NATURAL RESOURCES ADVISORY COUNCIL
Minutes of the June 13, 2007

MEMBERS PRESENT
Patrick Early, Chair
William Pippenger
Donald Van Meter
William Wert
John Bassemeir
David Lupke

DEPARTMENT OF NATURAL RESOURCES STAFF

Ron McAhron	Executive Office
Jim Hebenstreit	Water
Mark Basch	Water
Monique Riggs	Water
Mike Crider	Law Enforcement
Samuel Purvis	Law Enforcement
Laura Minzes	Indiana State Museum and Historic Sites

NATURAL RESOURCES COMMISSION STAFF
Stephen Lucas
Jennifer Kane

Call to Order

Patrick Early, Chair, called the meeting to order at 10:43 a.m., EDT in the Park Office, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. In the absence of a quorum, he observed that official action could not be taken, but there could be informal discussions of agenda items.

Chairman's Report

The Chair noted that two new persons were appointed to the Advisory Council to complete its twelve-person membership. He reflected these appointments "will help us a little bit with our quorum issues hopefully."

The Chair reported that the Natural Resources Commission met in May at Clifty Falls State Park. He said the "biggest item of note" was the final adoption of a rule package that, among other amendments, allowed the use of pistol cartridges of certain caliber to be used in rifles.

Consideration of proposed rule for water withdrawal contracts from reservoirs under P.L. 231-2007 and IC 14-25-2; Administrative Cause No. 07-100W

Jim Hebenstreit, Assistant Director of the Division of Water, presented this item. He reported the most-recent session of the Indiana General Assembly enacted P.L. 231-2007, codified as amendments to IC 14-25-2, which affects the sale of water from state-owned water supply storage. Hebenstreit provided background of the Division of Water's Sale of Water Program. "What many of you may not know is that the Division of Water and the Department of Natural Resources, and the State of Indiana are in the water supply business." The U.S. Army Corps of Engineers had a program in Indiana and other states during the 1950s through the 1970s to build flood control reservoirs. "At some point in the 1950s, someone recognized that it might be possible to add in a water supply component into those flood control reservoirs." Indiana invested additional funds in Brookville, Monroe and Patoka Lakes to create water supply storage, and the DNR has the ability to sell water from these three reservoirs. Versailles Lake, Brush Creek Reservoir, and Hardy Lake are totally state owned, and they are also reservoirs from which the DNR may sell water. "In effect, Monroe, Brookville and Patoka were created for flood control, but the state then paid the additional cost of creating a larger impoundment, which would also accommodate a certain amount of water supply storage."

Hebenstreit said that IC 14-25-2 sets the legal structure for Indiana to sell water from state owned and financed reservoirs. "We can enter into contracts for both direct withdrawals and releases for downstream use, and the contracts are, by statute, limited to a maximum term of 50 years." He explained that the statutory 50-year contract limit was to accommodate bonds issued by the utilities to finance their facilities. By Indiana statute, the DNR must sell raw water for $33 per one million gallons ("MG"), "which is pretty dirt cheap".

Hebenstreit noted that most contracts are on Brookville, Monroe, and Patoka Lakes. He said Brookville Lake has a firm yield of 82 million gallons per day ("MGD"). Currently, there are three contracts on Brookville Lake—two golf courses and the Franklin County rural water system. These contracts "only commit less than 1%" of the available supply." Monroe Lake has an available supply of 122 MGD storage with six contracts and is the "sole source" of water supply for the City of Bloomington. "This is really the reservoir that led to the source of the legislation." He explained there was a proposal to supply 80 MGD to the Indianapolis area, which would basically have tied up almost all of the supply for that reservoir between Indianapolis and Bloomington and basically locking Bloomington in with its current contract limit of 24 MGD. Hebenstreit noted that another contract on Monroe Lake is with IPL for release of water to augment stream flow at its Petersburg plant. IPL has had the contract for approximately 20 years, "has never used any water, but still pays approximately $10,700 every year" to the DNR.

Hebenstreit said for "any contract for water supply, the entity" purchasing the water "would have to construct treatment facilities." David Lupke asked whether Bloomington was selling treated water, filtered water or raw water. Hebenstreit answered that Bloomington withdraws the raw water, treats the water, and then distributes treated water to its customers, with the Town of Nashville being the only contract outside Monroe County.

Hebenstreit said that on Patoka Lake the state can sell up to 78 MGD, with approximately 21% of that supply currently committed. The only contract on Patoka Lake is with Patoka Lake Regional Water and Sewer District for 20 MG. The District uses water from Patoka, treats it, and sells the treated water to smaller communities. "We believe that [the District's] service extends to a minimum of eight to nine counties." He noted that Hardy Lake was built in 1960s, and it is totally state owned. Hardy Lake supplies water for release to the Stucker Fork Conservancy District, a rural water supply system.

Hebenstreit explained that the 2007 statutory amendments govern new contracts and contract renewals. Prior to the new statute, the Division of Water's contract process did not include a provision for public input. The new statute requires a public meeting to be held in all affected counties, and it "charges the Advisory Council, or gives the Council the ability" to conduct the meetings.

John Bassemier asked, "How do you determine the value of water? Do you look at other states, how much is consumed, or how much is available?" Hebenstreit explained that the statute sets the amount at $33 per million gallons. "The rates were set based on the state trying to get a return of its investment" with a five-year rate review adjustment for inflation. He said that with the 1970s and 1980s inflation rate, the five-year inflation adjustment would have priced water at a level that would have been cost prohibitive for city governments. "With that, we have evolved to the set amount of $33 MGD, which was a compromise" between the existing contract rates. Hebenstreit noted that other states charge as much as $150 per MGD. David Lupke characterized the Indiana statutory rate as being "ridiculously low." Hebenstreit agreed. Lupke then said, "It also sends communities the wrong message by saying, 'Water doesn't have much value.' From all the news from around the rest of the country, we should realize that water does have a tremendous amount of value."

Hebenstreit said, "For years, we have had plenty of water that was not committed. The proposal by the Indianapolis Water Company to use Monroe Reservoir, I think, sent a signal to everybody that, 'maybe, water is a little more valuable.'" Lupke asked whether any of the reservoirs were "running at capacity". Hebenstreit replied that no reservoir is 100% committed. "21% of Monroe is committed out of its total."

Lupke then asked, "Has there been any calculation of the environmental or ecological needs?" Hebenstreit explained that the original contracts between the federal government and Indiana recognized the reservoirs as being for flood control and water supply, and they do not mention recreation or the environment. "Each reservoir has a couple of different purposes, but some of them actually have contracts to use the water to release downstream for water quality purposes, but nothing says we have to evaluate the environmental impacts on the reservoir itself." Lupke asked, "Or the downstream impacts?" Hebenstreit said, "No. There is a minimum release on each reservoir, but all those numbers were developed in the 60s, so I don't know if they are necessarily adequate."

The Chair inquired of the underlying purpose of the new legislation. "The legislators who sponsored the bill, what were they trying to keep from happening, or what were they trying to control?" Hebenstreit answered, "I think the legislators were trying to make sure that, say,

Bloomington had a voice if the supply capability of the reservoir was going to be maxed out." The Chair asked if he understood correctly that Monroe Lake was not at capacity, but the proposed contract with Indianapolis "would have put the reservoir at capacity". Hebenstreit answered, "That is correct." The Chair said, "So, what the legislation calls for is for there to be a public hearing." Lucas responded that the legislation requires "several" public meetings, one for each affected county.

William Wert asked, "Is there a sense in the municipalities that continued growth obviously demands more water? At some point, we do not have any more water to commit to them." Hebenstreit said, "I think that is an issue that is lost on most people right now, because, I think, Indiana has been looked at as a state with all the water we need." Wert said, "I know, but in other states it is an issue." Lupke said that some areas of Indianapolis "could get there with the growth." Hebenstreit reflected that 20 years ago the economic feasibility of piping water from Monroe Lake to Indianapolis would have been questioned. With the draft proposal from Indianapolis, and the response from Bloomington, the need to view feasibility must be considered in a larger geographic context. He then deferred to Steve Lucas to outline procedural aspects of the 2007 statutory amendments.

Lucas explained that an early draft of the legislation would have required the Advisory Council to "conduct the public meetings." He noted that an amendment was made to the bill to allow the Advisory Council to "delegate the meeting authority to someone to conduct the meeting on its behalf." He said the authority for rule adoption under IC 14-25-2 "goes back to 1955, but Indiana has never had any rules based upon this authority, probably because there was a sense that we had all the water we needed." He said that the Division of Water has conducted analyses of water contracts on a case-by-case basis, but "there is not really a process in place. There's not a public process for review," and there are no published "evaluation standards."

Lucas said the legislation was "given an emergency clause so it went into effect immediately. We do not have any standards, and the standards need to be by rule. We can't do a permanent rule" quickly enough to address immediate needs, "although the Director can do a temporary rule that can be put in place pretty quickly." Lucas said that the rule "ultimately" will need to have "substantive parts". He said the proposal contained in the Advisory Council's packet is a "rule in progress. You usually do not see rules in such a crude form. What we are looking to accomplish is if this Council would give its blessing to a process, and then if the Director saw fit, he could adopt a temporary rule." Lucas said a proposed permanent rule would be brought back to the Advisory Council at a later date, and this proposal would include substance as well as process.

Lucas then focused his discussion upon proposed 312 IAC 6.3-3-3 that would govern the requisite public meetings. He said the proposal would delegate authority to the Director of the Division of Water to "assign someone, probably someone from the Division of Water, although the Division Director could appoint another DNR employee" to conduct the public meetings. "It might make sense in some situations to appoint someone from the Office of Legal Counsel." He explained that the person delegated would hold the public meeting as described in the proposed rule. The public meeting structure is statutory, but the process is "really wide-open to what you are going to evaluate." The public meeting would be informal and would not be an evidentiary

hearing. "There will be flexibility." The proposed rule would also provide that the hearing officer could maintain a record but would not be required to prepare a transcript. What the hearing officer does "if taking notes, or recording the meeting, would be the official record."

Donald Van Meter noted that 312 IAC 6.3-3-3(d) states that the hearing officer "may" maintain a record. "There has to be some kind of record." He suggested replacing "may" with "shall". Van Meter added that the hearing officer would still have flexibility because the proposed rule still would not "dictate the kind of record." Lucas said, "That's a good comment," and he reflected the draft could be modified accordingly if it were the will of the Advisory Council. The members who were present expressed concurrence with Van Meter's modification, and Lucas indicated the modification would be incorporated.

Lucas said that 312 IAC 6.3-3-4 sets forth the duties of the Advisory Council. "The Advisory Council is a critical cog in the machine. You would need to review what the hearing officer recommends." Lupke commented, "I think there could be some discretion on the part of, perhaps the Chair." If the Chair were to decide "it's a non-controversial situation, delegation would make a lot of sense. In the case that there might be controversy, the Chair could say 'we need the entire Council, or as many as possible present for the meetings.'" Lucas responded, "You can certainly do that. That's your prerogative." Lupke asked, "Is it under the Advisory Council's discretion?" Lucas responded, "It's the Council's public meeting."

Patrick Early reflected that, pursuant to the proposed rule, the Advisory Council "would, in essence, assign a proxy." Lucas added that the proposed rule could be modified to give authority to the Chair, rather than the Director of the Division of Water, to make the appointment of hearing officer. Requiring the Chair to make this appointment "probably would be a burden sometimes," although he believed doing so would be lawful.

The Chair said, "We would sometimes be able to predict where there is going to be a lot of contention. But, I think, being consistent and doing it the same way so that the hearing officer goes to every single meeting," would result in greater predictability. In either approach, "the hearing officer has to come back to us so the Advisory Council would have fulfilled our obligation with the hearing going to all those individual counties." Having the Director of the Division of Water select the hearing officer, particularly where as many as eight or nine public meetings might be required, could be implemented more efficiently.

Lucas said, "That was the way we envisioned it, but it is your call." Pursuant to the rule proposal, the Advisory Council would still "look at the summary presented by the hearing officer, and would consider recommendations from the division that manages the reservoir, recommendations from a federal, state, or local agency with expertise regarding water usage and supply, and then any information received at the Advisory Council meeting to which the report was presented." The Council members present ultimately determined to approve the delegation of appointment by the Director of the Division of Water as set forth in the proposal.

Lucas noted that, by statute, the Advisory Council would submit a summary and recommendation to the Commission not later than 30 days from the date of the public meeting. "That's a pretty narrow window considering how things function." He said the proposed rule

would put a fine point on this requirement by reflecting the 30-day time limit would, where multiple public hearings were conducted, be measured from the final public meeting. Van Meter reflected that this approach was logical.

Lucas said, "What we would be looking for is your informal blessing. The Council doesn't have a quorum, but at least in the short term, it is the Director's prerogative on an emergency rule. You would be making a suggestion to the Director. Later on, you will be making a recommendation to the Commission" with respect to preliminary adoption of a permanent rule. He also referenced several clerical errors to be corrected from the distributed draft.

Bill Pippenger inquired whether "20 days" under 312 IAC 6.3-3-5(d) could be amended to read "20 working days or 20 business days." Lucas indicated that section (d) is a restatement of statute. "That would be a good idea, if we could do it." Unfortunately, the Commission did not have discretion to modify this subsection.

Pippenger asked whether an "inflation clause or escalator clause" could be added to the rule proposal. Lucas said he deferred to Jim Hebenstreit, but "I think the price is locked in" by statute at $33 per MG. Hebenstreit confirmed this perspective.

Chairman Early observed a quorum was not present. The Advisory Council could not take official action, but the individual members could offer a statement of consensus to the DNR Director for the preparation of a temporary rule. The members present then expressed a unanimous consensus that the draft procedural elements of the rule proposal be recommended to Director Carter for a temporary rule. The draft was recommended as presented but with the correction of referenced clerical errors and with the substitution of "shall" for "may" in proposed 312 IAC 6.3-3-3(d).

Consideration of request for recommendation for approval of the conveyance of Pigeon Roost Memorial Site to Scott County for use as a county park

Laura Minzes from the Division of Indiana State Museum and Historic sites presented this item. She explained that proposed is the conveyance of Pigeon Roost Memorial Site to Scott County to be used as a county park. Minzes provided Council members with copies of two letters from the Scott County Visitors Commission. She explained that the Visitors Commission, in its April 2007 letter, expressed interest in receiving the historic site. Minzes indicated that the Division of Indiana State Museum and Historic Sites had been "working toward" conveyance of the property to Scott County, "but were turned away for lack of public support. This time [Scott County] came to us." Minzes said that the Division is "looking forward" to working with Scott County "even if the conveyance eventually goes through." She noted that the second letter from the Visitors Commission sets forth the "long range plans" for the site.

Minzes explained the Pigeon Roost Memorial Site is basically an "unmanned park" between Scottsburg and Henryville just east of US 31. "It is literally right off the highway; however, you would miss it if you weren't looking for it, because there is a railroad, and between the railroad and the highway it is substantially overgrown with brush so you don't see it." Minzes indicated

that the site becomes an attraction for illicit activities. She also explained that the memorial site is under the governance of the Division of Indiana State Museum and Historic Sites, but in the past it was under authority of several other DNR divisions.

William Pippenger noted that the support materials for this item indicate that the property commemorates the "French and Indian War, a.k.a. the War of 1812". They were about 80 years apart. Which war was it?" Minzes apologized for the error and indicated the site commemorates the War of 1812.

David Lupke indicated that he was "completely supportive" of the conveyance of the memorial site, but asked, "What mechanism do we have in place to enforce the covenants and make sure the property is maintained by the county and the local group?" Minzes explained that, as with other surplus properties, the DNR has conservation easements that require an annual inspection. "Luckily, we do not have a lot of structures here." She noted that the Department does not own the property where the monument is located. "The portion where the monument is was purchased by Scott County in 1903, but never transferred to the State." Minzes said the parcels around the monument are proposed to be conveyed to Scott County. She explained that the cemetery on the site would be covered by the various cemetery laws.

The Chair asked Stephen Lucas for clarification as to the Advisory Council's required action. Minzes said that a recommendation would need to be presented for consideration of the Natural Resources Commission. She added, "the Division Board of Trustees will meet tomorrow to consider the proposed conveyance. We anticipate [the Trustees] approval" with full consideration by the Natural Resources Commission at its July meeting.

The Chair noted that because a quorum was not present, "I don't think we can have an official motion." He asked, "if we can have a unanimous consent that all of the members in attendance recommend that this be moved forwarded to the Commission." All members present answered in the affirmative. No member voiced opposition to the proposed conveyance of Pigeon Roost Memorial Site to Scott County for use as a county park.

Second consideration of tendered project regarding riparian zones in public waters; Administrative Cause No. 07-045A

Stephen Lucas, Director of the Natural Resources Commission's Division of Hearings, presented this item. He indicated that the Advisory Council had a "very good" discussion of the subject matter at its last meeting. "You didn't get to a specific resolution as to how you wanted to go forward."

Lucas then summarized the prior discussion of the topic. He said there is a "growing issue" on public freshwater lakes, which are mostly within the northern two tiers of counties, where "we have a lot more competition as among riparian owners and the general public for the usage of the shoreline." He indicated that this issue also has direct application to all navigable waters, and there has been recent interest in the issue for navigable waters as well as for public freshwater lakes. David Lupke said, "I would say that it is much more than just the two counties."

Lucas explained that a mechanism is being sought that "we could communicate better within the Department and to the public as to how we were addressing conflicts in specific contexts." He indicated that the Overview before the Council members contains several different cases where resolution has been rendered that include maps for illustration. "Right now, if persons have a conflict, they can look to the Natural Resources Commission's online database, CADDNAR." Lucas noted that the decisions in CADDNAR have legal, precedential value. "There are a couple of reported decisions by the Court of Appeals, but mostly they are CADDNAR decisions." One option would be "to stay with the way we do it now. If a person wanted to track down" a decision, the person would conduct an online database search on CADDNAR.

Lucas said a second option would be the development of a guidance document that would not have force and effect of law, "but would attempt to synthesize [the reported and CADDNAR decisions] into something that the Advisory Council and the Commission gave their blessings to, which we would update periodically." The adoption of rules to address the issues would be the third option, the fourth option would be to recommend legislation, and a fifth option would be some combination of the previous four options.

Lucas said the resolution of riparian rights is a subject that "might not resonate with everybody," but the discussion during the prior Advisory Council meeting suggested considerable interest with some members. He said one approach for moving forward might be that a "volunteer committee" be formed that would work give instruction and advice to the NRC Division of Hearings, the Division of Water and the Division of Law Enforcement as to how to draft a document. Lucas said his sense from discussions at the last meeting "was that a guidance document, a nonrule policy document, was the best approach."

The Chair asked whether it was the Department's and the Commission's view that a nonrule policy document is "the best course of action, because you are the ones that are going to have to deal with it. What works best or what is the most practical solution?" Lucas answered, "I would like to see us do more than what we are doing currently. CADDNAR is better than nothing, but it is not a very good solution."

David Lupke said, "As I recall it, we are going from nothing, or very little, to providing a guidance document. That would almost have to be the first step anyway before you could go to a rule process." He said the nonrule policy document could be "field tested" and then "we may have to fine tune it or go through a rule process. This would be the logical first step."

Chairman Early asked Lucas, "You would see [drafting the nonrule policy document] as a joint venture between a Committee of this Council" and the Division of Hearings? Lucas responded that the Division of Hearings could be a "point of contact", but the affected DNR Divisions should also participate.

The Chair noted that Lupke was familiar with the issues, and he asked if Lupke would serve as Committee Chair. Lupke responded, "Absolutely." Early asked whether other Council members would like to assist. Van Meter responded that he would be interested. The Chair then appointed

Van Meter as a Committee member, and he added that if a member not present today "feels like they would like to get involved, we could do that."

Van Meter said, "This problem is only going to get worse." Lupke added, "There is so much pressure on these lakes now. With the development pressure and everything else, it's just going to get worse."

Pippenger asked whether the Lake Management Work Group had addressed the issue. Lucas said the Work Group is working on "a lot of different issues. It's conceivable that they might wade into this particular issue, but there is so much on their plate, that I would be a little bit surprised." Hebenstreit reflected that the issue is "so complex". He said a draft document could be provided to the Work Group for additional input. "If we did a rule right at the get go, based on what I have seen, we would start finding holes in it day one."

The Chair asked the Council "Is everyone okay with that resolution?" The members present answered collectively in the affirmative.

Next Meeting

The Chair announced that the Council's next meeting is scheduled for 10:30 a.m., EDT, on August 15 "during the State Fair. We are trying to put together a program that will involve what all our facilities are out at the State Fair. We will be able to go through our exhibits there."

Adjournment

The Chair adjourned the meeting at 11:42 p.m., EDT.