

DNR DIRECTOR ORDERS

Senate Bill 425 (Substitute H-2)
First Analysis (5-7-92)

Sponsor: Rep. Vernon J. Ehlers
Senate Committee: Health Policy
House Committee: Judiciary

THE APPARENT PROBLEM:

The Department of Natural Resources (DNR) has long used posted orders to protect state parks and recreation lands in a variety of ways. Posted orders can prohibit diving off a pier where that has recently become a problem, ban open fires in drought-stricken areas, bar gawkers from endangered species nesting sites, and close off dangerous construction sites and military practice areas. Orders have been issued and posted under Rule 299.321, which prohibits a person from using a state park or recreation area in a manner prohibited by a posted notice issued by the department. The rule was promulgated in part under the authority of Public Act 17 of 1921 (the DNR enabling act), which says that it is a misdemeanor to violate a rule affecting the use of lands under DNR control.

Recently, problems have arisen in enforcing "director's orders", as the posted notices are called. In a case involving the possession of alcohol in Holland State Park (something prohibited by a director's order), the attorney general and solicitor general submitted a brief that said that agency rules and regulations are ineffective unless they are promulgated under the Administrative Procedures Act, and that the failure to follow the rulemaking process rendered the order invalid. The brief pointed out that "inasmuch as the legislature has only provided criminal penalties for violations of promulgated rules, the defendants cannot be prosecuted for violating a department's order."

Although emergency rules have been developed to attempt to re-establish the department's ability to enforce orders concerning the use of state-owned lands, the department is seeking a more permanent solution in the form of amendments to the Administrative Procedures Act. The department has proposed that director orders be exempted from the act's definition of "rule" in much the same way

that DNR fish and game orders have long been exempted.

THE CONTENT OF THE BILL:

The bill would amend the Administrative Procedures Act (APA) to exempt from the definition of "rule" an order of the director of the Department of Natural Resources pertaining to the use of lands under the control of the Commission of Natural Resources, if that order is authorized in a rule promulgated pursuant to the APA and under Public Act 17 of 1921, and if the substance of the order was indicated to the public by means of posting or signs on or adjacent to the property affected by the order.

MCL 24.207

HOUSE COMMITTEE ACTION:

As passed by the Senate, the bill was part of a package of bills dealing with physician licensure and medical liability.

FISCAL IMPLICATIONS:

The DNR reports that the bill has no fiscal implications. (5-6-92)

ARGUMENTS:

For:

The bill would re-establish the department's ability to enforce violations of posted director orders as misdemeanors, something that is urgently needed with the onset of the season of peak use of recreational lands. Without speedy restoration of that authority, the department will not be able to close dangerous construction sites and military practice areas, protect Kirtland's warbler or eagle nesting sites, restrict alcohol use in state parks,

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regulate public access sites, or control high-risk recreational activities such as hang-gliding to protect the safety of participants and bystanders.

Against:

It is not clear how exempting land use orders from promulgation under APA will enable them to be enforced as misdemeanors. As the attorney general's brief noted, criminal penalties attach only to violations of department rules, and thus a person could not be prosecuted for violating an order.

Response:

From the department's point of view, violation of an order constitutes the violation of the rule that authorizes it, and therefore the violation of the order may be prosecuted as a misdemeanor in the same way that the rule is. By exempting orders from the APA, the bill would eliminate the need to promulgate them as administrative rules in order to give them legitimacy.

Rebuttal:

To ensure that orders are enforceable as desired, it may be necessary to examine and amend the authorizing statutes (such as Public Act 17 of 1921) to make it clear that violations of both rules and orders may be prosecuted as misdemeanors. However, the complexity of the problem of how to ensure the enforceability of land use orders makes it possible that the answer lies in alternative approaches.

Against:

Some may question whether an unpromulgated order should be prosecuted as a misdemeanor. If violation of a regulation is to be a crime, there should be some minimal amount of process involved to ensure adequate review and public notice.

Response:

The public would be notified of the land use orders by posting and nearby signs.

POSITIONS:

The Department of Natural Resources supports the bill. (5-6-92)