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REGULATIONS—OHIO WILDLIFE COUNCIL—AUTHORIZED TO PROMULGATE AND ENFORCE ON AREAS ADMINISTERED BY DIVISION OF WILDLIFE, REGULATIONS AFFECTING SWIMMING, BOATING, CAMPING, PICKNICKING AND COMPARABLE RECREATIONAL ACTIVITIES—PROVISO, TO EXTENT REGULATIONS REASONABLY CALCULATED TO REGULATE TAKING, PROTECTION, PRESERVATION, POSSESSION OR PROPAGATION OF WILD ANIMALS—SECTION 1531.01 RC.

SYLLABUS:

The Wildlife Council is authorized to promulgate and enforce on the areas administered by the Division of Wildlife, regulations with respect to swimming, boating, camping, picnicking and comparable recreational activities only to the extent that such regulations are reasonably calculated to regulate the taking, protection, preservation, possession or propagation of "wild animals" as defined by Section 1531.01, Revised Code.

Columbus, Ohio, October 26, 1953

Hon. Charles A. Dambach, Chief, Division of Wildlife
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"The Ohio Division of Wildlife as you know has under its administration certain areas which, although maintained primarily for hunting and fishing purposes, also afford opportunity for public swimming, boating, camping, picnicking and comparable recreational use. It is our desire that all areas under our administration be utilized to the fullest extent for the public so long as that use is not inconsistent with the primary purpose for which the areas were acquired or for which they are managed. It is important therefore that if these activities are to be permitted on areas under the administration of the Division that they be properly supervised and that certain rules and regulations be adopted to assure proper utilization.

"For this reason I wish to request a formal opinion from you as to what authority the Ohio Wildlife Council has to promulgate

and enforce regulations with respect to swimming, boating, camping, picnicking and similar recreational activities on areas under its administration.”

Under the statutes of Ohio the violation of a lawful order of the Wildlife Council is made a crime, punishable as a misdemeanor. I presume, therefore, that your question as to the authority of the Wildlife Council to “promulgate and enforce” such regulations is directed to the authority of the council to adopt regulations, the violation of which would be a misdemeanor and punishable as such.

In Section 1531.06, Revised Code, Section 1435-1 G.C., we find language which standing alone could possibly be construed as granting the Wildlife Council almost unlimited power to adopt orders. This section provides in part:

“* * * The council may make and issue orders benefiting wild animals, fish or game management, preservation, propagation, and protection, outdoor and nature activities, public fishing and hunting grounds, flora and fauna preservation, and regulating the taking and possession of wild animals on any lands or waters owned or leased or under its supervision and control, and may for a specified period of years prohibit or recall the taking and possession of any wild animal or (on) any portion of such lands or waters. * * *”

In the literal language of this statute, the council is given the power to make and issue orders benefiting “outdoor and nature activities,” a grant of power which if literally construed would be almost limitless. I cannot so construe the power of the council. In the first place, such an unlimited grant, without even the semblance of legislative guide posts, would constitute an unconstitutional delegation of legislative power. *Matz vs. Curtis Cartage Co.*, 132 Ohio St., 271. In the second place, I believe it clear from a detailed study of the numerous statutes relating to the Division of Wildlife that the General Assembly itself intended the power of the Wildlife Council to adopt rules to be limited to such rules as relate to the taking, possession, protection, preservation or propagation of “wild animals” as defined by Section 1531.01, Revised Code.

Obviously, in construing a statute granting rule-making power to an administrative agency, such statute must be read in *pari materia* with those statutes providing a penalty for the violation of such a rule. Although the general power of the Wildlife Council to adopt rules is contained in

Section 1531.06, Revised Code, and further supplemented by Sections 1531.08 and 1531.09, the only penalty contained in Chapter 1531. is Section 1531.99 which provides that whoever violates Section 1531.11 shall be fined, etc. Section 1531.11 reads:

“No person shall take, kill, possess, transport, buy, or sell any clams and mussels, crayfish, aquatic insects, fish, frogs, turtles, or game animals contrary to any order, rule, or regulation of the wildlife council made in conformity to law.”

It is clear, therefore, that under Section 1531.99 all rules and regulations of the Wildlife Council may not be enforced by criminal proceedings, but only such rules and regulations as relate to the killing, possessing, transporting, buying or selling of certain animal life.

We find, however, that other penalty provisions are contained in the succeeding Chapter 1533. Section 1533.99 paragraph (J) reads:

“Whoever violates any section of the Revised Code relative to the taking, protection, preservation, possession, or propagation of wild animals or the use or possession of unlawful devices for such taking or any order of the wildlife council, for which no penalty is otherwise prescribed, shall be fined not less than fifteen nor more than two hundred dollars.”

While the specific language of paragraph (J) quoted above speaks of “any order of the Wildlife council,” without any specific limitation, it would appear that the type of order the General Assembly had in mind was that relative to the taking, protection, preservation, possession, or propagation of “wild animals.” That this is true is indicated by the fact that this same sentence makes it a misdemeanor to violate “any section of the Revised Code relative to the taking, protecting, preservation, possession or propagation of “wild animals.” It would appear that the General Assembly in speaking of “any order of the wildlife council” had in mind orders of a similar character.

This conclusion is further fortified by an examination of Sections 1533.69 and 1531.02 of the Revised Code. Section 1533.69 reads as follows:

“Prosecution for violation of an order of the wildlife council made and established as provided by the Revised Code, relative to the taking, possession, protection, preservation, or propagation of wild animals, shall be under section 1531.02 of the Revised

Code. The affidavit charging the violation shall describe the offense and cite the number by which such order its designated and set out the provisions of such order."

Section 1531.02 reads in part as follows:

"* * * A person doing anything prohibited or neglecting to do anything required by sections 1531.01 to 1531.26, inclusive, and 1533.01 to 1533.69, inclusive, of the Revised Code, or contrary to any council order violates this section. * * *"

Thus it will be noted that in the entire scheme of things the orders of the Wildlife Council which can be prosecuted under Section 1533.99, paragraph (J), Revised Code, are orders relative to the taking, protection, preservation, possession or propagation of wild animals. It follows that the Wildlife Council does not have cart blanche authority to promulgate and enforce by way of criminal prosecution, any and all regulations as to swimming, boating, camping, picnicking and similar recreational activities on areas under its administration. It also follows that to the extent such regulations would reasonably fall within the scope of regulations relative to the taking, protection, preservation, possession or propagation of wild animals, the Wildlife Council could promulgate and so enforce such regulations regardless of the fact that incidentally they would also result in the regulation of such recreational activities. The question of whether a particular regulation would so qualify is a question of fact to be determined in the first instance by the Wildlife Council, acting in the exercise of a sound discretion.

In conclusion and in specific answer to your question, it is my opinion that the Wildlife Council is authorized to promulgate and enforce on the areas administered by the Division of Wildlife, regulations with respect to swimming, boating, camping, picnicking and comparable recreational activities only to the extent that such regulations are reasonably calculated to regulate the taking, protection, preservation, possession or propagation of "wild animals" as defined by Section 1531.01, Revised Code.

Respectfully yours,

C. WILLIAM O'NEILL

Attorney General