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Natural Resources Committee
February 08, 2013

[LB499]

The Committee on Natural Resources met at 1:30 p.m. on Friday, February 8, 2013, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB499. Senators present: Tom Carlson, Chairperson; Lydia Brasch, Vice Chairperson; Annette Dubas; Ken Haar; Jerry Johnson; Rick Kolowski; Ken Schilz; and Jim Smith. Senators absent: None.

SENATOR CARLSON: Welcome to the Natural Resources Committee. I'm Tom Carlson, Chair of the committee, and what we lack in numbers today in the audience we make up for quality, so that's good. (Laughter) To my far left is Senator Rick Kolowski from Omaha, District 31; next to him will be Senator Ken Haar from Malcolm, District 21; and then Senator Jim Smith from Papillion, District 14; Senator Ken Schilz from Ogallala, District 47; to my immediate left Laurie Lage, our committee legal counsel; and then to my far right is Barb Koehlmoos, our committee clerk; next to her is Senator Lydia Brash from Bancroft, District 16, the Vice Chair of the committee; and next to her, Senator Jerry Johnson from Wahoo, District 23; and then next to me, Senator Annette Dubas from Fullerton, District 34. Our pages for today and this session are Tobias Grant from Lincoln and David Postier from York. They will be serving us today. And I think with...how many testifiers do we have today?

SENATOR JOHNSON: One.

SENATOR CARLSON: Okay. And you know the ropes so I don't need to go through a lot of...we won't be using the lights today. (Laughter)

SENATOR DUBAS: Is this a record for Natural Resources?

SENATOR CARLSON: Well, it might be. So I don't think...if we don't have any questions, we'll open the hearing on LB499 and Senator Brasch. Welcome. [LB499]

SENATOR BRASCH: Thank you. Thank you, Chairman Carlson and good afternoon, members of the Natural Resources Committee. I am Lydia Brasch, L-y-d-i-a B-r-a-s-c-h and I represent the 16th District of the Nebraska Legislature. I am here to introduce LB499, which I have brought at the request of the Nebraska Game and Parks Commission, to make changes to the powers and duties of the commission to allow for greater public input and flexibility in their rule making process. This legislation was developed by Game and Parks in coordination with the Governor's Policy Research Office. For years, the Game and Parks Commission followed a rule making process similar to the one laid out in LB499 for commission orders. It wasn't until the late 1990s or early 2000s that the commission was forced to change the rule making process after the Attorney General's Office began to reject any regulations that were passed at a meeting where the commission had made modifications to the proposed published

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regulations following the public hearing and then passed at the same meeting. Under the Administrative Provisions Act, or APA, the Attorney General's Office under 84-905.01 and the Governor's Office 84-908, are required to review rules or regulations. While the commission did not receive a formal opinion from the Attorney General's Office, a review of the full APA indicated that their standard practices were out of compliance. Since bringing their rule making process into compliance with APA procedure, the commission has faced problems with the timing of certain hearings. For example, they do not receive the federal frameworks from the U.S. Fish and Wildlife Service who has authority over waterfowl and all migratory birds until late July. Thus, final action under the APA process cannot be taken until the August commission meeting. The commission normally holds a meeting in July and has a hearing on waterfowl seasons based on staff recommendations and our estimate of what the federal frameworks will be. However, the commissioners have to table the seasons at that time. The commission holds a July meeting because the current requirements of the APA do not allow for any changes to recommended changes to be made at the same meeting when they are passed. The commission has a public hearing in July to take public comments for any changes before the August meeting. From the standpoint of Nebraskans who attend the hearings to provide feedback, they continue to struggle with the fact that under the current APA procedures, the commission cannot make changes in response to public testimony and pass season changes at the same meeting. Participants in these hearings get frustrated that the commission is not listening and responding to their concerns. This issue is augmented during waterfowl seasons. When the commission holds the public hearing for waterfowl regulations in August, the commission cannot make changes to the seasons during that meeting. The commission can either pass the regulation changes as approved by the Attorney General's Office or table them. Because waterfowl seasons begin in September and the commission's next meeting is in October, there is no time for additional changes to be considered. If the commission tabled waterfowl regulations to make changes at the next meeting, they could not have waterfowl seasons that began before late October. Thus, waterfowl hunters that come to testify at the public hearings in August feel like they are wasting their time. This takes considerable time for review and requires the Attorney General and Governor's Offices to spend considerable time reviewing season changes that they are not really policy-level regulation changes. As mentioned before, the Governor's Policy Research Office worked with Game and Parks to develop these changes because it would increase the efficiency of government by not requiring additional reviews on annual season settings done by the commission, and is why we have proposed them to be done as orders rather than regulations. Towards this end, Section 37-304 and LB499 makes a new distinction between the procedures governing the commission's power to pass orders and to adopt and promulgate rules and regulations. First, the commission's power to promulgate rules and regulations governing the methods or type, kind, and specifications of hunting, fur harvesting, or fishing gear used in the taking of any game, game fish, nongame fish, game animals, furbearing animals, or game birds would remain the same under the Administrative

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Procedures Act. Second, the commission would be able to pass commission orders which would fall under a new set of administrative procedures governing conservation orders, seasons, open and closed areas, and bag limits. Section 37-314 (1) and (3) of LB499 sets up new set of administrative procedures under which the commission orders are passed. Under these new rules, the commission would hold a public hearing on each proposed commission order similar to the way business is conducted today. Under the new process, the commission would be allowed to make changes to the orders at the same meeting in response to public input before publishing the final orders. As mentioned previously, under the APA, the commission is required to table the proposed rules before making season changes. This would shorten the rule making process for about eight rules and regulations hearings a year, and would help the commission respond to input provided at a public meeting to help fulfill the purpose of such a hearing. Finally, LB499 makes another change to Section 37 by adding bird, fish, and wild animal populations to the list of endangered items that could allow the commission to open or close game seasons. Under current emergency regulations, the commission can only close a season if there is a threat to human life or property. This provision would give the commission the latitude to quickly respond to disease epidemics or other extenuating circumstances rather than waiting up to several months for the next scheduled commission meeting. I will briefly point out that this legislation carries no fiscal note. As I conclude, I do want to thank you for your time and I believe that Timothy McCoy of the Game and Parks Commission is behind me today and he is happy to answer any questions from his agency's perspective after he has shared his testimony with the committee. I want to thank you for your time again, and I would be happy to answer your questions. [LB499]

SENATOR CARLSON: Okay. Thank you, Senator Brasch. Any questions of her? Senator Haar. [LB499]

SENATOR HAAR: Thank you. This is always a learning process for me. So, the APA, the Administrative Procedures Act, is a state of Nebraska law, right, not a federal law that tells how rules and regs can be made? [LB499]

SENATOR BRASCH: The APA, it was my belief that it is what we must follow, its procedures, but it is based on federal. And I would...he would be able to clarify that. But in my conversations with them, that many times they must wait for federal information, and then they have a hearing and they cannot act on it and that is a further delay in the seasons, or they cannot quickly respond to situations such as the drought last year where there were lakes drying up and fish that truly needed to be harvested or just deteriorate in a dried-up lake. [LB499]

SENATOR HAAR: Thank you. [LB499]

SENATOR CARLSON: Any other questions? Okay. Hearing none, thank you, Senator

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Brasch. Now we're open to listen to proponents, so... [LB499]

TIMOTHY McCOY: Waiting to see if somebody else beat me up here. (Laughter)
[LB499]

SENATOR CARLSON: Okay. Welcome, Tim. [LB499]

TIMOTHY McCOY: Thank you, Chairman Carlson and members of the Natural Resources Committee. Appreciate the opportunity to talk to you today about LB499. As Senator Brasch noted, this was a bill we worked with her on. We had also worked with the Governor's Policy Research on. The proposed legislation allows us to develop a different class. I think I forgot to spell my name, didn't I. Laurie is catching me. [LB499]

SENATOR CARLSON: Please do. [LB499]

TIMOTHY McCOY: For the record, my name is Timothy McCoy, T-i-m-o-t-h-y M-c-C-o-y. I'm the deputy director of the Nebraska Game and Parks Commission. I apologize for that gaffe. The legislation would allow us to develop a new class of regulations called conservation orders. The focus of this is to be narrowly confined to our normal season setting processes which we do annually in terms of waterfowl and big game. We do it, typically, every two years on fishing unless we have other changes that come up or issues with fish population somewhere. And really, there's two parts to this, the part that the Policy Research Office was...came to us with, was an interest in efficiency in terms of the review processes. From our standpoint, I'll try and help address, I think, the earlier question. The APA process is a state requirement in statute that is followed for passing regulations. It requires publishing of those, a notice of those recommended changes that will be made on the Secretary of State's Web site. It requires an advanced notice for public input. And then, it also requires a review process by the Attorney General's Office and finally approval by the Governor before those regulations can be put into place. Our intent with this is not to avoid the public input process. Public input is very valuable to us in terms of setting our seasons and evaluating whether the recommendations our staff are making are something that should, or shouldn't be done by the commission. And really, there has been a struggle as we've come into compliance with this from our hunters and fishermen. They come to a meeting, part of it's because of traditionally they expected if there were going to be changes made, they were discussed openly by the commission during that...following the public testimony, they decide what the recommendations were and they pass those. And so they came and...they came to a hearing, they provided their input, and they walked out and they knew what the seasons were going to be when they left. And so, we have tried to keep this confined to those season setting activities for the other reason, those are things we do every year, we're going to be doing waterfowl seasons. And in terms of waterfowl seasons specifically, the federal frameworks we get come out annually in July. They normally come out in mid to late July. And so, we have just

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enough time to provide typically our recommendations to the secretary so they can be published and provide that public notice. And then, we have that hearing in August, and typically that's in late August because we have to meet the notice requirements before we have that public meeting. And then, we have early teal seasons that start in September. So there...if they were to try to...if they didn't want to pass those right now, if they tabled them, we would either not have any September waterfowl seasons or seasons in October, or we would potentially be having seasons that were based on what the recommendations were the year before as long as they fell in the federal frameworks. So there's a little double-edged sword. We have to stay in those federal frameworks. And the other thing that would likely do, is you would have seasons that typically opened on weekends that would not open on weekends, and I know what we would have is a bunch of upset waterfowl hunters. So really, that's the goal of doing this. There isn't a fiscal impact. It's mainly a operational impact. The other part about this bill is it would allow those conservation orders for those seasons to have the effective law 15 days after posting on our agency's Web site, and that would be also a little different from the other process. I will mention, too, we do have an imbedded representative of the Attorney General's Office in our agency that reviews all of our recommended changes to regulations and would review any conservation orders to ensure that we continue to follow statutes, because that's very important to us to make sure that all the seasons we set are legal with the statutes of the state of Nebraska. And it's a real big issue from our law enforcement standpoint. We always want to make sure we have that lined up. [LB499]

SENATOR CARLSON: Okay. Thank you for your testimony. Questions of the committee? Senator Schliz. [LB499]

SENATOR SCHILZ: Thank you, Senator Carlson. Tim, good afternoon. Thanks for coming in today. So, I guess, if this is put into place and you care about waterfowl seasons or anything like that, you better be to that meeting, then because from what I understand that's going to be your goal is to try and get those on so everybody knows. Have you had any...are there any concerns that...or how do you get that out? How do you...how do you have outreach to folks so that they understand that the process has changed? [LB499]

TIMOTHY McCOY: With waterfowl, typically, we do...we have a history in the last...at least several years of doing...we do meetings around the state with folks that are interested in waterfowl hunting. We do the same thing with big game. We do public meetings. They are not...they're input meetings. They aren't the public notice meeting and a hearing, but they're meetings to discuss issues that waterfowl hunters have or with big game that big game hunters have. And, normally, we do that in advance of our recommendations. And the reason is to try and get a feeling for what the big issues are that are out there and things that we need to look into and to watch for. And we try to reiterate to all those folks that come to those meetings that, you know, once the

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recommendations are out and we're going to have a public hearing of the commission, if you have concerns about those, you know, you need to come testify because that is your opportunity to really provide input to the commission before they make a change in any regulation. We're going to them on the front-end really for our information, but in terms of that process we try to do that. [LB499]

SENATOR SCHILZ: Right. So then if I understand this right, and you can correct me if I'm wrong, where you're having...let's just take waterfowl because that's the one that runs into the time constraints. Basically what happens, as soon as that recommendation comes out and in the process the way it is today, it gets tabled, there's really no chance to change that after that because you have to just continue to move on. Is that correct? [LB499]

TIMOTHY McCOY: What...I think I know what you're asking so I'll try to answer it. [LB499]

SENATOR SCHILZ: Okay. [LB499]

TIMOTHY McCOY: When we bring our recommendations out and we have our July meeting, we can take public testimony then and we still have the ability to change that because we know we're going to table it for August because we know we have to. We don't have the federal frameworks yet. So it's actually the public input meeting for really the August action. [LB499]

SENATOR SCHILZ: Right. [LB499]

TIMOTHY McCOY: And what happens is, we, at times, have individuals that can't come to the July meeting or didn't realize it was happening and they come to the August meeting because they've saw the notice and they want to testify and they want something changed. And they're really frustrated because basically at that point, the commissioners can either pass the recommendations we have that meet federal frameworks based on what they heard at the last meeting or they can table it. And if they table it, we're up against the wall. So it is...and that's the part this would eliminate. We could still have two meetings, but what it would allow, it would allow for some other small changes if in that meantime the recommendations that came out after the first meeting really caused a problem. It's...we would not necessarily intend to do that, but anybody can come to that meeting and make, you know, make their case and they could tweak those seasons. And that's the thing. It's going to be limited to season dates. Potentially in some cases, you know, bag limits maybe the, you know, the number of deer in a unit if it's 1,200 or 1,250 that we're going to offer that year. Normally these things are, I would say in the big scheme of things where they're very minor, but there are people that are very passionate about this that come to our meetings that really want to see something and they think it's going to make a big difference for their part of

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the world and that's their opportunity to make their case. [LB499]

SENATOR SCHILZ: And you want to be responsive to those folks, I take it. [LB499]

TIMOTHY McCOY: We would like to be responsive to that. [LB499]

SENATOR SCHILZ: Thank you. [LB499]

SENATOR CARLSON: Senator Haar. [LB499]

SENATOR HAAR: Could you tell me, Tim, what do you mean by federal frameworks? [LB499]

TIMOTHY McCOY: Because waterfowl are migratory birds, the hunting of waterfowl actually is dictated under a federal guidelines from the U.S. Fish and Wildlife Service that have to go through the federal register process. And so, we have an expectation of what we think those will be when we have our first meeting, but normally they are not out and they are not official yet. And so, we have to wait until we get those official frameworks before we can...before we can pass our regulations because we don't want to take a chance of passing regulations that then don't comply with those federal guidelines. And those are done annually. [LB499]

SENATOR HAAR: Okay. Thank you. [LB499]

SENATOR CARLSON: Okay. Further questions? Senator Kolowski. [LB499]

SENATOR KOLOWSKI: Senator Dubas, was...please, you had your hand up first. [LB499]

SENATOR DUBAS: Go ahead. [LB499]

SENATOR KOLOWSKI: Oh, thank you. Mr. Chairman, Tim, I wonder what's the biggest downside to this whole proposal at this point? What would you say is the most troublesome that you might have to deal with? Hearing all the...what we're trying to get done with the law, and just wanted to get your opinion on that. [LB499]

TIMOTHY McCOY: We would...we haven't saw anything in this that indicates there's a large downside. There...the only thing that I could see would be there might be concerns from people that don't deal with fish and wildlife seasons that might have the appearance that we're somehow trying to cut out the public process. And we're committed to having the public involved in this process because it's part of what...that's how we operate. That's how we have to operate. [LB499]

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SENATOR KOLOWSKI: Thank you. [LB499]

SENATOR CARLSON: Senator Dubas. [LB499]

SENATOR DUBAS: Thank you, Senator Carlson. Thank you, Tim. Do you have the capacity to issue orders in any other capacity? [LB499]

TIMOTHY McCOY: We do not. As an agency we've never issued orders. We've only done regulations. I know we were...it was identified to us that the Department of Natural Resources, and I think other agencies in the state, use orders. And I'm not sure how they...how they issue those orders, but that was one of the things Policy Research Office identified to us is that they thought it was...you know, it would be in the purview of the state government to make...set this class of orders for our agency. [LB499]

SENATOR DUBAS: But this is pretty restricted as to what you're going to be able to do and you're doing this in response to a very specific issue that has caused problems in the past. [LB499]

TIMOTHY McCOY: Correct. Correct. We are...we want to be very specific about this because it needed to be clear, and I don't think that we're in a position that we think we would want to do everything under orders. I think having the full APA process when you're making significant policy changes with the reviews and the sign-offs through the AG's Office, and also the Governor's Office is the right way to go. And season setting is a pretty specific, pretty technical component of what we do. [LB499]

SENATOR DUBAS: Thank you. [LB499]

SENATOR CARLSON: Senator Johnson. [LB499]

SENATOR JOHNSON: Thank you, Senator Carlson. Thank you, Tim. I don't know if I have a solution, but I have a thought process as coming through the municipal government side of it, whenever we have an ordinance that's introduced and there appears to be no opposition, it's just flying through and pretty simple. Everybody's there that's ever had an interest in it. The counsel, by super majority, has the ability to waive the three readings, and if that passes, then you can move forward and enact. Is there a possibility that using the waterfowl, that maybe at the July meeting, because you can't act at the same meeting, to be able to, by super majority, to suspend the rule if...and if it passes, then you could move forward. If it doesn't, then you wait until August. And then at the August meeting, you've answered all those questions and by suspension of that rule, super majority could allow you to vote that day. That still kind of follows the same process, but it still gives you the...you're still under the same rules and regulations. It just allows you to make that decision the same day. Is that an alternative? [LB499]

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TIMOTHY McCOY: Under our current structure, we still have the risk of passing anything in July because we don't have the federal frameworks. Typically don't actually have the federal frameworks at that point in time. [LB499]

SENATOR JOHNSON: So it's unlikely that you would pass it in July? [LB499]

TIMOTHY McCOY: Right now, we can't pass anything in July. [LB499]

SENATOR JOHNSON: Okay. So let's just move to August then. [LB499]

TIMOTHY McCOY: Right. [LB499]

SENATOR JOHNSON: If it's the August meeting, and so you don't have to wait again, to be able to suspend it at that point. [LB499]

TIMOTHY McCOY: We don't actually have our...the regulations don't require additional readings. Normally, our commission when they act and pass, then it goes through the rest of the APA process. [LB499]

SENATOR JOHNSON: Okay. [LB499]

TIMOTHY McCOY: So, it's, you know, some of the time that we also run into is, you know, there's some time for that review process to go through before those things can be enacted to. [LB499]

SENATOR JOHNSON: Okay. Just a thought process that I had. Thank you. [LB499]

SENATOR CARLSON: All right. Now you...I heard you say, I think I heard you say that you have a representative from the Attorney General's Office in Game and Parks Office. Is that right? [LB499]

TIMOTHY McCOY: Yes. We have an embedded Attorney General...a gentleman that works for the Attorney General's Office that's in our office at least two days, sometimes three days a week that reviews all of our rules and regulations before we even post them. And we would...we always use that review process before we make any proposed regulation change to make sure that it follows...that it's legal. [LB499]

SENATOR CARLSON: So if you have that person in your office on a very regular basis, then if you were asked if you consulted the AG's Office on a bill, you would say yes because of that representation? [LB499]

TIMOTHY McCOY: Well, yes. Normally, we have that review but the...he's the representative of the AG for our agency. But I think when it goes into actual the review

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and sign-off, under the APA I do believe it...I believe the sign-off probably has to come from the Attorney General himself. At least under statute that's how it looks. I think the Governor sign-off also has to happen. [LB499]

SENATOR CARLSON: Did he sign-off on this bill? [LB499]

TIMOTHY McCOY: He's been part of the group that worked on this bill with Governor's Policy Research. [LB499]

SENATOR CARLSON: Okay. [LB499]

TIMOTHY McCOY: Yes. He was critical in it. [LB499]

SENATOR CARLSON: Now, under the rules and regulations that you're wanting to get, what would be an instance where you would close a season, an example? [LB499]

TIMOTHY McCOY: Probably a...one of the best examples that we've ran into in the past was when the Missouri River was flooding a few years ago and we were having...supposed to be having a Paddlefish season. That's one...that was actually a threat to humans. In terms of a threat to wildlife, the EHD outbreaks we had this year with deer, kind of raised our eyes in terms of, you could have something going on with migratory waterfowl or a disease issue or just something that happens with the wildlife population that we know that it's crashing and there's problems, it would allow us to suspend that season, because right now, we can't do that. [LB499]

SENATOR CARLSON: And what would be an example where you'd want to extend a season? [LB499]

TIMOTHY McCOY: Extend a season? I don't believe that this actually would allow us to extend a season. [LB499]

SENATOR CARLSON: Wouldn't allow that. Okay. All right. [LB499]

TIMOTHY McCOY: This just allows us under emergency conditions to close a season. [LB499]

SENATOR CARLSON: Okay. All right. Thank you. Any other questions of the committee? Okay. Thank you for your testimony. [LB499]

TIMOTHY McCOY: Thank you. [LB499]

SENATOR CARLSON: Any other proponents? Any opponents or anyone testifying in a neutral position? Senator Brasch, do you want to close? Senator Brasch waives closing,

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so that closes the hearing on LB499 and thank you for coming. Committee, we will stay and go into Executive Session. [LB499]