



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: February 9, 2016
TO: Representative Shamia Fagan, Chair
FROM: Aaron Knott, Department of Justice Legislative Director
SUBJECT: HB 4106 – Temporary Rules

The Department of Justice is neutral to the policy underlying this proposal, but is concerned that some of the language used could lead to an increase in litigation costs.

BACKGROUND

HB 4106 amends ORS 183.335(6) to specify that when promulgating emergency rules (temporary rules) an agency may not rely upon “expediency, convenience, best interest of the public, general public need or speculation” as the basis for its findings of serious prejudice to the public interest. It also requires that the agency “demonstrate” rather than state the basis of the serious prejudice to the public interest.

IMPACT

Temporary rules are promulgated when an agency finds that its failure to act will result in “serious prejudice to the public interest or the interest of the parties concerned.” This bill would interfere with an agency’s ability to adopt emergency rules because an agency is arguably acting in the “best interest of the public” and to address “general public need” when it promulgates a rule to prevent “serious prejudice to the public interest.” In addition, in that temporary rules are generally adopted to practically and efficiently achieve the purpose of the rule, all temporary rules could be characterized as “expedient.”

Agencies may need to promulgate an emergency rule to prohibit the movement of diseased plants or animals – for example, a quarantine that prohibits the movement of poultry or poultry products in order to contain an avian flu outbreak. These decisions, although necessary to prevent “serious prejudice to the public interest” are also based on the “best interest of the public” (preventing the spread of disease) and address the “general public need” to prevent the spread of plant and animal diseases.

Another example is when forest and range fires affect whether hunters may safely hunt in burned or on-fire areas. ODFW must use temporary rules to close hunts already authorized by permanent rules in response to fires, and must adopt those closures before it could legally adopt a permanent rule amendment to close the season. Thus while both expedient and for the general public interest, these are the situations for which these temporary rule justifications were created, and are working. It is expedient for an agency to be able to respond in real time to emergency

and management issues as they arise, and it is surely in the general public interest not to cripple their ability to do that.

The modifications in HB 4106 set up a standard that is extremely difficult to implement. How are agencies to prevent serious prejudice to the public without taking into consideration “general public need” or the “best interest of the public”? This could chill an agency’s ability to react to serious emergencies as they present themselves.

Another serious concern is the heightened standard for promulgating temporary rules. The inclusion of the word “demonstrating” on p. 3 line 22 increases the standard for temporary rules by requiring something more than a “statement “ by the agency that explains why a temporary rule is required to prevent serious prejudice to the public interest. While the standard of proof is not clear, the addition of this word does seem to have the effect of increasing the threshold showing an agency would have to make to promulgate an emergency rule in an unpredictable manner.

CONTACT

Please contact Department of Justice Legislative Director Aaron Knott with any further questions or concerns.

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