor" activities not requiring site-specific evaluations.[101]

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98. *Id.* at 24-25.

99. *See infra* text accompanying notes 105-16. See also, for example, a letter by Assistant Commissioner of the N.Y. Dep't of Envtl Conservation, Herbert E. Doig, to Assemblyman Maurice Hinchey expressing the concern of the Department about anti-trapping legislation, and specifically opposing a ban on the steel-jaw leghold trap. Letter from Herbert Doig to Maurice Hinchey (May 20, 1987) on file at Pace Envtl. Law Rev. office.

100. N.Y. Comp. Codes R. & Regs. tit. 6, § 618.2(d)(5) (1986).

101.

> The following site-specific and individual fish and wildlife activities shall be considered "minor" if they do not involve significant departures from estab-

Yet, DEC regulations describing the types of activities (termed "significant") for which it does require a site-specific impact statement, describe the same kinds of impacts upon the environment as are caused by game management for recreational hunting. These include the proposed removal or destruction of large quantities of vegetation or fauna, substantial interference with the movement of any resident or migratory fish or wildlife species, impacts on a significant habitat area, or substantial adverse effects on a threatened or endangered species of animal or plant, or the habitat of such a species.[102]

By contrast, projects classified by the DEC as not having significant effects on the environment include the replacement

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lished and accepted practices and if such actions are described in and are a part of general fish and wildlife management programs for which an EIS [Environmental Impact Statement] has been prepared: fish and wildlife habitat improvement, planting of native or naturalized fish and wildlife, harvesting or thinning of fish or wildlife surpluses, setting of hunting, trapping and fishing seasons . . . .

Id. The exemption from site-specific review is in the face of DEC's recognition of the environmental diversity of the state:

> The Division's fish and wildlife management responsibilities span the entire state. Problems in meeting those responsibilities are complicated by an extremely wide range of ecological settings in which to exercise mandates. These vary from seacoast sand dunes to sub-alpine mountain tops. . . . Reflecting this wide range in habitats, flora and fauna species likewise are very diverse. These ecological settings are affected further by a wide range of human population density or use pressures.

Game Management Impact Statement, *supra* note 30, at i.

102. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11(2). Section 617.11 sets forth the criteria which are considered indicators of significant effects on the environment. These include:

1. a substantial adverse change in existing air, soil, or water quality;
2. substantial adverse effects on threatened or endangered plants or animals or their habitat;
3. a substantial change in use of land including agricultural, open space, or recreational resources;
4. the creation of a hazard to human health;
5. inducement of significant change in public attraction or use; and
6. creation of a material conflict with a community's current plans or goals.

Further, when examining these criteria to decide if an impact statement is required, the DEC advises that "[i]n all instances where there is question as to the advisability of a site specific assessment, the Division will opt in favor of their preparation." Habitat Management Impact Statement, *supra* note 48, at ii.

of a building on the same site, maintenance and repair of farm buildings, repaving of highways not involving addition of new traffic lanes, installation of traffic control devices, and collective bargaining activities.[103] These activities are clearly "minor" compared to the effects on the environment of its game management program as described by the DEC.

The DEC has, in effect, fashioned itself a pair of blinders in one critical area — the impact on the environment of its 45 million dollar traditional game management program — which permits it to ignore modern statutory requirements enacted to ensure the environment's protection. Indeed, with respect to endangered species, the Department conceded in 1980 that "[t]oo little is known at this time to determine [the] magnitude of the effects of various game species management programs on endangered species,"[104] and yet it has not updated its impact statements.

D. *Hunting: Promotion Without Regard to Consequences*

1. *Advertisement*

The Department compounds the problems just discussed by actively promoting increased hunting and trapping among the general population. In its attempts to drum up trade, the DEC's promotional material is exuberant about hunting opportunities in the State. "Big Game Hunting is Great in New York State" exults the I Love New York Big Game Hunting brochure:

> Consider 32,000 square miles of big game range with deer numbers among the highest in the U.S. Imagine 11,000 square miles of identified bear range within that complex. . . . Big game hunting is really BIG when you come to New York. . . . You might also be interested to know that it contains one of the biggest black bear populations in the eastern United States.[105]

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103. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13(b)(1), (3), (4), (6) & (13) (1986).

104. Game Management Impact Statement, *supra* note 30, at 105-06.

105. Div. of Fish and Wildlife, N.Y. Dep't of Envtl. Conservation, I Love New

The brochure continues:

> There's no quota system for legal buck hunting (deer with antlers 3" or longer) and by the end of the hunting season, nearly 80% of the legal bucks are removed. This is the way it is with gun hunting season—fast paced, intensively managed and relatively short.[106]

The DEC's active promotion to increase the killing is disturbing to many, but if, at a minimum, the hunting environment were being monitored, this promotion would be arguably legitimate given the language of the Conservation Fund statute.[107] The Department, however, sometimes crosses the line between conventional promotion and something darker. It has, in fact, developed a program directed at changing the minds of young people who may already have decided they do not want to kill animals. Recently, it commissioned a ten thousand dollar Cornell University study designed "[t]o identify the specific elements . . . for a program to increase hunting and trapping participation among youngsters."[108] The

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York Big Game Hunting (brochure) 3 (Jan. 1984). Available from N.Y. Department of Environmental Conservation, 50 Wolf Road Albany, N.Y. 12233.

> If you would like to see how a black bear can be trapped or listen to a duck caller, you can visit the Belleayre Ski Center tomorrow or Sunday in the Catskill Mountains, where the State Department of Environmental Conservation is holding a hunting and fishing weekend, open to the public without charge.

A Hunting Weekend, N.Y. Times, Sept. 27, 1985, at C21.

106. I Love New York Big Game Hunting (brochure), *supra* note 105, at 5. Also, from Department of Environmental Conservation's I Love New York Small Game Hunting (brochure):

> New York has more than 3.5 million acres of public land open to the hunter — that's a lot of hunting! . . . To top it off, specially developed wildlife management areas, totaling more than 150,000 acres are scattered throughout all upstate regions. . . . [W]e enjoy hunting. We want you to like hunting in New York, too. We've spent a lot of time and effort making sure that our turkey hunting ranks with the best in the northeast. We like our marshes because of the profusion of ducks and geese they produce and attract; that's why we're either buying wetlands or creating laws to protect them.

Div. of Fish & Wildlife, N.Y. Dep't of Envtl. Conservation, I Love New York Small Game Hunting (brochure) 1, 3 (Jan. 1984).

107. N.Y. State Fin. Law § 83 (McKinney 1974 & Supp. 1987). *See supra* note 40.

108. Job VII-9, *Evaluating the Attitudinal and Informational Impediments to*

study is based, in part, on the results of another DEC commissioned study, costing more than twenty thousand dollars, designed "[t]o determine the familial impediments and incentives which affect participation in hunting and trapping among family members, and to . . . identify ways to overcome impediments and enhance incentives."[109]

The ten thousand dollar study provides for the employment of a specialist in youth environmental education. It also explores methods of increasing "subsequent female participation in hunting."[110] In effect, in order to increase the number of hunters and trappers in the state, the DEC is engaging in behavior modification of young people, ostensibly despite the wishes of their families.

On behalf of New York's hunters and trappers, the Department also makes forays into local politics to oppose attempts to enact legislation which would have the effect of reducing hunting or trapping. In December 1985, for example, the town of Pittsford, in upstate New York, considered a local safety ordinance to prohibit the discharge of firearms within the town limits. A DEC spokesman attended the meeting to speak against the ordinance. He distributed a DEC position paper filled with statistics to show that the chances of being killed by hitting a deer with one's car were greater than being killed by a hunter, and cited the low incidence of hunting accidents in the county.[111] Presumably, the Department was not concerned about the wishes of townspeople to have no incidence of hunting accidents.

In late 1986, the Suffolk County legislature was similarly

Hunting/Trapping Faced by Youngsters, Project W-146-R-10: New York Annual Performance Report: 1984-85 segment at 15. [hereinafter Job VII-9]. This segment, prepared by D. Decker, T. Brown, Outdoor Recreation Research Unit, Dep't of Nat. Resources, N.Y.S. College of Agriculture and Life Sciences, Cornell Univ., Ithaca, N.Y. was approved by C. Parks, Federal Assistance Coordinator and S. Free, Chief Wildlife Biologist, N.Y. Dep't of Envtl. Conservation (retired 1986).

109. Job VII - 7 *Investigation of Familial Incentives/Impediments to Hunting and Trapping Participation* at 12 (1985).

110. Job VII-9, *supra* note 108, at 15.

111. Minutes of the Town Board of the Town of Pittsford, N.Y. Public Hearing, Ban on Discharge of Firearms, Dec. 17, 1985. Minutes are on file at Pace Envtl. Law Rev. office.

the subject of intensive DEC lobbying, as it considered an ultimately successful safety bill to ban the controversial leghold trap. Without citing any data, the Department's spokesman painted for both the legislators and the media a grim picture of diseased and exploding populations of furbearing animals running rampant over the county.[112] When challenged by a state legislator to support these allegations, the Department did not provide corroborating data.[113]

Departmental zeal to promote hunting led the DEC to consider hampering a proponent of preserving wildlife for its intrinsic worth. John Harris was the director of a traveling wildlife program who worked with tame wolves to impress upon his audience the importance of saving this endangered species. In a 1976 internal DEC memorandum, a Senior Wild-

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112. Brand, *Trap Ban Ensnared in Controversy*, Long Island Newsday, Melville, N.Y. (Nassau and Suffolk County Editions), Oct. 14, 1986, at 21, col. 1.

113. Assemblyman Robert Connor, in a letter to Harold Knoch, Regional Wildlife Manager, Dep't of Envtl. Conservation, Nov. 26, 1986, requested corroboration of the statements made at the hearing. After receiving Mr. Knoch's response, Assemblyman Connor sent a second letter, March 4, 1987, which stated that Knoch had "provided absolutely no data, but only added to the rhetoric." Assemblymen Connor found another memo to him from Herbert Doig, Deputy Commissioner of DEC, (May 25, 1987) on leghold traps, to be "a compilation of trapping rhetoric that has been around for years, untrue and unsubstantiated." Letter from Assemblyman Conner to Herbert Doig (July 2, 1987). Letters are on file at Pace Envtl. Law Rev. office.

The leghold trap is notorious because veterinarians attest to the exceeding cruelty of a device which does not kill its quarry outright but holds it by jaws clamped deep into the flesh of a leg for hours and days until the trapper comes to kill it - generally by bludgeoning. In the trap, the animal struggles to escape, literally tearing its body apart in the process. Veterinarians who have treated leghold-trapped animals describe deep gashes and bone-crushing injury, massive hemorrhaging, displaced jaws, shoulders and hips, shattered bones, compound fractures and often the phenomenon trappers call "wring off," where the animal severs its own foot to escape on three paws.

(Paraphrase by the author of the views expressed by veterinarians). *See generally* Leghold Trap, Expert Opinions (G. Whitney, ed. 1983 2d printing 1985). Available from H.A.L.T. (Humanitarians Against Leghold Trap), c/o George D. Whitney, D.V.M., Oakwood Rd., Orange, Conn. 06477.

After the Suffolk County ban was enacted, a group of Rockland County (NY) environmentalists proposed that their County legislators enact a similar provision. Predictably, a DEC wildlife biologist was quoted in the Rockland County newspaper as opposing the proposed legislation. He stated: "Evidently, we're dealing with people who feel that animals don't have to die," and "[t]hey're denying the reality of their existence." Journal-News, (Rockland County) Jan. 19, 1987, at B1-2.

life Biologist shed some light on the Department's concern that Harris' wolf, Rocky, had been used by Dr. Michael Fox of the Humane Society of the United States, on several days to drum up anti-kill emotions among the audience. The memo stated that three of the four presentations were "anti-kill, anti-government wildlife management (as it is presently practiced, i.e. game species-prime management)" and that John Harris had not spoken.[114]

Four months later, Harris' request for a permit to continue traveling with his animals was the subject of another DEC internal memorandum which again expressed concern about the use of Rocky to further the cause of "anti-hunt and anti-kill" sentiment in programs for school children. Another DEC biologist was quoted in the memo:

> [He is] wondering if we can't prevent the use of the animal in furthering this ethic through a condition in the permit. I believe that this would be an infringement of a constitutional right and would be quite impossible. At any rate, [he] is asking for a complete review of a 1977 permit to Harris and it would be swell if we could get this firmed up within the next week so as to avoid an eleventh-hour issuance.[115]

2. *Promotion of the Return a Gift to Wildlife (RAGTW) Program*

A further indication of DEC sport hunting bias occurs with respect to the special wildlife funds donated by New York's taxpayers with the filing of their yearly tax return. The New York State Legislature has enacted a provision permitting its taxpayers to "Return a Gift to Wildlife" (RAGTW).[116]

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114. Copy of inter-office memorandum dated Nov. 8, 1976 from R. Schroder, DEC Senior Wildlife Biologist, is on file at Pace Envtl. Law Rev. office.

115. Copy of inter-office memorandum dated March 9, 1977, from S. Parker, Principal Clerk, Program Administration, on file at Pace Envtl. Law Rev. office.

116. N.Y. Tax Law § 625 (McKinney Supp. 1987). This section allows an individual to contribute to the Conservation Fund for fish and wildlife management purposes through a check-off on his state tax return. The contribution does not reduce

New York's statute, unfortunately, does not specify that these "gifts" must be used for non-game animal programs, and its legislative history does not furnish much clarification.[117] Consequently, a controversy has arisen over how these funds should be used, because a significant portion of the approximately $1.7 million received annually by DEC is being used for programs related to the consumptive use of wildlife.[118]

In fiscal year 1985-86, for example, the DEC allocated $52,500 in RAGTW funds to a public relations project aimed at landowners. It was designed to persuade private landowners to make their property available for hunting and trapping.[119] Ninety thousand dollars of RAGTW funds were appropriated for Project Wild,[120] a program directed at school children which has been challenged by animal protection groups for propounding traditional beliefs about wildlife as a

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the amount of state tax owed by such individuals. All revenues collected in this manner are credited to the Conservation Fund and used "only for those purposes enumerated in section eighty-three of the state finance law." *Id.*

117. New York Assembly Ways & Means Committee, Ways and Means Report, at 1 (Nov. 1985). *See* Att'y Gen. Formal Opinion No. 84-F15 (1984). The RAGTW program's legislative history indicates an intent that the funds be used "to restore the Conservation Fund to an adequate level." N.Y. State Legislative Annual 23 (1982). It is interesting to note that, at the same time, the legislation also included provisions for establishing a Conservation Fund Advisory Council (codified in N.Y. Exec. Law, § 700 (McKinney 1982 & Supp. 1987). The Council was established in response to requests from "sportsmen's organizations" for a commission to ensure "the proper use of Conservation Fund moneys by establishing an independent sportsmen's advisory council which will be empowered to review all pertinent material and report to the Commissioner and the legislature on the extent to which the Conservation Fund is managed in accordance with State law." N.Y. Legislative Annual 23-24 (1982).

N.Y. Exec. Law § 700, which creates the Conservation Fund Advisory Council, specifies that "[t]he council shall be representative of individual and organized sportsmen's interests in each region of the state." *Id.* at § 700(1)(a). Persons appointed to the Council must demonstrate their interest and knowledge of fish and wildlife management "in part by the holding of a valid New York state hunting, fishing or trapping license at the time they are designated or appointed to such council and for each of the three years immediately preceding their designation or appointment to such council." *Id.* § 700(1)(b).

118. N.Y.S. Assembly Ways and Means Committee, The Ways and Means Report at 1-2 (Nov. 1985).

119. Listing of RAGTW funded projects in N.Y. Dep't of Envtl. Conservation, News Release, April 11, 1985, at 3 [hereinafter RAGTW News Release].

120. *Id.*

commodity for consumption. As if to corroborate the need for concern, the program is vigorously defended by organized hunting and trapping interests.[121]

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121. In January 1985, after a meeting with a group of animal advocacy organizations, DEC Commissioner Henry G. Williams agreed to place a moratorium on the dissemination of Project Wild material within the state until it could be fully reviewed. As an indication of the intensity with which hunters and trappers support Project Wild, the fish and game columnists were calling for the Commissioner's job, as illustrated by the following examples.

> Come June 25, some calendars may note that 109 years ago, commanding officer George Custer (known by the Indians of that day as "Yellow Hair") was massacred by a force under Sioux Chief Crazy Horse. Custer had made a frontal attack on the Sioux tribe at Little Big Horn. He had disobeyed orders and was saved from an Army court martial by being slaughtered with his men.
>
> A parallel may be seen in the events of the last dozen days in the camp of commanding officer Henry Williams, Commissioner of New York State's Department of Environmental Conservation.
>
> In not much more than 20 minutes, a frontal assault dislodged the Commissioner's composure and he escaped with only partial plucking of the silky white hairs from his pate. His partial retreat took him beyond the camp of the true conservationists, the sportsmen, where he might have found some measure of comfort, but it looks as though they may not want any part of him now.
>
> It all happened in a meeting between Williams and nine representatives of anti-hunting/fishing/trapping groups. Williams let himself be led into a trap and agreed with the anti's that there should be change in the 287 page text for Project Wild workshops. The workshops were aimed at educating public school teachers, 4-H leaders, Boy Scouts and other youth leaders about wildlife management. The project was to be funded by $85,000 donated by New York taxpayers to the Return a Gift to Wildlife Fund.
>
> Commissioner, in military life even high ranking commanding officers have been court martialled for giving aid and comfort to the enemy.
>
> *Battle lines now being drawn*
>
> Francis Hartman, president of the 300,000-strong New York Conservation Council (N.Y.S.C.C.) said, "We've been trying to get EnCon in the schools for over 20 years, to teach students conservation, as opposed to preservation. Conservation is the wise use of existing resources," he said "and the N.Y.S.C.C. is going to oppose the Project Wild cancellation." Bob Boice, Chairman of the Conservation Fund Advisory Council was distressed by the project cancellation because of all the labor that went into planning the program. [Boice is a member of the Return a Gift to Wildlife Advisory Board].

Rosenkranz, Adirondack Guidepost, *Sportsmen Arm for Battle,* Valley News, Elizabethtown N.Y., Jan. 23, 1985, at 14, col. 1.

> It was a move that has sportsmen in this state hopping mad, and according to a few, what the head of the Department of Environmental Conservation did on Jan. 10 could set the state's fish and wildlife bureau back 20 years. The controversy centers around Project Wild, a 287-page text put out by the

The DEC received forty-five thousand dollars to prepare and distribute four educational posters, one of which informs school children that the Department thinks it is important to trap beavers. Another praises the DEC's role in managing sixty thousand wild turkeys so that "New Yorkers are now able to enjoy a magnificent inhabitant of the state's woodlands."[122]

More than twenty-one thousand dollars in RAGTW funds were allocated for a project entitled "Deer Activity Studies/ Long Island" designed to "develop a suitable management plan for the area."[123] It is possible that this is the most questionable of the "gifts" for two reasons. First, because the DEC manages deer not to protect the individual animal, but to increase their number for hunting. Second, because it promotes RAGTW as if it does protect the animal. In fiscal year 1984-85, a period for which tax funds for this project were solicited, RAGTW promotional material depicted a white-tail fawn peering timidly out at the camera as if imploring donations to protect its life. DEC appeals to protectionist emotions to induce donations, which it then uses for programs designed to kill the animals. As has been noted, during the 1986 hunting season almost 40,000 fawns were killed by bow and arrow and shotgun hunters in New York.[124]

Funding of these RAGTW projects was increased for fiscal year 1986-87. Other allocations include $229,000 for a New York City fish and wildlife staff, and such management related allocations as $66,000 for a master habitat data bank, $26,500 for the management of Long Island raccoons, $20,000 for the publication of DEC's *Fish and Game Journal* and $130,000 to promote the Return a Gift to Wildlife program.[125]

Western Assn. of Fish and Wildlife Agencies. It is used in over 30 states to help educate school children about wildlife.

Moran, *Sportsmen Blast DEC Withdrawal of Wildlife Text*, New York Post, Jan. 23, 1985, at 51, col. 1. [The Commissioner reinstated Project Wild.]

122. RAGTW News Release, *supra* note 119, at 3.

123. *Id.*

124. *See supra* text accompanying note 54.

125. N.Y. Dep't of Envtl. Conservation, *Return a Gift to Wildlife Approved Projects for 1986-87*. Available at Pace Envtl. Law Rev. office.

Despite several years of controversy, Department promotional material still does not indicate that a good proportion of RAGTW funds are used to increase the killing of animals, and DEC continues to promote the program as if all its revenues were used exclusively to protect New York's wildlife.[126] This could be considered a fraud on donating taxpayers, eighty-two percent of whom, according to a Cornell University study of 1982-83 donors, donated because they "liked wildlife."[127]

Significantly, the RAGTW Advisory Committee includes both the president and past president of the New York State Conservation Council, the state's major hunting and trapping lobby.[128] Corrective legislation prohibiting the use of RAGTW

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126. The following are excerpts from the Return a Gift to Wildlife Advisory Committee brochure which the DEC distributes throughout the state every year during tax season:

> New Yorkers have contributed approximately $6.7 million to Gift to Wildlife in just four years. These contributions are deposited into the State Conservation Fund, and used solely for fish and wildlife projects. More than seventy-five projects have been funded since the beginning of Gift to Wildlife.
>
> More than 335,000 concerned citizens have supported Gift to Wildlife by making a voluntary contribution. Your contribution will help protect and improve one of our most important resources — our fish and wildlife.
>
> Return a Gift to Wildlife allows each of us to play a part in ensuring the future of our fish and wildlife resources. Gift to Wildlife funds enable the New York State Department of Environmental Conservation and other groups to conduct a variety of projects benefitting our fish and wildlife.

See current RAGTW promotional brochure on file at Pace Envtl.Law Rev. office. The project titles listed in this brochure require taxpayers to have some sophistication about game management terminology in order to discern that many are devoted to improving hunting opportunity. For example, the following RAGTW projects are listed: biology and management of deer on suburban Long Island, beaver pheromone study, Project Wild, master habitat data bank, fish and wildlife journal publication, improved habitat management of state wildlife areas, landowner relations development. *Id.*

127. Connelly, Brown, & Decker, *Evaluation of the 1982-83 "Return a Gift to Wildlife" Program Promotion Efforts*, at 11. Outdoor Recreation Research Unit N.Y.S. College at Agriculture & Life Sciences, Cornell Univ., Ithaca, NY (April 1984).

128. N.Y. Dep't of Envtl. Conservation, Return a Gift to Wildlife Advisory Committee (promotional material) (1987). "The [N.Y.] Conservation Council [NYSCC] is a statewide federation of county federations of Sportsman's Clubs and represents several hundred thousand organized sportsmen." Kenyon, *Politicians, Sportsmen Preparing to do Battle*, Poughkeepsie Journal, (Poughkeepsie, N.Y.) Feb. 28, 1985 at 26, col. 2. The NYSCC newsletter states in its masthead and statement of purpose that

funds for hunting and trapping activities has been introduced in the legislature during the past two sessions,[129] but it languishes in committee due to heavy pressure from organized hunters and trappers, as well as the DEC.[130]

E. *Hunting: Statutory Mandate and the Non-Hunting Majority*

As discussed, the DEC attributes its preoccupation with game management for recreational purposes to statutory mandates. Yet, these fish and wildlife provisions were enacted at the turn of the century or earlier, and reflect a cultural ethos which existed before the development of modern concerns for the protection of wildlife and the natural environment. It is unlikely, for example, that one of the most sweeping of New York's fish and wildlife statutes — that which establishes regional fish and wildlife boards — would have been similarly drafted today.[131] By statute, the composition of these boards is limited to three people: an area official, a landowner, and a county "sportsman."[132] They are charged with developing comprehensive "wildlife practices" in every area of the state. The program's purpose is to obtain "on the privately owned land and waters of the state, practices of fish and wildlife management which will preserve and develop the fish and wildlife resources of the state and improve access to them for recreational purposes by the people of the state."[133]

After approval by the DEC Commissioner, these wildlife

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the organization represents "some 300,000 conservationists in the Empire State" of "sportsmen and conservation clubs." N.Y.S. Conservation Council Comment, Nov. 1986.

129. N.Y. Assembly Bill A. 6906, introduced in 1985 and 1986, and A. 5710 introduced in 1987. A related bill, A. 5709 would require the accurate promotion of RAGTW.

130. Letter from Assemblyman Robert Connor to the author, (Sept. 4, 1987) discussing DEC's and sportsmen's opposition to the bill. Letter is on file at Pace Envtl. Law Rev. office.

131. N.Y. Envtl. Conserv. Law §11-0501(4) (McKinney 1984). This section was amended in 1975, prior to which the boards were named "Regional fish and game management boards."

132. *Id.*

133. *Id.* § 11-0501(1).

practices are implemented through "cooperation agreements" with regional landowners who are offered incentives to open their lands to the public for hunting.[134] In return, the DEC provides goods and services including patrolling, game protectors, inspection stations, technical services, labor and materials, and trees and shrubs which are provided without charge at DEC nurseries.[135]

Two representatives of each regional board sit on the State Fish and Wildlife Board, and again by statutory mandate, are joined in an advisory capacity by representatives of the DEC, the Department of Agriculture, New York State's College of Agriculture and Life Sciences, its College of Environmental Sciences and Forestry, the State Soil Conservation Committee, the State Soil and Forest Practice Board, the State Farm Bureau, the Izaak Walton League, and the New York State Conservation Council.[136]

Although Board decisions will affect the life and death of all wild animals in the state, the Fish and Wildlife Board includes no representatives from organizations formed to protect the environment generally, and the lives of wild animals for their intrinsic worth. Nor does any other official forum exist for considering these perspectives, ostensibly widely shared among the ninety-one percent of the people who do not hold sporting licenses.[137] Such an omission may be constitutionally impermissible; however, the exploration of this theory is beyond the scope of this article.

IV. Proposals for Change

Change will be effected by statute when a sufficient number of the public understands how its wildlife tax dollars are spent, and insists that its dollars no longer be spent to support the killing of animals for sport, particularly in the absence of environmental justification. As long as there is nothing in current statutory law prohibiting the agency from

134. *Id.* § 11-0501(9).
135. *Id.* § 11-0501(10).
136. *Id.* § 11-0501(5)(a).
137. *See supra* text accompanying note 45.

spending general fish and wildlife funds (as opposed to State Conservation Fund and Pittman-Robertson grants) for game management programs, a voluntary change by the Department in the application of these revenues is probably not currently attainable in the face of state and federal fiscal incentives to increase recreational hunting.

These incentives make it highly unlikely that DEC will cease its promotion of hunting and trapping until countervailing incentives in the form of funds already collected from the overwhelming majority of New Yorkers who do not hunt and trap are earmarked by law for application to the protection of wildlife. This can be accomplished by enactment of statutes that:

1. Preclude the use of general tax funds for hunting and trapping activities. Then, the small percentage of people who still want to kill for sport would finance these activities themselves via existing fiscal channels.

2. Require the allocation of RAGTW funds exclusively for the protection of wildlife.

3. Reconstitute wildlife planning boards to reflect proportionately the general public's concern about wildlife.

4. Establish a separate bureau within the DEC, or a separate department staffed by people responsive to the general public's concern for the protection of wildlife and the environment to administer protection programs financed by general tax funds and to advise the legislature about required legislation. (In the interest of accuracy, the new body should be designated "Bureau of Wildlife" while the current Bureau's name should be changed to "Bureau of Sport Hunting and Trapping.")

5. Prohibit the "management" of animals to increase their number for hunting and trapping.

6. Prohibit the promotion of hunting and trapping in recognition of its clash with both environmental well-being and the interests of those members of the public who do not share the "sportsman's" enthusiasm for killing.

7. Require site specific environmental impact statements for hunting and trapping, with regulatory provisions for dissemination of their findings to the general public for

comment.

8. Require proof of official claims, by impartial scientific evidence, that a given hunting or trapping season is ecologically necessary for the well-being of the animals, their habitats, or for the preservation of private property, and that no less radical alternative exists.

9. Prohibit the setting of hunting and trapping seasons and the issuance of licenses unless environmental justification is established.

V. Conclusion

It is the settled law of the land that wildlife belong to the people and is held in trust for them by the states in their sovereign capacity. New York DEC's Fish and Wildlife Division is an example of a state agency charged by law with the protection of wildlife, which operates as handmaiden to a paying clientele —the small minority of the population which hunts and kills wildlife for sport.

The wildlife agencies are driven by direct fiscal incentives to increase the number of sport hunters and trappers in their states. In their efforts to do so, life and death decisions about individual wildlife are made with an eye toward keeping the paying clients flush with hunting opportunities.

In New York, the clash between contemporary environmental priorities and the effects of managing wildlife for an annual surplus of game animals continues virtually unexamined. The DEC justifies these activities by citing statutory mandates, and, indeed, game management statutes have remained essentially unchanged since the turn of the century when they were enacted as liberal checks on unrestricted killing. That they survive in New York is a measure of how successfully the DEC has misled the public to believe that hunting is an ecological necessity. Frequently, however, significant environmental problems result from calculated agency decisions to increase the number of animals available for hunting and trapping.

Legislatures should enact statutes which better reflect the contemporary public's concerns about both the environment

and wildlife by prohibiting the "management" of animals to increase their numbers for hunting and trapping, by reconstituting wildlife planning bodies to reflect proportionately the views of the public at large, by placing responsibility for the protection of wildlife within a bureau other than one preoccupied with providing animals to hunt and trap, and by prohibiting hunting and trapping, unless environmental justification and the absence of non-lethal solutions are established.