

NATURAL RESOURCES COMMISSION

March 19, 2013 Meeting Minutes

MEMBERS PRESENT

Bryan Poynter, Chair
Robert Carter, Jr., Secretary
Donald Ruch
John McAhron
Thomas Easterly
Michael Cline
Amanda Neyron
Patrick Early
Doug Grant
R.T. Green
Robert Wright

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane
Debra Freije

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Cheryl Hampton	Executive Office
Cameron Clark	Executive Office
Phil Bloom	Communications
Scotty Wilson	Law Enforcement
Linnea Petercheff	Fish and Wildlife
Doug Keller	Fish and Wildlife
Mark Reiter	Fish and Wildlife
Bill James	Fish and Wildlife
John Bacone	Nature Preserves
Phil Marshall	Entomology
John Bergman	State Parks
Brian Paulik	State Parks
Gary Miller	State Parks
Terri Price	Water

GUESTS PRESENT

Mark Ennes	Liz Jackson	Mark Owens
Jeff Morgan	Sally Harrison	Tom Sheulot
David Smith	Richard Harrison	Jeff Thornburgh
Alan Hux	Darren Petty	

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:15 a.m., EDT, on March 19, 2013 at The Garrison, Fort Harrison State Park, 6002 North Post Road, Ballroom, Indianapolis, Indiana. With the presence of ten members, he observed a quorum.

Thomas Easterly moved to approve the minutes for the meeting held on January 15, 2013. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Reports of the Director, Deputies Director, and Advisory Council

Director Robert E. Carter, Jr., announced Deputy Director Ron McAhron was retiring after working for the DNR since 2005. Today would be the last NRC meeting with Ron's attendance. "Ron is one of the hardest working Deputy Directors I've ever seen. He will be sadly missed by the Department and by the entire State of Indiana. He's one of the finest people that I've ever met, and a gentleman, and a tremendous public servant."

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, provided his report. "I also want to praise Ron and thank him for his friendship, guidance and wisdom and the delivery of such."

Davis called upon Dr. Donald Ruch to outline the biodiversity study at the Goose Pond Fish and Wildlife Area.

Ruch explained the survey provided a summary of the organisms found or documented for the Goose Pond. He distributed a hardcopy of the *Results of a Biodiversity Survey at Goose Pond Fish and Wildlife Area, Green County, Indiana*. He said a description of the "BioBlitz" could be found on the Indiana Academy of Science's website at www.indianaacademyofscience.org.

Chairman Poynter asked Ruch if there was any unique finding that resulted from the Goose Pond survey.

Ruch replied, "Yes, as you read through it, you will note that there are a number of authors. Each author represents a different taxonomic group, such as reptiles, amphibians, fungi, plants. You'll note that there were a good number of county records and new records of organisms for that region of the State for some of the organisms. There was quite a bit of new information."

The Chair asked Ruch if there would be a follow-up to the BioBlitz.

Ruch responded, "A BioBlitz is like a snapshot in time. This is good for July, but it doesn't tell you what early spring would be or late summer would be." He added, "As far as plants, going back within ten years is not going to produce a great amount of information beyond this." He noted there have been conversations about a second BioBlitz in another ten years, and possibly performed at a different time of the year.

Ron McAhron, Deputy Director for the Bureau of Water and Resource Regulation, provided his report. "Looking back, this has been a great opportunity for me. I thoroughly enjoyed the eight

years that I've been here. There have been some wonderful people to work with and some wonderful topics.”

McAhron said he and Director Carter met with Governor Pence to discuss State operations for the next four years. “A new Administration brings some new initiatives and some perhaps re-energized initiatives that we had.” He said DNR along with IDEM and INDOT were scheduled to meet on March 22nd for discussion on the Indiana Wetlands Stream Mitigation Program. “This is something we’ve talked about for a long time—trying to maximize the benefit of the dollars that large money projects like INDOT would spend on mitigation where we could get more bang for the buck, more ecological benefit from them. There’s some new impetus from this new Administration—opportunities with the Division of Oil and Gas to work with the new Energy Department and opportunities to move us towards a one-stop-shop for water permitting.” He concluded, “These are exciting initiatives that you’ll be hearing more about in the coming months and something that I’ll miss not being a part of.”

The Chair reflected, “Again, I’ve had the opportunity to work with Ron in a myriad of different circumstances and can only echo that it’s a great loss to the Department. You have shoes that are hard to fill, and I know that you’re respected by many, many people, including this Commission and those that you work with. On their behalf, I thank you for all you’ve done.”

CHAIR AND VICE CHAIR

Updates on Commission and Committee activities

The Chair recognized Amanda Neyron who served as proxy for the Department of Tourism.

In the absence of AOPA Committee Chair, Jane Stautz, he asked Steve Lucas to provide an update on AOPA activities. Lucas reported that all five members were present at the March 7 meeting, including the new member from INDOT, Jennifer Jansen. The committee dealt with the “continuing challenge” from Big Long Lake. The AOPA Committee “really serves a thankless task, and now I get a rare opportunity to thank members for the time they put in. I welcome the opportunity to give my thanks.”

The Chair stated, “It’s nice to have an Advisory Council that’s back and productive.” He then deferred to Chairman Patrick Early to provide updates from the last Advisory Council meeting.

Patrick Early, Chair of the Advisory Council reported the Council met in February. He said the legislature redefined the Advisory Council, decreasing membership from twelve to seven persons. The meeting discussions “revolved around the primary role of the Advisory Council and its relationship with the DNR.” DNR senior staff was in attendance and each explained their respective responsibilities within DNR. Early added, “We have a good group..., and I don’t think we will have any problem getting a quorum and dealing with issues going forward.”

The Chair noted the Advisory Council’s review of issues has historically helped the Commission work more efficiently.

DNR, EXECUTIVE OFFICE

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

No additional topic was identified.

PERSONNEL ITEMS

Information Item: Introduction of Jeremy Weber, Assistant Manager of Brookville Lake/Whitewater State Park

John Bergman Introduced Jeremy Weber as the new Assistant Property Manager of Brookville Lake and Whitewater State Park. He said Weber graduated from Purdue in 1999. Weber was most recently an extension agent at Montana State University and previously worked seasonal jobs for DNR.

The Chair asked Weber what his job duties would consist of as Assistant Manager. Weber responded he would be in charge of the main gates, concessions, camp stores and security.

The Chair welcomed Weber and said the Commission appreciated his service to Indiana.

DIVISION OF NATURE PRESERVES

Request for permission to hold public hearing and for the appointment of a hearing officer relating to a proposed addition to Hoosier Prairie Nature Preserve and the amendment of its Articles of Dedication and the Master Plan; Administrative Cause No. 13-048N

John Bacone, Director of Division of Nature Preserves, presented this item. He said the Hoosier Prairie Nature Preserve was dedicated in 1978 and originally included 304 acres. Later, acreage was added to the property.

Bacone explained another 275 acres are proposed for inclusion, which would bring the total acreage of the preserve to 579 acres. The additional acreage contains wet and dry prairies, wetland and oak savannas, and associated rare plants and animals. The proposal would also amend and update the nature preserve's Master Plan. The Master Plan is developed from the Articles of Dedication for the Hoosier Prairie Nature Preserve. He noted the Articles of Dedication also need to be updated. To amend Articles of Dedication for a nature preserve, a public hearing needs to be held in Lake County where the nature preserve is located, and notice of the public hearing published in a newspaper of general circulation in Lake County. The Nature Preserves Act (IC 14-31-1) requires the Commission to make findings to support any amendments to Articles of Dedication. Bacone requested the Commission to appoint a hearing officer to conduct a hearing in Lake County to satisfy statutory requirements.

Thomas Easterly moved to approve appointment of a hearing officer to consider a proposed addition to Hoosier Prairie Nature Preserve, the amendment of the Master Plan, and the

amendment of the Articles of Dedication. Patrick Early seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF FISH AND WILDLIFE

Consideration of Department of Natural Resources, Division of Fish and Wildlife response regarding citizen petitions for rule change; Administrative Cause Nos. 12-177D, 12-100D, 13-020D, and 13-052D

Linnea Petercheff, Staff Specialist with the Division of Fish and Wildlife, presented this item. She said the Commission received four citizen petitions for rule changes over the past nine months. One petition was the request to sell squirrel tails, another that a spring squirrel season be opened, and two others were for certain rifle cartridges to be legalized for deer hunting.

Petercheff said the Division of Fish and Wildlife has a process in which public comments can be submitted as part of their biennial rule revision process. She said the Division would begin accepting public input in January through February of 2014. Comments can be submitted online or by written letter, and at least one open house for public attendance would be scheduled. After the Department has reviewed the comments, proposals would be submitted as a rule package and then presented for preliminary adoption at the Commission's July 2014 meeting. The rule amendment package would also be presented to the Advisory Council for its review and recommendations.

Petercheff noted last November the Commission gave preliminary adoption to two rule packages that included amendments to a significant number of fishing, hunting, and permitting provisions. The Division of Fish and Wildlife requested that these two rule packages complete the rule promulgation process before beginning new packages.

Petercheff said the Division of Fish and Wildlife "also understands the importance of the petitions and the need for evaluation." The Division of Fish and Wildlife requested the four petitions, in addition to any other petitions received before February of 2014, be incorporated into the next biennial rule revision process.

John Davis observed, "This is a reflection of what we discussed with you several months ago on how we were going to handle these [citizen petitions], and that if something came through in the meantime that required a separate look in a timely fashion, we would recommend that. But, these seem to fit into the biennial revision process."

Chairman Poynter added, "After we did our comprehensive fish and wildlife review, this was an effort to streamline, because we do recognize the value for these citizen petitions." He then recognized Jeff Morgan.

Jeff Morgan, representing the Hoosier Tree Dog Alliance, said that the Alliance sponsors several youth events throughout the State, providing the youth the opportunity to experience hunting in the wild. The Alliance favored a squirrel spring season and would further offer input on the consideration of a spring squirrel season.

The Chair asked Morgan if he was in favor of the rule proposal presented by Linnea Petercheff.

Morgan replied in the affirmative.

Bryan Poynter commented, “I know that the Tree Dog Alliance does do a lot of outreach to the young folks, and I know that this is something worthy of consideration at the time these rule changes come before us.” He thanked Morgan for his presence and input.

Thomas Easterly moved to approve the request by the Division of Fish and Wildlife that responses regarding the four referenced citizen petitions for rule change be consolidated into the 2014 biennial review of fish and wildlife matters. In addition, the Division of Fish and Wildlife was authorized to consolidate similar citizen petitions received later into the 2014 biennial review. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

Consideration for preliminary adoption of amendment to 312 IAC 5-6-9 to establish permanent special boating zones on Tippecanoe Lake and James Lake; Administrative Cause No. 12-098L

Chairman Poynter explained that as anticipated by Executive Order 13-03, Director Rob Carter requested an exemption from the Office of Management and Budget to move forward with preliminary adoption of this rule adoption. Because the exemption request is still pending, the Chair would not take a vote on preliminary adoption. Because Mark Ennes drove all the way from Valparaiso for this agenda item, however, he wanted to provide Ennes an opportunity to speak.

Mark Ennes, representing the Lake Tippecanoe Property Owners Association, said the Association has a rich history of water quality projects associated with Lake Tippecanoe. He said a “sunset clause” in the rule would cause the rule to expire on January 1, 2014. “We have seen recently with a vegetation survey that we’re getting much more native growth, in the areas that we’ve been looking for, which is very important news. Today, we’re here again for a modification of the existing rule. There’s a small area which we call the ‘Northwest Quadrant’—initially had been in front of the property that the Ball Foundation owned that is now private property. We’re looking to further clarify trolling motors to be electric only, and then, again, to eliminate the ‘sunset clause’. We think this will enable us to continue to have progress for water quality projects. We also are looking for an aquatic vegetation plant project that we hope to do this spring. I guess the bottom line that we should share with our Governor is that clean lakes create money opportunities for the people that live on them, as well as the businesses, and we think that this rule will continue to enhance that situation.”

John Davis asked whether the ecozone encouraged native plants.

Ennes replied, “Yes, again, it was two-fold. One was for the water quality and the enhancement of the wetlands. But, secondly, it allowed the DNR Conservation Officers and also our Lake Patrol to be able to have specific speed zones. The true actual shoreline exists up in the wetlands areas. If you were going to use the 200-foot rule regarding speed, there wasn’t really any way to do that. By creating a perceived shoreline and using the 200-foot rule, it enabled the

Conservation Officers and also Lake Patrol to provide better situations as far as maintaining proper speed limits and addressing safety concerns. Yes, we are seeing results, and we want to see those continue.”

Donald Ruch asked for clarification of the term “native”. He asked, “Are you talking about natural plants coming in and growing, or are you actually talking about native plants versus introduced or exotic plants?”

Ennes explained that he was describing aquatic native vegetation, meaning “vegetation that previously existed that disappeared due to heavy boat traffic, which is now re-establishing. Again, we had hoped to have a longer time frame to take a look at it, but we were on this five-year window.” He continued, “We were pleasantly surprised with the recent survey showing very significant growth during the past five years. We want to enhance that with some additional plantings to restore the native shoreline that used to be there. In order to do that, we need to continue to have the ecozone.”

Steve Lucas reported the Division of Hearings received a March 13, 2013 letter from Sergeant Jon Tyler, Lake Patrol Coordinator of the Kosciusko County Sheriff’s Department. The letter was directed to Chairman Poynter with respect to this agenda item. He read the substantive parts of Sgt. Tyler’s letter:

I am aware that the special boating zones on Lake Tippecanoe and Lake James in Kosciusko County are currently under review and a proposal has been forwarded to alter the zone in various areas.

I, as the Kosciusko County Sheriff’s Department lake patrol coordinator, am familiar with the boating practices on these lakes and find that this area of boating restrictions enhances the safety of lake patrons. The area currently under the restrictions of the special boating zone are very shallow and pose a real threat to the safety of high speed boaters, their passengers, and persons being towed by a boat operated in these areas at a high speed. It is appropriate for these areas of Lake Tippecanoe and Lake James to be restricted to electric motors only or idle speed only.

Therefore I am recommending adoption of amendments to 312 IAC 5-6-9 to establish permanent special boating zones on Tippecanoe Lake and James Lake as listed in Administrative Cause No. 12-098L.

Ennis reiterated that the sunset period would expire January 1, 2014. “I appreciate you allowing me the opportunity to speak, because it was a five-hour round trip for me to today.”

The Chair commented, “I think it’s a great example how you manage the Association, and work well with the Commission. Thank you for being here. Sorry we couldn’t hear this today, but I anticipate it to be back on the agenda very soon.”

Ennes concluded, “As past President of the organization, I had the privilege to work with a lot of good people. As I said, we have a very rich history of water quality projects and we want to continue them.”

DNR, DIVISION OF STATE PARKS AND RESERVOIRS

Consideration of acceptance of a proposal for Quakertown SRA Marina at Brookville Lake received in response to a Prospectus prepared by the Division of State Parks and Reservoirs as per IC 14-18-2 and approval to negotiate a ground lease with the proposer

Gary Miller, Assistant Director for the Division of State Parks and Reservoirs, presented this item. He said under IC 14-18-2, any DNR division negotiating a long-term ground lease with a private developer is required to draft a prospectus, a statement of intent, and provide newspaper notice of the prospectus. The current agreement between the Department and Quakertown Marina, Inc., operator of the marina at Brookville Lake, is soon to expire. James L. Girot, Sr., President of Quakertown Marina, submitted a proposal within the allowed timeframe.

Miller explained that after proposals are received, the Department selects the proposal with the best response to the prospectus and then brings the proposal before the Commission to request permission to negotiate a long-term lease. Miller stated that the Division of State Parks and Reservoirs requested permission to negotiate a ground lease with Quakertown Marina.

As anticipated by IC 14-18-2-6, R.T. Green moved to approve the proposal and to authorize the Department to negotiate a ground lease with Quakertown Marina. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of the recommended report of the Natural Resources Commission regarding the Petition for the Establishment of the Move Over Lake Conservancy District; Administrative Cause No. 12-206C

Jennifer Kane, Hearing Officer, presented this item. She said the Vigo Circuit Court referred the petition for the Establishment of the Move Over Lake Conservancy District to the Commission on December 6, 2012 according to IC 14-33-1-1. The purposes of the proposed district are: (1) developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management; and (2) operation, maintenance, and improvement of works of improvement including, but not limited to Move Over Lake and the Move Over Lake dam and spillways. Kane explained the Indiana General Assembly, through the Indiana Conservancy District Act, has “tasked the Commission to gather comment from interested persons, and to seek technical assistance from other governmental units regarding the proposed conservancy district.” The Vigo County Commissioners, Indiana State Department of Health and the Department of Natural Resources filed comments.

Kane explained that the Commission does not decide whether to form a conservancy district, but that authority rests with the Vigo Circuit Court for this proposed conservancy district. She explained that, “in essence, the Commission acts as a friend to the Court compiling comment and technical information in order to determine and report to the Vigo Circuit Court whether the proposed district for the two purposes meet statutory conditions. The statutory conditions to be met are whether: (1) The proposed district appears to be necessary; (2) The proposed district

holds promise of economic and engineering feasibility; (3) The proposed district seems to offer benefits in excess of costs and damages; (4) The proposed district proposes to cover and serve a proper area; (5) The proposed district could be established and operated in a manner compatible with established: (A) conservancy districts; (B) flood control projects; (C) reservoirs; (D) lakes; (E) drains; (F) levees; and (G) other water management or water supply projects. A public hearing was held as scheduled on January 11, 2013 in Terre Haute.

Kane said the impetus for the Petition is to repair and for future maintenance of the Move Over Lake Dam. There are 15 freeholders within the proposed conservancy district. Kane said that testimony and DNR records indicate that the Move Over Lake Dam is jointly owned by Roy and Deloris Woodsmall, Sally Harrison and Sherry Lamb, and Mary Jane Aten Faust. The dam embankment spans the properties owned by the Woodsmalls, and Harrison and Lamb, and the principal spillway is located on the Faust property. The DNR inspected the Move Over Lake dam in 2004, 2007, and 2010. Kane said the Department in its 2010 inspection report concluded the “entire Move Over Lake Dam requires major rehabilitation”. Kane also noted that the Move Over Lake dam was overtopped in a 2008 rain event, which also resulted in flooding of some of the properties within the proposed conservancy district boundary.

Kane said the proposed conservancy district, if established, would obtain ownership of the Move Over Lake common area, ownership or leasehold interest in the dam, and ownership of the dam spillways in order to complete the remaining dam repairs and continued management of the structures. She noted that the Fausts would convey ownership of the dam to the proposed conservancy district. Kane said the Lake Homeowner’s Association’s offered verbally, and subsequently, a written offer to purchase or obtain a leasehold interest from the remaining owners of the dam—Woodsmalls, Harrison and Lamb—in order to make repairs to the dam. “As of the date of this recommended report, an agreement has not been reached.” Kane said the Association has been working to resolve the deficiencies of Move Over Lake and dam since 2004, and all Move Over Lake property owners were notified that breaching of the dam and loss of property values may result if the dam is not repaired and brought into compliance with regulatory standards. The decrease in property values was estimated at between \$800,000 and \$1 million with the loss of the dam.

Kane stated that emergency repairs (Phase 1 Construction) to the portion of the dam located on the Faust property were completed on November 18, 2011. “The Association collected funds from some homeowners to cover costs, but the Association continues to experience resistance in collecting funds for further repair of the dam.” She said a contractual lease agreement, if successful, between the proposed conservancy district and all owners of the dam would facilitate the repair of Move Over Lake dam. Kane said the estimated cost to bring Move Over Lake dam into regulatory compliance and to rectify the progressive deterioration is approximately \$312,207.30, of which \$92,987.30 funded completion of Phase 1. The remaining portion of the dam, a little over two-thirds, continues to be deficient. Kane said it is proposed that each of the 15 freeholders within the proposed district would be assessed \$20,000 to cover the remaining estimated dam improvement costs. She said the Association dues are currently \$1,500 per household, but if the conservancy district is established the estimated annual operating and management budget is approximately \$24,500, or an increase to \$1,633 per freehold annual assessment.

Kane explained that the Commission is currently authorized to provide analyses described in the Indiana Conservancy Act (IC 14-33-2-17). The statutory structure does not anticipate the Commission will approve or decline the petition to establish the conservancy district or even approve or decline a purpose for which the conservancy district is to be established. The Indiana General Assembly has (IC 14-33-2-26 and IC 14-33-2-27) placed this authority squarely and exclusively with the Vigo Circuit Court. Kane said the creation of a conservancy district does not remove any obligation by the conservancy district to acquire any license or permit required by law.

Kane said that for the two purposes positive findings are recommended for four of the statutory conditions. For whether the proposed district holds promise of economic and engineering feasibility for both purposes, questions remain. “The proposed district does not appear to have ownership of all properties needed to affect the purposes.” Since 2004, the Association has attempted to rectify the deficiencies of the Move Over Lake dam. “Discord within the community presents a hurdle to accomplishing the required repair and maintenance of the dam, in other words, its purposes. Where adequate repair and management of a dam are currently being provided, there is no need. However there is a continuing lack of proper dam maintenance as has been documented by DNR and Triad Associates.”

Kane said each of the 15 freeholders would be assessed approximately \$20,000 to cover the total costs of dam repair. Comments received at the public hearing and a comment from David Smith indicates there is freeholder concern regarding the appropriateness of the proposed assessments. She referred the Commission to a copy of Smith’s comments provided on blue paper. “Whether the assessment to a parcel should be proportionate to valuation of the parcel is within the province of the Vigo County Circuit Court.” Upon receipt of the Commission’s report, the Vigo Circuit Court would schedule a hearing. She explained the Vigo Circuit Court may amend the Petition to conform to the findings of the Commission, or the Court may make its own findings. But new evidence would need to be presented to the Court.

Kane noted several conservancy districts have been established for purposes similar to those proposed for the Move Over Lake Conservancy, including the Jet-to Lake, Lake DeTurk, Northwest Lake, and North Lake Conservancy Districts. These districts have successfully repaired and maintained dams. The conservancy district is a proven method to correct dam deficiencies. Kane said the success of the Move Over Lake Conservancy District is contingent upon the conservancy district acquiring the necessary property rights to make repairs.

Kane noted three technical errors within the recommended report should be corrected. She explained that the Vigo County Commissioners’ and the State Department of Health letters were inserted incorrectly and should be moved to the corresponding introduction paragraphs on pages ten and eleven; amend reference to Petitioners’ Exhibit B as prepared by James Twiggs rather than Cohen-Cook; and correct the Indiana Administrative Code citation in Footnote 8, regarding definition of “Overburden” as defined at 312 IAC 25-1-93. Kane then recommended approval of the recommended report with corrections as the Commission’s report to the Vigo Circuit Court.

Alan Hux, attorney representing the petitioners for the establishment of Move Over Lake Conservancy District, addressed the Commission. He commended the Division of Hearings for their “good job” in providing the information gathered at the initial hearing. Hux recommended approval of the report and requested that the Commission forward the findings onto the Vigo Circuit Court for an additional hearing to determine whether or not the district should be established. Hux offered to answer any questions concerning the establishment of Move Over Lake.

David Smith addressed the Commission and provided members with a hard copy of his comments. Smith said he, his wife, Mary Ann Smith, and his wife’s sister, Susan Knapp Davies, own property on Move Over Lake, which was previously owned in the early 1950s by Marvin and Kathryn Knapp. Smith said he and the Davieses were not totally against the creation of the Move Over Lake Conservancy District, but he disagreed with the petition as presented. The petition reflects there are 15 freeholders rather than the actual 16 freeholders. “This is important as the annual assessment for the property owners as stated in petition is based on 15.” The reason the petition reflects 15 freeholders was because the Faust property is considered as one freehold when in “actuality it should be two separate freeholds— Andrew Faust as one, and Mary Jane Faust, across the lake, being the second freehold.” Andy Faust property was previously owned by Faust’s mother, Mary Jane Faust, but the property was transferred to Andy. Mary Jane Faust still owns the property across the lake.

Smith urged that with 16 freeholders on the lake, the conservancy district board should not consist of any fewer than five members. Any decision affecting the amount of annual assessment should be voted on by all members of the conservancy district, with the decision determined by a majority of at least 60%. He asked that the Commission consider his comments in its decision to accept the recommended report.

Alan Hux stated that he believed 15 freeholders to be the correct number when the petition was filed with the Vigo Circuit Court. He did “not believe the count of 15 freeholders versus 16 made a difference” since the statute requires more than 30% be in favor. 50% of the freeholders signed in favor of the petition. Assessments are governed by statute, and it is under the purview of the conservancy district board to establish or assess exceptional benefits or special benefits. Exceptional benefits are generally assessed based upon the number of lots that are exceptionally benefited. “That is also covered by the statute and its board action and would not be germane to whether the Commission would forward this report to the Vigo Circuit Court.”

Kane reported no comment was received urging more or less area be included in the proposed district. “However, if the Vigo Circuit Court is presented with additional evidence at its hearing, the Vigo Circuit Court could change the boundaries adding territory to the proposed district boundary if supported by evidence.”

Hux stated his recollection is the Faust properties are included within the boundaries. “I don’t think Mr. Smith is discussing whether or not those properties are included within the district or whether or not they would be subject to the special and exceptional benefits. I think he’s questioning whether or not there is one freeholder or two freeholders, which at this point, based upon the statutory requirements, does not make any difference as far as the petition goes. The

Court has already found that there are an appropriate number of petitioners to refer the petition to the Commission.”

The Chair recommended a motion for approval of the Hearing Officer’s report, as amended, to make technical corrections.

David Smith asked if he could “make another point” in rebuttal to Hux.

The Chair replied in the affirmative.

Smith commented, “It sounds to me like as reading the petition that the number 15 is within the petition as the number determining the assessment. That should be a variable number. It should not be fixed at 15. That’s the point I was trying to make. It’s now 16, but the petition still refers to 15 as what the assessments are going to be built upon.”

The Chair commented, “I did hear you, and I think that it was addressed that our jurisdiction today is not to establish if it’s 15 or 16. That will be done at the [Vigo Circuit Court] if there is evidence to support that. It’s not that we’re not hearing you. It’s not really a matter for us to debate today. I hope that makes sense to you.”

Smith replied, “Yes.”

R. T. Green moved to approve the hearing officer’s report for furtherance to the Vigo County Circuit Court regarding the petition for the establishment of the Move Over Lake Conservancy District. Donald Ruch seconded the motion. Upon a voice vote, the motion carried. Robert Wright abstained.

Information Item: Status of rules given preliminary adoption from September 2012; Administrative Cause No. 13-054A

Stephen Lucas, Director of the Division of Hearings, presented this information item. He said he has received numerous inquiries from Commission members and interested citizens concerning rule adoptions in light of the Governor’s Executive Order 13-03. Cameron Clark and Mike Smith from DNR’s Executive Office are working closely with OMB to develop mutual understandings of the consequences of EO 13-03. As a result, he said what he outlined in this information item was likely to be modified or clarified moving forward. But in an effort to be responsive to the inquiries, as best as possible, he wanted to pass along advancements since the January Commission meeting and his best understanding of where things stood at the moment.

Lucas distributed a handout that included six categories of activities that were or might be impacted by EO 13-03. He then referenced each category.

Category 1 consists of rules for which a “Notice of Intent” was posted in the *Indiana Register*, by January 14, 2013, to seek adoption as a permanent rule. The Division of Hearings has identified eight proposals within this category. During the January 15 meeting, the Commission approved final adoption of two of these proposals, but it made delivery of the proposals to the Attorney

General contingent upon receiving favorable additional Administration instruction. He said supplemental instruction was received through OMB in February. Based on the instruction, Sandra Jensen reported electronically to #SBA Rules on February 25. On March 4, the Division of Hearings forwarded to the Attorney General the two sets of proposals considered by the Commission in January. These were for LSA Document #12-403(F) (several matters from the Division of Fish and Wildlife) and LSA Document #12-514(F) (modifying the gypsy moth quarantine to include LaPorte and St. Joseph Counties). The Attorney General approved both proposals for legality, and they were approved and posted by the Governor with the Legislative Services Agency on March 15. They become effective April 14.

Lucas added that two more of the eight proposals in this category are on today's agenda for consideration as to final adoption. These are LSA Document #12-554(F) (mediation of surface water disputes) and LSA Document #12-511(F) (thousand cankers disease). The hearing process has been completed for yet another, LSA Document #12-555 (State Land Office), and this item is tentatively set for submission and Commission consideration in May. The final three proposals in this category are currently pending before OMB with respect to DNR's proposed fiscal analyses for them.

Category 2 consists of rules for which the Commission has given preliminary adoption but for which a "Notice of Intent" was not posted in the Indiana *Register* by January 14. For these, Lucas said DNR and the Division of Hearings have been informed another preliminary adoption by the Commission is not required. But a proposal cannot be submitted to LSA for publication of a "Notice of Intent" unless OMB grants an exemption from the moratorium established by EO 13-03. Within this category are the following: Alcohol Authorized at Dunes State Park Pavilion, Events on Public Waters, Coal Bed Methane and Coal Seam Protection, Carbon Dioxide Pipelines, and Great Lakes Compact Implementation. Lucas said this listing includes only proposals given preliminary adoption after September 1, 2012, although there are other proposals given preliminary adoption previously.

Category 3 consists of readoptions of rules for which Lucas, as the Commission's delegate, gave preliminary adoption on January 8. He said the Division of Hearings is acting on the understanding that before these can be submitted to the Legislative Services Agency for publication of a "Notice of Intent", they must also be submitted to and granted an exemption by OMB. If readoption is not completed this year, these rules would be sunsetted: Definitions of General Application (312 IAC 1), Division of Law Enforcement Structure (312 IAC 4), Dams Regulation (312 IAC 10.5), Historic Preservation Review Board Structure (312 IAC 20), Archaeology Review and Recovery (312 IAC 21), Human Remains and Historic Preservation (312 IAC 22), and Surface Mining Control and Reclamation (312 IAC 25). Lucas added that on March 18, OMB issued an exemption authorizing the agency to move forward with readoption of the SMCRA rules (312 IAC 25).

Category 4 references a shorthand process by which an agency may make nonsubstantive changes to rules through what are commonly referred to as an "agency correction" or "*errata*". He said the process is not strictly rule adoption, but at least until clarification is achieved, the Division of Hearings is acting on the assumption an exemption is needed under EO 13-03.

Category 5 references all other permanent rules going forward under EO 13-03. Lucas said that “our current understanding is the agency must demonstrate an exemption before seeking preliminary adoption” from the Commission. Illustrative was the proposal to amend the boating zone on Tippecanoe Lake and James Lake in Administrative Cause Number 12-098L, “which was on the Commission’s agenda today,” but for which action was not taken because an exemption request is still pending.

Category 6 is for emergency rules or temporary rules. Lucas said the authority for these rules is with the DNR Director and not the Commission. He included a reference to the category to help give a complete picture and because these rules are important to subjects for which the Commission has responsibilities.

Consideration of report on rule processing, public hearing, and hearing officer analysis with recommendations regarding final adoption of rule amendments adding 312 IAC 11.8 to help implement P.L. 151-2012 (IC 14-25-1-8) to mediate disputes among surface water users; LSA Document #12-554(F); Administrative Cause No 12-060W

Steve Lucas, Hearing Officer, presented this item. He said for consideration as to final adoption was proposed 312 IAC 11.8 that would help implement PL 151-201, which amended IC 14-25-1-8, to provide a modern opportunity for mediation of surface water disputes. The proposal is one of the eight that fits within *Category 1* discussed previously for EO 13-03.

Lucas said PL 151 simplified IC 14-25-1-8 by incorporating the AOPA mediation provisions of IC 4-21.5-3.5 and by authorizing the participating parties to enter a binding agreement if mediation succeeds. The rule would defer to other statutory systems, such as provided in IC 36-9-27.4 for a drainage board to resolve a dispute concerning obstructions in regulated drains, or as provided in IC 36-9-28.7 for a local unit of government to resolve a storm water nuisance. The rule would also clarify the remedy is not available to surface water quality disputes—only those based on water quantity.

Under the proposed rule, if a person requested mediation an administrative law judge would be appointed to determine if the request met statutory and rule requirements. If so, the ALJ would help identify persons needed to achieve a resolution. The DNR’s Division of Water would provide technical support but could not be required to participate in mediation outside Indianapolis.

If the mediation succeeded, a private agreement could be entered and the proceeding dismissed. If the DNR was a party, an agreed order could be entered and approved by the ALJ and the Secretary of the Commission. The agreed order would be both an agreement and an agency order. If the mediation failed, the mediator would inform the ALJ, and the ALJ would be required to dismiss the proceeding.

Lucas said “our history with IC 14-25-1-8 is the remedy is unlikely to be pursued frequently.” But the clarification of the process by statute and in the proposed rule, and the potential for the parties to enter a binding agreement, “may cause its use to be somewhat more attractive. The designed short regulatory life of a proceeding—mediation is conducted and either succeeds or

fails, then the matter is closed—may also generate interest in seeking at least temporary solutions to immediate water quantity disputes.” He then presented proposed 312 IAC 11.8 to the Commission for action on final adoption.

Thomas Easterly moved to give final adoption to 312 IAC 11.8 governing the mediation of surface water disputes, under IC 14-25-1-8, as posted for preliminary adoption. R.T. Green seconded the motion. On a voice vote, the motion carried.

Consideration of report on rule processing, public hearing, written comment, hearing officers analyses, and recommendation regarding final adoption of rule amendments adding 312 IAC 18-3-24 to regulate thousand cankers disease; LSA Document #12-511(F); Administrative Cause No 10-083E

Steve Lucas started by adding his thanks to Ron McAhron and expressing his appreciation for the chance to work with him, particularly on rule adoptions. He said this rule proposal would be the last they followed to completion.

Lucas then introduced this item. He said for consideration as to final adoption was proposed 312 IAC 18-3-24 to declare the walnut twig beetle and *Geosmithia morbida*, a fungus that kills walnut trees, as “pests or pathogens” subject to quarantine under IC 14-24-3-9. Quarantine is now governed by a temporary rule that is set to expire in August. This proposal is also one of the eight in *Category 1* that was discussed earlier in the meeting.

He said the language presented for final adoption was modified from what was posted in the *Indiana Register* following preliminary adoption. Most of the modifications were in response to written comments from Liz Jackson, Executive Director of the American Walnut Manufacturers Association. Also considered were written responses to Jackson by Indiana State Entomologist, Phil Marshall.

He recommended modifying the definition of “bark” to exclude one-half inch of wood in addition to the vascular cambium that was set forth in the language given preliminary adoption. The term would also be simplified so the word “bark” is not also used in the definition of “bark”.

The hearing officers recommended modifying the “regulated articles”. An exemption is more clearly set out in Clause (E) of subdivision (c)(5), in part by acknowledging the exemption in the introduction. In support of Jackson’s comments and Marshall’s response, two types of processed lumber would be recognized in the exemption—those that are “without bark” and those that are “kiln-dried”. A reference to “square edges” would be eliminated.

The only substantive modification sought by the American Walnut Manufacturers Association, which was not incorporated in the language recommended for final adoption, was to reframe approved external quarantines for other States from a statewide basis to a county-and-buffering-county basis. “The State Entomologist’s response for this subject is set forth on page eight of the hearing officers’ report and was found to be persuasive.” Lucas added that his understanding is the State Entomologist and representatives of the regulated community met following distribution of the hearings officers’ report, and they may have additional comments to the

Commission regarding framing the quarantines. “I believe both Liz Jackson and Phil Marshall are present and would address the Commission.” He then presented proposed 312 IAC 18-3-24, with the outlined modifications from language given preliminary adoption as set forth in Exhibit A, with a favorable recommendation for final adoption.

Liz Jackson, Executive Director of the American Walnut Manufacturers Association (AWMA), addressed the Commission. She said AWMA members produce approximately 50% of the walnut lumber produced in the United States. She thanked Phil Marshall and the Steve Lucas for their “willingness to consider comments on the proposed rule and the thoughtful consideration and revisions they made.” Considering the risk to the walnut resource, she said the AWMA was in support of the proposed rule as revised and recommended final adoption.

Dr. Ruch inquired about the severity of the Thousand Canker Disease. “Will it take out 100% of the walnut trees, or is it just a periodic disease?”

Jackson replied, “That’s yet to be determined. There’s a lot of unclear science. Where it is prevalent, it is taking out close to 100%. It’s very prevalent in the West. It’s behaving a little bit differently in the East, and it’s not clear to what degree” the disease will impact black walnuts here.

Phil Marshall, State Entomologist and Director of Division of Entomology and Pathology, addressed the Commission. He said Liz Jackson responded correctly to Dr. Ruch’s inquiry. The impact of the disease in the East was still uncertain.

Marshall said a point of concern was that the disease involves both an insect and a fungus. A Cincinnati, Ohio veneer mill is currently “under regulation after its shipment of material containing the beetle.” He anticipated later this year that “Ohio may have a positive location in nature, but no trees are currently infested. Our concern is that we have a large amount of walnut in the State of Indiana. As Liz [Jackson] said, we don’t know what it’s going to do in the natural woods.”

Marshall also expressed concern for landowners who have plantations with a large economic investment and with large mature trees that are prone to disease. “Because based on the West, the disease kills. We do not have any measure to control it like we did with emerald ash borer. If it comes in, we would have to destroy the trees. That’s our only option right now until research improves.”

Marshall thanked Jackson and the walnut industry for their involvement with the proposed rule. He commended Jackson for her dual role of also representing the landowners in the Walnut Council. “She is doing a good job for that.”

Ruch asked “Is the insect the only vector for the fungus?”

Marshall replied, “Yes. The insect is a beetle called *pityophthorous*. We do have similar native beetles here in Indiana. Last summer, I was quite concerned because we had a sample come out of Pokagon State Park. But it was a native beetle, not this beetle.”

Donald Ruch moved to approve the hearing officer's report and recommendation for final adoption of rule amendments adding 312 IAC 18-3-24 to regulate thousand cankers disease. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Adjournment

The meeting was adjourned at approximately 11:15 a.m. EDT.

Next Scheduled Meeting:

May 14, 2013 (10:00 a.m., EDT (9:00 a.m., CDT), Ballroom, The Garrison, Fort Harrison State Park, Indianapolis