STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Petition of the TOWN OF HURON for a Declaratory Ruling	:	DECLARATORY RULING 11-05

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Introduction

Petitioner, the Town of Huron, by its attorneys, Knauf and Doran, P.C., seeks a declaratory ruling, pursuant to section 204 of the State Administrative Procedure Act (SAPA) and 6 NYCRR Part 619, with respect to the legality of the discharge of firearms by persons appointed by the Town, and the adjoining Towns of Wolcott, Rose and Butler, as rabies field responders.

Background

Petitioner advises, and for the purposes of this ruling we assume to be true, that because of the spread of rabies into Wayne County the municipalities within such County have embarked upon a cooperative rabies program pursuant to Public Health Law Article 21, Title 4 and General Municipal Law §119-0. Pursuant to an agreement with each town in the County, the County public health nurse oversees the program by answering calls regarding rabid animals. Each town must appoint a "rabies field responder" who is on call at all times. When a call is received by the nurse, he or she notifies the responder if action is necessary.

The Towns of Huron, Rose, Butler and Wolcott have entered into an agreement pursuant to which each town appoints a "primary rabies field responder" and at least one of the responders is on call at all times. The responder who is on call is expected to respond to a notification from the County nurse. When he or she responds to a call outside his own or her town, the responder is acting as a "backup field responder". In order to carry out their duties, responders are required to use firearms to kill animals which are or are suspected to be rabid. Many of these animals will be located within 500 feet of a dwelling at the time the need for their destruction becomes necessary.

Inquiry

You ask (1) can a primary rabies responder discharge a firearm in the course of his or her duty to kill a rabid or suspected rabid animal where the discharge will occur within 500 feet of a dwelling, and (2) can back-up field responders from other towns so discharge a firearm within the Town of Huron.

Discussion

Environmental Conservation Law (ECL) §11-0931(4)(a) prohibits the discharge of a firearm within 500 feet of a dwelling house. ECL §11-0931(4)(b) exempts from such prohibition the owner or lessee of the dwelling house, or members of his or her immediate family actually residing therein, or a person in his or her employ, or the guest of the owner or lessee of the dwelling house acting with the consent of the owner or lessee. When the responder is present on the premises at the request of the owner or lessee, the responder's status is that of an invitee or guest. Accordingly, either a primary or back-up field responder would be permitted to discharge a lawfully possessed firearm within 500 feet of a dwelling if he or she is on the premises as a guest of the owner or lessee and if such owner or lessee consents to the discharge. However, such consent does not authorize the responder to discharge a firearm if he or she is within 500 feet of another dwelling without the consent of the owner or lessee of the other dwelling.

SAPA §204 provides that agencies may issue a declaratory ruling with respect to any statute enforceable by it. See In the Matter of the Petition of Martin S. Baker, et al., DEC 8-01. Accordingly, I have made the ruling set forth above. Additionally, I note that ECL §71-0921 provides that police officers and employees of the Department of Environmental Conservation (DEC) shall enforce the provisions of the ECL. While the Penal Law is controlling over the ECL (see ECL §71-0101), DEC is not specifically directed to enforce the Penal Law. DEC is thus not empowered to issue declaratory rulings with respect to the Penal Law. However, this legal constraint does not diminish DEC's advisory and educational responsibility to assist in compliance with the ECL, and to that end I provide the following interpretation. You should be aware, however, that ultimately it is the courts which have power to construe those provisions.

DEC has found that rabies in certain wildlife species exists in the State and threatens the health and welfare of people and native animal populations. The virulent nature of rabies requires prompt and extraordinary actions (see 6 NYCRR Part 181,

Control of Rabies in Wildlife). DEC regulations, 6 NYCRR §181.3(e), specifically authorize its employees to euthanize, by firearms, animals suspected of having been exposed to rabid animals. DEC believes that the killing of animals exposed to rabies is justified to avoid imminent public or private injury; accordingly, should a rabies field responder be charged following discharge of a firearm for a violation of law relating to such discharge the defense of justification would be available to such responder.

Penal Law §35.05 provides that conduct which would otherwise constitute an offense is justifiable and not criminal when:

> it is performed by a public servant in the reasonable exercise of his official powers, duties or functions.

As set forth above, DEC believes that the destruction of potentially rabid wildlife with a firearm is reasonable. Penal Law §10.00(15) defines a "public servant" as any public officer or employee of the State or a political subdivision thereof. Clearly field responders are public servants. The agreements between the towns and between the County and town contemplate that responders will be required to respond to rabid animal complaints. It is clearly within the scope of the responder's powers, duties and functions under the agreements to discharge firearms in response to public requests for assistance in dealing with potentially rabid animals.

Penal Law §35.05 also provides that conduct which would otherwise constitute an offense is justifiable and not criminal when:

> Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence or morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

The serious, even life-threatening, results from human contact with a rabid animal are well known. Clearly the desirability of avoiding human injury or death from rabies outweighs the desirability of avoiding the consequences of discharge of a firearm in close proximity to a dwelling. However, it may be possible in some circumstances to avoid use

of a firearm by employing alternatives such as jab poles containing lethal injections in a hypodermic syringe.

CONCLUSION

Based on the above, I rule that discharge of a lawfully possessed firearm within 500 feet of a dwelling is not unlawful if it is done by either a primary or backup rabies responder as a guest of the owner or lessee of the dwelling, with his or her consent, and provided that the owners or lessees of all other dwellings within 500 feet of the discharge also consent to the discharge. It is also my informal opinion that destruction of potentially rabid animals by rabies field responders by firearms in close proximity to dwellings should be construed as being within the duties of a public servant and as a rational response to an emergency as provided for in Penal Law §35.05.

A copy of this ruling will be sent to the State Police and other appropriate law enforcement agencies to apprise them of these significant issues of public health and safety.

Marc S. Gerstman

May 18, 1993