NATURAL RESOURCES COMMISSION
Fort Benjamin Harrison - The Garrison
6002 North Post Road, Indianapolis, Indiana

Minutes of November 13, 2007

MEMBERS PRESENT
Bryan Poynter, Chair
Jane Ann Stautz, Vice Chair
Robert Carter, Jr., Secretary
Richard Mangus
Mark Ahearn
Damian Schmelz
Brian Blackford
Doug Grant
Lawrence Klein
Thomas Easterly

NATURAL RESOURCES COMMISSION STAFF PRESENT
Stephen Lucas
Sandra Jensen
Jennifer Kane
Debra Michaels

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Shelley Reeves	Executive Office
Ryan Hoff	Executive Office
Mike Crider	Law Enforcement
Samuel Purvis	Law Enforcement
Jim Hebenstreit	Water
Terri Price	Water
Phil Bloom	Communications
John Bacone	Nature Preserves

GUESTS PRESENT

Ruth DeBoer
Robert DeBoer
Michael Roth
Kenneth Yarian
Ann Sterling

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:07 a.m., EST, on November 13, 2007 at The Garrison, Fort Benjamin Harrison, 6002 North Post Road, Indianapolis, Indiana. With the presence of ten members, the Chair observed a quorum.

Damian Schmelz moved to approve the minutes of September 18, 2007 without amendment. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Report of the Director and Deputies Director

Director Carter updated the Commission on the multi-state investigation regarding illegal trade of foxes and coyotes. He indicated that the investigation resulted in the arrest of persons across the Midwest and Southeast. "In our state, there are things that are wild and things that are not wild. We wanted to close the loophole so that coyotes possessed off season would be euthanized. We have a very good reason for that." The Director explained that the animals were being transported out of Indiana "at a record pace" and going to other states "where they are put in pens and then chased down by hounds. Most of the time [the coyote] is killed." The Director said that other states have requested Indiana to stop the exportation of the wild animals.

The Director noted that the state of Virginia is reporting a "coyote problem", where previously the problem did not exist. "I really want to compliment the guys in law enforcement for an excellent investigation, and Phil Bloom for his leadership in [the Division of] Communications. He said that the investigation continues to evolve, but "so far we have had a lot of positive feedback on our efforts."

The Chair noted that on Monday Indianapolis Channel 8 aired the news story. Channel 8 "did a very nice job thanks to comment from Phil Bloom and others. It was just a nice story. It gave the Department a good look, and it was very balanced and fair."

The Director noted that Col. Michael Crider and Maj. Samuel Purvis, along with Phil Bloom, Director of the Division of Communications, were present at today's meeting. "I think we should continue a course of action and get his rule changed. I think it's the right thing to do. I think it is something that we want for our state."

John Davis, Deputy Director for the Bureau of Lands, Recreation, and Cultural Resources, reported that the Department has been working with persons in French Lick and Orange County to develop trails in and around French Lick and West Baden Springs. He said that pedestrian and biking trails would be constructed. "It should be a nice opportunity for increased recreation activity in the area."

Davis said the Department has also been working with the U.S. Army Corps of Engineers regarding water management, timber management, and wildlife management at the Department's reservoirs. The Department has been meeting with Greendale and Lawrenceburg concerning historic sites. "You may have seen Dr. Jim Glass, Director of

the Division of Historic Preservation and Archaeology. [Dr. Glass] wrote an article for the Sunday *Star* this week about Mounds [State Park], Indiana mounds, and how important those are." Davis said Greendale is attempting to preserve "Fort Oberting, which is a "pretty impressive" mounds structure overlooking the Ohio River.

Davis reported that the Indiana General Assembly's Natural Resources Study Committee met four times this summer preparing for the legislative session. "We have been trying to coordinate items with them." Davis noted the hunting season is "open and going smoothly".

Commission Member, Thomas Easterly, asked, "You mentioned mountain bikes trails. How do we deal with erosion? Or, maybe they don't cause erosion like I think they do." Davis said, "You know, we have been surprised." A mountain bike test trail was constructed in 1996 at Huntington Reservoir to study potential erosion impacts and with impacts to other users of the forest and reservoir. "Mountain bike trails built properly do not have the erosion that you might fear." Davis said he walked a newly constructed mountain bike trail at Brown County State Park. "It's a pretty amazing structure. There is a lot of care taken to make sure that there are not troublesome places. Where they anticipate that there could be erosion, the trail is constructed to minimize that."

Easterly then commented, "So, it's not just putting a bunch of markers up and letting people go." Davis responded, "Absolutely not. It is a very controlled kind of thought about the topography and about how the bike will impact that. They are multi-use trails, so hikers also use mountain bike trails." Davis said the mountain bike trails on the state forests and parks get "a lot of use". Davis observed that mountain bike trails do not have the erosion problems as do horse trails.

Chairman Poynter said, "A lot of the trails groups, especially with the horses, mountain bikers, and hikers, they self-improve and take care of the trails don't they?" Davis said, "They do. Hoosier Mountain Bike group is tremendous. They have educated themselves on how to build trails in a sustainable fashion. They are out there all the time on existing trails doing maintenance and watching for trouble places if there are any. It's a really great program."

In absence of the Advisory Council Chair, Patrick Early, Chairman Poynter asked Stephen Lucas, Director of the Commission's Division of Hearings, to make a report on Early's behalf.

Lucas noted that the Advisory Council reviewed several items at its last meeting, two of which are on today's Commission agenda. He said James Hebenstreit would present Item 5 concerning contract withdrawals from reservoirs. As a result of statutory amendments made in the most recent General Assembly, the Advisory Council has new responsibilities regarding contract withdrawals.

Lucas said the Advisory Council also reviewed the proposed nonrule policy document, Agenda Item #4, which addresses the delineation of the lines between riparian owners

and between riparian owners and the public on public freshwater lakes and navigable waters.

Lucas concluded, "Both documents were considered in some detail by the Advisory Council. We received good suggestions, and modifications to the documents resulted from those suggestions in both instances."

CHAIR AND VICE CHAIR

Updates on Commission and Committee activities

The Chair noted that he was remiss at the Commission's last meeting in not introducing two "key" individuals with the Department. The Chair invited Ryan Hoff and Phil Bloom to briefly explain their responsibilities within the Department.

Ryan Hoff said that he is the Legislative Director for the Department. One of his responsibilities will be to serve as a Department contact and resource person for Commission members. Hoff said he joined the Department in July 2007. Prior to his joining the Department, he was employed with the Department of Transportation, Ohio Northern Law, and four years with the Indiana General Assembly. "I will be looking forward to working with you all."

The Chair asked, "How many issues do you think you will be tracking in this Legislative session?" Hoff said the Department "only has a small handful that we are pursuing. Granted, every year there are always surprises, but usually no less than a dozen different bills that we will be tracking closely. This year will be a little different because everyone's focus will be on property taxes. It should be a session unlike any other."

Chairman Poynter reflected, "In the short time that I have had to work with Ryan, I can assure you that we are in great hands." The Chair asked Mark Ahearn, Commission Member, if he had an opportunity to work with Hoff when Hoff was employed with the Department of Transportation. Ahearn responded, "Absolutely. It's the DNR's gain and INDOT's loss."

The Chair then invited Phil Bloom to address the Commission. "Phil and I have known each other for an awful long time, and have worked together in a myriad of different ways over the years. Much like with Ryan, I was just thrilled—if that is even enough to describe it—that Phil joined the Department, and he is already making a mark."

Bloom said, "If you were thrilled, you can only imagine how thrilled I was when [the Director] made the job offer a couple months back." He said he is a "life long" Hoosier and has spent "30 years in the newspaper business, the last 28 years with the Fort Wayne *Journal Gazette*, and the last 16 years as Outdoors Editor. I have been to many, many Natural Resources Commission meetings over the years." Bloom said he has "spent time" with Commission Member, Richard Mangus, when Mangus was an Indiana State

Representative. "I'm just delighted to be here." He noted that the Division of Communications has 16 staff members, and the Division's job is to "serve the needs of the DNR in communicating the message and informing the public about what's going on in various programs."

The Chair said, "Phil is far too humble, so I will brag just a little bit." He said Bloom is an author, an award-winning outdoor page editor, and serves on the Board of Directors of the Outdoor Writers of America. "Phil Bloom serves with me in a role as a member of Hoosier Outdoor Writers."

The Chair requested an update regarding the Commission's Division of Hearings office move. Lucas said that the current projected date of the office move was November 30.

Consideration of 2008 Commission meeting dates and locations

The Chair proposed the Commission's 2008 meeting schedule. "We want to set forth dates and a rough idea where we might be going." He said initial discussions had taken place among the Vice Chair, Lucas, and me regarding "keeping with the same format of scheduling on the third Tuesdays of the month." He confirmed that the Commission would next meet on January 22 at The Garrison, Fort Harrison State Park.

Bryan Poynter said discussions "with the Department's Executive Office have been ongoing regarding possible locations of the meetings that might match roughly with agenda items that we might be dealing with. In keeping with the format that we tried this year successfully, the aim was to have at least two meetings, probably in the summer, out of Indianapolis to complete the circle, if you will, of being in all areas of the state by the end of next year." He suggested a May meeting location in southwestern Indiana in conjunction with a mining and reclamation tour and touring Goose Pond. In July, the Commission meeting location is proposed for Northwest Indiana. The Chair said that a date range of three days have been proposed around the third Tuesday in May and July to accommodate travel, the meeting, and tours. If this proposal succeeds, the Commission would have met in all four quarters of the state, in addition to Central Indiana, in the last two years.

The Chair requested input from the Commission members regarding the proposed meeting schedule. "I think the Department would like to see us continue" to travel outside of Indianapolis. "I think it helps the constituents, the public, and groups that we serve." He said a tour of the Indiana Dunes and the Lake Michigan area could be planned. The Chair suggested that if there are "places, issues, things that you would like to see incorporated as Commission members now in a public forum, or after the meeting to meet with Department staff please let us know, because we are trying to do things that would match the issues of the Commission."

The Chair said that discussions were held with Vice Chair Stautz and Lucas regarding continuing the education process for Commission members for at least the first three

meetings of 2008. The training sessions could precede by one hour the regularly scheduled meeting, and they would be open to comply with the Open Door Law. The sessions would be "specific to issues of a macro nature that we often times deal with as a Commission, beginning with rule making. We have talked about other sessions to consider the processes employed for evaluating conservancy districts and for evaluating slip rates. Those are things that we have dealt with; we deal with all the time, and will deal with on a much more micro sense." The Chair then requested Steve Lucas to provide additional detail.

Lucas responded, "If the Commission is agreeable, we could try to set dates specific for March, September and November, applying the third Tuesday of the month." He then proposed meeting dates of March 18, September 16, and November 18 to be held at The Garrison, Fort Harrison State Park. He said the Commission's Division of Hearings would coordinate with the Department's Executive Office "to design more specificity as to the May and July trips."

Doug Grant stated, "Not only does it help to know the exact date, but it helps to know the exact time for those of us that travel farther away." Lawrence Klein commented, "I assume that the start time is 10:00 unless something fundamentally changes." The Chair said, "I would feel that it is safe to say that without any further consultation that those meetings here at The Garrison would start at 10:00. I offer though the one that would be in January we may start our education portion at 10:00 and have the actual Commission meeting start at 11:00." The Chair indicated that the dates would be "solidified" in the next two weeks.

Klein asked, "Is there a way that we could, at least, marry a little bit of the [education] topical matter to upcoming agenda issues? Might we go over those that you know are coming our way? That would be beneficial. If there is a need to expand or elaborate as to the role and function that the Commission has, I would find that we may need to spend more than hour doing that. We may want to look at a day, or morning or some off the calendar time that we can do that."

The Chair noted Klein's comment. "It's such a moving target with how things funnel to the agenda. We just took the effort to pick the three or four things that are of the most macro nature. If there are issues that show up on our agenda, that's why Ryan Hoff may call or Steve Lucas is always available. We will try to very closely match some of those agenda topics to make sure the Commission members are fully prepared."

Lucas said the proposal was for a presentation on rule adoption at the January meeting. "The reason we picked that topic to go first is because it is the most pervasive topic. For virtually every Commission meeting, you have rule issues." The discussion of slip rates was also set to come in advance of the next application of the nonrule policy document, which addresses slip rates. Anticipated for the September 2008 Commission meeting is a review of slip rates. "Targeting a discussion of conservancy districts is more difficult," he said, because the Commission's responsibilities for conservancy districts arise "sporadically and unpredictably." But the hope was the information item later in today's

meeting would provide assistance in the short term regarding conservancy districts. Lucas added, "It might make sense and might fit with Larry [Klein's] idea of thematic discussions for a fourth discussion topic focused on Coastal Zone Management or the Great Lakes Charter at the July meeting." Either of these "would fit geographically with Northwest Indiana."

DNR, EXECUTIVE OFFICE

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

The Chair opened the floor to Commission members to offer topics or issues appropriate for referral to the Advisory Council for future consideration. No topics or issues were offered. The Chair noted that the process of referring topics to the Advisory Council is "working fabulously. I appreciate Chairman Early's efforts and the efforts of all the Advisory Council members who participate."

ADVISORY COUNCIL

Consideration of the adoption of riparian zones within public freshwater lakes and navigable waters as a nonrule policy document, Information Bulletin #56; Administrative Cause No. 07-045A

The Chair noted that this item is an issue about which the Commission has heard "bits and pieces." With the absence of Early, the Chair deferred to Stephen Lucas.

Lucas introduced the topic. "If somebody would have asked me 20 years ago what you have the most adjudications about, it would have been coal mining but we don't have as much about coal mining anymore. If you would have asked ten years ago, I probably would have said the Flood Control Act. Today, it would be the Lakes Preservation Act." Lucas said disputes arise under the Lakes Preservation Act in numerous contexts. "These include seawalls, underwater beaches and even the placement of boathouses. But the most frequent appeals result concerning the placement of piers and boat stations." Within this subset of Lakes Preservation Act cases, the most common issue involves "how to draw the lines" between riparian owners.

Lucas also noted that the principles regarding line drawing have equal application to navigable waters, although there were not currently a large number of cases pertaining to navigable waters. Drawing lines between riparian owners, and between a riparian owner and general public usage, "is really a public waters issue. It is not, *per se*, a public freshwater issue." The efforts by the Advisory Council also have direct application to navigable waters.

Lucas said the proposed nonrule policy document was a "marvelous example of a cooperative effort that involved the Division of Water, the Division of Law Enforcement, the Office of Legal Counsel, and to some extent the Division of Fish and Wildlife. Guidance was provided from a Committee of the Advisory Council which reviewed documentation and moved the proposed nonrule policy document forward. What we're going to give to you in terms of this line-drawing process is a consolidation of concepts, with graphics, of what we think the law is. There are some decisions from the Court of Appeals on this issue. Some of the decisions come from CADDNAR, and, frankly, some of what you'll have today are things that are still actively on appeal. I'd like to say this is going to be a nice granite conclusion to a complicated problem, and a sensitive problem, but it won't be. We'll be back seeking modifications as we receive direction from the Courts. I'm sure if you give your approval to the nonrule policy document, it will be used by the Division of Law Enforcement, the Division of Water and the Division of Hearings. I'm also sure it will be tested, retested and questioned. But, I think it's a huge step forward in terms of trying to resolve issues. I think this is as important a guidance document as we've given to you in the last decade."

Chairman Poynter noted that Lucas "did a wonderful summarizing of a very complicated problem" that deals with every facet of Commission responsibilities in this legal area. He asked Lucas to pause before reviewing the substance of the nonrule policy document to explain the difference between a "nonrule policy document" and a "rule".

Lucas responded that a nonrule policy document "does not have the force and effect of law. Once the rule goes through the adoption process, it has the force and effect of law, the same as the statute and the constitution. There are different levels of law, and a statute cannot violate the constitution. A rule cannot properly violate the statue or violate the constitution. But, within these limitations, a rule has the force and effect of law. A nonrule policy document is just to offer guidance. In this instance, it's a little different than some nonrule policy documents in that virtually everything here has some legal foundation to it. In this case, there's a little bit of rule behind it, there's a little bit of statute behind it. There's quite a bit of what we might call 'common law'. There's quite a bit of precedent behind the proposed nonrule policy document, either from the Court of Appeals of Indiana or from the AOPA Committee and CADDNAR. This nonrule policy document does not have the force and effect of law, but it's mostly a compilation of what we believe are laws, even laws of differing persuasive worth."

Lucas outlined the general terms of the proposed nonrule policy document. He then provided the Commission members with six diagrams developed for inclusion in the document. He said that if the nonrule policy document would be approved by the Commission, it would be posted on the Commission's website, as well as on the Legislative Services Agency's website.

Lucas thanked Jim Hebenstreit and Tony Scott from the Division of Water for the preparation of new, refined diagrams. He said these were just developed and were not available for inclusion in the Commission packet, but were substantively consistent with

those in the packet. Hebenstreit projected the new diagrams through PowerPoint, and Lucas explained principles depicted in the diagrams.

Lucas said the first principle was where the shore approximates a straight line, and where the onshore property boundaries are approximately perpendicular to this line. In this situation, the boundaries of riparian zones were determined by extending the onshore boundaries into the public waters. He said the first principle was the simplest factual context and the one specifically approved by the Court of Appeals of Indiana in *Bath v. Courts*.

The second principle arises where the shore approximates a straight line, but where the onshore boundaries approach the shore at obtuse or acute angles. He said the boundaries of riparian zones are generally determined by extending a straight line at a perpendicular to the shore. This principle was developed in a Wisconsin case, *Nosek v. Stryker*, a decision approved by the Court of Appeals of Indiana and upon which *Bath v. Courts* was founded. An expansion of the second principle was developed in a CADDNAR case. If the boundaries of two owners intersect at the shore, or in proximity to but landward of the shore, the boundaries of the riparian zones may be formed by a perpendicular to the shore from the point of intersection of the onshore boundaries. Lucas said application of the second principle may be most compelling where land owners in the vicinity have historically used a perpendicular line to divide their riparian zones, but the principle probably should not be applied where a result is to deprive a riparian owner of reasonable access to public waters.

The third principle arises where the shore is irregular, and it is impossible to draw lines at right angles to the shore for a just apportionment. Lucas said this principle was the third of final element of the *Nosek* case. Here the lines forming the boundaries between riparian zones would divide the total navigable waterfront in proportion to the length of the shores to each owner taken according to the general trend of the shore. If the navigable waterfront borders a lake which is substantially round, or is a bay that is substantially round except for its connection to the main body of the public waters, the riparian zones may be made by running lines from each owner's shore boundaries to the center of the lake or bay. If the navigable waterfront borders a long lake or other public waters which are not substantially round, the riparian zones may be made by identifying a line through the center of the public waters, where deflected lines run from each owner's shore boundaries to intersect the centerline at perpendiculars. Similarly to the expansion described in the second principle, if the boundaries of two owners intersect at the shore, or in proximity to but landward of the shore, the riparian zones may be formed by running a line from the owners' boundary intersection to the center of a substantially round public waters or to a center point where at the cul-de-sac of a long lake. Otherwise for a long lake or other public waters which are not substantially round, the lines would be run from the intersection of their boundaries to intersect the centerline at a perpendicular.

Chairman Poynter observed, "If someone asks a Commission member what the Natural Resources Commission does, this is a fantastic example. When you put real faces, real

dollars, real issues in the water, this becomes a mess. And, this nonrule policy document goes a long way to address the issues for adding guidance to the DNR, to us as Commission members, and just as importantly, to the public."

Jane Ann Stautz complimented the Advisory Council, the Commission's Division of Hearings, the Division of Law Enforcement, the Division of Water, and the DNR's Office of Legal Council for their efforts with the nonrule policy document. She said the nonrule policy document "would be helpful and very useful to the AOPA Committee in understanding the law and in applying it equitably, so I'm very supportive of this and very appreciative."

Doug Grant expressed support for Stautz's comments. "I've lived on a couple of northern Indiana lakes all my life, and this is big time stuff up there." He said there was a great need for better understanding of rights among riparian owners and with public use of the lakes.

"As a refresher", Bryan Poynter asked AOPA Committee Chair, Jane Stautz, to introduce the AOPA Committee Members. Stautz responded, "We expanded the AOPA Committee in January to bring in more expertise, more diversity, and make it easier for those who serve on that committee." She said Mary Ann Habeeb, Robert Wright, Mark Ahearn, Douglas Grant and her constitute the AOPA Committee.

Mark Ahearn said, "In addition to assisting us to resolve some of the disputes that come before us, regardless what the Court of Appeals may do with individual cases or how they get tested in the future, the idea of publicly saying 'this is a policy that we're looking at' is very helpful to public understanding. Before you divide your lot in your will, before you grant someone an easement, before you plant a new subdivision around the lake, you need to think about the implications from what we're publicly saying here. It may not be the way you assumed it was going to be. So it tends to encourage wiser development than some of the existing ones we've observed and that have been implemented and now can't be sorted out. I think, moving ahead, counsel ought to be better able to advise their clients what to do with their property with respect to riparian rights."

Douglas Grant moved to adopt the nonrule policy document for delineating riparian zones in public freshwater lakes and navigable waters, as presented. Larry Klein seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF WATER

Consideration for preliminary adoption of new rule, 312 IAC 6.3, for water withdrawal contracts from reservoirs under P.L. 231-2007 and IC 14-25-2; Administrative Cause No. 07-100W

James Hebenstreit, Assistant Director of the Division of Water, presented this item. He explained that IC 14-25-2 enables Indiana to enter contracts to sell water from reservoir

impoundments that were State financed. "We can contract to also sell minimum stream flow withdrawals downstream of the reservoir." He said that by statute the price of the water is $33 per million gallons.

Hebenstreit said the statute dates back to the 1960s, and most of the earlier contracts date back to the statute's effectiveness. "Most of the contracts are on Monroe, Brookville, and Patoka Reservoirs, and there are also some sales of water from Hardy Lake, and really small sales on Brush Creek and Versailles Lake." He provided a brief overview of the existing contracts on the main three reservoirs. The Monroe, Brookville, and Patoka Lakes were built first for flood control storage. "The state decided that it would pay extra money to finance additional storage in those reservoirs for public water supply." Hebenstreit noted that the water sale contracts specify the elevations between which the water is located that can be sold.

Hebenstreit noted that Monroe Lake is the sole source of water supply for Bloomington. The reservoir has a "dependable yield of 122 million gallons per day, and Bloomington's contract authorizes the city to take up to 24 million gallons per day." He explained that the State sells water to Bloomington, and Bloomington then sells water to communities in surrounding counties.

Hebenstreit said that the Patoka Regional Water and Sewer District (PRWSD) is the primary customer on Patoka Lake. The PRWSD has a contract that allows withdrawal of 20 million gallons per day. "That's about 20% of the storage of the reservoir." He said the PRWSD distributes water to communities located in ten to eleven counties. "That is probably what the legislature envisioned originally when the state was authorized to enter into contracts is to provide regional water supply."

Hebenstreit said that "for years there has not been much demand from the public to buy water from the reservoirs. A lot of the storage is uncommitted." The Department has not "got into competing uses, but that changed a couple years ago when there was a proposal to bring some of the water from Monroe Lake to Indianapolis, which would have, if approved, committed almost all" of the storage capability. This proposal initiated a statutory amendment which required the Advisory Council to conduct public meetings when a contract proposal is received. During a public meeting, the Department would discuss the nature of the pending request, the process by which the Commission would determine whether to enter into a contract, and would provide an opportunity for public comment. Previously, the contract review included no criteria to "spell out" what the requirements were or what type of data to submit. The statutory amendment and the proposed rule would bring this program more in line with the other regulatory programs.

Hebenstreit then provided an overview of proposed new rule 312 IAC 6.3. He said 312 IAC 6.3-2-5, which governs minimum quantities of stream flow, defines the minimum releases which must be maintained from the reservoirs. The contracts with the federal government provide what minimum releases the U.S. Army Corps of Engineers would maintain.

Hebenstreit said Rule 3 clarifies procedures. Section 1(b) would define what an application must include for submission to the Department. Section 3(b) covers the public meeting that is held in each county in which the requesting party is located and in any county where water would be distributed. Section 4(d) defines what the Advisory Council may consider, which also includes other information from other DNR divisions, state and federal local agencies, and public comments.

Hebenstreit said Rule 4 would govern contract terms and conditions. Section 1 includes water allocation factors and sets priorities. He said the Commission has contracts with a "couple of golf courses to buy water from the reservoirs. If, I think, demand ever got higher and there was more interest in drinking water versus golf courses, I think the golf course would fall out of the mix and the drinking water would be a higher priority."

Hebenstreit said Rule 5 was directed to drought alerts. Section 2 outlines how the Department declares drought alerts and generally follows the state's current water shortage plan. The rule also includes indices that might be used to gage a drought warning or drought emergency. "We've already had an indication from the State Climatologist that the proposed use of the Palmer Hydrologic Drought Index may need to be changed. So, as this moves through the process, we suspect that that will have to be revised."

Mark Ahearn asked if the reference in proposed 312 IAC 6.3-3-5(c), to IC 4-21.5-2-5(11), identified appeal rights under AOPA. Lucas responded the cross-reference specified that the rule defined the disposition of property by contract and did not establish a right to adjudication under AOPA. Contracts are exempted from AOPA by IC 4-21.5-2-5(11). Lucas also said, "This is really a contract process, not a licensure process."

Jane Ann Stautz referenced 312 IAC 6.3-4-1 regarding water allocation factors. She asked for clarification on how the priorities for the use of water were established. Hebenstreit responded that an Indiana statute states that drinking water for humans and livestock is the first priority. Under the proposed rule, the second priority would be health and safety, which he said was based on "experience with other water management programs." Stautz observed that as the rule proposal moved through the process, seeking to define priorities was likely to invigorate discussion. "As you look at other states and what is happening elsewhere, like Atlanta, there's been a lot of discussion around prioritization and application." Hebenstreit agreed and added, "If you look at our water shortage plan, the cry has always been you need to have priorities in there. We've made that effort here."

Larry Klein asked if the contract with Bloomington was for a period of 50 years. Hebenstreit responded the statute allows contracts to be entered for a period of 50 years. He explained that the original contract with Bloomington, which "expired a couple of years ago, was for 40 years. When most of those contracts were entered the applicants asked for the longer term to coincide with bond issuances, and that was a financing concern with them, so that's why there are longer terms." Hebenstreit said not all

contracts are for 50 yeas. He said, "One golf course contract is a ten-year contract and another one a 15-year contract."

Lucas added that the 50-year contract is a statutory ceiling. A contract is not required to be 50 years long, but it is prohibited from being longer than 50 years. Klein asked, "Who makes that determination on length." Lucas answered, "You do as the Commission."

Klein asked if he correctly understood. "We can control time, but we can't control price? To some extent, we can control consumption by these rules?" Hebenstreit agreed. He added that the proposed rule states an entity seeking a contract "has to show that it has looked at other alternatives for water supply before a contract for withdrawal from a reservoir would be approved by the Commission."

Doug Grant asked Hebenstreit, "What would you approximate the market rate is for raw water from a reservoir?" Hebenstreit responded, when the rates were originally established for the contracts, they were calculated based on the state gaining its return of investment. "I forget what dollar amount they figured, but Bloomington started it in the 1960s at a rate of $42 dollars. I think when we looked at it in the 80s or early 90s, it would have been $120 per million gallons. Klein continued, "And, they're still paying $33 dollars?" Hebenstreit replied, "Yes, so, I'd guess at today's price, if you look at the state's return on investment, it's probably over $200. Several other states have a flat rate, too, but it's up in the $100, $150 or $200 range. So, it's a dirt-cheap way to get water" in Indiana.

The Chair reflected, "This document that is before you is a great example of what the Advisory Council will do as a result of some legislative action. The draft principally came as a result of Jim, Steve, and Deputy Director, Ron McAhron, who received input from staff, wrote this, and now it's before the Commission for a preliminary adoption. I just want to thank you for the level of attention and detail, and I want to thank Chairman Early and the Advisory Council for their review and for addressing these issues in a very meaningful fashion. So, it's a very good example of the macro work that this Commission does."

Commission Member, Damian Schmelz, asked Hebenstreit if the "terrible misfortune" in Georgia presented a lesson in to "really examine the water withdrawal contracts." Hebenstreit replied, "Yes, and people have pushed us to do stuff both on the water shortage plan, because they are now saying, 'Don't wait until you're in that situation to have to start making those kind of decisions.'"

Commission Member, Doug Grant, asked Hebenstreit what the amount of yearly revenue was for Indiana from these water contracts. Hebenstreit replied, "About $250,000."

Larry Klein expressed concern with approving 50-year contracts, with the possibility of the cost of water "going through the ceiling". He said if that were to occur, "the Commission's hands would be tied by a contract which was written 50 years ago or 30 years ago." He suggested there be "review periods" that could be adjusted based upon

supply, demand or on scientific evidence that would "urge one to rethink the contract" or provide an opportunity for review. "Let's say the legislature in two years says we're going to go to $130 dollars per one million gallons, and we've just approved four 50-year contracts."

Lucas responded, "You decide the contract terms, so the solution to that is when the Commission decides to approve a contract, you don't approve a 50-year contract if you think it is a bad idea. This rule proposal doesn't say you have to approve a 50-year contract. This says that legally you cannot approve a contract that is longer than 50 years. The rule restates the statutory maximum."

Hebenstreit added, "And, that's what we're doing now. The golf courses are for a shorter period, because we figure in ten years there may be a change in demand, and maybe we won't want to sell it to a golf course."

Jane Ann Statuz moved to give preliminary adoption of new rule (312 IAC 6.3) for water withdrawal contracts from reservoirs to help implement P.L. 231-2007 and IAC 14-25-2. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF ENTOMOLOGY AND PLANT PATHOLOGY

Consideration for preliminary adoption of rule amending 312 IAC 18-3-12 governing standards for the control of the larger pine shoot beetle to add Switzerland County to the quarantine area; LSA Document #07-595, Administrative Cause No. 07-193E

Jennifer Kane, Hearing Officer, presented this item. She noted that in May 2007, the USDA confirmed Switzerland County as infested with the larger pine shoot beetle. The rule proposal adds Switzerland County to the quarantine area, essentially removing the county from the list of exempted areas found at 312 IAC 18-3-12(c). "As a result, the interstate and intrastate movement of the regulated articles listed in subsection (d) from quarantined counties will be restricted to prevent the artificial spread of the larger pine shoot beetle to noninfested areas or states."

Kane said that that the Division of Entomology and Plant Pathology had completed the required fiscal analyses and found that the removal of Switzerland County would not add additional trips or duties to existing Division responsibilities. There is one nursery dealer and one nursery grower in Switzerland County but they do not sell or grow stock that is susceptible to pine shoot beetle. Nursery stock from both businesses is sold locally and within the quarantined area. "No program specific certifications for export are required by the Department or the Federal Government to comply with the rule proposal."

Kane said this rule proposal will have very minimal or no economic impact on small businesses in Switzerland County. The only changes that may occur in response to the rule may be where the nursery dealer acquires its nursery stock. She said that pine

production in Switzerland County is "minimal or non-existent". On the other hand, the failure to adopt the rule proposal would result in the USDA's quarantine of the state's remaining 25 counties. She recommended preliminary adoption be given to the proposed amendments to 312 IAC 18-3-12.

Damian Schmelz moved to give preliminary adoption to the proposed amendments to 312 IAC 18-3-12 adding Switzerland County to the common pine shoot beetle quarantine area. Larry Klein seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of Amended Recommended Report of the Natural Resources Commission with Respect to the Petition for the Dissolution of the Illiana-Brunswick Conservancy District (Lake Circuit Court Cause No. 45C01-0101-MI-00003); Administrative Cause No. 07-182D

Jennifer Kane, Hearing Officer, presented this item. She noted that on August 20, 2001, the Lake Circuit Court ordered the creation of the Illiana-Brunswick Conservancy District. In its order, the Lake Circuit Court "adopted the Commission's findings and recommendations", which were filed with the Court on June 22, 2001, as its own findings and recommendations. The Court specifically found that the Illiana-Brunswick Conservancy District be created for the purpose of improving drainage.

Kane said that on September 18, 2006, the Illiana-Brunswick Conservancy District filed its petition for dissolution with the Lake Circuit Court. On August 9, 2007, the Lake Circuit Court referred the petition for dissolution to the Natural Resources Commission. She said that the Court ordered the Commission to hold a public hearing on the petition for dissolution to receive evidence on the propriety of dissolving the Conservancy District, and subsequently to file findings and recommendations. "The Court also found that the petition for dissolution complied with statute and bore the necessary signatures—the majority of the freeholders.

Kane said the public hearing was held on October 15, 2007 in Crown Point, and noted that the summary of evidence received was contained in the recommended report beginning on page three. "As evidenced by the testimony of the Petitioners and the Remonstrators, the drainage issues for which the conservancy district was established to address are ongoing and have not been fully resolved."

Kane said that the freeholders within the conservancy district contemplated funding of the operation and works of improvement to correct the drainage issues by a combination of assessment of special benefit taxes and user fees. In 2003, the cost for drainage improvements within the District was estimated to be $250,000. This estimate, being subject to inflation, has now increased to approximately $500,000. "The District has proven that it has not been able to collect freeholder taxes and user fees in sufficient amounts to begin construction improvements set forth in the District Plan." Since 2004,

the Illiana-Brunswick Conservancy District has only incurred expenses from professional services, such as engineering, accounting and lawyer fees.

Kane said the Conservancy District continuing to incur debt solely from professional services rendered rather than through construction of improvements for which the District was established is a "trend that appears well-established." She noted Indiana Code § 14-33-15-5 provides that the Lake Circuit Court cannot dissolve a district if the district has bonds or notes outstanding. The Illiana-Brunswick Conservancy District currently carries an estimated debt of $20,546.11. Kane said that the Department of Natural Resources, because of the outstanding debt, does not support dissolving the district.

Kane said the Petitioners did not present evidence at the public hearing for a plan by which to satisfy the District's debt. "The failure to provide a plan, however, does not preclude dissolution." Kane said the Petitioners would have an opportunity to present additional evidence regarding the plan of dispensing debt before the Lake Circuit Court.

Kane said Indiana Code § 14-33-15-5 provides that if the Lake Circuit Court finds the activities of the district should cease, the Court shall order the district to function only for the purpose of certifying necessary assessments or taxes, and for collecting the assessments and taxes in order to pay off the financial obligations.

Kane said the evidence received at public hearing demonstrated that the District would continue to incur debt. The evidence also demonstrated the District's continued inability to procure funds sufficient to implement its District plan—to improve the drainage. "Evidence supports that the District should cease activities, except as needed to satisfy its financial obligations, in order that the court may dissolve the district."

Kane clarified the inclusion of the word "amended" in the title of the document. She explained that on October 26, 2007 the recommended report was forwarded to the Petitioner and other interested parties. A written comment submitted by Scott Garmany was omitted but has been inserted on page 13 of the amended report. Kane noted Garmany's comments did not change the resulting findings and recommendations. She recommended the Commission adopt the findings and recommendation, as presented in the Commission's packet, as its report to the Lake Circuit Court.

Ruth DeBoer addressed the Commission on behalf of the Petitioners. She provided a map of the district which she said consisted of 1,290 acres. She said there was "one party" who owned 25 acres and who opposed the dissolution. She said only eight of the 25 acres has a "real water problem. The size of the district also precludes us from having an effective district, because we're just really not eligible for any federal funds, which was originally the intent when the district was formed."

The Chair thanked DeBoer for her comments and for taking the effort to make the lengthy trip from her home to the Commission meeting.

Damian Schmelz moved to approve the amended recommended report in the matter of petition for the dissolution of the Illiana-Brunswick Conservancy District as the Commission's report to the Lake Circuit Court. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Information Item: Recent Decisions by Court of Appeals of Indiana Construing Conservancy District Act:

(a) In Re: The Petition for the Creation of South-West Lake Maxinkuckee Conservancy District (Crist v. South-West Lake Maxinkuckee Conservancy District) [Published Opinion]

(b) In Re: The Matter of the Merrillville Conservancy District [Unpublished Opinion]

(c) In Re: The West-Central Conservancy District [Unpublished Opinion]

Steve Lucas said "Commission members have asked us to keep them current on developments regarding laws that you administer. The Court of Appeals of Indiana has recently decided three cases with direct bearings on the administration of conservancy districts. Although the entity primarily responsible for the oversight of conservancy districts is the County Circuit Court, the Commission and the DNR also have critical roles."

Lucas reflected that two of the Court of Appeals decisions were unpublished. "This status limits their significance to the particular facts at issue. Unpublished opinions cannot be cited as precedent. Because these cases are still very much active, however, I will refer briefly to them. The third case—pertaining to the South-West Lake Maxinkuckee Conservancy District—is a reported decision. The consequence is that the South-West Lake Maxinkuckee Conservancy District decision becomes part of the body of law, governing not just that particular conservancy district, but all future controversies which may arise regarding conservancy districts.

Lucas said the South-West Lake Maxinkuckee Conservancy case presented several matters of first impression. "I'll begin with and talk mostly about this decision." The South-West Lake Maxinkuckee Conservancy District was proposed to be created for the purpose of collecting and treating sewage along the portion of Lake Maxinkuckee that is near Culver but not covered by the Town's wastewater treatment facilities. After determining the petition satisfied the jurisdictional requirements, the Marshall Circuit Court referred the matter to the Natural Resources Commission to make the statutory technical findings which pertain mostly to feasibility and need.

He suggested an initial point of note is that the Court of Appeals references events that it characterizes as "public hearings"—the first was held "on July 22, 2004 and was the hearing which I conducted for the Commission in Culver." The second "public hearing"

was the Commission meeting of November 16, 2004 during which the Commission considered and acted upon the hearing officer's report. "From my perspective, the Court's characterization of the Commission meeting as a second 'public hearing' may mean that the Commission may, for conservancy districts, consider evidentiary matters and make adjustments to the technical findings of the hearing officer. This aspect of the opinion probably calls for us to take a second look at the Commission's nonrule policy document pertaining to conservancy districts. My hope is we can do so when we revisit the subject of the conservancy districts during the May 2008 meeting."

Klein asked regarding the Illiana-Brunswick Conservancy District map presented by the De Boer's, "So the map could have been evidence?" Lucas answered in the affirmative.

Ahearn said, "Not getting too wrapped around the axel, the implications of taking evidence are, among others, we would then make a decision perhaps based on material that didn't exist prior or was not part of the record." Lucas answered, "Exactly. The map is a graphic example. In this case, the [De Boer's] map was supportive of what the hearing officer recommended." Lucas noted that "if the map would have been a dramatic departure" from the recommendation, "then I think that is something that needs to be addressed."

Lucas observed, "The first point actually enumerated by the Court of Appeals has to do with its jurisdiction to consider appeals from Circuit Court decisions pertaining to conservancy districts. The Conservancy District Act calls for direct appeals to the Indiana Supreme Court from decisions for the establishment of conservancy districts. But the Court of Appeals decided the Supreme Courts rules trump the statute, and the Supreme Court rules do not include conservancy district appeals among those which go directly to the Supreme Court. A decision—this decision, in fact—could still advance from the Court of Appeals to the Supreme Court upon 'transfer'. Accepting transfer is discretionary by the Supreme Court, however—an option which, more often than not, the Supreme Court declines."

He said the second enumerated point by the Court of Appeals was a detailed analysis of signatures in support of a petition opposing the formation of a district. The latter situation is commonly referred to as a "remonstrance". Under the Conservancy District Act, if 51% of the freeholders within a proposed district support a remonstrance, the formation is vetoed, regardless of its merit. The Commission has no direct role in the remonstrance process. In the *South-West Lake Maxinkuckee Conservancy District* case, some remonstrators later changed their minds, and some remonstrators had been but were no longer freeholders when they signed the remonstration petition. The Court of Appeals determined those who changed their minds did so too late under the statutory language, so they were still counted toward the remonstration. Those who were not freeholders when they signed were disqualified—and their votes were not counted toward the remonstration. "Ultimately, the Court of Appeals did the math and determined the percentage supporting the remonstrance was 50.9%–less than the required 51%, and not enough to support the remonstration, so it failed."

Lucas said "the third enumerated point by the Court of Appeals has to do with contiguity of portions of the Conservancy District. A statutory requirement—and this one is within the category of statutory requirements which the Commission considers in its technical findings—is whether 'each part of the district is contiguous to another part'. The parts of the proposed district are separated by approximately 1,300 feet of shoreline where the DNR has an access site on Lake Maxinkuckee. The Court of Appeals affirmed the Commission finding that contiguousness was satisfied despite this gap." Lucas added that the Court of Appeals acknowledged the issue of "contiguousness" was one of first impression and ruled: "By requiring a conservancy district to be contiguous, the legislature sought to ensure that the property included in the district was related to the purpose for which the district was being established in both general nature and proximity." The Court reasoned the point of the legislative requirement was "to prevent a conservancy district from being comprised of unrelated, unconnected parcels of land."

Lucas suggested that "the issue of 'contiguousness' has always been a challenge for us in the Division of Hearings. Working with the Division of Water, we asked the Commission to adopt a nonrule policy document directed to the review of conservancy district issues, and the Commission has done so. One major element of the nonrule policy document deals with contiguousness. The *South-West Lake Maxinkuckee Conservancy District* case gives us important guidance, and we will later ask the NRC to amend the nonrule policy document in this regard. Again, the hope is this issue can be addressed during the May NRC meeting."

Lucas said the fourth issue by the Court of Appeals "was directed to the identification of areas within a new conservancy district. The Marshall Circuit Court allowed persons in one portion of the District to opt out and instead obtain sewer services from the Town of Culver. The Remonstrators argued this structure was inconsistent with the statutory requirement, but the Court of Appeals disagreed. The Remonstrators also argued that by giving a separate opportunity to opt out to those in the area which could receive services from Culver, those in other areas were denied their right to the Due Course of Law Clause under the Indiana Constitution. Again, the Court of Appeals rejected this argument saying that the remonstrators had an opportunity to be heard. That the Marshall Circuit Court gave freeholders in one area of the proposed district two opportunities to obtain relief did not violate the Due Course of Law Clause."

Lucas observed "the fifth issue considered by the Court of Appeals relates, as did the 'contiguousness' issue discussed previously, directed to a responsibility of the Natural Resources Commission. In its technical findings, the hearing officer report recommended, and the Commission found, that the 'public health will be served immediately or prospectively by providing for a sewage collection and disposal system.' In support of the finding, the Commission cited a J.F. New survey which concluded that 'the leachate detector survey indicates discharge of septic effluent into Lake Maxinkuckee', and 'a solution to present methods of sewage treatment must be found for the residents on Lake Maxinkuckee.' Additional citations were to reports by state and local health officials, concerned citizens and other lake surveys. The Commission report

acknowledged that animal waste, chemical fertilizer runoff and pesticides also contributed pollutants to Lake Maxinkuckee, but the Court of Appeals concluded 'these findings do not change the fact that the NRC ultimately concluded that establishing the Conservancy District would promote public health.' Because the trial court's conclusion was supported by the Commission findings, the Commission findings had an adequate factual basis, and the Commission findings were prima facie evidence for the Marshall Circuit Court, the conclusion that public health would be served was also appropriate. In other words, to satisfy a finding of service to the public health, the Commission is not required to discount all other facts which may tend to degrade public health. That a district would serve a positive function, even if not provide a full resolution, is enough."

Lucas concluded his discussion of the *South-West Lake Maxinkuckee Conservancy District* decision by suggesting it might be the most important decision from the Court of Appeals, in the last 20 years, regarding implementation of the Conservancy District Act. "The decision provides us with a lot of guidance where guidance is sorely needed."

Lucas then outlined the *Merrillville Conservancy District* case. He said for additions to territory, the processes of the Conservancy District Act are abbreviated as compared to those for the formation of a new district. "Through the nonrule policy document I referenced previously, the Commission has delegated its authority to the Division of Hearings and to the Director of the Division of Water. The Division of Hearings assembles comments and data and forwards them to the Director of the Division of Water. Water's Division Director then makes a determination on technical points relating to the addition of territory, and the determination is forwarded to the Circuit Court. In this instance, Jennifer Kane served as the hearing officer from the Division of Hearings. Mike Neyer of the Division of Water made the technical findings, and they were forwarded to the Lake Circuit Court. Positive findings were made as to the proposed addition of territory, or 'annexation', as sought by the Merrillville Conservancy District."

Lucas said the Independence Hill Conservancy District is adjacent to the Merrillville Conservancy District, and the two conservancy districts have a history of competition. Independence Hill sought to object to the effort by Merrillville Conservancy District to include the new territory, but the Lake Circuit Court determined Independence Hill Conservancy District lacked "standing" to object. The Lake Circuit Court determined the statute limited standing to object to an annexation to (1) the Natural Resources Commission; (2) the owner of property in the petitioning conservancy district (here, that means a property owner within the Merrillville Conservancy District); or (3) the owner of property in the area to be annexed. Since the Independence Hill Conservancy District fit none of these three categories, the Merrillville Conservancy District moved to dismiss the complaint by Independence Hill on the basis the Independence Hill Conservancy District lacked standing. The Court of Appeals agreed and sustained a dismissal of Independence Hill's objections.

Lucas said "the third and final conservancy district for discussion was a dispute between the Town of Avon and the West Central Conservancy District in Hendricks County,

which is still pending. He said Sandra Jensen was the hearing officer for the Commission. "The West Central Conservancy District provides sewage collection and control and seeks to add another purpose—to provide potable water supply. One of the Commission's roles with respect to conservancy districts is to help assure compatibility with other regulatory authorities. For this type of issue, there is concurrent jurisdiction with the Indiana Utility Regulatory Commission which sets rates for sewer services. The IURC stated that in the case that 'historically… [it] has set rates [for sewer services] based upon the cost of service, and as such, cross-subsidization of costs from one type of utility service to another is not permissible.'"

Lucas said "the Hendricks Circuit Court granted summary judgment to the Town of Avon on the proposition by the West Central Conservancy District was proposing to cross-subsidize sewer rates with water supply. The Court of Appeals reversed—and I'm going to oversimplify—on the basis that there were material facts in dispute. The Court of Appeals reasoned IURC must ultimately make a detailed ratemaking analysis based upon a full consideration of the facts. As it bears upon the role of the Natural Resources Commission, however, the West Central Conservancy District decision illustrates the proposition that a determination of cross-subsidization is one for the IURC and not the NRC. We do not have a boxer in the fight."

The Chair commended Steve Lucas, Sandy Jensen and Jennifer Kane, for making easier to under understand, "very complicated pertinent issues". He said conservancy district reviews were an important Commission role but a role that was sometimes challenging.

Jane Ann Stautz noted that re-examination of the Commission's conservancy district nonrule policy document was essential in light of the *South-West Lake Maxinkuckee Conservancy District* decision. Particularly as the decision "relates to admission of evidence before us here at the Commission," a new look is required, "because I think there are all kinds of implications that should be considered. It may even present the opportunity or need to remand a conservancy district recommendation back to the hearing officer in some cases, if it is truly new evidence before the Commission. Stautz added that she believed the Commission needed also to review "what constitutes contiguousness or contiguity and to make sure we incorporate the Court of Appeals decision into our guidance document."

ADJOURNMENT

The meeting was adjourned at 12:04 p.m., EST.