

4 October 2006


MEMORANDUM FOR: Virginia Attorney General's Regulatory Reform Task Force

SUBJECT: Request for repeal of unsupported a gun bans found in the Virginia Administrative Code

Dear Attorney General McDonnell and members of the Regulatory Reform Task Force:

As per our meeting on September 29th, here is the document I promised to provide you.

1. VCDL represents thousands of gun owners in Virginia who believe that the right of self-defense is an important human right, and that the right to carry guns for self-defense, openly, or concealed with a permit, is undeniably guaranteed by the constitutions, statutes, and public policies of Virginia and the United States. In particular, VCDL believes that absent specific statutory authority from the General Assembly to ban the carriage of firearms, state agency gun bans must be repealed.
2. In preparation for the first meeting of the Virginia Attorney General's Regulatory Reform Task Force, a team of Executive Members of the Virginia Citizens Defense League (VCDL) combed the Virginia Administrative Code (VAC) and discovered numerous gun bans quietly buried in various chapters of the VAC. These regulatory gun bans have apparently escaped legal scrutiny despite significant contemporary liberalization of gun carry rights in Virginia's positive statutes, as well as other legal authorities pertaining to firearms in recent years. Incredibly, some of these hidden gun bans establish criminal penalties of up to a year in jail, even though the VAC regulation itself does not specify a penalty.¹
3. VCDL therefore requests that the Government and Regulatory Reform Task Force take immediate action to repeal the below list of gun bans which we feel grossly infringe on the human right of self defense, and are imposed by state agencies without sufficient statutory authority, contrary to letter and spirit of the constitutions of the United States and Virginia, and contrary to the public policies of the Commonwealth.
4. Please contact me at President@VCDL.org or (804) 639-0600 if I can be of any further service in this matter.

Sincerely,

Philip van Cleave
VCDL President

¹ For example, to find out the penalty for violating the state park open carry gun ban at 4VAC5-30-200, the citizen must not only know that 4VAC5-30-200 exists, and also know that he is entering a state park and not a local or regional authority's park, but then, without any cue to do so in 4VAC5-30-200, he must know to look at Va. Code § 10.1-104(B) to see that "A violation of any regulation shall constitute a Class 1 misdemeanor, unless a different penalty is prescribed by the Code of Virginia."

Unsupported gun bans in the Virginia Administrative Code

Regulation	Description	Authorities finding lack of statutory authority to enact the gun ban	Authorities prohibiting the gun ban directly	Constitutional provisions disfavoring the gun ban	Public policies & authorities disfavoring the gun ban
Open carryⁱⁱ bans					
4VAC5-30-200	State park open carry ban; incorporated via other VAC regs to ban open carry upon other state lands and National Forest lands in Virginia	1	9	2	3, 4, 5, 6, & 11
4VAC15-40-60	DGIF land & National Forest gun ban	1	9	2	3, 4, 5, 6 & 11
4VAC15-270-60	Ragged Island WMA open carry ban	1	9	2 & 8	3, 4, 5, 6, & 11
Total gun carry bansⁱⁱⁱ					
4VAC15-50-70	Gun ban for persons hunting with bow	1	7, 9, & 10	2 & 8	3, 4, 5, 6 & 11
4VAC15-50-71	Gun ban for persons hunting with muzzleloaders	1	7, 9, & 10	2 & 8	3, 4, 5, 6 & 11
4VAC15-90-70	Gun ban for persons bow hunting deer	1	7, 9, & 10	2 & 8	3, 4, 5, 6, & 11

ⁱⁱ VCDL urges that these regulations be amended to delete the gun carry ban language entirely, or alternatively, and only in the case of hunting related regulations, incorporate an element that clarifies that gun carry is prohibited only if the guns are being carried “for the purpose of hunting wild birds and wild animals” in violation of law. This language is used effectively already at 4VAC15-270-40 governing gun carry upon inland waters of the Commonwealth. It should be noted that it is already a crime to “recklessly handle” a firearm, to “brandish” a firearm, or to carry a concealed handgun while intoxicated. Va. Code §§ 18.2-56.1, 18.2-282, 18.2-308(J1). Additionally, if convicted of recklessly handling a firearm “. . . while the person is engaged in hunting, trapping or pursuing game, the trial judge may, in addition to the penalty imposed by the jury or the court trying the case without a jury, revoke such person's hunting or trapping license or privilege to hunt or trap while possessing a firearm for a period of one year to life.” Va. Code § 18.2-56.1(B).

ⁱⁱⁱ See footnote ii above.

Regulation	Description	Authorities finding lack of statutory authority to enact the gun ban	Authorities prohibiting the gun ban directly	Constitutional provisions disfavoring the gun ban	Public policies & authorities disfavoring the gun ban
4VAC15-90-80	Gun ban for persons hunting deer with muzzleloaders	1	7, 9, & 10	2 & 8	3, 4, 5, 6, & 11
4VAC15-240-60	Gun ban for persons bow hunting turkey	1	7, 9, & 10	2 & 8	3, 4, 5, 6, & 11
4VAC15-40-120	Hog Island WMA gun ban	1	7, 9, & 10	2 & 8	3, 4, 5, 6, & 11
4VAC15-40-140	Buggs Island/Lake Gaston gun ban	1	7, 9, & 10	2 & 8	3, 4, 5, 6, & 11
12VAC5-31-700	EMS vehicle gun ban	See 1 & 4.	7	2	3, 4, 5, 6, & 11, 12
8VAC90-10-50	Virginia Commonwealth University Gun Ban	4	7	2	3, 5, 6, & 11
Discharge bans^{iv}					
24VAC30-50-10	VDOT rest stop gun discharge ban without self-defense exception	See 1 & 4	Human right of self-defense	2, 13	3, 4, 5, 6, 7 & 11
24VAC30-100-10	VDOT parking lot gun discharge ban without self-defense exception	See 1 & 4	Human right of self-defense	Notes 2, 13	3, 4, 5, 6, 7 & 11

Authorities:

1. *Op. Atty. Gen.*, September 9, 2002 (“Read as a whole, the duties imposed on the Department may be summarized into four categories: the acquisition of property; the development of recreational facilities; the handling of funds; and cooperation with other agencies. Authority to govern the recreational activities of parks is implicit in these general duties, including regulations related to safety. **Particular authority to proscribe the conduct of individual citizens is limited to littering, parking and the payment of charges. Otherwise, an individual's**

^{iv} VCDL urges that these VDOT discharge regulations be simply deleted, or in the alternative, replaced by a ban on “reckless discharge.” Va. Code § 18.2-280 already bans the discharge of firearms generally in public places, and it is already felony to discharge a firearm to endanger others. Va. Code § 18.2-286.1. As noted in footnote 2, it is also already a crime “recklessly handle” a firearm, or to “brandish” a firearm. Va Code §§ 18.2-56.1 & 18.2-282.

conduct must comport with the general laws of the Commonwealth and is enforceable by Department officials charged with that responsibility [emphasis added].”)

2. U.S. Const. amend. II; Va. Const. art. I, § 13.
3. Va. Code § 15.2-915 as amended in 2004 by HB 530 (fully preempting localities and authorities on open carry) implies a public policy that law abiding adults have a universal expectation of the right to carry firearms openly, or concealed with a permit, throughout the Commonwealth, except as restricted by the General Assembly. This expectation has subsequently been reinforced in the Code of Virginia by adoption of SB 326 in 2004 & HB 1917 in 2005 to clarify to state agencies that a person lawfully carrying a gun openly or concealed is not to be presumed illegally hunting with that gun absent evidence to the contrary (see authorities 9 & 10 below), while at the same time, since 2004, the General Assembly has rejected every and all bills to allow localities or state agencies to restrict the right to carry firearms in public, consistent with Va. House of Delegates Joint Resolution 21 (see authority #11 below).
4. *Op. Atty. Gen.*, January 4, 2006 (Virginia’s public colleges and universities may not impose a general prohibition on the carrying of firearms on college campuses and that “[t]he **right** [emphasis added] to carry openly has not been revoked by the General Assembly”).
5. Virginia State Police Letter dated 31 December 2002 at http://www.vcdl.org/letters/VASP_OPEN.pdf (open carry of handguns in ABC licensed establishments not prohibited).
6. Virginia Department of Alcohol, Beverages & Control Letter dated 4 August 2003 at http://www.vcdl.org/letters/ABC_Letter.pdf (open carry of handguns in ABC licensed establishments not prohibited).
7. Va. Code § 18.2-308 (establishing a universal right for permit holders to carry concealed handguns except as prohibited by the General Assembly). *See Op. Atty. Gen.*, September 9, 2002 (“A person’s privilege to carry a concealed handgun is considered **universal** [emphasis added] within the Commonwealth subject to limited circumstances”).
8. Va. Const. art. XI, § 4.
9. Va. Code § 29.1-521(A)(1) (“a person lawfully carrying a gun, firearm or other weapon on Sunday in an area that could be used for hunting shall not be presumed to be hunting on Sunday, absent evidence to the contrary”).
10. Va. Code 18.2-308(B)(6) (“possession of a handgun while engaged in lawful hunting shall not be construed as hunting with a handgun if the person hunting is carrying a valid concealed handgun permit”).
11. Va. House of Delegates Joint Resolution 21 (22 January 1964), at <http://www.virginia1774.org/HJR21JPG.html> (declaring policy of the Virginia General

Assembly that the Second Amendment provides an individual right to bear arms and that “**no agency of this state** [emphasis added] nor any other political subdivision should be given any power or seek any power which would interfere with, restrict, or prohibit the purchase, possession, or use of firearms by any citizen of good standing for the purpose of personal defense”).

12. *Benshoff v. City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999)(private volunteer rescue squads and rescue squad members are not "employees" of the city when performing their rescue squad services). Accordingly, the “employee” exception to firearm preemption at Va. Code § 15.2-915 is inapplicable, and consistent with *Op. Atty. Gen.*, September 9, 2002, *Op. Atty. Gen.*, January 4, 2006, and the public policies of Virginia, EMS operators also have the universal expectation of the right carry firearms openly, or concealed with a permit, throughout the Commonwealth, except as restricted by the General Assembly (see authority #3 above).

13. U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”); Va. Const. art. I, § 17 (“The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed”).