Public Hearings and the Rule Making Process in Wisconsin: The Conservation Commission

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In discussions regarding reasons for controlling administrative discretion two frequently mentioned points are important to an understanding of the hearing stage of the rule making process. First, some control over administrative action is necessary to prevent the formation of a growing chasm which may separate the public employee from the citizenry. Second, certain checks on agency action tend to insure that the agency's activities keep within the letter and the spirit of the law as well as restricting the possibilities of arbitrary or prejudiced action.¹

Put in another way, public hearings are important in a democratic rule making process because they acquaint individuals and groups with contemplated rules which may have a direct bearing on their activities. Moreover, hearings permit those who may be affected by a proposed rule to make known their views to the administrators in charge of promulgating and enforcing the rules. In this way, theoretically, at least, public hearings insure more practical rules.²

Realistically, however, it is necessary to take into account several factors that temper these generalizations. In the first place, the influence of private individuals and groups varies greatly from agency to agency. Thus, the importance of a hearing in some agencies is considerably subordinate to personal contacts and conferences. Other agencies have obtained a reputation for the judicial fashion in which they obtain their information and in such agencies the hearing is conducted with all the formality of a court room. In either case it seems clear that the factual data developed in public hearings often is of less value than written briefs and private consultations.³

Another problem results from the essentially democratic nature of

¹ For a discussion of these and other objectives of control over administrative action see: M. E. Dimock, Forms of Control over Administrative Action, in ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION, Baltimore, 1935, p. 288.
³ For a discussion of these points see: A. Leiserson, ADMINISTRATIVE REGULATION, Chicago, 1942, pp. 54-55 and 89-93.
public hearings. Since hearings are a device through which group
opinion may be channeled for or against a proposed rule, they may
serve to delay or postpone the promulgation of a rule or to gain further
concessions for a militant interest group. Thus, while hearings are
devices of democracy, they may be used to prevent desirable rules
which are definitely in the public interest. It is because of this problem
that one authority maintains that no rigid formula for public hearings
should be laid down for all types of rules.4

GENERAL PRACTICES IN WISCONSIN5

Only eleven of Wisconsin's state agencies have had any experience
with public hearings as part of their rule making process.6 Prior to
1955, statutory provisions required four state agencies to precede all
of their rules by a public hearing,7 and seven other agencies were
required by statute to precede certain specific rules with a public hear-
ing.8 There was no statutory provision requiring other agencies to
hold public hearings in these circumstances prior to 1955. Frequently
the statutes providing for public hearings by an agency also spelled
out the type of notice for such hearings which the agency was required
to issue. These statutes, however, varied widely regarding the exact
manner of giving such notice. They differed also by providing that
notice must be published in the official state paper any time from 10
to 60 days in advance of the hearing.9

Many agencies go beyond the minimum requirement fixed by the
statutes in seeking additional means to publicize the fact that hearings
are to be held. The use of press releases sent to all newspapers in the
state and to trade journals is common. Agencies with publications of
their own, such as the Conservation Department's WISCONSIN CON-

4 See: J. Hart, in PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT,
THE EXERCISE OF RULE MAKING POWER, Special Study No. 5, Washington, 1937,
p. 31.

5 For a discussion of the importance of public hearings in the rule making pro-
cess, and of Wisconsin practice regarding such hearings and notice require-
ments see especially: LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE
RULE MAKING, STAFF REPORT ON PUBLIC PARTICIPATION IN RULE MAKING, April
22, 1954. See also: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINIS-

6 In only 3 of the agencies—the Conservation Commission, the Department of
Agriculture and the Public Service Commission—are such hearings common.
Hearings have been used to a lesser degree by the Board of Health, Industrial
Commission and the Department of Public Welfare. The Banking Department,
Bureau of Personnel, Investment Board, Board of Accountancy, and the Grain
and Warehouse Commission have even less experience with this type of hear-
ing. See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE

7 These agencies were: the Banking Department, the Investment Board, Bureau of
Personnel and the Committee on Water Pollution. See: PRELIMINARY
REPORT TO THE 1953 LEGISLATURE BY THE JOINT COMMITTEE ON RULE MAKING,
May 1953, p. 18.

8 Ibid., at Appendix B.

9 Ibid., at p. 18 and Appendix B.
SERVATION BULLETIN and THE ACTIVITIES PROGRESS REPORT, make use of them to issue notice of coming hearings. Since the uproar over its highly controversial “Milk House” order several years ago, the Department of Agriculture has followed the practice of notifying all legislators of all of its hearings on rule making.

The formality of hearings varies from agency to agency. In some, all persons who appear to testify must do so under oath. In others, persons not wishing to give oral testimony are permitted to submit written statements. Still others are conducted much in the fashion of a town meeting, where an occasional bit of gentlemanly profanity is as much in order as a lawyer’s oath. In some agencies hearings are conducted by a commissioner, in others by a law examiner or by a member of the Attorney General’s office. The proceedings of such hearings are transcribed by some agencies while other agencies do not follow this practice.

It is interesting to note that following its preliminary study of the rule making process in Wisconsin, the special legislative committee on rule making refused to make any recommendations regarding the extension of requirements for public hearings on proposed rules. However, after more than a year of intensive study, its successor, the legislative council committee on rule making came to some definite conclusions regarding the importance of public hearings in the rule making process. It recommended that as a general proposition agencies should be required to hold hearings prior to adopting, amending or repealing rules. While the committee felt emergency rules should be excepted from this generalization, it stressed the need for limiting the period of time emergency rules might continue in existence to prevent circumventing regular procedures through the unwarranted

10 Some agencies such as the Public Service Commission have developed publications whose main purpose is to give notice of the agency’s activities to interested persons. See: P.S.C. Motor Carrier Calendar, (weekly).

11 This order is credited by several legislators with primary responsibility for the creation by the legislature of the administrative rule making study by the Wisconsin Legislative Council, out of which grew the complete revision of Wisconsin’s Administrative Procedure Act contained in Wis. LAWS 1955, c. 221. For a history of the administrative rule making study see: O. Helstad and E. Sachse, A Study of Administrative Rule Making in Wisconsin, 1954 Wis. L. Rev. 368 (1954).

12 Several states have established uniform procedures for notice and hearing on rule making. Six states—California, Indiana, Massachusetts, Minnesota, Ohio and Virginia—require a public hearing to precede an agency’s adoption of a rule. The statutory provisions of these states may be found in: PRELIMINARY REPORT TO THE 1953 LEGISLATURE BY THE SPECIAL JOINT COMMITTEE ON RULE MAKING, May, 1953, Appendix D.

13 Ibid., at p. 19. The committee felt that further study was necessary, but believed that the mere interest of the legislature in rule making processes had a salutary effect on the process. Certain agencies which had been lax in holding public hearings in the past informed the committee that their future policy would be to hold such hearings whenever possible.

use of emergency rules. It also recommended improving notice procedures in connection with public hearings on proposed rules. The committee also recommended that each agency be authorized to use public participation techniques such as informal conferences and advisory committees. Its final recommendation relating to public hearings urged that present provisions authorizing formal petitions for adoption, amendment or repeal of rules should be retained and improved. It stressed, however, that procedures for submitting such petitions should be written into the law and agencies should be required to take formal action on such petitions if they are submitted by a specified number of persons.

Provisions of the Administrative Procedure Act

These proposals as incorporated in the revised Administrative Procedure Act provide that an agency shall precede all its rule making with notice and hearing unless: (1) the proposed rule is procedural rather than substantive, (2) the proposed rule is designed solely to bring the language of an existing rule in conformity with a statute which has been changed or adopted since the adoption of such rule, (3) the proposed rule is a properly adopted emergency rule, (4) the proposed rule is the adoption, revocation or modification of a statement of general policy coming within the provisions of Section 227.01(4) of the new Administrative Procedure Act. Section 227.01 (4) provides in part:

"Every statement of general policy and every interpretation of a statute specifically adopted by an agency to govern its enforcement or administration of legislation shall be issued by it and filed as a rule."

The final exception to the general hearing requirement prior to the promulgation of a rule must be set forth in detail because it is the most general in scope, and because it has caused a certain amount of misunderstanding among some agencies. Section 227.02(1)(e) provides public hearings must be held unless:

"The proposed rule is published in the notice section of the Administrative Register together with a statement to the effect..."
that the agency will adopt the proposed rule without public hearing thereon unless, within 30 days after publication of the notice, it is petitioned for a public hearing on the proposal by 25 persons who will be affected by the rule, a municipality which will be affected by the rule, or an association which is representative of a farm, labor, business, or professional group which will be affected by the rule. If the agency receives such a petition it shall not proceed with the proposed rule making until it has given notice and held a hearing as prescribed by Section 227.021 and 227.022.

It is important to note that the exceptions to the general hearing requirements just listed do not apply if another section of the statutes specifically requires the agency to hold a hearing prior to the adoption of a proposed rule. Thus, hearing procedures of the Conservation Commission relating to fish and game seasons and bag limits as set forth in Section 28.174 would not be altered by the new general hearing requirements. The exceptions to the general hearing requirements also do not apply if the agency determines that a hearing is desirable. In that event the agency has discretion to determine what kind of hearing it will hold and what kind of notice it will give.

The new Administrative Procedure Act has one section devoted to notice of hearing, which is an innovation. It provides that when an agency is required to hold a public hearing as part of its rule making process, the agency must first transmit written notice of the hearing to the Revisor of Statutes for publication in the notice section of the Administrative Register. Moreover, if a statute applicable to a specific agency or a specific rule or class of rules requires publication in a local newspaper, the agency must abide by that statute in addition to publishing in the notice section of the Register. Second, the agency must transmit written notice of such hearings to every member of the legislature who previously has made a request in writing to be notified of proposed rule making and filed it with the Revisor of Statutes. Third, the agency is authorized to take any other steps it deems necessary to convey effective notice to persons who are likely to have an interest in the proposed rule making.

Notice must be given at least 10 days prior to the date set for the hearing. Such a notice must include: (1) a statement of the time and

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See: Wis. Laws 1955, c. 221 §35.35 (1) (a) ; 35.93.

18 Wis. Laws 1955, c. 221, §227.02 (2) (a).

19 While there is some confusion among various members of the Conservation Department and the Commission regarding this point, the authors of the bill informed this writer that it was not their intent to alter hearing procedures which are established elsewhere in the statutes for specified agencies.

20 Wis. Laws 1955, c. 221, §227.02 (2) (b).

21 Wis. Laws 1955, c. 221, §227.021.

22 This provision will affect certain rules of the Conservation Commission which are to be discussed in greater detail shortly.
place at which the hearing is to be held, (2) either the express terms
or an informative summary of the proposed rule, or a description of
the subject matter, (3) as far as possible, a reference to the statutory
authority pursuant to which the agency proposed to adopt the rule,
and (4) any additional matter which may be prescribed by statute
applicable to the agency involved or to the specific rule or class of
rules under consideration.

Finally, this section provides that the failure of any person to
receive notice of a hearing on proposed rule making is not grounds
for invalidating the resulting rule if notice of the hearing was pub-
lished in the manner prescribed by the statute. Procedures for conduct-
ing hearings are spelled out in another section of the Administrative
Procedure Act. However, the procedures prescribed by this section
do not supercede procedures prescribed by any statute relating to a
specific agency or to the rule or class of rules under consideration.

CONSERVATION COMMISSION PRACTICES

Notice and hearing procedures of the Conservation Commission are
notably well-developed and almost formalized when compared with
many administrative agencies in Wisconsin. While there is no gen-
eral statutory provision requiring all rules of the Commission to be
preceded by public hearings, such requirements exist in regard to a
substantial number of the rules promulgated by the Commission.
The most specific statutory provision relates to hearings on fish and
game regulations and provides:

"The Conservation Commission may exercise the authority con-
ferred upon it . . . either on its own motion or on petition from
any group of citizens. Provided, that upon petition of not less
than one thousand citizens in cases of a contemplated order
affecting the entire state or a part thereof larger than two

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23 See: Wis. Laws 1955, c. 221, §227.022. This section provides in part, that inter-
ested persons or their representatives may present facts, views or arguments
relative to the proposed rule. The presiding officer may limit oral presenta-
tions to prevent undue repetition. But interested persons may present their
views in writing to the agency whether or not they have had the opportunity
to present them orally. The agency may administer oaths or affirmations and
must keep minutes of the hearing in a manner it determines is feasible. Any
person appearing at the meeting who so requests, shall be given an oppor-
tunity to present his views to a quorum of the board or commission ultimately
responsible for the final rule, if such quorum is not present at the hearing.
The determination as to whether such a presentation is to be written or oral
is left to the board or commission involved.

24 See for example: Wisconsin Legislative Council, 1955 Report, Administra-
to the 1953 Legislature, May 1953, Appendix B; Wisconsin Legislative
Council, Interim Report on Administrative Rule Making, No. I, August,
1953, pp. 73-93.

25 See for example: Wis. Stats. (1953) §§29.174(3); 77.06(2); 77.02(2);
77.10(1); 144.537.

counties or of not less than fifty citizens residing in the county if but a single county or part thereof is affected, or of not less than one hundred citizens residing in the two counties if not more than two counties or parts thereof are affected, the Commission shall conduct one or more public hearings upon such order at a place convenient to the petitioners. Notice of such hearings shall be published at least once a week for three successive weeks in the official state paper in the case of an order affecting the entire state and in such newspapers as will fairly advise the residents of the community affected in the case of an order affecting a part of the state only. At the hearing, any person having any testimony to present which bears upon the contemplated order shall be given an opportunity to be heard. A complete stenographic record shall be kept of all testimony taken.”

NOTICE PROCEDURES

The notice of a hearing which is to be held to consider a proposed conservation rule normally contains only a brief statement of the purpose of the hearing, plus the time and the place of the hearing. Actual drafts of the proposed rules are not included with copies of the notice sent to interested persons.

Especially noteworthy are the ends to which the Department and the Commission go to insure that all interested persons are notified of a forthcoming hearing. News releases frequently are prepared by the public relations personnel of the Department for general distribution to newspapers throughout the state. Of course, notice was always published in the official state newspaper and in other papers of general circulation in the areas most likely to be affected by the rule as required by statute. Notice of most hearings is also published in the Department’s CONSERVATION BULLETIN (67,000 copies) and its ACTIVITIES PROGRESS REPORT (4,000 copies). In addition, letters announcing the hearings are frequently sent to conservation clubs, and posters and postcard announcements are widely distributed. All of these techniques are utilized to publicize the notice of the yearly county meetings at which delegates to the Conservation Congress are elected.

27 The rule making bill—5, S,—as recommended by the Legislative Council eliminated the requirements regarding publication of notice in the official state paper and in local papers for rules affecting only portions of the state. This was because publication would be governed by the general publication requirements for rules in, Sections 227.025 and 35.93, which provide for publication in the ADMINISTRATIVE CODE and REGISTER. See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part I, Dec. 1954, p. 40. In the senate, however, Senator Paul Rogan introduced amendment 2, S. which reinstated the requirement to publish notice in local papers for rules affecting local areas only. While opposed by the Conservation Department, the amendment was approved by the legislature and constitutes the only major alteration in the bill as submitted by the Legislative Council. See: WIS. LAWS 1955, c. 221, §29.174(3).
Hearing Procedures

Fish and Game Regulations. It has been noted previously that there is no general provision requiring that all rules of the Commission be preceded by a public hearing. Requirements for a hearing that do exist for certain classes of rules have produced a variety of hearing procedures. The requirements of Section 29.174(3), just noted, are fulfilled by the Conservation Congress system (including the 71 county meetings) which accommodates the hearing stage of the rule making process as well as the initiation, drafting and advisory stages. For example, one rule recites:26

"(T)he said State Conservation Commission, after due notice . . . held public hearings . . . in seventy-one county seats or other properly designated places, to secure recommendations concerning the open and closed seasons, bag limits, size limits . . ."

While it has been previously mentioned, it should be reiterated that county hearings are not formal proceedings requiring an examiner or presentation of testimony in a formal manner before a Commissioner or the entire Commission. These hearings are held under the jurisdiction of a Commission employe, and while a record is kept, irrelevant testimony is not made a matter of record. Department instructions in this respect state:

"It is suggested that the Department representative inform the chairman during the hearing as to which facts are pertinent . . . however, matters pertinent to the general discussion of conservation should not be deleted under any consideration . . . It is imperative, however, that the votes on each question be secured. Also, the stenographer should be instructed not to take notes on elections unless reasons are given for doing so."

The culmination of the hearing process on fish and game regulations is the annual meeting of the Conservation Congress. A verbatim copy of Congress proceedings is obtained by recording all that transpires on a tape recorder.

Interstate Boundary Waters. In addition to the hearing procedures afforded by the Conservation Congress system, separate public hearings are held on various other classes of rules. In most instances hearings are held on rule proposals relating to interstate boundary waters and commercial fishing, although conservation laws on the subject do not specifically require such hearing. Notices of hearings to be held dealing with interstate boundary waters and commercial fishing do not contain drafts of the rule proposals, but merely mention the purpose of the meeting, plus the time and place at which the hearing is to be held. An example of the procedures followed may be seen

26 Rule #F-797 (Amend.1) (1952).
by noting the process followed regarding a proposed rule on commercial fishing in the Great Lakes which occurred in 1952.29

Following the recommendations of the Great Lakes Fishery Advisory Committee, the Department held public hearings in Washburn, Oconto, Sturgeon Bay and Milwaukee. Two mimeographed letters were sent to interested persons, with the first letter requesting the recipient's ideas for items to be included on a proposed questionnaire. Three weeks later and three weeks before the hearing was held, the second letter was sent to all conservation wardens, licensed commercial fishermen and members of the Advisory Committee. One noteworthy paragraph states:

"All persons who have testimony or recommendations to offer will be given an opportunity to be heard. Although notices of the hearings are being published in local papers to meet the statutory requirements, we are sending this letter to call specific attention to the hearings and would appreciate having you notify as many people as possible about the hearings so that all interested will be in attendance."

These hearings are not mere formalities. They are normally well attended and the discussions frequently become quite heated. Comparisons of the points of consensus at such hearings and the final recommendations of the Great Lakes Fishery Advisory Committee and the Conservation Department indicate the Committee's and Department's willingness to accept ideas put forth at the hearings.30 As a result, ideas voiced at such hearings often find their way into final conservation rules.

When hearings are not held on rules of this nature, compelling reasons are usually present. For example, in 1953 Dr. Schneberger informed the Commission at its April meeting of the urgency of adopting a rule pertaining to the licensing of trammel nets in the Mississippi River. This rule, he explained, should be regarded as an emergency measure since the Legislature had just passed an enactment permitting such nets and the Governor's approval was expected momentarily. Immediate commission action was urged because of the growing competition between Iowa and Wisconsin commercial fishermen. This explained why no public hearings had been held. But since no hearing was held, Dr. Schneberger pointed out, the wording and provisions of the rule were kept simple. The Commission formally approved the rule.31

29 Rule #F-405 (1952).
30 Compare, for example, Transcript of Public Hearing on Great Lakes Fishing, Milwaukee Court House, July 19, 1954 to the final rules approved by the Commission as spelled out in the Conservation Commission Minutes, October 7, 1954.
31 See: Conservation Commission Minutes, April 10, 1953, p. 10.
Forest Crop Lands. Public hearings are required on rules setting aside privately owned lands as forest crop lands. As outlined by statute, personal notice of the hearing must be given the owner of the land and to the town assessor and notice to others must be given through publication in at least one county newspaper. Department personnel agree that such hearings are usually a matter of formality since seldom is there any objection to entering lands under the forest crop law. These hearings, however, unlike those dealing with proposed rules on commercial fishing and interstate boundary waters are conducted in a formal fashion.

All petitions to bring land under the forest crop act, however, are not approved. At the October, 1954 meeting of the Conservation Commission, Mr. Erdlitz, head of the forest crop section recommended rejecting a petition of this nature affecting lands in Shawano County because his field examination indicated that the tract was more valuable for recreational than for forestry purposes. The Shawano County board sustained Mr. Erdlitz's recommendation for rejection and the Conservation Commission concurred.

There is considerable evidence to indicate that the Conservation Commission looks carefully at any attempt to remove lands from provisions of the forest crop act once they have been approved. For example, petitions to remove land from provisions of the act have been rejected because: the lands were submarginal for agricultural purposes and because the land contained valuable hardwood cover where the danger of forest fires would increase if the request was granted since the county in question intended to create a dumping ground on the lands involved.

Miscellaneous Hearings. On many of the other subjects over which the Conservation Commission has jurisdiction, whether or not a hearing is held seems to depend upon the nature of the contemplated change. For example, hearings are not normally held on rescinding fish refuges. However, when a rather heated controversy developed among property owners along the shores of Gilbert Lake as to whether the rule establishing the lake as a fish refuge should be rescinded, the Commission, primarily in the interests of public relations, held a hearing in an attempt to determine the consensus regarding the continuation of the refuge. Official notice was published in the local papers and in addition posters containing notice of the forthcoming hearing were prepared. The notice publication was unusual in that it contained the statement that sworn testimony would be taken at the hearing.

32 Wis. Stats. (1953) §77.02.
33 See: Conservation Commission Minutes, October 7, 1954, p. 11.
35 Conservation Commission Minutes, July 9, 1954, p. 11.
The hearing was presided over by Dr. Schneberger, a representative of the Department, and all that transpired was recorded. Ballots were provided for those who wished to register their feelings but did not wish to make an oral presentation.\textsuperscript{36}

Public hearings are held by the Commission on a host of other miscellaneous problems. Recently a series of hearings were held to determine the sentiment of persons leasing land or property from the Commission on proposed alterations in the Commission's leasing policies.\textsuperscript{37} When a new trout management policy was being seriously considered by the Commission, then-Director Swift suggested that it might be well before the policy was adopted to hold formal public hearings in each conservation area of the state to test public sentiment. The Commission moved that "while the policy is sound" public hearings should be held to obtain suggestions and criticisms which would be taken into consideration before the final policy was adopted.\textsuperscript{38}

When one township board, of the several involved, was slow to approve permitting certain property in its jurisdiction into becoming part of the West Shore Conservation Area, the Conservation Commission held public hearings there to determine the extent of support and opposition to the plan before final Commission action was taken.\textsuperscript{39}

On the other hand, if the subject of a proposed rule does not seem to warrant a hearing, and where the statutes do not seem to require one, hearings are not held. For example, regarding a proposed revision of a rule dealing with the taking of mussels and clams in inland waters, the Superintendent of the Fish Management Division wrote to the Conservation Director, "Since this is a rather minor matter, public hearings are not necessary."

It is clear from the above that Conservation Commission practice generally favors the informal type of hearing arrangement. As an experiment, a short time ago, the Commission sponsored "model" fur hearings at which sworn testimony was taken, and the hearing conducted in the more formal court-room-type atmosphere. Following the hearings, the Department solicited the reactions of the participants to this type of approach. The replies ranged from those critical of the new procedure to those which expressed no preference. No significant sentiment favoring the formal approach was apparent. Various representatives of the Department have also indicated that a marked reluctance actively to participate in a hearing is notable among those present whenever sworn testimony is called for in a specific hearing.

\begin{quote}
Hearings on License Petitions. The hearings most closely ap-
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proaching the formal variety are concerned with granting licenses for private fish hatcheries. The purpose of such hearings is to determine if public rights are involved regarding the proposed licensing of a private fish hatchery on a spring or landlocked pond. Notice of such hearings is published once in the local newspaper, usually one week in advance of the hearing. In addition to publication in a newspaper, a copy of the notice is sent to the county clerk, the local conservation warden, local Conservation Congress delegates, and to the persons directly involved in seeking to obtain the license.

The hearing itself, as previously mentioned, is formal in nature. Sworn testimony is taken upon which findings of fact and conclusions of law are based. Such hearings are presided over by the Conservation Department counsel and the testimony is recorded on a disc-recording machine. The Department counsel accepts the responsibility for seeing that the testimony is confined to the issues involved, and that the normal judicial rules of evidence are observed in a slightly liberalized form. Petitioners are seldom represented by counsel and the license petition is even less frequently contested. As a result the Department counsel has found that during the course of such hearings, it is he that does most of the examining.40

No public hearings, however, are held on license petitions for private deer or game farms. Regarding private deer farms, the Commission has adopted a rule spelling out the height of a fence necessary to obtain a private deer farm license as required by Wis. Stats. (1953), Section 29.578(16). This, however, is the only standard adopted as a formal rule by the Commission relating to such licensing.

Public hearings, as such, are not normally held regarding adoption or alteration in rules affecting licensed private shooting preserves. However, Mr. Grimmer, of the Conservation Department, when discussing Rule M-102 (Rev. 7) relating to this subject at a Commission meeting, noted that the Department's recommendation resulted from recommendations of the shooting preserve committee, the game management board, and meetings with individuals and groups of licensed shooting preserve operators.41

The action of other agencies also occasionally forces alterations in Conservation Commission licensing procedures. For example, the Commission rule requiring that metal license tags be attached to each tame pheasant canned by licensed pheasant breeders in Wisconsin was changed when the State Board of Health refused to permit metal tags inside of the sealed containers. The Commission then unanimously

40 In his general discussion of this phase of the rule making and contested case process, Fuchs also notes that cross examination will rarely be asserted except where there is a genuine contest. See: R. F. Fuchs, Rule Making and Contested Cases, 33 Iowa L. Rev. 225 (1948).
approved of permitting pheasant breeders to stamp the tag number on the outside of the can.\(^{42}\)

It is the view of representatives of the Department that they prefer to keep specific and formal standards used as guides in licensing procedures at a minimum. This, they believe, permits them to determine each petition for a license on a case-to-case approach.

It is the contention of the Department counsel that notice and hearing relating to licensing procedures cannot be regarded as part of the rule making process. Such procedures, Mr. Kaminski believes, must be considered as part of the "contested case" process as outlined in Wis. Stats. (1953), Section 227.01(3), since licensing affects private rights and interests. However, while it may be conceded that the actual granting or refusal to grant a license may be a contested case, it would seem that the formal or informal adoption of standards by the Commission which are to be used generally in determining whether or not licenses should be granted, could be regarded as examples of rule making.\(^{43}\)

It is worth noting that in 1953, then-Assistant Director H. T. J. Cramer requested an informal Attorney General’s opinion as to what procedures the Commission should follow in respect to holding public hearings on license petitions. In a law memorandum dated April 15, 1953, Assistant Attorney General Roy Tulane presented his views on the subject to Mr. Cramer.\(^{44}\)

Mr. Tulane could find no statutory provision in Chapters 23 or 29 of Wisconsin Statutes which regulated the manner in which the Commission must administer the licensing laws. It might be assumed, therefore, that the legislature left it up to the Conservation Commission to adopt proper rules governing public hearings on license petitions, he explained. However, the Assistant Attorney General went on to suggest a number of procedures that might be followed. First, it was thought that such hearings might be conducted by any properly designated employe. Second, if convenient, it would be desirable that a transcript of the testimony be taken and that witnesses be sworn, Mr. Tulane believed. Such a transcript should then be reviewed by the staff, and the Director on the advice of Department personnel might then either grant or deny the license. If the petition was denied, the Assistant Attorney General concluded, the petitioner

\(^{42}\) See: Conservation Commission Minutes, November 13, 1953, p. 5.

\(^{43}\) For a discussion of the importance of establishing clear standards in licensing through the adoption of administrative rules see: L. D. White, Public Administration, New York, 1948, pp. 541-42.

\(^{44}\) It must be pointed out that such law memoranda of the Attorney General’s office contains the following heading; “This memorandum represents the author’s personal views. It is not to be quoted or referred to as an Attorney General’s opinion or as representing the views of the Attorney General’s Department.”
on request should obtain a hearing on the record before the full Commission. There is no evidence, however, that the Commission or the Department attempted consciously to follow these suggestions.

Despite the obvious concern of the Commission and Department over providing ample opportunities for public hearings, occasional criticism of the hearing procedure is heard. Several years ago the Commission received a letter from Mr. Wallace Grange, president of the Citizens Natural Resources Association, protesting the method of conducting a meeting held in Horicon regarding a proposed rule to open portions of the Horicon Marsh to goose hunting. Mr. Grange contended that the chairman of the meeting attempted to impose gag rule through a five-minute limitation on discussion and by requiring that discussion be confined to the arrangements applicable to the proposed rule. In his opinion, Mr. Grange concluded, the minimum standards which should apply to the conduct of any public meeting called by a state agency were not met at the Horicon meeting.

In answer to Mr. Grange's charges, then-Director Swift explained to the Commission that the meeting referred to was not called by the Wisconsin Conservation Department but by the United States Fish and Wildlife Service. This agency requested that some Wisconsin Conservation Department personnel be present at the meeting. There were approximately 500 people present at the meeting, Mr. Swift pointed out, and it was the desire of the group that the meeting should not be dominated by certain persons who might usurp more than their fair share of the time. The group, therefore, voted by acclamation to place a 5-minute limitation on each individual presentation. The minutes of this Commission meeting indicate that "no decisions were made" regarding the Grange charge.45

Suggestions to improve various aspects of Conservation Commission hearing procedures—particularly in respect to the Conservation Congress—are occasionally voiced by commissioners themselves. Commissioner Smith suggested, for example, that some changes be made in the Congress so that county committees would be informed that if they differed with Congress recommendations they should make this fact known to the Commission before the order was finally adopted.46

**Effects of the New Administrative Procedure Act**

Before concluding the discussion of the notice and hearing phase of the rule making process in conservation a word might be added regarding the effects of the new Administrative Procedure Act in this area. In general, it may be said that where conservation statutes outline the procedure for notice and hearing regarding a proposed rule,
the new Administrative Procedure Act will not materially alter this stage of the process. The one major exception, however, is that under the new law, notice of the hearing will be published in the notice section of the new ADMINISTRATIVE REGISTER instead of being published in the official state newspaper.47 (However, rules of local applicability will continue to be published in 3 newspapers "of wide circulation" in the territory affected, since the new Act leaves unchanged Wts. Stats. (1953) §23.09(9). In addition, the agency is also required to transmit written notice of a hearing to every member of the legislature who has previously filed a written request for such notice with the Revisor of Statutes.48

The new Administrative Procedure Act generally excepts from its provisions dealing with notice and hearing those classes of rules which have their notice and hearing procedures outlined elsewhere in the statutes.49 Nonetheless, there is concern among some persons charged with conservation regulation that previously established procedures will be drastically altered—particularly in the field of fish and game regulations. In his speech before the Twentieth Annual Conservation Congress in Madison, June 6, 1955, Conservation Commissioner-elect, Arthur R. MacArthur said:50

"I would also like to call your attention to a future basic change in the relationship between the Commission, the Department, and the Congress. I am referring to Bill 5, S. recently enacted into law by the present Legislature. This law provides that the Conservation Commission in the future will submit proposed orders for consideration at the annual county meetings. At the present time, the Department recommendations are considered at the county meetings and the Commission sits in a more or less judicial position to consider recommendations of the Department and the Congress before a Commission proposal is drafted. This will, therefore, be changed in the future. This does not mean, however, that the recommendations of the Congress will not receive the same consideration which they now receive by the Commission. It merely means that the Commission will be required to consider departmental recommendations prior to the time the questionnaire is prepared for discussion at the county meetings."

The minutes of the Executive Council of the Conservation Con-
gress meeting, June 5, 1955, reveal that another point was voiced by a Department employe at that gathering. The minutes read:51

"Mr. J. R. Smith said a new procedure would be put into opera-
tion if Bill 5, S. affecting closed areas becomes law. There
would be a hearing on every closed area and next year it is
going to be handled at the county meetings."

It is the conclusion of the Wisconsin legislative council staff which
drafted the new bill that the concern of the Conservation Department
and Commission over completely revamping their fish and game hear-
ing procedures is unwarranted. The staff noted that there was no
intent on the part of those responsible for the new Act to alter hearing
procedures outlined elsewhere in the statutes. The Act attempts to
spell out hearing procedures for those agencies and classes of rules
where the previous law was silent on the subject. Moreover, it is
difficult to point to any section of the new law as evidence for the
view expounded by some Department and Commission officials.

But even if it were conceded that the provisions of Section 29.174
(3) do not specifically outline procedures relating to the conduct of
hearings on fish and game seasons (thus bringing this area into the
scope of Section 227.012) the procedures now followed by the Com-
mission in this area appear to conform to the requirements of the
revised Administrative Procedure Act.

If, however, there are no provisions elsewhere in the statutes
establishing notice and hearing techniques for any class of proposed
rules, the general provisions of the new Act come into play. In this
fashion the new Act will affect notice and hearing procedures of the
Conservation Commission in regard to those areas where the statutes
do not spell out the procedures to be followed. Examples of this
would be: rules establishing fish and game refuges, forest protection
districts, state forests and state parks, or any other rules on which
the Commission does not normally hold hearings. Since the general
requirements of the new Administrative Procedure Act relating to
notice and hearing on those rules where other statutes do not outline
the procedures to be followed have been discussed elsewhere, no attempt
will be made here to repeat them.52

**Making the Final Rule**

**General Practices.** Practice in regard to making the final rule
differs not only among state agencies, but also within an agency, de-
 pending upon whether or not a hearing on the rule has been held.

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51 Meeting of Executive Council of the Conservation Congress, Madison, Wiscon-
sin, June 5, 1955. Insofar as there are no statutory provisions establishing no-
tice and hearing procedures for rules establishing closed areas, Mr. Smith's
view of Bill 5, S. is probably correct.

52 See: Pages 5-8, supra.
If no public hearing has been held the making of the final rule is normally not a distinguishable step in the rule making process. Following a public hearing on a proposed rule, however, there is usually a period of time devoted to deliberation and redrafting the rule in view of the information obtained or the views expressed at the meeting. Thus the basic objectives of the public hearing are realized.

Until 1953, the form of the final rule as well as the procedures used in making the final rule were the responsibility of the person or persons in an agency upon whom the statutes conferred the authority to promulgate rules. So far as the form of rules is concerned, the special joint committee on rule making found in 1953, that not only was there no uniformity in the form of the final rules of the various agencies, but frequently there was no uniformity in the rules issued by a single agency. Even the form of numbering used for rules differed not only among agencies but within an agency.

The committee, therefore, recommended the passage of Bill No. 25, S., which became Chapter 276, Wis. Laws 1953. It provided that each agency must publish its own rules in pamphlet form. The pages must be of uniform size for all agencies, the same size type must be used, the pamphlets must be hole-punched for a ring-binder, the decimal numbering system must be employed and the Revisor of Statutes must approve the outline and numbering. The Revisor of Statutes was also required to compile and publish an annual index governing all the rules.

While the legislative council committee on administrative rule making generally approved of the provisions of the 1953 act, it recommended further clarification by statute of the final form of rules. The committee's recommendation in this regard is included in the new Administrative Procedure Act. This provision carefully spells out the exact form of the rule and the numbering procedure for such rules. It cautions against unnecessary repetition of statutory language, but permits an agency to include with its rules brief notes, illustrations, findings of fact, digests of Supreme Court cases or Attorney General's opinions or other explanatory materials, so long as they are distinguished from the rules. The Revisor of Statutes, however, is authorized to edit such materials before publication in the ADMINISTRATIVE

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64 See: PRELIMINARY REPORT TO THE 1953 LEGISLATURE, May 1953, p. 20.


66 Wis. Laws 1955, c. 221, §227.024.
Code and Register and may eliminate them entirely.\textsuperscript{57} Finally, the Revisor of Statutes may, in order to preserve uniformity in the Administrative Code, change the title or numbering of any rule, and must furnish advice and assistance to any agency requesting it, in respect to the form and mechanics of rule drafting.

**Conservation Commission and Department Procedures**

When it comes time to make the draft of the final rule the process varies from the most informal to the most formal of procedures followed, depending upon the agency.\textsuperscript{58} Two agencies following the most formal process are the Public Service Commission\textsuperscript{59} and the Conservation Commission. A standard routine was established for the Conservation Department by the Director's letter of February 2, 1950, in order to facilitate the final preparation of rules and to insure their accuracy.

Following completion of the necessary research work, public hearings and investigations, the respective division chief submits the information obtained therefrom, together with his recommendations, to the chief warden, and, when necessary, to the proper Department boards for correction or additions. As previously noted, the Department has developed staff boards on game, fishery, forestry and law enforcement.\textsuperscript{60} The division chief then submits a written request for the preparation of the rule to the Assistant Director. The request must contain all essential data and indicate clearly the position of the chief warden and the staff boards regarding the proposal. Furthermore, all original material pertaining to the proposal must accompany the request. The Assistant Director in turn refers the request to the Department counsel for the actual drafting of the proposal.

The rough draft prepared by the counsel is next submitted to the respective division chief who compares it with the original material and indicates his approval or queries in writing on the rough draft. The rough draft is then prepared and forwarded by the division chief through regular departmental channels to the Director for his approval. Included with the draft at this stage is a memorandum prepared by the division chief setting forth the essential points of the proposal. The rough draft of the rule and the memorandum must reach the Director's desk at least two weeks before the Commission meeting to

\textsuperscript{57} The revisor of statutes must, however, submit the edited version to the agency for its comments prior to publication.

\textsuperscript{58} For a discussion of this phase of the rule making process as it operates in a great variety of Wisconsin agencies see in particular: Wisconsin Legislative Council, Interim Report on Administrative Rule Making, Part II, Feb. 1954.


\textsuperscript{60} These boards cut across division lines and aid in achieving administrative coordination. They also conduct studies and surveys on departmental problems.
enable the Director and Assistant Director to have ample time to study, discuss, correct or modify the draft.

In spite of this detailed procedure aimed at avoiding mistakes in the final form of conservation rules, errors are inevitable. When errors are discovered the Commission is forced to formally amend the rule to correct it. In 1954, for example, Dr. Schneberger explained to the Commission that the provision prohibiting attendance of set lines at night was included erroneously in Rule F-825. Since enforcement of this provision would cause serious handicaps to the operation of set lines in the Mississippi River and since this was not required by Minnesota, Dr. Schneberger recommended the deletion of this section from the rules. The Commission unanimously approved.\(^{61}\)

Prior to the Commission meeting, Commissioners are circularized by the Director with the Department's recommendations. It must be emphasized, however, that the Commission frequently overrules the Department in refusing to adopt recommended rules. For example, the Department recommended a 3-inch, spike-horn buck deer season in 1955, and the Conservation Congress, by a voice vote for the first time in its history, concurred in the Department's recommendation. The Commission, after being prodded by Commissioner Smith, turned down this recommendation at its meeting in Wautoma, July 8, 1955, and voted instead for a fork-horned buck season.\(^{62}\)

Commission action is always determined by majority vote and dissenting votes are not uncommon. Within 24 hours after affirmative Commission action, the Director's letter states, the division chief must take steps to process the rules. To fulfill this requirement, the chief prepares a memorandum to the Assistant Director setting forth Commission action and requesting the counsel to prepare the final draft of the rule. The Assistant Director, in turn, forwards this request to the counsel.

After the final draft is prepared by the counsel it is compared with the original material, proofread, and checked for accuracy by the division chief concerned, the chief warden, the counsel, and by any other Department personnel the division chief may wish to call upon. Each proofreader must certify by memorandum that he has compared the final draft with the original material and after proofreading and

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\(^{61}\) Conservation Commission Minutes, April 9, 1954, p. 16

\(^{62}\) The Commission at this meeting refused to adopt what seems to be an unusually large number of departmental recommendations which had been concurred in by the Conservation Congress particularly in the field of game rules. An indication of this may be seen by comparing the recommendations of the Congress as they appeared in the Wisconsin State Journal, June 8, 1955, to the actual rules adopted by the commission as outlined in the Wisconsin State Journal, July 10, 1955. For comments on this action see: Milwaukee Journal, July 18, 1955; Superior Evening Telegram, August 8, 1955, R. G. Lynch, Maybe I'm Wrong, Milwaukee Journal, August 14, 1955.
checking it for accuracy has found it to be correct. The division chief
next submits the final draft along with the memoranda signed by the
proofreaders to the Assistant Director, who in turn requests the coun-
sel to submit the final draft personally to the Attorney General for
approval. 63

Following approval by the Attorney General, the Assistant Director,
when the rule involves fish and game regulations under Chapter 29 of
WISCONSIN STATUTES, requests the division chief to prepare a letter
of transmittal to the Governor, whose approval is required. The final
draft and the letter to the Governor, together with the memoranda of
the proofreaders, is then submitted to the Director for his approval.
When the Governor's and the Director's approval have been received,
the rule is returned to the counsel. Prior to the adoption of Chapter
221, WISCONSIN LAWS 1955, the counsel then filed the rule with the
Secretary of State, the Revisor of Statutes and the legislative council.
Under the new Administrative Procedure Act, however, the rule need
no longer be filed with the legislative council after January 1, 1956. 64
In the past the directive of the Director stipulated that the Depart-
ment counsel was responsible for the publication of the rule in the
official state newspaper as well as its distribution to interested per-
sons. 65 Part of the procedure will of necessity be changed since the
adoption of the revised Administrative Procedure Act. This Act
abolishes the requirement for publishing rules in the official state
paper, and replaces it with the requirement that rules be published
in the new ADMINISTRATIVE REGISTER. 66 Department policy, while not
yet completely formalized in this regard seems to place the responsi-
bility on the Department counsel for seeing that the rule is published
in the new publication.

The Director's letter formalizing the procedures for drafting the
final rule requires that the rule making process be given "priority

63 This is a rather unique clearance procedure which results from departmental
policy rather than statutory requirement, as is normally the case with clearance
requirements. In practice, the counsel for the Conservation Department sub-
mits the final draft of the proposed rule in person to the Assistant Attorney
General assigned to the Commission.
64 See: WISCONSIN LAWS 1955, c. 221, §227.023 (1). The requirement that rules must be
filed with the Legislative Council was introduced into the statutes in 1953 to
facilitate the Legislative Council's study on administrative rule making. With
the completion of that study, there is no longer any need for this filing re-
quirement. See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINIST-
65 In addition to publication in the official state paper, over 1,500 copies of new
rules of statewide significance are distributed to interested persons including
all district attorneys, judges, county clerks, clerks of Circuit Court and to the
Attorney General. Copies of rules pertaining to commercial fishermen are sent
to all licensed commercial fishermen. Over 600,000 each of the pamphlets
Wisconsin Hunting Regulations and Wisconsin Fishing Regulations are dis-
tributed to each person purchasing a hunting or fishing license.
66 See: WISCONSIN LAWS 1955, c. 221, §35.93 and 227.025.
treatment” and all Department personnel are directed to cooperate with
the counsel “in every way possible” in order to expedite the processing
of rules and also to insure their accuracy. The only exceptions to the
formalized procedures just outlined relate to the issuance of emerg-
ency rules such as fire regulations and are only permitted with the
approval of the Assistant Director and the Director.

It is the feeling of the Conservation Department that adoption of
the revised Administrative Procedure Act will require certain altera-
tions in the procedures outlined in the Director’s letter of 1950. In a
letter to all supervisory personnel dated January 4, 1956, the Director
outlined tentative alterations in procedures relating to the preparation
and submission of rules. No action was taken to rescind the existing
directive, however, because it was considered desirable to gain experi-
ence with the new procedures.

The changes relate primarily to the time schedule or routing of
recommendations, the letter noted, and this is now an even more im-
portant item than in the past. Thus the new schedules should be
substituted immediately. The Director estimated that it will take ap-
proximately three months to process a rule under the new system.
This, it was emphasized, is an especially important element to bear in
mind regarding fish and game season rules. To clarify this point the
letter outlines a hypothetical rule and the dates on which the various
stages of the rule making procedure would occur to fall within the
provisions of the law.

Regarding such rules, the directive explains, it is planned that the
Department recommendations will be considered by the Commission
at the April meeting so it can adopt tentative rules at that time which
can be considered in May at the official county hearings. The Com-
mission would then consider the testimony from these hearings and
from the June statewide session of the Conservation Congress when
it makes any necessary changes or amendments to establish final rules.

While noting that the new Act provides for certain situations when
no hearing need be held, the Director’s letter notes, this method will
be used very seldom by the Conservation Commission. The memoran-
dum concludes by noting that there actually is no great change from
previous procedures so far as the Conservation Commission and De-
partment are concerned. The new time schedule and the preliminary
action of the Commission in adopting a proposed rule are the two
major changes. There are those who might even question whether the
new law requires the preliminary action of the Commission on rules.

SUMMARY

Public hearings serve several important functions in the administra-
tive process. First, they acquaint individuals and groups with con-
templated administrative rules which may have a direct bearing on their activities. Second, public hearings permit those who may be affected by a proposed rule to make known their views to the administrators charged with promulgating and enforcing the rule, thus, theoretically, at least, insuring a more practicable rule. As such, it is difficult to overemphasize the importance of public hearings in the democratic administrative process.

Of the eleven Wisconsin agencies which have had some experience with public hearings on proposed rules, the Conservation Commission has established some of the best developed procedures. Few agencies can boast of as wide-spread and formalized an arrangement for public hearings as the Conservation Congress system and the 71 annual county meetings. While there is no general statutory provision requiring that all rules of the Commission be preceded by a public hearing, such provisions do exist for rules dealing with fish and game seasons and petitions to enter land under the forest crop act. In addition, hearings are regularly held on rules relating to interstate boundary waters, commercial fishing and petitions for private fish hatchery licenses.

The Conservation Commission goes to great lengths to publicize notice of such hearings. Prior to 1955, the statutes normally required publication of notice in the official state newspaper for those rules on which a hearing was required by law. The Commission, however, usually goes further in its attempts to publicize notice of hearings and normally provides for press releases in a variety of state newspapers, publication in the department's Conservation Bulletin and Activities Progress Report, letters to local conservation clubs and the preparation of posters announcing hearings. Hearings on conservation rules are normally conducted in an informal fashion, with the exception of hearings on forest crop lands and petitions for private fish hatchery licenses. Moreover, the Conservation Commission and Department have adopted one of the most formalized methods for drafting the final rules, thus insuring their accuracy and uniformity regarding form and numbering with other rules promulgated by the Commission.

The adoption of the revised Administrative Procedure Act by the 1955 legislature will cause certain alterations in Conservation Commission and Department methodology regarding the hearing process and the form of the final rule. However, it would not appear to alter hearing procedures that are established elsewhere in the statutes which affect the Conservation Commission. Where hearings are not specifically required on a certain rule in the conservation law, the new Administrative Procedure Act normally requires that such hearings are to be held unless the rule falls into one of the classified exceptions listed
in the Act. Under the new Act, notice of hearings will no longer be published in the official state newspaper, but will be published in the new Administrative Register. Moreover, the new Act carefully spells out the form that the draft of a rule must follow as well as the numbering system which must be used. It also requires filing such rules with the Revisor of Statutes for publication in the Administrative Register.

The enactment of the revised Administrative Procedure Act has caused concern among certain elements within the Conservation Department and Commission. It is their belief that the new Act will drastically alter established methods of holding public hearings on conservation rules, particularly in the area of fish and game seasons. The belief has been expressed that under the new legislation the relationship of the Commission and the Conservation Congress must in some fashion be changed, although there is as yet no clearly formulated view of what the new arrangement is to be.

The drafters of the new Act, however, have pointed out that there was no intent to alter hearing procedures that are spelled out in the statutes dealing with specific agencies, such as in the case of Wis. Stats. (1953) Section 29.174, dealing with hearings on hunting and fishing regulations. The new Act, rather, attempts to provide hearing procedures for those classes of rules where the statutes prior to 1955 did not specifically require hearings. Moreover, it is difficult to find any provision in the new Act which can be used as evidence to support the view of those conservation officials who maintain that major changes in fish and game hearings are required.

There would seem to be some elements in the Department and the Commission, as is probably true in all administrative agencies, who favor limiting public participation in the agency's rule making and policy-forming functions. This would presumably insure that the agency's technicians and professionals would play a larger part in these activities. There are those who might see the argument that the new Administrative Procedure Act requires a widespread change in conservation hearing procedures as an opening wedge in a drive to increase the role of the conservation professionals in rule making at the expense of the Conservation Congress and other organizations representing the public.