



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNSEL

MEMORANDUM

To: House Committees on Natural Resources, Fish, and Wildlife, and on Government Operations

From: Luke Martland, Director and Chief Counsel

Date: January 19, 2021

Subject: Executive Orders reorganizing the Executive Branch and the procedure set forth in 3 V.S.A. chapter 41

I. Introduction

On January 14, 2021, the Governor's Office submitted two Executive Orders (E.O.s). The first (No. 01-21) will create the Agency of Public Safety and centralize functions currently handled by other agencies and departments within the new Agency. The second (No. 02-21) will reorganize the Natural Resources Board. The Chairs of your Committees requested a summary of the statutory process for the Senate and House to follow concerning these E.O.s. Section II of this memorandum will explain the procedure set forth in 3 V.S.A. chapter 41 and provide some historical information, and section III will briefly summarize some issues raised by these E.O.s.

II. 3 V.S.A. Chapter 41 and Executive Orders

Pursuant to 3 V.S.A. chapter 41, the Governor may propose "changes in the organization of the Executive Branch or in the assignment of functions among its units as he or she considers necessary for efficient administration." 3 V.S.A. § 2001. The procedure for the Governor to do so is set forth in 3 V.S.A. § 2002, which states that an E.O. "propos[ing]" the reorganization must be submitted to both the House and Senate on or before January 15th. The proposed reorganization will then "become effective unless disapproved by resolution of either House of the General Assembly within 90 days, or before final adjournment of that annual session, whichever comes first." 3 V.S.A. § 2002(b). The remaining sections of chapter 41, 3 V.S.A. §§ 2003 – 2007, concern matters such as the transfer of personnel and appropriations, the terms of any gubernatorial appointees, and the prospective effect of any reorganization.

Therefore, the process set forth in 3 V.S.A. chapter 41 is relatively straightforward:

- The Governor must issue the E.O. on or before January 15th.
- The E.O. may propose changes to the organization and functions of Executive Branch agencies and departments.

- If either the House or Senate pass a resolution within 90 days (or before adjournment, whichever comes first) disapproving the E.O., the E.O. does not go into effect.
- If neither the House nor Senate does so, the E.O. will go into effect and the reorganization can proceed.

Over the approximately 50 years since 3 V.S.A. chapter 41 became law, the process set forth in that chapter has been used multiple times by different administrations, including the current one. In 2017, Governor Scott issued E.O. No. 05-17, which proposed establishing an Agency of Economic Opportunity; E.O. No. 06-17, which sought to create the Agency of Digital Services; and E.O. No. 07-17, which attempted to merge the Department of Liquor Control and the State Lottery Commission. E.O. No. 05-17 was disapproved by Senate Resolution 6 and therefore did not go into effect, E.O. No. 06-17 was not disapproved by either body and therefore went into effect, and E.O. No. 07-17 was disapproved by House Resolution 14.¹

III. E.O.s No. 01-21 (Public Safety) and No. 02-21 (Natural Resources Board)

On January 14, 2021, the Governor’s Office submitted two E.O.s. The first (E.O. No. 01-21) would create the Agency of Public Safety and centralize various functions currently handled by other agencies and departments within the new Agency, and the second (E.O. No. 02-21) would reorganize the Natural Resources Board. The committees of jurisdiction, and members of the House, may want to note four things in determining how to proceed.

First, both E.O.s incorrectly state that the E.O. shall take effect “unless disproved by both houses of the General Assembly” (emphasis added). As noted above, 3 V.S.A. § 2002 clearly states that an E.O. shall not take effect if “disapproved by either House of the General Assembly,” not both (emphasis added). See, In re Grievance of Hood, 156 Vt. 412, 414 (footnote 2) (1991) (“The executive order was submitted to the general assembly in accordance with 3 V.S.A. § 2002. Neither house passed a disapproving resolution.”). It is unclear if the Governor’s Office’s misrepresentation of the law is mistaken or intentional. If the misrepresentation is intentional and the Governor’s Office is attempting to reinterpret the guiding statute to impose a higher bar — that both the House and Senate must pass a disapproval resolution — there is absolutely no basis for this attempt to rewrite the statute.²

¹ However, the Department of Liquor Control and the State Lottery were subsequently merged into a new Department of Liquor Control and Lottery by act of the General Assembly.

² It appears that the Governor’s Office may also be implying that 3 V.S.A. § 2002 raises constitutional questions. Although addressing these questions is beyond the scope of this memorandum, Legislative Counsel is glad to do so if helpful. However, focusing on potential constitutional questions is, at this stage, premature. Since the statute went into effect in 1970, it has not been challenged, much less held to be invalid. Instead, it has been repeatedly used, including by the current Governor. It seems disingenuous for the Governor’s Office to benefit from 3 V.S.A. chapter 41 (by seeking to use the law’s procedure to carry out two major reorganizations), while also misrepresenting one aspect of the statute in an apparent effort to “raise the bar” on the General Assembly, and simultaneously implying that the very statute that it is seeking

Second, one or both of these E.O.s make changes that may be viewed as going beyond the mere reorganization of an agency or department. For example, E.O. No. 02-21 seems to make substantive changes in how an Act 250 permit is issued. Legislative Counsel can provide more information concerning the details and impact of each E.O.

Third, aspects of both proposed reorganizations may conflict with existing statutes. Although 3 V.S.A. § 2002(a) states that an E.O. may include “changes in the organization of the Executive Branch of government which are not consistent with or will supersede existing organization provided for by law,” it is preferable to amend existing statute(s) as necessary to conform to any such changes. There is great potential for confusion if the current statutes do not reflect the actual status of the law on a particular topic.

Fourth, the 90-day period expires on April 14th, and the House will therefore need to take action before that date if it wishes to disapprove either E.O.

IV. Conclusion

This memorandum is only intended to provide a brief summary of the procedure set forth in 3 V.S.A. chapter 41 and to highlight some of the issues raised by E.O.s No. 01-21 and No. 02-21. The attorneys in the Office of Legislative Counsel would be glad to answer any questions you may have and to provide more detail on these issues if helpful.

to benefit from may be constitutionally suspect. In the absence of any legal challenge to the statute, it remains in effect and its clear terms, including that either the House or Senate may disapprove the E.O.s via a one-house resolution, must be followed.