NATURAL RESOURCES COMMISSION
September 18, 2012 Meeting Minutes

MEMBERS PRESENT

Bryan Poynter, Chair
Jane Ann Stautz, Vice Chair
Robert Carter, Jr., Secretary
R. T. Green
Anicia Richardson
Donald Ruch
Michael Cline
Kent Abernathy

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

DEPARMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Ron McAhron	Executive Office
Chris Smith	Executive Office
Cheryl Hampton	Executive Office
Shelley Reeves	Executive Office
Mike Smith	Executive Office
Cameron Clark	Executive Office
Phil Bloom	Communications
Michael Portteus	Law Enforcement
Linnea Petercheff	Fish and Wildlife
Reed Stiller	Fish and Wildlife
Nate Schmalzried	Fish and Wildlife
Mitch Marcus	Fish and Wildlife
Jim Webb	State Parks and Reservoirs
Carl Lindell	State Parks and Reservoirs
Steve Lemen	State Parks and Reservoirs
John Bergman	State Parks and Reservoirs
Alex DeGroot	State Parks and Reservoirs
John Bacone	Nature Preserves
Mike Molnar	Lake Michigan Coastal Program

GUESTS PRESENT

John Bentley	James Olson	Sue Nelson
Aleesa Drennen	Sara Funck	Joan Carey
Kathleen Brennan	Brian Miller	Mark Newman

Nicole Barker	Tracy Fletcher	Jason Kissel
Kathleen Lucas	David Plebanski	Patrick Cannon
Jane Neulich	Michael Knight	Jerry Allen
Genevieve Allen	Alice Bentley	Kim Huffman
John Wall	Kira Kaufmann	John Doyle
Peg West	Patrick Stinson	John Richardson
Dale Gramm	Norm Lindbled	Judy Lindbled
Gary Bally	Susan Bally	Cherie LeFevre
Lynda Lancaster	Garry Traynham	Jim King

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 7:13 p.m., EDT, on September 18, 2012 at Potato Creek State Park, Nature Center, 25601 State Road 4, North Liberty, Indiana. With the presence of eight members, he observed a quorum.

The Chair welcomed everyone to Potato Creek State Park. "This is the first time since I have been Chair that the Commission has met here. We are all excited to be here."

Jane Ann Stautz, Vice Chair, moved to approve the minutes for the meeting held on July 17, 2012. RT Green seconded the motion. Upon a voice vote, the motion carried.

Reports of the Director, Deputies Director, and Advisory Council

Director Robert E. Carter, Jr., provided his report. He thanked Jim Web, Property Manager at Potato Creek State Park, for hosting the Commission. "Thank you very much, and your staff. The park looks absolutely beautiful. This is a great place, a great venue to have a meeting. We appreciate that."

The Director reported the Fish and Wildlife License Bundle for hunting deer has been highly successful. "I've been told tonight that this has been our hottest item as far as deer licenses sold." He noted the Department held the fourth annual Hoosier Outdoor Experience on September 15 and 16 at Fort Harrison State Park. "It grows every year…. We had about 24,000 kids and families at the park." The Director said Governor Daniels would attend the dedication of the new Welcome Center and staff office space at Goose Pond Fish and Wildlife Area.

Ron McAhron, Deputy Director for the Bureau of Water and Resource Regulation, provided his report. He commended the efforts of Division of Water staff in addressing issues filed by small domestic water well users who may have been impacted by large water withdrawal facilities. "Between June and August staff investigated 200 complaints, which would normally be three years worth." He said the Division of Water attempts to make the "people whole in the interim to get them a water supply, and as we get the data in to evaluate how much pumpage and drawdown there was from the various facilities around them, apportion the cost for making domestic well system whole again…. We are in that phase right now." He said most impact on domestic water wells result from irrigation from a golf course or agricultural operation. "Staff does a great job of trying to protect the smaller folks. I just wanted to get a shout-out to them."

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, provided his report. He said the drought was "pretty devastating for a lot of our efforts this year. We had a lot of tree mortality, restoration suffered. That's kind of a part of the business that we are in. We'll hope…that next year is a little more normal, and some of those trees will survive."

Davis said this summer's Indiana State Fair was very successful, followed by a successful Hoosier Outdoor Experience. He recognized Shelley Reeves and her efforts in both summer events. "She worked a lot of overtime and really did a wonderful job."

Davis said the Department is preparing to break ground for an aquatic center at Prophetstown State Park. The aquatic center will have a splash pad–pool facility that "we think will help our campground. That's going to be a nice addition." He said recent land acquisition added acreage to Prophetstown. "That park is going to have a tremendous lake as a result of some stone and gravel quarrying. We are going to end up with a beautiful lake."

Davis said the Director and other staff traveled to Clark County "to review the 2,000 to 3,000 acres of timber blow down at Clark State Forest" near Henryville. There are unique timber salvage operations. He added that last week the agency attended the Natural Resources Legislative Summer Study Committee meeting at Indiana Dunes State Park. The Committee and the Department viewed the new bird tower's metal framework. The Division of Forestry will custom mill salvaged wood from Clark State Forest to complete the bird tower. "Not only will we be interpreting the birds and the dunes but also the use of forest products."

CHAIR AND VICE CHAIR

Updates on Commission and Committee activities

The Chair reported that Jim Webb, Potato Creek State Park Property Manager, provided a brief tour of the park immediately prior to the meeting. Webb highlighted recent park projects. The Chair thanked Webb for his dedication.

DNR, DIVISION OF NATURE PRESERVES

Consideration of the dedication of the Loblolly Marsh Nature Preserve in Jay County

John Bacone, Director of the Division of Nature Preserves, presented the item. He said he was pleased to bring the Loblolly Marsh for consideration as a nature preserve. The tract is a large wetland restoration to bring back the wetlands that Gene Stratton Porter "so eloquently wrote about in the Limberlost books." The proposed nature preserve is located near the Limberlost State Historic Site. He said the wetland restoration was a great partnership among the NRCS, The Friends of the Limberlost, and the Department.

Bacone said the area was farmland that was being flooded almost annually and was "willingly sold by farmers into the Wetland Restoration Program. Over the years Ken Brunswick and…tons of volunteers have a restored a large complex of wetlands, forestlands, and prairie lands. It's a great place. There are handicap accessible boardwalks trails that lead through the

property. Almost instantly, as was the case with Goose Pond, as soon as the wetlands were there, the rare birds started showing back up." Bacone said Loblolly Marsh would be Indiana's 250th dedicated nature preserve. Governor Daniels was present at public ceremonies this July. Bacone recommended Loblolly Marsh be dedicated as a nature preserve.

John Davis said he spoke with Commissioner Ruch about Loblolly Marsh. "I think it's worth noting that it's used pretty regularly by Ball State students." Dr. Ruch affirmed that his students regularly study the Loblolly Marsh.

Donald Ruch moved to approved dedication of the Loblolly Marsh Nature Preserve. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

DNR, STATE LAND OFFICE

Consideration of preliminary adoption of new 312 IAC 28 to identify and govern the State Land Office, a new division within the Department of Natural Resources; Administrative Cause No. 12-075K

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, presented this item. He said the State Land Office "goes back to an era before Indiana was a State and sold property after the 1787 Northwest Ordinance and on through until land was pretty much conveyed out. The State Land Office has had the charge of tracking State-owned property, not just DNR property but all land owned by the State" excluding universities and the Indiana Department of Transportation. There are approximately a dozen land owners within State Government, "but by far the largest landowner is the Department of Natural Resources."

Davis said the Department of Administration was asked to support transfer of the State Land Office to the Department because the DNR is the largest customer. "Not very many other agencies are in the process of acquiring land. We certainly are actively acquiring land." With enactment of P.L. 151-2012, the State Land Office duties to service other State agencies will continue within the DNR structure. "We felt that since we were 95% of the business and almost all of the effort that the State Land Office puts out, it should be under DNR." Also, "we want to have an official and compelling relationship with all counties so that they will report State ownership to the State Land Office in the form prescribed by the State Land Office." Proposed 312 IAC 28 provides a framework to later set the reporting process. "It's not a very complex issue, but this will be a huge, huge benefit to us. I can't tell you how many different parcels of land we own around the State. We own almost one-half million acres, but many of those came in tiny parcels so we have dozens of tax statements that go to all sorts of places. Sometimes they come to our office. Sometimes they go to a tax address that DNR used to occupy 50 years ago when we were the Department of Conservation." In the next two years, the Department and the Counties will draft additional rule proposals to establish a uniform reporting system. Davis recommended the proposed rules in the Commission packet be given preliminary adoption.

Michael Cline moved to give preliminary adoption to rules adding 312 IAC 28 governing the State Land Office, a new division within the Department of Natural Resources. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF WATER

Consideration of recommendations with respect to approval of an application (Application No. 152) by the City of Cannelton for a loan of $98,500 from the Flood Control Revolving Fund with respect to the City's flood protection system

Ron McAhron, Deputy Director for the Bureau of Water and Resource Regulation, presented this item. A loan request for $98,500 from the Flood Control Revolving Fund ("FCRF") was made on behalf of Cannelton. The FCRF loan and other funds Cannelton secured will enable repair of a large pump that is integral to its community flood protection system. "This is needed for physical protection for the community. Also, failure to get this done would compromise or remove Cannelton's status as a certified flood control system, which would have flood insurance impacts on the people protected by the levee." McAhron said there are approximately 500 homes that currently do not require flood insurance, although the families are encouraged to carry the insurance. "If this certification was to go away, they would have to carry flood insurance…. It would be a significant burden for the individual property owners."

McAhron said the FCRF was initiated in the 1950s, and, by statute, has a $300,000 cap at a 3% interest rate. The Legislature transferred management of the FCRF to the Commission in 2008. Cannelton's request is the 152nd application. "So far there have only been three defaults, but none on our watch." McAhron said the Cannelton's application was reviewed by the Division of Water and was deemed to meet statutory requirements. "There is a real need for a small community in Perry County to complete its funding stream for this repair."

The Chair asked, "Why aren't more communities utilizing this?"

McAhron responded communities search for grants first. FCRF funding provides loans that must be paid back with 3% interest.

R.T. Green moved to approve the City of Cannelton's application for a loan of $98,500 from the Flood Control Revolving Fund for the City's flood protection system. Anicia Richardson seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF LAW ENFORCEMENT

Consideration of preliminary adoption of amendment to 312 IAC 5-3 governing boat races, water ski events and organized recreational activities occurring on public waters of the state; Administrative Cause No. 12-137L

Major Michael Portteus, Indiana State Boating Law Administrator, presented this item. He said the rule amendments would bring their application in line with current practice. The phrase "major organized boating activities" would be changed to "organized recreational activities". The Division of Law Enforcement grants permits for activities that include fireworks displays, rubber duck races, and triathlons. "These activities aren't 'boating activities', but they affect recreational boating. We just want to bring the rule in line with the way we use the permit."

Jane Ann Stautz moved to give preliminary adoption of amendments to 312 IAC 5-3 governing boat races, water ski events and organized recreational activities occurring on public waters of the state. RT Green seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF STATE PARKS AND RESERVOIRS

Consideration of preliminary adoption of amendments to 312 IAC 8-2-5 to authorize the sale and consumption of alcoholic beverages at the pavilion in Indiana Dunes State Park in implementation of P.L. 71-2012; Administrative Cause No. 12-075P

John Davis introduced this item. He said current property rules prohibit alcohol at Indiana Dunes State Park, and the proposed amendments would allow alcohol at the park's Pavilion. At its May 15, 2012 meeting, the Commission authorized the Department to enter negotiations with a potential concessionaire for a restaurant, snack bar, and service area in the Pavilion. "We believe it will be a tremendous place. It's going to be the only place on the beach to have a meal in Indiana and would have a beautiful view of Chicago." He said the Legislature this year "amended the Indiana Code to allow concessionaires at state properties, at the Dunes, to serve alcohol. We don't allow alcohol anywhere else at the Dunes. That's been long-standing."

The Vice Chair asked for clarification regarding whether the proposed amendment at 312 IAC 8-2-5(6), "a designated youth tent area" applies to all of the Department's park facilities.

John Bergman explained that youth tent areas "are predominately for use by persons 18 years of age or younger—Boy Scouts, church camps, and such other groups. We think it's an area where we probably need to address the alcohol use." With the online reservation system, "we have been finding that older groups have been making reservations for these areas. That wasn't our intent. We think that by implementing this rule, when they see that when they go to make a reservation that they can't have alcohol, they will be less likely to make that reservation." He added the amendment would be a "good rule to have for a youth tent area".

John Davis introduced Garry Traynham, an Assistant at the Indiana Dunes National Lakeshore, "our neighbor and partner along Lake Michigan…. Garry has been there a long time and we appreciate his partnership." Traynham thanked the Commission and said he enjoyed working with the Department.

Donald Ruch moved to give preliminary adoption of amendments to 312 IAC 8-2-5 to authorize the sale and consumption of alcoholic beverages at the pavilion in Indiana Dunes State Park. The amendments also restate a prior preliminary adoption that would prohibit alcohol at youth tent areas. RT Green seconded the motion. Upon a voice vote, the motion carried.

Consideration of amendments to nonrule policy document for geocaching on DNR properties (Information Bulleting #46); Administrative Cause No. 11-131A

John Bergman presented this item. He said the Commission has had a geocaching policy since early 2000. The original nonrule policy document was drafted "without a lot of real in-depth

knowledge of geocaching itself." Evolution of the activity over the years has shown the nonrule policy document needs modification. The geocaching community has "learned a little bit more about us, and we have learned a little bit more about them." He said the proposed amendments resulted from a joint effort by the Department and the geocaching community.

The Chair asked, "Who originated this change? Was it a geocacher or the Department?"

Bergman responded the agency had concerns about some of the unlicensed activities occurring, and the geocaching community had concerns about some things the agency was regulating. "It was just due to that we recognized that we needed to start talking. We have been talking."

The Chair stated, "I think all the changes that were recommended were good ones."

Bergman said he believed the geocaching community was supportive of the proposed changes.

Anicia Richardson moved to approve amendments to the nonrule policy document for geocaching on DNR properties, Information Bulleting #46 (Third Amendment). Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

Consideration of request to set an annual Dog Park Pass fee range, $50 – $175, at Fort Harrison State Park

John Bergman also presented this item. He said the Commission sets Department fees, most recently approving fee ranges. State Parks requested approval to set a fee range for the Fort Harrison State Park dog park—planned for summer 2013. Most urban dog parks charge "a fee of a little less than $50. We believe our dog park is going to offer amenities that at a normal dog park you wouldn't find." This dog park would have a pond and would be larger and more natural than most. A fee has not yet been set, and having a fee range would provide flexibility.

Donald Ruch noted that the fee for one dog is $75. He asked about a fee for a second dog.

Bergman said that the Department has not yet set a fee. "We would potentially set a fee less than that for a second dog. We recognize that most dog parks do have a lesser fee for a second dog."

Michael Cline moved to approve an annual Dog Park Pass fee range of $50 to $175 at Fort Harrison State Park. Jane Stautz seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of report on rule processing, public hearing, written comments, and Hearing Officers analyses and recommendation regarding final action of rule amendments to 312 IAC 8, to address management of nature preserves and other properties management by the DNR; LSA Document #12-218(F)); Administrative Cause No. 12-001N

Jennifer Kane, Hearing Officer, presented this item. The proposed amendments to 312 IAC 8 would require a landowner's written consent before the Commission may set fees, establish

entrance and exit sites, authorize hunting, or make similar conditions on usage on any nature preserve not owned by the State of Indiana. The amendments would also clarify that restrictions on public usage of a nature preserve would apply to properties owned by the State of Indiana and managed by the Division of Nature Preserves but not yet dedicated as a nature preserve.

Kane said, by statute, the DNR is directed to set policies and rules for the selection, acquisition, use, management, and protection of nature preserves. The Division of Nature preserves and local land trusts supported the proposed amendments. They would reinforce the cooperative efforts between Indiana's land trusts and the Department.

Kane said Thomas Laycock submitted a comment recommending inclusion of "DNR properties", consisting of easements on real estate not owned by the State of Indiana, within the same fee owner protections as afforded for nature preserves it the fee is not owned by the State. But throughout the rule adoption process, the scope of the proposed rules was for dedicated nature preserves. Expanding the rule to include all easements might not qualify as a "logical outgrowth, and the inclusion could jeopardize the entire rule adoption".

Kane said that even though 312 IAC 8-2-15 is not proposed to be amended, a secondary discussion was held at the public hearing regarding concerns on licensure requirements, which require a fee owner or land trust to apply for a permit in advance of an event the fee owner or land trust is hosting on its own property. Most fee owner activities on nature preserves fall under the guidelines of the Master Plan, but the Master Plan does not negate the license requirement. She said Jason Kissel from ACRES Land Trust requested the Department to further review 312 IAC 8-2-15 to explore whether license exceptions would be appropriate.

Kane recommended the Commission give final adoption to the proposed amendments as contained in Exhibit A and as posted to the Indiana *Register*.

Kane noted that the Hearing Officers' Report on page seven listed suggestions for Commission consideration regarding the comments submitted by Laycock and Kissel. She said the Commission could direct the Department through its informal group, DNR Property Use Committee, to review the comments by Laycock and Kissel for appropriateness as to a separate rule amendment package.

Steve Lucas added that the Hearing Officers recommended final adoption, without amendment, to what was published for preliminary adoption. They also "suggested consideration be given to the ideas presented by Laycock and Kissel, and that these ideas could be referred to the DNR Property Use Committee for evaluation." The Committee could "come back at a later date with recommendations as to whether these ideas might also warrant rule amendments." Lucas recommended separating any motion for final adoption from any motion to refer the citizens' ideas to the DNR Property Use Committee.

Jason Kissel spoke as Executive Director of ACRES Land Trust (serving 17 Northeast Indiana Counties) and as the representative for ILPA (an umbrella organization for the 26 Indiana land trusts). "We are here in support of the changes that you have in front of you, that first motion. We sure appreciate that you are considering those changes. Not only does it address the two

issues that are being addressed specifically, but it keeps us as private landowners interested in dedicating our properties under the Indiana Nature Preserve Act. It provides us a lot of stability; a lot of law enforcement ability; and a lot of legal enforcement that we cannot provide as private landowners."

Kissel also urged the Commission to further review the other issues. Land trusts are required to get a permit for any activity they have on their own property. "So, going out to our property tomorrow when we have an event of ten kids coming out and we are going to tell them about the property, we should technically apply for a permit for that. We don't feel that's in our best interest or in the best interest of DNR when we have already established what the appropriate uses are within the preserves." He added, "If we are going to have a large event of 250 people or doing something unusual within a nature preserve that of course should come before the DNR through the permitting process. We are just looking for an exemption from the run-of-the-mill programs similar to the naturalist programs at state parks."

R.T. Green moved to give final adoption to rule amendments to 312 IAC 8, to address management of nature preserves and other properties management by the DNR, as posted in the Indiana *Register*. Anicia Richardson seconded the motion. Upon a voice vote, the motion carried.

John Davis said the DNR Property Use Committee would welcome a Commission directive to review the additional items raised by citizens.

Donald Ruch moved to approve a directive requesting the DNR Property Use Committee to review: (1) extending the requirement of fee owner consent of any property managed by the DNR; and (2) establishing an exemption or general license, with respect to 312 IAC 8-2-15, for activities by a fee owner on a DNR property owned by other than the State of Indiana. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of report on rule processing, public hearing, written comments, and Hearing Officers analyses and recommendation regarding final action of rule amendments to 312 IAC 11, which governs public freshwater lakes, to authorize in 312 IAC 11-3.5 extended duration for qualified licenses; LSA Document #12-270(F); Administrative Cause No. 110-105W

Steve Lucas, Hearing Officer, presented this item. He said since 1947 passage of antecedents to the Lakes Preservation Act, language limited a permit "to only two years. In most instances, that makes sense, and I can understand the policies behind it." The Indiana General Assembly recently gave the Commission authority to authorize, by rule, extended durations for particular kinds of permits. Proposed 312 IAC 11-3.5 would identify permits with more than two-year durations. "These principles are currently in place, through temporary rules, and have been for more than a year". Jim Hebenstreit, Assistant Director of the Division of Water, reported recently "the license duration extensions under the temporary rules are working well." Lucas recommended the amendments for final adoption as contained in the Commission's packet.

Ron McAhron observed the proposal is "a good rule and lessens administrative burden for us and for the public at these lakes. But it does not lessen the protections" for natural resources.

Anicia Richardson moved to give final adoption of amendments to authorize in 312 IAC 11-3.5 extended durations for qualified licenses. Michael Cline seconded the motion. Upon a voice vote, the motion carried.

Consideration of preliminary adoption of 312 IAC 11.8 to assist with implementation of P.L. 151-2012, which amended IC 14-25-1-8, pertaining to the mediation of disputes between the users of surface water; Administrative Cause No. 12-060W

Steve Lucas also presented this item. He said since 1955 the "Water Rights Act" authorized "the mediation of disputes which could arise from too much water or too little water." The provision is currently codified at IC 14-25-1-8. The Division of Hearings has received sporadic inquiries about the use of the mediation provision. "It doesn't come up every year, but in my tenure, it has come up perhaps a dozen times. It was usually when there was a drought." When he "walked through the former provision with people, they would never choose to use it. The reason, I think, is because the statute said you could go through this whole process and in the end you could have an agreement, but the agreement wasn't binding."

Lucas said in 2012, the General Assembly amended IC 14-25-1-8 and caused the Administrative Orders and Procedures Act provisions regarding mediation to apply in disputes between users of surface water. "If you got to the end of the process, and the participants signed an agreement, the agreement would be binding." Lucas acknowledged the Division of Water has had concerns the proposed rule might be abused. "I appreciate their efforts and those of Ron McAhron…in trying to come up with something that we hope will work and will provide a smooth process going forward." Tf the Commission gives preliminary adoption, "we'll go to public hearing and see what citizens have to say."

Kent Abernathy asked, "Where do the mediators come from?"

Lucas explained that Sandra Jensen and he are mediators who have completed training approved by the Indiana Supreme Court. "There are other agencies that work with the Commission's Division of Hearings, such as the Office of Environmental Adjudication, that have registered mediators. A person using the proposed rule would not be required to use a mediator employed by the State, however, but could use a mediator from the private sector." He said as a Commission ALJ, he has "encouraged persons as a first choice to seek a mediator from their own community. But persons may also choose a registered mediator from a State program called 'Shared Neutrals Program'. These options would also apply to the proposed rule."

Abernathy asked, "Is there still an appeals process? Would they appeal it to an administrative law judge?"

Lucas answered, "This context is extraordinary. An administrative law judge would take jurisdiction" to bring the parties together, and then the dispute would go to mediation. "If the parties were successful and came to an agreement, then that agreement could be a private

agreement that the agency would never see. It could be an agreed order. In latter instance, it would be approved by the administrative law judge and by the Secretary of the Commission, who is Rob Carter at this time. The parties could fail to come to an agreement…, and the mediator would report back [to the administrative law judge] that there was an impasse. The administrative law judge would say 'we're done', and the proceeding would be dismissed." That's not typical of how mediation works under AOPA, but it's a limitation that would apply in this context. If mediation is unsuccessful, the proceeding would be dismissed.

Kent Abernathy moved to give preliminary adoption of 312 IAC 11.8 to assist with implementation of P.L. 151-2012, which amended IC 14-25-1-8, pertaining to the mediation of disputes between the users of surface water. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

DNR, EXECUTIVE OFFICE

Information Item: Status Report regarding Lake Michigan Shoreline at Long Beach; Administrative Cause No.11-190W

Cameron Clark, Chief Legal Counsel for the DNR, introduced this item. Clark noted issues relating to the Lake Michigan shoreline at Long Beach were presented at the Commission's November 2011 meeting. "We had a discussion about sort of a microcosm of all of Lake Michigan focusing on Long Beach and who actually owns the beach. I believe I was given a directive to come up with some rule to deal with the issues. There are two issues: who owns the beach; and who can use the beach? I got to thinking; we've got 43 miles of shoreline. It would be a difficult rule in whatever direction we took it to apply because each mile has its own character." He said Indiana's Lake Michigan shoreline includes lands owned by the Federal Government, the State, municipalities, and industrial enterprises. "The other part of it is there is…still an ongoing debate, if you will, as to who owns [the shoreline]. I wasn't sure that that was really something that the DNR should dive into. If it is owned by the public, it's owned by the State, not by DNR. If it is not owned by the State, but is owned by the private property owners, it's a public access issue that I believe should be addressed by the General Assembly. [The General Assembly has] addressed public trust and public access in other respects in the law. [It has] specifically excluded Lake Michigan from the Lake Preservation Act. I don't know why or what the thinking was, but, frankly, I'm not sure that the DNR, for sure, should decide what the public trust area is for all of Lake Michigan or for Long Beach, in particular. And, I'm not sure, if I can speak for the NRC. I'm not sure that's really where the NRC should get involved, too. I really think it's a General Assembly question. And, it, in my opinion, would hopefully resolve some issues to the satisfaction of all parties and maybe avoid some litigation. If litigation is involved, in my opinion, it would be long. It would be lengthy and be very involved. Quite frankly, I do not want the DNR to be involved in a two or three-year litigation of this issue. If it happens, it will happen. But the State would be one of the parties, but DNR will not be, in my opinion. If we are sued and brought into it, then obviously we'll participate with the help of the [Attorney General's Office]."

Clark said the other related issue is the language on the Division of Water's webpage, which asserts that the "State of Indiana owns below the ordinary high water mark. It's not qualified as

to any particular stretch of Lake Michigan. I made the decision that I'm not sure that type of assertion belongs on the Division of Water's webpage. And, so that type of reference on that webpage is going to be removed. We are working on some more general language that should, hopefully, not be offensive to anybody, but still gets the message that Division of Water wants."

Clark concluded, "What I wanted to relate to you tonight is that that I don't think this is a matter for DNR, and I don't think this is a matter for the NRC. Obviously, that's for you to decide, but I really think that this access issue is, in my opinion, the key to the whole thing. Hopefully, it can be resolved through the General Assembly. Maybe not, but I think that's where it should go first."

The Chair commended Clark on his efforts regarding these issues. "You've done a nice job. There are a lot of very interested people here…. These issues can sometimes be tough." The Chair acknowledged receipt of a letter provided by the representatives of Save the Dunes, Alliance for the Great Lakes, the Long Beach Community Alliance, the NRDC, the Conservation Law Center, and the Abrams Environmental Law Clinic:

> **WHY THE LAKE MICHIGAN SHORE IS EVERYONE'S TO ENJOY**
>
> ….
>
> The law of the land, from ancient time until now, is that the shore belongs to us all to enjoy. Indiana's beautiful Lake Michigan shore is no exception, for two separate and important reasons.
>
> **1. The Public Trust Doctrine: the Shore is for Everyone**
>
> The Public Trust Doctrine is the principle dating from antiquity, but still very much part of our law today, that the public has a right to use and enjoy the water and its shores. The Public Trust Doctrine governs access to and use of the waterfront in states throughout the U.S., and requires that states hold the shore in trust for the people. While in earlier times people needed access only for fishing, navigation, and drawing water, in modern times states—including Great Lakes states—interpret the Doctrine to mean that the public may enjoy the shore for recreational purposes as well.
>
> The Public Trust Doctrine entitles the public to recreate on the shore regardless of who actually owns it. While usually (as in the case of Indiana) the state owns the land below the ordinary high water mark, the public is considered to have a Public Trust easement over the shore even when it is privately held—in the vast majority of states up to the ordinary high water mark.
>
> **2. Nine-Tenths of the Law: Indiana has Owned the Shore Since Statehood**
>
> In the absence of clear evidence to the contrary, the State of Indiana owns the Lake Michigan shore up to the ordinary high water mark. The title history reveals the following facts:
>
> - *Before Statehood*—Virginia ceded the captured Northwest Territories to the federal government after the Revolutionary War, but with the shore held in trust by the federal government for new states to be carved out of the Territories. The Northwest Ordinance of 1787 provided that new states would enter on an "equal

footing" with existing states—to which the English crown had granted their shares in trust for the people.

- *After Statehood*—Indiana joined the Union in 1816, receiving ownership of the underwater lands and the shore in trust up to the ordinary high water mark. The federal government later issued land patents to settlers, but these did not, by definition, include the shore, because the federal government did not own it after 1816. The federal government's post-statehood treaties with Native Americans concerning lands in Indiana likewise did not have power to diminish the State's ownership of the shore.
- *The Intervening Years*—Over the years since statehood, the ordinary high water mark boundary of state ownership has shifted with changes in the shoreline caused by accretion and erosion, but under Indiana law these shifts do not alter the State's ownership up to that boundary.

James Olson, representing the Long Beach Community Alliance (the "Alliance"), said the Alliance was a "group of residents in the Town of Long Beach who is vitally interested, because the years and decades of use of the public beach on the lakeward of the plat and the road." Olson lives in Traverse City, Michigan, and is an attorney with the law firm Olson Bzdok & Howard. "I'm here because one of my specialties for quite awhile has been public trust and sovereign and state title." He agreed with Clark's conclusion that the State of Indiana "is on solid ground with respect to State ownership. Also, I think it is correct that this Commission doesn't really have to do anything. It's the Department of Natural Resources' webpage." He said the language on the Department's website is cited in an ordinance. The language indicates the State owns title to the ordinary high watermark and also cites 312 IAC 11-2-6. This rule was adopted in 1995 and readopted in 2001, and "basically says that for all the waters in Indiana, the ordinary high watermark is the place where the State title begins and below the ordinary high watermark, it's the State's title. The DNR webpage doesn't really say anything different if you get straight down to it." Olson said the Department's webpage does not have to be a concern of the Commission. "Your regulation is your regulation. Nobody has contested that."

Olson said in 1816 the State of Indiana took title to the bottomlands of the Great Lakes and all the waters. "Every State since the Thirteen Colonies under constitutional law, as decided by the U.S. Supreme Court as recently as the *Montana*[1] case…gets the title to the land of navigable waters up to the ordinary high watermark. So the allegations and statements to you so far in this matter, beginning of last November in the petition before you, are not correct that the State of Indiana is title owner only goes to the low watermark." When the Federal government started issuing titles, including the one at Long Beach, the original government lot in 1830, the Federal government could only convey that which it owned. "Because the Federal government owned nothing below the ordinary high watermark, even if deeds said so, it couldn't have conveyed to the petition or the so called 'front lot owners in Long Beach' or any other person who is a front lot owner on Lake Michigan in Indiana. A plat can't do it, as has been suggested. And, certainly, whatever a deed says from a private owner to another private owner is meaningless, because we know very well that if it is below the ordinary high watermark," the land belongs to the State.

[1] *PPL Montana, LLC v. Montana*,132 S.Ct. 1215 (2012)

Olson concluded, "I think you are on solid footing. There is nothing you need to do. There is nothing before you that triggers the need for you to do something…. There is nothing you have to move on. The people in Indiana are on very solid footing, using the Equal Footing Doctrine, with respect to your ownership. There is also a public trust responsibility regardless of where that line is that also goes to the ordinary high watermark, which can't be abdicated." The U.S. Supreme Court concluded that all of the Great Lakes, including Lake Michigan, was governed by the principle just enunciated—"an inviolate principle that belongs to all of the citizens of each State of this Country."

Michael Knight said he represents lakefront land owners in Long Beach, the names of whom are undisclosed "because Long Beach is a small community". He said that lakefront title stems from both the Equal Footing Doctrine, which as stated in *PPL Montana*, just guaranteed the title to the waters and the land beneath the waters. "We are here to talk about the land outside of the waters." Knight said that no Great Lakes State's Supreme Court has ever not held that the private property owner's deed runs to the water. "Only Michigan has come out to say that there is a public right outside of the water." He explained that the Northwest Ordinance of 1787 states that the waters from the St. Lawrence to the Mississippi "shall be forever free. It said nothing about deeds."

Knight said Indiana became a State in 1816. The Great Lakes datum in 1955 and 1985 set the water levels of Superior, Michigan, Huron, Erie, and Ontario to monitor the flow of the water. He said 312 IAC 11-26 "says nothing about ownership. It says we'll either have a definitional ordinary high watermark or we will have an administratively set ordinary high watermark." Knight concluded by reading an excerpt from *PPL Montana*, which explains the difference between the equal-footing doctrine versus the public rights doctrine.

> IV.D. As a final contention, the State of Montana suggests that denying the State title to the riverbeds here in dispute will undermine the public trust doctrine, which concerns public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses…The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country…Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law,… subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public,… the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.

Knight said IC 14-26-2-1 does not apply to Lake Michigan, land under the waters of Lake Michigan, and any part of the land in Indiana that borders on Lake Michigan. "I believe it is a matter of state law, and I believe our General Assembly has spoken. I concur with Mr. Clark that this is up to the General Assembly to decide, and it has already been decided." Knight thanked Cameron Clark for revisiting the language on the Department's website, "because it has caused the appearance of everyone here tonight just about because it is such an important issue."

The Vice Chair thanked the parties for providing further clarification.

The Chair said, "I do appreciate everybody's attention to this. It is a matter of concern."

DNR, LAKE MICHIGAN COASTAL MANAGEMENT PROGRAM

Information Item: Update on Lake Michigan Coastal Program

Mike Molnar, Program Manager for the Lake Michigan Coastal Program, presented this item. He said the Lake Michigan Coastal Program is celebrating its 10th Anniversary. In 2002 the program was approved at the Federal level, which "opened up a world of opportunity for Indiana to participate in a larger Federal partnership". He said the programs main purpose and mission is to provide financial and programmatic assistance for the management of Indiana's coastal resources. Indiana's 45 miles of Lake Michigan shoreline is one of the most diverse regions in the world. Molnar said the Coastal Program is housed in the Division of Nature Preserves. Grants have been made successfully since 2003, funding projects such as low-cost construction, public outreach, land acquisition, and planning. An emerging issue this year in the coastal region is non-motorized transportation planning. Molnar noted that in 2002, the initial year of the coastal program, $1.6 million dollars was distributed. Varying totals have been distributed through the years. In 2012, $589,331 was distributed.

Molnar said the Coastal Program provides financial and technical assistance to nongovernmental entities and local organizations. Financial assistance of $2.3 million was provided to several divisions within DNR. The Program also provides watershed planning services. He said a Lake Michigan shoreline assessment project is underway to develop a shoreline map identifying all of the coastal structures. The Program also funded the recent Lake Michigan shipwrecks survey.

Information Item: Update on Indiana Lake Michigan Underwater Archaeological Resource Project, with brief video presentation

Kira Kaufmann, Ph.D., an underwater archaeologist and principal investigator at Commonwealth Cultural Resources Group (CCRG), presented this item. She provided a presentation of *Diving into the Past: Indiana's Lake Michigan Historic Shipwrecks*. Kaufmann said the survey of Indiana's Lake Michigan historic shipwrecks is "really an important project not only when it comes to the Indiana Department of Natural Resource, but also it has a much broader impact." She said the survey was initiated 25 years ago by former Indiana State Archaeologist, Gary Ellis. "There is no historic preservation management project like this that has ever been done by any state around Lake Michigan. This really is the first. It really is a trailblazing kind of project and program."

Kaufmann said the project's major goals last year were to re-identify the locations of many of the historic shipwrecks in Lake Michigan's territorial waters and to develop a management plan. Another component was public outreach. "We did an incredible amount of public outreach. This project has created a wide variety of products…. It has been a very, very visible project throughout the Midwest." She said the Department and the Lake Michigan Coastal Program are following through and completing recommendations from the management plan. The locations of nine of the 14 historic shipwrecks were re-identified: *Material Service*, *Car Ferry No. 2*,

Unknown #4, J. D. Marshall, Muskegon, Unknown #5 and #6, and the *George F. Williams*. Persons lost their lives in some of the shipwrecks "so many of these sites were and are gravesites although there are no longer human remains at the shipwreck sites." In 2011, 50,000 acres of Lake Michigan were surveyed looking for additional historic shipwrecks. "We found numerous anomalies, which we have yet to go back and identify."

Kaufmann said the 2012 project goals are to (1) implement the management plan; (2) provide public outreach; (3) complete a National Register Nomination; (4) develop a paraprofessional program; (5) continue shipwreck monitoring; and (6) complete an additional survey of the *Horace A. Tuttle*. She provided a pamphlet about the *J.D. Marshall* and said a user friendly project website is at http://divingindiana.wordpress.com/. Kaufmann said a National Register Nomination of Historic Places (NRHP) has been submitted for the wreck of the *Material Service*. The NRHP is currently under technical review, which takes approximately six to eight months, and subsequently will be reviewed at the state and national level. "This will be the first shipwreck nominated to the National *Register* in 25 years. It will be the second shipwreck for Indiana listed on the National *Register*. The *Material Service* is close to Chicago's Lake Michigan waters and is the only iron-hulled historic vessel within Indiana's waters. The *Material Service* is the "only vessel with what we call 'structures'. So, as a SCUBA diver, you can actually go down into the wreck and swim around".

Kaufmann closed with a brief video of shipwrecks in the Indiana waters of Lake Michigan.

DNR, DIVISION OF FISH AND WILDLIFE

Information Item: A review of environmental impacts from high speed boats on Indiana's public freshwater lakes; Administrative Cause No. 10-029V

Linnea Petercheff, Staff Specialist with the Division of Fish and Wildlife, presented this item. She said the Commission asked the Department to conduct a review of impacts from high speed boats and larger sized boats on Indiana's public freshwater lakes. National statistics on boating show the number of registered boats has increased since 2001 in Indiana, and many boats are between 15 and 18 feet long. A number of factors need to be considered when determining environmental impacts from boating. These include physical impacts such as the wake into shoreline erosion, prop wash induced sediment, scouring and re-suspension of the sediments, as well as noise pollution and fuel emissions. Boat size, boating speed, hull design, water depth, and shoreline characteristics all have to be considered when evaluating physical impacts.

Petercheff said local shoreline characteristics play a significant role in determining those impacts. "If the shoreline is already stabilized with a seawall or trees, the wave erosion is going to be very minimal." The size of boats is a factor, and the number of boats is also a contributor. For impacts to fish and wildlife in lakes, the area closest to the shoreline where aquatic vegetation can grow "is the most important area that is impacted by boats". She said boating in this zone can impact fish and wildlife resources by destruction of habitat, destruction of bird nests, and physical contact with the propellers. Petercheff said ecozones have been created on a number of Indiana lakes that prohibit boating in those areas to help protect fish and wildlife resources and to provide other special protection.

Petercheff concluded by saying the Department believes there are environmental impacts from boats, "but it is a very complex process and not easy to quantify or single out as to one particular reason." She said additional protection, such as special boating zones or ecozones, could be established on specific lakes to address specific impacts. Petercheff noted that an existing ecozone, which would expire next year, is currently being evaluated.

DNR PERSONNEL

Information Item: Introduction of new assistant property managers

- **Nathan Schmalzried, Kankakee Fish and Wildlife Area**
- **Reed Stiller, Kingsbury Fish and Wildlife Area**

The Chair noted the Commission no longer has authority over the approval of property managers or assistant property managers. "This is an information item that I think we all enjoy, which is an opportunity to visit with some of those that come before us."

Mitch Marcus, Wildlife Section Chief in the Division of Fish and Wildlife, presented the item. He said Reed Stiller is the new Assistant Property Manager at Kingsbury Fish and Wildlife Area. Stiller was a high school salutatorian, a 10-year 4-H member, received a Bachelor's Degree in biology from Ball State and a Master's Degree in Biology from Georgia Southern University. He is an avid reader, enjoys hiking, hunting, and canoeing, and is married with a daughter. Stiller was a naturalist at Mounds State Park and worked for the Muncie Children's Museum.

Marcus introduced Nathan Schmalzried, the new Assistant Property Manager at Kankakee Fish and Wildlife Area. Schmalzried is a native of Huntington and received a Bachelor's of Science in Wildlife Biology at Purdue University. Schmalzried enjoys hunting, fishing, golfing, and four-wheeling. Marcus said, "Nate is looking forward to getting his feet wet at Kankakee…and is striving to become a productive team member within our Division."

John Davis said that Stiller and Schmalzried are Assistant Property Managers at two "very complex properties". Kingsbury is a "former Army ammunition plant that still has a lot of commercial and industrial implements inside. They are getting ready to have a multi-modal terminal there. There's going to be a bunch of highway work, a bunch of railroad work, and it's going to be a complex, although probably a pretty peaceful place." He said the Kankakee Fish and Wildlife Area is one of the smaller properties, but it is located at the junction of the Yellow River, the Kankakee River, and two major regulated drains. "It is a tricky, tricky place, especially during high water. There is a lot of weekend late night—I've got to fill this hole before the levee breaks—kind of work. I expect we will be talking to Nate when he's out in the weather a lot. Good luck, gentlemen."

Adjournment

The meeting was adjourned at approximately 8:58 p.m., EDT.