STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 11-16

Off Highway Vehicle Use in State Forests

QUESTIONS

Tenn. Code Ann. § 70-9-104(5) prohibits the use of off-highway vehicles (OHV) in state forests and other areas unless expressly approved for such use on or before the effective date of May 10, 2004. After the effective date, the statute allows for access if specified by rule or regulation.

1. Which state agency or agencies must give their approval in order to allow recreational OHV use in a state forest?

2. In what form must any required approval be provided?

3. If any approval is required to be provided in the form of a rule, does the agency that must provide that approval have the authority to do so by means of adopting an emergency rule?

OPINIONS

1. The Department of Agriculture's Division of Forestry must give its approval to allow OHV users access to state forests.

2. After May 10, 2004, the approval to allow OHV users access to state forests must be through rules and regulations. Prior to that date, rules and regulations were also used by the Division of Forestry to approve OHV use in state forests.

3. If the Division of Forestry can meet the criteria for emergency rulemaking set forth in Tenn. Code Ann. § 4-5-208(a) (Supp. 2010), then it may provide approval for OHV use in state forests through an emergency rule pursuant to the Uniform Administrative Procedures Act.

ANALYSIS

1. The Tennessee Off-Highway Vehicle Act of 2004 (OHV Act) creates a program to manage OHVs to maximize economic and recreational opportunities, to protect the environment, and to ensure that adequate revenue is generated for such purposes. Tenn. Code Ann. § 70-9-102. The Director of the Tennessee Wildlife Resources Agency (TWRA) is charged with establishing and implementing the OHV program. Tenn. Code Ann. § 70-9-

104(1). The OHV Act expressly prohibits OHV use in wildlife management areas and refuges used solely for hunting, fishing, or other TWRA-related activities; state forests; state parks; and state natural areas. Tenn. Code Ann. § 70-9-104(5). However, OHV use is permitted in those areas in two instances: first, if there has been express approval for such use on or before May 10, 2004; and second, after May 10, 2004, if access is allowed by rule or regulation. *Id*. May 10, 2004, is the effective date of the OHV Act. *See* 2004 Tenn. Pub. Acts 622, § 11.

The General Assembly has created the position of State Forester, who serves under the Commissioner of Agriculture and who has the duty and responsibility of protecting and managing lands designated as state forests. Tenn. Code Ann. § 11-4-301(d)(10). The State Forester, with the approval of the Commissioner of Agriculture, may promulgate rules and regulations to implement the Forestry Code. Tenn. Code Ann. § 11-4-301(d)(18). The State Forester supervises the Division of Forestry, a division of the Department of Agriculture, which develops, implements, and promotes forestry programs and policies. Tenn. Code Ann. §§ 11-4-401 and 11-4-402.

The Division of Forestry promulgated Tenn. Comp. R. & Regs. 0080-7-1-.06, which allows for the limited use of off-road vehicles in state forests. This rule was originally placed in effect in 2001. Thus, when the OHV Act went into effect on May 10, 2004, the Division already provided express approval for OHV use. Subsequently, the Division in 2007 repealed the rule and issued a new rule that still provided for the use of off-road vehicles on certain unpaved roadways and areas designated for that specific use.

Although the OHV Act gives the TWRA Director the responsibility to administer the OHV program, and authorizes the Wildlife Resources Commission to promulgate rules and regulations to effectuate the purposes of the Act, Tenn. Code Ann. § 70-9-105(3), the Act does not specify which agency must promulgate rules and regulations to allow for OHV use in state forests under Tenn. Code Ann. § 70-9-104(5). The Legislature, however, is presumed to have knowledge of the state of the law on the subject under consideration at the time it enacts legislation. *Equitable Life Assurance Company v. Odle*, 547 S.W.2d 939, 941 (Tenn. 1977). When the OHV Act was enacted in 2004, the Division of Forestry's rules already allowed off-road vehicle access on certain unpaved roads. The OHV Act does not change the authority of the State Forester or the Division of Forestry in this regard. Because the General Assembly is presumed to have known that the Division of Forestry was already regulating OHV use in state forests when it enacted the OHV Act, and did not alter this authority, it is the opinion of this Office that the Division of Forestry, under the Department of Agriculture, must give approval to allow OHV users access to state forests.

2. Approval for OHV use in state forests under Tenn. Code Ann. § 70-9-104(5) after May 10, 2004, must be given by rule and regulation. The OHV Act clearly states this requirement. Prior to May 10, 2004, approval for OHV use in state forests was given through rules and regulations as well. *See* Tenn. Comp. R. & Regs. 0080-7-1-.06.

3. Agencies authorized to promulgate rules must do so pursuant to the Uniform Administrative Procedures Act (UAPA), Tenn. Code Ann. §§ 4-5-201 to -228 (Supp. 2010). The UAPA provides for emergency rulemaking under Tenn. Code Ann. § 4-5-208 (Supp. 2010). This statute sets forth the criteria for an emergency rule. Tenn. Code Ann. § 4-5-208(a) (Supp. 2010). If the Division of Forestry can meet these criteria concerning OHV use in state forests, then it may adopt an emergency rule under the UAPA.

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