

**STATE OF TENNESSEE**

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Opinion No. 07-49

Authority of the Tennessee Department of Agriculture to Regulate Wild Elk Imported by the Tennessee Wildlife Resources Agency

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**QUESTIONS**

1. Did Section 5 of Chapter 103 of the Public Acts of 2001, which amended Tenn. Code Ann. § 70-4-403(3)(P), remove “wild elk” from the list of Class III wildlife for which the Tennessee Department of Agriculture (TDA) is responsible for permitting?
2. Are wild elk imported into the State by the Tennessee Wildlife Resources Agency (TWRA) for elk restoration in the northern Cumberland Plateau subject to the provisions of TDA published rule 0080-2-1-.12 concerning the importation of “Bison and Other Ruminants”?
3. In light of the 2001 amendment to Tenn. Code Ann. § 70-4-403(3)(P), did TDA exceed its authority by waiving provision I.A. of the Memorandum of Understanding executed in 2000 by TDA and TWRA, which provided that elk imported by TWRA would meet the requirements of TDA rules?

**OPINIONS**

1. Yes. Section 5 of the 2001 Tenn. Pub. Acts, ch. 103, establishes that only elk originating from a legal source held in captivity for farming are Class III wildlife under Tenn. Code Ann. § 70-4-403(3)(P). All other elk are “wild elk” and are deemed Class II wildlife by this amendment.
2. No. Rule 0080-2-1-.12 became inapplicable after the 2001 amendment went into effect because the wild elk TWRA would import are not “animals” regulated by TDA under Tenn. Code Ann. §§ 44-2-101(1) and -102.
3. No. By virtue of the 2001 amendment, wild elk imported by TWRA are no longer subject to TDA’s general supervision of animals under Tenn. Code Ann. §§ 44-2-101(1) and -102. Thus, TDA did not exceed its authority by waiving provision I.A. of the Memorandum of Understanding.

## ANALYSIS

1. In October 2000, the Tennessee Wildlife Resources Commission approved a proposal by TWRA for elk restoration in the northern Cumberland Plateau in Tennessee. To implement this program, TWRA initially sought to import elk from Elk Island National Park in Edmonton, Alberta, Canada.

TDA and the State Veterinarian have “general supervision of all animals within or that may be in transit through the state.” Tenn. Code Ann. § 44-2-102 (2000). TDA is authorized to “regulate the importation of animals into this state” and to “[o]rder tests or vaccinations of animals . . . imported into the state.” Tenn. Code Ann. § 44-2-102(3) and (4) (2000). “Animal” or “animals” as used in this law is defined to mean, *inter alia*, “all Class III animals as established by § 70-4-403.” Tenn. Code Ann. § 44-2-101(1) (2000).

Tennessee Code Annotated § 70-4-403 establishes five classes of wildlife kept and maintained for any purpose. Class III wildlife require “no permits except those required by the department of agriculture.” Tenn. Code Ann. § 70-4-403(3) (2004). Included within Class III are the following:

Cervidae except white-tailed deer and wild elk. Elk originating from a legal source while held in captivity for the purpose of farming shall be regarded as Class III wildlife. All other elk shall be wild elk and shall be regarded as Class II wildlife. No person shall possess elk in captivity within the eastern grand division of the state as defined in § 4-1-202 without having documentary evidence indicating the origin of the elk being held. This documentary evidence will be presented to the agents of the department of agriculture or the wildlife resources agency upon request. Sale documentation of offspring of purchased elk is not required.

Tenn. Code Ann. § 70-4-403(3)(P) (2004).

This law was amended in 2001 to read as quoted above. *See* 2001 Tenn. Public Acts, ch. 103, § 5. The amendment became effective on April 18, 2001, when it was signed by the Governor. Prior to the 2001 amendment, Class III included “[c]ervidae except white-tailed deer.” 1991 Tenn. Pub. Acts, ch. 487, § 1. Elk belong to the family cervidae. By virtue of the 2001 amendment, only elk originating from a legal source held in captivity for farming are Class III. All other elk are deemed “wild elk” by Tenn. Code Ann. § 70-4-403(3)(P) and are Class II. Thus, wild elk are not “animals” under Tenn. Code Ann. § 44-2-101(1) for which TDA is responsible for permitting.

2. In implementing its general supervisory authority in Tenn. Code Ann. § 44-2-102, the legislature has empowered TDA to promulgate all necessary rules and regulations. Tenn. Code Ann. § 44-2-102(9) (2000). To this end, TDA has promulgated Tenn. Comp. R. & Regs., ch. 0080-2-1-.12, entitled “Bison and Other Ruminants.” This rule establishes certain testing and other requirements relative to the importation of cervidae.

The elk TWRA seeks to import into Tennessee under its restoration program would be “wild elk” within the meaning of Tenn. Code Ann. § 70-4-403(3)(P). Because wild elk are Class II wildlife, not Class III, they are not “animals” under Tenn. Code Ann. § 44-2-101(1) subject to TDA’s regulatory authority under Tenn. Code Ann. § 44-2-102. Thus, any wild elk imported by TWRA after the April 18, 2001, effective date of the amendment to Tenn. Code Ann. § 70-4-403(3)(P) are not subject to TDA Rule 0080-2-1-.12.

3. In December 2000, TDA and TWRA entered into a Memorandum of Understanding (MOU) for the purposes of establishing a disease testing and monitoring protocol for the elk restoration program in the northern Cumberland Plateau. Provision I.A. of the MOU recognizes that TWRA will initially import elk from Elk Island National Park in Canada and provides that “[a]ny future importation of elk will meet or exceed the procedures in this MOU and rules promulgated by TDA and evaluated on an annual basis.” Memorandum of Understanding Between the Tennessee Department of Agriculture and the Tennessee Wildlife Resources Agency, ¶ I.A.

At the time the MOU was executed by TDA and TWRA, the only cervidae excepted from Class III wildlife under Tenn. Code Ann. § 70-4-403(3)(P) were “white-tailed deer.” All other cervidae were Class III and, thus, within TDA’s authority over “animals” under Tenn. Code Ann. §§ 44-2-101(1) and -102. As of the April 18, 2001, effective date of the amendment to Tenn. Code Ann. § 70-4-403(3)(P), “wild elk” are Class II wildlife and no longer “animals” over which TDA exercises general supervision under Tenn. Code Ann. §§ 44-2-101(1) and -102. Thus, TDA did not exceed its authority by waiving provision I.A. of the MOU after the 2001 amendment went into effect.

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