

Memorandum Urging Veto

COMMITTEE ON ANIMALS AND THE LAW

Animals #11-GOV

July 23, 2019

S. 5849

By: Senator May

A. 1599

By: M. of A. Hunter

Senate Committee: Rules

Assembly Committee: Rules

Effective Date: 90th day after it shall have become a law

AN ACT to amend the environmental conservation law, in relation to wildlife damage management.

LAW & SECTIONS REFERRED TO: Environmental Conservation Law Section 11-0522, subdivisions 3 and 9 of Section 11-0505, subdivision 2 of Section 11-0901, and subdivisions 2 and 4 of Section 11-0931.

THE COMMITTEE ON ANIMALS AND THE LAW OPPOSES THIS LEGISLATION AND URGES ITS VETO

The Committee on Animals and Law customarily supports legislation that is important to carry out New York's commitment to animal welfare and is in the best interest of animals. Rarely does the committee submit any formal opposition to bills that have been passed by the legislature and urge the governor to veto a bill. However, our concern about the purported need for this bill and the questionable efficacy of its provisions for wildlife damage control, compounded by an equally strong concern over the potential for dire and perhaps unintended consequences to public health and safety arising out of its firearms component, demand such an unusual position.

This bill would make multiple amendments to Article 11 of the Environmental Conservation Law (originally The Fish and Wildlife Law), and add a new Section 11-0522 to the ECL for the purpose of: i) authorizing cull permits; ii) establishing a group of persons, "certified nuisance wildlife specialists," to execute these cull permits; and iii) extending the use of cull permits to the forest preserves in the Adirondack and Catskill Parks. Section 11-0522 establishes the circumstances under which the newly authorized permits to cull wildlife will be issued to the certified nuisance wildlife specialists; there must be a finding by the entity requesting the permit that wildlife has become a nuisance and destructive to private or public property, or a threat to public health or welfare. The wildlife for which the new cull permit will be issued are: *all wildlife* existing in a wild state at an airport, including but not limited to wild game; and coyotes and deer in any other area.

The bill also defines the minimum cull permit application criteria, which include: i) a timeframe; ii) a site-specific wildlife management plan; iii) a geographic description of the area; and iv) a written contract with the entity or airport requesting permission to cull.

The bill also expands exceptions to Section 11-0931 of Environmental Conservation Law concerning “Prohibitions on the Use and Possession of Firearms” by broadening its provisions heretofore limited to law enforcement officers to include “certified wildlife nuisance specialists.”

WELL-ESTABLISHED CULLING OPTIONS ALREADY EXIST IN NEW YORK UNDER CURRENT LAW

Culling is an extreme form of wildlife population control in which animals are lethally eliminated, often outside of regular hunting seasons, to manage overpopulation and/or to mitigate wildlife-based damage. Although it is a drastic measure to manage wildlife damage, culling is not prohibited in New York; it is already part of an extensive cache of tools used by DEC and is currently implemented, when deemed necessary, to ensure that DEC meets its mandate to: “... *provide the people of New York the opportunity to enjoy all the benefits of the wildlife of the State, now and in the future ... through scientifically sound management of wildlife species in a manner that is efficient, clearly described, consistent with law, and in harmony with public.*”¹

Under existing law, in 2017 there were over 30 DEC-authorized deer culling programs operating in upstate regions of New York, facilitated by the U.S. Department of Agriculture Wildlife Services sharpshooters, law enforcement officers and volunteer hunters.² More recently, in February 2019 the U.S. District Court, EDNY, in Central Islip, ruled in favor of the U.S. National Park Service, in allowing the culling of 100 deer on the William Floyd Estate in Mastic Beach, New York, in Suffolk County.³ Additionally, DEC often contracts with USDA to assist with non-lethal and lethal wildlife damage management control, and permits private landowners and municipal governments to do the same.

Moreover, and also pursuant to current law, the DEC implemented a new process in 2018 for: i) evaluating deer damage issues; ii) establishing population goals; and iii) implementing a management plan incorporating social and ecological impacts associated with deer in New York. While culling is not precluded, current DEC protocol echoes recommendations from the North East Section of The Wildlife Society, a respected authority on wildlife science, management and conservation, which, notably, recommends culling as a last resort.⁴ Subsequently, DEC published a detailed guide for communities to follow in developing deer management plans, including resources for wildlife management practices.

¹ Bureau of Wildlife, Management Plan for White-tailed Deer in New York State 2012-2016, Department of Environmental Conservation, 2011, http://www.dec.ny.gov/docs/wildlife_pdf/deerplan2012.pdf.

² Figura, D., (August 2017), DEC questions how NY communities kill deer, other nuisance wildlife, https://www.newyorkupstate.com/outdoors/2017/08/decquestions_how_ny_communities_kill_deer_othernuisancewildlife.html

³ *Animal Welfare Institute et al v. Soller et al*, No. 2:2017cv06952 - Document 45 (E.D.N.Y. 2019)

⁴ *Id.*, pg. 17

Despite the use of the culling option, the practice remains highly controversial among wildlife biologists and conservationists who question the efficacy and benefits of the solution that harms natural resources. For example, recent studies suggest that culling to mitigate diseases spread by deer, such as Chronic Wasting Disease and Lyme Disease *may actually increase prevalence and/or shift the transmission to other carriers.*⁵

Despite the successful use of these existing and well established culling options, the only stated justification offered by the sponsor's memo, as rationale for the greatly expanded culling programs in the proposed legislation, is: "*Government employees are currently subject to restrictions written during times of deer scarcity in the 20th century.*" True, older restrictions are still enforced. This is because they have been shown to be effective, as evidenced by an extensive five-year plan for deer management implemented in New York between 2012-2016. Based upon an expansive review process that began in 2009,⁶ the plan stressed the importance of the existing protocols, and, significantly, it did not mention the need for culling permits, nor a class of persons certified to perform culls.

NO JUSTIFICATION FOR THE INCLUSION OF COYOTES IN THE CULLING PROVISIONS OF THE BILL

New ECL Section 11-0522(2)(b) expressly includes coyotes, along with deer, in the wildlife for which a cull permit may be issued, but it is very unclear why coyotes were included in this bill. The sponsor's memo does not even suggest that current coyote controls, under existing law, are insufficient to deal with coyote overpopulations or the damage and risks to humans and livestock posed by coyotes. Coyote populations are already managed through contracts between DEC, private landowners, municipalities and the U.S. Wildlife Services.⁷ Moreover, the DEC recognizes that non-lethal methods of control decrease attacks on livestock on its Coyote Conflict webpage, which states that most problems involving conflicts between coyotes and livestock in New York involve free ranging chickens and sheep, and "can be avoided with proper husbandry techniques."⁸ Thus, the DEC promotes non-lethal methods for managing coyotes, even when there may be a human-coyote conflict. While the department acknowledges that such conflicts can result in dangerous situations, it also clearly states that statistically, "... coyotes pose less of a threat to humans than do domestic dogs."⁹

⁵ Marie I. Tosa, et al, (September 2016), *Localized removal affects white-tailed deer space use and contacts*, The Journal of Wildlife Management, (The report suggests that more research is needed to determine whether culling exacerbates the issue of disease spread after the study demonstrated that removing groups of deer to manage wildlife diseases unintentionally created opportunities for diseases spread between groups previously uninfected.). <https://doi.org/10.1002/jwmg.21176>; K. J. Kugeler, et al, *Will Culling White-Tailed Deer Prevent Lyme Disease? Zoonoses Public Health*. 2016 Aug; 63(5): 337–345, ("Currently, there is insufficient evidence to recommend deer population reduction as a Lyme disease prevention measure, except in specific ecologic circumstances." <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4912954/>)

⁶ Bureau of Wildlife, *Management Plan for White-tailed Deer in New York State 2012-2016*, Department of Environmental Conservation, 2011, http://www.dec.ny.gov/docs/wildlife_pdf/deerplan2012.pdf

⁷ https://www.aphis.usda.gov/regulations/pdfs/nepa/2018%20FONSI_NY%20Mammal%20Damage%20Management%20EA.pdf

⁸ [NYS DEC: Coyote conflicts, https://www.dec.ny.gov/animals/6971.html](https://www.dec.ny.gov/animals/6971.html)

⁹ *Id.*

Furthermore, evidence suggests that culling as a damage management tool may be counter-productive and actually lead to *increased* coyote populations.¹⁰ This is due to the pack nature of coyotes and the fact that when there are fewer animals in the pack, females produce more offspring, which, in turn, and with less competition, are more likely to survive.¹¹ Additionally when packs are broken up, they cannot defend their territories as effectively, thereby allowing other coyotes to add to the remaining coyote population.¹²

At best, this legislation is premature. If legislation to create additional means of controlling wildlife and reducing wildlife damage is sought, it should be crafted in careful consultation with wildlife experts to comprehensively assess its impact.

THE BILL'S EXPANSION OF THE FIREARMS "USE AND POSSESSION" STATUTE RAISES CONCERNS FOR PUBLIC HEALTH AND SAFETY

New culling methods are authorized by this legislation, and, among other things, they will expand the exceptions to New York's current prohibition against taking wildlife with the assistance of a spotlight, including a vehicle's headlights, for certified nuisance wildlife specialists. Currently, under ECL §11-0931(2), only law enforcement officers acting in their official capacity are authorized to use a spotlight in a motor vehicle while in possession of a loaded longbow, crossbow or firearm.¹³ This is so because New York, like many states, takes a strong stand against spotlighting while in possession of a loaded weapon because of the high risk for injury to people and/or wildlife not visible beyond the light source. This high risk led to 2018 legislation in New York that significantly increased the monetary and incarceration penalties for hunting deer with the assistance of artificial light sources.¹⁴ The provisions of this bill are diametrically opposed to the current law's protective measures designed to decrease the possibility of firearms accidents and fatalities.

Additionally, this legislation gives greater latitude to certified nuisance wildlife specialists in their general use of firearms, and it requires only some (unspecified) indication of a minimum level of marksmanship. To safeguard the public's welfare, law enforcement officers in New York State undergo extensive training, well beyond minimum standards of marksmanship, before they are entrusted with the authorized possession and use of a loaded firearm. This

¹⁰ Draheim, M., *Why killing coyotes doesn't make livestock safer*, The Conversation US, May 31, 2017, <https://www.scientificamerican.com/article/why-killing-coyotes-doesn-t-make-livestock-safer/>

¹¹ *Id.*

¹² *Id.*

¹³ ECL § 11-0931 "Prohibitions on the use and possession of firearms" Section (2): "...no person except a law enforcement officer in the performance of his official duties shall, while in or on a motor vehicle, use a jacklight, spotlight or other artificial light upon lands inhabited by deer if he or she is in possession or is accompanied by a person who is in possession of a longbow, crossbow or a firearm unless such longbow or crossbow is unstrung or such firearm or crossbow is taken down or securely fastened in a case or locked in the trunk of the vehicle."

¹⁴ *See* ECL §§71-0921 & 71-0925. The statute also increased penalties for hunting deer out of season.

includes use of a spotlight while in possession of certain loaded weapons.¹⁵ The proposed legislation, however, *does not* require that the certified nuisance wildlife specialist be a law enforcement officer, nor does it require that such persons meet the same extensive training and selection standards as required of law enforcement officers. The vague standards for marksmanship certification pose a potential threat to public safety and welfare, especially insofar as, regarding both the military and law enforcement certification, marksman status is considered a beginning level of expertise.¹⁶ Thus, these proposed broad exceptions concerning possession and use of firearms is also inconsistent with New York's strong policy, and recently enacted laws, in striving to control the possession and use of firearms.

In addition to broadening the "police officer" exceptions for spotlighting with a loaded longbow, crossbow or firearm in a motor vehicle, the bill also overrides current statutory prohibitions against shooting across highways. ECL §11-0931(4)(a) states that, "[N]o person shall: (1) discharge a firearm, crossbow or long bow in such a way as will result in the load, bolt, or arrow thereof passing over a public highway or any part thereof ..." Furthermore, ECL §11-0901(2) currently prohibits the taking of wildlife on or from any public highway, with the exception that wildlife may be taken from highways in non-state, county or town highways located in forest preserves. This bill amends ECL §11-0931(2) to allow certified nuisance wildlife specialists to shoot wildlife from *any* highway in a forest preserve. Quite clearly, this increases the risk of accidents and jeopardes public safety in such forest preserves.

CONTENT ASIDE, THERE ARE SUBSTANTIAL DEFICIENCIES WITHIN THE BILL ITSELF

The content of the bill itself would be problematic, even if it were otherwise justified, which it is not. *Firstly*, the bill's competence guidelines qualifying "certified nuisance wildlife specialists" to perform culls are not well defined. Individuals wishing to qualify as a certified nuisance wildlife specialist must have a minimum level of marksmanship certification, but the legislation does not define that "minimum" level, despite the fact that both the New York State Police *and* branches of the U.S. military have standards for marksmanship. Instead of using any such established standard, this bill merely leaves this requirement to DEC to further define in regulations. *Secondly*, although the bill does require that certified nuisance wildlife specialists obtain liability insurance or have other financial arrangements approved by DEC, it does not state any minimum limit for that insurance. This is in contrast to the general practice in New York when liability insurance is mandated to be secured, for example, as is the case with automobile insurance. *Thirdly*, the bill refers to "reporting requirements" for "certified nuisance wildlife specialists," but it does not enumerate what must be included in such reports, which should, at the very least, include an outcome assessment of any culling performed pursuant to a DEC issued. Although it is appropriate to have the DEC set forth specific requirements for "certified nuisance wildlife specialists" and their reports, this legislation should give more direction to DEC on the regulations they are required to promulgate. Most importantly, reports

¹⁵ Law Enforcement Training Resources, NYS Division of Criminal Justice Services, <https://www.criminaljustice.ny.gov/ops/training/coursesevents/index.htm>

¹⁶ Military degrees of shooting skill are designated by three titles, "Marksman, Sharpshooter and Expert" listed in order of progression. Army Weapons Qualification Course, Military.com, <https://www.military.com/join-armed-forces/army-weapons-qualification-course.html>

submitted by “certified nuisance wildlife specialists” should be available to the public. This should be mandated in the express language of the statute, not left to departmental regulations, discretion, or interpretation.

CONCLUSION

While this bill may be a well-intentioned attempt to address issues relating to damage caused by wildlife, numerous provisions are not consistent with accepted wildlife management practices. Moreover, its provisions relating to the new class of “certified nuisance wildlife specialists” and authorization to possess and use firearms raise strong concerns for public safety. For foeregoing reasons, the NYSBA’s Committee on Animals and the Law **OPPOSES** this legislation and **URGES ITS VETO** by the Governor