

ADVISORY COUNCIL
Minutes of February 11, 2009

MEMBERS PRESENT:

Patrick Early, Chair
Aymarie Travis Lucas, Vice Chair
John Bassemier
William Wert
Rick Cockrum
Donald Vanmeter
James Snyder
Kari Evans
James Trachtman
David Lupke

NATURAL RESOURCES COMMISSION STAFF PRESENT:

Stephen Lucas
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT:

John Davis	Executive Office
Ron McAhron	Executive Office
Cheryl Hampton	State Parks and Reservoirs
James Hebenstreit	Water
Monique Riggs	Water
Linnea Petercheff	Fish and Wildlife
Mitch Marcus	Fish and Wildlife
Mike Crider	Law Enforcement
Nick Heinzelman	Heritage Trust and Foundation

GUESTS PRESENT:

Bruce Heeke
Michael Phillips

Patrick Early, Chair of the Advisory Council, called the meeting to order at 10:37 a.m., at The Garrison, Fort Harrison State Park, 6001 North Post Road, Indianapolis, Indiana. With the presence of ten members, the Chair observed a quorum.

John Bassemier moved to approve the meeting minutes of August 13, 2008 and the meeting minutes of October 15, 2008. Donald Van Meter seconded the motion. Upon a voice vote, the motion carried.

Election of Officers: Chair and Vice Chair

Donald Van Meter moved to re-elect the “existing team” and nominating Patrick Early, as Chair, and Aymarie Travis Lucas, as Vice Chair. William Wert seconded the motion. Upon a voice vote, the motion carried.

Information Item: Overview of the statute (IC 14-25-2) and rule (312 IAC 6.3) governing sell of water on a unit pricing basis for water supply purposes from the water supply storage in reservoir impoundments or parts of the impoundments that are financed by the state; Administrative Cause No. 08-190W

James Hebenstreit, Assistant Director of the Division of Water, gave a brief overview of the initial applications of 312 IAC 6.3 to IC 14-25-2. He said the Department’s Division of Water received two contract requests for the sale of water from state-owned reservoirs. The governing statute, IC 14-25-2, was amended in 2007 to require the Advisory Council to conduct meetings to receive public input on any contract application. According to new rules at 312 IAC 6.3, the hearings are conducted by an appointee or appointees of the Director of the Division of Water. The hearing officer then formulates a summary report with recommendations and makes a presentation to the Advisory Council. The Advisory Council, “in turn, presents” its report to the Commission. This report may adopt the hearing officer recommendations, in whole or in part, and may make modifications based upon the expertise of Advisory Council members or based upon statements received at the Advisory Council meeting. Hebenstreit said 312 IAC 6.3 also designates the Division of Water to serve as the point of contact and coordinate the administrative, professional, and technical functions regarding contracts for the withdrawal or release of water supply storage from a reservoir.

Hebenstreit then introduced Monique Riggs, Environmental Scientist with the Division of Water, who made a PowerPoint presentation. The presentation outlined the review process relative to requests for contracts for sale of water and also provided data specific to each contract request. She said the presentation was also made at the public hearings. Riggs said the State of Indiana owns water supply storage capacity in reservoirs financed wholly or in part by the State. The Division of Water currently administers contracts on Brookville Lake, Hardy Lake, Monroe Lake, and Patoka Lake. The unit-pricing of \$33 per million gallons is set by statute.

Riggs said that the Patoka Lake water supply storage that is available for the State to sell is between the elevations of 560 MSL to 536 MSL. “The water supply storage component allows for a firm yield of 78 million gallons a day of available water.” Monroe Lake has water supply storage between 515 MSL and 538 MSL. “That’s about 160,000 acre feet and provides for a safe yield of 122 million gallons a day.”

Riggs said the required public meetings were held regarding the two contract requests. “We put together a summary of the testimony” that was provided at the public hearings with Department recommendations. The summaries are Agenda Item #5 and Agenda

Item #6. She said the Advisory Council is required to submit a report to the Commission summarizing both of the public meetings. “It is ultimately the Natural Resources Commission that determines to approve, condition, or deny the contract, of course, with final approval being by the Governor, the Attorney General, and the person applying for the contract.”

Riggs said Water Allocation Priorities were recently established in 312 IAC 6.3. The first priority is water allocation “for household purposes, or drinking water for livestock, poultry, or other type of animals.” The first priority mirrors a long-established statutory priority. The second priority is health and safety; the third priority is for power production that meets contingency planning requirements; the fourth priority is for industry and agriculture; the fifth priority is for “anybody who falls under the third and fourth priority, but decides to waive the contingency planning component”; and, the sixth priority is for any other purposes.

Consideration of Hearing Officer Report in Preparation for Advisory Council Summarizing Public Meetings and Making Recommendations to the Natural Resources Commission Regarding Request by Patoka Lake Regional Water & Sewer District for a Modified Water Sale Contract Under IC 14-25-2 and 312 IAC 6.3; Administrative Cause No. 09-030V

Monique Riggs, Environmental Scientist, also presented this item. She said the Patoka Lake Regional and Water Sewer District (PLRWSD) has contracted with the State of Indiana since 1977. Currently, the existing contract is “good” until 2043. “What [PLRWSD] is applying for is to add an additional 15 years to bring [its] total contract term back up to 50 years so that [it] is able to cover the federal financing requirements so that [it] can extend rural water supply in Orange County.” She noted that “all other aspects” of the PLRWSD contract “will remain unchanged.”

James Trachtman asked whether the cost of \$33 per million gallons was statutory. “There’s no built in escalation of that? The thing that jumps out at me a little bit is the interest is used for the development fund, acquisition of easements, finance construction, and maintenance on reservoir improvements. All those things will certainly be more expensive than 30, 40, or 50 years from what they are now. Should there perhaps be some way to have that rate moved? That’s cheap water.”

Riggs said, “That’s very cheap water.” Trachtman then said, “That’s probably why the folks at the golf course are just paying for and returning it rather than opting to buy a simple meter.” He added, “Unless there is an escalation built in or at least a review every five years or ten years like a municipal water utility would do for a rate increase.”

Riggs said she agreed with Trachtman’s statements, but the current statute does not include “some sort of escalation of the rate. It’s just set and that’s it as far as I know.”

Hebenstriet explained that when the statute was first enacted, the initial contracts were subject to a five-year review and the costs were adjusted for inflation. “Unfortunately, with the increase in construction costs in the ‘70s and ‘80s, the rate for Bloomington, (which is the biggest customer) was set at \$42. I think when we calculated about ten years out the price was \$140. We kept having battles with people not wanting that kind of a jump. So, one year the Legislature set [the \$33 per million gallons] by statute.” He said the statute would need to be amended to accomplish the result suggested by Trachtman.

Trachtman noted that with the current statutory cost “you are going to have more and more requests as it becomes cheaper and cheaper water over the next decades.”

Hebenstriet said this result seemed probably to him as well.

Ron McAhrn said that Monroe Lake water supply storage is at 22% capacity. “So even though that this is—comparing to neighboring states—cheap water, we are still no where near” capacity. “This is a legislative matter. I’m sure they would appreciate a variety of suggestions.”

McAhrn then commended the Division of Water and the Division of Hearings on a “great job” developing a contract review process which has standards and vision. He also expressed appreciation to the Division of Water for its execution of the review, but “it is a very clunky process to have this many public hearings. I think we had six people show up at twelve public hearings at quite a bit of cost for the staff to make those trips and the applicants to do that.” He said the quantity of required hearings was based on the statute, and suggestions for next year’s legislative session could be made to streamline the review process.

Amy Marie Travis Lucas asked, “In the actual contract, since we haven’t seen the actual contracts, do you commit to a dollar amount or do you commit to the statutory dollar amount?” Hebenstriet said, “It’s committed to the dollar amount, and [the contract holder] submits annual reports to the amount of water used.” The Department bills the contract holder. Travis Lucas then asked, “So the contract is committing the State of Indiana to that \$33 amount?” Hebenstriet answered in the affirmative.

David Lupke asked, “In terms of the value of the \$33 per million gallons that is so ridiculously low, I don’t think the Legislature has ever looked at the value of the resource beyond ‘Oh, we’ve got this drinking water.’ What is the recreational value of the resources? What is the conservation value of the resources? What are the other uses of that resource besides flood control and water for use? If we actually looked at some of those things, we might find that to draw 100% of that water is not a good idea because it would hurt all of these other things like recreation and the industries that are supported by it.”

John Davis said that the \$33 per million gallons amount was an issue where review might be warranted. Ultimately, the decision as to the amount of compensation rested with the Indiana General Assembly.

Richard Cockrum observed, “First, it looks to me that the statute is already 13 years old. So, it’s probably significantly obsolete in true value. They ought to look at use. I think there is a use difference in Patoka when it is being used for domestic purposes, as opposed to Monroe Lake being used to irrigate a golf course. There is a significant difference in that. I imagine every golf course would love to get water rates like that, and this one, in essence, is being subsidized by the taxpayers who own the water. I’m not trying to gouge them at all, but I think there is some legitimate point of looking at the true value and looking at the use versus value.”

Amy Marie Travis Lucas asked, “Are they already committed to the language in a particular contract? If you are talking about extending a contract 50 years, what you can do is write into the term of the contract that we are committing to the statutory value of the water, and that statutory value may be increased up to ‘x’ percent as it applies to [the contract]. So you can make a contract be forward looking.” She said that if the contract language is not committed, then the Department may want to consider inserting language that the statutory dollar value is applicable up to a certain percentage. “That way the contract holder would have some assurance that it’s not going to massively increase.”

John Bassemeir asked about the total annual amount of money generated from the contracts. Hebenstreit answered that with all the water sale contracts the Department holds, the Department receives about \$270,000 to \$280,000 per year. The Eagle Pointe contract provides \$2,000 to \$3,000 per year, and the PLRWSD contract provides \$80,000 per year. “The biggest user is the City of Bloomington, which gets its water from Monroe Lake, and may pay about \$140,000 to \$150,000.”

Travis Lucas said, “It’s not just specifically the amount of the money the state could make or isn’t making, it’s also an economic issue— supply and demand. If we make [the water] too cheap, demand goes up, and we reduce our supply in the long run.”

Ron McAhrn observed, “When the rate was fixed, the idea of any kind of demand side controls, price controls on the demand side, was just not in Indiana’s mindset. So, that’s being kicked around now in the Water Shortage Task Force, but more relevant in the Water Supply Task Force.” He noted that the Indiana Utility Regulatory Commission is also reviewing this issue in its rate cases.

Jim Hebenstreit said, “Now we hear, especially on the Water Shortage Task Force, more and more concerns about availability in a state that traditionally thought of itself as water rich. I think ten, 20, 30 years down the road, the value of those reservoirs and capacity may start come into play.”

Travis Lucas said, “Because the contracts are so long, we have to look 50 to 100 years down the road.” Hebenstreit agreed.

Davis said that he would investigate whether the language in the contracts was committed and whether amendments could be made as suggested by Travis Lucas.

John Davis said part of the contract review process is analyzing the impacts on recreation. “I think if we were in a place where we were increasing usage quite a bit and going to see a change in the lake, you know, where the level is and what it does to the boat ramps, and all the people that service the docks, or effects to fish and wildlife, I think we have that to look at.”

Hebenstreit explained there is a statutory requirement that when the contract is forwarded to the Governor for signature, “we also have to send a memo of the comments of the impact of the withdrawal on the recreational use of the lake. Interestingly enough Lake Monroe was built for flood control and water supply and not for recreation purposes, but that’s a bridge we will cross someday when somebody else wants to use water at Lake Monroe.”

Donald Van Meter added, “Even if you found that you were endangering the recreation or the wildlife, if there was a need for water supply, it has number one priority. So you are going to use it anyhow for drinking water.”

McAhron noted that the Department would be able to “kick in” some restrictions if it became critical. The newly enacted contract review process is a “very positive step. For years, it was kind of *laissez-faire*.” But “I think there is a better way to get public involvement.”

William Wert asked how a drought emergency would be determined. Hebenstreit responded the Department has a water shortage plan, which lists declaration criteria that are monitored on a weekly basis. “We are in the process of revising [the plan] right now.”

Donald Van Meter asked whether the Governor had the ultimate responsibility for declaring a water shortage emergency. Hebenstreit answered in the affirmative. Van Meter then asked from what sources the Governor receives information to support an emergency declaration. Hebenstreit said the Department and a “multitude of other agencies” provide information to the Governor.

The Chair said, “These public hearings, the twelve public hearings, were really our responsibility, so we appreciate not having to go through twelve public hearings that six people showed up at. I assume, in summarizing it, the opposition of those six people is not widespread.”

Riggs responded there was no opposition to the contracts.

The Chair said that using less than one-fifth of the water supply capacity, “it’s probably not really a prudent thing” to have multiple public hearings, but “it’s required. I suppose you do have to look at everything.”

Hebenstreit noted that Mike Philips and Bruce Heeke, representatives from the Patoka Lake Regional Water and Sewer District, were present at today's meeting and available for comment or to answer questions. "They were kind enough to attend, one or both of them, all ten of the hearings".

Amymarie Travis Lucas moved to approve the hearing officer's report, as the Advisory Council's report to the Commission under 312 IAC 6.3-3-4, and that the Advisory Council recommend the Commission enter a contract with Patoka Lake Regional Water and Sewer District, under IC 14-25-2 and 312 IAC 6.3, consistent with the hearing officer's report. Richard Cockrum seconded the motion. Upon a voice vote, the motion carried.

Consideration of Hearing Officer Report in Preparation for Advisory Council Summarizing Public Meetings and Making Recommendations to the Natural Resources Commission Regarding Request by Eagle Pointe Golf Resort for a Water Sale Contract from Lake Monroe Under IC 14-25-2 and 312 IAC 6.3; Administrative Cause No. 09-031V

Monique Riggs, Environmental Scientist, also presented this item. She said Eagle Pointe Golf Resort held a water purchase contract with the State for "quite awhile," but the contract has expired. Eagle Pointe Golf Resort is requesting a new contract for water supply to irrigate grounds of a golf course and for filling a waterfall feature. A total annual limit of 85 million gallons would apply, which for its 150-day irrigation season is just over ½ million gallons per day. The contract would be for ten years, the maximum proposed term the Division of Water would support for an irrigation contract.

John Bassemeir said that he had not seen the water feature at the golf course. He asked, "Don't they reuse the water? Do they pump it into the sewer?" Riggs said the Eagle Point Golf Course does "not dump it into the sewer. Actually, [the water] goes back into Lake Monroe, but [Eagle Pointe] has so far chosen not to meter return water. [Eagle Pointe] has chosen to pay for the total withdrawal. The water that goes through the waterfall isn't actually used. It gets returned." Riggs said Eagle Pointe could "put a return meter on, and then we would have a more exact number, and [Eagle Pointe] would generally pay less." Bassemeir then said, "Then I'm fine with it."

Kari Evans moved to approve the hearing officer's report, as the Advisory Council's report to the Commission under 312 IAC 6.3-3-4, and that the Advisory Council recommend the Commission enter a contract with Eagle Pointe Golf Resort, under IC 14-25-2 and 312 IAC 6.3, consistent with the hearing officer's report. Richard Cockrum seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommendation for preliminary adoption of amendments to 312 IAC 9 (2nd Non-Substantive Rule Amendment Package) that make technical changes to rules governing definitions, restrictions and standards governing wild animals, mammals (except for deer), and birds to reorder language for improved clarity, simplicity, and continuity; Administrative Cause No. 09-026D

Linnea Petercheff, Staff Specialist with the Division of Fish and Wildlife, presented this item. She explained the amendments are “trying to clarify intent, clean up language, and combine language when we could.” Petercheff said the word “handicapped” is replaced with the word “disability”. She said the two rules governing hunter orange were combined into one rule “so that all the requirements to wear hunter orange are all in one place.” 312 IAC 9-2-13 is amended to allow the ability to administer drugs to wild animals held in captivity, but “clarifying that poison is included” in the list of drugs, and allows mammals held under a game breeder license, wild animal possession permit, or scientific purpose license, when given specific authorization, to be spayed or neutered. “Those animals are not released back into the wild.” 312 IAC 9-3-15 is amended to clarify “lawful disposition” of certain species of nuisance wild animals that are taken by a landowner or tenant to mean that the wild animal is euthanized or released in the county of capture.

Petercheff explained the rules governing possession of squirrels, eastern cottontail rabbits, bobcats, river otters, and badgers would be amended by adding a list of licenses under which the animals could be possessed. She said the Division of Law Enforcement “specifically asked” for this amendment. Rules pertaining to hunting blinds and non-toxic shot for migratory birds would be combined into one under 312 IAC 9-4-2. “We’ve also tried to clarify what we mean by ‘possession’ of several endangered species of birds, because they can be legally hunted in other states under federal law, but they are endangered” in Indiana. She noted the proposed rule sections are formatted to address migratory birds, 312 IAC 9-4-5, 312 IAC 9-4-6, 312 IAC 9-4-7.1, and 312 IAC 9-4-7.2 followed by the non-migratory bird species in 312 IAC 9-4-7.5.

Petercheff said the definitions of “youth” under 312 IAC 9-4-11 are amended for statutory consistency to mean a person less than 18 years rather than 16 years of age as currently written. Rules governing fur bearing mammals would be “added back in. We didn’t put it in this original draft. There was some legislation that had been introduced. We had anticipated it moving forward, but it’s not.” The rules would be amended to clarify the lawful possession of the species.

The Chair explained to the Advisory Council there are three projects in 312 IAC 9 “going on kind of simultaneously” governing fish and wildlife. First, 312 IAC 9 was readopted last year in its current form. The Chair also noted that a committee was formed to comprehensively review 312 IAC 9 and try “to make these rules simpler to understand.” He said the committee is processing non-substantive or “housekeeping” rule amendment packages in order to simplify and clarify intent of the rules. The third project is an online suggestion form to facilitate public suggestions for substantive amendments. The Advisory Council “will have public hearings on the substantive changes.”

Richard Cockrum said he had received comments from people attending hunting and fishing shows this winter. “People are really appreciative of the fish rules we did a couple years ago.” He asked how the public could participate in the process. Petercheff responded that the link for the online suggestion form is located on the Commission’s homepage at <http://www.in.gov/nrc/>.

William Wert asked, “When we are talking about Canada geese, aren’t there a greater and a lesser Canada goose, and is there a need to define those two?” Petercheff said that she would consult with the waterfowl biologist “to make sure we didn’t accidentally omit a species.” Aymarie Travis Lucas reflected, “I don’t know if they are technically a separate species because they do interbreed.” Richard Cockrum added, “They are not a separate species technically.”

Travis Lucas said, “I would just comment, just from a law enforcement perspective of prosecuting these cases, thank you. She said, “It is so very helpful. Thank you for all your hard work.”

Donald Van Meter asked for the “rational” in changing “youth” from 16 years to 18 years. Petercheff responded that, by statute, the youth consolidated hunting license is for persons under the age of 18. She added that legislation pending before this year’s Indiana General Assembly would clarify its intention regarding the meaning of “youth” for hunting licensure purposes.

Richard Cockrum moved to recommend the Commission give preliminary adoption of amendments to 312 IAC 9 (2nd Non-Substantive Rule Amendment Package) regarding definitions, restrictions and standards governing wild animals, mammals (except deer), and birds to reorder language for improved clarity, simplicity, and continuity. Donald Van Meter seconded the motion. Upon a voice vote, the motion carried.

Discussion of an easement exchange with Indiana Rail Road and Peabody Energy

John Davis, Deputy Director of the Bureau of Lands and Cultural Resources, introduced this item to consider approval for an easement exchange with the Indiana Rail Road and Peabody Energy. He said Advisory Council and Commission approval might not be needed, and “I think technically it probably is an informational item. I think this is some land management, but it is a little unusual. Whether it’s for approval or not, I guess we ask for your support.” Davis then introduced Nick Heinzelman, Director of the Division of Land Acquisition.

Heinzelman said the easement exchange is “fairly unusual thing” for the Department. He said the Department currently does not have the ability to exchange property that is valued over \$10,000, but the Department is working with the Legislature to “up that limit to make things like this a little bit easier.”

Heinzelman explained that Peabody Energy is starting a new mine called Bear Run in Sullivan County. Peabody “would like to get this mine off the ground. I believe sometime next year.” He also explained that part of the construction of the new mine, Peabody would need to create a rail spur that “goes from a pretty major rail line” through Sullivan and Dugger over to the mine. Heinzelman provided a map of the area and the proposed easement exchange. “The property in question...is not adjacent to any other property that we currently own and it has very poor access.” Peabody requests a perpetual easement of approximately 40 acres to create the railroad spur. He said Indiana Rail Road would construct the spur.

Heinzelman said that in exchange for the perpetual easement for rail use, Peabody is “willing to transfer to us any rights that [Peabody] has in three rail corridors that go right through the middle of Greene-Sullivan State Forest. These are things we would love to clean up.” He said the initial route Peabody was reviewing was “right next to” an archery range and campground, “which would have been terrible to take trains up through the middle” of the state forest. In addition to transferring the rights to the three rail corridors, Peabody would also deed several small tracts of land to the DNR. “This totals about 19 acres. You can see that they are all in-holdings within our state forest. This is going to cleanup quite a few property boundary issues.”

Amymarie Travis Lucas asked, “Has [Peabody] openly and notoriously possessed” the properties? Davis answered, “No.” She then asked whether Peabody had made any improvements to the properties. Davis said Peabody had not made improvements. “We want to clean these up and get conveyances.”

Heinzelman noted that the three corridors are abandoned rails. “There may be some ballast in some of the areas, but for the most part they are overgrown.”

The Chair asked whether any Advisory Council action is required. Davis said, “We prefer approval”.

Amymarie Travis Lucas moved to recommend that the Natural Resources Commission adopt a resolution supporting the grant of an easement to Peabody Energy and Indiana Rail Road, for the construction of a railroad spur, in exchange for the receipt of any rights Peabody Energy has to an inactive railway through Greene-Sullivan State Forest and for tracts including approximately 19 acres which Peabody Energy owns within the exterior boundaries (sometimes called “in-holdings”) of Greene-Sullivan State Forest. James Trachtman seconded the motion. On a voice vote, the motion carried.

Adjournment

The meeting adjourned at 11:32 a.m., EST.