

NATURAL RESOURCES COMMISSION

The Garrison
Fort Harrison State Park
6002 North Post Road
Indianapolis (Lawrence), Indiana

Minutes of January 13, 2009

MEMBERS PRESENT

Bryan Poynter, Chair
Jane Ann Stautz, Vice Chair
Robert Carter, Jr., Secretary
Patrick Early
Mark Ahearn
Brian Blackford
Robert Wright
Thomas Easterly
Larry Klein
Doug Grant

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESEN

John Davis	Executive Office
Chris Smith	Executive Office
Dan Bortner	State Parks and Reservoirs
Cheryl Hampton	State Parks and Reservoirs
Lance Tresenriter	State Parks and Reservoirs
Nicole Thiele	State Parks and Reservoirs
John Bryman	State Parks and Reservoirs
Ryan Lemley	State Parks and Reservoirs
Terri Price	Division of Water
James Hebenstreit	Division of Water
Traci Powell	Division of Water
Bourke Patton	Indiana Heritage Foundation
Glen Salmon	Fish and Wildlife
Linnea Petercheff	Fish and Wildlife
Tom Flatt	Fish and Wildlife
Megan Abraham	Entomology and Plant Pathology
Phil Marshall	Entomology and Plant Pathology
Mike Crider	Law Enforcement
Samuel Purvis	Law Enforcement

GUESTS PRESENT

David Grupenhoff	Mike Mullett
Alan Hux	Mark Ennes
David Swart	Evelyn Keut
Dan Bright	Rick Hofstetter
Frank Mueller	Ethan Lowe
Jack Corpuz	

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:09 a.m., EST, on January 13, 2009, at the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of ten members, the Chair observed a quorum.

Larry Klein moved to approve the minutes of the Commission's November 18, 2008 minutes without amendment. Patrick Early seconded the motion. Upon a voice vote, the motion carried.

Election of Officers

Patrick Early made a motion to re-elect current slate of officers for the year 2009. He nominated Bryan Poynter as Chair, Jane Ann Stautz as Vice Chair, and Robert Carter as Secretary. No other nominations were offered. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Reports of the Director, Deputies Director, and Advisory Council

The Department Director, Robert Carter, Jr., provided his report. He noted that the State of Indiana is "no different than other states" concerning the budget situation. He said there are revenue shortfalls and currently the Department is "building out" its biennial budget for the next two years. The Director said the Department is working with the Legislature, and "it's going to be a tough two years. We are looking roughly three percent less than the most recent biennium as far as the budget is concerned." He said that any type of dedicated revenue sources that the Department has are "very important".

The Director said that it is important to market the Department, as it has always been, but "especially now it is very important for us to market our product and work hard. Until consumers start to spend again, we are still going to suffer. Our revenues are based on consumer spending. It's a hodge-podge of sales tax, income tax, and even involves gaming revenues." He said he appreciated all the supportive emails he has received, and appreciated the "understanding of the Department employees. They have done very well." The Director said there have been no personnel layoffs. "We are not actually seeing any cuts in services, which is very good. We are pretty proud that we are able to

tighten the belt and not cut any services.” The Director also noted his appreciation for the Department’s constituent groups understanding.

The Director said the land holding divisions are “geared up” to prioritize capital projects because “we may see some money come through the economic stimulus package. We don’t know how much or when it will come down, but it could be soon. Anything that could put people to work, put Hoosiers to work, we are going to look at that. We do have a lot of capital needs.” He noted that several dams and levies were destroyed during the last flooding. “We have an opportunity to do a lot of repairs there, too.”

The Chair said, “I know you are dealing with a lot. Thank you for what you are doing.”

John Davis, Deputy Director of the Bureau of Lands and Cultural Resources, presented his report. He said that the Department is meeting with the Legislature on budget issues. “We are getting ready for our hearings for building the budget.” He said Department staff is also meeting the newly elected legislators, “trying to get them up to speed on what the [Department] does and encouraging them to learn as much as they can about state government, before they start to change it.”

Davis said work continues on the plans for the Interlake Property, which encompasses approximately 2,000 acres located in southern Indiana. “We are in a master planning process trying to allow off-road vehicles, mountain bikes, hunting, and other recreational activities. He said the property is adjacent to the Sugar Ridge Fish and Wildlife Area. “Those efforts so far have been well attended locally. There is lots of energy and good ideas from the constituents that use the property or want to use the property.” He said the property development will be staged in order to “spend the correct amount of money on improvements and to hold budgets down.”

Davis said the Department has been involved in Vermillion County with conversation with the United States, local county commissioners, and economic development personnel regarding the future use of the Newport Chemical Plant. “That’s where the VX has just been all taken care of and moved out.” He said the area encompasses 7,000 acres and includes industrial and commercial development, but there are also “a lot of woods, prairie restoration that the Army has done, so the area has a lot of potential, we think, for a fish and wildlife area, state forest, or nature preserve in an area in the state which is underserved by our properties.” He said the Department is “hopeful” for the successful use of the tract.

Davis concluded by noting that “we don’t know what the future holds, but we are trying to be ready for everyone—the Governor, the National Government—when they ask us to respond. We’ll hopefully be ready to tell them what we can do to help the big picture.”

The Chair noted that Deputy Director, Ron McAhron, was not present. He asked whether another person would provide a report in McAhron’s stead.

Davis said McAhron was not present at today's meeting because he is in Chicago meeting with other Great Lakes officials discussing the future of the Great Lakes and implementation of the new Great Lakes Compact. Davis said McAhron has also been "very involved" in the Little Calumet River Basin Commission project, which is a project that has "stretched for now about 15 years. Ron is the best person to be trying to get that back on track so that we can get that project finished for the folks in Northwest Indiana." Davis also noted that McAhron's bureau is also looking for savings and preparing for "stimulus" projects.

Patrick Early, Chair of the Advisory Council, provided his report. He said the Council did not meet in December due to the difficulty of getting a quorum and the "lack of pressing issues. That made it prudent to go ahead and cancel" the scheduled meeting. Early added, however, that "We do have quite a few things on our plate coming up."

CHAIR AND VICE CHAIR

Updates on Commission and Committee activities

The Chair thanked Jane Ann Stutz for chairing the Commission's Administrative Orders and Procedures Act ("AOPA") Committee, and also thanked Doug Grant, Robert Wright, Mark Ahearn, and Maryann Habeeb (proxy for Thomas Easterly) for their service on the AOPA Committee.

Jane Ann Stutz said that two decisions were recently entered on judicial review which "basically affirmed prior decisions by the AOPA Committee. So, again, good work by the ALJs as well as the Committee members. I appreciate the work and service there." Stutz said the AOPA Committee met this morning to hear one matter. "It looks like we will have several matters before us for an April meeting."

The Chair commented, "There is never a shortage of issues before the AOPA Committee. I do, in all sincerity, thank those who make this special effort."

The Chair reminded the Commission that a task force was convened in 2008 to "enact a broad review" of the fish and wildlife rules at 312 IAC 9. He said "infrastructure was laid" for the project which has been substantively implemented and is "now live". The Chair asked Sandra Jensen of the Commission's Division of Hearings to provide an update regarding the work of the task force.

Sandra Jensen noted that the online "substantive suggestion form" has been uploaded to the Commission's Web page. She said press bulletins "are planned to be broadcast tomorrow. The idea is that the Department's Communication Division will send out press releases to all media contacts, as well as post the information on the Wild Bulletin email alert system." Jensen said the suggestion form is the "featured item" on the Commission's Homepage at www.in.gov/nrc. She added that several suggestions have already been submitted.

Jensen said the first of the task force's "housekeeping" rule package, which is Agenda Item #9, is ready for consideration as to preliminary adoption. "I call them 'housekeeping' packages because they are essentially major re-works but not particularly substantive. There are some minor amendments, but for the most part" rule amendments are proposed "to make it easier to read and easier to enforce".

The Chair encouraged the Commission members to "stay close and pay attention to these things, because the first action that we took was at our last meeting, where we re-adopted the rules" under 312 IAC 9, which were to expire in 2010. "Glen [Salmon], Linnea [Petercheff], Director Carter, and the [Department's] Executive Office have all worked very hard to keep this on schedule."

The Chair said the task force anticipates that the online suggestion form will be available through the first quarter of this year. "We are encouraging through the broadest sense of being open to public input of suggestions for ideas to be brought forward. The rule packages will be brought forward at each of our next three meeting, the first of which being today." He concluded, "There was a lot of hard work from the task force, and we look forward to a much better product for the end user, the consumer of our fish and wildlife resources, when this project is completely done."

Consideration of scheduling for semi-monthly meetings during the remainder of 2009

The Chair explained "the Commission's Division of Hearings staff met and had a retreat in the fall of 2008, at which I participated. Part of the issues discussed is where we would have our Commission meetings going forward." Dates have been "solidified" as reflected in the Commission's packet. He said it was previously planned to have three meetings held outside of Marion County. With budget constraints, the number of meetings to be held outside of Marion County has been "cut down to two, and these are relatively close to the central part of the state to avoid extra expense with overnight travel costs." The Chair said that if there was no disagreement from Commission members, the next meeting would be held on March 17, 2009 at The Garrison, Fort Harrison State Park. Other meetings would be as referenced in the Commission packet.

Commission member, Thomas Easterly, requested that the September meeting date be "moved back one week later". The Chair said the request would be considered, but "for now we will keep it as scheduled. I don't know if there have been any advanced plans made. Anticipating not, then we will take it into consideration."

The Chair then announced tentative 2009 meeting dates are as follows:

March 17	Ft. Harrison State Park (The Garrison)
May 19	Morgan-Monroe State Forest
July 21	Ft. Harrison State Park (The Garrison)

September 22 Prophetstown State Park
November 17 Ft. Harrison State Park (The Garrison)

Consideration and identification of any topic appropriate for referral to the Natural Resources Advisory Council

The Chair asked whether there were any items for referral to the Advisory Council. No new topics were presented for referral to the Advisory Council.

PERSONNEL ACTION

Permanent Appointments

Jeremy Kolaks as the Assistant Property Manager of Yellowwood/Morgan-Monroe State Forest, Nashville/Martinsville, Indiana

Tom Lyons, Assistant State Forester, Division of Forestry, presented this item. Lyons recommended the permanent appointment of Jeremy Kolaks as the Assistant Property Manager of Morgan-Monroe and Yellowwood State Forests. He explained that the two state forests, which cover approximately 50,000 acres, are separate, but are managed under one property manager and one assistant property.

Lyons said that Kolaks has done an “excellent job for us and we are elated to recommend Jeremy for permanent appointment.”

The Chair thanked Kolaks for “coming back and being here, and for his service to the Department as Assistant Property Manager.

Thomas Easterly moved to approve for permanent appointment Jeremy Kolaks as the Assistant Property Manager of Yellowwood State Forest and Morgan-Monroe State Forest, located in Nashville, Indiana and Martinsville, Indiana respectively. Larry Klein seconded the motion. Upon a voice vote, the motion carried.

Ryan Lemley as the Assistant Property Manager of Raccoon State Recreation Area, Rockville, Indiana

Dan Bortner, Director of the Division of State Parks and Reservoirs, presented this item and the next four agenda items. He said that Ryan Lemley, Lance Tresenriter, Amanda Tikkanen, and Nicole Thiele have been with the Department for over a year. He noted that three of the four assistants are located on water-based type properties, Brookville Lake, Raccoon Lake, and J. Edward Roush Lake. “They didn’t get the trial by fire, but they got the trial by water with all of the flooding and things we had last year.”

Bortner said that Lemley, Tresenriter, Tikkanen were employees of the Department prior to moving into management positions. “It’s exciting to see folks getting their degrees, positioning themselves to go into the leadership roles.” Regarding Nicole Thiele, Bortner said, “We stole her from Florida state parks. We always like to do that, too.”

Bortner said, “I can’t say enough good things about them.” He said the assistant property managers have done some “wonderful things” and have incorporated new computer and GPS technology in managing the properties. Bortner recommended permanent appointment of Ryan Lemley, Lance Tresenriter, Amanda Tikkanen, and Nicole Thiele.

Larry Klein moved to approve permanent appointment of Ryan Lemley, as Assistant Property Manager of Raccoon State Recreation Area, Lance Tresenriter, Assistant Property Manager of J. Edward Roush Lake, Amanda Tikkanen, Assistant Property Manager of Brookville Lake, and Nicole Thiele, Assistant Property Manager of Mounds State Park. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Lance Tresenriter as the Assistant Property Manager of J. Edward Roush Lake, Huntington, Indiana

[See discussion above.]

Amanda Tikkanen as the Assistant Property Manager of Brookville Lake, Brookville, Indiana

[See discussion above.]

Nicole Thiele as the Assistant Property Manager of Mounds State Park, Anderson, Indiana

[See discussion above.]

DIVISION OF FISH AND WILDLIFE

Consideration for preliminary adoption of amendments to 312 IAC 9 governing the taking of white-tailed deer and hunter education requirements; Administrative Cause No. 08-189D

Linnea Petercheff, Staff Specialist, Division of Fish and Wildlife, presented this item. She said the proposed amendments would consolidate and simplify the rules governing hunting of white-tailed deer and amend rules regarding hunter education requirements. She said the current rules have been combined into four categories: general requirements and licenses; equipment; season dates and bag limits; and hunting deer on designated military reserves and National Wildlife Areas. “The current rule language is complicated, and we needed to make some additional changes for clarification purposes.”

Petercheff said 312 IAC 9-3-2, as proposed, would list the license types, clarify licenses, and clarify tagging standards to require the name and license number of the person who “actually killed” a deer and “report that information accurately to the check station. That has been a problem in recent years.” Petercheff explained the proposed amendments to 312 IAC 9-3-3 combine the list of equipment that can legally be used to take a deer during the special youth deer season. “This has been allowed by temporary rule for the past two years.” She said other changes are proposed, regarding hunting with bow and arrows and hunting with a muzzleloader, so equipment authorized for deer hunting would be capable of being shot or fired outside lawful shooting hours. This result would be consistent with the existing rule for hunting with rifles and handguns. Petercheff noted another amendment to 312 IAC 9-3-3 would allow archery equipment and a firearm to be possessed during the firearms season, as long as the hunter has an archery license and a firearm license. During the muzzleloader season, archery equipment could also be possessed, if the hunter has licenses for both the muzzleloader and archery.

Petercheff said 312 IAC 9-3-4 would be amended to allow a youth hunter to take either an antlered or antlerless deer, during the special youth deer season, and to clarify the requirements for the adult that accompanies the youth hunter. If the youth hunter takes an antlered deer, then “it would be the only antlered deer the youth hunter could take that year in all the deer seasons, combined, to comply with the one-buck rule. The DNR received a petition with over 100 signatures requesting this change.” Petercheff said an online survey was conducted regarding the amendment and “found that 80% of those who responded to the survey were supportive of the change.” For statutory consistency an amendment would correct the youth age from less than 16 years of age to less than 18 years of age. At the request of the City of Warsaw, Petercheff said Warsaw has been added to the list of designated urban deer zones, which has the support by both the Division of Law Enforcement and the Division of Fish and Wildlife.

Petercheff explained that 312 IAC 9-3-8 is amended to eliminate the list of named military reserves and national wildlife refuges. Reference would be to the generic terminology of “military reserves” and “national wildlife refuges”. The section would also be amended to allow use of firearms for hunting deer on these properties beginning October 1 instead of November 1 of each year. 312 IAC 9-3-9 would be amended to allow other Department staff to issue to a person that has found a dead deer (such as a deer that has been killed by the collision with a motor vehicle) a departmental permit to possess that deer. 312 IAC 9-12-2 and 312 IAC 9-12-3 would be amended to include the new apprentice hunting license and would set forth hunter education requirement standards consistent with a 2008 statute.

Doug Grant, Commission member, asked for clarification regarding designation of an area as an urban deer zone. Petercheff said if the City of Warsaw is added, nine areas will have been designated urban deer zones. This designation allows hunting to begin on September 15 instead of October 1.

The Chair reiterated that the rule proposal before the Commission is the “first of the organized rule packages that will be brought forward preferably as we described without

major substantive issue so that we can efficiently receive input and in the end receive and produce a better product. I think it was a good first start.”

Patrick Early said, “I have one small concern, and it probably just involves reorganizing the way we deal with it. As we go through this, these [rule packages] are intended primarily to be ‘housekeeping’ type changes, and we are going to be dealing with the substantive changes as part of the process that [task force] set up. I’m a little bit concerned that we have changed this youth hunting to allow the taking of a buck. I look at that as somewhat of a substantive change.” Early said Commission member Phil French and he have received comment from several individuals, and there is “some concern that that may be abused in some way, unfortunately, by people who are not as ethical as others.” He said the rule amendment “might merit a little bit more discussion to make sure that we have more input than just the online survey.” Early said he was not “personally opposed” to the proposed amendment. “Anything we can do to increase youth hunting is something that I’m very much in favor of.” He asked that the amendment to allow a youth hunter, to take either an antlered or antlerless deer during the special youth deer season [312 IAC 9-3-4(b)(1) and (b)(2)], be removed from the “housekeeping rule package” and instead include the amendment a future “substantive changes” rule package.

The Chair said, “Again, I think the integrity of this process is what you are speaking to, and that is that this Commission set forth and committed to the public that we would be dealing, as much as we possibly could, without substantive” rule amendments at this stage in the process.

Early said, “This is an issue that I anticipate there may be people that want to have some input on and perhaps some public testimony. I would like to propose that we take [proposed 312 IAC 9-3-4(b)(1) and (b)(2)] out of this rule package and insert it in a substantive rule amendment package.” The Chair asked Early whether the request to remove proposed 312 IAC 9-3-4(b)(1) and (b)(2) was in the form of a motion. Early said, “Yes.”

Petercheff said the Department through petitions and emails received “a lot” of requests to make this change. The Department has “supported” this rule amendment “for some time. We were just hoping to be able to begin that part of the process.”

John Davis said he understood Early’s motion. “That is what we promised, that we wouldn’t have substantive changes, but I also think there is a timing issue here. One reason we brought [the rule amendment] this time was [for the rule] to be in place for next season.” He suggested removing 312 IAC 9-3-4(b)(1) and (b)(2) and promulgating the rule amendment as a separate package but “still have both of [the rule packages] travel today from the Commission”. He observed the “housekeeping” rule package also includes other substantive amendments, which “I don’t think are as controversial,” such as the apprentice license. “I’m not suggesting we separate those, but there are substantive changes even if we take the antlered deer part out.”

Early responded, “I understand what you are saying. I think there are, as you say, some other things that could be considered a substantive change, but I don’t think any of them would be controversial.” He reiterated his concern about the “integrity” of the process. “I want to make sure we are not slipping major changes through that people otherwise feel like they should have some input in as part of a process that we said wouldn’t involve major changes.” Early noted the removal of the rule amendment would delay the effectiveness of the rule for the upcoming youth hunting season.

Davis said the “downside” of leaving the rule amendment in is “if there is discussion and we don’t want to include it then we start putting the whole rule in jeopardy.” He asked, “How do you think it would be if we had these two [rule packages] travel together, and that would mean you would have two public hearings.”

The Chair said, “I think we are saying the same thing. I think we are on the same track. So, for the purposes of clarity, I think what you are saying is you would like to make a motion to separate [312 IAC 9-3-4](b)(1) and (b)(2) out of this process to be set aside on its own as a separate proposal?” Early responded, “That’s fine.”

The Chair said the Commission has two motions to consider: (1) preliminary adoption of the housekeeping rule package as set forth in the Commission’s agenda packet with the “minus” proposed amendment at 312 IAC 9-3-4(b)(1) and (b)(2); and, (2) preliminary adoption of proposed amendment at 312 IAC 9-3-4(b)(1) and (b)(2) as a separate rule proposal.

Mark Ahearn asked, “By ‘minus’, we mean we are leaving the present law unchanged?” Jane Ann Stautz said, “Correct.”

Patrick Early moved to approve for preliminary adoption the proposed amendments to 312 IAC 9 governing the taking of white-tailed deer and hunter education requirements, but modified by removing the proposed change to allow a youth hunter to take an antlered deer during the special youth deer season. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Patrick Early moved to approve for preliminary adoption, in a separate rule promulgation, of a proposed amendment to allow youth hunters to take an antlered deer during the special youth deer season. Robert Wright seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF ENTOMOLOGY AND PLANT PATHOLOGY

Consideration for preliminary adoption of amendments to 312 IAC 18-3-18 governing the regulation of the emerald ash borer (*Agrilus planipennis*), as a pest or pathogen, to provide standards for quarantine; Administrative Cause No. 08-207E

Phil Marshall, Director of the Division of Entomology and Plant Pathology, presented this item. He said the rule proposal adds area to the emerald ash borer quarantine to

reflect the “seven additional townships” where emerald ash borer has been detected during the 2008 survey season. Marshall said the seven areas have been declared quarantined for 90 days by “authority” of the Department Director. He noted that four of the new townships are in four new counties: Hamblen Township in Brown County; Georgetown Township in Floyd County; Plain Township in Kosciusko County; and Polk Township in Monroe County.

Marshall said primarily the new quarantine locations are the result of the movement of firewood in campsites. “There are some locations that we cannot specifically identify how [emerald ash borer] was introduced into the area.”

Easterly asked whether emerald ash borer was present in townships not quarantined, but are adjacent to quarantine townships. If a township and adjacent township is not quarantined, “does that mean you think there is no emerald ash borer there or just not very many?” Marshall said, “Not there right now and not very many. It’s both.” Marshall noted that more native borers have been detected in 2008, and in some instances, these also have been killing trees.

Larry Klein asked how the Department conducts emerald ash borer surveys. Marshall responded that the 2008 survey was a cooperative effort with the USDA APHIS using three observation techniques. He said there is a “100-mile band”, which reaches from the western middle of Indiana and is “arced down through toward Cincinnati and Louisville.” Emerald ash borer traps were placed on a “1 ½ mile grid throughout the area. There were well over 5,000 [purple panel] traps placed.” Marshall said that winds from Hurricane Ike displaced many of the traps, and the Department and the USDA are still retrieving these. He said “detection trees or trap trees” in campgrounds are also used for surveying, along with visual observations. “The Brown County site was detected by an arborist.”

Thomas Easterly moved to give preliminary adoption to amendments to 312 IAC 18-3-18 to add areas to the emerald ash borer quarantine. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF STATE PARKS AND RESERVOIRS

Consideration for preliminary adoption of amendments to 312 IAC 8-2-3 regarding the discharge of firearms on DNR properties; Administrative Cause No. 08-152A

John Bergman, Assistant Director of the Division of State Parks and Reservoirs, presented this item. He said, “A year ago there was an incident at Brown County State Park where two individuals were legally licensed to carry handguns for target shooting and were just outside the campground. When we reviewed the rules, we didn’t believe—now that people can legally have a licensed handgun on a state park and DNR properties—we had a rule that actually prevented them from discharging that weapon, and certainly not on a state park.” Bergman said the “Property Regulations Committee” met to discuss an amendment to the existing rules to address this type of situation, and to

clarify the “whole discharge issue” on all of DNR properties. He recommended preliminary adoption of the proposed amendments to 312 IAC 8-2-3.

Mark Ahearn asked, “Help me understand how the 200-foot requirement is obsolete language?” Bergman said, “Right now we can regulate that by signage anyway, so it’s not necessarily obsolete. If we want to create a safety zone around any area, we can still create that safety zone it just doesn’t necessarily have to be 200 feet.” Steve Lucas said the subject of the rule proposal was “talked about a lot” with the property holding divisions. “It is challenging, but in situations where the 200-foot limitation would have applied before, there is signage typically that applies. We couldn’t come up with a situation that wasn’t covered.”

Jane Ann Stautz noted her understanding that persons can lawfully possess and discharge a handgun on a DNR property, “but yet you want to protect folks that are in the buildings or campsites that they are not discharging it nearby. I didn’t understand how that was protected” with the proposed amendment. “I’m not sure all the parks today, or beaches, have that signage with a buffer zone around [the areas] for those that might be hunting in the park area. If that the case, that’s wonderful.”

Bergman noted that hunting and carrying of a loaded firearm are now allowed in a state park, but these things were not previously allowed. “It was never an issue on a state park, but obviously on reservoirs, fish and wildlife areas, and forestry you could. That’s how the rules were written.” He said the rule was amended to allow a person to carry a licensed handgun, and that “opened up the state park issue to consideration of ‘Okay, now they have a loaded weapon with them legally, when can they discharge it?’”. He said the proposed rule amendment attempts to address this issue.

Stautz indicated she “supports and agrees” with the proposed rule concept, but she said she was still concerned the proposed rule, as written, allowed a firearm to be discharged lawfully within 200 feet “or less than that” of structures, campsites, and other areas. “I don’t see a buffer zone of where they can discharge that firearm when they are hunting lawfully on the property.”

Bergman said buffer zones are “usually marked with signage. Signage is allowed under the property regulations to create signs and create rules. We can always make sure our buffer zones are signed as they are now.”

John Davis said the proposed rule “tries to prohibit discharge” on properties that are listed in 312 IAC 8-2-3(b). “It leaves discharge legal on a reservoir or fish and wildlife area. That’s where the 200-foot restriction is obsolete, because those are all posted already.”

Lucas agreed with Davis. “Generally speaking, you can’t...discharge in a park anyway.” The Department establishes safety zones within a state park where there is a hunt to control deer. “We talked about this extensively. It was an issue that troubled all of us.... There was a whole paradigm shift in terms of how the rules were structured when

licensed firearms were allowed on all DNR properties. Whereas before you couldn't have a firearm, now you can. Instead of possession, the rule would now control where you can discharge and where you can't." Lucas said "every example of a situation presented by the property managers was seemingly covered by signage, or by some other restriction," under the terms of the proposed amendments.

Davis said the "200 feet language wouldn't be obsolete if a sign fell down, and someone was hunting on a reservoir, and they didn't see a sign, and there was no rule prohibiting" discharge of firearm within 200 feet. "There wouldn't be anything that would prevent them from discharging a firearm next to the manager's house." Stautz said, "Yes. So if it's not posted, you could have a potential situation. I think it's a drafting issue."

Ahearn said, "My concern is that posting of signs is not near as informative or comprehensive means of communication as having everyone know what the law is. If we are looking at 'serious' communications versus 'inconsequential' consequences it maybe doesn't matter. But if we are looking at discharging a firearm where we think there will be people—maybe I'm missing the point—that seems pretty substantial consequences. The means to communicating that law just strikes me that it ought to be more than whether they saw the sign or an area was adequately signed."

Lucas said that if existing subsection (g) is kept in the rule, proposed subsection (c) would "to a large extent conflict. Part of the problem is if you say there is a blanket prohibition on discharge of a firearm in all situations, let's say at a campsite or boat dock, then that really means that you can't discharge a firearm in the lawful defense of person or property. You can't discharge a firearm as a law enforcement officer in those locations, or you are committing a violation".

Ahearn, "But doesn't it say, 'unless otherwise designated'?"

Bergman said during deer control hunts in state parks, the entire state park is closed.

The Chair asked, "Is it possible that we could add something to this such as 'unless otherwise provided in law'?" Lucas said, "I don't think that gets us anywhere, because it's 'otherwise provided by law' where? The rule needs to be specific." An impetus for the proposal was the reluctance by a sheriff's office to issue a ticket for discharge of a firearm on a state park, when the activity was not in proximity to a campground or other protected area. "The Deputy didn't see a blanket prohibition on the discharge of a firearm." As we wrote proposed subsection (c), we saw that there are inherent conflicts with existing subsection (g). He added, "We'll go forward however the Commission prefers, but at this point, I couldn't articulate what I would think would be better language" than what has been proposed.

The Chair asked for additional input from Jane Stautz or Mark Ahearn. Stautz said, "As I was looking at it, it was really the item" referenced in 312 IAC 8-2-3(c)(3), in the lawful pursuit of wild animals, "that's where you are going to have probably situations on your

reservoirs where they would be hunting, and we would not want them discharging or hunting within 200 feet” of a campground or similar protected site.

Lucas said proposed 312 IAC 8-2-3(c)(3) could be amended and moved to a new (c)(5), and then with added language reading along the lines of “However, this authorization does not allow discharge within 200 feet of any of the following:”. Lucas asked whether this suggested change would address the Commission’s concerns.

Ahearn said, “Yes. I’m more comfortable with that.” Stautz said, “Yes. It does.” Ahearn said, “So, if we are preliminarily adopting this rule then we would say ‘with (c)(3) modified by the terms of [existing subsection] (g)?” Lucas responded, “Correct.”

Jane Ann Stautz moved to approve for preliminary adoption of proposed amendments to 312 IAC 8-2-3 with the modification that proposed subsection (c)(3) be restated as subsection (c)(5), the numbers changed accordingly, to include the existing language in existing subsection (g). Robert Wright seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF WATER

Consideration of application by City of Cannelton for a Flood Control Revolving Fund loan in amount of \$45,000 for improvements and maintenance of City’s flood protection system

Terri Price, Water Planner for the Division of Water, presented this item. She explained that the Commission has not frequently considered Flood Control Revolving Fund (the “FCRF”) applications. She said IC 14-28-5 established the FCRF in the late 1950s and provides low interest loans “encouraging local entities to address water resources issues.” Approved activities include removal of obstructions in streams and channels, clearing and straightening channels or streams, building or repair of levees, dykes, or other flood protective works. An activity also “must be needed for the purpose of protecting the public health, safety, and general welfare.”

Price said the FCRF is available to municipalities, cities, towns, or special taxing districts such as conservancy districts. The loans cannot exceed \$300,000, with interest assessed at 3%, and the loan with interest must be paid within ten years. Price said the statute was amended in 2008 to remove the State Board of Finance as part of the approval process. “So the approval rests solely with the Commission.” She reminded the Commission that it has preliminarily adopted rules to set standards for the review of loan applications, but the rules are not as yet effective. The Department “thought it best to process the first few [loan applications] through the entire Commission.”

Price said the instant loan application is from the City of Cannelton in Perry County. Cannelton’s application is for a \$45,000 loan to “do work on [its] flood walls”. Cannelton has borrowed from the FCRF “twice before”, and it has a “current outstanding

balance of \$15,450. That would be paid at the end of 2009.” Cannelton’s flood works system was completed in 1952. The system consists of 3,600 feet of levee, 4,800 feet of concrete flood wall, and three pumping stations. Price said the Army Corps of Engineers in 2007 “noticed some problems” with Cannelton’s flood works. Cannelton has applied for the loan to begin repairing the flood works, and it proposed to repay the loan through annual installments of \$10,000, plus interest, using its economic development income tax. Price requested the Commission give approval to the City of Cannelton’s request for a loan in the amount of the \$45,000 from the Flood Control Revolving Fund.

Ahearn asked whether the Department has received or is likely to receive competing applications for Fund money. Price said, “We went five years without an application. We had two last year from two conservancy districts and then this one from the City of Cannelton.” She noted the proposed rules set standards for the review process if “competing” applications are received.” Price said that currently the FCRF balance is \$1.5 million.

Thomas Easterly moved to approve Cannelton’s application for a Flood Control Revolving Fund loan of \$45,000 for improvements and maintenance to the City’s flood protection system. Larry Klein seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of recommended report of the Natural Resources Commission with respect to the petition for creation of the Story Conservancy District (Brown Circuit Court Cause No. 07C01-0803-MI-0129); Administrative Cause No. 08-151C

Sandra Jensen, Hearing Officer, presented this item. At the request of the Chair, she provided an overview of the Commission’s role regarding the consideration of petitions for the establishment of conservancy districts. She explained that the Commission is “not responsible for an actual determination of whether to approve or decline” the establishment of the proposed district. “Actually, the Commission is not being called upon to offer a recommendation...its responsibility” as set forth in IC 14-33-2-17 and Information Bulletin #36 “is to report back” to the circuit court for each purpose the district is proposed. The Commission is to make findings on whether the proposed district: (1) appears to be necessary; (2) holds promise of economic and engineering feasibility; (3) the public health will be served immediately or prospectively; (4) cover and serve a proper area; (5) established and operated in a manner compatible with established: (A) conservancy districts; (B) flood control projects; (C) reservoirs; (D) lakes; (E) drains; (F) levees; and (G) other water management or water supply projects. She stated the Commission’s findings are *prima facie* evidence of the facts that are stated within the report. “They are very important to the parties, but the Commission is not actually confirming whether or not this conservancy is to be established.”

Jensen said that on August 8, 2008 the Brown Circuit Court referred the petition for establishment of the Story Conservancy to the Commission. The proposed district intends to be established for the purpose of providing for the collection, treatment, and disposal of sewage and other liquid waste, and providing for water supply for domestic, industrial, and public use. Jensen said notice of the Court's referral was sent to various state agencies including Indiana Department of Environmental Management, Indiana State Department of Health, Indiana Utility Regulatory Commission, and the Department as well as local government offices. Notice of the October 27, 2008 was published in the Brown County *Democrat*, a newspaper of general circulation in Brown County, and was also posted to the Commission's electronic calendar.

Jensen said the public hearing was conducted as scheduled with Petitioners represented by counsel, David Grupenhoff, and Remonstrators represented by counsel, Michael Mullett. She said evidence provided at the public hearing is included in the report beginning on page two. The Petitioners and Remonstrators provided "extensive supplementation" following the public hearing, which is also included in the report beginning on page 23. The report also contains comments received by state agencies and local government offices.

Jensen said the evaluations of the proposed district "were complicated a little bit by the fact that [the Story Conservancy District] is located in close proximity to a floodway of the Middle Fork of Salt Creek, of which the floodway elevation has not been delineated for that particular area. She said that the floodway delineation was "in process", but was not available at the writing of the report. Jensen explained that the floodway delineation "might, in fact, impact some of the proposed development that would occur in this area".

Jensen noted that Remonstrators filed a "Request by Remonstrators Neighbors for Reconsideration by Hearing Officer and/or Consideration by Commission of Probative and Material Evidence Apparently Overlooked or Disregarded in Draft Report", which was provided to Commission members by electronic mail on January 9, 2009. She noted that David Grupenhoff and Michael Mullett were present at today's meeting.

David Grupenhoff, attorney for Petitioners, requested the Commission to adopt the Hearing Officer's recommended report to the Brown Circuit Court. "We do not have any major quibbles with the report." He said the existing Story Bed and Breakfast is "presently capable of building and supporting this wastewater treatment plant." He noted the discussion in the report regarding whether the treatment plant would be "scalable as the proposed [condominiums] went on, and part of the Remonstrators' motion to reconsider is what happens if these condos don't get built?" Grupenhoff explained that the evidence presented by Petitioners is that the Story [Bed and Breakfast] is presently able to build and finance" the wastewater treatment plant, and the [proposed district] "would benefit". He said Bright Properties, LLC is planning to construct a "light industrial food processing plant," which would also be served by the wastewater treatment plant. "So, you've got two industrial uses that will be going in pretty much right away. In fact, Story Inn is closing later today on financing to build the wastewater treatment plant."

Grupenhoff said that the Hearing Officer's report "adequately addressed and considered" the two points raised by the Remonstrators' in the motion to reconsider. He said the Hearing Officer's report "adequately" analyzes what would happen in the event the condominiums are "slow to be built". Grupenhoff notes that the Remonstrators state in the motion to reconsider the evidence provided by real estate agent, Karen Zody, that there is no need for a wastewater treatment plant if the condominiums are not constructed because the sewage from Story Inn is presently being treated by a subsurface septic system. "The problem with that is two-fold. First, subsurface systems will fail eventually. The other is that [Zody's] position on that score assumes that there will be no growth in the area whatsoever, and that the Story Inn will remain static; that is not the case."

Grupenhoff said the second point raised by the Remonstrators that evidence provided by Gary Ladd, P.E. that the soils within the area are suitable for subsurface sewage treatment. "We think that, again, the Hearing Officer has adequately dealt with that issue in her report, particularly noting the report of the USDA that found the soils in the area generally not suitable for subsurface treatment. And [the USDA] report was also tendered by the Division of Water in its comments" on the proposed district. Grupenhoff said that the representative from the Brown County Health Department indicated at public hearing that Brown County septic rate failure "are somewhere in the neighborhood of 60% or 70% depending on where you are" and soils in Brown County "are not conducive to septic systems".

Grupenhoff said that the area where the proposed wastewater treatment plant would be located would be "subject to some sort of flood mitigation." He also said the floodway delineation is "still in process" and expects a final report to be filed this week. Grupenhoff said the area for the proposed treatment plant "may be floodplain, maybe flood fringe, but we can still put the proposed wastewater treatment plant in flood fringe." He concluded by noting the Hearing Officer did "a good job in handle" the floodway and flood plain alternatives, and asked the Commission to approve the proposed report.

Michael Mullett, attorney for the Remonstrators, said, "From our particular perspective—and I represent a group of remonstrating neighbors—this particular conservancy district would only include three businesses in a relatively small area. None of the surrounding neighbors would be included in the district." He said the remonstrators are concerned about the impacts of the proposed district "on them and their property". He added, "The reason we say we are for the report is we believe that the report is correct; that the critical issues here with respect to the facts that needed to be found with regard to the formation of the district are...flooding, financing, and feasibility". Mullett explained that the remonstrating neighbors "support" the conclusions in the Hearing Officer's Report the evidence of record "is not sufficient" to make findings required with respect to either engineering or economic feasibility "because of the flooding and the financing issue and the interplay between those two".

Mullett noted that the remonstrators indicate that the base flood elevation "should be 564.6 or a little more, and the remonstrating neighbors' expert, [Dr. Parola] indicated that

[the flood elevation] is at least 568 or could be as high as 570 feet or more. So, we are not talking about inches; we are talking about a large number of feet". Mullett said the remonstrators presented evidence through Dr. Arthur Parola, a professor at the University of Louisville and Director of the Stream Institute, that [Parola] is quite certain... where the flood elevation is going to end up". Mullett said, "We think the base flood elevation is quite critical here. So far, we don't believe the petitioners have demonstrated a full comprehension of the way in which flood fringe is determined in Indiana" under rules or modeling programs. He said the stream modeling the petitioners provided as evidence "is simply not enough to determine or delineate the floodway and the flood fringe... Clearly, there is not sufficient information at this time with regard to the flooding issue".

Mullett addressed the economic feasibility of the proposed district, and said that the condominium development, the Club Story development, which is assigned 58% of the wastewater treatment plant construction costs, is presently an "empty" farm field. He noted that the petitioners did not present a report to show how the financing would be re-allocated and assumed by the Story Bed and Breakfast. Mullett said the remonstrators question the size and cost of the proposed wastewater treatment plant "if the only load that you are going to be serving is the Club Story development". He noted that sizing of a treatment plant is "critical" to the performance of package treatment plants. "You've got a clear inter-relationship here between Club Story and its economic and engineering feasibility and the economic feasibility of the conservancy district itself." Mullett noted that the Hearing Officer's report addresses these issues.

Mullett said the remonstrators have several "quibbles" with the Hearing Officer's report. He said that "since the Club Story development is so uncertain, so speculative that [it] cannot support the need" for the proposed conservancy district. He said the second issue is "interrelated. We're not quite sure why this is, there seems to be some perception that package plants are inherently superior waste treatment mechanisms to onsite subsurface treatment systems." He said the remonstrators are concerned with the evidence presented that Brown County soils are unsuitable for septic systems. "It's not everywhere in Brown County. The specific places cited by the Health Officer are subdivisions neighboring Nashville, not Story. None of the failing systems were in the Story area." Mullett noted that Story Bed and Breakfast currently has two commercial onsite waste treatment systems. "The [Indiana State Department of Health (ISDH)] does oversee and regulate commercial onsite systems, and in terms of assessing soil suitability, that's particularly one of the things [ISDH] has done. [ISDH] has, in both instances, assessed and approved the suitability of the soil for an onsite subsurface disposal system." Mullett said evidence provided by Gary Ladd, a licensed engineer, indicated that the petitioners "did not look" at onsite subsurface disposal as an alternative for the proposed conservancy district.

Mullett said that the remonstrators disagree with the Hearing Officer's conclusion that onsite subsurface wastewater treatment was "ruled out and need not be considered" due to soil unsuitability. He reiterated that commercial onsite subsurface waste treatment systems are regulated by the ISDH in accordance with a "very comprehensive scheme that I have asked [the Commission] to take administrative notice of." He said the

remonstrators presented a “quite comprehensive compilation of the problems that exist” with package treatment plants. “We also identified the particular problems here in Brown County with regard to surface water, NPDES permitted systems.” He said Nashville, Helmsburg, and Gnaw Bone have had “significant financing and operational problems” with their respective package treatment plants. “Creating another one of these systems that’s even smaller and that is clearly under financed, you are just asking to set up a situation here that will be another problem plant down the road.”

Grupenhoff noted that “nothing the remonstrators have submitted has disputed the fact that wastewater treatment package plant of this type is indeed engineering feasible. There is no question that these kinds of plants work and have worked for a long time.” He noted that there have been problems with package plants, “just as there are problems with anything that are not properly maintained and controlled, which is exactly the purpose of using a conservancy district to manage this plant... You will have a single body with a community interest in maintaining and controlling this wastewater treatment plant instead of just a single private owner who could sell the entity to someone else. Here you are going to have a conservancy district that everyone inside the conservancy district will have a hand in and everyone will have an interest in maintaining and making sure the wastewater treatment plant functions properly.”

Thomas Easterly moved to approve the recommended report of the Natural Resources Commission with respect to the petition for creation of the Story Conservancy District (Brown Circuit Court Cause No. 07C01-0803-MI-0129). Brian Blackford seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommended report of the Natural Resources Commission with respect to the petition for creation of the Lake Edgewood Conservancy District (Morgan Circuit Court Cause No. 55C01-0808-MI-00728); Administrative Cause No. 08-165C

Sandra Jensen, Hearing Officer, also presented this item, and noted that the Commission’s role regarding the proposed Lake Edgewood Conservancy District is the same as explained in the previous agenda item. She said the Morgan Circuit Court referred the petition for establishment of the Lake Edgewood Conservancy District on October 10, 2008. The purposes of the proposed conservancy district are (1) developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management; (2) operation, maintenance, and improvement of a work of improvement including by not limited to Lake Edgewood and the Lake Edgewood dam and spillway; (3) provide collection, treatment, and disposal of sewage and other liquid wastes.

Jensen said other state agencies and local governmental offices were notified of the petition referral and notified of the December 4, 2008 public hearing. A notice of the public hearing was also published in the Martinsville *Reporter*. She said the public hearing was conducted as scheduled, with petitioners represented by Alan Hux and

remonstrators, at the time of the public hearing, were represented by Phillip Smith. Comments received at the public hearing are summarized in the report on pages one through eleven. Jensen noted that Alan Hux was present at today's meeting.

Alan Hux said he did not have a presentation, but would answer any questions from the Commission.

Larry Klein moved to approve the recommended report of the Natural Resources Commission with respect to the petition for creation of the Lake Edgewood Conservancy District (Morgan Circuit Court Cause No. 55C01-0808-MI-00728). Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommended report of the Natural Resources Commission with respect to the petition for creation of the Grand Oaks Conservancy District (Porter Circuit Court Cause No. 64-C01-0809-MI-8874); Administrative Cause No. 08-164C

Stephen Lucas introduced this item. He said he and Jennifer Kane served jointly as the hearing officers. She "did the heavy lifting for review of the proposed Grand Oaks Conservancy District. In a few moments, I'm going to pass this matter to her to outline the proposal and proposed findings, but before doing so, there are two items which I'd like to offer for clarification or correction, as amendments to the report, and as set forth in the green sheets distributed at the Commission's table.

Lucas said the first change was on page 19 of the report and would delete a superfluous clause, at the beginning of the last sentence, for a paragraph which addresses economic and engineering feasibility for the purpose of water supply. He said the clause was irrelevant and asked that it be stricken.

Lucas said the second change was on page 20 and was more substantive. The recommendations in the written materials were based upon un-refuted evidence the sources of the City of Valparaiso's water supply were several wells located in the Kankakee River Basin, as well as at least two wells located in the Great Lakes Basin. The evidence was that the water from these sources was intermingled. Since the proposed district was located outside the city limits, and wholly within the Kankakee River Basin, the result would be a new diversion of water from the Great Lakes Basin. To accomplish this result would require approval by the Council for the recently established Great Lakes Compact.

Lucas said new evidence suggests all the water supply for the conservancy district, and for subsequent discharge to the Kankakee River Basin, would come from the Kankakee River Basin and not the Great Lakes Basin. Although the application of the Great Lakes Compact is at its infancy, and "nothing is carved in stone", this factual situation is not as likely to constitute and inter-basin transfer that requires Compact approval. He asked the Commission to consider modify its finding to reflect the new contingency. In addition, because the locations of the water supply wells were still not absolutely determined, and with important questions which may yet be asked of the Great Lakes Council, he asked

that the DNR's Division of Water be authorized and directed to supplement the record of this proceeding within the Porter Circuit Court.

Jennifer Kane, Hearing Officer, said the Porter Circuit Court referred the petition for the creation of the Grand Oaks Conservancy District on October 10, 2008. The Grand Oaks Conservancy District is proposed to be established for the purposes of: improving drainage; providing water supply, including treatment and distribution, for domestic, industrial, and public use; providing for the collection, treatment, and disposal of sewage and other liquid wastes; developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management; preventing the loss of topsoil from injurious water erosion; and operation, maintenance, and improvement of: (1) a work of improvement for water based recreational purposes; or (B) other work of improvement that could have been built for any other purpose authorized by this section. Kane said the Petitioners, through their attorneys, Ethan Lowe and David Hollenbeck, announced the withdrawal of the purpose of flood prevention and control at the public hearings.

Kane said the public hearing was held on December 3, 2008 in Valparaiso. The proposed Grand Oaks CD encompasses 227 acres located in unincorporated Porter County south of the City of Valparaiso to include a planned single family residential development with approximately 400 homes. The land within the proposed conservancy district boundaries is contiguous and the site is drained to Sievers Creek, and flows south to Cobb Ditch, and ultimately into the Kankakee River within the Kankakee River Basin. Kane noted that the proposed Grand Oaks Conservancy District appears to be necessary and proposes to cover and serve a proper area for all purposes. She said, however, the planned residential development is in a preliminary stage, which attributes to findings of insufficient evidence to make recommendations. Kane noted that instead of going through all of the findings, she would point out the purposes for which insufficient evidence was presented. She also noted that, at the Court's discretion, the Petitioners could provide additional evidence to the Porter Circuit Court.

Kane explained that the petitioners presented three options regarding the purpose of providing water supply, including treatment and distribution, for domestic, industrial, and public use water within the proposed district. Option 1: Individual drinking water wells constructed for each developed lot; Option 2: Construction of water supply wells, an onsite water treatment plant, and a distribution system; and Option 3: Water supply by City of Valparaiso (with an onsite distribution system). She noted there was insufficient evidence presented by petitioner to make a determination as to engineering feasibility for Option 1 and Option 2 regarding the purposes of water supply, and the other purposes of developing forests, wildlife areas and recreational facilities, and preventing the loss of topsoil from injurious water erosion.

In whether the proposed district seems to offer benefits in excess of costs and damages, Kane said there was insufficient evidence presented by petitioners to make a determination regarding the purposes of improving drainage and preventing the loss of topsoil from injurious water erosion.

Kane said another factor that must be considered by the Commission is whether the public health will be served immediately or prospectively by the establishment of the district for any of the following purposes: (A) Water supply; (B) Sewage disposal; (C) Storage of water for augmentation of stream flow; (D) Any combination of these purposes. She said evidence was not presented as to whether an aquifer exists within the proposed conservancy district that could carry sufficient capacity and provide potable water to the development through Option 1 or Option 2.

Kane said the last factor for Commission consideration is whether the proposed district could be established and operated in a manner compatible with established: (A) conservancy districts; (B) flood control projects; (C) reservoirs; (D) lakes; (E) drains; (F) levees; and (G) other water management or water supply projects.

Kane said Steve Lucas had already explained the findings regarding compatibility of water supply and sewage treatment relating to the potential water diversions from the Great Lakes Basin.

The Chair recognized Ethan Lowe, attorney for the petitioner for the proposed conservancy district. Lowe said he did not have prepared remarks but would be pleased to attempt to answer questions. Lowe said he supported approval of the report by the hearing officers.

Larry Klein moved to approve the recommendations of the hearing officers, as amended on Page 19 and Page 20, as the Commission's recommendations to the Porter Circuit Court for the proposed Grand Oaks Conservancy District. He also asked that the Department of Natural Resources, through its Division of Water, be authorized to supplement the record of the Porter Circuit Court concerning the location of water supply wells and the potential significance of the Great Lakes Compact on the proposed district. Jane Ann Stautz seconded the motion. On a voice vote, the motion carried.

Consideration of final adoption of amendments to 312 IAC 5-6-9 governing the use of boats on Tippecanoe Lake, James Lake and connecting channels in Kosciusko County; LSA #08-295(F); Administrative Cause No. 07-145L

Stephen Lucas, Hearing Officer, presented this item. He said for consideration of final adoption are amendments to 312 IAC 5-6-9 for special restrictions of boat operation on Tippecanoe Lake, James Lake, and their connecting channels in Kosciusko County. The proposed rule adoption follows a petition for rule change from the Lake Tippecanoe Property Owners Association, was "twice considered by the Commission before being given preliminary adoption, and drew considerable interest from local citizens." Lucas noted that Commission member Doug Grant attended the public hearing.

Lucas said "as evidence by the length and complexity" of the Hearing Officer's report "making consideration of this rule adoption simple or straight forward is probably a challenge I cannot master, but I will try to make it as focused as possible". The Hearing

Officer's report was circulated to the Department and to the public on December 2, 2008. Lucas said the recommendations, beginning on page 71 of the report, provided "key concerns", which have since been addressed by the [Department] and by the Lake Tippecanoe Property Owners Association. "This effort by the DNR and the [Lake Tippecanoe Property Owners Association (LTPOA)] was communicated to the Commission members and to the public by email last week."

Lucas said regarding Part A of the recommendations, the Department has provided GPS coordinates in lieu of a general description for a relocated marker buoy. With regard to Part C, Lucas said the Department has outlined the terms of an agreement between DNR's Division of Law Enforcement and the LTPOA for the placement and removal of marker buoys. With respect to Part D, the Department has "now offered a concept to measure the success of the restricted zone if a new zone is approved by the Commission before sunset of that zone in five years."

Lucas noted that immediately prior to the meeting members of the Commission were provided "Exhibit C" (printed on yellow paper), which is similar to Exhibit B within the Hearing Officer's report, but with two modifications marked with handwritten arrows. He said he did not adopt the DNR's Committee's recommendation to include the word "electric" before the word "trolling" in the first sentence in 312 IAC 5-6-9(c). Adding the word "electric" to the rule proposal may not meet the general standards for rule adoption for "a 'logical outgrowth'. I'm not sure I can identify written comments in support of this change. There certainly was discussion of it, and it might make sense. But typically what I'll do in this situation is present to the Commission what I consider to be the more conservative approach. The more conservative approach would be not to give that language final language now as an amendment, but if worthy, to take the amendment to a subsequent rule adoption." He acknowledged that "what is a 'logical outgrowth' rests not with me, not even with the Commission, but with the Attorney General."

Lucas said a technical amendment in 312 IAC 5-6-9(d)(3)(B)(ii) would replace the Department's general language recommendation "one hundred (100) feet from the perceived shoreline" with specified GPS coordinates "SPC 2212626 (UTM 4575369) north and SPC 310139 (UTM 606120) east".

Lucas said the "greater issues" pertaining to the rule adoption are referenced in Part B of the recommendations as to the size and configurations of the restricted boating zones adjacent to Ball Wetlands, both within open waters of Tippecanoe Lake and James Lake. With respect to these issues, "what are presented are mostly policy questions, and the Commission could probably lawfully give final adoption just as the zones" are proposed. "But also based upon comments from the public, and based upon graphics offered in the hearing process, the Commission could make those zones somewhat smaller. That would be lawful as well. I don't think there is a legal right or wrong. It's a policy question." Lucas said "a lot of public comments" voiced concerns about the size of the zones. He concluded by offering, for consideration as to final adoption, proposed rule amendments as depicted in Exhibit C and provided to the Commission on yellow paper.

Mark Ennes said he was the “immediate past president” of the LTPOA. He recognized and thanked Tom Flatt and DNR staff for their assistance, as well as Steve Lucas for conducting the public meeting. He said at the initial stage of the rule amendment process, the LTPOA’s primary focus in establishing the watercraft zone was environmental. “As time has gone on, we have also realized that there are some safety issues here, too. In light of that, I have some specific suggestions as far as what the size” of the restricted watercraft zone. As a result of additional research by Tom Flatt, “it has become increasingly evident that the depth of Lake Tippecanoe is much shallower” than what the LTPOA initially believed. “If we have a 500-foot area of the ecozone, I think it is very appropriate, because it is still very shallower there. To go to the 200-foot, as some have suggested, puts that water depth at two feet.”

Ennes said that comments were received regarding “Little Tippe” suggesting “we only have a 50-foot area there from the perceived shoreline. That’s probably the biggest issue on Tippecanoe Lake and James Lake is the perceived shoreline.” He said that he has observed many skiers within 200 feet of the perceived shoreline. “I would like to see that that issue there again is for 200 feet from the perceived shoreline for both an environmental and safety standpoint, and “200 feet would be consistent with state law.”

David Swart, current President of the LTPOA, said he agreed with Ennes on the 500-foot zone on Tippecanoe Lake and the 200-foot zone on “Little Tippe. Our biggest concerns are the 500-foot level even on Big Tippe, it has become evident on a safety issue as far as the depth of water, but also keeping boats from the prop wash and wave action we will get if we move any closer than 200 feet.” He added “a lot of money” has gone into this project, and “we would like to see this move forward.” Swart said he has approval from the LTPOA Executive Board that the LTPOA “will be in a position to remove the buoys in the fall. DNR will establish [the buoys] in the spring of this year as approved.” He also noted that the LTPOA has two patrol boats, one equipped with a GPS unit, “to periodically check [the location] of those buoys, probably on a weekly basis, if necessary if we saw anything moving.” Swart said the LTPOA would also provide any necessary maintenance required.

Lucas said the Department committee that reviewed this petition for rule change was chaired by Tom Flatt. Maj. Felix Hensley represented the Division of Law Enforcement, and Jim Hebenstreit represented the Division of Water.

The Chair thanked Mark Ennes, David Swart, and DNR Review Committee for their “patience and assistance” regarding the rule proposal.

Thomas Easterly requested clarification regarding the 500-foot and 200-foot zones. Lucas explained that the watercraft zone for Tippecanoe Lake would be 500 feet from the perceived shoreline—“500 feet from where the wetland begins.” He said that Tom Flatt could provide a graphic “to give you a better vision than I orally can.”

Flatt presented a graphic of the proposed watercraft zones as proposed. He said within James Lake the watercraft zone would be 200 feet from the Ball Wetlands, and within Tippecanoe Lake the watercraft zone would be 500 feet from the Ball Wetlands.

Doug Grant said, “You can’t tell it from here, but I looked at that [graphic], and that 500-foot out. When you look at the contour lines, I was very surprised that we are at three feet [to] four feet in most of those areas. We have kind of fallen emotionally in love with five feet, which I again would caution you not to fall in love with, because the way boats are running, that’s the minimum where the damage is done. As far as protecting the bottom, this is kind of a minimum standard.”

Flatt said that previous proposed watercraft zones were based on “old depth maps that showed the five-foot line come in fairly close. The new hydro-acoustic sampling showed that that’s not the case.” Flatt said “soundings” were performed for two of the buoy points, and “they are right at four feet.” He acknowledge, however, that the hydro-acoustic equipment has an error of six to 12 inches. “We don’t know if that’s because of calibration or because of the transition zone that might be reflected differently.”

Doug Grant said that a few years ago the United States Coast Guard advised skiing in “nothing under five feet”.

Easterly asked whether the proposed rule as amended in Exhibit C is reflected in the graphic. Lucas answered, “Yes.”

Jane Ann Stautz directed the attention of Commission members to the recommendation for final adoption in 6.D. on page 71 of the report, for prompt development of metrics to measure success of any rule amendments. She said, “I know there was some email correspondence with regard to some proposals around that, but again, I would like to emphasize the importance of having those metrics in place as we anticipate more issues like this in the establishment of these types of ecozones to make sure that we are very clear on what we are measuring, the effectiveness of this. I think it will help us going forward.”

Chairman Poynter expressed his concurrence with the Vice Chair’s remarks. He reflected that having a good measure for the success of the ecozone was important.

Thomas Easterly moved to approve for final adoptions amendments to 312 IAC 5-6-9 as modified in Exhibit C with prompt development of metrics. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Information Item: Overview of informal process for the administrative review of ratemaking recommendations for resorts and marinas under lease with the department of natural resources

Sandra Jensen provided an overview of the process for the administrative review of ratemaking recommendations for resorts and marinas under lease with the department of natural resources. She also presented a handout to Commission members, which predominantly explained the use of comparable rates as charged by other marinas in the “general area”. Jensen said the Commission’s ratemaking authority is “limited” to marinas that are operated on lakes or reservoirs that are leased from the US Army Corps of Engineers. “As a result, there are leases between the Department and the marina operator, but there are also leases between the DNR and the [Corps]”. She said the leases provide the standards in which the Commission and the DNR review petitions requesting rates for marinas. Jensen said the Commission “cannot withhold a rate increase unreasonably unless, of course, it is determined that the rate proposed exceed fair market value”. Jensen said the lease between the Department and the Corps provides that the Corps has the ability to “adopt or not to adopt” the Commission’s ratemaking determination. “What the Commission submits [to the Corps] is a recommendation...it is not an actual rate determination”.

Jensen said the Commission adopted nonrule policy Document, Information Bulletin #20, in 1998 to provide standards, “a consistent process”, for review of these petitions. She said the nonrule policy document was amended in 2003. Jensen provided additional information regarding the conduct of the public hearing and other processes set forth in the nonrule policy document.

Consideration of approval of amendments to Information Bulletin #20 governing the ratemaking process for resorts and marinas under lease with the Department of Natural Resources; Administrative Cause No. 06-200P

Sandra Jensen also presented this item. She explained that the language in bold and stricken fonts in the nonrule policy document, Information Bulletin #20 (Second Amendment) depict new language and deletions respectively. One technical amendment would capitalize references to the agency names. She said substantive amendments were the addition of the words “establishment” and “increase request” to “make it real clear that this nonrule policy document doesn’t relate strictly to increases” to rates.

Jensen noted Section 2 would be amended to clarify “any fee” that is going to be charged by a marina is subject to the nonrule policy document. “There are a lot of marinas out there that have rentals for temporary covers. It’s not just the slips, the houseboats, and guestrooms.” She said most of the substantive changes are in Section 6 which provides standards for setting interim rates. A marina may charge for one boating season any fee-based item that becomes available after April 1 due to new construction, modification of existing facilities, or other services made available by the marina operator. The amendments would clarify that a marina operator must submit a petition to the

Commission, by April 1 of the following year, to request that any interim rate approved by the Department in Section 2 be made permanent. If a petition is not submitted, the interim rate would be voided.

Doug Grant thanked Jensen for the overview. “That makes it a lot clearer. It just seems like you still have a heck of a hard problem of finding comparables that you can feel confident about.” Jensen responded, “It’s interesting and definitely challenging.” The nonrule policy document requires the marina operator to provide what the marina operators “consider to be comparables.” She said the Department’s Division of State Parks and Reservoirs reviews the comparables provided by the marina operators, but also develops its own list of comparables.

Robert Wright moved to approve the nonrule policy document, Information Bulletin #20 (Second Amendment) as presented. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

John Davis complemented Sandra Jensen for her efforts. “Sandra is certainly an asset to the Department, to the Commission, and to our understanding and presenting a clear message to our customers and constituents.”

Davis also said that the Department is “still having major problems” with the Inn at the Four Winds at Lake Monroe. “We have a failure, I think, to operate an establishment in accordance with what [the Department] expects. Our lessees put on the [Department’s] face, like it or not. They represent us to the public. This one is not working.” He said the DNR was having discussions with prospective buyers, but today’s economy presents difficulties. He said the Commission may be presented with the matter for consideration of a resolution to the problems associated with the lessee of the Inn at the Four Winds. “I don’t know what the corrective action will be..., but since the [Commission] is involved in the policy making for the Department, I think when we have a problem, even if we didn’t need the Commission’s blessing or a vote to fix it, I think we would be back here to inform you at the very least.”

ADJOURNMENT

The meeting was adjourned at approximately 12:13 p.m., EST.