

ADVISORY COUNCIL MEETING
Minutes of August 17, 2011 Meeting

ADVISORY COUNCIL MEMBERS PRESENT

Patrick Early, Chair
AmyMarie Travis Lucas, Vice Chair
Richard Cockrum
David Lupke
James Snyder
Donald Van Meter
William Wert

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Ron McAhron	Executive Office
Chris Smith	Executive Office
Cheryl Hampton	Executive Office
Cameron Clark	Executive Office
Doug Keller	Fish and Wildlife
Phil Marshall	Entomology and Plant Pathology

GUESTS PRESENT

No guests were present.

Call to order by Chairman, Patrick J. Early

The Chair called the meeting to order at 10:34 a.m., EDT, at the Fort Harrison State Park Inn, 5830 North Post Road, Roosevelt Room, Indianapolis, Indiana. With the presence of seven members, the Chair observed a quorum.

Approval of minutes of meetings held on February 16, 2011 and April 13, 2011

James Snyder noted an error in the draft April 13, 2011 minutes, which misidentified Barbara Simpson, as Barbara “Gibson”, and requested the minutes be corrected.

AmyMarie Travis Lucas moved to approve the meeting minutes of February 16, 2011. Richard Cockrum seconded the motion. Upon a voice vote, the motion carried.

Travis Lucas moved to approve the draft minutes of April 13, 2011 with an amendment to correct the error identified by Snyder. Cockrum seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommendation for repeal of 312 IAC 24 governing Indiana State Museum and Historic Sites; Administrative Cause No. 11-133A

Steve Lucas, Director of the Natural Resources Commission’s Division of Hearings, presented this item. He provided Advisory Council members with a printed copy of 312 IAC 24. He said the repeal of 312 IAC 24 is a consequence of legislation in this past session that removed the Division of Indiana Museum and Historic Sites from the Department of Natural Resources and created the Indiana State Museum and Historic Sites Corporation (the “Corporation”) as a public body corporate and politic to govern the state museum and historic sites (P.L. 167-2011). The Indiana State Museum and the historic sites statutorily “are not part of the DNR anymore. The functions of the Advisory Council, the Natural Resources Commission, and the Department have been severed.” Lucas said the Department and the Division of Hearings were working with the Corporation to “carry forth ...from existing rules and nonrule policy documents to incorporate into its own rule making authority.” Other Commission rules and nonrule policy documents would be repealed or amended through separate processes. Unless members expressed interest in reviewing them, however, they would not necessarily be taken through the Advisory Council. Lucas then requested that the Advisory Council recommend to the Commission the repeal of 312 IAC 24.

David Lupke, Advisory Council member, asked how the properties with both Department jurisdiction and historical significance would be handled.

John Davis, Deputy Director of the Bureau of Lands and Cultural Resources, responded. “This is about artifacts..., but there are a lot of areas where [the Department] will remove its authority pertaining to the Indiana Museum and Historic sites.” He said the DNR was reviewing plans to retain title to the properties and to “do something less than a transfer of property to the Corporation, some kind of document that will allow everything to happen that needs to happen.” Even with the repeal of 312 IAC 24, the properties would be governed by “the principals and the guardian policies stipulated by the American Association of Museums. So, there is protection for the things owned by the State of Indiana.” Historic properties “located within state parks, forests, reservoirs, and fish and wildlife areas are either designated as nature preserves or are buildings on the National

Register, and were not previously managed by what is now the Corporation. The Division of Historic Preservation and Archaeology was not impacted by the legislation.”

Donald Van Meter, Advisory Council member, asked whether the Department’s budget was impacted with the creation of the Corporation.

Davis responded the budget bill “specifically defined the allotment for each division of the Department. The funds allotted to the Division of Indiana State Museum and Historic Sites will now be the Corporation’s operating budget.”

Van Meter then asked whether the properties would be under jurisdiction of the Corporation.

Davis responded the question has not been determined fully. The Department wishes not to transfer every parcel of ground to the Corporation. The budget set aside for managing those properties would be transferred to the Corporation, and the Corporation would manage those sites.

Donald Van Meter moved to recommend repeal of 312 IAC 24 governing Indiana State Museum and Historic Sites. William Wert seconded the motion. Upon a voice vote, the motion carried.

Information Item: Consideration of recommendation for preliminary adoption of aquatic nuisance plant species rule amendments; Administrative Cause No. 11-054E

Ron McAhron, Deputy Director of the Bureau of Resource Regulation, provided a printed copy of the proposed rule amendments to the members. He said “the Department has reviewed a serious issue regarding invasive aquatic plants, which are currently available in commercial trade.” Agency professionals have done a good job in working with vendors to stop the sale of these invasive aquatic plants listed in the proposed rule. But invasive plants exist in aquariums. People sometimes dump their aquariums in public waters and cause the spread of invasive aquatic plants. “For us to try to regulate aquariums is, to say the least, awkward. We’ve tried to put this in the context of let’s quit selling them; do some educational work; and see how it goes for awhile.” McAhron introduced Doug Keller, Aquatic Invasive Species Coordinator for the Division of Fish and Wildlife.

Doug Keller said his responsibility, as the Aquatic Invasive Species Coordinator, is to minimize the likelihood new invasive aquatic organisms will be introduced in Indiana’s natural environment. “Ideally, we would catch them while they are still early, and we” may “go for eradication of those species. We have been successful with some eradication, but more often than not..., even before they are noticed, they are so widespread that eradication is simply not a feasible option.” A control program is then initiated to lessen the ecological or recreational impacts.

Keller said the rule is proposed under the statutory authority administered by DNR's Division of Entomology and Plant Pathology, rather than the Division of Fish and Wildlife Article, because the latter division does not have authority to regulate aquatic plants. Invasive aquatic plants reduce habitat diversity, which ultimately reduces ecological function and fish and wildlife diversity. They impede recreation, reduce property values, hamper water utility withdrawals when the invasive plants clog pipes, contribute to flooding where water cannot flow naturally, and are extremely expensive to eradicate or even control.

Keller said the cost for treating and eradicating invasive aquatic plants is one impetus for the proposed rule. Stores continue to sell of them. Brazilian elodea has been regulated since the detection of the plant in Griffy Lake, and the aquatic plant should no longer be sold commercially. Parrot feather continues to be sold. The cost of the two-year eradication of Brazilian elodea at Griffy Lake was \$150,000 (\$1,400 per acre). "Fortunately, we were successful in eradicating that species." For nearly five years, Lake Manitou has been treated for hydrilla, "with 99% eradication achieved, which has cost \$1.6 million, or \$2,200 per acre." The newest aquatic invasive plant introduced to Indiana is parrot feather, which is currently in the aquarium trade. Parrot feather was found in Meserve Lake, a small natural lake in Steuben County. The Department is in a \$50,000, three-year eradication program, which appears to be successful since no plants have been found this year.

Keller said the Department has coordinated with several groups to gain consensus to remove aquatic invasive species from store shelves. Keller said he lead the Indiana Aquatic Invasive Plant Work Group ("Work Group"). The Work Group included Indiana DNR, invasive species experts from Illinois-Indiana Sea Grant, the University of Notre Dame, The Nature Conservancy, and ecological consulting companies. There was representation from the aquatic plant industry, including growers, the water garden retail industry, aquarium industry, and the Indiana Nursery and Landscape Association. The Work Group developed a risk assessment process for aquatic plants to identify those that pose substantial risk to Indiana, and the Work Group also identified benign aquatic plants. The risk assessment process has been completed, but there are still a number of plants that need to be assessed.

Keller said the Work Group agreed the proposed list at 312 IAC 18-3-22(a) includes known, highly invasive, species of aquatic plants that should no longer be offered for sale in Indiana. The proposed rule would prohibit the sale and distribution of 28 species, 17 of which are federal noxious aquatic plants and should not be in sale anyway. There are approximately 400 to 500 species of aquatic plants in trade currently. A few of the prohibited plants are currently in trade, but there will be minimal impact to the industry, because there is an abundance of suitable replacements that are less invasive. Keller said the recently formed Indiana Invasive Species Council has endorsed the rule proposal.

Phil Marshall, the State Entomologist, said the proposed rule would give Division of Entomology and Plant Pathology professionals "more comfort and ability to address these plants, because they do encounter them sometimes within their landscape nurseries

where they're getting into water gardens." The rule proposal is "supported substantially by scientific and biological data."

Richard Cockrum noted that in 312 IAC 18-3-22(c), there is a reference to "subsection (d)". The proposed rule does not contain a "subsection (d)".

Keller thanked Cockrum for pointing out the clerical error. He said the subsections would be re-designated and the error corrected.

Cockrum then asked for clarification of the modes of transport of the aquatic species in subsection (c)(2). "When we list these methods of transport, are we better off just to say it is against the rules to transport them? I mean, there are nine of these. What if I come up with a tenth one and say, 'Well, you didn't list that one so I'm okay'?"

McAhron said the transportation issue has been one of the problems. "There's going to be an educational component with this, and hopefully...we try to balance between education in the rule and education outside of the rule."

AmyMarie Travis Lucas said, by statute, mopeds and golf carts are not defined as motor vehicles. "Why not just say that it is illegal to transport it, period?"

McAhron suggested subsection (c)(1) could be amended to read "Sell, offer for sale, gift barter, exchange, or distribute or transport the species in any manner?"

Cockrum and Travis Lucas agreed with the McAhron's amendment.

David Lupke, Advisory Council member, supported an amendment that referenced "any transport is illegal." He also recommended adding at the beginning of subsection (c)(2) add "Intentionally or unintentionally", to read "Intentionally or unintentionally transport...".

Keller said that the list of modes of transport was proposed, because the Department does not have a method for regulating the vectors that move species around from lake to lake. The list is directed to the movement of species of one body of water to the next. "We want to manage those boat trailers and things that pick something up from a body of water and go ten miles to the next lake."

Cockrum asked, "Doesn't 'transporting' cover that regardless of whether you mention 'trailer'?"

Travis Lucas offered that if the list is retained in the proposed rule, subsection (c)(2) could be amended by adding subdivision (J) to read "by any other manner".

McAhron said the Department would need to post information on its website that fleshes out the education component and ideally would place pamphlets in the stores where these materials have been sold.

Lupke asked whether there was an educational campaign in the pet industry informing citizens against dumping aquariums in lakes.

Keller said there are national education campaigns in the plant and pet industry regarding invasive aquatic plants. One campaign is Habitattitude, which starts at the pet and water garden industries, and provides options or alternatives to releasing your fish. But the national campaigns rely on retail outlets to be a part of the education program.

Cockrum thanked all those involved in addressing this issue. “I can appreciate your being sensitive to the aquatic industry, but as you pointed out, taxpayers end up paying for this. I encourage you to continue to be aggressive to try to address this, because it is a big problem and an expensive problem.”

Cockrum asked that the Advisory Council express support for preliminary adoption of the proposed rule, adding amendments to subdivision (j) to read “any other means” and by re-lettering the subsections.

Travis Lucas offered a further amendment at (c)(2)(i) to delete “other aquatic appurtenance”, and insert “by any other means” rather than adding subdivision (j).

Rick Cockrum amended his motion by correcting the lettering of the subsections; at subdivision (i), by deleting “other aquatic appurtenance” and inserting “by any other means”; and by adding at subsection (c)(2) the words “Intentionally or unintentionally”. James Snyder seconded the motion. Upon a voice, vote the motion carried.

Information Item: Update on NRC May and July Meetings

The Chair deferred this item to the next meeting.

Information Item: 2011 Legislation

Chris Smith, the Department’s Legislative Liaison, presented this item. He said as previously discussed in Agenda Item 3, legislation was enacted for transfer of the Indiana State Museum and Historic Sites from the Department to the Indiana State Museum and Historic Sites Corporation, “a very similar organization to the Indiana State Fair.” Part of the Indiana State Museum’s mandate is to raise funds, so as a quasi-government agency, the employees are allowed “more latitude to fund-raise.” The Department is drafting a memorandum of understanding with the Corporation, which was a key piece in enacting the legislation, such as continuing grounds maintenance at Angel Mounds and other properties, and in turn allowing the Division of Law Enforcement to store its boats on the properties with river access.”

Smith said DNR had “three main bills that were introduced in the most recent legislative session, and two of those were successful.” SB 532, which was the technical correction

bill, amended statutes governing boating laws more consistent with the driving and intoxicated driving statutes. Also addressed were prohibitions on activities that are “somewhat hazardous, such as wake or teak surfing behind boats equipped with an outboard drive. This is a water sport in which a surfer trails behind an inboard ski boat, surfing the boat’s wake without being directly attached to the boat. There is a risk of carbon monoxide poisoning.”

Smith said regarding fish and wildlife, there was a change “to allow shipping of furs out of state as established by rule as opposed to the previous statute that was in place, which allowed shipment five days after the close of the season.” There are more and larger fur sales taking place outside Indiana occurring after the five-day limit. “It’s hard enough for some of our fur takers to sell their wares, so it’s trying to help them do a little better business.” Also established was a roe takers and roe harvester’s license for paddlefish and sturgeon, which allows the DNR to better track the harvest and amount of eggs sold and exported. A name change was enacted to the “charter boat fishing operator’s license”, which was simplified to a “fishing guide’s license”.

Cockrum suggested some of the definitions may need amendment in addition to the title of the license because the original statute was for Lake Michigan boat captains, and there is statutory language about recording the harvest. “No one envisioned 25 years later that there would be guides on the White River, Sugar Creek, and Tippecanoe River. So, there are a lot more ‘inland’ guide services that don’t really fit under this.”

Smith said another statutory change was to the falconry license. Previously, nonresidents needed a U.S. Fish and Wildlife Service license to bring a falcon into Indiana and hunt. The U.S. Fish and Wildlife Service no longer requires this license. The legislation requires a license from the person’s home State in addition to an Indiana hunting license.

Amendments to statues governing Department programs were enacted. The Lake and River Enhancement (“LARE”) Program was funded by a fee collected when a boat is registered, and the funds were allocated through a grant process. The previous statute was specific to lakes, but the statutory amendment expanded the grant program to include removal of invasive plants from rivers, as well as including removal of logjam obstructions. Another statutory change was enacted for off-road vehicles to exempt government entities, fire departments, and other emergency response entities from registering. The registration fees go towards the maintenance and keeping of trails and expansion of trails, “which those entities are not really using”.

A statutory change was made to require the Great Lakes Task Force and the Indiana Department of Environmental Management to report each summer to the Environmental Quality Services Committee regarding the activities occurring in the Great Lakes Basin.

Smith said another statutory change was enacted regarding coal bed methane gas and will require rule adoption.

McAhron said the Department proposed bills in the past two years regarding coal bed methane gas, and this year legislation was passed. There are two entities in Southwest Indiana interested in energy production from coal seams. He said temporary rules have already been approved. In early 2012, the Department will present permanent rule proposals regarding coal bed methane gas to the Advisory Council and the Commission.

Smith reported a joint resolution passed for the first time to authorize the constitutional right to hunt and fish. The resolution was expanded significantly from its original format, which was basically hunting and fishing, to include commercial production of meat, fish, and poultry, as well as farming dealing with meat, fish, and poultry.

Smith said a bill that did not pass was introduced to create a subcommittee to specifically deal with hunting and fishing matters outside the Advisory Council and the Natural Resources Commission. The subcommittee was to be made up of five individuals, each of whom was required to have a hunting license or a fishing license for three of the last five years. The Natural Resources Summer Study Committee may revisit the proposal this year.

Davis said the Indiana Legislative Sportsmen's Caucus was formed as a result of introduction of the bill and the subsequent hearing.

William Wert suggested inviting the members of the Caucus to Advisory Council and Natural Resources Commission meetings. Davis responded the Department has invited members of the Legislature to the meetings.

Travis Lucas suggested sending Advisory Council and Commission member biographies to the Caucus members. "I think they would be truly impressed at the diversity of this group and of the Commission of people's personal interests, educational background, hunting and fishing backgrounds" and other recreational interests. Smith and Davis agreed sending the biographies might be helpful.

Smith said the Natural Resources Study Committee is set to discuss three topics at its August meeting. The Committee would review the sedimentation of Versailles Lake, which also is the municipal water supply for the Town of Versailles, and partially located in Versailles State Park. The Department has drafted a plan to deal with the sedimentation, but funding the four-year, \$10 million project is a challenge. Also to be discussed is the coal severance tax that is imposed on minerals extracted from the ground. The issue is whether that tax should be increased and whether the tax should also apply to the extraction of gas and aggregate. Another topic of discussion is whether the state park entrance fee should be waived for those entering exclusively to eat at a restaurant.

Smith reported the Department has asked its divisions to review and submit legislative proposals for the upcoming session. The proposals will be reviewed and subsequently forwarded to the Governor's Office for approval. He said the Speaker's Office has requested the Department to review and account for all of its boards and commissions and to provide a detailed report.

Information Item: Great Lakes Compact Rules Overview

Ron McAhron presented this item and provided a printed copy of a PowerPoint presentation to the members. He said Indiana was one of the first States to approve the Great Lakes Compact. “The Department has extensive information about conservation and efficiency within the Great Lakes region; however, a permanent rule has not been processed to implement a voluntary conservation program. Statutes were enacted to provide permitting requirements and thresholds. A temporary rule is being drafted in the interim until a permanent rule can be adopted.” The agency “is working with farmers, primarily, and other stakeholders regarding education on water conservation, as well as engaging them in drafting the temporary rule in order to achieve a rule that is understandable.” Professionals in the Division of Water have “done some really good outreach to get a questionnaire out to try to measure stakeholder comprehension.” He invited Advisory Council members to contact Mark Basch or Monique Riggs for more information.

Information Item: Consideration of recommendations with respect to use of the shoreline along Lake Michigan, generally, and Long Beach, particularly

Cameron Clark, the Department’s Chief Legal Counsel, presented this item. He noted that other states bordering Lake Michigan have been dealing with the issue, particularly through litigation. He condensed the issue as pertaining to the public’s right to use the shoreline of Lake Michigan. When Indiana gained Statehood, the Northwest Ordinance gave the bed of navigable waterways to the State. “What is not defined, and has not been defined legislatively or defined through common law, is what is the upper limit of the bed of Lake Michigan?” Clark said the Natural Resources Commission adopted the elevation level of Lake Michigan as 581.5 feet, which is the elevation to primarily define regulatory jurisdiction. “It has morphed into, in my opinion, a designation of what the State owns relative to the property owners along Lake Michigan.”

Clark said the Department recently received a letter of notice of potential claim from an attorney representing property owners in Long Beach, Indiana. The letter essentially states the Long Beach property owners own to water’s edge of Lake Michigan, and it claims the public has no right to use the beach in front of the lake front property. The letter also requested the Department to remove from its website any reference to ownership relative to the high water mark of Lake Michigan.

Clark said that research conducted by both the Department and the property owners’ attorney has not provided any “silver bullet remedies to the problem. The only case law we found was from the 1800s dealing with ownership to the water’s edge or relative to the banks of the Ohio River, nothing else in the State.” Clark said he was reluctant for the State to get into ownership or fee title to the land along Lake Michigan, but “what we need to consider though is, from a public trust standpoint, what the public can use along

Lake Michigan.” He said the property owners are asserting their deeds show ownership to the water’s edge dating back to 1911.

Clark reported Michigan dealt with this same issue by ultimately focusing on public trust and not ownership. The Michigan Supreme Court found the public has the right to use beaches along Lake Michigan to a certain distance from the water’s edge. The difficulty was determining the distance, because it could not be fixed at a certain elevation due to seasonal and yearly level changes. The Michigan Supreme Court also determined the public’s rights “within that certain distance from the water’s edge, but those rights were fairly limited.”

Clark said the Long Beach property owners are enjoying “what they think is their beach.... In addition the Long Beach Police Department and the Town of Long Beach are also kind of in the mix.” He said that this issue may ultimately be brought before the Natural Resources Commission. Clark said the property owners have offered as a resolution that the distance of ten feet from the water’s edge would be accessible to the public, but individuals would not be allowed to stop within that beach area. Property owners have riparian rights, but those must be balanced with the public trust.

Clark noted 20 years ago Long Beach did not have a beach, but because the lake level dropped, there now is an extensive beach to which the property owners are laying claim. He said the property owners’ attorney has offered to make a presentation to the Commission.

The Chair asked, “What’s being enforced right now? Is everybody treating it as if the entire beach is public?”

Clark answered, “Nobody knows.” He said the Chief of Police for Long Beach has contacted DNR regarding this issue and has requested jurisdictional guidance. The Long Beach police patrol the beach using their four-wheelers, but the lakefront property owners have told the police that they do not want the patrol on their property. The Town of Long Beach and LaPorte County assess taxes upon property owners based on a 150-foot deep lot, which stops well short of the water’s edge.

James Snyder noted property ownership is also an issue in Portage. Portage created a new park adjacent to the Town of Ogden Dunes, which is now bordered by West Beach, the National Lakeshore, and the Portage Lakefront Park. Snyder said the parks are popular locations, and visitation of these parks is “spilling far over into Ogden Dunes when they at one time had exclusivity”. He also said there are lakefront property owners in Porter who have erected a fence into Lake Michigan to keep persons from entering from the Porter Beach, a public park.

The Chair asked whether each platted lot within Long Beach has dimensions.

Clark responded Long Beach subdivision was platted in 1911, and the original plat showed a road between the lots and Lake Michigan. In 1914, Long Beach was re-platted,

without re-incorporating the legal description, moving the road behind the first row of lots. The 1911 plat indicated that the platted area extended to the water's edge, but there was an intervening road. The property owners have not proven they own to the water's edge. When Indiana achieved Statehood in 1816, the State obtained ownership of the bed of Lake Michigan. Clark said the property owners have not provided any deeds.

Clark said the concern is that any resolution that backs away from Indiana's claim of fee ownership may impact on other bodies of water within Indiana. "I'm not able to prove that we own it, because the upper limit of the bed has not been defined."

Davis said, "If a deed could be found within the Federal Land Office that was located in the State of Indiana for that parcel of land that was eventually platted as Long Beach, and the deed went to a section line, and that section line was close to the shoreline, that would be the only root of title for all those people in that subdivision."

Clark said the issue is public rights versus private rights. He said the property owners' "biggest beef really is probably with the Town of Long Beach. If they can get us to remove reference to ownership on our website—there are multiple references—then they can go to the Town of Long Beach, and say, 'You people stay off our property.' They will rest on the deeds that they have without anybody really being in the position to challenge that." Clark said the Town of Long Beach is using the Department's website information as its basis for its jurisdiction.

Lupke asked how surrounding States have resolved the ownership issue.

Clark said the Ohio Court of Appeals decided for the private property owners, but the decision is before the Ohio Supreme Court. He thought Wisconsin also sided with the private property owners.

The Chair suggested the dispute would likely need to be litigated. Even if the Department reached a settlement with the property owners at Long Beach, other citizens were likely to be dissatisfied.

Adjournment

At 12:16 p.m., EDT, the meeting adjourned.