

State of New York
Department of Environmental Conservation
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In the Matter of the Petition of the
Coalition to Save the Deer, et al.,
for a Declaratory Ruling pursuant
to Section 204 of the State
Administrative Procedure Act

Declaratory
Ruling
11-06

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Introduction

Petitioner Coalition to Save the Deer (Petitioner) is an unincorporated not-for-profit association of residents of the Village of North Haven, Suffolk County. Petitioner seeks a Declaratory Ruling with respect to the authority of the Department of Environmental Conservation (DEC) to issue permits pursuant to Article 11 of the Environmental Conservation Law (ECL) authorizing the taking of deer which have become a nuisance, destructive to public or private property or a threat to public health or welfare.

Background

Significant numbers of wild whitetail deer exist in the Village of North Haven. The regular open season for deer in Suffolk County [see ECL §11-0907(2)(a)(h)] and the special open season [see ECL §11-0903(9)] have not produced a sufficient reduction in the size of the herd to reduce complaints from the public about damage to natural and planted vegetation. Residents of the Village are also concerned about the incidence of deer-vehicle collisions and the possible spread of disease by deer, which host the reproductive stage of the ticks responsible for Lyme disease transmission.

In early 1993, the Mayor and the Village Board of Trustees requested that DEC staff of Region 1 try to address these long-standing issues within the Village. Public meetings were held at which DEC staff presented information regarding deer management. A Citizens Task Force on deer management was formed and was authorized by the Village and DEC to recommend appropriate deer population objectives and identify management techniques. The task force made seven recommendations to the Village Board of Trustees. These included education, experimentation with deer contraception and issuance of DEC permits, known as nuisance deer permits, authorizing the shooting of deer causing property damage or otherwise constituting a nuisance. In March 1994 the Citizens Task Force, responding to considerable public concern about discharge of firearms within the Village and other matters, rescinded its earlier recommendation concerning nuisance deer permits.

Chapter 78 of the Local Laws of the Village of North Haven prohibits the discharge of firearms within the Village except during a special deer season. Special deer seasons for Suffolk County, pursuant to ECL §11-0903(7), are fixed by DEC regulation and can take place during the month of January only. On March 11, 1994, DEC, by letter to Village of North Haven Attorney Anthony Tohill, advised the Village that until this local law is amended, DEC would not issue nuisance deer permits outside of the special January season.

Notwithstanding the March 11, 1994 letter, on March 25, 1994, Petitioner obtained an Order to Show Cause why DEC should not be restrained from issuing deer management permits and why an order should not be entered annulling the decision of DEC to issue permits for baiting and shooting of deer or other destruction of deer or for the purpose of controlling the population of deer by destruction of deer in the Village of North Haven. On April 28, 1994, Petitioner and DEC entered into a Stipulation whereby Petitioner withdrew its CPLR Article 78 Petition, thus discontinuing the judicial proceeding. As part of the Stipulation, DEC agreed to consider the Article 78 petition as a petition for a Declaratory Ruling pursuant to 6 NYCRR §619.1 provided Petitioner supplemented its original papers by letter setting forth a clear and concise statement of the controversy or uncertainty that is the subject of the Declaratory Ruling petition, together with additional facts, information and citations to all relevant statutory and regulatory provisions, if any, pertinent to such controversy or uncertainty. By letter dated May 18, 1994, Petitioner submitted such supplemental information.

Petitioner questions in the following respects DEC's legal authority pursuant to ECL §11-0521 or any other statute:

1. To issue "nuisance" deer permits for the purpose of deer population control or deer management;
2. To issue baiting and shooting permits or allow the baiting and shooting of deer or any other wildlife, except for upland game birds, under any circumstances;
3. To issue any permit which will allow the shooting of deer for the purpose of deer population control or deer management, or for any other purpose on private property during non-hunting seasons;
4. To issue permits allowing the killing of deer for any purpose by the use of firearms in

violation of any local ordinance, including that of the Village of North Haven Code Section 78 which prohibits the use of firearms except as set forth in the ordinance;

5. To issue permits allowing the killing of deer for the purpose of deer population control or deer management without first issuing an environmental impact statement in accordance with ECL §8-0109; and
6. To issue nuisance permits to kill deer or any other wildlife without having an administrative policy and guidelines for the evaluation of applications for such permits.

Petitioner also requests that DEC issue a Declaratory Ruling setting forth whether it does in fact issue permits as set forth above in paragraphs numbered 1 through 6 and, if so, to specify the statute, rule, regulation, policy, administrative directive or authority by which the Department issues such permits. Finally, Petitioner requests that DEC issue a Declaratory Ruling indicating under what conditions or circumstances it will issue permits in the Village of North Haven or any other village or community in the State to kill deer by any means for the purpose of deer population control or management.

Analysis

The following examines and discusses Petitioner's inquiries respecting DEC authority to issue permits authorizing the taking of deer and other wildlife which have become a nuisance, destructive to public or private property or a threat to public health or welfare.

1. DEC's legal authority to issue "nuisance" permits for purposes of deer population control or deer management.

ECL §11-0105 provides that the State of New York owns all wildlife. ECL §11-0103(6)(a) defines "wildlife" to include wild game and all other animal life existing in a wild state, except fish, shellfish and crustacea. ECL §11-0107 provides that no person may take or kill wildlife except as permitted by the Fish and Wildlife Law (ECL Articles 11 and 13). ECL §11-0303(2) provides:

To such extent as it shall deem feasible without prejudice to other functions in the management of fish and wildlife resources of the state and the execution of other duties imposed by law, the department is directed, in the exercise of the powers conferred upon

it, to develop and carry out programs and procedures which will in its judgment, (a) promote natural propagation and maintenance of desirable species in ecological balance, and (b) lead to the observance of sound management practices for such propagation and maintenance on lands and waters of the state, whether owned by the state or by a public corporation of the state or held in private ownership, having regard to (1) ecological factors, including the need for restoration and improvement of natural habitat and the importance of ecological balance in maintaining natural resources; (2) the compatibility of production and harvesting of fish and wildlife crops with other necessary or desirable land uses; (3) the importance of fish and wildlife resources for recreational purposes; (4) requirements for public safety; and (5) the need for adequate protection of private premises and of the persons and property of occupants thereof against abuse of privileges of access to such premises for hunting, fishing or trapping.

These statutory provisions vest in DEC broad authority respecting the management of the wildlife resources of the State. See Barrett v. State, 220 N.Y. 423 (1917).

ECL §11-0523 entitled "Destructive or menacing wildlife; taking without permit," provides, generally, that persons occupying or cultivating lands may take all unprotected species of wildlife, except some birds, when such wildlife is injuring property or has become a nuisance. In addition, the following protected species may be taken without license or permit: skunks, raccoons, coyotes, fox squirrels, opossum and weasel. Landowners may either take the nuisance wildlife themselves, authorize an employee to do so or retain one of the nearly 1200 nuisance wildlife control officers licensed by DEC.

ECL §11-0521 entitled "Destructive wildlife; taking pursuant to permit," authorizes persons to take species of wildlife not named in ECL §11-0523 after obtaining a permit from DEC. Specifically, ECL §11-0521(1) provides:

The department may direct any environmental conservation officer, or issue a permit to any person, to take any wildlife at any time whenever it becomes a nuisance, destructive to public or private property or a threat to public health or welfare. ...

ECL §11-0521(3) provides:

Nothing in this section shall be construed as requiring or obligating the department to issue a permit to take

wildlife or to direct the taking of any wildlife when in its opinion the nuisance, destruction of property or threat to public health and welfare will not be effectively abated thereby.

The clear and unambiguous language of ECL §11-0521(1) and (3) constitute a delegation by the Legislature to DEC of authority to issue permits to take wildlife when, in its opinion, a nuisance,¹ destruction of property or threat to public health and welfare will be effectively abated thereby. Such authority for the State agency which administers the laws pertaining to wildlife management has existed since at least 1912. Section 157 of the Conservation Law, added by Chapter 318 of the Laws of 1912, authorized the issuance of permits to any citizen of the state to take species of protected birds and quadrupeds which were destructive of public or private property. That section was renumbered §156 by Chapter 40 of the Laws of 1938 and renumbered §200 by Chapter 630 of the Laws of 1955. These provisions of law have been construed throughout this century to authorize the Conservation Department and its successor, DEC, to issue permits to citizens for the taking of wildlife which have become a nuisance because they are destroying property, usually crops or ornamental vegetation. This is a reasonable and appropriate construction based on the clear and unambiguous language used by the Legislature.

Petitioner questions DEC's authority to issue "nuisance" deer permits for the purpose of deer population control or deer management. That authority is specifically granted to DEC pursuant to ECL §§11-0303(2) and 11-0521. Every year DEC issues permits to airport operators, orchardists, vineyard operators, nursery owners, farmers, home gardeners, Christmas tree growers and others authorizing them to take deer causing damage to property. These permits authorize the taking of deer so as to reduce the number of animals at the location of the damage. While in some circumstances it is possible to identify an individual animal which is a nuisance, normally the nuisance is created by the presence of deer in numbers that are greater than the property can accommodate without suffering damage. It is excess numbers of deer that create the nuisance, whether it is destruction of crops and ornamental vegetation or deer-vehicle collisions. Eliminating excess (nuisance) deer is a form of deer management that directly addresses the destruction of property that is usually the basis for citizen complaint.

While most wildlife species are managed by State authorities, the federal government has concurrent jurisdiction

¹Webster's Collegiate Dictionary, 9th edition p. 811, (1983) defines a "nuisance" as "one that is annoying, unpleasant or obnoxious".

over such species as migratory birds and has adopted regulations providing for permits to kill birds that damage property. For federally protected wildlife both State and federal permits are required. The federal regulation entitled, "Control of Depredating Birds," authorizes issuance of permits for taking of depredating migratory birds. 50 CFR Subpart D, §21.41 et seq. An applicant for a permit must provide information regarding the species of bird and damage involved and the extent of damage. No further guidance is provided regarding the issuance of a permit. The federal government also issues "depredation orders" pursuant to which migratory game birds may be killed because they have accumulated in such numbers in a particular area as to cause serious damage to agriculture, horticulture or aquaculture. For example, 50 C.F.R. §21.43, "Depredation order for blackbirds, cowbirds, grackles, crows and magpies," authorizes taking of those species, without permit, when found committing or about to commit depredations upon crops or when they concentrate in such numbers and manner as to constitute a nuisance.

2. DEC's legal authority to issue "baiting and shooting" permits.

Petitioner contends that DEC does not have authority to issue permits that authorize baiting and shooting of deer or any other wildlife under any circumstances. Petitioner apparently relies on the prohibition against use of pre-established bait piles in the hunting of deer, as contained in ECL §11-0901(4)(b)(7), to argue that DEC lacks authority to include a condition permitting use of bait in nuisance permits issued pursuant to ECL §11-0521. However, ECL §11-0901(14)(a) provides that nothing in ECL §11-0901 restricts the authority of any special permit or license issued by the DEC. Clearly, the prohibition of use of bait in hunting deer does not apply to a person taking deer pursuant to a nuisance permit, provided that permit authorizes it. In Humane Society of the United States v. County of Monroe, et al., 192 A.D.2d 1139 (1993), also involving nuisance deer permits, the court ruled that the Legislature has expressly provided that certain enumerated prohibitions concerning wildlife do not "restrict the authority of any special permit or license issued by the Department."

3. DEC's legal authority to issue permits authorizing the shooting of deer on private property outside hunting seasons.

Petitioner asserts that DEC has no authority to issue a permit that will allow shooting of deer on private property during non-hunting seasons.

DEC has never suggested nor implied that nuisance permits authorize trespass on private property. ECL §11-0703(1)(b) provides that licenses issued by DEC do not authorize the holder

to trespass on land of another. ECL §11-2115 makes it an offense for any person engaged in hunting without permission upon the lands of another not to leave such lands immediately when requested to do so by the owner, lessee or lawful occupant. In the case of nuisance permits, the permit holder is the property owner or his or her agent, and the permit authorizes the owner to take deer only on the owner's property where the nuisance condition exists. Consequently, while a permit holder may not take deer on someone else's property, he or she may lawfully do so on his or her own land. Since ECL §11-0521(1) specifically provides that nuisance permits may authorize taking of deer "at any time" it does not matter whether the season is open or closed. This matter was addressed in Humane Society of the United States v. County of Monroe, et al., 192 A.D. 2d at 1140, where the court held:

Over the years, the Department has issued nuisance permits for the shooting of deer in areas closed to hunting and it has construed the statutes to authorize that practice. [I]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld' (Matter of Bernstein v. Toia, 43 NY2d 437, 448, rearg denied 43 NY2d 950, quoting Matter of Howard v. Wyman, 28 NY2d 434, 438; Ostrer v. Schenk, 41 NY2d 782, 786).

4. DEC's legal authority to allow the killing of deer with firearms in municipalities where discharge of firearms is permitted.

Petitioner denies the existence of authority for DEC to issue a permit authorizing shooting of deer with a firearm in an area where a local law prohibits discharge of firearms. This is a moot issue because DEC has never contended that it has authority to allow private citizens to ignore a local law enacted pursuant to the police power provisions of the Municipal Home Rule Law. In the case at hand, on March 11, 1994, and as discussed heretofore, DEC wrote to North Haven Village Attorney Anthony Tohill as follows:

Chapter 78 of the Local Laws of the Village of North Haven prohibits the discharge of firearms within the Village. Section 78.3 thereof provides an exception to such prohibition for upland shooting by any person who has obtained the appropriate permits to hunt deer during a special deer season established by the Department of Environmental Conservation. Special deer seasons for Suffolk County are authorized by Section 11-0903(7) of the Environmental Conservation Law, but may only take place during the month of January. Under the existing language of the local law,

the discharge of a firearm for the purpose of taking deer pursuant to a nuisance deer permit outside of the special January deer season would constitute a violation of such local law.

5. DEC's legal authority to issue permits without first issuing an environmental impact statement.

Petitioner contends that DEC lacks authority to issue permits allowing the killing of deer for population control or deer management without first issuing an environmental impact statement (EIS) in accordance with ECL §8-0109, the State Environmental Quality Review Act (SEQR). DEC has already issued an EIS. In 1980, DEC prepared and issued a Final Programmatic Environmental Impact Statement on the Wildlife Game Species Management Program of the Department of Environmental Conservation, Division of Fish and Wildlife. This EIS discusses in great detail DEC's programs for wildlife management and population control. Actions taken consistent with the EIS do not require further compliance under SEQR. Additionally, 6 NYCRR §618.2 defines certain actions as "minor" actions which are Type II actions not requiring further review under SEQR. These actions include "thinning of fish or wildlife surpluses and weeding of species incompatible with man's interests" provided these actions are described in and are part of general fish and wildlife management programs for which an EIS has been prepared. Accordingly, since an EIS has been prepared, DEC has fully complied with SEQR and no further environmental review is required of actions involving issuance of permits pursuant to ECL §11-0521.

6. DEC's legal authority to issue nuisance permits without an administrative policy and guidelines.

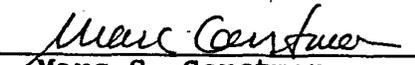
Petitioner alleges that DEC may not issue nuisance permits to kill deer or any other wildlife without having an administrative policy and guidelines for the evaluation of applications for such permits. It is unclear upon what legal premise this argument is based. Clearly, DEC is under no legal obligation to prepare an administrative policy and guidelines for each statute it administers, particularly when the language of such statute is clear and unambiguous. In the case of ECL §11-0521, the Legislature has provided that permits to take wildlife may be issued "at any time whenever it becomes a nuisance, destructive to public or private property or a threat to public health or welfare." No formal or informal administrative guidelines or policy need be adopted to implement this language, and the Legislature has not required adoption of the same by regulation or otherwise. The permit application requires that the applicant identify the species in question, the

nuisance or damage claimed to have occurred and the location. Based upon this information, and on inspection of the property by a DEC wildlife biologist, where appropriate, a permit to take wildlife is issued or denied. Because it is not possible to define the almost infinite variations of fact which could constitute a nuisance, no further guidance is necessary or appropriate.

Conclusion

Permits are issued by DEC for population control and deer management. DEC has legal authority to issue these permits and may authorize baiting and shooting where appropriate. To exercise the terms of a permit, the holder must be so authorized by the owner of the property. Permits do not authorize discharge of firearms where local laws prohibit such discharge. Finally, DEC has complied with ECL Article 8 (SEQR) and is not obligated to issue administrative policies or guidelines providing for the evaluation of permit applications.

Dated: August 10 , 1994



Marc S. Gerstman
Deputy Commissioner
and General Counsel