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STATUTORY AND REGULATORY AUTHORITY DELINEATING OHIO ANIMAL DISEASE CONTROL IN OHIO

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In a world currently contemplating a highly pathogenic bird flu and possible subsequent pandemic outbreak, either naturally occurring or terrorist generated, a comprehensive animal disease control plan is critical to the health and well-being of a state's animal and human population. Animal disease control in the State of Ohio is regulated primarily by statute or regulation, and rests primarily with the Ohio Director of Agriculture (hereinafter "Director"). Chapter 941 of the Ohio Revised Code (hereinafter "ORC") contains the pertinent authority for animal disease control. ORC Chapter 941, in addition to the powers provided to the Director, also grants the Governor of Ohio the authority to embargo the importation of diseased or infected animals into Ohio.¹

I. SECTION 1.01 STATUTORY AUTHORITY

The key provisions of ORC 941 are:

1. ORC 941.06 (Notice of disease; prohibition of transfer of infected, exposed or adulterated animal);
2. ORC 941.07 (Investigation; quarantine; expenses);
3. ORC 941.10 (Rules governing importation and movement of animals);
4. ORC 941.11 (Order for destruction of animal);
5. ORC 941.12 (Appraisal of animal ordered destroyed; indemnification of owner);
6. ORC 941.14 (Disposal of dead animals by owner);
7. ORC 941.15 (Disposal of dead animals by department or township; assessment of cost); and
8. 941.99 (Penalties).

Critical to triggering the applicable provisions of ORC Chapter 941 is the presence of a dangerously contagious or infectious disease.² Diseases

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¹ See OHIO REV. CODE ANN. § 941.10(B) (2007).

² See OHIO REV. CODE ANN. § 941.01(A) ("'Dangerously contagious or infectious disease' means any disease, including any foreign animal disease, or vector, that the director of agriculture, in his sound discretion, determines to be of harmful effect on the animal or poultry industry or the public health and to be capable of transmission by any means from a carrier animal to a human or to another animal.").

are declared contagious or infectious in two ways. First, the Director may designate certain diseases as dangerously contagious or infectious through the administrative rule process. If accomplished in this fashion, a rule is promulgated pursuant to ORC Chapter 119 and the disease listed in the Ohio Administrative Code (OAC).³ If it is a new or previously undiagnosed disease, it may be designated as a contagious or infectious disease by the director pursuant to an emergency executive order.⁴ When the disease is designated infectious or contagious through an emergency executive order, it is done so without the normal hearing provided in the normal ORC Chapter 119 rules process. An emergency designation is effective for a period of 90 days and must be replaced by a designation pursuant to ORC Chapter 119 rules process if the designation is to be permanent. In addition to granting the director the authority to designate such diseases, the same rule also provides the director with the ability to prohibit (or regulate by proclamation) the movement of any animals which could carry the designated infectious or contagious disease into or out of a particular area of the State. Finally, the rule also prohibits anyone from selling, moving or disposing of such diseased animals without the written permission of the Ohio Department of Agriculture (hereafter ODA).⁵

The process for controlling or quarantining a dangerously contagious or infectious disease in Ohio normally begins as a result of notice being provided to the ODA of the possible existence of such a disease. Any person who suspects the existence of such a disease, is required, by statute to immediately notify the director or a licensed veterinarian, who must then immediately notify the Director.⁶ Once the Director is notified, a determination is made as to whether the suspected disease is in fact, a dangerously contagious or infectious disease as contained in OAC 901:1-21-02. Currently there are twenty-six diseases listed as dangerously contagious or infectious diseases. If the disease is not listed, and it is one that the scientific community views as requiring control, then the Director may designate it through emergency executive order as described above.⁷

Upon the notice to the ODA that an animal may contain a dangerously contagious or infectious disease, the director is granted the authority to immediately quarantine the animal and/or the geographic area in which the animal is located, so that he is able to inspect, test, and examine the animal or other animals within the quarantine area.⁸

³ OHIO ADMIN. CODE 901:1-21-02 (2007).

⁴ *See id.* at 901:1-21-02(D).

⁵ *See id.* at 901:1-21-02(C).

⁶ OHIO REV. CODE ANN. § 941.06(A).

⁷ *See* OHIO ADMIN. CODE 901:1-21-02(D).

⁸ *See* OHIO REV. CODE ANN. § 941.07(A).

II. QUARANTINE ORDER

If the investigation of the initially quarantined animal reveals that it is indeed infected with or exposed to a dangerously contagious or infectious disease, the Director may issue quarantine orders, without a prior hearing, in order to prevent such disease from affecting other animals in the state or the public health. No person shall fail to comply with the terms and conditions of the quarantine order.⁹

When a quarantine order is issued, the Director shall, if possible, notify the owner of the affected animal or animals. Notice may be made by personal service, certified mail, or a posting on the quarantined premises.¹⁰ In practice, a veterinarian usually delivers the order.

The quarantine order is normally signed by a veterinarian (acting as an agent of the State) and contains the following information:

- a. The name and address of the person owning and having custody of the quarantined animal, if known;
- b. A description of the quarantined animal;
- c. A description of the premises and means of conveyance affected by the quarantine;
- d. The reason for the quarantine;
- e. The terms and conditions applicable to the quarantine;
- f. A notice to the effect that persons adversely affected by the quarantine order may request a hearing to review the order.¹¹

A person adversely affected by a quarantine order, may request a hearing within thirty days after receiving the order, in accordance with ORC Chapter 119. Such request does not stay a quarantine order.¹²

A quarantine order remains in effect until a written notice of release is issued by ODA or until ordered to be released after the ORC Chapter 119 hearing (if a hearing is requested).¹³ The hearing is administrative in nature and is normally conducted at the ODA campus. The ODA is represented by the Office of the Attorney General. The affected party may appear pro se or may be represented by an attorney. The matter is heard by an independent hearing officer (a private attorney selected randomly from a list of practitioners contracted to serve as hearing officers). Although the Civil Rules are not applicable, the hearing is relatively formal and a transcript is prepared. After presentation of evidence, the hearing officer will issue (normally within two to three weeks), a written Report and Recommendation. The

⁹ See *id.* § 941.07(B).

¹⁰ See *id.* § 941-07(D).

¹¹ See *id.* § 941.07(E).

¹² See *id.* § 941.07(F).

¹³ See *id.* § 941.07(G).

Report and Recommendation is normally adopted by the Director (although adoption, in whole or in part, is not required), who then issues a final Order affirming or denying the quarantine. This Order may be appealed to the applicable court of common pleas.¹⁴

All necessary and proper expenses incurred by the Director in the quarantine of an animal are to be paid by the State. However, such expenses shall not include the maintenance, feeding, and quartering of the animal while in quarantine, which expense remains that of the animal owner.¹⁵

III. ENFORCEMENT OF QUARANTINE ORDER

Once quarantine is established, no animal or its means of conveyance, shall be brought to or removed from the premises or geographic area disclosed in a quarantine order without written permission from the Director. The size of the geographic area may be one, or many counties, or any part thereof, which is reasonable and flexible, providing the Director the flexibility to control the disease with the smallest area of quarantine permitted by the spread of the disease. Conveyance, as used in ORC Chapter 941, means any transportation device including trucks, trailers, etc.¹⁶

Anyone violating a quarantine order is guilty of a fourth degree misdemeanor; each subsequent violation is a third degree misdemeanor.¹⁷ In order to help assure compliance with quarantines, once established, ORC Chapter 941 provides that any law enforcement officer of the state or a political division thereof, shall, within his jurisdiction, assist any authorized person in the enforcement of ORC Chapter 941 when requested to do so by the Director.¹⁸ Thus, the Director may call upon local authorities to maintain the quarantine and prevent the spread of the disease.

Additionally, if an owner refuses to follow the quarantine order, ODA may seek an injunction against the violator. ORC Section 941.10 supplements the quarantine authority of the Director by granting the Governor the ability to prohibit importation, into Ohio, of any diseased animal. ORC Section 941.10 provides that "no person shall import, move, sell, or dispose of any animal contrary to a proclamation" issued by the Governor without first obtaining written permission from the Director.¹⁹ Violation of this pro-

¹⁴ See OHIO REV. CODE ANN. § 119.12 (2007).

¹⁵ See OHIO REV. CODE ANN. § 941.07(H).

¹⁶ See *id.* § 941.07(C).

¹⁷ See *id.* § 941.99(A).

¹⁸ See *id.* § 941.05(C).

¹⁹ See *id.* § 941.10(C). The Proclamation issued by the Governor is a formal, written document, and is distributed to various media.

vision is a fourth degree misdemeanor; and each subsequent violation is a third degree misdemeanor.²⁰

When an animal is moved into the state in violation of any applicable federal or state law, or Governor's Proclamation, the Director may, *without prior hearing*, do one of the following:

- a. Quarantine the animal until it is brought into compliance;
- b. Order the animal returned to the point of origin;
- c. Order the animal moved to immediate slaughter.²¹

Such importation restrictions have been established as not violative of interstate commerce. A state may under its general police power restrict interstate commerce for a legitimate local purpose.²² The Commerce Clause²³ delineates powers bestowed on Congress to regulate interstate commerce. Federal authority, however, is not absolute.²⁴ Through the general police powers, a state may regulate matters of legitimate local concern, even though interstate commerce may be affected.²⁵ Courts examine whether the State restriction or Interstate Commerce affirmatively discriminates against interstate commerce to ascertain if the state has exceeded its police power authority.²⁶ If the restriction affirmatively discriminates, the court will examine whether or not the limitation is in excess of the punitive local benefits. The state must then show that the statute serves a legitimate state purpose and there isn't a nondiscriminatory means to resolve the issue.²⁷

Through a Governor's Proclamation, Ohio has the authority under ORC 941.10 (B) to prohibit the importation of animals from a state if the Director has information that a disease in another state may endanger the health of Ohio's animals. Such restrictions on interstate commerce are created with the legitimate state interest to maintain Ohio animal populations free of disease, protecting both the animal and human populations. Only by prohibiting animals carrying a contagious disease from states where it is prevalent, can Ohio protect against such disease.

The U.S. Supreme Court's decision in *Maine vs. Taylor* offers further support for a state's police powers. In *Taylor*, the Court considered the constitutionality of a Maine statute prohibiting the importation, export,

²⁰ See *id.* § 941.99(A).

²¹ See *id.* § 941.10(D).

²² See *Chemical Waste Management, Inc. vs. Hunt*, 504 U.S. 304 (1992).

²³ U.S. Const. art. I, § 8, cl. 3.

²⁴ See *Maine vs. Taylor*, 477 U.S. 131, 137 (1986); see also *Chemical Waste Management*.

²⁵ See *Maine*, 477 U.S. at 137.

²⁶ See *id.* at 138.

²⁷ See *id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

transport, sale, receipt, acquisition, or purchase of any baitfish from out-of-state. Maine's statute restricted all inward shipments of live baitfish at the State's border.²⁸ The U.S. Supreme Court deemed that Maine's statute was discriminatory on its face and thus subject to strict scrutiny.²⁹ Maine therefore, had to establish that the restriction on the importation of baitfish into its State served a legitimate state local purpose, and one that could not be met by nondiscriminatory means.³⁰

Upon review of the evidence, the U.S. Supreme Court found that Maine had a legitimate and substantial purpose in prohibiting the importation of baitfish.³¹ The Court held that discrimination in interstate commerce may be justified where out-of-state goods or services are likely to threaten the health and safety of a State's citizens or the integrity of its natural resources, and where outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protection.³²

Similarly, ORC Section 941.10(B) and the proclamations permitted thereunder serve a legitimate state local concern, to protect the health of Ohio's animals and human population from disease. As such, ORC Section 941.10(B) does not violate the Interstate Commerce clause of the U.S. Constitution.

IV. DESTRUCTION OF THE ANIMAL

Because a diseased animal can be a threat to both the animal and human population of the State, the Director may, *without a prior hearing*, order the destruction of any domestic or nondomestic animal infected with or exposed to a dangerously contagious or infectious disease, or determined to endanger the health or well-being of animal populations or public health in the state. For nondomestic animals, the Director coordinates the seizure and destruction of the animals with Ohio Department of Natural Resources (ODNR).³³

Failure to comply with the Director's order to destroy such an animal is a fourth degree misdemeanor. Each subsequent violation is a third degree misdemeanor.³⁴ The Director, if possible, must notify the owner of the issuance of a destruction order by personal service or by certified mail.³⁵ If a destruction order is issued, it must contain the following:

²⁸ See *id.* at 132.

²⁹ See *id.* at 138.

³⁰ See *id.* at 139.

³¹ See *id.* at 148.

³² See *id.* at 150 (citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43 (1980)).

³³ See OHIO REV. CODE ANN. § 941.11(A).

³⁴ See *id.* § 941.11(B).

³⁵ See *id.* § 941.11(C).

1. The name and address of the person owning and having custody of the animal, if known;
2. A description of the animal affected by the order;
3. The reason for the order;
4. A reasonable deadline for compliance with the order;
5. A notice to the effect that any person adversely affected by the destruction order may request a hearing to review the order.

The adversely affected person may request a hearing, within thirty days after receiving the order. The hearing must be in accordance with ORC Chapter 119, as detailed above.

V. APPRAISAL OF ANIMAL DESTROYED

When an animal is ordered destroyed pursuant to ORC Section 941.11, except for pigs infected with or exposed to pseudorabies, the animal must be appraised. The appraisal right also does not apply to any animal that is adulterated with residues and ordered destroyed by the Director.³⁶

ORC Section 941.12 states that the Director shall appraise any animal destroyed by his order based upon the current market value. The Director may indemnify the owner, but only after verifying with the Director of the Office of Business and Management (OBM) that there is sufficient money available to pay the indemnification.

The amount of indemnity shall be the appraised value of the animal, less any salvage value and indemnity received from another agency. In no case may the state indemnity payment to exceed \$50/head for a grade animal or \$100/head for a registered purebred animal.³⁷

For the purpose of indemnification, the value of any animal ordered destroyed shall be determined by an appraisal made by a representative chosen by the owner and a representative chosen by ODA. In the event of a disagreement as to the amount of the appraisal, a third disinterested person shall be selected, at the owner's expense, by the owner and Director, to act with them in the appraisal of the animal.

The Director may refuse to pay an indemnity for any animal ordered destroyed, if; the owner has been convicted of or pleads guilty to a violation of any of the provisions of ORC Chapter 941 or the related rules.³⁸

It should be noted, that although there is an indemnification process, it is subject to several limitations. While appraisal is required, indemnification occurs *only* at the discretion of the Director, and only if OBM certi-

³⁶ See *id.* § 941.12(A).

³⁷ See *id.* § 941.12(B).

³⁸ See *id.* § 941.12(D).

fies funds are available. Further, the dollar limits per animal cannot exceed the statutory amounts.

Indemnity is discretionary and limited because the animals are not being "taken," as in eminent domain, in order to further some public interest (highways, bridges, etc.). Rather, they are being eradicated to protect the public and animal population from a dangerous disease. In this regard, it is important that an abatement of a nuisance under the state's policy power should not be confused with the taking of property for a public use under the state's eminent domain power.

The United States Supreme Court ruled more than a century ago that the abatement of nuisance is a police power function of the state, and that unlike an eminent domain appropriation, the removal of a nuisance does not require compensation to the owner.³⁹ The Supreme Court of Kansas explained the difference between the two powers in *Balch v. Glenn*⁴⁰:

The courts have universally recognized the distinction between the two powers. Under the exercise of the one [eminent domain], private property cannot be taken either for public or private use without compensation; in the exercise of the other [police power], the use may be limited or controlled, or the property itself destroyed, without any compensation therefore being made to the owner. It is no objection to the validity of laws passed in the proper and lawful exercise of the police power that provision is not made for compensation to the individual whose property may be affected thereby. Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of pestilence is not taken for public use.⁴¹

This doctrine has been consistently followed in the years since by the U.S. Supreme Court, the Ohio Supreme Court, and other courts.⁴²

VI. DISPOSAL OF DEAD ANIMALS

The final issue to be addressed is the disposal of animals eradicated pursuant to ORC Chapter 941. Disposal is required to be made by either the owner,⁴³ or ODA, or the board of township trustees of the township in which the land is located.⁴⁴ If disposal is conducted by ODA or the township trustees, the cost must be added by the Treasurer to the tax as-

³⁹ *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁴⁰ 119 P. 67 (Kan. 1911).

⁴¹ *Id.* at 69-70.

⁴² *See, e.g., Miller v. Schoene*, 276 U.S. 272 (1928); *Solly v. City of Toledo*, 218 N.E.2d 463 (Ohio 1966); *State ex rel. Miller v. Anthony*, 647 N.E.2d 1368 (1995); *Van Gunten v. Worthley*, 159 N.E. 326 (Ohio Ct. App. 1927).

⁴³ *See* OHIO REV. CODE ANN. § 941.14(A)-(B).

⁴⁴ *See id.* § 941.15.

assessment of the land. It thus becomes an obligation of the animal owner, similar to a property tax.

In certain instances ODA may prefer to handle the disposal if there is a risk of spreading disease if the disposal is not properly completed. ODA will consult with Ohio EPA to determine the best method of disposal; however, burial is the preferred method.

The owner must dispose of the animal when given notice by ODA or the township trustees. Such notice must be sent by the Director, in writing, and may require the owner to employ a specific method of disposal.⁴⁵ The Director may also prohibit the owner from transporting the body of the dead animal utilizing any street or highway.⁴⁶ Violations of these sections constitute a fourth degree misdemeanor; each subsequent violation is a third degree misdemeanor.

VII. CONCLUSION

In conclusion, Ohio's Revised Code Chapter 941 comprehensively and systematically addresses each step in the process of discovering, designating, and containing one infectious or dangerously contagious disease. It is critical that Ohio, or any other state, maintain such a statutory framework to provide for a clear and concise plan for assuring that when an infectious or dangerously contagious disease is discovered, that the state possesses the tools to restrict it and quickly bring it to the point of eradication. Anything less would subject the animal and human population to horrific economic and/or health consequences.

⁴⁵ See *id.* § 941.14(C).

⁴⁶ See *id.* § 941.14(D).

