

Members

Sen. Michael Young, Chairperson
Sen. Joseph Zakas
Sen. Richard Young
Sen. Lindel Hume
Rep. Scott Pelath
Rep. Dennie Oxley
Rep. Phil Hinkle
Rep. Michael Murphy



ADMINISTRATIVE RULES OVERSIGHT COMMITTEE

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MEETING MINUTES¹

Meeting Date: October 17, 2008
Meeting Time: 10:00 A.M.
Meeting Place: State House, 200 W. Washington St., Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 3

Members Present: Sen. Michael Young, Chairperson; Sen. Joseph Zakas; Sen. Richard Young; Sen. Lindel Hume; Rep. Scott Pelath; Rep. Phil Hinkle; Rep. Michael Murphy; .

Members Absent: Rep. Dennie Oxley.

Senator R. Michael Young, Chairman of the Committee, called the meeting to order at 10:30 a.m. Chairman Young² announced that the Committee would consider the following: (1) A proposed bill draft to void an administrative rule³ adopted by the Natural Resources

¹ Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

²In these minutes, Senator R. Michael Young will be referred to as "Chairman Young," and Senator Richard Young will be referred to as "Senator Young."

³The administrative rule at issue, LSA #07-749(F), was approved by the Governor and filed with the publisher of the Indiana Register and Indiana Administrative Code on July 31, 2008. DIN: 20080827-IR-312070749FRA (accessible at:

Commission (Commission) on the taking of coyotes. (2) A final report containing the Committee's recommendations on the issues considered by the Committee during the 2008 legislative interim. Chairman Young explained that because the Committee had taken public testimony on the issues under consideration at its previous meetings, the current meeting would be limited to the Committee's discussion of and recommendation on these topics.

Discussion of bill draft:

Chairman Young then asked staff to discuss PD 3385,⁴ a bill draft prepared at the Committee's request and in Chairman Young's name to address the Commission's rule

<http://www.in.gov/legislative/iac/20080827-IR-312070749FRA.xml.html>). In adopting LSA #07-749(F), the Commission amended an existing administrative rule, 312 IAC 9-3-12(d), concerning the "taking" of coyotes. Before its amendment, 312 IAC 9-3-12(d) had simply been a restatement of a law first enacted by the legislature in 1987 to provide that a person who possesses land, or another person designated in writing by that person, may take coyotes on the land at any time (IC 14-22-6-12). However, following its amendment, 312 IAC 9-3-12(d) provides as follows:

(d) A person who possesses land, or another person designated in writing by that person, may take coyotes on that land at any time. **A coyote taken under this subsection from March 16 through October 14:**

(1) must be euthanized within twenty-four (24) hours of capture; and

(2) shall not be:

(A) possessed for more than twenty-four (24) hours;

(B) sold;

(C) traded;

(D) bartered; or

(E) gifted.

(Roman text indicates text in 312 IAC 9-3-12(d) before its amendment. Bold text indicates language added to 312 IAC 9-3-12(d) after its amendment by LSA #07-749(F).)

On September 9, 2008, the Committee received a complaint alleging that the Commission had: (1) exceeded its statutory rulemaking authority in making the above-noted changes; and (2) thwarted the General Assembly's intent to create an "open season" on coyotes taken by landowners on their own land. Further information on the Commission's rule and the related complaint is contained in the minutes for the Committee's October 13, 2008, meeting (accessible at: <http://www.in.gov/legislative/>).

⁴See Exhibit 1. At the Committee's meeting on October 13, 2008, Committee members discussed various legislative approaches that could be taken to address both public concerns that Commission's rule had, in effect, nullified the General Assembly's intent to create an "open season" on coyotes taken by landowners on their own land, as well as the Commission's concerns about the potential for the spread of disease when live coyotes are transported across state lines. The various legislative options discussed by the Committee are summarized in the minutes for the Committee's October 13, 2008, meeting (accessible at: <http://www.in.gov/legislative/>).

concerning the taking of coyotes. Staff explained that the proposed bill would: (1) void that part of the Commission's rule that places certain restrictions on the possession and disposition of a coyote taken on land by the person who possesses the land (or by a person designated in writing by that person), if the coyote is taken from March 16 through October 14; and (2) prohibit the sale or transportation of a live coyote that is captured or trapped at a location inside Indiana to a location outside Indiana. The bill would take effect upon passage,⁵ except for the provision that would void the Commission's rule, which would take effect retroactively on March 15, 2009.⁶

Following staff's summary of PD 3385, Chairman Young asked Committee members to introduce themselves and indicate the districts they serve. After these introductions, Senator Young asked if anyone from the Department of Natural Resources (DNR) was present to address questions raised by Committee members about who serves on the Commission and about the respective roles of the DNR and the Commission in the rulemaking process. Sandra Jensen stood and introduced herself as the hearing officer who had presided over the Commission's adoption of the rule at issue. Ms. Jensen explained that the Commission consists of 12 members,⁷ including the Director of the DNR and one representative each from the Indiana Department of Environmental Management, the Indiana Department of Transportation, and the Office of Tourism Development. She noted that no legislators serve on the Commission. As for the role of the DNR in the rulemaking process, Ms. Jensen noted that under state law, the rulemaking authority of the DNR must be exercised by the Commission.⁸

After this explanation by Ms. Jensen, Representative Hinkle moved to recommend the proposed bill for approval by the Committee. Senator Young interjected to state that he did not believe that the legislature should take any action with respect to the Commission's rule at this point. He reminded Committee members that at the Committee's meeting on October 13, 2008, he had suggested that a study committee should examine the issue during the 2009 interim, when there would be more time to consider the policy issues involved and to receive testimony from the DNR and the public.

Representative Murphy said that he recalled disagreeing with Senator Young's position at the Committee's previous meeting because of the fact that the DNR could begin enforcing the new rule on March 16, 2009. According to Representative Murphy, any action

⁵A bill that takes effect "upon passage" takes effect when signed by the Governor, or on the eighth day after presentment to the Governor if the Governor refuses to sign or veto the bill. IND. CONST. art. 5, § 14.

⁶March 15, 2009, was selected as the effective date for the voiding of the Commission's rule because the rule places restrictions on the possession and disposition of coyotes taken from March 16 through October 14.

⁷The Commission also includes the following members: (1) The chairperson of an advisory council that serves the Bureau of Water and Resource Regulation and the Bureau of Lands and Cultural Resources. (2) A representative from the Indiana Academy of Science. (3) Six citizen members appointed by the Governor, at least two of whom must have knowledge, experience, or education in the environment or in natural resource conservation. (Not more than three of the citizen members may be of the same political party.) See IC 14-10-1-1.

⁸Under IC 14-10-2-4(c), "whenever the department or the director has the authority to adopt rules under IC 4-22-2, the commission shall exclusively exercise the authority."

recommended by a study committee after the 2009 session would come too late to address those cases involving the taking of coyotes after the effective date of the DNR's new restrictions and before the effective date of any legislation that might result from the study committee's work.

Representative Pelath then asked whether a representative from the DNR could answer whether coyotes were an endangered species and whether, in fact, they were sometimes considered a "nuisance" animal.

Colonel Michael Crider stood and introduced himself as the Director of Law Enforcement for the DNR. Colonel Crider indicated that coyotes are not an endangered species and are often considered to be nuisance wild animals because of their potential to spread disease and kill or injure domestic animals. Colonel Crider noted that trapping is an effective method for capturing coyotes and preventing them from causing damage on private property. He further pointed out that nuisance coyotes may be taken under a free nuisance wild animal control permit issued by the DNR. A list of hundreds of individuals who are licensed to take nuisance wild animals for landowners and businesses is maintained by the DNR and accessible on the DNR's website and through a toll free hotline.

Colonel Crider explained that in adopting the rule at issue, the Commission had intended for the prohibition against the possession, selling, trading, bartering, or gifting of coyotes taken from March 16 through October 14 to apply only to *live* coyotes. In fact, the Commission had been surprised to discover that the final version of the rule, as posted in the Indiana Administrative Code, did not contain language limiting the restriction to live coyotes. According to Colonel Crider, the version of the rule approved by the Commission after the public hearings on the rule *did* contain language limiting the restrictions to live coyotes. He stated that to his knowledge, the rule finally approved by the Commission had not posed restrictions on the possession or disposition of coyote parts or pelts.

Representative Pelath asked whether there was an interstate market for live coyotes. Colonel Crider responded that there was indeed a market for live coyotes, explaining that live coyotes are often sold across state lines for use in running enclosures that are part of dog training facilities. According to Colonel Crider, these enclosures can range from 40 acres to several thousand acres, with some of the larger ones containing 600 to 800 dogs. He noted that Virginia spends over \$1 million each year to control its coyote population, and officials there have complained that a large number of coyotes entering the state have come from Indiana. Colonel Crider further pointed out that the thriving interstate trade in coyotes has evolved since the time the General Assembly enacted IC 14-22-6-12 to create the apparent "open season" on coyotes taken by landowners on their own land.

According to Colonel Crider, from the DNR's perspective, the ideal situation would be to prevent the movement of all wildlife across state lines. He cited the spread of emerald ash borer disease through the interstate movement of firewood and the spread of VHS disease among fish through the interstate sale of minnows as examples of problems that occur as a result of such movement.

Representative Hinkle commented that he did not recall Colonel Crider having discussed at the Committee's last meeting the sale of coyotes for dog training purposes. He noted that at the previous meeting, the DNR's representatives had cited the prevention of the spread of disease as the reason for having adopted the rule at issue. Representative Hinkle questioned why the Committee was now learning for the first time of the DNR's apparent desire to stop the interstate movement of all wildlife. He further questioned how such a policy would even be possible, given that coyotes and other wildlife living near the

state's borders could easily wander into a neighboring state.

Senator Hume agreed that the natural migration of wildlife will always occur. He also noted that people regularly take their dogs from one state to another. He asked Colonel Crider if there were certain diseases that had been spread through the human transportation of coyotes that would not have occurred through natural migration. Colonel Crider responded that rabies had been spread from coyotes transported from Texas to Alabama for use in dog training operations. He also pointed out that the transportation of domestic dogs across state lines does not present the same set of concerns as does the transportation of wild animals, in that most dog owners vaccinate their pets against rabies and other diseases.

Senator Hume asked whether the dog training enterprises described by Colonel Crider were involved in dog fighting. Colonel Crider indicated that the enclosures he described are used for confined chases or competition hunts, and not for dog fighting.

While expressing his disapproval of confined hunts, Senator Young argued that coyotes are nuisance animals that cause damage to livestock. He reminded Colonel Crider that DNR representatives had testified at the Committee's previous meeting that a rulemaking had been pursued because the DNR did not believe it could achieve its desired policy goals with respect to coyotes through the legislative process. He informed Colonel Crider that the Commission had exceeded its statutory authority in adopting the disputed rule. He advised that, going forward, the DNR should have to explain its objectives before a summer study committee and then pursue any policy changes it seeks through the legislative process.

Colonel Crider responded that the Commission had proceeded with the rulemaking process because the DNR believed that, given its concerns about the spread of disease and its discussions with natural resources agencies in other states, it could not wait to act in attempting to prevent the transportation of live coyotes across state lines. According to Colonel Crider, attorneys within the agency had advised that adopting the rule was within the DNR's authority and was consistent with the agency's mandate to properly manage Indiana's wildlife. He maintained that the DNR had not tried to circumvent the legislative process.

Representative Murphy returned the Committee's attention to the motion offered earlier by Representative Hinkle to recommend the proposed bill for approval by the Committee. Representative Murphy seconded the motion. Senator Hume agreed that the bill before the Committee would provide a vehicle to address the issues raised in connection with the Commission's adoption of the rule concerning the taking of coyotes.

Stating that he did not believe the Commission had exceeded its statutory rulemaking authority in adopting the rule, Senator Zakas suggested that it would be more appropriate for an individual legislator to go forward with the proposed bill or some other legislative solution, but that the Committee itself should not recommend any legislation. Senator Zakas suggested that the dispute at hand involved the policy underlying the rule, not the process used to arrive at the policy.

Representative Pelath stated that he, too, was reluctant to remove the issue from the DNR's purview by introducing legislation in a subject matter in which the DNR has expertise.

After further discussion among Committee members, Chairman Young asked staff to take a roll call vote on whether the Committee would recommend the introduction of PD 3385

during the 2009 session of the General Assembly, as moved by Representative Hinkle. In response to questions among Committee members about the number of votes needed for the Committee to recommend the bill, staff explained that under the statute establishing the Committee, the affirmative vote of five members of the Committee is required for the Committee to take any action.⁹ Staff then proceeded to take a roll call vote. After the vote, Chairman Young announced that the Committee had voted 4-3 in favor of recommending the introduction of PD 3385 during the 2009 session. However, the motion failed because the required five affirmative votes were not obtained.

Committee members then discussed whether there was any administrative action that the DNR or the Commission could take to achieve the DNR's stated purpose of preventing the transportation of live coyotes across state lines, while not restricting the possession or disposition of the parts or pelts of coyotes taken by property owners on their own property. Chairman Young acknowledged Sandra Jensen, the hearing officer during the Commission's rulemaking. Ms. Jensen stated that because the Commission had only recently become aware of the discrepancy between the rule as it was published in her report,¹⁰ and the final version of the rule, as posted in the Indiana Administrative Code, the Commission had just begun to explore its options for making technical corrections to the rule under the Administrative Rules and Procedures Act (IC 4-22-2). She expressed concern that given the delay between the posting of the final rule and the discovery of the discrepancy, the Commission may have missed any statutorily imposed deadline to correct the error.

Chairman Young asked staff whether the applicable statutes prescribe any deadline for correcting technical errors in administrative rules. Staff cited IC 4-22-2-38, which allows an agency to use an abbreviated process to adopt a rule to replace certain inaccurate references in another rule or to correct a "typographical, clerical, or spelling error in another rule." An agency that adopts a rule under IC 4-22-2-38 is not required to following certain procedures that would otherwise apply to a rulemaking action under IC 4-22-2, such as publishing the proposed rule, holding a public hearing, preparing certain economic impact estimates, and submitting the rule to the Attorney General and the Governor for approval.¹¹ Instead, the agency would submit the correcting rule to the publisher of the

⁹See IC 2-5-18-9(b). While the Administrative Rules Oversight Committee is a statutorily created committee, the requirement in IC 2-5-18-9(b) that the affirmative vote of five of the Committee's eight members is needed for the Committee to take any action comports with the Legislative Council's resolution governing study committees:

Unless there are specific contrary provisions in a statute, a study committee may not recommend a final bill draft, or a final report, unless the draft or report has been approved by a majority of the voting members appointed to serve on that committee.

LEGISLATIVE COUNCIL RESOLUTION 08-02, §11(a) (May 22, 2008).

¹⁰See Exhibit 2 (SANDRA L. JENSEN, NATURAL RESOURCES COMMISSION, REPORT OF PUBLIC HEARINGS AND COMMENTS, AND RECOMMENDATION REGARDING FINAL ADOPTION, APPENDIX A, (July 1, 2008).)

¹¹IC 4-22-2-38(b) provides that "[s]ections 24 through 37.1 of this chapter [IC 4-22-2] do not apply" to a rule adopted by an agency under IC 4-22-2-38 to replace an inaccurate reference

Indiana Register and Indiana Administrative Code for the assignment of a document control number.¹² Following the assignment of a document control number, the agency would submit the rule to the publisher for filing.¹³ Subject to the agency's submission of all documentation required by the publisher, the publisher would then accept the rule for filing and electronically record the date and time of acceptance.¹⁴ The correcting rule would take effect on the date that the rule being corrected becomes effective, or 45 days after the date and time that the correcting rule is accepted for filing by the publisher, whichever is later.¹⁵

Staff noted that IC 4-22-2-38 does not prescribe a time by which an agency must submit a rule to the publisher to correct another rule. However, staff did suggest that the Commission should consider verifying with the publisher that a rule to add the word "live" to the rule as finally posted in the Indiana Administrative Code would indeed be considered a technical correction under IC 4-22-2-38. Staff suggested that such a determination would likely depend on records of the rule text actually submitted by the Commission to the publisher before the rule was posted by the publisher.

After additional discussion by Committee members, it was agreed that the Commission should seek to correct the rule administratively under IC 4-22-2-38.

Discussion of final report and Committee's recommendations:

Chairman Young then asked staff to review the recommendations set forth in the draft of the Committee's final report.¹⁶ Staff read from the section entitled "Committee Findings and Recommendations" on page 7 of the draft report. The Committee agreed to strike language recommending the introduction of PD 3385 during the 2009 session of the General Assembly. Chairman Young asked staff to compose a sentence recommending that the Commission seek to correct the rule concerning coyotes by adopting a rule under IC 4-22-2-38 to specify that the restrictions on the transportation or sale of coyotes apply only to *live* coyotes. Staff composed and read the following statement to the Committee:

The Committee therefore recommends that the Commission seek to adopt a rule under IC 4-22-2-38 to amend 312 IAC 9-3-12(d) to read as follows:

(d) A person who possesses land, or another person designated in writing by that person, may take coyotes on that land at any time. A coyote taken under this subsection from March 16 through October 14 must be euthanized within twenty-four (24) hours of capture. A live coyote taken under this subsection from March 16 through

or correct certain errors in another rule. IC 4-22-2-38(c) additionally provides that "[n]otwithstanding any other statute, an agency may adopt a rule [under IC 4-22-2-38] without complying with any statutory notice, hearing, adoption, or approval requirement."

¹²See IC 4-22-2-38(d).

¹³See IC 4-22-2-38(e).

¹⁴See IC 4-22-2-38(f).

¹⁵See IC 4-22-2-38(g).

¹⁶See Exhibit 3.

October 14 shall not be:

- (1) possessed for more than twenty-four (24) hours;
- (2) sold;
- (3) traded;
- (4) bartered; or
- (5) gifted.¹⁷

Committee members agreed to replace the sentence recommending the introduction of PD 3385 during the 2009 session with the sentence composed by staff.

Chairman Young then moved to adopt the Committee's final report, as amended. Representative Hinkle seconded the motion. Chairman Young asked staff to take a roll call vote on the motion. After the vote, Chairman Young announced that the Committee had voted 6-1 in favor of adopting the Committee's final report, as amended. Having received the requisite five affirmative votes, the motion passed.

There being no further business before the Committee, Chairman Young adjourned the meeting at 12:10 p.m.

¹⁷The proposed amended language is identical to the proposed rule included in Appendix A of Sandra Jensen's July 1, 2008, report. (See Exhibit 2.)