

# LEGISLATIVE REVIEW OF AGENCY RULE- MAKING: VERMONT'S ANTLERLESS DEER HUNTING REGULATION

## INTRODUCTION

The Vermont antlerless deer season<sup>1</sup> has been the subject of debate since at least 1968 and will likely continue to be debated far into the future.<sup>2</sup> Vermont sportsmen's groups and many individual deer hunters oppose an antlerless deer season. Reasons for their opposition include fear of depleting the present deer herd, distrust of state wildlife biologists, and a sense that hunting antlerless deer violates hunter ethics and tradition. On the other side of the issue, state wildlife biologists assert that an antlerless deer hunt is necessary to balance the availability of food with the number of deer. This note analyzes the antlerless deer hunting issue and discusses whether the legislative review of the Vermont Fish and Wildlife Board's antlerless deer permit rule comports with the Vermont Administrative Procedure Act, Vermont case law, and sound public policy.

The Vermont Administrative Procedure Act<sup>3</sup> (APA) provides that rules promulgated by Vermont administrative agencies may be reviewed by the Legislative Committee on Administrative Rules (hereinafter referred to as the rules committee).<sup>4</sup> The rules committee is a joint legislative committee consisting of eight members from the Vermont General Assembly: four from the House of Representatives and four from the Senate.<sup>5</sup> In 1985, the Fish and Wildlife Board, seven state residents chosen by the governor with the advice and consent of the senate,<sup>6</sup> promulgated a proposed rule

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1. During a regular Vermont deer season, a hunter may take one deer with antlers not less than three inches long. VT. STAT. ANN. tit. 10, § 4741 (1984). In contrast, in an antlerless deer season, a hunter may take one deer without any restrictions on antler length and consequently juvenile males (yearlings) and female deer (doe) are included in the hunt.

2. Rutland Herald, Jan. 15, 1968, at 1, col. 1. Between January 15 and January 25, 1968, the Rutland Herald carried a series of ten articles discussing the Vermont antlerless deer hunting dilemma. In the first article, the paper called the antlerless deer season a "great . . . debate painted in velvet and amethyst strokes of opprobrium, dissent, controversy, charge and countercharge." *Id.*

3. VT. STAT. ANN. tit. 3, §§ 801-849 (1985).

4. VT. STAT. ANN. tit. 3, § 842 (1985).

5. *Id.* at § 817(a).

6. VT. STAT. ANN. tit. 10, § 4041 (1984). A bill proposed in the Vermont Senate would raise the number of board members to fourteen. S.171, Adjourned Session (1986).

requiring the Fish and Wildlife Department, the agency administered by the board,<sup>7</sup> to issue 22,150 antlerless deer permits to resident and nonresident deer hunters. The rules committee objected to the board's antlerless deer permit rule, sending the rule back to the board for reconsideration.<sup>8</sup> Upon reconsideration, the board nevertheless decided to promulgate the rule without any changes.<sup>9</sup> Consequently, under the Vermont APA, if a court action is initiated to invalidate the rule, the burden shifts to the board to prove that the authority to promulgate the rule has been properly delegated to the board, that the board acted within its statutorily defined jurisdiction, and that the rule was not arbitrary.<sup>10</sup>

This note focuses primarily on whether the rules committee acted appropriately when it objected to the board's antlerless deer permit rule.<sup>11</sup> Section I provides background information necessary for an understanding of the arguments presented herein. Sections II and III address two objections of the rules committee: (1) that the Vermont Constitution prohibits the delegation of the deer herd regulatory power to the board (herein referred to as the non-delegation doctrine); and (2) even if properly delegated, the present antlerless deer season is contrary to the intent of the legislature. Section IV discusses the rules committee's third objection, that the rule was arbitrary. It also discusses the more general issue of discretionary legislative review of scientific agency fact-finding. This note concludes with a discussion of traditional judicial and legislative deference to a scientific agency and the role of such deference in the antlerless deer permit controversy.

## I. REGULATION OF VERMONT'S DEER HERD

Vermont's annual deer herd management cycle begins when

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7. VT. STAT. ANN. tit. 10 § 4041 (1984).

8. Valley News, Sept. 12, 1985, at 17, col. 1.

9. *Id.*

10. VT. STAT. ANN. tit. 3, § 842(b) (1985).

11. Although this note focuses on the rules committee's review of the board's antlerless deer permit rule, many of the arguments contained herein are applicable to any discussion of legislative control over scientific fact-finding. For example, a bill before the Vermont House has the stated purpose of "plac[ing] control of the deer herd with the legislature and . . . repealing authority for a doe season." H.513, Adjourned Session (1986). The arguments contained in this note suggest that if this bill is enacted, irresponsible wildlife management and irreparable harm to the deer herd may result. See *infra* text accompanying notes 85-131. Consequently, this bill, although perhaps politically responsive to some constituents, should be reassessed in light of the potential harm it may cause to the wildlife resource it claims to protect.

the Fish and Wildlife Department compiles various biological and habitat data obtained during previous hunting seasons. The biological data typically consists of the weights of deer taken by hunters, the widths and numbers of antler points, the ages of deer as determined by cross-sectioning teeth, reproductive information determined by dissecting and examining female deer reproductive tracts, and dead deer counts taken in the spring after the snow has melted.<sup>12</sup> The department also collects habitat data such as the species and number of trees browsed, and the number, locations, and types of deer yards used during the winter.<sup>13</sup> After collecting this biological and habitat data, the department analyzes the information and determines the appropriate regulations for the upcoming deer season.

The department does not have the statutory authority to promulgate a rule based upon its assessment of the deer herd. Instead, the department submits a formal recommendation to the Fish and Wildlife Board, the administrative agency empowered to promulgate deer season regulations.<sup>14</sup> The board considers the department's recommendation and promulgates a rule in compliance with the rule-making requirements of the Vermont APA.<sup>15</sup>

In the present controversy, the department collected and analyzed the relevant biological and habitat data. Furthermore, the department analyzed the data in light of a long-range deer management plan that the department adopted in 1983.<sup>16</sup> The stated goal of that plan is to balance the deer herd population with the carrying capacity of the winter range while also providing optimal hunting seasons.<sup>17</sup> The plan has three phases. During the first phase, a maximum number of antlerless deer hunting permits are issued in order to reduce the deer population to the winter range carrying capacity.<sup>18</sup> Second, after achieving the goal of phase one,

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12. See R. Regan, 1985 Antlerless Season Harvest and Permit Recommendations, 1-2 (Vt. Fish & Wildlife Dept. 1985).

13. Vt. Fish & Game Dept., 3 Habitat Highlights No. 2, 1, 2-3 (Winter 1983).

14. VT. STAT. ANN. tit. 10, § 4082 (1984).

15. VT. STAT. ANN. tit. 3, § 836 (1985). The rule-making procedure requires (1) pre-filing (when required by law); (2) filing of the proposed rule; (3) publication; (4) opportunity for public hearing and comment; (5) a final proposal; (6) agency response to any rules committee suggestion; and (7) filing of the adopted rule. *Id.*

16. Habitat Highlights, *supra* note 13, at 1.

17. *Id.* Carrying capacity is the scientific premise that "a given habitat, water or land, will support a given amount, or poundage, of wildlife." Rutland Herald, Jan. 22, 1968, at 1, col. 1.

18. Habitat Highlights, *supra* note 13, at 1.

the number of antlerless deer permits will be adjusted to maintain the deer population at a level below the winter carrying capacity for five to ten years.<sup>19</sup> The second phase goal is to permit the over-browsed winter range to recover to an optimal level.<sup>20</sup> In the final phase, the number of antlerless deer hunting permits will be moderated to encourage stability between deer populations and the winter range carrying capacity.<sup>21</sup>

The department accomplished phase one of its plan between 1979 and 1982 in deer management units (DMUs)<sup>22</sup> where antlerless deer hunting was permitted.<sup>23</sup> Possibly because of pressure from sportsmen's groups and other interested parties, the department did not implement phase two in 1983.<sup>24</sup> However, in 1984 phase two began, and the department recommended to the board that antlerless deer hunting permits be issued.<sup>25</sup> The board followed this recommendation and, after complying with the APA procedural requirements, promulgated an antlerless deer hunting rule.<sup>26</sup> The rules committee objected to the rule; however, the board decided to adopt the rule in its original form. A court action followed in which the board carried its burden of proof and the court upheld the rule.<sup>27</sup>

Similarly, in 1985 the department recommended that the board promulgate a rule directing the department to issue 22,150 antlerless deer hunting permits.<sup>28</sup> The board accepted the recommendation and again the rules committee objected.<sup>29</sup>

The rules committee has the power to object to a rule proposed by any state agency and to recommend that the agency

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19. *Id.*

20. *Id.*

21. *Id.*

22. The Fish and Wildlife Department has divided the state into seventeen geographic deer management units. Each DMU is managed independently in order to allow the department to develop regional deer herd management. Regional management recognizes local variations in deer densities, winter weather, and the quality and quantity of winter range. Regan, *supra* note 12, at 1.

23. *Id.*

24. *Id.* at 2.

25. *Id.*

26. *Id.*

27. *Tinker v. Wright*, No. S393-84WnC (Washington County Super. Ct. Oct. 12, 1984).

28. *Valley News*, Sept. 12, 1985, at 17, col. 1.

29. Transcript of the Vermont Legislative Committee on Administrative Rules, Sept. 11, 1985 [hereinafter cited as Transcript].

amend or withdraw the rule.<sup>30</sup> The specific grounds for objection are statutorily limited to a finding that either (1) the rule is beyond the authority of the agency, (2) the rule is contrary to the intent of the legislature, or (3) the rule is arbitrary.<sup>31</sup> After a finding pursuant to one or more of these criteria, the agency that originally proposed the rule must respond in writing to the rules committee.<sup>32</sup> If the agency does not amend or withdraw the rule, the rules committee may vote to file an objection with the secretary of state.<sup>33</sup> This filing shifts the burden of proof from the complaining party to the agency in any subsequent court action.<sup>34</sup> In a court action the agency must prove that the rule is "within the authority delegated to the agency, is consistent with the intent of the legislature and is not arbitrary."<sup>35</sup>

The 1985 antlerless deer hunting rule facially complied with all of the procedures required by the Vermont APA. The department collected and analyzed the relevant data and submitted a formal recommendation to the board.<sup>36</sup> The board filed a rule proposal and provided two opportunities for public comment.<sup>37</sup> After the board published the proposed rule, the rules committee determined that the rule was not within the legislative intent and that the rule was arbitrary.<sup>38</sup> One member of the rules committee also suggested that the law that originally delegated authority to the board to regulate the deer herd violated the Vermont Constitution.<sup>39</sup> Therefore, the rules committee sent the rule back to the board for reconsideration. The board disagreed with the rules committee and formally accepted the proposed rule without any amendments or modifications.<sup>40</sup> Consequently, if a court action followed, the board would retain the burden of proof. However, if the rules committee abused its powers of review, then the burden

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30. VT. STAT. ANN. tit. 3, § 842(a) (1985).

31. *Id.* at § 842(b).

32. *Id.* at § 842(a).

33. *Id.* at § 842(b).

34. *Id.*

35. *Id.* (emphasis added). The rules committee need only satisfy one of the three APA objection criteria, but the agency carries the burden of proof in a subsequent court action for all three criteria regardless of which criteria the rules committee relies upon.

36. See Regan, *supra* note 12, at 1.

37. Transcript of the Vermont Legislative Committee on Administrative Rules, Aug. 27, 1985, at 6.

38. Transcript, *supra* note 29 (Statement of Senator Hunter).

39. *Id.*

40. Valley News, Sept. 12, 1985, at 17, col. 1.

would be improperly placed upon the board. Therefore, the next step is to determine whether the rules committee complied with the Vermont APA.

## II. THE NON-DELEGATION DOCTRINE

Chapter 2, section 67 of the Vermont Constitution states in pertinent part: "The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed . . . under proper regulations, to be made and provided by the General Assembly."<sup>41</sup> The rules committee apparently interpreted the state constitution to restrict the power to regulate the deer herd to the state legislature alone.<sup>42</sup> Thus, according to the rules committee's logic, the legislature violated the constitution when it delegated the power to regulate the deer herd to the board. However, Vermont case law does not support this non-delegation argument. Between 1898 and 1951 four Vermont Supreme Court decisions approved delegation of the legislature's wildlife regulatory power.

In *State v. Theriault*<sup>43</sup> the Vermont Supreme Court held that a state law that authorized the fish and game commissioner to prohibit fishing in stocked streams did not constitute a taking of private property without just compensation.<sup>44</sup> Rather, the law constituted a valid exercise of the state's police power to preserve or increase wildlife resources.<sup>45</sup> In this case, the defendant had been charged with illegally fishing in a stocked stream that had been posted by the fish and game commissioner.<sup>46</sup> The defendant claimed that restricting his fishing rights constituted a taking of private property for the public use without just compensation.<sup>47</sup> Although the court held that the state legislature had properly exercised its police power, the court also stated that if the legislature's act infringed upon another constitutional provision, the legislature's act would be struck down.<sup>48</sup> The *Theriault* decision indicated the court's willingness to limit the state legislature's reg-

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41. VT. CONST. chap. 2, § 67.

42. See Transcript, *supra* note 29.

43. 70 Vt. 617, 41 A. 1030 (1898).

44. *Id.* at 623, 41 A. at 1032.

45. *Id.*

46. *Id.* at 618-19, 41 A. at 1031.

47. *Id.* at 620, 41 A. at 1031.

48. *Id.* at 621, 41 A. at 1031.

ulatory powers over wildlife by invoking other provisions of the state and federal constitutions.

Admittedly, *Theriault* suggested only that chapter 2, section 67 of the Vermont Constitution<sup>49</sup> was limited by other constitutional provisions—a limitation imposed upon most state police powers.<sup>50</sup> However, in *State v. Niles*<sup>51</sup> the court further limited the legislature's constitutional power to regulate wildlife. The defendant in *Niles* had been charged with possessing two deer during a closed hunting season.<sup>52</sup> The defendant, a Vermont resident, claimed that since nonresident hunters were not subject to the same penalty for violating the law that residents were, the law discriminated against residents in contravention of the fourteenth amendment of the United States Constitution.<sup>53</sup> The court rejected this claim by stating that the legislature retained the police power to regulate all hunters and could provide whatever regulations it saw fit, the only limitation being the state or federal constitution.<sup>54</sup> More significantly, the *Niles* court also stated that it was within the proper exercise of the state's police power to delegate licensing power to the fish and game commissioner.<sup>55</sup>

The next Vermont Supreme Court decision to suggest that the legislature's wildlife regulatory power could be lawfully delegated was *State v. Haskell*,<sup>56</sup> in which the defendant had violated the law by depositing sawdust, shavings, and refuse into a river.<sup>57</sup> The defendant mill owner complained that the law was unreasonable and discriminated against citizens who owned certain kinds of property.<sup>58</sup> Following the reasoning of both *Theriault* and *Niles* (without explicitly citing those decisions), the court held that when the legislature exercises its police power to protect wildlife such as fish, the legislature was limited to a reasonable exercise of such power.<sup>59</sup> The reasonableness, in turn, would ultimately be deter-

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49. The *Theriault* court actually referred to chapter 2, section 40 of the Vermont Constitution. Vt. CONST. chap. 2, § 40 (1793). However, section 40 of the 1793 Vermont Constitution is retained in its original form under § 67 of the present Vermont Constitution.

50. See *State v. Morse*, 84 Vt. 387, 394, 80 A. 189, 191 (1911).

51. 78 Vt. 266, 62 A. 795 (1906).

52. *Id.* at 268, 62 A. at 795.

53. *Id.*

54. *Id.* at 270, 62 A. at 796.

55. *Id.* at 273, 62 A. at 797.

56. 84 Vt. 429, 79 A. 852 (1911).

57. *Id.* at 430-31, 79 A. at 853.

58. *Id.* at 431, 79 A. at 853.

59. *Id.*

mined by the court.<sup>60</sup> Therefore, the court permitted the judiciary some control over the regulation of wild game. *Haskell* became another step in the movement away from exclusive legislative control over wild game regulation.

Finally, in *Elliot v. State Fish and Game Commission*,<sup>61</sup> the Vermont Supreme Court explicitly held that regulations promulgated under chapter 2, section 67 did not have to be promulgated by the legislature itself, but could be promulgated through a delegation of power to a body or person given proper jurisdiction.<sup>62</sup> In *Elliot*, the plaintiffs filed a petition requesting that the legislature afford additional protection to trout and black bears in Addison county.<sup>63</sup> In support of their petition, the plaintiffs claimed that the Vermont Constitution required that all hunting and fishing regulations be promulgated by the General Assembly.<sup>64</sup> In other words, they argued that the legislature could not constitutionally delegate any authority or power to the fish and game commissioner.<sup>65</sup> The court flatly rejected this argument and relied upon *Theriault* and *Niles* to support the conclusion that this regulatory power could be constitutionally delegated.<sup>66</sup>

The Vermont Constitution provides one other source that might support the rules committee's non-delegation argument. Chapter 1, article 5 states that the people of Vermont, by their legal representatives, have the sole, inherent, and exclusive right to govern and regulate the internal police power.<sup>67</sup> The Vermont Supreme Court has explicitly stated that both chapter 1, article 5 and chapter 2, section 67 provide the legislature with the power to provide for and regulate wildlife.<sup>68</sup> Consequently, even if the regulation of wildlife is constitutionally delegated under chapter 2, section 67, the delegation of this same police power could be found unconstitutional under chapter 1, article 5. However, as reasoned

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60. *Id.*

61. 117 Vt. 61, 84 A.2d 588 (1951). The *Elliot* court refers to the language contained in chapter 2, section 67 of the Vermont Constitution but erroneously cites to section 63. For purposes of clarity and consistency, the *Elliot* case is discussed as if that court properly cited to section 67.

62. *Id.* at 69, 84 A.2d at 593.

63. *Id.* at 62, 84 A.2d at 589.

64. *Id.* at 66, 84 A.2d at 591.

65. *Id.*

66. *Id.* at 67, 84 A.2d at 592.

67. VT. CONST. chap. 1, art. 5.

68. See *State v. Theriault*, 70 Vt. 617, 621, 41 A. 1030, 1031; see also *Bondi v. MacKay*, 87 Vt. 271, 275-76, 89 A. 228, 230 (1913).

by analogy below, this argument is without merit.

In *State v. Morse*<sup>69</sup> the respondent was prosecuted for violating a regulation of the State Board of Health.<sup>70</sup> The regulation prohibited bathing in Berlin Pond because that pond provided Montpelier with its water supply.<sup>71</sup> The defendant argued that the Board of Health's regulation deprived him of his property without just compensation.<sup>72</sup> The court rejected this argument because the regulation only affected a single use of the defendant's land, and was a valid exercise of the state's police power.<sup>73</sup> Furthermore, the court noted that the state's police powers need not remain with the legislature and could be "lawfully . . . *delegated* to municipalities, to local or to state boards . . . and when so delegated the agency employed is clothed with the power to act, as full and efficient as that possessed by the Legislature itself."<sup>74</sup>

The regulation of the right to hunt and fish is also a part of the state's police power.<sup>75</sup> Arguably, the *Morse* decision was not limited to the state's police power to regulate bathing in a public water supply. *Morse* suggests that all police powers under chapter 1, article 5 may be constitutionally delegated to municipalities and boards. Therefore, along with the delegation of power under chapter 2, section 67, the agency receives wide discretionary powers to exercise the police power under chapter 1, article 5.<sup>76</sup>

### III. CONTRARY TO THE INTENT OF THE LEGISLATURE

The rules committee explicitly objected to the board's administrative rule because the rule allegedly violated the legislature's intent.<sup>77</sup> The rules committee supported this objection with two assertions: (1) that the legislature intended a presumption against a state-wide open antlerless deer season; and (2) that the board failed to support its rule with well-established scientific criteria.<sup>78</sup> These assertions are not, however, supported by the language of

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69. 84 Vt. 387, 80 A. 189 (1911).

70. *Id.* at 389, 80 A. at 190.

71. *Id.* at 390, 80 A. at 190.

72. *Id.* at 392, 80 A. at 191.

73. *Id.* at 393, 80 A. at 191.

74. *Id.* at 393-94, 80 A. at 191 (emphasis added).

75. See *supra* text accompanying notes 43-60.

76. See *Morse*, 84 Vt. at 393, 80 A. at 191.

77. Transcript, *supra* note 29.

78. *Id.*

the statute which delegated authority to the board, or by the scientific evidence supporting the board's rule. Therefore, the rules committee's objection that the rule is contrary to the intent of the legislature is incorrect.

The statute that originally empowered the board with wildlife regulatory authority states:

It is the policy of the state that an abundant, healthy deer herd is a primary goal of fish and game management. It is also acknowledged that although a *state-wide open season on antlerless deer is not recognized as desirable or necessary to achieve this goal*, a limited antlerless season on a management district basis could be an effective tool for harvesting an overpopulation of the deer herd. It is the policy of this state that the use of a limited district open season on antlerless deer be implemented only after a scientific game management study by the fish and game department supports such a season.<sup>79</sup>

This statutory policy statement contradicts the rules committee's first assertion because it does not prohibit an antlerless deer hunt. The policy statement only suggests that the antlerless deer season is undesirable. Consequently, if there is a legislative presumption against an antlerless deer season, as the rules committee suggests, that presumption is equivocal and refers only to a "state-wide open season."<sup>80</sup>

The proposed antlerless deer season was not state-wide because the department's permit recommendation suggested an antlerless deer hunt in sixteen out of the seventeen deer management units.<sup>81</sup> The proposed hunt was also not an open season because the rule was based upon a lottery system and only allowed 22,150 antlerless deer hunting permits.<sup>82</sup> Therefore, the department was

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79. VT. STAT. ANN. tit. 10, § 4081(c) (1984) (emphasis added).

80. *Id.*

81. Regan, *supra* note 12, at 1. It is, however, difficult to determine exactly why the department excluded only one DMU from its permit recommendation. One reason may simply be that the department was aware of the "state-wide" language in the policy statement and excluded the unit solely to comply with the statement. Senator Hunter argues that this is what makes the board's rule arbitrary. Transcript, *supra* note 29. On the other hand, biological and habitat factors may support the exclusion of this unit from the antlerless deer permit recommendation.

82. See Regan, *supra* note 12, at 4. An open season is broadly defined as "that period of time during which fishing or hunting is permitted." VT. STAT. ANN. tit. 10, § 4001(2) (1984). Therefore, an open antlerless deer season is only limited by season length, and is otherwise available to all resident and nonresident hunters. In the 1985 antlerless deer permit lottery,

not recommending a state-wide open season because not all of the state's deer management units were involved and because only a limited number of hunters were allowed to shoot an antlerless deer.

In response to the rules committee's second assertion, it is true that the board may implement a limited district antlerless deer hunting season only after the department conducts a scientific game management study.<sup>83</sup> However, the department complied with this statutory mandate by developing a comprehensive long-range deer management plan.<sup>84</sup> Therefore, the department satisfied every requirement imposed by the statute, thus bringing the antlerless deer hunting rule within the board's jurisdiction.

#### IV. THE APPROPRIATE STANDARD FOR LEGISLATIVE REVIEW OF SCIENTIFIC AGENCY RULES

##### A. *Discretionary Political Review v. Traditional Judicial Review*

The final legislative review standard under the Vermont APA is for the rules committee to determine if the administrative rule is arbitrary.<sup>85</sup> This was the second explicit standard under which the rules committee objected to the board's rule.<sup>86</sup> The question here is whether the rules committee may, as a matter of policy, apply a discretionary, political standard of review or must follow a defined, traditional standard such as the judicial "arbitrary and capricious" standard.<sup>87</sup> If bound by the former, the rules committee may object to a rule on a purely political basis with no consideration of a reasonable relationship between the rule and the legislative purpose. If bound by the latter, the rules committee may not object to a rule if the rule is reasonably related to the purposes stated in the

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51,755 people applied for the permits. Telephone interview with Ron Regan, Vermont Fish and Wildlife Department Deer Project Leader (Feb. 18, 1986). Because only 22,150 permits were issued, the 1985 antlerless deer season was not an "open season" as defined in the statutes.

83. VT. STAT. ANN. tit. 10, § 4081(c) (1984).

84. Habitat Highlights, *supra* note 13, at 1.

85. VT. STAT. ANN. tit. 3, § 842(b) (1985).

86. Transcript, *supra* note 29. The rules committee stated that to prohibit antlerless deer hunting in management unit A and to permit an antlerless deer hunt in management unit B, a unit allegedly similar to A in both habitat and biological parameters, was an arbitrary exercise of power. *Id.*

87. See *infra* text accompanying notes 135-42.

enabling legislation.<sup>88</sup> Vermont case law does not discuss this issue directly. However, some Vermont decisions might be read to imply that a discretionary standard of review applies to legislative review of agency rule-making.

In *In re Consolidated Rate Appeals of Green Mountain Power Corp.*<sup>89</sup> the Vermont Supreme Court stated that the substance of a technical rule proposed by an administrative agency might be beyond the scope of judicial review and that the appropriate forum for such review is a policy-determining procedure considered internally by an agency or by legislative action.<sup>90</sup> In *Green Mountain Power Corp.* a public utility appealed the Vermont Public Service Board's review of proposed utility rate increases.<sup>91</sup> The court acknowledged the complexity involved in rate increase review<sup>92</sup>—complexity created by the Public Service Board's stated goal of providing adequate service at just and reasonable rates.<sup>93</sup> The court's refusal to undertake a substantive review of the Public Service Board's action and the court's inference that legislative review of an agency rule is better adapted to agency policy considerations, suggests that legislative review is not bound by the same restrictive standards of review currently imposed upon the Vermont judiciary. The rationale for such a view is that courts, as opposed to legislative rules committees, are not adapted to making legislative types of determinations.<sup>94</sup>

Courts in other jurisdictions have directly discussed the scope of legislative review.<sup>95</sup> For example, in *State ex rel. Barker v. Manchin*,<sup>96</sup> the West Virginia Supreme Court considered a coal miner's petition for a writ of mandamus to compel the Secretary of State to file, in the permanent register of rules, certain safety regulations promulgated by the Director of the Department of Mines.<sup>97</sup> These regulations had previously been disapproved by the Legisla-

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88. See *infra* text accompanying note 136.

89. 142 Vt. 373, 455 A.2d 823 (1983).

90. *Id.* at 380, 455 A.2d at 825.

91. *Id.* at 377, 455 A.2d at 824.

92. *Id.* at 379, 455 A.2d at 825.

93. *Id.* at 380, 455 A.2d at 825.

94. See *Fairchild v. Vt. State Colleges*, 141 Vt. 362, 368, 449 A.2d 932, 935 (1982).

95. See *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 632 (W.V. 1981), *State of Alaska v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980), and *Opinion of the Justices*, 121 N.H. 552, 431 A.2d 783 (1981).

96. 279 S.E.2d 622 (W.V. 1981).

97. *Id.* at 625.

tive Rule-Making Review Committee, a committee similar to the Vermont rules committee.<sup>98</sup> The petitioner claimed that the statute that created the rules committee violated the separation of powers doctrine embraced in article V, section 1 of the West Virginia Constitution.<sup>99</sup> The court agreed with the petitioner's argument because the rules committee's statutory powers violated constitutional provisions limiting the legislature's power to enact laws.<sup>100</sup> The court also held that if the rules committee had complied with the state and federal constitutions, the rules committee would not be bound by the relatively restrictive judicial standards of review and could review proposed rules based solely upon the committee's discretion.<sup>101</sup> However, the court criticized this standardless form of review because a legislative rules committee may use its discretion to inappropriately influence or dictate the content of a rule or regulation.<sup>102</sup> Furthermore, the court stated:

It would doubtless be unrealistic to assume that a group of state legislators would be content to make judgments about the *legal* power of administrative agencies, and ignore the *political* implications of administrative policies as these are revealed in actual application in specific instances. Legislative review of administrative rule-making is almost certain, in the United States, to be *political* review.<sup>103</sup>

Despite its criticism of political review, the West Virginia court held such review valid as long as the legislative review process complied with the procedural requirements of the state constitution.<sup>104</sup>

Both *Green Mountain Power Corp.* and *Barker* involved judicial review of policy issues (public utility rate increases and public safety), and can be distinguished from the antlerless deer situation. Judicial review of agency policy decisions requires the court to review agency choices between factors not necessarily supported by scientific evidence. The judges need not be experts in any particular academic field to consider the benefits and harms of an agency policy choice. However, when a judge reviews scientific facts, ex-

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98. *Id.*

99. *Id.* at 630.

100. *Id.* at 633.

101. *Id.* at 632.

102. *Id.*

103. *Id.* at 632 n.5 (quoting Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J. PUB. L. 134, 157-58 (1958)).

104. *Barker*, 279 S.E.2d at 633.

pertise in the scientific field may be essential to making a rational choice between conflicting sources of scientific evidence. Unfortunately, most judges do not have this scientific training.

The case discussed below, *Defenders of Wildlife, Inc. v. Endangered Species Scientific Authority*<sup>105</sup> (ESSA), reveals the dangers of political review of wildlife regulations. The case involved judicial review of scientific fact-finding and might arguably be distinguished from the present antlerless deer controversy which involves legislative review. However, such a distinction is irrelevant because neither judges nor legislators are trained in either the theory or the technology of the science under consideration. Therefore, when a rules committee ignores the statutory standard of review and determines its own biological criteria, the affected natural resource suffers as much harm as if the judiciary determined the criteria.

In *Defenders of Wildlife*, the United States Court of Appeals for the District of Columbia Circuit discussed the court's scope of review of scientific agency fact-finding. At issue in *Defenders of Wildlife* were the ESSA scientific guidelines controlling bobcat pelt exports from approximately thirty-five states.<sup>106</sup> ESSA relied primarily upon bobcat population trend data to establish these guidelines.<sup>107</sup> Population trend data most often consists of sex ratios, survival and fecundity by age, frequency distribution of ages, and numbers or density of the animals.<sup>108</sup> After analyzing the bobcat population trend data, the ESSA found that bobcat pelts could be exported from thirty-three of the states with no detriment to the bobcat population as a whole.<sup>109</sup> The Defenders of Wildlife challenged ESSA's finding as an arbitrary exercise of agency discretion.<sup>110</sup> The United States District Court for the District of Columbia temporarily restrained ESSA's bobcat guidelines and interested groups intervened.<sup>111</sup> Subsequently, the district court dismissed the complaint with respect to twenty-six states, but with respect to the seven other states, the court set aside ESSA's find-

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105. 659 F.2d 168 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 963 (1981).

106. 659 F.2d at 174.

107. *Id.* at 177.

108. Casenote, *Defenders of Wildlife, Inc. v. Endangered Species Scientific Authority: The Court as Biologist*, 12 ENVTL. L. 773, 796 (1982).

109. 659 F.2d at 173.

110. *Id.* at 176.

111. *Id.* at 174.

ing that no detriment would result from the bobcat pelt export.<sup>112</sup> The Defenders of Wildlife appealed the decision.<sup>113</sup>

The appellate court invalidated ESSA's reliance upon population trend data because, according to the court, ESSA did not properly consider total population figures.<sup>114</sup> Subsequently, the appellate court remanded the case to the district court with the directive that the district court review ESSA's guidelines in light of the appellate court's total population standard and reject ESSA's population trend standard.<sup>115</sup>

The appellate court's substitution of standards is troubling for three reasons. First, the *Defenders of Wildlife* decision is an example of how a court might irreparably harm a wildlife resource by replacing biologically valid criteria with biologically harmful criteria<sup>116</sup> developed through a "gut feeling" of the court or by an emotional appeal made by parties opposed to the wildlife regulation. The court's reliance on a single biological measure, total population figures, could devastate the bobcat population if that measure is inaccurate.<sup>117</sup> Second, when the court acts as a biologist, wildlife biologists lose the flexibility to balance ecological relationships with the social demands upon the wildlife resource.<sup>118</sup> Third, and perhaps most disturbing, one cannot fail to note the clear similarities between *Defenders of Wildlife* and the present Vermont deer herd controversy. In both instances, a scientific agency promulgated a rule based upon scientifically reliable population data. Upon review, the agency's data was invalidated. In both instances, the reviewing body utilized intuitive rather than scientific criteria in contravention of the APA review standards. Such intuitive or political review may cause irreparable harm to the wildlife resource being regulated.

One need look no further than the history of deer herd management in Vermont for an example of the devastating effects such political review can have upon a natural resource. Political control of Vermont's deer herd has damaged the deer herd's viability and significantly affected the Vermont sportsman's opportunity to

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112. *Id.*

113. *Id.* at 181.

114. *Id.* at 177.

115. *Id.* at 183.

116. Casenote, *supra* note 108, at 799.

117. *Id.* at 797.

118. *Id.* at 800.

hunt.

The Vermont legislature controlled deer herd management between 1777 and 1978.<sup>119</sup> The state legislature enacted the first prohibitive hunting law on March 3, 1797 which provided that, "if any person or persons shall willingly kill or destroy, any wild buck, doe or fawn . . . at any time between the tenth day of January, and the first day of July following . . . every such person shall . . . forfeit and pay a sum of ten dollars. . . ."<sup>120</sup> This very liberal hunting law remained in effect until 1865 when the legislature passed a law *absolutely prohibiting* the taking of any deer for a period of 10 years.<sup>121</sup> This drastic policy reversal was in response to severe depletion of the state's deer herd caused by two major factors: (1) the essentially limitless hunting season originally enacted by the 1797 legislature and the support of such a season by subsequent state legislatures; and (2) rapid deforestation of the state caused by an unprecedented influx of immigrants.<sup>122</sup> The deer herd was so severely depleted that in 1878 a Rutland sportsmen's group imported seventeen deer from New York to reestablish a Vermont deer herd.<sup>123</sup> To protect the deer herd from imminent state-wide extinction, the absolute prohibition on deer hunting continued until 1896.<sup>124</sup>

Apparently learning from its past mismanagement, the 1896 Vermont legislature enacted a law authorizing a *limited* deer season which allowed a hunter to take, in the month of October only, "deer, having horns."<sup>125</sup> Furthermore, the same law limited a hunter to two deer per hunting season.<sup>126</sup> Unfortunately, neither the deer herd's health nor habitat stability motivated the reopening of the deer season. The motivating force happened to be several persons who complained to the legislature that deer were damaging crops.<sup>127</sup> The legislature responded to these complaints and reopened the deer season. In contrast to this political response to

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119. See generally Vt. CONST. chap. 2, § 40 (1793).

120. 1797 Vt. Acts, chap. 44, § 1.

121. 1865 Vt. Acts 184, § 1.

122. See generally L. FOOTE, *THE VERMONT DEER HERD 10-11* (1945) (publication of the Vermont Fish & Game Service, now known as the Vermont Fish and Wildlife Department, Montpelier, Vt.).

123. *Id.* at 12.

124. 1876 Vt. Acts 56, § 3; 1884 Vt. Acts 80, § 1; 1890 Vt. Acts 54, § 1.

125. 1896 Vt. Acts 94, § 2.

126. 1896 Vt. Acts 94, § 3.

127. L. FOOTE, *supra* note 122, at 14.

appease constituents, a 1902 Fish and Game Commission biennial report stated that most of the complaints of so-called crop damage came from persons who disliked the prohibitive hunting season and wished to shoot deer at their convenience.<sup>128</sup> At the end of the 1897 hunting season it became clear that the political response was ill-founded and that the fish and game commissioner's suspicions were correct, because only 103 deer had been killed that season.<sup>129</sup> Fortunately for the Vermont hunter, the deer herd was not again decimated by the state's political regulation of the deer herd.

Between 1896 and 1961, the legislature continuously changed the deer season laws.<sup>130</sup> It is not clear whether these changes resulted from political or biological decision-making, or from a combination of both. Regardless, the volume and variety of state legislation strongly suggests the legislature's lack of understanding regarding scientific deer herd management.

To summarize, Vermont case law suggests that legislative review of agency policy decisions is more discretionary than judicial review. Although this inference is judicially approved in at least one other jurisdiction, that jurisdiction has expressed concern over this standardless form of review because it may actually be political review. Such concern is especially well-founded when a court reviews scientific agency fact-finding as opposed to agency policy decisions.

Subjective or standardless court review of wildlife regulations violates the APA and leads to irresponsible wildlife management. Judges are not typically trained in the technology or theory of wildlife biology. Consequently, substituting subjective judicial criteria for scientifically valid criteria might irrevocably harm the affected wildlife resource. Similarly, state legislators are not trained in the wildlife sciences, and subjective legislative criteria may also harm wildlife resources. Vermont's history of legislating the deer population is specific evidence of the Vermont legislature's wildlife

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128. *Id.* (quoting 1902 Biennial Report of the Vermont Fish and Game Commissioner, State of Vermont).

129. L. Garland, 1978 Deer Season Prospects and Vermont's Experience With a Buck-Only Hunting Season Since 1897, 1, Table 2 (Nov. 1, 1978). Contrast with the 1985 total male deer harvest of 7,477. Vermont Standard, Jan. 2, 1986, at 5, col. 1.

130. 1898 Vt. Acts 108; 1904 Vt. Acts 127; 1908 Vt. Acts 145; 1908 Vt. Acts 146; 1910 Vt. Acts 193; 1912 Vt. Acts 201, § 13; 1917 Vt. Acts 217; 1919 Vt. Acts 184; 1921 Vt. Acts 197; 1927 Vt. Acts 120; 1931 Vt. Acts 149; 1933 Vt. Acts 101; 1935 Vt. Acts 149; 1945 Vt. Acts 129; 1947 Vt. Acts 128; 1951 Vt. Acts 147; 1955 Vt. Acts 290; and 1961 Vt. Acts 119, 161.

mismanagement. Near extinction of the state's deer herd and short-sighted yearly fluctuations in regulations are the hallmarks of Vermont legislative action in this area. Therefore, to prevent political review, judges and legislators should apply the judicial "arbitrary and capricious" standard and should not object to or strike down a scientific agency's fact-finding unless there is no reasonable relationship between the scientific evidence presented and the legislature's intent.<sup>131</sup> What judges and legislators must avoid is the replacement of a sound scientific regulation with a subjective, political regulation.

B. *Application of the Vermont APA "Arbitrary" Standard of Review to the Antlerless Deer Permit Rule*

Apart from the policy-oriented debate regarding the appropriateness of political review of scientific agency rule-making, one could argue that in regard to the antlerless deer hunting rule, the rules committee was not required to apply a restrictive arbitrary and capricious standard. The Vermont APA itself only requires that a rule be "arbitrary,"<sup>132</sup> not "arbitrary and capricious" in order for the rule to be objectionable, and therefore one may argue that the legislature may statutorily employ a more relaxed, discretionary standard of review than it currently employs. However, deletion of the word "capricious" does not necessarily mandate a relaxed standard of review. Black's Law Dictionary defines arbitrary as "fixed or done capriciously or at pleasure . . . [A]bsolutely in power, capriciously . . ." <sup>133</sup> The same dictionary defines caprice as "[w]him, arbitrary, seemingly unfounded motivation."<sup>134</sup> Thus, the word arbitrary and the word capricious are synonyms and can be used interchangeably. As a result, the rules committee should apply the same restrictive "arbitrary and capricious" standard of review currently employed by the Vermont courts.

In *Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc.*<sup>135</sup> the Vermont Supreme Court accepted the explicit reasoning of the United States Supreme Court and held that:

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131. See *infra* text accompanying note 136.

132. VT. STAT. ANN. tit. 3, § 842(b) (1985).

133. Black's Law Dictionary 96 (5th ed. 1979).

134. *Id.* at 192.

135. 137 Vt. 142, 400 A.2d 1015 (1979).

[W]here the empowering provisions of a statute authorize an agency to make such rules and regulations as may be necessary to carry out the provisions of the Act, the validity of such rules or regulations will be sustained so long as they are *reasonably related* to the purposes of the enabling legislation.<sup>136</sup>

Furthermore, the Vermont Supreme Court pointed out that agency interpretation of an enabling statute should be followed by the court unless there are compelling reasons to believe that the agency's interpretation is wrong.<sup>137</sup>

The *Bishop's House* case involved judicial review of agency adjudication. The relevant inquiry here, however, is whether the same standard of review applies to judicial review of agency rule-making. Unfortunately, very few Vermont cases involve an appeal from an administrative rule as opposed to agency adjudication. Shedding some light on the issue is *In re Consolidated Rate Appeals of Green Mountain Power Corp.*,<sup>138</sup> in which a utility company appealed a Vermont Public Service Board rate increase issued pursuant to the board's rule-making authority. As in *Bishop's House*, the court reviewed the statutory language and the legislative intent behind the organic statute.<sup>139</sup> Furthermore, the court applied the "capricious" standard of review:

Unless there is a showing . . . that the Board somehow willfully or capriciously ignored or rejected proper and uncontroverted relevant evidence, the failure of the Board to find the utility's case supported is unimpeachable. Likewise, as previously noted, if conflicting evidence was before the Board, it was free to determine for itself what was to be believed and accepted, without intervention by this Court, except on some basis related to bad faith, fraud or demonstrable mistake.<sup>140</sup>

*Bishop's House* and *Green Mountain Power Corp.* suggest that the proper scope of judicial review of agency rule-making is similar to the scope of judicial review of agency adjudication.

Because discretionary, political review of the board's antlerless

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136. *Id.* at 150, 400 A.2d at 1019 (citing *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (emphasis added)).

137. *Id.* at 150-51, 400 A.2d at 1019-20 (quoting *Red Lion Broadcasting Co. v. Federal Communications Comm'n.*, 395 U.S. 367, 381 (1969)).

138. 142 Vt. 373, 377, 455 A.2d 823 (1983).

139. *Id.* at 387, 455 A.2d at 830.

140. *Id.* at 381-82, 455 A.2d at 826.

deer rule is unwise,<sup>141</sup> and because the statutory mandate to review based upon an "arbitrary" standard is indistinguishable from the judicial "arbitrary and capricious" standard of review, the rules committee should have followed the standard of review suggested by *Bishop's House* and *Green Mountain Power Corp.* Consequently, the rules committee should have reviewed the language and intent of the enabling statute solely to decide whether the agency action was reasonably related to the legislature's intent. Furthermore, the board's authority to weigh the credibility of conflicting testimony should not have been interfered with unless the board had acted with "bad faith, fraud or demonstrable mistake."<sup>142</sup> Having established the appropriate standard for the rules committee's review of the board's antlerless deer permit rule, the remaining question is whether the rules committee properly applied this standard of review.

The Fish and Wildlife Department based its recommendation (to allow an antlerless deer season) upon 1985 deer mortality surveys, browse utilization surveys conducted in thirty-three wintering areas, analysis of fifty-three female deer reproductive tracts, the ages, weights, and antler beam measurements from 1,771 deer taken in the 1984 hunting season, and the total deer kill numbers from the 1984 season.<sup>143</sup> The department then determined a "target buck per square mile" figure for each of the seventeen deer management units in the state.<sup>144</sup> These target figures, derived from the biological and habitat data mentioned above, represented the ideal harvest for the 1985 deer season.<sup>145</sup> Furthermore, the department determined an optimum "adult female (AF) to adult male (AM) harvest ratio" which represented the population ratio deemed necessary to maintain stability within the deer herd.<sup>146</sup> Finally, for each deer management unit, the department developed a three step mathematical formula to determine the number of antlerless deer permits to be issued in the 1985 hunting season;<sup>147</sup> this became the department's recommendation, which the board accepted as the basis for its rule.

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141. See *supra* text accompanying notes 85-131.

142. *Green Mountain Power Corp.*, 142 Vt. at 382, 455 A.2d at 826.

143. Regan, *supra* note 12, at 1-2.

144. *Id.* at 3.

145. *Id.*

146. *Id.*

147. *Id.* at 4.

The rules committee formally objected to the board's antlerless deer permit rule.<sup>148</sup> Senator Hunter objected to the rule for several reasons, one of which was that the board did not meet its "heavy burden" to prove the need for an antlerless deer season through established scientific criteria.<sup>149</sup> Apparently, Senator Hunter failed to note that the board's rule relied very heavily upon the department's recommendation—a recommendation developed after considerable scientific study.<sup>150</sup> Representative Reynes also objected, stating that he believed there were additional variables to consider, such as the extent of coyote predation.<sup>151</sup> Representative Reynes's criticism is flawed for two reasons. First, biological studies of coyote feeding habits suggest that "[a]t this time coyotes do not appear to be decimating Vermont's deer herd."<sup>152</sup> Second, "wildlife mangers can describe an animal population by an infinite number of parameters."<sup>153</sup> When reviewing these parameters the proper scope of review is to evaluate the cumulative effect of all of the evidence presented and not to concentrate on the effect of a single deleted element.<sup>154</sup> Judges and legislators must avoid "simplistic judgments of the relative weight to be afforded various pieces of technical data."<sup>155</sup> Representative Reynes's emphasis, rather than being on coyote predation, should have been on the cumulative effect of the data presented, and the Vermont APA's "arbitrary" standard of review should have been applied to the board's rule.

Senator Baker also neglected to apply the "arbitrary" standard of review:

First, hearing testimony from many people who have spent much of their lives in the woods, both as a living and as an

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148. Transcript, *supra* note 29.

149. *Id.*

150. See Regan, *supra* note 12, at 1-4.

151. Transcript, *supra* note 29.

152. Vermont Standard, Jan. 23, 1986, at 5, col. 4. In this article, Mark Scott of the Vermont Fish and Wildlife Department discusses recent legislation to establish a coyote control program in Vermont. This program concerns the wildlife biologists because past history has shown that coyote control programs do not work. Furthermore, he states that the public perception of coyote abundance and predation on deer is incorrect. *Id.*

It seems likely that the coyote problem will soon come before the rules committee and, as in the present deer herd controversy, the board's coyote rule will be subject to political review.

153. Casenote, *supra* note 108, at 796.

154. *Id.* at 802 (quoting *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 38 (D.C. Cir.) (en banc), cert. denied, 406 U.S. 941 (1976)).

155. *Id.* (quoting *Ethyl Corp.*, 541 F.2d at 66 (Bazelon, C.J., concurring)).

advocation [sic] indicates to me that there is a great deal of doubt as to the authority of the expertise of the biologists . . . . Fourth, in my district there are many farms no longer active and growing up to ground cover and can support additional numbers [of deer] . . . . Most of the hunters and foresters who testified averaged 30 years in experience . . . . Their experience equates in my mind at best to a biologist who has been in the department for 10 to 15 years . . . . Finally, Mr. Chairman, my observations of board members, Fish and Wildlife, during the testimony at these hearings appalled me. They often snickered and poked fun amongst themselves at these people who were testifying . . . . I find that very unprofessional, impolite, and in dam [sic] poor taste.<sup>156</sup>

From the above excerpt it appears that Senator Baker based his review of the board's rule upon three factors. First, he questioned the competence of the state biologists; second, he substituted the personal opinion and random observations of hunters and foresters for the expertise and advice of the biologists; and third, based upon a personal, subjective determination, he stated that he did not like the attitude of the board or the department members.<sup>157</sup> Nowhere in Senator Baker's analysis does he address whether the scientific data gathered by the department was reasonably related to the legislature's goal of maintaining a healthy deer herd. Consequently, Senator Baker's analysis does not comport with the "arbitrary" standard of review required by the Vermont APA.

As a final example of the rules committee's misapplication of the "arbitrary" review standard, Representative Fyfe admitted that the data collected by the department was "good scientific evidence and supported the antlerless deer seasons."<sup>158</sup> However, Representative Fyfe objected to the rule. If the data admittedly supported the rule, why did he object to the rule? By his own admission, the rule was not "arbitrary." Representative Fyfe's reason for objection becomes clear in further statements: the people in his political district did not care for the antlerless deer season.<sup>159</sup> Like

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156. Transcript, *supra* note 29.

157. *Id.*

158. *Id.*

159. *Id.* This note argues that the rules committee review of the antlerless deer controversy did not comply with the Vermont APA and is contrary to sound public policy regarding legislative review of scientific agency fact-finding. Representative Fyfe's "analysis" raises a much broader problem—the general role of scientific agency fact-finding in a democracy where such facts clearly conflict with the majority view. Query what would happen in the antlerless deer controversy if the Vermont populace voted against an antlerless deer season.

Senator Baker, Representative Fyfe did not apply the statutory "arbitrary" standard of review.

The rules committee hearing record contains no evidence of any consideration of whether the actual data collected by the department was reasonably related to the plain meaning of the enabling statute or to the intent of the legislature.<sup>160</sup> The rules committee review ultimately relied upon political considerations and personal points of view. Such determinations are unwise<sup>161</sup> and do not comport with the standard of review mandated by the Vermont APA. Because of the rules committee's objection to the board's antlerless deer permit rule, the Vermont APA mandates that the burden of proof be shifted to the board in a subsequent court action.<sup>162</sup> It is improper to impose this burden of proof where the rules committee engaged in political review as opposed to the proper Vermont APA standard of review.

#### V. DEFERENCE TO A SCIENTIFIC AGENCY

The previous discussion focused on the need to impose upon the rules committee a standard of review similar to the judicial "arbitrary and capricious" standard. The rationale for such a standard (aside from the statutory mandate) is that political influence on deer herd management has been harmful and that such influence could successfully be avoided through the use of the above standard of review. Another reason for rejecting political review, and for applying the restrictive "arbitrary and capricious" standard, is to appropriately defer to the expertise of a scientific agency.

Most state courts abide by a theory of review that limits the extent to which a nonexpert judge may scrutinize the discretion of an agency expert.<sup>163</sup> In 1897, Judge Canty of the Minnesota Su-

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As this note argues, replacing the valid scientific criteria with political criteria unrelated to biological reality, may irreparably harm the deer herd. It would not be surprising to see this dilemma develop sometime in the near future.

160. In fairness, it should be noted that Senator Hunter mentioned the arbitrary standard of review in regard to the deer management units. He believed that the decision not to have an antlerless deer season in unit A (Grand Isle) was arbitrary. Transcript, *supra* note 29. However, as mentioned earlier, the enabling statute does not prohibit a state-wide season; the statute states that only a state-wide open season is disfavored.

161. See *supra* text accompanying notes 85-131.

162. VT. STAT. ANN. tit. 3, § 842(b) (1985).

163. B. SCHWARTZ, ADMINISTRATIVE LAW § 10.1, at 584 (1984).

preme Court expressed the unique position of a judge who is called upon to review technical matters typically regulated by a state agency:

[It] is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question.<sup>164</sup>

Immediately following this statement, Judge Canty acknowledged that on appeal from an "expert" commission, the court must take judicial notice of all the technical learning, knowledge, and information commonly understood by the commission.<sup>165</sup> In other words, a nonexpert judge should defer to the special knowledge and expertise of the agency.

Several Vermont cases parallel Judge Canty's reasoning and state that in an appeal from an administrative action, the court should defer to the expertise of an agency and presume that the agency decision is valid, reasonable, and correct.<sup>166</sup> In the present situation, however, Senator Hunter correctly notes that the board is no more of an expert on the antlerless deer issue than is the rules committee: "They [the board] are lay people as well as we, and I think we can listen to the experts and make up our own mind just as they can. . . ."<sup>167</sup> Therefore, perhaps deference to the board is unwarranted in the present controversy. The only problem with Senator Hunter's analysis is that even though the board consists of lay persons, the board based its rule on the recommendation from highly-trained scientific personnel.

A logical solution to the deference issue might be to grant the Fish and Wildlife Department, the state wildlife biologists, the power to promulgate antlerless deer permit rules. Senator Hunter's analysis would support such a solution since he suggested that the rules committee should defer to the apparent scientific expertise of

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164. *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, —, 72 N.W. 713, 716 (1897).

165. *Id.* at —, 72 N.W. at 716-17.

166. *In re Marjorie Johnston*, No. 83-312 (Vt. Jan. 4, 1985); *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 481 A.2d 1274 (1984); *In re Handy*, 144 Vt. 610, 481 A.2d 1051 (1984); *Fairchild v. Vt. State Colleges*, 141 Vt. 362, 449 A.2d 932 (1982); and *In re Agency of Administration, State Bldgs. Div.*, 141 Vt. 68, 444 A.2d 1349 (1982).

167. Transcript, *supra* note 29.

the department.<sup>168</sup> The present rules committee, however, is not likely to grant any deference to the department. This is primarily due to attitudes of members such as Senator Baker who believed that "there [was] a great deal of doubt as to the authority of the expertise of the biologists."<sup>169</sup> Unless a presumption of validity attaches to the department's rule, the rules committee will continue to subject the rule to political review.

#### CONCLUSION

The antlerless deer permit rule promulgated by the board results from a constitutional delegation of power, is within the jurisdiction established by the enabling statute, and is not arbitrary. As a result, the rules committee's objection to the rule is without foundation, and the burden of proof will be improperly placed upon the board if a court action should follow.

Also, legislative review of agency rule-making should incorporate, and more significantly, apply, the "arbitrary and capricious" standard currently employed by the Vermont judiciary. Political review, the process plainly used by the present rules committee, is inappropriate in the context of the antlerless deer season and arguably so in any rules committee review of scientific agency fact-finding.

This note began by stating that the antlerless deer season controversy will most likely be debated far into the future. This prophecy has held true at least for 1986 because a new state-wide citizen's group, Vermont Wild Ways, Inc., has been organized to actively oppose any antlerless deer season.<sup>170</sup> Furthermore, this group supports the return of deer herd management to the legislature.<sup>171</sup> It will be interesting to see what other groups may rise to take up arms with or against this group. Regardless of who becomes involved in the political fray over deer herd regulation, the almost inevitable loser of the battle will be Vermont's white-tailed deer.

*John R. Bashaw*

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168. *Id.*

169. *Id.*

170. Barre Times Argus, Jan. 12, 1986, at 3, col. 1.

171. *Id.*

