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NOTICE OF PUBLIC HEARING

ON A PROPOSED RULE

SECRETARY OF STATE

AGENCY: West Virginia Department of Natural Resources

RULE TYPE: Interpretive

RULE TITLE: W. Va. Dept. of Natural Resources, Chapter 20, Article 2, Procedural Rules for Obtaining Permits to Kill Deer or Other Wildlife Causing Damage to Cultivated Crops (Series 83) and Interpretive Rules for Obtaining Permits to Kill Deer or Other Wildlife Causing Damage to Cultivated Crops (Series 84)

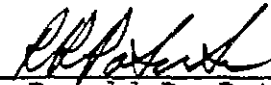
A PUBLIC HEARING ON THE ABOVE PROPOSED RULE WILL BE HELD AT 7:00 p.m. ON February 4 at 1800 Washington Street, East, Room 674, Charleston, West Virginia AND AT 7:00 p.m. ON February 11 AT Elkins Operations Center, Ward Road, Elkins, West Virginia 26241

COMMENTS ARE LIMITED TO: ORAL WRITTEN BOTH XX

COMMENTS MAY ALSO BE MAILED TO: Mr. Ron Shipley, Special Assistant to the Director, Director's Office of Regulatory Affairs, Dept. of Natural Resources, 1800 Washington Street, East, Charleston, West Virginia 25305

THE DEPARTMENT REQUESTS THAT PERSONS WISHING TO MAKE COMMENTS AT THE HEARING MAKE AN EFFORT TO SUBMIT WRITTEN COMMENTS IN ORDER TO FACILITATE A REVIEW OF THESE COMMENTS.

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THE PROPOSED RULE.



Ronald R. Potesta
Director



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

ARCH A. MOORE, JR.
Governor

August 4, 1986

RONALD R. POTESA
Director

MICHAEL A. FOTOS
Deputy Director

The Honorable Ken Hechler
Secretary of State
State Capitol, Suite 157-K
Charleston, West Virginia 25305

Re: Filing of Adopted Rules (Issuance
of Permits to Kill Deer or Other
Wildlife Causing Damage to
Cultivated Crops, Fruit Trees or
Commercial Nurseries, Series IV-E)
and Response to Comments

Dear Mr. Hechler:

Enclosed please find for your filing a copy of adopted
procedural and interpretive rules of the Department of
Natural Resources and a Response to Comments.

If you have any questions concerning this filing, please
contact Mr. Jeffrey E. Herrold, Director's Office of
Regulatory Affairs, at 348-2761.

Sincerely,

Ronald R. Potesta
Director

RRP/jhb

Enclosures

cc: Richard M. Hall
Robert L. Miles
James M. Ruckel

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The Department's rulemaking is prompted by Judge Hott's decision in the case of Burns v. Hertig. Under Section 20-2-15(a) of the West Virginia Code, the Department must issue special hunting permits to landowners if they sustain "substantial damage" to crops caused by deer or other wildlife. In his decision, Judge Hott ruled that current Administrative Procedures did not establish any guidelines to determine how much damage is necessary to trigger this substantial damage provision. Consequently, the Judge required the Director to "...establish reasonable standards and guidelines to assist the local conservation officers in determining when there is 'substantial damage' under Code 20-2-15, and (he) shall also clarify the 'Procedures for Controlling Wildlife Damages' to make it clear what damage triggers the duty of the conservation officer to determine the number of animals to be removed or destroyed." The adopted rules provide this guidance to conservation officers by defining the circumstances which constitute "substantial damage" to cultivated crops, fruit trees, and commercial nurseries.

PROMULGATION HISTORY: Proposed procedural and interpretive rules relating to crop damage permits were filed with the Secretary of State on January 2, 1986. Two public hearings were then held to receive comments on the proposed rules. The first hearing was held in Charleston on February 4, 1986; the second hearing was held in Elkins on February 11, 1986. The comment period ended on February 12, 1986 at 5:00 p.m.

RESPONSE TO COMMENTS (Procedural Rule): The following synopsis details each change made to the Procedural Rule proposed on January 2, 1986 and the rationale for that change:

Section 1. Scope and Authority

Reference to damage to fruit trees or commercial nurseries has been added to Section 1.1 so that the language of this section is consistent with Section 20-2-15(a) of the West Virginia Code.

Section 2. Procedure

Substantial was added to Section 2.3 so that the language of this section is consistent with Section 20-2-15(a) of the West Virginia Code.

FISCAL NOTE FOR ADOPTED RULES

Rule Title: Issuance of Permits to Kill Deer or Other Wildlife Causing
Damage to Cultivated Crops, Fruit Trees or Commercial Nurseries

Type of Rule: Legislative X Interpretive X Procedural

Agency: Department of Natural Resources

Address: 1800 Washington Street East, Building 3, Charleston, WV 25305

1. Effect of Proposed Rule (Estimated Total Cost)	Increase \$	ANNUAL		Current \$	FISCAL YEAR	
		Decrease \$			Next \$	Thereafter \$

Personal Services

Current Expense

Repairs and Alterations

NO CHANGE

Equipment

Other

2. Explanation of Above Estimates: The adopted rules should have no impact upon Department expenditures.
3. Objectives of These Rules: The adopted rules establish the procedures that must be followed to obtain a crop damage permit and the Department's methodology for issuance of that permit.
4. Explanation of Overall Economic Impact of Proposed Rule.
 - A. Economic Impact on State Government: No Impact
 - B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens: No Impact
 - C. Economic Impact on Citizens/Public at Large: No Impact

Date: August 4, 1986

Director



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 1986 AUG -4 AM 10:25
 SECRETARY OF STATE

PREAMBLE FOR
PROCEDURAL AND INTERPRETIVE RULES
RELATING TO CROP DAMAGE PERMITS

PROGRAM: Hunting.

REGULATIONS: West Virginia Code, Chapter 20, Article 2, Issuance of Permits to Kill Deer or Other Wildlife Causing Damage to Cultivated Crops, Fruit Trees or Commercial Nurseries (Series IV-E).

AUTHORITY: West Virginia Code, Chapter 20, Article 2, Section 15(a) and Chapter 29A, Article 3.

ACTION: Adopted Rules

TOPIC: Rules for the issuance of permits to kill deer or other wildlife causing damage to cultivated crops, fruit trees, or commercial nurseries.

SUMMARY: The Department is adopting rules concerning the procedures that must be followed to obtain a "crop damage permit" and the Department's methodology for issuance of that permit. This rulemaking is being taken pursuant to court order (Burns v. Hertig 84-C15; Tucker County Circuit Court, May 20, 1985). It replaces previous Administrative procedures issued by the Department.

SUPPLEMENTARY INFORMATION: The Department is promulgating a procedural and an interpretive rule for the implementation of the provisions of West Virginia Code Section 20-2-15(a) relating to crop damage by deer or other wildlife. This will be the first time rules have been promulgated on this code section under the revised Administrative Procedures Act, Chapter 29A, Article 3 of the West Virginia Code. Previously, this procedure was covered by the Department's Administrative Procedures, Series VII - General Departmental Policies. The filing of both a procedural rule and an interpretive rule, instead of a combined procedural and interpretive rule, is required by the Secretary of State's policy to not accept combined rules.

West Virginia Procedural Rules
Department of Natural Resources
Chapter 20-2
Series IV-E

Section 1. Scope and Authority

1.1 Scope and Purpose. The purpose of these regulations is to establish the procedures for obtaining permits to kill deer or other wildlife causing damage to cultivated crops, fruit trees or commercial nurseries.

1.2 Authority. These regulations are promulgated under the authority of the West Virginia Code Chapter 20, Article 2, Section 15(a) and Chapter 29A, Article 3.

1.3 Effective Date. These regulations will be effective 30 days after filing.

1.4 Filing Date. These regulations were filed on August 4, 1986.

Section 2. Procedure

2.1 Notification. At the occurrence of damage, the landowner, lessee or tenant shall, in person or by telephone, notify the local conservation officer or district law enforcement office and report his name, address, specific location where damage is occurring, type of damage and species causing such damage.

2.2 Conservation Officer Investigation. The conservation officer or his wildlife designee shall investigate the alleged damage according to the following procedures, complete the necessary wildlife damage forms and permits, and submit completed forms quarterly to the district game biologist.

2.3 Determination of Substantial Damage.

2.3.1 Cultivated crops. The conservation officer or his wildlife designee shall select a starting point in the area the crop owner indicates damage has occurred and follow along the crop row or a straight line in the case of grain or forage crops. After every five steps he shall record if damage is occurring within a one-step radius of that point. If damage can be found at 20% of the sample points, then there is substantial damage.

~~2.3.2 Gardens and Ornamentals. Total crop damage equalling 20% or more.~~

~~2.3.3--Orchards--and--Christmas--Trees~~ 2.3.2 Fruit Trees and Commercial Nurseries. Damage must occur on 20% of the trees in the portion of the orchard or nursery receiving damage. To be included in the calculation, browse damage must occur on at least 10% of the ends of branches at a height of 5 feet and lower.

Section 3. Issuance of Permits

3.1 Upon making a determination of substantial damage pursuant to Section 2.3, the conservation officer or his wildlife designee shall issue a permit for the number of animals as follows:

3.1.1 For estimates of 5 or less animals determined to be causing damage, the conservation officer or his wildlife designee may allow the permittee to kill up to 100% of the estimated animals.

3.1.2 For estimates of 6-10 animals determined to be causing damage, the conservation officer or his wildlife designee may allow the permittee to kill up to 80% of the estimated animals.

3.1.3 For estimates of more than ~~100~~ 10 animals determined to be causing damage, the conservation officer or his wildlife designee may allow the permittee to kill up to 50% of the estimated animals.

3.2 The permittee may not kill more than the number of animals specified on the permit. No permit will be issued for greater than 25 animals.

Section 4. Duties of Permittees

4.1 All animals taken must be immediately tagged with a non-hunting tag supplied by the Department of Natural Resources. Part of the tag shall be affixed to the carcass and the remaining portion returned to the Department of Natural Resources within 48 hours following the date of kill.

4.2 No animals taken under this provision may be transported beyond the boundaries of the State of West Virginia.

Section 5. Reoccurrence

5.1 If substantial damage continues or reoccurs after removing deer or other wildlife, then the conservation officer or his wildlife designee may repeat issuing permits provided that the procedures of Section 4.2 Sections 2 and 3 are followed, until successive substantial damage ceases.

RESPONSE TO COMMENTS (Interpretive Rule): The following synopsis details each change made to the Interpretive Rule proposed on January 2, 1986 and the rationale for that change:

Section 1. Scope and Authority

Reference to damage to fruit trees or commercial nurseries has been added to Section 1.1 so that the language of this section is consistent with Section 20-2-15(a) of the West Virginia Code.

Section 2. Applicability

One commenter noted that Section 2.1 refers to protection of personal property but that the Procedural Rule makes no such reference. This commenter suggested that a change be made for the sake of clarity and uniformity. Department rulemaking was prompted by Judge Hott's decision in Burns v. Hertig, which focussed upon the determination of substantial damage to crops. Thus, for clarity and consistence, the Department is issuing rules relating to crop damage permits only. Damage to "personal property" caused by deer or other wildlife will be addressed in future Department rulemaking.

Section 2.1 has been further revised to conform to the language of Section 20-2-15(a) of the West Virginia Code by addition of the phrases cultivated crops, fruit trees or commercial nurseries and deer or other wildlife. Proper citation to Section 20-2-15(a) has also been made.

One commenter pointed to a need to define "cultivated crops" in Section 2.2 rather than "crops" so that this rule will parallel the Procedural Rule. We concur with this recommendation. Therefore, deletions have been made so that this section will be consistent with Section 20-2-15(a) of the West Virginia Code. The definition of "cultivated crops" was provided by the West Virginia Department of Agriculture.

Section 3. Exceptions

One commenter recommended that Section 3.2 be dropped so that timber would be included as a crop under this rule. This suggestion has not been adopted. The Department has no basis for concluding that the Legislature intended timber to be considered

as a "cultivated crop." However, Section 3.2 has been deleted as superfluous because timber is not defined as a cultivated crop in this Rule.

Section 4. Authorized Persons

The phrase take wildlife in Section 4.1 has been changed to kill deer or other wildlife to conform to the language of Section 20-2-15(a) of the West Virginia Code.

The word or has been deleted from the first sentence of Section 4.1 to correct the grammar of this passage.

One commenter stressed the need to define the term "immediate vicinity" used in Section 4.1. This commenter suggested that "immediate vicinity" be specified in the issued permit and be based upon species, habitat, and topography. We have adopted this recommendation and a new final sentence has been added to this section in order to define "immediate vicinity".

West Virginia Interpretive Rules
Department of Natural Resources
Chapter 20-2
Series IV-E

Section 1. Scope and Authority

1.1 Scope and Purpose. The purpose of these regulations is to provide interpretations of the Director's authority governing the issuance of permits to kill deer or other wildlife causing damage to cultivated crops, fruit trees or commercial nurseries.

1.2 Authority. These regulations are promulgated under the authority of the West Virginia Code Chapter 20, Article 2, Section 15(a) and Chapter 29A, Article 3.

1.3 Effective Date. These regulations will be effective 30 days after filing.

1.4 Filing Date. These regulations were filed on August 4, 1986.

Section 2. Applicability

2.1 Landowners, lessees or tenants may protect their personal property--and/or cultivated crops, fruit trees or commercial nurseries from destruction, damage or loss from the direct or indirect feeding, nesting, burrowing, building, trampling or other damage-causing activities of game animals,--game--birds and/or furbearers; deer or other wildlife as provided by 20-2-15, Code--of--West--Virginia Section 20-2-15(a) of the West Virginia Code.

2.2. Crops--shall--include--cultivated--crops,--hayfields,--Christmas trees,--shrubs,--and--ornamentals,--orchards,--and--nurseries. Cultivated crops shall include any crop for which the mechanical removal of weeds is required.

Section 3. Exceptions

3.1 Damage caused by bears or migratory birds is not covered by these provisions.

~~3-2-Permits--shall--not--be--issued--for--damage--to--trees--grown--for reforestation.~~

Section 4. Authorized Persons

4.1 Persons authorized to ~~take~~ kill deer or other wildlife under these provisions shall include only the landowner, lessee, or tenants or persons previously designated by the owner and approved by the conservation officer or his wildlife designee. Permittees may kill animals only in the immediate vicinity of the permittees' damaged crops. "Immediate vicinity" shall be determined by the conservation officer or his wildlife designee based upon the species in question, neighboring habitat, and other relevant factors and shall be specified in the permit issued.

Section 5. Disposition of Animals.

5.1 Landowners, lessees or tenants may retain all animals taken.

5.2 All other animals may be picked up by the conservation officer or his wildlife designee or, with the prior approval of the conservation officer or his wildlife designee, be given away or buried by the permittee.

Section 2.3.2 is superfluous and has been deleted. Damage to garden crops will be determined under Section 2.3.1; damage to nursery stock will be determined under the new Section 2.3.2.

Section 2.3.3 has been renumbered Section 2.3.2 and revised to conform to the language of Section 20-2-15(a) of the West Virginia Code. One commenter suggested that special note be made of tree damage caused by horn rubbing by deer or gnawing by beaver. The commenter felt that this section of the Procedural Rule covered browse-related damage only. We believe the suggested change is unnecessary. The term "damage" in the first sentence of this section includes all types of wildlife damage referred to in Section 2.1 of the Interpretive Rule.

Section 3. Issuance of Permits

Several commenters noted that reference to 100 animals in Section 3.1.3 was a typographical error and should read 10 animals. This error has been corrected.

Section 5. Reoccurrence

One commenter noted that Section 5.1 speaks only of removing deer and suggested inclusion of the phrase the animals in place of deer. Revision has been made to include deer or other wildlife, language consistent with Section 20-2-15(a) of the West Virginia Code and Section 1.1 of this Rule.

Several commenters pointed out that reference to "Section 4.2" did not make sense. One commenter further suggested that the procedures outlined in Sections 2 and 3 of this rule should be followed when permit issuance is repeated, assuring that all crop damage permits are issued in a uniform manner. We have adopted this suggestion.