

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

**ADMINISTRATIVE RULES GOVERNING) Administrative Cause
FISH AND WILDLIFE, 312 IAC 9) Number: 16-161D
)
) LSA Document #17-436(F)
)**

**REPORT ON RULE PROCESSING, PUBLIC HEARING, AND HEARING
OFFICER ANALYSES WITH RECOMMENDATIONS REGARDING FINAL ACTION**

1. RULE PROCESSING

For consideration as to final action, is a rulemaking package proposing the addition of five new administrative rules and the amendment of several existing administrative rules within 312 IAC 9 governing the management of wildlife.

Rules proposed for amendment include 312 IAC 9-2-2 to allow the use of a motorboat to hunt squirrels, 312 IAC 9-2-11 governing the taking or chasing of wild animals, except fish, on state parks and historic sites, and 312 IAC 9-3-12 governing the taking of fox, coyotes, and skunks. Additional rules amendment proposals involve 312 IAC 9-3-13 and 312 IAC 9-3-14, relating to the seasons for taking mink, muskrat and long-tailed weasel, as well as raccoon and opossum, respectively. Other rules that would be amended in this rulemaking are 312 IAC 9-3-14.5 relating to the possession of furbearing mammals, 312 IAC 9-10-12 governing fur buyers' licenses, and 312 IAC 9-11-2, which is associated with wild animal possession permits. Administrative rules addressing the trapping of river otters, 312 IAC 9-3-18.2, and 312 IAC 9-3-18.5, governing exotic mammals, along with 312 IAC 9-10-11 addressing nuisance wild animal control permits are also proposed for amendment. General requirements associated with migratory birds and waterfowl are proposed for amendment at 312 IAC 9-4-2, and 312 IAC 9-4-11 proposes amendments relating to the hunting of wild turkeys. More administrative rules proposed for amendment address endangered species including 312 IAC 9-3-19 that relates to endangered species of mammals, 312 IAC 9-4-14 governing endangered species of birds, and 312 IAC 9-9-4 controlling endangered species of invertebrates. Other proposed amendments

include 312 IAC 9-3-18.1 to allow the taking of bobcats, which, if approved, will necessitate the amendment of 312 IAC 9-3-18.4 to remove the prohibition on the possession of a bobcat carcass, hide, or other part, as well as the amendment of 312 IAC 9-2-3 to allow for the sale of bobcats and their parts.

The rulemaking package also proposes the addition of these administrative rules:

- a. 312 IAC 9-2-16 that will control the release of captive-bred mammals, reptiles, amphibians, and mussels;
- b. 312 IAC 9-3-18.7, governing the taking of bats;
- c. 312 IAC 9-3-18.8 addressing black bears;
- d. 312 IAC 9-10-25 establishing a nuisance deer control permit; and
- e. 312 IAC 9-10-26 creating an endangered species propagation permit.

On December 2, 2016, Joseph Hoage, then Chief Legal Counsel for the Department of Natural Resources' (Department), submitted to the Office of Management and Budget (OMB) a request for an exemption to the suspension of rulemaking actions under the provisions of Executive Order 13-03. In a letter dated June 2, 2017, Micah G. Vincent, Director of OMB, wrote in response "Based on [the Department's] submission, the request qualifies for an exception under paragraph 6(b) and 6(g) of Executive Order 13-03. Therefore, [the Department] may proceed with the rule proposed in its December 2, 2016 submission."

The Natural Resources Commission (Commission) gave preliminary adoption to the proposed amendments on September 19, 2017 after considering input from Linnea Petercheff, of the Department's Division of Fish and Wildlife, as is represented in the following excerpt of the official minutes of the Commission's meeting:

Consideration of preliminary adoption of biennial wildlife rule amendment package (312 IAC 9); Administrative Cause No. 16-161D

...the Division of Fish and Wildlife (Division) and law enforcement officers review the administrative rules related to hunting, fishing, trapping, and other fish and wildlife associated permits. She stated that the Division initiated a number of rule ideas and topics for public comment in 2016 to start the biennial rule change

process. She stated that over 1,600 comments were received both on-line and by regular mail during the months of April and May of 2016. As a result, a few ideas submitted by the Division were dropped. Petercheff stated that 312 IAC 9-2-16 prohibits the release of captive-bred native and exotic species of mammals, reptiles, amphibians, crustaceans, mussels, and other animals that did not come from the wild in Indiana except as authorized by permit. She stated that 312 IAC 9-3-14.5 allows the hides and carcasses of legally harvested furbearers taken during the season to be kept year-round by hunters and trappers without a special authorization or permit. She stated that the proposed rule amendment to 312 IAC 9-3-14.5 was primarily due to the price of hides and would allow for greater flexibility for hunters and trappers to sell the hides when the sale yields the best price. Petercheff stated that the deer control permit rule is currently governed by a temporary rule and the Division is requesting that it be made a permanent rule. She stated that 312 IAC 9-10-25 establishes a separate rule for the deer control permit that would specify the requirements for obtaining a permit, the time frame in which the deer could be taken, methods that could be used, and disposition of the deer, including the antlers. Petercheff stated that 312 IAC 9-10-11, which governs nuisance wild animal control permits, would require raccoons, opossums, and coyotes captured under a nuisance wild animal control permit to be euthanized. She stated that an exception to the permit would be landowners protecting their own land from nuisance animals. She stated that the proposal would allow the capture and release of an endangered species. She stated that from a scientific standpoint the habitats are overpopulated in suburban and rural areas around the state. Petercheff stated that each area of property has a carrying capacity in which a certain number of animals can exist and the Department is considering the welfare of the animals in relationship to people as part of the rule amendment process. 6 Petercheff stated that 312 IAC 9-3-18.1 authorizes a bobcat hunting and trapping season. There would be a bag limit of one bobcat per person and a statewide quota. She stated that the season would be open in a restricted number of counties in Southern Indiana. She stated that the counties and the quotas would be set in a temporary rule each year. Petercheff stated that 312 IAC 9-4-11 would add Elkhart, Kosciusko, and Noble Counties to the fall wild turkey firearms season. Amendment to 312 IAC 9-3-19 would add three species of bats to the state's list of endangered species. She stated that because some of the bats can be found in buildings there are provisions that would allow for the safe removal, due to health concerns. She stated that 312 IAC 9-4-14 adds the rufa red knot to the state's list of endangered species of birds and removes the osprey from the list. She stated that the osprey meets the criteria for delisting since 50 or more nesting territories have been documented for more than three years. Ospreys are still protected by state and federal law under the Migratory Bird Treaty Act. Davis noted that the turkey hunting season is similar to how the otter hunting season started as to opening limited counties and establishing quotas. Davis asked whether Elkhart, Kosciusko, and Noble Counties are the first or the last of the counties to open up for fall wild turkey firearms season. Petercheff answered that the fall wild turkey firearms season is not open to all counties in the state. There would potentially be more counties that could be added in the future. She stated that the three counties identified are areas where the population of wild

turkeys are sufficient to support a firearms season. Petercheff noted that Elkhart, Kosciusko, and Noble Counties are already open for fall archery season and all counties are open statewide for the spring wild turkey firearms season.

Members of the public were also recognized by the Commission in September 2017 to offer input about the Department's rulemaking package. Most of the comments were focused on the establishment of a season for taking bobcats.

Most of those who spoke in opposition to the opening of a season for taking bobcats noted that the Department does not represent a significant number of human-bobcat conflicts or characterize the bobcat as a significant threat to domestic animals or livestock. These individuals noted the recent removal of the bobcat from the endangered species list in 2005 and questioned whether the Department had conducted a scientific study of bobcat populations to ascertain that current populations will sustain even a limited taking season. A large number of comments reflect a preference for the Commission to consider the non-consumptive user, i.e. the photographer, animal watcher, and opposed the establishment of a taking season that provides for the commercialization of wildlife for profit. Public input received during the Commission meeting indicated that before offering its proposal, the Department had received public input that, at a ratio of four to one, opposed the establishment of even a limited season for taking bobcats.

However, others who offered insights observed that bobcats are more frequently being inadvertently caught in traps, are being sighted and are becoming engaged in conflicts with hunting dogs. These individuals supported a limited season on bobcats that would be modeled after the limited taking season for river otters that was established three years prior.

In further discussion occurring during the September Commission meeting, the Department acknowledged possessing no accurate population data for the bobcat noting that the Division of Fish and Wildlife does not conduct population counts for most wildlife species. The Department did confirm that all states surrounding Indiana, with the exception of Ohio, do have limited hunting seasons for bobcats.

The Notice of Intent to adopt the rule amendments and new rules was published in the Indiana REGISTER at 20170927-IR-312170436NIA on September 27, 2017. The notice identified Petercheff as the “small business regulatory coordinator” for purposes of IC 4-22-2-28.1.

The Commission caused the information required by IC 4-22-2-22.5 to be included in its online rulemaking docket on September 19, 2017. The rulemaking docket was updated periodically as the rulemaking progressed.

As specified by Executive Order 2-89 and Financial Management Circulars 2010-4 and 2015-1, proposed fiscal analyses of the rule proposal, and the rule standards analysis required by IC 4-22-2-19.5 were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to OMB and the Legislative Council on September 28, 2017. On January 17, 2018, the Commission received an approval letter from Jason D. Dudick, Director, State Budget Agency, which, in part, stated,

After reviewing the proposed rule, the recommendation of the State Budget Agency is that the rule changes be approved.

Furthermore, the statement and analysis (attached hereto) provided by the Indiana Natural Resources Commission is hereby adopted as the Office of Management and Budget’s own Fiscal Impact Statement for the purpose of satisfying the requirements under IC 4-22-2-28(d). Also, it is adopted as the Office of Management and Budget’s cost benefit analysis under IC 4-3-22-13(a).

On February 2, 2018, the Division of Hearings submitted the proposed rule to the Legislative Services Agency (LSA), along with the Statement Concerning Rules Affecting Small Business (also known as the Economic Impact Statement or EIS). The Notice of Public Hearing and the Justification Statement required by IC 4-22-2-24(d)(3) were submitted to LSA on February 5, 2018. On February 14, 2018, the text of the proposed rule (20180214-IR-312170436PRA); the notice of public hearing (20180214-IR-312170436PHA); and the EIS (20180214-IR-312170436EIA), were posted to the Indiana REGISTER. Following receipt from LSA on February 5, 2018 of an “Authorization to Proceed”, the Division of Hearings caused a Notice of Public Hearing to be published on February 14, 2018 in the *Indianapolis Star*, a newspaper of general circulation in Marion County, Indiana. In addition, the notice of the public hearing and a

summary of the proposed rule changes were published on the Commission's web-based electronic calendar and links to the documents were provided on the Commission's rulemaking docket.

As required by Ind. Code § 4-22-2.1-5, a copy of the rule proposal and Economic Impact Statement was forwarded to the Small Business Ombudsman for the Indiana Economic Development Corporation ("IEDC") on February 5, 2018 for review and comment. In a letter dated March 6, 2018, Katelyn Colclazier, IEDC's Small Business Ombudsman, stated:

Based upon this statement and review, the Small Business Ombudsman supports the proposed rule related to the economic impact to small business as not presenting an undue burden if the NRC conclusion reflects the actual result after promulgation.

The IEDC's comments were posted to the Commission's rulemaking docket on March 6, 2018 and were available for review at the public hearings as required by IC 4-22-2.1-6.

2. PUBLIC HEARING AND COMMENT

The public was provided from approximately September 19, 2017 until March 23, 2018 to submit written comments using the Commission's online comment form, by personal delivery, or by U.S. Mail addressed to the Commission's Division of Hearings.

Throughout the public comment period, the Commission's Division of Hearings was contacted with reports that the online comment system was not accessible or was not functioning properly. A comment received through the online comment system on October 26, 2017 indicates that the link provided in the Notice of Intent posted on September 27, 2017 was not accessible to the public on that date; however, records maintained by the Division indicate that the system was fully functional on September 19, 2017. In most instances of complaints regarding system malfunction, Division staff assisted callers in properly accessing the system to aid in the person's ability to make a comment. Division staff also tested the comment system on a number of occasions, using both state equipment and email accounts as well as privately owned equipment and email accounts. These tests never revealed an instance in which the online comment form failed to operate as intended.

At the public hearing conducted on March 14, 2018, Melissa Montgomery stated that the online comment system was not accessible or user-friendly if accessed using a wireless device, such as a cell phone. Following the public hearing, using a public Wi-Fi connection, the hearing officer and the Division's legal analyst accessed the system using cell phones. Division staff have been unable to replicate any of the complained-of difficulties relating to the submission of written comments using the Commission's online system.

Two public hearings were conducted, as scheduled, at which oral and written comments were received from the public. The first public hearing, held in Mitchell, Indiana on March 14, 2018, was attended by at least 93 members of the public. The second public hearing, attended by at least 110 members of the public, was conducted in Anderson, Indiana on March 22, 2018. Department staff also attended both public hearings.

The public comment period closed on March 23, 2017. The close of the public comment period was announced during the public hearings and was also posted on the Commission's rulemaking docket.

In 2007, the Commission first adopted its Nonrule Policy Document, Information Bulletin #55 (Third Amendment), "Citizen Comments to Hearing Officers (IB #55), "to encourage consistency, transparency, and efficiency in the development of hearing officer reports" with respect to the recordation and consideration of input received from the public. <http://www.in.gov/legislative/iac/20170524-IR-312170259NRA.xml.pdf> last visited April 19, 2018. IB #55 was most recently amended on May 24, 2017. In accordance with IB #55, certain comments that were submitted through means or in a manner inconsistent with IB #55 have not been considered by the hearing officer and are not included in the report¹. Qualifying public comments have been considered by the Hearing Officer in the preparation of this report and are attached and incorporated as follows for the Commission's further review and consideration:

¹ These comments have been retained as public records as required by law.

- a. Exhibit A: Written comments received through the Commission’s online comment form.
- b. Exhibit B: Written comments received by U.S. Mail
- c. Exhibit C: Summary of oral comments received at the March 14, 2018 public hearing;
- d. Exhibit D: Written comments hand delivered during the March 14, 2018 public hearing;
- e. Exhibit E: Summary of oral comments received at the March 22, 2018 public hearing; and
- f. Exhibit F: Written comments hand delivered during the March 22, 2018 public hearing.

The Department’s Division of Fish and Wildlife provided its Response to the public comments on May 4, 2018. The Department’s Response is attached and incorporated as Exhibit G.

3. ANALYSES AND RECOMMENDATIONS REGARDING FINAL ADOPTION

Hearing Officer Analysis

On February 14, 2018, LSA suggested revision of four rules as follows:

- a. With respect to the administrative rule added at 312 IAC 9-2-16 LSA observed that the word “mollusk” appears in the actual rule language while the word “mussel” appears in the rule heading and suggested that these references be consistent.
- b. LSA suggested that 312 IAC 9-4-2(l)(1)(F), be revised to read “A resident youth consolidated hunting, trapping, and fishing license...” by adding the words “and fishing”.
- c. At 312 IAC 9-10-11(j)(6) LSA suggested the word “working” be stricken and replaced with the word “business.”
- d. LSA noted that formatting and language revision is necessary in 312 IAC 9-10-26(d) to conform to rule drafting style.

In consultation with the Department, revisions were drafted to fulfill LSA’s suggestions without altering the meaning or interpretation of this rule. The revision of 312 IAC 9-10-26(d) will cause it to read as follows:

(d) A permit issued under this section authorizing the release of a specimen into the wild may only be issued if the applicant establishes the animal bred or reared in captivity:

- (1) is, as testing is scientifically possible and appropriate for the species and age of the animal, free of any communicable disease;**
- (2) will not become a nuisance;**
- (3) will not damage a:**
 - (A) native wild animal;**
 - (B) domesticated species of animal; or**
 - (C) species of plant;**
- (4) is capable of surviving after release and achieving the release goal;**
- (5) is genetically appropriate; and**
- (6) is capable of meeting anticipated post release impact and management guidelines.**

These suggested revisions have been incorporated into the rule language proposed for final adoption.

Comments from the public were received relating to a large number of individual rule amendments and additions included within this rulemaking package. The largest amount of public input relates to two proposed rules. The first involves the addition of 312 IAC 9-3-18.1 to establish a taking season for bobcats, which requires correlating amendments be made to 312 IAC 9-3-18.4, 312 IAC 9-2-3, and 312 IAC 9-10-12. The second relates to the proposed amendment of 312 IAC 9-10-11 to add subsection (j)(4), which would require the euthanization of all raccoons, Virginia opossums and coyotes captured by an individual under a nuisance wild animal control permit. A reduced number of comments were received in opposition to other Department proposals, particularly the Department's proposal to allow squirrel to be hunted from a boat (312 IAC 9-2-2), to authorize Department staff to take or to engage the services of another person to take certain species of wild animal that are causing or threatening to cause damage or creating a public safety concern on state parks (312 IAC 9-2-11), and to allow the taking of bats in limited circumstances (312 IAC 9-3-18.7).

In some instances comments reflected opposition to portions of existing administrative rules that are not proposed for amendment in this rulemaking. Those comments, for example, seek the removal of subsections (g) and (h) of 312 IAC 9-3-14.5 despite the fact that subsection (g) is not the subject of any proposed amendment and the amendment proposed for subsection (h) is only offered for the purpose of clarification. The revision of any portion of a rule involved in this

rulemaking package that is not included within the scope of this rulemaking is not allowed at this time. *IC 4-22-2-29(c)*.

In other instances, the comments received are not consistent with the actual rule amendment proposed. For example, one comment states opposition to 312 IAC 9-3-18.2 on the mistaken belief that “The proposed changes prohibit wildlife rehabilitators, nuisance wildlife control operators, scientific collector permit holders, etc., from possessing river otters.” (*Laura Nirenberg, Online 10/26/17*) The amendment proposed for 312 IAC 9-3-18.2(l) will not prohibit individuals holding valid permits of these types from possessing a river otter.

Generally, public opinion supported the addition of certain species to the lists of endangered mammals, birds and invertebrates as set forth in 312 IAC 9-3-19, 312 IAC 9-4-14, and 312 IAC 9-9-4, respectively. In most cases support was also expressed for the addition of protection for black bears at 312 IAC 9-3-18.8 and through the amendment of 312 IAC 9-3-18.5 and 312 IAC 9-10-11(a).

In drafting this report for consideration by the Commission, the hearing officer has attempted to concentrate on the evaluation of proposed rule additions and amendments that are the most noteworthy to the public and for which the most meaningful input has been received.

A number of comments were received in opposition to allowing squirrels to be hunted from or pursued by a hunter from a motor driven conveyance. The content of many of these comments indicates that the commenter lacked full understanding of the proposed amendment to 312 IAC 9-2-2 as they refer to the “pursuit” of, the “running down” of, and the “chase” of squirrels with a vehicle. (*Arnold McGill, Online 1/23/18; Ann McKee, Online 2/28/18; Eileen Brown 3/6/18*) To be clear, the proposed amendment would not allow these types of activities. The amendment would allow a squirrel to be hunted from a motorboat that is “beached”, “resting at anchor”, “tied to a stationary object”, or is “otherwise without motion” except motion created by wind or water movement.

More relevant comments related to this rule amendment express concern for safety associated with the firing of a weapon into a wooded area from a body of water because of the popularity of that type area for hiking and other recreational pursuits and note the difficulty of identifying property boundaries from the water in order for a hunter to ensure that they are shooting only into property for which they have received consent to hunt. (*Lisa Watson, Mail 3/19/18*). Other comments express concern that the Department has failed to provide justification for allowing this expansion of the opportunity to hunt squirrels and question the ability of a hunter to accurately shoot small game, such as a squirrel, from a boat that is being rocked by water movement or wind. (*James Richards, Online 3/14/18; Thomas Meek, Online 3/23/18, Mail 3/23/18*).

The Department's response acknowledges the existence of a potential conflict between recreational users of property but observed that public properties, such as the Hoosier National Forest, are open for hiking, hunting and other recreational pursuits at the same time. The Department also notes that it will continue to be the hunter's responsibility to know the property boundary within which they have authorization to hunt. The Department does not explain the reason for the proposal to allow the hunting of squirrels from a motorboat and does not address concerns about shooting accuracy from a boat rocked by water and wind, particularly when shooting at a small target. Except as it relates to the use of a motor driven conveyance as an aid for a disabled hunter, which is already authorized, diligent search of the public input received by the Commission has not identified one public comment in favor of this proposal.

The proposal to amend 312 IAC 9-2-11 would allow authorized employees of the Department to take non-endangered species of non-migratory birds, mute swans, mammals or reptiles on a state park or state historic site property. The amendments would also allow a state park property manager to authorize a person holding a valid nuisance wild animal control permit or valid trapping license to take raccoons, Virginia opossums, striped skunks, beavers or muskrats from the state park if the animal is causing or threatening to cause damage or creating a public safety or health concern. The latter situation involves only state parks and not state historic sites.

On its face, the rule amendment proposed for 312 IAC 9-2-11 would allow the specified animals to be taken from state parks or state historic sites by a limited number of specially authorized Department employees or in the case of state parks by properly licensed persons authorized by the property manager. This rule would allow for the taking only if the animal is a threat to health, safety or property.

Comments offered in opposition to this rule amendment proposal observe that trapping in state parks presents the opportunity for park visitors and their pets to become unintended victims of traps. (*Zach Reid, Online 3/23/18*) Other comments note that the rule, as proposed, does not obligate the property manager to confirm by “substantial evidence” that the animal is a nuisance and suggests that the Department’s proposed rule will allow for the further commercialization of wildlife.

The Department already engages in the removal of nuisance animals from its properties through the adoption of an emergency rule or by the issuance of a special permit. The adoption of this proposed rule amendment will place the Department in a better position to more timely dispatch a diseased animal and to, for instance, remove a nuisance animal from a heavily populated campground where the potential for human-animal conflict is greater. The hearing officer observes that under 312 IAC 8-2-1, the Department may authorize a use, establish conditions upon a use, prohibit a use of a DNR property, or close an area to entry by the public by the posting of signage. In accordance with 312 IAC 8-2-6(a), a member of the public is responsible to be in control of their pets, and under 312 IAC 8-2-1(b) to ensure compliance with Department signage. While accidents can occur and the introduction of animal traps or occasions for hunting within a Department property could increase that potential, the hearing officer recognizes that the Department presently dispatches diseased animals on, removes nuisance animals from and successfully manages hunting on state parks and other Department properties on an annual basis. It is the Department’s responsibility to manage and preserve natural resources, including wildlife, for the benefit of the public; however, that responsibility must be balanced with the need to protect visitors to its properties from the harms caused by wildlife that are overpopulated, are prone to human-animal conflict, and are diseased.

With respect to the alteration of the taking, hunting, or trapping seasons set forth in 312 IAC 9-3-12 for fox, coyote and skunk, 312 IAC 9-3-13 for mink, muskrat and long-tailed weasels, 312 IAC 9-3-14 for Virginia opossums and raccoons, and 312 IAC 9-3-18.2(a) for river otters, the only substantive change is the removal of exact hours for the beginning and ending date of the seasons in favor of simply stating the dates. For example, at 312 IAC 9-3-12 the season for fox will now begin at midnight on October 15th instead of noon on October 15th and end at 11:59 p.m. on February 28th, instead of noon. Comments were received in opposition of these amendments on the basis that they equate to an “extension” of these taking seasons. In most cases, these amendments have the effect of opening a season 12 hours earlier and closing the season 12 hours later, with a large portion of those hours occurring during the overnight hours. It is not reasonable to characterize these amendments as an intent to extend hunting, trapping or taking seasons. Instead these amendments are observed to significantly simplify the administrative rules thereby increasing understandability, decreasing instances of unintended violations and enhancing the capability of enforcing the season dates.

The establishment of a taking season for bobcats at 312 IAC 9-3-18.1, carries with it the need for contemporaneous amendments of 312 IAC 9-2-3 to allow for the possession of any portion of a bobcat; 312 IAC 9-3-18.4 to eliminate a prohibition on the possession of a carcass, hide or any part of a bobcat; and 312 IAC 9-10-12 to allow a licensed fur buyer to acquire and possess an untanned hide or carcass of a bobcat. The rule proposal would allow the Department Director to establish a season for taking bobcats in designated counties. The Department Director would also be required to specify a statewide quota and allows for the early closure of the season if the quota is reached. The Department anticipates in the first year that the bobcat quota would be 250-300 and hunting would only be allowed in 30 counties located in the southern one-third of the State. (*Exhibit G*)

A limited season was established for river otters in 2015 through amendments to 312 IAC 0-3-18.2, which were similar to the amendments proposed here that would establish a limited season for taking bobcats². The Commission concluded with respect to river otters that their

² This type limited season controlled by the director through a temporary rule has been successfully used for other species as well, including wild turkey, the hunting opportunity for which is continuing to slowly expand.

populations varied by location within the State. In some geographical areas there were few or no sightings while anecdotal data indicated that in other locations river otters were frequently trapped by accident, were being struck by vehicles in increasing numbers and the Department was receiving a significant number of complaints about nuisance river otters causing significant financial losses for individuals with stocked ponds and for operators of fisheries. *Natural Resources Commission, Meeting Minutes, January 20, 2015, https://www.in.gov/nrc/files/nrc_jan_2015_minutes.pdf*. Some comments received in 2014 in favor of establishing a limited trapping season for river otters indicated that landowners experiencing significant nuisance damage were resorting to self-help by “killing river otters illegally and simply throwing them away.” “*Report on Rule Processing, Consideration of Public Comments, Analysis and Recommendation Regarding Final Adoption,*” pg. 5, *Administrative Cause Number 14-054D, LSA Document # 14-341(F)*. With respect to river otters the Department’s most recent feasibility study was conducted in 1994. Despite the time between that feasibility study and rule proposal, the Department was able to identify 66 counties where river otter populations were sufficient for harvest while recognizing that river otter populations had not reached sustainable levels in 26 counties where habitat was not optimal for the species.

The rule amendments that would allow the taking of bobcats were the subject of significant public input that largely disfavors the establishment of even a limited season.

The individuals who commented in favor of the establishment of a limited season for taking bobcats are predominantly from hunters and trappers who report seeing bobcats frequently while in the field and through trail camera photographs. (*J.R. Bardon, PHI Oral*) Trappers report that the incidental trapping of bobcats in trap sets intended for coyote occurs on an occasional basis. (*Clayton Barnett, PHI Oral*) The majority of the hunters and trappers who favor the establishment of a limited bobcat season and who report sighting and/or incidental trapping of bobcats appear to be from counties in the southern part of the state, including Warrick, Washington, Jackson, Dubois, Spencer, Pike, Greene, and Harrison Counties. Other reports of frequent bobcat sightings come from individuals in areas including Parke and Vermillion Counties. The locations of these reports are generally consistent with the Department’s response

and bobcat mortality reports that record the number of bobcat mortalities by vehicle strikes, incidental trapping or known deaths by other causes. *Indiana Department of Natural Resources, 2015 Wildlife Science Report, pg. 43.*

Several of the individuals who commented in favor of establishing a season for trapping bobcats offered the opinion that the bobcat is responsible for decreased populations of rabbits and turkeys as well as other small game and ground nesting birds. (*Keven Kluemper, Online 3/6/18; Donald Kolley, PH1 Oral; Dennis Cobb, PH2 Oral*) Conversely, the comments in opposition to establishing a season for taking bobcats observe that bobcats are an APEX predator that aid in creating greater biological diversity by controlling the population of rodents and other small animals such as rabbits that frequently become nuisance animals. (*Leslie Bishop, Online 3/19/18; Elizabeth Mahoney, Online 3/20/18*). The positions taken with respect to the bobcats' impact upon other wildlife is a matter of perspective as between the various commenters; however, the sentiments reflect a need to manage the bobcat, and all species of animals, in a well-reasoned manner for the mutual benefit of each species.

Many of those who expressed opposition to the establishment of a limited bobcat season observe that despite frequently engaging in outdoor recreational pursuits they have never seen a bobcat in the wild. These individuals question the veracity of the hunters and trappers with respect to their reports of bobcat sightings. (*Betty Fendel, PH1 Written*) It is understandable that some concern may exist that hunters and trappers may be incentivized to over-report such sightings in order to support the establishment of the season that they favor. The hearing officer recognizes that hunters and trappers frequently traverse wild and virtually undisturbed woodlands that are not commonly visited or even accessible to the general public. A bobcat is an elusive creature and it is reasonable to believe that hunters and trappers traversing lands virtually untouched by people would see bobcats more frequently than would a person hiking in state parks or on other public lands where people are a constant or even occasional feature. The hearing officer acknowledges that some individuals who report having never seen a bobcat are engaged in more rugged and remote outdoor recreational activities in areas similar to those experienced by hunters and trappers; however these occasions are reasonably believed to be the exception. Taking all of the comments into account, the hearing officer recognizes the potential for the over-reporting of

bobcat sightings by those who favor the establishment of a season. However, the sightings of bobcats reported by hunters and trappers who support the rule proposal are not so numerous as to warrant suspicion as to their credibility.

Many individuals who expressed opposition to the establishment of a limited bobcat season generally disfavor trapping viewing it as a cruel and inhumane practice and believe the taking of any animal from the wild simply for fur or for trophy is unacceptable. (*Elizabeth Mahoney, PH2 Written, 3/22/18; Coalition to Protect Indiana's Bobcat, PH2 Written, 3/22/18; The Humane Society of the United States, PH2 Written, 3/22/18; Jan Aylsworth, Online, 11/7/17*). Other commenters who express opposition to this rule proposal simply oppose hunting and trapping entirely. (*Jocelyn Collie, Online, 11/7/17*) A significant number of individuals opposed to the proposed amendment to 312 IAC 9-3-18.1 also offered scientifically and biologically supported arguments against the establishment of a season for taking bobcats.

The public comments provided by individuals identifying themselves as biologists or natural resources professionals noted that the Department has not undertaken a scientific population study of bobcats and express concern that the Department has proposed the establishment of even a limited bobcat season without first conducting a scientific population study or at minimum updating its mortality data. (*Vicki Fischer, PH1 Oral; Leslie Bishop, PH1 Oral; Allison Klement, Online 3/20/18; Jennifer Christie, Online 3/22/18*) Department Wildlife Science Reports indicate that in each of the years 2010, 2011 and 2012 bobcat mortalities exceeded 70. In 2013, bobcat mortalities decreased to 61 and remained consistent in 2014 at 63. *Indiana Department of Natural Resources, 2014 Wildlife Science Report, pg. 34; and 2015 Wildlife Science Report, pg. 44*. Notable is the fact that in 2013 bobcat deaths occurred in only 30 counties and the 2014 mortalities reportedly occurred in only 25 Indiana counties. *Id.* The Department's 2016 Wildlife Science Report contains no data for the bobcat.

Leslie Bishop, a biologist from Nashville, Indiana recognized that mortality data and trail camera sightings can be useful in establishing "presence-absence data" but that is "not data that can be used to predict population size." . She continued that the Department has some good records but the data does not take all necessary information into account, noting that the 2015 State Wildlife

Plan “flagged” the Department’s bobcat data as being in need of statistical population reconstruction. Tim Maloney of the Hoosier Environmental Council echoed a sentiment expressed by Bishop, which acknowledged that the Department’s Division of Fish and Wildlife has not been provided the necessary resources to conduct a proper scientific population study, which was recognized as being resource and staff intensive undertaking. *Id.*; *Tim Maloney, Online 3/23/18*).

Many individuals observe that the bobcat was listed as an endangered species in Indiana in 1969 and remained so identified until 2005, when until 2012 the bobcat continued to be identified as a species of special concern in Indiana. The bobcat has enjoyed protection from all hunting and trapping since 1969. The Department reported in the *2014 Wildlife Science Report* that the bobcat had been the focus of a seven year study using radio-telemetry to learn about their movement, habitat, reproduction and food habits. The Department stated;

From a modest beginning more than 40 years ago, bobcats have benefitted from focused research and monitoring efforts carried out by professional wildlife biologists. Today, the prospects for Indiana’s most elusive predator have never looked better, and careful stewardship of bobcats will continue under the Wildlife Science Unit.

The most significant theme of the comments received with respect to the establishment of a limited season for trapping bobcats is the belief that the Department has not conducted the degree of “focused research and monitoring efforts” sufficient to justify establishing even a limited taking season.

The data available pertaining to the bobcat is notably distinguishable from the data presented to support the establishment of the limited river otter season in 2015. The Department acknowledges that it has not received a significant number of complaints regarding bobcats as a nuisance animal as was the case with the river otter. Furthermore, the most recent information available from the Department’s bobcat mortality data indicates incidences of bobcat mortality in only 25 to 30 of Indiana’s counties with the two most recent years’ data reflecting a decline. This is significantly less convincing that the Department’s confidence in 2015, when the limited river otter season was established, that sustainable populations of river otter occurred in 66 of Indiana’s 92 counties.

While anecdotal evidence exists to support a belief that larger bobcat populations exist in certain counties, the question remains whether the available evidence is consistent with the Department's history and its own stated expectation of "focused research and monitoring efforts" and "careful stewardship" for the benefit of not only the bobcat but for all impacted species.

While the amendments offered at 312 IAC 9-3-18.2(d) provides an individual an additional 24 hours to report the take of a river otter, the other amendments in this subsection were designed for the sole purpose of more clearly stating the occasions in which a person is required to report the taking of a river otter. Comments opposed to the extension of time to make the report observe that submitting the report "requires minimal effort" and question the need for extending the time. (*Laura Nirenberg, Online 10/26/17 & Mailed March 14, 2018*). In its response, the Department explains that pursuant to Indiana Code § 14-22-6-4 a trapper is only obligated to check a trap every 24 hours, which means that an animal may be trapped immediately after a trap is set but not retrieved until 24 hours later. This proposed rule amendment takes this into account and affords a trapper a full 24 hour period to report the take.

The public opinion associated with the proposed rules relating to bats focused on what has been viewed as a contradiction between the addition of three species of bat to the endangered species list at 312 IAC 9-3-19 while, at the same time, adding 312 IAC 9-3-18.7, which allows a person to take a bat under specific identified situations without a permit. (*Jennifer Selm, Mail, pgs. 87 – 88*). Those who have commented in opposition to the taking opportunities provided in 312 IAC 9-3-18.7 seemingly fail to realize that, at the present time, with the exception of bats that have been identified as endangered species, there is absolutely no limitation or restriction on the taking of bats. The Department's proposed amendment of 312 IAC 9-3-19 to identify additional bats as endangered species and the addition of the rule proposed at 312 IAC 9-3-18.7 to establish limitations of the number of bats that may be taken and identify the situations in which they may be taken actually add new protections for bats that do not presently exist. However, in adding these new protections the Department also recognizes the need to allow the taking of bats in limited situations in which they pose a risk to people from disease or because of their location within residences or other structures inhabited or utilized by people on a routine basis.

Public input was limited regarding 312 IAC 9-4-11, which will allow turkey hunting on properties managed by the Department's Division of Fish and Wildlife, and will add Elkhart, Kosciusko, and Noble Counties to the list of counties where turkey hunting may occur during the fall season. While some people believe there to be no need to expand the hunting season for wild turkey other people believe the limited expansion is an appropriate increase in hunting opportunities. The Department offers that current turkey hunting occurs with only a 7% success rate in the fall season with an average take of 700 birds annually. The expected additional harvest from the three added counties is estimated by the Department to be less than "20-25 birds in the fall harvest" in any of the counties.

The Department's proposal to amend 312 IAC 9-10-11(j)(4) to require that all raccoons, Virginia opossums and coyotes captured by an individual holding a nuisance wild animal control permit met with significant opposition. The Department offers that these three species have "thriving populations" throughout the state and frequently do not remain in an area to which they have been relocated after having been caught. "*Proposed Nuisance Wildlife Rule Change*", <https://www.in.gov/dnr/fishwild/9715.htm>, last visited on May 4, 2018. The Department adds that "the vast majority" of these species caught by nuisance animal control operators are already euthanized and maintains that the euthanization of the small number of these species that are presently being captured and released is inconsequential in light of their abundant populations. *Id.*

Certain members of the public note that while the Department believes these animals are expendable because of their abundant populations, the Department, in a seemingly contrary fashion, continues to allow the breeding of these species in captivity by game breeders licensed under 312 IAC 9-10-4. (*Laura Nirenberg, Online 3/15/18*) Many comments reflect that because of their low body temperatures Virginia opossum are hugely resistant to disease and are a tremendous benefit to the eradication of ticks, which are becoming increasingly dangerous as the spreaders of disease. Other comments question the need to interfere with a permit holder's or an individual's ability to exercise their freedom of choice with respect to the outcome of these animals when the Department acknowledges that only a few of the animals are presently being released.

Mike Meservy, the owner of Advance Pest Control in Indianapolis, explained that his nuisance animal control business is based solely upon “catch-and-release” because the largest portion of his customer base desires this service. (*Mike Meservy, PH1 Oral & PH2 Oral*). Meservy noted that he would never release a diseased or injured animal, but, like other commenters, expressed his opinion that the Department should not have the authority to mandate the killing of an otherwise healthy animal when such an action violates the personal and professional ethics of the license holder. (*Id.*; *Jill Wise, PH2 Oral*; *Bob Cower PH1 Oral*; *Lawrence County Sheriff Mark Branham, PH1 Oral*). Many commenters, who have used the services of a nuisance wild animal control operator have stated that if the rule is adopted they will reconsider altogether their use of those services in the future. (*Sandy Blackburn, PH1 Oral*; *Julia Duncan, PH1 Oral*; *Josh Trine, Online 12/29/17*) Meservy and other license holders indicate that the rule amendment will for them out of business.

The reluctance of the public to utilize the services of a permitted nuisance wild animal control operator could have multiple impacts. The most notable includes a negative financial impact to the permit holder’s business or a permit holder being unable to remain in the business due to ethical values. Equally important is the possibility that more people will resort to “self-help” with respect to the removal of nuisance wild animals in order to avoid euthanization of the animal.

While the Department, in its Economic Impact Statement, recognized that approximately 250 nuisance animal control businesses may have impacts of approximately \$1,000 annually associated with the expense of euthanization and carcass disposal, the Department’s assessment of fiscal impact upon small businesses does not appear to consider a loss of business or the possibility that a permit holder would, due to ethical convictions, be forced to close a business.

The notion that this rule amendment may cause a greater number of people without adequate training or knowledge to attempt removing nuisance wildlife raises a myriad of concerns, including the possibility that the person may be subjecting themselves to harm from bites,

scratches or contact with a diseased animal, all of which can be prevented if a trained and knowledgeable nuisance wild animal control operator is used for this purpose.

While the comments indicate a belief that the requirement to euthanize a raccoon, Virginia opossum or coyote would not apply to an individual who resorted to self-help that belief is not entirely accurate. While a coyote may be taken by a possessor of land at any time, 312 IAC 9-3-12(d) specifies that a coyote taken outside the prescribed coyote taking season must be euthanized. In order for a person to take a raccoon or Virginia opossum outside of the season prescribed at 9-3-14 the person would be obligated to obtain a permit under 312 IAC 9-10-11, which reasonably could include a Department requirement to euthanize that animal once captured. However, once again, a person with strongly held convictions against the killing of an otherwise healthy animal might reasonably avoid these requirements without regard for a proper and legal release location or the ability to identify whether the animal is diseased.

Conversely, a professional nuisance animal control officer, reliant upon holding a valid permit to continue business, would have greater incentive to comply with reasonable requirements, which at present require release of a captured animal only in the county of capture and only upon property from which the operator has obtained the owner's permission. Furthermore, under the existing administrative rule a nuisance animal control operator is required to provide an annual report of the nuisance animals captured by number, species, capture location, method of disposition and location of release, if applicable.

Overall, it appears that the Department's proposed amendment to 312 IAC 9-10-11(d) may yield results not anticipated by the Department. Furthermore, the rule proposal may have fiscal consequences to small businesses that were not contemplated.

A few comments were received requesting that damage to forests be considered in computing the economic impact for purposes of obtaining a deer control permit established by the addition of 312 IAC 9-10-25. (*Stan Moore, Online 10/17/17, Marc Roberts, Online 10/26/17*) The proposed rule, as presently written, would consider a tree planted by an individual in calculating the economic impact of damage, which addresses Moore's concern, but the rule in its present form

would not allow the loss of “naturally seeded” saplings to be included in the calculation as Roberts proposes. Roberts, stated that forestry consultants and the Indiana Association of Soil and Water Conservations Districts, concur with his request. The Department offered that the number of complaints received does not seem to indicate a “widespread concern” regarding “deer damage to naturally-occurring vegetation.” For this reason, the Department did not believe inclusion of this type damage in the economic damage determination is necessary at this time. Other comments offer that the rule proposed at 312 IAC 9-10-25 is overly broad and fails to require a landowner to take steps to minimize human-deer conflict. (*Laura Nirenberg, Online 10/26/17*). The rule as proposed, which mirrors a presently valid temporary rule, contains substantially more restrictive requirements than 312 IAC 9-10-11(a), which allows a property owner to obtain a similar permit for the control of other species of nuisance wild animals. The Department provides a detailed response supporting its proposal contained in 312 IAC 9-10-25. The Department represents in its response that management of deer “is a dynamic process of repeated surveys of farm operators, deer hunters, and of the general public followed by adjustment of deer population levels to comply with the evolving desires of the residents.” The Department further recognizes that in balancing consumptive and non-consumptive recreational opportunities it is necessary to maintain moderate deer populations throughout Indiana in order to allow deer to be found in areas with less than optimal habitat. However, in managing deer to retain moderate populations throughout the State, deer can become over-abundant in areas offering more ideal habitats. For this reason the deer control permit is a necessary tool in controlling deer populations in a more customized manner to reduce or prevent damage in a more localized area.

Hearing Officer Recommendation

With the exception of the amendment to 312 IAC 9-2-2, the amendment of 312 IAC 9-10-11(j)(4) and the addition of 312 IAC 9-3-18.1, along with correlating amendments at 312 IAC 9-2-3(b)(10), 312 IAC 9-3-18.4 and 312 IAC 9-10-12(e), the Hearing Officer recommends that the proposed new rules and rule amendments be granted final adoption as presented in Exhibit H, which includes the revisions discussed previously to adjust the language and drafting style as suggested by LSA.

The proposed amendment to 312 IAC 9-2-2, which would allow squirrel hunting from a motorboat; the proposed amendment to 312 IAC 9-10-11(j)(4), which would require the holder of a nuisance wild animal control permit to euthanize all captured raccoons, Virginia opossum, and coyotes; and the addition of 312 IAC 9-3-18.1, which would establish a bobcat season, and required correlating amendments at 312 IAC 9-2-3(b)(10), 312 IAC 9-3-18.4 and 312 IAC 9-10-12(e) relating to the disposition of a bobcat or its parts, have each been the subject of significant and thought-provoking public comment. The Department's response with respect to the public comment on these rule proposals is minimal and does not fully address the concerns expressed by the public. With respect to these administrative rule proposals, the Hearing Officer recommends additional enlightened discussion and thorough consideration by the Commission.

Dated: May 7, 2018

Sandra L. Jensen
Hearing Officer