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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Municipalities – Game and Fish –
Ordinances – Lakes – Marshall County

The use of gill nets on Lake Guntersville is
illegal pursuant to section 9-11-88 of the
Code of Alabama.

Dear Mrs. Logan:

This opinion of the Attorney General is issued in response to your request
on behalf of the City of Guntersville.

QUESTION

Is the use of gill nets on Lake Guntersville
illegal pursuant to section 9-11-88 of the Code?

FACTS AND ANALYSIS

Section 9-11-88(b) of the Code states as follows:

(b) It shall be unlawful for any person to take, catch, capture, or kill any game or nongame fish by use of a gill, trammel, or similar type net in that part of the Tennessee River lying within the boundaries of Alabama and all tributaries thereto. Any person violating this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than two hundred fifty dollars (\$250) nor more than five hundred dollars (\$500), or by

imprisonment in the county jail for six months, or by both a fine and imprisonment.

ALA. CODE § 9-11-88 (Supp. 2012).

Although subsection (b) of section 9-11-88 of the Code appears to prohibit the capture and killing of any fish by use of a gill net in any part of the Tennessee River lying within the state of Alabama, the commentary to this particular section of the Code references the 1977 case of *State v. Lash*, 350 So. 2d 748 (Ala. Crim. App. 1977). This Code commentary states that the *Lash* Court held that section 9-11-88(b) of the Code is unconstitutional because section 9-11-88(b) was a local law for which the public had not received adequate notice. Hence, at first blush, the enforcement of section 9-11-88(b) of the Code would appear to be improper. A closer reading, however, of *Lash* indicates that the Court of Criminal Appeals, after discussing the constitutionality of the statute, determined that it lacked subject-matter jurisdiction of the case and dismissed the appeal.

The holding in *Lash* was later addressed by the Alabama Supreme Court in a 1995 Opinion of the Justices. Specifically, the Court was asked to determine whether House Bill 362 was a general or local law. *Opinion of the Justices* No. 349, 665 So. 2d 1378 (Ala. 1995). House Bill 362 related to the catching, capturing, or killing of any fish by use of a gill, trammel, or similar type of net in the waters impounded by William "Bill" Dannelly Reservoir Dam and would have amended section 9-11-88 of the Code. The Justices concluded that, if enacted, House Bill 362 would be a general law. Further, the Court noted that the inquiry may have been prompted by *Lash*, and specifically, the opinion expressed in dicta in that case.

This Office does not make decisions regarding the constitutionality of an ordinance, act, or statute. Instead, all validly enacted laws are presumed constitutional. Furthermore, with the highest court in the state making a determination that a law is constitutional, there leaves little question as to the constitutionality of that law. Based on the foregoing, it is the opinion of this Office that the use of gill nets on Lake Guntersville is illegal and strictly prohibited pursuant to section 9-11-88(b) of the Code.

The Department of Conservation and Natural Resources ("Department") is authorized to promulgate regulations and enforce all laws and regulations pertaining to fish, seafood, and wildlife. ALA. CODE §§ 9-2-1 to 9-2-29 (2001); see also, *Opinion of the Justices* No. 349, 665 So. 2d at 1380. Accordingly, if not previously addressed, the Department should, as it deems necessary, enact regulations regarding the use of gill nets on Lake Guntersville. Also, it is the

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Department that is responsible for enforcing both section 9-11-88(b) and any regulations pertinent thereto.

CONCLUSION

The use of gill nets on Lake Guntersville is illegal pursuant to section 9-11-88 of the Code.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE

Attorney General

By:



BRENDA F. SMITH

Chief, Opinions Division

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