

OPINION NO. 1122

Syllabus:

1. "Temporary written orders" may be adopted by the chief of the division of wildlife pursuant to Section 1531.08, Revised Code, without a public hearing and without compliance with Section 119.03, Revised Code.

2. "Modifying or rescinding orders" enacted pursuant to Section 1531.08, Revised Code, do not require a public hearing.

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To: Fred E. Morr, Director of Department of Natural Resources, Columbus, Ohio

By: William B. Saxbe, Attorney General, June 15, 1964

I am in receipt of your request for my opinion on the following questions under Section 1531.08, Revised Code, which arise because of the amendment of this section, effective September 30, 1963 (130 Ohio Laws 573):

"1. May the Chief of the Division of Wildlife issue a 'temporary written order' under authority of section 1531.08, Revised Code, on the basis of the annual public fish and game hearing provided within said section, or must he hold a hearing prior to promulgation of each order under procedures of Chapter 119, Revised Code?

"2. May the Chief of the Division of Wildlife modify or rescind an order previously made without a public hearing, as stated in section 1531.08, Revised Code, or must he hold a hearing for this purpose under procedures of Chapter 119, Revised Code?"

Prior to its amendment (130 Ohio Laws 573) this statute provided to the extent here material:

"In conformity with Section 36 of Article II, Ohio Constitution, providing for the passage of laws for the conservation of the natural resources of the state, including streams, lakes, submerged lands, and swamplands, and in conformity with sections 1531.01 to 1531.26, inclusive, and 1533.01 to 1533.69, inclusive, of the Revised Code, the wildlife council has authority and control in all matters pertaining to the protection, preservation, propagation, possession, and management of the wild animals and may issue temporary written orders for management of such wild animals. Each year there shall be a public fish hearing and a

public game hearing. The results of the investigation and public hearing shall be filed in the office of the chief of the division of wildlife and open for public inspection during all regular office hours. Modifying or rescinding orders do not require a public hearing.

"* * * * * * * * * *"

The first paragraph of this section now provides:

"In conformity with Section 36 of Article II, Ohio Constitution, providing for the passage of laws for the conservation of the natural resources of the state, including streams, lakes, submerged lands, and swamplands, in accordance with Chapter 119 of the Revised Code, and in conformity with sections 1531.01 to 1531.26, inclusive, and 1533.01 to 1533.69, inclusive of the Revised Code, the chief of the division of wildlife has authority and control in all matters pertaining to the protection, preservation, propagation, possession, and management of the wild animals and may issue temporary written orders for management of such wild animals. Each year there shall be a public fish hearing and public game hearing. The results of the investigation and public hearing shall be filed in the office of the chief of the division of wildlife and open for public inspection during all regular office hours. Modifying or rescinding orders do not require a public hearing."

Section 1531.08, Revised Code, further provides in part:

"The chief may establish, modify, rescind, and enforce orders throughout the state or in any part or waters thereof as provided by sections 1531.08 to 1531.12, inclusive, and other sections of the Revised Code. Such orders shall be based upon the public hearing and investigation provided in this section, including, among other things, the distribution, abundance, breeding conditions, food, cover, life history, and economic importance of the wild animals involved, together with the influence of topography, soil weather, and other nonliving or living things, on these wild animals, and whether or not such animals are materially destroying property or are otherwise becoming a nuisance or the sexes are not properly balanced or the natural food supply is insufficient or additional numbers may be taken without depleting the brood stock.

"* * * * * * * * * *"

A comparison of the present language of Section 1531.08, supra, pertaining to the rule making authority with that language employed before its most recent amendment, reveals the main change to be a substitution of the words "chief of the

division of wildlife" for the words "wildlife council." In addition it is now provided that the authority and control exercised under Sections 1531.01 to 1531.26, inclusive, and Sections 1533.01 to 1533.69, inclusive, Revised Code, shall be in accordance with Chapter 119, Revised Code. Chapter 119, Revised Code, is known as "The Administrative Procedure Act." The effect of this amendment, then, was to superimpose the general administrative rule making procedure under Chapter 119, Revised Code, upon a previous special rule making procedure contained in Chapter 1531, Revised Code, without repealing any of the latter. The questions resulting are whether "temporary written orders" and "(m)odifying or rescinding orders" authorized by Section 1531.08, supra, are subject to the procedure outlined in Chapter 119, Revised Code.

Section 119.13, Revised Code, provides, in summary, that an agency adopting, amending or rescinding a rule shall cause reasonable public notice to be given at least thirty days prior to the date set for the required public hearing containing a synopsis of the proposed rule, amendment or rule to be rescinded and the time and place of the public hearing; that the full text of the rule, amendment or rule to be rescinded shall be filed with the Secretary of State at least thirty days before the time set for the public hearing; and that a public hearing be held at the date, time and place designated in the notice. Section 119.02, Revised Code, provides:

"Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule."
(Emphasis added)

Considering your second question first, I think it clear that the rescission or modification of orders under Section 1531.08, supra, may be done without a public hearing. It will be noted that it is precisely provided that no public hearing is required for this type order and it follows that they are "otherwise specifically provided by law" within the meaning of Section 119.02, supra.

The answer to your first question is less clear. There is no provision in Chapter 119, Revised Code, which sets forth a procedure for adopting "temporary written orders." The term is not even found in this chapter. There is a procedure for the adoption of rules for a limited time upon the determination of the Governor that an emergency exists (Section 119.03(F), Revised Code) but these emergency orders appear to have a more limited application than "temporary written orders" under Section 1531.08, supra. It seems obvious, too, that the purpose of temporary orders precludes following the procedure set forth in Section 119.03, supra, for the adoption of permanent rules.

While "temporary written orders" unlike "(m)odifying or rescinding orders," are not specifically authorized without hearing, the provision for such orders precedes the general

authority contained in the second paragraph of this statute to make orders based upon the annual public hearings and investigations, and presumably the General Assembly intended, initially at least, that temporary orders need not be preceded by public hearing. I am inclined to the view that there was no change in legislative intent with respect to such orders by the amendment of September 30, 1963. I am persuaded that a summary procedure -- without public hearing -- is authorized for the adoption of these temporary orders, operating now (if not before) as an exception by implication to the general procedure for the adoption of permanent rules required by Section 119.03, supra.

Admittedly, the legislative intent is not clear from the language. The contrary conclusion, however, would, in effect, render that provision in Section 1531.08, supra, permitting the adoption of "temporary written orders" meaningless, for there is nothing to prevent permanent orders from carrying an expiration date and the only significance a distinction between "temporary written orders" and other orders can have is in the procedure for their adoption.

It should be pointed out that all such "temporary written orders" must be filed with the secretary of the state and with the clerk of the court of common pleas of each county where effective and given such further publicity as the chief of the division of wildlife determines is necessary. Section 1531.10, Revised Code.

In specific answer to your questions, it is my opinion that:

1. "Temporary written orders" may be adopted by the chief of the division of wildlife pursuant to Section 1531.08, Revised Code, without a public hearing and without compliance with Section 119.03, Revised Code.

2. "Modifying or rescinding orders" enacted pursuant to Section 1531.08, Revised Code, do not require a public hearing.