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Joint Committee on Finance

Paper #459

Emergency Rules -- Deer Management (DNR -- Fish, Wildlife, and Recreation)

[LFB 2013-15 Budget Summary: Page 330, #5 (part)]

CURRENT LAW

Agencies typically promulgate permanent administrative rules, which are subject to certain rule promulgation, public notice and hearing, and legislative review procedures. Occasionally, preservation of the public peace, health, safety, or welfare necessitates implementing a rule prior to the time it could take effect as a permanent rule; in which case the agency may initially adopt the rule as an emergency rule.

GOVERNOR

Specify that the Department may promulgate rules to implement the recommendations in the deer management assessment report. Further, specify that these rules may be promulgated as emergency rules, that DNR is not required to provide a finding of emergency for these rules, and that the emergency rules remain in effect until June 30, 2015, or the date on which permanent rules take effect, whichever is sooner.

DISCUSSION POINTS

1. Under current law, an agency may promulgate an administrative rule as an emergency rule if "preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures" of the permanent rule process. Certain requirements that apply to permanent rules also apply to emergency rules, including the requirement for gubernatorial approval of the scope statement and of the final draft rule. Scope statements include information about the agency's intended rulemaking, including the objective of the proposed rule, the statutory authority for the rule, and a description of all entities that may be affected by the rule. However, several requirements that apply to permanent

rules do not apply to emergency rules including: preparation of an economic impact analysis (EIA), submittal to the Legislative Council for review, and holding a public hearing prior to promulgating the rule (permanent rules require an agency to hold a public hearing and require notice of the public hearing to include the text of the proposed rule, a plain language analysis of the rule, and the EIA and fiscal estimate). Further, emergency rules are not submitted to the Legislature for review. For emergency rules, once the Governor has approved a final draft emergency rule in writing, the agency may publish the rule in the official state newspaper, at which time the rule takes effect (unless the rule specifies another effective date). An agency must hold a public hearing on an emergency rule within 45 days after the promulgation of the rule and an emergency rule remains in effect only for 150 days, unless the Joint Committee for Review of Administrative Rules (JCRAR) grants an extension for an additional 60 days. The total period for all extensions granted may not exceed 120 days (for a maximum effective period of 270 days).

2. The bill would allow the Department to promulgate emergency rules, without the finding of an emergency, to implement the recommendations contained in the 2012 deer management assessment report. Under the bill, the rules would remain in effect until June 30, 2015, or the date on which permanent rules take effect, whichever is sooner (rather than for the general 150 to 270 day period under current law). The report, issued by Dr. James C. Kroll, and two other deer management experts, David C. Gynn, Jr. and Gary L. Alt, made a number of recommendations including recommendations related to: (a) deer population management; (b) hunting regulations and seasons; (c) predator management; (d) chronic wasting disease management; (e) development of a Deer Management Assistance Program (DMAP); as well as recommendations related to DNR research topics (including deer habitat, forest health, and public opinion) and technological needs (the report recommended a statewide geospatial information system be developed in Wisconsin to aid in land management). The administration indicates that emergency rule-making authority was included in the bill so that rules could be promulgated in time for the 2014 fall hunting season, which DOA indicates would not be likely if the rule were to be promulgated through the permanent rule process.

3. On March 13, 2013, the Governor approved a DNR scope statement for rules relating to deer management, hunting and implementation of the deer management report. The Department developed the scope statement for permanent rules. However, if the emergency rule language included in the bill is passed, DNR plans to prepare a scope statement for emergency rules that DNR indicates would be similar to this scope statement. In the scope statement, the Department states that "the objective of these proposed rules is to work with sportsmen and sportswomen and other stakeholders in order to implement ideas and solutions" from the report to "forge a new age for deer management". The scope statement also states that the primary policy alternatives being analyzed and considered are ones recommended in the deer management report, but that "throughout this rulemaking process, the Department and its partners may evaluate other policy alternatives as they are identified". The scope statement identifies a number of administrative rules that would be changed including: (a) Chapter NR 1 related to Natural Resources Board Policies, including a shift away from deer population goals expressed in specific numbers of animals in favor of more general population goals, a revision of what the Department considers tolerable levels of crop damage (either to higher or lower levels depending on public feedback), development of a young forest initiative task force (young forests provide habitat for many species including ruffed

grouse, cottontail rabbit, snowshoe hare, fox, turkey, bobcat, white-tailed deer and black bear, certain migratory songbirds and several bird species considered species of greatest conservation need including whip-poor-will, American woodcock, brown thrasher, veery, cuckoos and eight species of warbler) and deer research priorities; (b) Chapter NR 8 related to License and Permit Procedures including changes to improve efficiency or flexibility in the issuance of licenses; (c) Chapter NR 10 related to Game and Hunting including changes to deer population management policy and practices and hunting regulations related to population goals (the rules could replace the current population goals with a simplified goal statement to "increase, stabilize, or decrease population density" and establish a set of metrics to monitor progress towards those goals), setting antlerless harvest goals, regulations, and antlerless permit quotas on a three to five-year cycle instead of annually under current rule, changes to free antlerless deer tags, changes to names for permits and allowable uses of permits including possible modification or elimination of back tags, deer carcass tags, and tagging requirements, potential modifications of deer season dates and feeding regulations, establishment of a Deer Management Assistance Program (DMAP), and rule changes related to management of chronic wasting disease (CWD) including the establishment of a fee for antlerless tags in CWD zones; and (d) modifications to Chapters NR 11, 12, 13, 19, and 45 needed to update cross references with other rules (primarily changes to Chapter NR 10).

4. As identified in the scope statement, implementation of the Kroll report recommendations would include the development of a DMAP and the creation of a fee for issuance of bonus deer permits in CWD-confirmed areas. These two topics would specifically be provided emergency rule-making authority (without the finding of an emergency) under the bill and are discussed in separate budget papers. It could be argued that with the authority to promulgate emergency rules to implement these two specific recommendations of the report (to implement a DMAP and to establish a fee for bonus deer permits in CWD-confirmed areas), it is unnecessary for the bill to also provide the broader language allowing for the promulgation of emergency rule-making authority to implement further unspecified report recommendations.

5. However, according to DOA, the bill language providing DNR with authority to promulgate emergency rules to implement the report recommendations is deliberately broad in order to allow the Department to incorporate public input from multiple public listening sessions. To solicit public feedback on implementation of the recommendations of the Kroll report, DNR developed an online survey, available through April 20, 2013. The Department also organized four "deer-trustee report action teams" including: (a) herd health/chronic wasting disease action team; (b) Deer Management Assistance Program (DMAP) action team; (c) regulations and seasons structure action team; and (d) science and research action team. DNR scheduled a series of seven meetings of the action teams beginning in March, 2013, through July, 2013, at the UW-Stevens Point Dreyfus University Center (from 10:00 a.m. to 3:00 p.m.) and the Department encouraged the public to attend the meetings and be part of an action team or watch a live webcast of the meetings online. The final meeting is scheduled for July 20, 2013, after which the Department plans to develop the final emergency rule, which DNR plans to have in place no later than March, 2014, to allow the purchase of licenses beginning in license year 2014 (April 1, 2014, through March 31, 2015), with fall 2014 as the first deer hunting season with these rules in place. The Department plans to have a permanent rule in place by March, 2015. Some would argue DNR has outlined a process for a potential emergency rule that has adequate provisions for public input. As such, the provision could

be adopted (Alternative 1).

6. On the other hand, it could be argued that promulgating the rules through the permanent rule-making process would allow for greater public input, as a permanent rule requires a public hearing before a final draft of the rule is prepared and to be submitted to the Legislature for review. In addition, permanent rules allow for further public input once the rule is submitted to a standing committee of the Legislature for review.

7. Although the bill would specify DNR may promulgate rules to implement recommendations in the Kroll report, this provision likely does not expand DNR's authority to promulgate an administrative rule on a particular topic, but rather would allow the use of emergency rule procedures in a case where the Department may currently promulgate a rule. Emergency rule authority, without the funding of an emergency, is granted by the Legislature from time to time. However, in most cases specific statutory parameters are established and the affected agency is expected to fill in the detail of a program through rule. In this instance, a rather broad grant of authority would be provided, without the specific parameters, or the content or direction, of the emergency rule being known. Under such circumstances, some would argue greater scrutiny from the public and the Legislature may be warranted. If the provision were deleted (Alternative 2), the Department could continue to develop such rules but would be required to do so through the permanent rules process, or with the actual finding of an emergency, so long as the rules correspond with existing statutory authority.

ALTERNATIVES

1. Adopt the Governor's recommendation that DNR may promulgate rules to implement the recommendations in the deer management assessment report, that these rules may be promulgated as emergency rules, that DNR is not required to provide a finding of emergency for promulgation of these rules, and that the emergency rules remain in effect until June 30, 2015, or the date on which permanent rules take effect, whichever is sooner.

2. Delete the provision. No explicit statutory authority would be provided for DNR to promulgate administrative rules to implement the deer management assessment report recommendations. (To the extent that the rules correspond with existing statutory authority, DNR could promulgate administrative rules to implement the report recommendations, but would be required to do so through the permanent rules process, or with the actual finding of an emergency.)

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