ADVISORY COUNCIL
December 14, 2011 Meeting Minutes

ADVISORY COUNCIL MEMBERS PRESENT

Patrick Early, Chair
Richard Cockrum
David Lupke
Jim Trachtman
Donald Van Meter
William Wert
Ross Williams

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Cheryl Hampton	Executive Office
Chris Smith	Executive Office
Cameron Clark	Executive Office
Scotty Wilson	Law Enforcement
Steve Hunter	Law Enforcement
Linnea Petercheff	Fish and Wildlife
Mark Reiter	Fish and Wildlife
Jack McGriffin	Reclamation
Monique Riggs	Water

GUESTS PRESENT

Jack Corpuz
Brian Richmond
Bill Herring
Keith Dutton

Call to order by Chairman, Patrick J. Early

The Chair called the meeting to order at 10:37 a.m., EST, at the Fort Harrison State Park Inn, 5830 North Post Road, Roosevelt Room, Indianapolis, Indiana. With the presence of seven members, the Chair observed a quorum.

Donald Van Meter moved to approve the August 17, 2011 minutes as presented. Jim Trachtman seconded the motion. Upon a voice vote, the motion carried.

Advisory Council "sunset" possibility

The Chair requested the Department's Legislative Liaison, Chris Smith, to provide a legislative update regarding the Select Committee on Government Reduction, an ongoing committee that reviews boards and commissions.

Chris Smith said Speaker of the House, Brian Bosma, asked the state agencies to provide a survey on their respective boards and commissions created under statute. "We did that as a pretty extensive survey consisting of 30 questions detailing statutory authority; works done; attendance and costs; and other issues like that." Smith said the goal of the Legislature's Committee is to "come out with a bill this session to combine, withdraw, and make efficiencies of government, which is its charge".

Smith said the Department has been before the Committee three times during the summer sessions to discuss the survey and evaluations. "I think what saved [the Advisory Council] the last time was the fish and wildlife rule review process." The Committee noted the Natural Resources Commission also has the ability to form subcommittees as needed. Smith said the Committee's bill is not yet available, but "as we all know bills tend to change from the introduction through their process. The Advisory Council is on it, and may stay on, but that's all up in the air at this point." He said updates will be provided as the bill moves forward.

The Chair said the Advisory Council has been used as a "buffer before issues get before the Commission. Actually, during the comprehensive fish and wildlife rules review, we used it as a public hearing body, which is one of the legislative purposes of this body. In truth, there are many more public hearings that we never participate in, but it's not practical for us to do that so staff ends up doing what 90%, 80% of the public hearings…. Consequently, as we looked at the issues about what our topics are we have some times struggled to come up with things meaningful enough to have people drive from out of town to come here. I know we all want to be involved in this, but I guess we are going to maybe sit back and see if [the bill] develops any legs."

The Chair requested Chris Smith to provide periodic reports as the legislative session progresses. "If the Advisory Council is on the chopping block when the bill gets put together, there's probably no sense us rushing to have meetings in February and April, unless people feel differently."

John Davis, Deputy Director of the Bureau of Lands and Cultural Resources, asked Chris Smith whether he provided information to the Legislature's Committee regarding the other Advisory Council duties, such as the conduct of the water reservoir contract public hearings. Smith answered in the affirmative. He also noted the history of the Advisory Council was also presented to the Committee.

Donald Van Meter asked, "You get the feeling that [the Advisory Counci] is going to be on the list, correct?" Smith answered in the affirmative.

Davis asked for clarification regarding the Commission's ability to create subcommittees.

Smith explained that the Committee's attorney believed the Commission has the ability to form subcommittees as needed.

Donald Van Meter asked, "But is that a subcommittee of the Commission?"

Smith said the subcommittee of the Commission would be populated by its members and not a separate body. He explained the Commission could form subcommittees with input from Department staff.

2012 Meeting Dates

The Chair then tentatively reserved the following dates for meetings to be held in 2012 beginning at 10:30 a.m., ET, in the Fort Harrison State Park Inn, Roosevelt Room:

February 15, 2012; April 18, 2012; June 20, 2012; August 15, 2012; October 17, 2012; and December 12, 2012.

Consideration of recommendation for preliminary adoption of rules (or development of a rule) to provide for review of testing results and review of continuing education; Administrative Cause No. 11-189A

Stephen Lucas, Director of the Natural Resources Commission's Division of Hearings, introduced this item. This agenda item is "a new one not just for the Advisory Council but for the Commission. It is how to manage processes where, by law, a person has to have a certification to engage in a vocation or avocation, and that authority is placed with the Department of Natural Resources." Lucas provided examples of Department licensing or certification programs. He said the Division of Water administers the water well drilling contractor and pump installers program. Water well drillers and pump installers must pass a test and participate in continuing education. The Division of Fish and Wildlife administers licensing for falconers. Falconers must pass a test, but there is no continuing education requirement. The Division of Reclamation administers blaster certification, which requires continuing education for a licensed blaster. Lucas said he

was not familiar with the nuances of each licensing program, but the impetus for the draft rule language was brought to the fore in a Commission meeting with respect to new rules being adopted by the Commission regarding water well drilling contractors and pump installers. He said the Commission's IDEM representative reported that IDEM was finding that it is necessary to have an understanding of how the DNR was going to deal with testing. If somebody fails the test that means they can't be a water well driller contractor. That person might feel like a question on the test was not appropriate, was unfair, or ambiguous, or their answer was just as good as, or better than, the one that would have caused the person to pass the test.

Lucas said particularly as continuing education becomes more serious—"sometimes in the first stages of a profession continuing education isn't taken as seriously as it comes to be taken as time passes"—entities in the business begin to become proficient at developing better continuing education. Entities want to be able to provide education which qualifies for as continuing education credit. Lucas said a person in a profession that has specialized areas may want to take a continuing education class that addresses a particular interest to that profession. For example, in the context of water well drilling contractors there may be some who just drill wells for testing pollutants. "There may not be an adequate course in Indiana, but there is a great class offered in Georgia. An individual may not want to pay the cost of the class and travel expenses if the Georgia class would not qualify for continuing education credit in Indiana. You might have a situation where it's the professional who wants to have the flexibility to have assurances before taking the class. That's kind of the umbrella of the issues…. I threw out a draft rule for the packet not because I'm sold on the draft, but to use as a tool to help focus the conversation." Lucas thanked Department professionals who provided input. "We wouldn't rush forward today, and they may like to have the opportunity to weigh in."

The Chair asked, "Is this establishing standards that haven't existed in the past?"

Lucas responded that if an issue arose through a complaint, "I think we would have to address it as an adjudicatory matter without any guidelines for review."

John Davis, "When you talk about a challenge, you are talking about somebody failed the test?

Lucas responded that would be the most likely example.

Davis noted some license programs have continuing education and testing and other license programs do not. He asked, "So you have all those components and each legislative action either required one or both, testing and continuing education?"

Lucas said, as an example, there is a professional licensing for timber buyers. Currently, for timber buyer licensure there is no testing or continuing education requirement. This initiative would not apply to timber buyer licensure. "However, if there is a testing requirement or continuing education, or both, then you have a potential for adjudication".

The Chair asked, "Who sets the requirements and standards professional licensing?"

Lucas explained that testing and continuing education requirements may have originated in statute or rule. "It would have to come from a law administered by the DNR" for the proposal to apply.

Linnea Petercheff reported the Commission adopted rules in 312 IAC 9, the fish and wildlife administrative rule, which provides testing requirements and continuing education requirements.

The Chair asked for clarification regarding the purpose of the proposed rule amendments.

Lucas explained that the draft rule proposal before the Advisory Council would create a process or "sideboards by which you would look to when someone is saying 'I think I developed or attended a class that should qualify for continuing education credit, but you didn't give it to me,' or perhaps more commonly, 'I think I should have passed this test, but you gave me a failing mark and that wasn't fair.'"

Jim Trachtman asked, "So there's no appeal process whatsoever now?" Lucas responded there was no document to identify the parameters of a process.

The Chair said, "So this sort of outlines what the appeal process is in giving them some guidelines…. It's not standardizing testing or continuing education?"

Lucas said the Chair was correct. The proposed rule "does not address substance and is strictly procedural." Proposed 312 IAC 2-5-2 would clarify that when a license applicant is notified of receiving a "fail score", the applicant may meet with the DNR division administering a test to discuss a particular question thought by the applicant to have been erroneously evaluated. "We would hope most matters would be resolved by consensus, and they wouldn't go any further."

Monique Riggs, Environmental Scientist with the Division of Water, said she assists with the water well drillers and pump installers license program. "It's the best way to begin is to process for informal review, because I think being the administrators of the rules that they have to follow and the entity that approves their education, we would be able to work something out before it ever" reached an adjudicatory proceeding.

The Chair asked, "Do they apply to you or submit their continuing education or testing to you?"

Riggs responded sponsoring organizations that provide continuing education courses, in the case of the water well drillers and pump installers, apply to the Division of Water for the approval. "But that's not to say that…if someone were to go out of state that applied to something specific that they might want to take it would be more efficient to have a procedure in place" for persons to seek approval from the Division of Water for a qualifying continuing education course.

Donald Van Meter noted some of the Department's professional disciplines and others, such as CPAs, "it's the professional organization that they belong to that does the certification. I assume that water well driller program is not one of those?"

Riggs responded the National Groundwater Association, Indiana Groundwater Association, and Indiana Rural Water Association, for examples, have been very actively involved in providing continuing education for drillers and pump installers. She noted that there are others that provide continuing education, such as pump manufacturers and material manufacturers. But the final decision regarding satisfactory testing and regarding qualification of a program for continuing education credit rests with the DNR's Division of Water.

Van Meter then asked, "The State requires the water well driller to do what? I haven't seen the job description."

Riggs explained that water well drillers and pump installers are requirement to fulfill a minimum requirement, every two years, of six hours of continuing education.

Van Meter clarified his question. "I'm thinking about the licensing not the continuing education."

Riggs said the Division of Water formulates the test for water well drillers and pump installers.

Van Meter asked whether there was an entity outside the Division of Water that provides any kind of certification for water well drillers.

Riggs answered that the Division of Water alone provides certification for water well drillers.

Van Meter asked whether Indiana's water well drillers licensing program was typical of most States. Riggs said Indiana's program is similar to those States in the Midwest region. Illinois, Ohio, and Kentucky have licensing programs administered by their respective DNR or Office of Environmental Policy.

Van Meter said, "My concern when it comes to testing is that it is 'reliable' and 'valid', and there are certain things that you do with exams to make them reliable and valid. Those are terms that some measurement people use. Have we done that?"

Riggs responded the test was authored in partnership between the Division of Water and the Indiana Groundwater Association's Education Committee.

Van Meter than asked, "So did they do reliability tests on the test? Validity tests?"

Riggs said the Indiana Groundwater Association Board reviewed the test questions and approved them.

Van Meter said, "That's one way of validating. You probably need more than one way. How about reliable? If a person took the test today, and then they also took a similar test or the exact test in three months, is it likely that the scores would be about the same? I'm not asking you to answer that question. But that's the 'reliability' element. Has there been any attempt to do that?"

Riggs said the Department's exam has not been tested for reliability.

Van Meter said that if exams are not tested for reliability and validity, "in court, the test and measurement people are going to be asking more specific questions than what I asked. If there's not the right answer to that, I think it makes the DNR very vulnerable."

Davis asked Van Meter whether he recommended that in formulating any Department exam, is it necessary to include a process of testing approval.

Van Meter said, "You need to be able to say to the person who is taking the test, and ultimately to the courts, it would seem to me, that we didn't just throw these questions out here. Here's what we've done in order to make this test adequately reflect a person's ability in this area."

Davis suggested the draft rule should provide a guidance framework for the professional licensing administered by the Department.

Lucas said the proposal would not attempt to impose substantive standards. "It's to develop a process that we hope can be consistent within the agency and transparent."

Van Meter noted a person can be certified without taking a test. "I was a certified professional soil scientist with my professional organization. I never took a test, but each year I had to submit my list of activities, and it was reviewed by a committee to make sure that I was doing the kind of things that kept me up to date in my area. So, there are ways other than taking a test to validate and to determine whether a person has the abilities for that profession… If I was involved in something like that, I think I would try to find valid, legitimate ways of determining whether a person was ready to drill wells in ways other than taking a test."

Riggs added, "The purpose of the exam is to demonstrate individuals understand and know 312 IAC 13, which covers the construction of water wells. That's what we test on specifically, not how they do their job or how they approach it."

Van Meter said, "That really helps out a lot as far as the validity of the test doing what you want it to do. I think that's good."

Richard Cockrum said "I understand and am comfortable with continuing education, but I'm a little bit bothered by the testing point. The Legislature and the Commission obviously has a test for a reason. If somebody fails it, are we setting up a mechanism of appeal that becomes subjective?"

Lucas responded, "I'm not sure the scenario you are talking about now wouldn't be true today" in the absence of any rule or other procedural structure. But if an individual filed for administrative review today, the administrative law judges would not have any guidance. The hope is this rule or something similar "would provide an avenue for an applicant to confer with the administering division regarding a particular testing outcome. The division that administers a test may agree the applicant has a valid complaint regarding a particular answer. "If that's what the agency looks at, and that's the conclusion that it comes to, why would the agency want to deprive that person from engaging in the profession?" If a grievance advanced as far as administrative review, the administrative law judge would have guidance was to what to consider and how. Lucas conceded there would probably be subjectivity to any process. "That's probably why…you have a test that is reliable and valid, because you reduce the subjectivity."

Cockrum asked whether an appeal would be appropriate if a person answered five out of seven questions correctly or four out of seven. "You can appeal failing the bar, but you have to be within a certain percentile to even appeal."

Lucas said, "I see your point, but I don't have a good answer. Maybe there is a good way to do that."

Sandra Jensen said a standard that requires a person to achieve a minimum testing percentile to qualify for appeal "may have validity".

The Chair asked whether there have been appeals from persons that have failed Department exams. Jensen added that she presided over an adjudication involving the soil scientist licensing program. This program is outside the DNR but within the responsibilities of the Commission's Division of Hearings.

David Lupke noted that California's licensing program "seems to avoid the whole issue of the validity of the test itself, because [California states] the board shall only consider appeals regarding significant procedural error or adverse environmental conditions during the test administration." He said California seemingly would not consider the validity of the test itself, but would assume the test is valid.

Lucas said he agreed with Lupke's assessment of the California model.

William Wert asked about an outcome that may result if the Department agrees with an applicant that there is a more appropriate answer to a test question. "If 'b' is a better answer than 'c', then do you have to go back to all the people that answered 'c' and retest them? What does that do to the validity of the test?"

Lucas answered, "I don't have any answer to that. It's a good question."

Van Meter said, "If you do it to one, then you are going to be vulnerable if you don't do it to all."

The Chair asked, "I think what you are asking us today is for our approval of this concept to move forward, is that correct?"

Lucas agreed, but he also invited Advisory Council members to participate in crafting a workable document.

Van Meter said, "At Ball State University—let's say someone is going up for tenure—we look at our guidelines if there is an appeal, and there are always appeals. We would say at the Dean's level that the department determines whether or not this person has the content, has the ability to do what it is that we're supposed to do. If that's appealed, and it goes to the college or university, the only thing we look at is the procedure…. Once you get away from the people who work with this person all the time—and know the subject matter and have their Ph. Ds in this area—we are not about to change that at a higher level. But we will look at whether or not they were given a fair treatment procedural wise. So that's something that might need to be reviewed." He also suggested that if there is a concern regarding the abilities of a certain individual, a panel of well drillers should be formed and "let the well drillers determine whether or not this person can drill wells…. I would trust them, because they drill wells…. Let the Department only be concerned about the procedural part." The DNR would need to have the ability to empanel well driller experts to review an appeal. "I don't think you want the Department to make judgments on whether or not a guy can drill a well."

The Chair invited Advisory Council members to contact Steve Lucas if they had an interest to assist in the crafting a proposed rule.

Information Item: Presentation and discussion about the "one buck rule" that expires on September 1, 21012

Mark Reiter, Director of the Division of Fish and Wildlife, presented this item. He said that a provision in 312 IAC 9-3-2, which allows a deer hunter to take no more than one antlered deer during the regular deer seasons, expires on September 1, 2012. The "one buck" provision has been renewed twice in the last ten years. An October 2011 survey of deer hunters reflected 65% supported the "one buck rule", and most were strongly in support of the provision. "We think now that it's probably time to move ahead and adopt the 'one buck rule' indefinitely. The 'one buck rule' does play into the new strategy that we have for deer management…where we tried to focus the harvest on antlerless animals." The rule amendment proposal would be brought before the Commission in January for preliminary adoption.

Bill Herring, life-long resident of Indiana, said he supported the continuation of the "one buck rule". The rule "helps increase the opportunity for more hunters to bag at least one buck. It stands to reason that if two bucks are taken out of the herd early on in the season, a hunter coming in later doesn't have the opportunity to get at least one of those." The "one buck rule" may have a side benefit in that it keeps more people interested in deer hunting and keeps them in the sport.

David Lupke moved to recommend preliminary adoption of amendment to 312 IAC 9-3-2 "making the 'one buck rule' permanent". Donald Van Meter seconded the motion.

Reiter explained that 312 IAC 9-3-2(u), as it currently reads, contains an expiration date of September 1, 2012, stating "(u) Before September 1, 2012, an individual must not take more than one (1) antlered deer during the seasons for an annual deer license." He said "Before September 1, 2012" would be stricken or removed.

David Lupke then amended his motion. He moved to recommend preliminary adoption of a rule amendment to 312 IAC 9-3-2(u) that would remove the expiration language. Donald Van Meter seconded this motion. Upon voice vote, the amended motion carried.

Jim Trachtman noted that he has received inquiries regarding the "one buck rule" as it relates to urban deer zones, and he suggested language within the Deer Hunting Guide be amended to further clarify the application of the "one buck" restriction.

Reiter said the Division of Fish and Wildlife would review the language within the Deer Hunting Guide.

Information Item: Update on Natural Resources Commission May, July, and September 2011 meetings

John Davis provided an update regarding the proposed rule amending 312 IAC 9-7-6, which would replace the minimum size limit of twelve inches for black bass taken from rivers or streams with a statewide requirement that black bass taken from rivers and streams must be less than twelve inches long or greater than 15 inches long, with not more than two black bass being greater than 15 inches long.

The Chair said the Commission in September gave final adoption to rule amendments governing hunting of deer. The Department's goal is to cause more antlerless deer to be taken. The Chair said the rule amendment package encourages more deer to being taken in the urban areas, expands the weapons you can use, expands the seasons, and adds an extra antlerless season between Christmas and New Year. "It focuses on all the things that we are talking about. I think all of us believe that it probably will not result in a whole lot more deer being taken unless we come up with programs that help supplement the cost of having does processed, because people will only take as many deer as they need." He said a concept of a benevolent fund to provide funds to supplement the cost of deer processing is being reviewed.

The Chair observed the Commission held its July meeting in Madison, Indiana, which was preceded by an open house. He said the Legislators from that region were invited. No Legislator and no member of the public attended.

John Davis added the Department launched a very successful program, GiveIn Game, that matches hunters with individuals who want venison meat.

Adjournment

The meeting adjourned at 11:58 a.m., EST.