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OFFICE OF THE
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Opinion No. 05-080

Effect of Proposed Amendatory Language to Senate Resolution Authorizing a Constitutional Right to Hunt, Fish and Harvest Game and Fish

QUESTION

Does an amendment proposed by the National Rifle Association to Senate Joint Resolution 44, which would amend Article XI, § 13 of the Tennessee Constitution to create a right to hunt, fish and harvest game and fish, present any constitutional or regulatory concerns?

OPINION

It is the opinion of this Office that the proposed amendatory language offered by the National Rifle Association to pending Senate Joint Resolution 44 presents a number of potential concerns, among them the possibility of a conflict with federal law governing the taking of endangered species. The proposed language could also impact the continued ability of the state wildlife agencies to regulate hunting, fishing and harvesting of game and fish effectively.

ANALYSIS

You have asked this Office to review proposed amendatory language to Senate Joint Resolution 44, which would amend Article XI, § 13 of the Tennessee Constitution to create a constitutional right to hunt, fish and harvest game and fish. The proposed language, offered by the National Rifle Association, provides as follows:

This right to hunt, fish, and harvest game and fish includes hunting and fishing for all game and fish species by all methods and means available to citizens under the laws, regulations, and restrictions of this state at any time during the ten years preceding the ratification of this amendment. Hunting, fishing, and the harvesting of game and fish shall always be a preferred and available means of controlling all invasive and overpopulated species.

The first sentence of the proposed language would authorize the right to hunt, fish and harvest “*all* game and fish species by *all* methods and means available to citizens under the laws, regulations, and restrictions of this state at any time *during the ten years preceding* the ratification.” (Emphasis

supplied). The breadth of this proposed language raises a number of concerns. First, we interpret the words “under the laws, regulations, and restrictions of this state” to encompass statutes passed by the General Assembly and regulations adopted or proclamations issued by the Tennessee Wildlife Resources Commission (TWRC). The NRA’s proposal suggests that citizens would have the right to hunt and fish in perpetuity those species authorized by state law within the last ten years. But any species of game and fish is always at risk of becoming threatened or endangered. If the NRA proposal becomes part of the constitutional right, then the General Assembly and the wildlife agencies would be precluded from adding such species to the state list of threatened or endangered species. *See* Tenn. Code Ann. § 70-8-101, *et seq.* More significantly, the proposed NRA language could place this constitutional provision in conflict with federal law. If, for example, such species were officially listed under the federal Endangered Species Act, then the state constitution would allow the taking of a species protected by federal law, and the supremacy clause in Article VI of the United States Constitution might preclude enforcement of the state constitutional right in that circumstance.

Second, the “all methods and means” provision in the first sentence of the NRA’s proposal may have the result of limiting the flexibility of the TWRC and the Tennessee Wildlife Resources Agency (TWRA) in administering and enforcing the wildlife statutes. The hunting, fishing, and harvesting of game and fish includes taking game and fish for commercial purposes, as well as for recreational purposes. For example, the General Assembly by statute and the TWRC by rule and proclamation regulate commercial fishing. *See, e.g.,* Tenn. Code Ann. § 70-4-119, Tenn. Comp R. & Regs., ch. 1660-1-17.

The NRA proposal could impact the continued ability of the TWRC and the TWRA to regulate commercial fishing effectively. The NRA proposed language would give commercial fishers a constitutional right to take any species of fish by any means and methods that have been authorized by statute, rule or proclamation during the “ten years preceding ratification” of the constitutional amendment. This would apparently include any means and methods and species that may have been authorized by the wildlife agencies in only one of the preceding ten years.

For example, it is our understanding that during some of the last ten years the TWRC’s proclamations have allowed commercial fishing of crappie at Reelfoot Lake by the means and method of netting. The TWRC then decided no longer to allow the commercial taking of crappie by netting at Reelfoot because it had resulted in overharvesting. Because state law during the last ten years allowed commercial fishing by the means and method of netting, the NRA language could be construed to give commercial fishers a constitutional right to continue taking fish by netting at Reelfoot Lake.

Similarly, the NRA’s proposed language could be construed to give commercial fishers a constitutional right to take any species allowed by state law in the last ten years. This could likewise impact the regulatory authority of the TWRC and the TWRA. Again, as an example, TWRC

proclamations during the last ten years have allowed the commercial taking of paddlefish at Kentucky Lake in Tennessee. We have been informed that the paddlefish commercially taken from these waters supply some sixty percent of the world's caviar. We also have been informed that recent scientific studies show that the paddlefish populations in these waters may be threatened. As a result, TWRA may recommend that the TWRC close the commercial taking of paddlefish until populations increase. Again, because recent state law has allowed the commercial taking of paddlefish in Kentucky Lake, the NRA's proposed amendatory language could be interpreted to mean that commercial fishers have a constitutional right to take paddlefish.

The second sentence of the NRA's proposal provides that hunting, fishing and harvesting shall "always be a preferred and available means of controlling all invasive and overpopulated species." The breadth of this language also raises regulatory concerns, as it appears to shift responsibility for resolving the question of whether a species is invasive or overpopulated from the wildlife agencies to the courts. Traditionally, the wildlife agencies have set seasons and bag limits for a particular species based on a variety of factors, including the population levels of a given species. Often this may vary from one county or geographical region to another.

Furthermore, the NRA proposal does not define "invasive," but the General Assembly has enacted laws and the TWRC has promulgated rules classifying wildlife. *See* Tenn. Code Ann. §§ 70-4-401 to 70-4-417 and Tenn. Comp. R. & Reg., ch. 1660-1-18-.03. Class V wildlife are those that are considered to be "injurious to the environment," which would appear to be synonymous with "invasive." Tenn. Code Ann. § 70-4-403(5). These include a variety of species of fish, such as black carp, silver carp and ruffe. The NRA's proposed amendatory language could be interpreted to mean that citizens have a constitutional right to hunt, fish and harvest these species or future species designated as invasive, when the wildlife agencies may have more appropriate means or methods for managing them. Thus, the amended language may impair the ability of the wildlife agencies to choose a more expeditious or efficient method for eradicating or controlling an invasive species.

In sum, it is the opinion of this Office that the NRA's proposed amendatory language to pending Senate Joint Resolution 44 presents a number of concerns, foremost among them the potential for conflict with federal law governing the taking of endangered species. But the proposed language also could impact the statutory authority of the state wildlife agencies to regulate hunting, fishing and harvesting of game and fish.

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