

**ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

**STATE OF NEW HAMPSHIRE  
DEPARTMENT OF JUSTICE**

**MEMORANDUM**

**TO:** The Governor & Executive Council of the State of New Hampshire  
**FROM:** Gordon J. MacDonald, Attorney General  
**DATE:** June 5, 2017  
**RE:** Review of Legislation By the Fish and Game Commission

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This memorandum responds to a question raised at the Council's May 17, 2017 meeting regarding the authority of the Fish and Game Commission ("Commission") to take positions on legislation. The question arises from the Commission's consideration of Senate Bill 12 earlier this year.

**A. Commission Authority To Establish Positions on Proposed Legislation**

RSA Title XVIII is captioned "Fish and Game" and it is comprised of RSA chapters 206 through 215-C. Several statutory provisions address the establishment, authority and operation of the Commission itself. Among those is RSA 206:4-a, which is captioned "Duties". It provides in relevant part:

In addition to other duties provided by law, it shall be the duty of the Fish and Game Commissioners, as the citizens' representatives, to be the stewards of the fish, wildlife and marine resources of the State of New Hampshire and to set general policy in the following areas: ...

V. Establishment of positions on proposed legislation that affects fish, wildlife and marine resources and the overall management of the Fish and Game department.

RSA 206:4-a (emphasis added).

Several principles of statutory construction apply. First, the Legislature has specifically defined the terms "fish," "wildlife" and "marine species" for purposes of RSA Title XVIII. See RSA 207:1, VI, XXXV and XV, respectively.<sup>1</sup> Thus, those specific definitions apply to RSA 206:4-a, V. For example, "wildlife" means "all species of mammals, birds, fish, mollusks,

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<sup>1</sup> RSA 207:1 provides that "[w]ords and phrases used in this title shall be construed" according to statutory definitions. (emphasis added). RSA 204:6-a is part of RSA Title XVIII.

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crustaceans, amphibians, invertebrates, reptiles or their progeny or eggs which, whether raised in captivity or not, are normally found in a wild state.” RSA 207:1, XXXV.

Second, the Legislature’s direction that the Commission shall establish a position on “legislation that affects fish, wildlife and marine resources and the overall management of the Fish and Game department” implies that the Commission may not take a position on legislation that has no similar effect. *St. Joseph Hospital v. Rizzo*, 141 N.H. 9, 11 (1996) (quoting *In re Guardianship of Raymond E.*, 135 N.H. 688, 691 (1992)) (reiterating “the familiar doctrine of statutory construction *expressio unius est exclusio alterius*: Normally the expression of one thing in a statute implies the exclusion of another”).

Third, to opine that the Commission can act more broadly with respect to legislation than what is specifically set forth in RSA 206:4-a, V would be to grant authority to the Commission that the Legislature chose not to provide. *State v. Smith*, 163 N.H. 427, 428 (2012) (stating that one can “neither consider what the legislature might have said nor add language the legislature did not see fit to include”).

Fourth, to the extent the plain language of the statute is ambiguous, the legislative history of RSA 206:4-a supports a narrow construction. Based on our review of that history, it appears that the Legislature amended RSA 206:4-a in 2004 because it perceived that the Commission had exceeded its authority, at least with respect to personnel matters associated with Department staff. The Legislature, partially at the Commission’s request, established specific duties for the Commission and authorized the Commission to take certain actions, thus setting parameters that limited the Commission’s authority.

In sum, the Legislature has specifically directed the Commission to establish positions on proposed legislation. However, that legislative directive is limited to the Commission’s presumably unique expertise in matters relating to fish, wildlife and marine resources – as defined by statute – as well as overall Department management.

Legislation affecting firearms is not one of the enumerated subject matters appearing in RSA 206:4-a, V. Nonetheless, we understand that the Department has annually reviewed firearm-related legislation, as reflected in meeting minutes. According to the Department, the purpose of the review is to assess potential impacts upon hunting seasons for game animals, its law enforcement division and its enforcement of specific statutes governing how and when firearms are used during hunting seasons. The Legislature may elect to clarify its position on the scope of RSA 206:4-a, V.

### **B. The Commission’s Consideration of Senate Bill 12**

This Office understands that the Commission considers pending legislation or LSRs at its January and February meetings. We further understand that the Commission has a legislative committee that meets on the mornings prior to these meetings. On January 11, 2017, the

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legislative committee met and recommended that the Commission take a position on Senate Bill 12.

Senate Bill 12 amended portions of RSA chapter 159. That statutory chapter regulates “pistols and revolvers,” which is a defined term. *See* RSA 159:1. In material part, Senate Bill 12 repealed RSA 159:4, (which required a license to carry a loaded concealed pistol or revolver) and amended RSA 159:6 (which provides for the licensing of pistols or revolvers). The latter amendments included the insertion of the following new subparagraph:

III. The availability of a license to carry a loaded pistol or revolver under this section or under any other provision of law shall not be construed to impose a prohibition on the unlicensed transport or carry of a firearm in a vehicle, or on or about one’s person, whether openly or concealed, loaded or unloaded, by a resident, nonresident or alien if that individual is not otherwise prohibited by statute from possessing a firearm in the state of New Hampshire.

Laws of 2017, Chapter 1 (codified at RSA 159:6) (emphases added).

Several statutory provisions within RSA Title XVIII address firearms. Of particular note, RSA 207:7, II provides:

II. No person shall have or carry, in or on a motor vehicle, OHRV, snowmobile, or aircraft, whether moving or stationary, a cocked crossbow, a loaded rifle or loaded shotgun or a rifle or shotgun with a cartridge in a magazine or clip attached to the gun.

RSA 207:7, II.<sup>2</sup>

This Office was provided with a recording of the Commission’s January 11, 2017 meeting. We have transcribed that portion of the meeting addressing the Commission’s consideration of Senate Bill 12. That transcript appears as Exhibit A hereto.

The issue presented to the Commission was a concern that the inclusion of the word “firearm” in an amended 159:6, III “opens the door for long guns.” Transcript, at p. 1. The transcript of the Commission’s deliberations speaks for itself. The Commission considered the matter and voted “to oppose SB 12 as written.” *Id.*, at p. 2. The motion was made by Commissioner Morse and seconded by Commissioner Patch to oppose Senate Bill 12 as written. The vote in favor was unanimous.

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<sup>2</sup> Although RSA 207:7 appears in RSA Title XVIII and is captioned, “Hunting From Motor Vehicle, OHRV, Snowmobile, Boat or Aircraft,” the New Hampshire Supreme Court has ruled that substantially the same language as is currently in RSA 207:7, II applies to “the having or carrying of loaded guns in vehicles whether hunting or not.” *State v. Shaw*, 102 N.H. 498, 500 (1960) (emphasis added).

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We understand that neither the Commission nor any Department employee testified or filed a letter against Senate Bill 12 with the Legislature. According to Colonel Kevin Jordan and Director Glenn Normandeau, the legislation moved through the Legislature too quickly.

Prior Legislatures considered language identical to Senate Bill 12. In 2011 and 2015, House Bill 536 and Senate Bill 116, respectively, made their ways through the Legislature with the same language Senate Bill 12 has in it. The Department cannot locate any documents regarding the Commission's position on the 2011 legislation. For the 2015 legislation, the Department recommended that the Commission "monitor" Senate Bill 116 but the Commission held no formal vote on the bill. No official position of the Commission or the Department appears in any of the 2015 legislative history. Both the 2011 and 2015 bills were vetoed by the then-Governors Lynch and Hassan respectively.

### **C. Senate Bill 12 and Loaded Long Guns**

It is the position of this Office that Senate Bill 12 has no effect on existing law with respect to loaded rifles or shotguns. *See* RSA 207:7. We are communicating that position to law enforcement agencies including the Department of Safety and the Fish and Game Department.

### **D. Conclusion**

The Legislature has directed through RSA 206:4-a, V, that the Commission establish positions on legislation affecting specifically defined areas within its jurisdiction. The subject matter of Senate Bill 12 – pistol-and-revolver regulation – is outside of those defined areas. The Commission has apparently had a practice of establishing positions on at least some firearms-related legislation. The stated concern with respect to Senate Bill 12 related to loaded long guns. It is our conclusion that Senate Bill 12 did not amend or alter the existing prohibition on loaded long guns.

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