

The Natural Resources Act of Ohio

A DESCRIPTION OF THE ACT.

The Natural Resources Act (Amended Senate Bill No. 13 of the 98th General Assembly) consolidated the various state agencies engaged in conservation activities under single administrative direction; however, it made no significant changes in previously existing substantive law. It brought into a new Department of Natural Resources the state conservation agencies, provided for the correlation of the duties of all divisions within the Department "to avoid and eliminate unnecessary duplications of effort and overlapping functions," and created a Natural Resources Commission. The Department is headed by a Director, who is appointed by the Governor with the advice and consent of the Senate and the approval of the Natural Resources Commission. The Act provides a procedure for his removal by the Governor, with the Governor's decision being final.

The Natural Resources Commission, which was created by this act, is composed of the Dean of the College of Agriculture of the Ohio State University and seven other members appointed by the Governor with the advice and consent of the Senate for staggered terms of seven years. Although the function of the Commission is essentially advisory and it has no rule-making or administrative authority, its consent is necessary for the appointment of the Director of the Department of Natural Resources and the appointment and removal of the chiefs of the divisions of the Department.

The Act created seven divisions in the new department. They are:

- Lands and Soils Division;
- Water Division;
- Forestry Division;
- Wild Life Division;
- Geological Survey Division;
- Parks Division;
- Beach Erosion Division.

Under the new administrative organization the State Geologist, the Chief Engineer of the Ohio Water Resources Board, the State Forester, and the Commissioner of Conservation and Natural Resources became the chiefs of their respective divisions of the Department. All other chiefs and the successors to the above named four chiefs are appointed by the Director with the approval of the Natural Resources Commission, with perhaps one exception, the Chief of the Division of Water whose appointment procedure is discussed in greater detail in Part II of this study.

The Director of Natural Resources may create advisory boards for any of the divisions of the Department. Such boards exercise no administrative function and their members receive no compensation other than actual and necessary expenses. The Act expressly provides for an advisory committee to assist the Ohio Water Resources Board which is composed of members selected by the Governor from specific groups.

Under the Act any person who held a position within the classified civil service, which position was transferred to a division of the Department, assumed a civil service position of equal rating. All employees of the Department are in classified service and anyone who held a position six months or longer, which was unclassified may have a position or grade of classified service commensurate with the duties of his office.

The duties of the Natural Resources Board, which was abolished, were, in general, transferred to the Division of Lands and Soils. The responsibilities for correlating all the activities of soil conservation as provided by law rest with the Chief of the Division. While he has no authority over substantive programs, he is authorized by law to cooperate with other agencies, make studies, reports, and recommendations on soil conservation.

Senate Bill No. 13, as originally introduced, abolished the Ohio Water Resources Board, transferring its functions to the Division of Water. The Act as finally passed contained an amendment to the Bill, which reestablished an Ohio Water Resources Board, permitting it to select the Chief of the Division of Water. This provision is discussed further in Part II of this study.

The new Division of Water embraces the authority of the old board with additional duties relating to dams, reservoirs and other improvements on rivers and streams. These latter functions were transferred to the Division from the Superintendent of Public Works and the authority was significantly modified and expanded. The Division may now lease surrounding lands as well as water, which leases may run for fifty years, an increase of twenty-five years. Bonds may also be issued for fifty years instead of twenty-five.

The new Division of Forestry operates with the personnel and includes the authority of the previously constituted Department of Forestry of the Ohio Agricultural Experiment Station. The Division assumes control over all public forests, except those used solely by the station for research purposes.

Two minor changes were made in the basic law affecting forestry. The Division of Forestry is now required to withhold enough seedlings from sale to reforest state wastelands and when the Divi-

sion supplies other state agencies with forest products, it must be paid "the actual prevailing value" for those products.

The Division of Conservation and Natural Resources in the Department of Agriculture was abolished and the Division of Wild Life in the Department of Natural Resources assumed most of its functions. The Division consists of a Wild Life Council, a Chief of the Division of Wild Life and such other bureaus and positions as may be provided for by the Wild Life Council. There may not, however, be more than two assistant chiefs of the new division. The members of the old Conservation and Natural Resources Commission became members of the Wild Life Council and will hold these positions until their terms expire. The functions of the old Division of Conservation and Natural Resources, which related to soil erosion, reforestation and parks, were transferred to other divisions within the Department. Hence, the new Division of Wild Life does not possess as broad authority as did the old Division. The Act provides for the integration of programs by the Council and the Director of the Department. In this connection, the Director assumes an operating function as a member of the Council and actively participates in the formation, initiation, and approval of policy decisions.

The Act provides for a conveyance to the Division of Parks of all state lands which are by nature parks, except roadside parks of the Department of Highways and lands of the Ohio Archaeological and Historical Society. Under this arrangement, the new Division will gain control of many of the lakes and other areas previously under the direction of the Division of Conservation and Natural Resources (the new Division of Wild Life). It is now in charge of all the functions of the Division of Conservation and Natural Resources that relate to state reservoirs dedicated to public use and pleasure resorts.

The State Board of Park Commissioners was abolished by the Act and its advisory functions were transferred to the Division of Parks. The Act also provides for a fine against an owner of any boat condemned by the Chief of the Division of Parks as unsafe if the owner offers such boat for hire. The new law also fixes a fine for violation of boat safety rules.

The Division of Geological Survey, as established by the Act, continues the general functions of the old Division which was headed by the State Geologist. The new Division, with a Chief at its head, has the authority to collect, study, interpret, and publish mineralogical and geological information and data.

The new Division of Beach Erosion had transferred to it from the Department of Public Works the authority to investigate, study, manage, and control all erosion projects along the shore lines of

Lake Erie and its connecting bays. The Division has no authority to engage in inland soil erosion activities. It operates in close cooperation with the Beach Erosion Board of the United States War Department (Department of the Army) and its functions, largely a matter of finance and engineering, are a continuation of the responsibilities of the Department of Public Works.

ANALYSIS OF SELECTED PROVISIONS OF THE ACT.

1. The organization of the Division of Water and the method of appointing its personnel was obscured by the enactment of amendments to the Bill which restored the Ohio Water Resources Board to the Division. The general provisions relating to the new Department, Sections 154-10 and 154-10c, General Code, state that the Director, with the approval of the Natural Resources Commission, shall appoint all chiefs of the divisions, except those who were previously appointed, and shall fix the salaries of the chiefs. The latter provision gives to each division chief, with the advice and consent of the Director, the authority to employ necessary assistants and fix their salaries except as otherwise provided by law. Other than this exception, the provisions grant general powers without any restrictions or provisos. Section 408-2, General Code, however, without any reference to the above sections, gives to the Ohio Water Resources Board the authority to "employ the Chief of the Division of Water, a secretary and such other number of technical and administrative assistants as may be deemed necessary and fix their respective compensations." This section also provides that the Division shall consist of the Ohio Water Resources Board, the Chief and "such positions as may be provided for by written order" of the Board. It appears that an exception may have been intended as to the appointment procedure in the Division of Water but to obviate any appointment complications and in the absence of more clarifying language and a clearer expression of the intent of the legislature, future chiefs of the Division might well be appointed by both the Director and the Board. It should be added that the fixing of salaries is even further complicated by the passing of Amended Substitute House Bill No. 382, which is separately considered under paragraph 12 of this discussion.

2. The provisions relating to the Division of Water are silent as to the functions of the Board and the Chief, except as to appointment. The old act gave all the powers and duties to the Board itself; the new act transfers these functions to the Division. Notwithstanding such transference, the Ohio Water Resources Board seems to retain some control over policy since an Advisory Committee to the Board is provided for by the Act, for it is doubtful that the legislature intended the appointment of an Advisory Com-

mittee to the Board if the Board's functions were to be merely advisory. With no more clarifying legislative expression, the solution of this problem rests in the development of a satisfactory working relationship between the Board and the Chief of the Division.

3. Section 412, General Code, was amended by the Act with a view to transfer to the Division of Water control over certain public works previously directed by the Superintendent of Public Works. Section 412 now provides that the "Division of Water, shall, except for Lake Nimisila and the state canal system, have the care and control of the public works of the state as defined in Section 411 of the General Code." The latter exception, accomplished by an amendment to the Bill, acted to remove the control of the public works from the Division, since public works, as defined by Section 411, constitutes the state canal system. The exception negates the control which the preceding language of the provision purports to grant, since the exception encompasses the same subject matter of control as does the specious grant. In a sense, the legislature gave control over the state canal system to the Division with one hand and took it away with the other.

In a subsequent provision within this section, the Act provides as follows:

other than as provided above, the Superintendent of Public Works shall have the care and control of the public works of the state and shall protect, maintain and keep them in repair (Emphasis is editor's).

This latter paragraph may be subject to two interpretations. It could be argued that the qualification, "other than as provided above," restricts the authority of the Superintendent so as not to include under his jurisdiction the canal system which is the subject of the preceding paragraph. If this interpretation is accepted, further complications are created, since the control over the canal system is left undetermined by other provisions of the Act.

The second interpretation, which is the more likely, is that the Superintendent retains those controls which were not granted to the Division by the section. Since its final action negates the vesting of authority in the Division, such powers remain in the Superintendent. Thus the Superintendent's controls remain unaffected and he retains authority over the canal system.

4. In Section 412-1 of the Act, the authority to construct reservoirs, dams, storage basins, dikes, canals, raceways and other improvements relating to waters was transferred from the Superintendent of Public Works to the Division of Water. Section 412-20, before the passage of the Act, stated that the Superintendent should proceed in such construction as provided in Sections 404 to 441, inclusive of the General Code. This reference, which was added to

Section 412-20 in 1933, was an attempt to integrate the functions of the superintendent; however, there is no immediately discernible reason why the reference was limited to Sections 404 to 441, since Sections 436 to 462 related to the same subject matter, eminent domain. This Act also provides the same limited reference, omitting Sections 442 to 462. While it is not anticipated that this restriction will create difficulties, it is noted for future legislative attention.

The phrasing of this reference also presents a problem, for Sections 404 to 441 now relate to many functions of the Superintendent of Public Works and the Division of Beach Erosion, as well as to the Division of Water. The reference now states that the Chief of the Division of Water "*shall proceed as provided in Sections 404 to 441, inclusive.*" (Emphasis is editor's.) Since some of these sections relate to other officers, the Chief generally cannot "proceed as provided," but only in a like manner. It is submitted that had the legislature intended to apply the general procedures of other officers, embodied in those sections, to the Chief through incorporation by reference, then the clause should have been phrased differently; for example, it might have read, "shall follow like procedures to those provided for his or other divisions or departments in Sections 404 to 441, inclusive." It should be added, however, that such rephrasing does not dispel doubts as to the wisdom of incorporation by reference of specific procedure originally enacted to apply to another department. Procedural variances brought about by basic differences in organization and policy may create difficulties and confusion which would be absent where the procedure is completely stated in the basic legislation. If uniformity of procedure is desired, then the legislation should not be directed towards one department, leaving the reader to make the necessary substitutions of departmental names and conditions.

In passing it should be stated that Sections 412-11 and 1453 continue the provisions which permit the creation of hidden or secret liens upon real property. Such liens are not disclosed by searching the records of the county, for no requirement is made for filing a notice of lien in the county where the property is located.

5. As stated in Part I above, the new Division of Beach Erosion assumed control of Lake Erie Beach erosion projects from the Department of Public Works. Section 412-28 of the General Code, both before and after the Act, grants certain powers to the Chief of the Division of Beach Erosion subject to the provisions of Section 412-29 of the General Code. This latter section, prior to amendment by this Act, stated that all laws providing for the control and management of the public works of Ohio by the Superintendent of Public Works were made effective as to the provisions dealing with beach erosion in so far as the same were applicable. This was fol-

lowed by a proviso which stated, among other exceptions, that "such laws" should have no application to certain lands over which control had been given to municipalities or corporations by specified acts. The Act amended Section 412-29 by deleting all of the text of the section except the proviso. While it seems apparent that the legislature intended to continue the limitations expressed in the proviso, its continuing reference to "such laws" may lead to dual interpretations. The proviso may continue, through inadvertence, to refer to the old deleted text or may relate to the preceding sections of the Act. However, if the latter meaning were intended, a clearer understanding should have been given by amending the words "such laws" to read "the preceding sections."

In amending the reference to laws and code sections which appears in Section 412-29 and which grants control of certain areas to municipalities or corporations, or in the printing of the engrossed bill an error was made in citing "Ohio laws 505." This citation should read "113 Ohio laws 505."

6. Section 802-2 of the General Code, a new section, grants authority to the personnel of the Division of Geological Survey to "examine, at their discretion, any such well during its construction to confirm the accuracy of the log and to collect samples of the cores, chips or sludge." This authority could have been a valuable aid to the Division, but since no construction permit or any notice of construction is required by the Act, it appears that this provision is of little practical effect. In the absence of such affirmative requirement, the Division may not learn of the construction until it is too late to make an examination.

7. Section 1431 of the General Code provides that the section shall not be construed to authorize the taking and possessing of deer without first obtaining, in addition to the regular hunting license, "a special deer permit as provided for in Section 1431-1." Section 1431-1, which is repealed by the Act, related to fishing and hunting by members of the armed forces in the years 1945 and 1946 and bore no relation to deer licenses. Section 1431-2 provides for such special deer permits and appears to be the section which should have been designated. The reference should have been amended by the Act in that the referred to section, which was improperly identified, was also repealed.

Section 1431-2 provides for the issuance of such deer permits "by the office of the Division of Conservation and Natural Resources at Columbus, Ohio, or by agents of the counties where an open season on deer is provided." The section also specifies that the funds derived from the sale of these permits should be "appropriated exclusively for the use of the Conservation and Natural Resources Commission" for certain purposes relating to deer, and

that the "Conservation and Natural Resources Commission shall provide such additional orders as it deems necessary to carry out the provisions of Sections 1431, 1431-1 and 1431-2 of the General Code." Section 1431-2 was not amended by the Act, although the Act abolished the Division of Conservation and Natural Resources and the Commission of that Division and, as previously indicated, repealed Section 1431-1. Section 1438-1, which formerly gave to the Conservation and Natural Resources Commission authority to regulate taking and possessing game, and Section 1432, which authorized the Commission to provide for the issuance of hunting and trapping licenses, were amended so as to transfer those powers to the Division of Wild Life. It appears that while the new Division may regulate the season on deer and issue regular hunting and trapping licenses, it has no authority to issue deer permits or to collect fees for such permits pursuant to Section 1431-2, since these latter powers remain with the defunct Division of Conservation and Natural Resources. It should be noted, however, that deer permits may still be issued by "agents of the counties where an open season on deer is provided."

This failure to amend Section 1431-2 creates a further problem as to the use of the funds derived from the sale of deer permits as the section provides that the funds received from the sale of such permits should be used exclusively for the now defunct Conservation and Natural Resources Commission. Regardless of how this and the other problems created by the failure to amend Section 1431-2 are temporarily resolved, it would seem advisable for some future session of the legislature to amend the section so as to integrate the new Department of Natural Resources into its provisions.

One further minor error is found in Section 1431-3 of the General Code. This section provides a fine for violations of provisions of Sections 1431, 1431-1 and 1431-2. The act did not modify the references to these sections, although Section 1431-1 was repealed.

8. The State Geologist and the Chief Engineer of the Ohio Water Resources Board were under classified civil service before their positions were transferred to the Department of Natural Resources by the Act. Section 154-10c of the General Code, a new section and a part of this Act, provides that any "person" holding a classified position which position is transferred to the Department of Natural Resources shall be transferred "to a position of a grade within the classified service equal to that which he now holds." The section also specifically provides that the State Geologist and the Chief Engineer of the Ohio Water Resources Board were to become the chiefs of their respective divisions and that thereafter all chiefs shall be appointed by the Director of Natural Resources with the approval of the Natural Resources Commission. The section fur-

ther states that chiefs may be removed by the Director with the approval of the Commission but only for "substantial reasons." Sections 154-7 and 154-19 of the General Code, unchanged by the Act, provide that all officers listed in Section 154-6 shall be in unclassified service, shall be appointed by the directors, and shall hold office during the pleasure of such directors. All of the chiefs of the divisions of the new Department of Natural Resources are listed in this Section 154-6.

The first conflict which is presented is that of the civil service status of the above named chiefs. Section 154-10c states that any person holding a classified position is transferred to a position of like grade within the classified service. Since the former State Geologist and the former Chief Engineer held such positions, it would seem to follow that their civil service status is continued. However, Sections 154-7 and 154-19, one directly and the other indirectly, hold that such officers shall not be within the classified service.

If the chiefs are considered within the classified service then their removal must follow the civil service procedures. However, those requirements are inconsistent with the provisions of Section 154-7, for under that section a chief may hold office during the pleasure of the director and may be removed without cause, while Section 486-17a of the Civil Service Act requires that removal be founded upon a listed cause.

If the chiefs of all the divisions, including the former State Geologist and the former Chief Engineer, are not under classified civil service, even then a problem exists as to their removal. Section 154-10c states that the chiefs may be removed by the Director for substantial reasons with the approval of the Natural Resources Commission. On the other hand, Section 154-7, as noted above, provides that the chiefs hold office during the pleasure of the director. Since Section 154-10c is the more recent provision and is a part of the Natural Resources Act, it appears that it will be followed in the removal of chiefs within the Department. Such an interpretation is supported by *State, ex rel. Jaster, Director of Highways v. Court of Common Pleas of Jefferson County*, 132 Ohio St. 93, 5 N.E. 2d 174 (1936), where a specific statute was enacted on the same subject covered by an existing general statute. The existing statute was not repealed and the Ohio Supreme Court ruled that the specific statute "must be held to have been engrafted upon the general statutes as an exception thereto."

A similar conflict as to the appointment of chiefs also exists. In Sections 154-7 and 154-10c the chiefs are appointed by the Director but in the latter section such appointments are subject to the approval of the Natural Resources Commission. Again, it would seem

that the conflict would be resolved in favor of the recent Section 154-10c, which requires the approval of appointments by the Commission.

9. Another problem is created by the general language of Section 154-4 of the General Code. This section, unchanged by the Act, provides for the appointment of all directors of departments by the Governor with the advice and consent of the Senate, with only one exception given. That is that the Director of Health must be chosen from a list of at least six physicians, which list is certified to the Governor by the Public Health Council. Section 154-3, which heretofore only created the departments and specified who should administer them, was amended by the Act to create the Department of Natural Resources and also to specify the qualifications for such director. Since Section 154-4 acts as a general provision governing the appointment of all directors, it is desirable to amend that section for uniformity so as to include the qualifications for all directors, including the Director of Natural Resources and such other directors whose qualifications are set forth elsewhere in the General Code. Such an amendment would seem consistent with the general purpose of Section 154-4 and would eliminate present confusion.

10. Section 2264-1 of the General Code provides for annual reports to the Governor from certain officers and state agencies. This section, which was not amended by the Act, continues to provide for reports by the State Geologist. Since the State Geologist now functions as the Chief of the Division of Geological Survey, the section should be amended either by deletion of the old title or by appropriate substitution of the new officer.

11. Illustrative of other oversights in failing to amend existing provisions which refer to conservation agencies by their old titles are Sections 479-1, 479-2, 479-3, and 2496. Reference to the old Conservation and Natural Resources Commission and the Division of Conservation in those sections should have been amended in accordance with the new departmental titles provided by this Act. These oversights create additional problems affecting the substance of those sections.

12. In addition to the problems mentioned above, further inconsistencies were caused by the passage of two other bills by the General Assembly. Section 1390 of the General Code was amended by the Act so as to change certain definitions in accordance with the new organization of the Division of Wild Life. Amended House Bill No. 107 was passed over the Governor's veto on July 29, 1949, to place quail on the game list. In so doing, however, it amended Section 1390 and restored the old definitions, removing those added by the Natural Resources Act. It is doubtful that this inadvertence will

create any difficulties, although certain words in other sections of the Act remain undefined.

Amended Substitute House Bill No. 382 was passed and approved on July 28, 1949, after the passage of the Natural Resources Act. An emergency clause contained in the bill enabled it to become effective when approved, which date preceded the effective date of the Natural Resources Act. This bill provides for the standardization of titles, classifications, salaries, etc., of state employees. Two of the sections within it, Sections 154-10 and 154-10c of the General Code, which were enacted, as distinguished from amended, contain, with one exception, the precise wording of the same sections as passed by the Natural Resources Act. The difference is in the omission of the provisions relating to the fixing of salaries from the bill. This action may create difficulties since the bill did not purport to repeal the old sections. While the doctrine of repeal by implication might be applicable to a conflict between other provisions of the bill and these sections of the Natural Resources Act, it appears that no such conflict exists as between the duplicated sections.

The second problem created by the enactment of Amended Substitute House Bill No. 382 relates to Sections 408-2 and 1443 of the General Code. The issue here is similar to the preceding one in that the bill contains the same provisions as does the Natural Resources Act; however, the provisions relating to the fixing of salaries is omitted from the bill. The problem is modified to the extent that the bill contains a section which repeals the former sections. Although the effective date of the Natural Resources Act follows that of the bill, in view of its subsequent passage, the bill may be presumed to repeal the sections as enacted by the Act.

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