

**NATURAL RESOURCES COMMISSION**

The Garrison  
Fort Harrison State Park  
6002 North Post Road  
Indianapolis (Lawrence), Indiana

**Minutes of March 17, 2009**

**MEMBERS PRESENT**

Bryan Poynter, Chair  
Jane Ann Stautz, Vice Chair  
Robert Carter, Jr., Secretary  
Patrick Early  
Mark Ahearn  
Robert Wright  
Thomas Easterly  
Larry Klein  
Doug Grant  
Donald Ruch

**NATURAL RESOURCES COMMISSION STAFF PRESENT**

Sandra Jensen  
Jennifer Kane

**DEPARTMENT OF NATURAL RESOURCES STAFF PRESEN**

John Davis	Executive Office
Ron McAhron	Executive Office
Adam Warnke	Executive Office
Cheryl Hampton	State Parks and Reservoirs
Nick Heinzelman	Indiana Heritage Foundation
Bourke Patton	Indiana Heritage Foundation
Mike Crider	Law Enforcement
David Windsor	Law Enforcement
James Hebenstreit	Water
Terri Price	Water
Ken Smith	Water
Monique Riggs	Water
John Bacone	Nature Preserves
Ben Eddy	Nature Preserves
Linnea Petercheff	Fish and Wildlife
Jon Eggen	Fish and Wildlife
Katherine Gould	Indiana State Museum

## **GUESTS PRESENT**

Alan Hux	Michael Phillips
Jack Corpuz	Brett Nelsen
Bruce Hecki	Tom Kramer

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:08 a.m., EDT, on March 17, 2009, at the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of ten members, the Chair observed a quorum.

Larry Klein moved to approve the minutes of the Commission's January 13, 2009 meeting without amendment. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

## **Reports of the Director, Deputies Director, and Advisory Council**

The Department Director, Robert Carter, Jr., provided his report. He announced that Michael Reed is the new Commissioner for Indiana Department of Transportation. He said Commissioner Reed has expressed a "desire to serve" on the Natural Resources Commission but was unable to attend today's meeting due to a travel issue. Mark Ahearn would continue to serve on the Commission's AOPA Committee. "Mark has done a very good job for us and is a very good friend to the DNR." The Director also introduced and welcomed the new appointee from the Indiana Academy of Science, Dr. Donald Ruch.

The Director said northern Indiana is "once again experiencing flooding". The Barbee Lake Chain was closed by emergency order yesterday. Lake Tippecanoe and the Barbee Lake Chain are "under a lot of water", and the Division of Law Enforcement is monitoring lake levels hoping "it is appropriate" to re-open the lakes this weekend for recreational boaters and fishermen. The Director also noted the levee failed at the Kankakee Fish and Wildlife area and water has inundated the property. "I'm not happy to report that."

The Director announced regarding the federal "stimulus package" that the Department is "heavily involved in trying to get as much money back into the state specific to our agency. It's a moving target, but we are looking at any and all options."

John Davis, Deputy Director of the Bureau of Lands and Cultural Resources, provided his report. He acknowledged INDOT's assistance and cooperation this weekend in addressing the Kankakee River levee failure. INDOT has been "helpful in securing materials and helping with moving those materials, and that's exactly what we would expect, but it's nice to see." He asked Mark Ahearn to express the DNR's and the NRC's appreciation to Commissioner Reed.

Davis said now is the season for prescribed burns with a "particularly big one" in Brown County State Park today. He explained a prescribed burn is a property management tool and

approximately 40 or 50 burns would occur this spring with more burns planned for the fall. “We can do a lot more acres” using burns “than we can manually.”

Davis said “reservation season is beginning right now, and we have “pretty good inn and campground reservations”. He also announced 7,000 acres at Newport in Vermillion County are “being talked about for reuse. We are in those conversations and hopeful that there will be some good natural areas to come out of that.”

Ron McAhrn Deputy Director, Bureau of Resource Regulation, reported on Indiana’s involvement in the Great Lakes Compact which became law in December 2008. Indiana “is working with other states and the two [Canadian] provinces putting together rules and procedures for the entire group. We are making some good progress, and we hope to wrap up to coincide with end of this legislative session. We’ll turn our attention to fleshing out the pieces for the Indiana component.”

McAhrn said the Water Shortage Taskforce is “nearing the end of work” by finalizing priority uses, conservation, and some guidance on low flow policy. The intention is to present a document to the May or the July Commission meeting.

McAhrn noted that the Division of Historic Preservation and Archaeology is involved in “what we call Section 106 reviews for any federal spending or federal licensure activity”. He said that that John Vanator of the Executive Office has worked with the division “in creative ways and is working with other sister agencies to make sure we have the people on board, even in these difficult times, to be able to do those reviews in a timely fashion” to keep the funds from the “federal stimulus package” moving. He also added, “We are working real closely with the State Revolving Fund, which Commissioner Easterly is heavily involved in, and housing folks, and INDOT. So far, that looks positive in a time that is pretty difficult to get people on staff.”

The Chair said, “Thank you everyone in the Executive Office for the work that you have done.”

Patrick Early, Chair of the Advisory Council said several items on the agenda today were considered by the Council. Early said that he would report the Council’s recommendation as each agenda item is presented.

## **CHAIR AND VICE CHAIR**

### **Updates on Commission and Committee activities**

The Chair reported there are some “changing faces” on the Commission. “Commissioner Reed will be joining us.” He said added that Mark Ahearn has “graciously agreed” to continue to serve on with the Commission’s AOPA Committee which is chaired by Jane Ann Stautz. The Chair thanked Mark Ahearn for his prior and continuing service to the Commission. “He is invaluable not only to the AOPA Committee, but has been very helpful in deliberative thought in some of the things we have dealt with on the Commission over the last several years. While we will miss his input here, we know that it will be carried through to the AOPA Committee.”

Jane Ann Stautz reported the next AOPA Committee meeting is scheduled for April 7, 2009. She reflected it would be a “full day, a very full agenda”.

The Chair introduced new Commission member Donald Ruch, Ph.D, from Ball State University. Dr. Ruch succeeds Dr. Damian Schmelz as the appointee of the President of the Indiana Academy of Sciences. He asked Dr. Ruch to introduce himself and provide a brief biography.

Dr. Ruch said he is a Professor of Biology, “but my area is botany” at Ball State University. “I teach a variety of botany courses. My research involves inventory of various sites, particularly in east central Indiana”.

The Chair said, “We value your appointment. Thank you for agreeing to be here.”

### **DNR, EXECUTIVE OFFICE**

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

The Chair asked whether there were any items for referral to the Advisory Council. No new topics were presented for referral to the Advisory Council.

### **DIVISION OF WATER**

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

James Hebenstreit, Assistant Director of the Division of Water, introduced this item. He said this information item relates to the following two agenda items. He said Monique Riggs would present an overview of the governing statute and rules regarding the sale of water from water supply storage in reservoir impoundments that are financed by the state. He then introduced Riggs, Environmental Scientist with the Division of Water, who made a PowerPoint presentation.

Monique Riggs provided a brief overview of the governing statutes and rules. She explained that the State of Indiana owns water supply storage in reservoirs that were funded fully or in part by the State. Brookville, Monroe, Patoka Lakes were “all funded by a combination of state and federal money. They were built by the US Army Corps of Engineers for a flood control component, and then the State kicked in some additional funding for water supply.” She said Hardy, Versailles, and Brush Creek Reservoirs were fully funded by the State. Riggs said the IC 14-25-2 authorizes the Commission to provide certain minimum quantities of stream flow or to sell water on a unit pricing basis from the storage capacity in those reservoir impoundments.

Indiana is compensated for withdrawals or releases at a rate of \$33 per million gallons, and “that is a rate that is legislatively set.”

Riggs said the water supply storage for Patoka Lake is between the elevations of 506 feet and 536 feet. Indiana is entitled to 77.5% of that water supply storage, and “that’s about 78 million gallons a day that can be pulled from Patoka Lake.” She said the water supply storage for Monroe Lake is between 515 feet to 538 feet, and “about 122 million gallons a day is available.” She added, “It’s from those water supply and storage components that the Division [of Water] receives request for withdrawals or release by contract.”

Riggs said IC 14-25-2 was amended in 2007 to require more stringent review processes where contract requests are made. The Commission adopted 312 IAC 6.3 to help implement the new legislation, and this rule is now in effect. Among the new requirements is a conservancy or contingency plan to list the alternatives the contract holder would “use if water from the reservoir should become unavailable due to drought alerts or other emergencies.” Riggs said the applicant can waive the contingency plan if the applicant “is willing to withstand not being able to have access to the water.”

Riggs explained the Commission agenda packets for Agenda Item #4 and Item #5 contain a summary of the comments received at the public meetings and the hearing officer’s recommendations to the Advisory Council. The draft minutes of the Advisory Council’s February 11, 2009 meeting, during which the hearing officer’s recommendations were adopted, are also included. Riggs said, “It is up to the Commission to determine to approve, condition, or deny a request for a water withdrawal contract, and the Commission determination is subject to final approval by the Attorney General, the Governor, and the applicant themselves.”

Riggs explained the factors the Commission may consider in reviewing and acting upon the request for contract are: (1) terms, conditions, and purposes of authorizing legislation; (2) likelihood of adverse effects to public safety, the environment, navigation, or recreation; (3) availability of another source of water to the person making the request; (4) proximity of the reservoir to any person that would receive water from the person making the request; and (5) water allocation priorities for the use of the water. Riggs said the water allocation priorities were established in 312 IAC 6.3-4-1(5).

Riggs said that Patoka Lake Regional Water & Sewer District (PLRWSD) has requested a contract with the Commission for public water supply [Agenda Item #4]. She said the PLRWSD has held a contract with the State since 1977. Its “most recent contract was entered into in 1993 with a term of 50 years, so it would have expired in 2043.” PLRWSD is requesting to “add back the additional 15 years” for this contract request, and “that’s in order to cover federal financing requirements so [PLRWSD] is able to extend rural water supply within Orange County and other counties in southern Indiana.” The proposed amended contract would expire 2059 and would be for an annual average daily withdrawal of 20 million gallons per day.

Riggs said Eagle Pointe Golf Resort [Agenda Item #5] has requested a ten-year water supply contract for irrigation of its grounds and waterfall feature. The proposed annual limit for Eagle Pointe is 85 million gallons per year, an average daily limit of 233,000 gallons per day over a

365-day period. She said ten years is a “typical maximum” contract term for water supply to be used for irrigation.

Donald Ruch asked whether the Department reviewed the impacts of the runoff from the Eagle Pointe Golf Resort and whether the runoff would carry pollutants to streams or waters of the state. Riggs responded, “I don’t think that’s considered in a contract request for withdraw.”

#### ADVISORY COUNCIL

#### **Consideration of Advisory Council’s Hearing Officer Report summarizing public meetings and 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**

Jim Hebenstreit presented this item. He said Patoka Lake Regional Water & Sewer District (PLRWSD) supplies water to ten counties in southern Indiana. PLRWSD is requesting to amend the contract term for an additional 15 years to “coincide with funding for [its] new expansion into Orange County,” but it is not changing the amount of water withdrawal. Multiple public meetings were held, but “only a few people showed up, most of whom were in favor” of the contract. Hebenstreit noted Michael Phillips and Bruce Hecki, representatives of PLRWSD, were present at today’s meeting. He said the Advisory Council and the Hearing Officer recommend approval of the modified water withdrawal contract.

Doug Grant asked, “Who does the money go to?” Hebenstreit responded the compensation funds are deposited into a dedicated fund that can be used by the DNR for a variety of environmental projects. “The first reasons used to be for additional reservoir exploration..., but now it can be used for lake and river enhancement.” Grant asked, “The \$33 is a legislative number?” Hebenstreit answered in the affirmative. Grant then asked, “How long has that been \$33 and who is to recommend a review of that?” Hebenstreit said, “It’s been that way since, I think, the early ‘90s. It’s probably woefully under-valued, but it would take a legislative change.” Hebenstreit said when most of the existing contracts were originally entered, the rates were reviewed every five years, but “as the cost of construction in the ‘80s and ‘90s rose, when we looked at those adjustments, we were looking at rates going for Monroe from \$40 per million gallons to \$100 and some. So, the legislature just took that problem out of the equation and set it.”

Robert Wright asked, “Is the price the same for public or private use?” Hebenstreit answered in the affirmative.

Patrick Early noted the two contracts for consideration are “well below” the capacity of the water supply we have available at this time. He said the Advisory Council held its public meeting on the two contracts and “recommends approval.”

Mark Ahearn asked whether any objections were filed regarding the PLRWSD contract. Hebenstreit responded that no objections were received. He said a hearing officer was appointed

for the Advisory Council from the Division of Water to conduct public meetings on the proposal. The hearing officer held ten public meetings for the PLRWSD contract request and two public meetings were held for the Eagle Pointe request. Hebenstreit added, “As Pat [Early] alluded, there is not a competition for the use right now. If we ever get to a proposal where we are using the maximum capacity of one of [the reservoirs], we will have all kinds of people commenting.”

John Davis added that ten public meetings were held on the PLRWSD’s request for a contract because a public meeting must be held in every county where the PLRWSD provides water.

Robert Wright moved to approve the request by Patoka Lake Regional Water & Sewer District for a modified water sale contract under IC 14-25-2 and 312 IAC 6.3. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

**Consideration of Advisory Council’s Hearing Officer Report summarizing public meetings and recommendations to the Natural Resources Commission regarding request by Eagle Pointe Golf Resort for a water sale contract under IC 14-25-2 and 312 IAC 6.3; Administrative Cause No. 09-031V**

Jim Hebenstreit also presented this item. He said the Eagle Pointe Golf Resort has requested a water sale contract for a term of ten years. “In the event we ever had competition for water, drinking water would be the highest priority, so irrigation contracts are done for five or ten year periods.” Hebenstreit said Eagle Pointe Gold Resort has held a contract with the state for “a number of years.”

Patrick Early commented the demand for water is “well below” the available water supply. “There were no objections from anyone so the Advisory Council recommends approval.”

Donald Ruch asked, “Does this golf course cause any runoff problems to the waters of the state?” Hebenstreit said, “We have never really looked at that. I’m not sure that it isn’t something we couldn’t look at.... I think if we knew blatantly that it was a problem, we would have them try to square that away before we bring something forward”.

John Davis said, “Because the Corps is the property owner there, the golf course design and construction the runoff were looked at. There were some filter strips and some buffers before running directly into the reservoir.” Davis added that he could provide to Ruch documentation from the US Army Corps regarding the design and construction.

Larry Klein asked whether a contract holder, such as Patoka Lake Water and Sewer District, could supply water to a golf course. Hebenstreit said any contract holder could enter into a contract with a golf course. Klein then asked, “So they could theoretically give 500,000 gallons a day to a golf course for 50 years, and we make the golf course that is withdrawing water come back every ten years? Is it because it’s a separate entity?” Hebenstreit said that he did not think that the sewer district would sell to a golf course because “typically, a golf course would not want to probably pay a price for treated water, but that’s obviously that maybe we should have thought through. We think, in terms of Patoka, primarily of providing drinking water.”

Klein said, “It occurs to me that there is an inherent conflict with locking in a price for 50 years with a group...that we are making others come back every ten years.”

Ron McAhron said the State knows to whom the contract holders supply water. The statute requires a contract holder to provide a distribution list. “That’s how we end up with the counties that we have to go to for the public meetings. We also ask them, as part of the findings, to give us contingency plans in case of drought or adverse impact. And we would expect, just like statute directs us, that domestic use would be the top priority.”

Klein asked whether the contract holders “have to follow the Indiana Code that says you must provide domestic water first before?” McAhron said, “I wouldn’t say it’s a matter of statute, but I would say as a practical matter public opinion would push them in that direction.” The Commission rule also expands upon water use priorities.

Klein asked, “When we enter into a contract, could there be language in a contract that says in the event of blank you must adhere to the Indiana Code...and distribute water in accordance with the same formula that we apply statewide to other entities?”

Thomas Easterly said “That would come as we do the water shortage and the water conservation through the Great Lakes. It will come statewide. A lot of things are going on right now about allocating water in Indiana.” McAhron agreed, and said, “That’s part of the Water Shortage Task Force work that we are trying to wrap up.”

Klein noted that he “understood the necessity, but I’m trying to understand the process.... I will defer to those better informed as to what’s coming down the pike as to the management of our resource, water.”

Thomas Easterly moved to approve a request by Eagle Pointe Golf Resort for a water sale contract under IC 14-25-2 and 312 IAC 6.3. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

## **DIVISION OF NATURE PRESERVES**

### **Consideration of the dedication of Wabash Lowlands Nature Preserve, Posey County**

John Bacone, Director of the Division of Nature Preserves, presented this item. He said the Wabash Lowlands is located in the “extreme” southwest of Indiana in Posey County near Hovey Lake Fish and Wildlife Area. He said the nature preserve is a part of a “much larger block of conservation lands” some of which are owned by The Nature Conservancy and others owned by the Department. He said the instant parcel is a part of tract acquired by assistance from The Nature Conservancy and Indiana Heritage Trust. “It’s loaded with rare plants and animals, including the copperbelly water snake and the swamp rabbit. It’s part of the vegetation in southwest Indiana that’s like being in the Deep South with cypress swamps.” Bacone recommended that the Wabash Lowlands be dedicated as a nature preserve.



Jane Ann Stautz moved to approve the dedication of the Wabash Lowlands as a nature preserve. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

## **DIVISION OF FISH AND WILDLIFE**

### **Consideration for preliminary adoption of amendments to 312 IAC 9 that make technical changes to rules governing fish and wildlife: definitions, restrictions and standards governing wild animals, mammals (except for deer), and birds; Administrative Cause No. 09-026D**

Linnea Petercheff, Staff Specialist with the Division of Fish and Wildlife, presented this item. She said the proposed rule amendments are “primarily intended for housekeeping changes” and includes amendments to definitions, restrictions and standards governing wild animals, mammals except for deer, and birds. She provided to Commission members an updated amendment proposal printed on yellow paper. “We made a few minor changes to the language” that was previously included in the Commission agenda packets.

Petercheff said definitions of words “no longer needed” were deleted and definitions of other words, such as “game bird” and “waterfowl”, were added when appropriate. She said the word “handicap” is removed and replaced with the word “disability” and defined. The definition of “exempted wild animal” is clarified. Petercheff said the “hunter orange” requirements are now grouped under one rule section. Other amendments are proposed regarding the possession and sale of wild animal parts, placement of traps, and administration of drugs to wild animals held in captivity.

Petercheff explained that scientific names have been added to rules governing squirrels, eastern cottontail rabbits, bobcats, badgers, and river otters. “Instead of language that used to say ‘you can possess a species only as authorized under this article’, we’ve actually spelled out under what permit or what authority a species currently has to be possessed.” So, that helps both officers and prosecutors to see exactly the means under which a person is able to possess or sell the wild animals. She also explained that the rules governing migratory birds have been combined under one rule, except for geese, which are separate due to special provisions.

Petercheff said a new rule is proposed that governs nonmigratory game birds to clarify their lawful possession and sale. “Again, we are dealing with live birds, parts, and carcasses. We tried to clarify that in one rule so that people don’t have to look at one rule for hunting the species, one rule for possessing and sale. They can see everything in one rule.” She noted the youth age is amended from less than 16 years of age to less than 18 years of age.

The Chair explained this rule amendment package is “step two” of the technical—“the macro picture kind of revisions—portion of the comprehensive revision of the fish and wildlife rules. Substantive changes to the fish and wildlife rules would be considered at a later date following discussion by the Advisory Council. “This is the second of three packages that are being brought through. The third and final will be at our next meeting. I want to commend Linnea and all

those in [the Division of] Fish and Wildlife for working through these issues and trying to keep them in a more superficial way to clean up and make technical changes.”

Robert Wright asked for clarification regarding the definition of “disability”, and asked whether the definition would also cover a birth defect. Petercheff answered in the affirmative. Wright asked, “Would that be an injury or a disease?” Petercheff responded, “It depends on when [a person] applies for a permit to get special access to hunt based on their disability and depends on what their doctor says.” Wright then asked, “I don’t have any question about the fact that you could issue one, but does it fit that definition?” Petercheff said, “I think so, because that’s not a normal aging process. That’s something someone would have had from birth.” Wright said, “One might argue that it’s also not an injury and it’s not a disease.” Petercheff noted that “birth defect” may need to be added in the definition of “disability”.

Mark Ahearn asked, “Why is the source of the origin of the physical impairment relevant? We are asking the permit issuer to make the call that it has to be an injury or a disease. Everybody struggles—the ADA struggles—to try to describe what a disability is.” Ahearn suggested the definition of disability be amended to read “disability is a physical impairment other than that which is contributable to the normal aging process”. Petercheff said, “That would work.”

The Chair said, “Mark, that’s a great catch.” He said that an amendment to the definition of “disability” would be a substantive rule amendment and appropriate for inclusion in a subsequent rule package. “That definition exists today.”

Ahearn asked, “This definition exists elsewhere?”

Jensen answered in the affirmative, and noted “This is something that I was aware of, but I had not mentioned it because we are not at that point of making substantive changes to the rules.” The purpose of the current amendment is to correct the word “handicap” to “disability”. She said, “In Phase 3 of this process, we certainly can look at that definition. It’s already on my radar screen, because I know [the definition] is not consistent with the ADA definition”.

Jack Corpuz from Indianapolis said, “I rise in support of this technical correction that you want to make to all these particular rules. I find this to be a help, I think, to the sportsmen of Indiana to bring all these rules together and update all these.”

Patrick Early moved to approve for preliminary adoption of amendments, as modified (printed on yellow paper) to 312 IAC 9, that make technical changes to rules governing fish and wildlife: definitions, restrictions and standards governing wild animals, mammals (except for deer), and birds. Doug Grant seconded the motion. On a voice vote, the motion carried.

#### **DIVISION OF LAW ENFORCEMENT**

**Consideration for preliminary adoption of amendment to 312 IAC 5-7-6 to establish a revised idle zone on Deer Creek in Perry County; Administrative Cause No 08-094L**

Capt. David Windsor, with the Division of Law Enforcement, presented this item on behalf of Maj. Felix Hensley. He said the Commission's Division of Hearings received a citizen petition for rule change from Mark Newton of Tell City. Windsor noted that Mark Newton also owns property along Little Deer Creek, a tributary to the Ohio River. Newton's petition cites "boating safety and extreme shoreline erosion as motivating factors" as justifications for a rule amendment. Windsor said 312 IAC 5-7-6 establishes a 300-foot idle zone on Little Deer Creek and a 600-foot idle zone on Deer Creek with the remainder of both creeks having a 20 mile per hour speed limit. Newton's property is located outside the current idle zone on Little Deer Creek within the area designated for a 20 mph limitation.

Windsor said Director Carter appointed a committee to review and make recommendations regarding the Newton petition. The Committee consisted of Jim Hebenstreit from the Division of Water, Brian Schoenung from the Division of Fish and Wildlife, and Maj. Felix Hensley, from the Division of Law Enforcement. He said Hensley contacted Newton and discussed the petition. Newton's "wishes were to amend 312 IAC 5-7-6 to convert both waterways to idle speed only to alleviate these problems." Maj. Hensley, along with F/Sgt. Phil Schuetter and Officer Joe Lackey, toured Deer Creek and Little Deer Creek by boat, and met with Newton and other property owners. The "number one concern voiced by the residents was that of safety. Almost all of the complaints were centered on the fishing tournament contestants that fish Deer Creek and Little Deer Creek every week of the boating season." Windsor said the property owners noted the wake generated by boats at 20 mph were "so forceful" they posed safety concerns for children in the water or on the docks.

Windsor said some residents cited "excessive" erosion problems and water quality diminution as justifications for amending the rule. "While touring the area, Maj. Hensley did not see eroded areas that he could directly attribute to the excessive boat speed." Windsor noted Hensley and Schuetter visited the area during a tournament and subsequently performed a test with a bass boat traveling at 20 mph. "Their idea was trying to determine if [the wake] was caused by a violation of the 20 mph speed limit or if it was issues caused by the 20 mph zone." Hensley concluded the wake produced at 20 mph "very well could have caused minor damage to boats more than to the docks." The test also verified the property owners' claim the resulting wake of a bass boat traveling 20 mph posed a safety hazard to persons on floating docks. Windsor reported Hensley "does not agree, however, to limiting the entire waterway to an idle zone."

Windsor said Hensley's Committee recommended the idle zone on Deer Creek be extended from 600 feet to 2,500 feet and the idle zone on Little Deer Creek be extended from 300 feet to 2,500 feet. He said the Commission today received an amended version of the proposed rule, printed on salmon-colored paper, which differs from the version previously included in the Commission agenda packet. The modified version of the rule proposal includes GPS points in 312 IAC 5-7-6(b)(1)(B) for format consistency.

Patrick Early asked whether there were persons opposed to the proposed amendment. Sandra Jensen said, "To my knowledge, no. I don't have my file with me, but included in the file is a petition actually signed by several people who are in support of this. I don't believe there was any vocal opposition." She added, "Of course, this is preliminary adoption. We will have to

have the public hearing in that area. So, if there is any opposition, I'm sure we will find out at that point."

Thomas Easterly moved to approve for preliminary adoption the amendments to 312 IAC 5-7-6, as recommended by the review committee, for a revised idle zone on Deer Creek in Perry County. Robert Wright seconded the motion. Upon a voice vote, the motion carried.

## **DIVISION OF LAND ACQUISITION**

### **Consideration of Commission 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**

Nick Heinzelman, Director, Indiana Heritage Trust Foundation, presented this item. He explained the Department has been negotiating with Peabody Coal for several months regarding holdings in Greene-Sullivan State Forest. Peabody is going to open a new mine called Bear Run Mine. "Once Farmersburg closes, [Bear Run Mine] will be the largest surface mine in Indiana." Heinzelman said to open the new mine Peabody would need to construct a rail spur to move coal from the mine to the major rail line that traverses the area. He provided an aerial map of the affected area and explained Peabody has rights on three corridors through Greene-Sullivan State Forest. Peabody acquired rights on one of the corridors through quiet title.

Heinzelman said that Peabody initially planned to locate the rail spur on the corridor, which would have impacted "several acres" of wetlands and would have been located next to one of the Department's campgrounds. "Instead, [Peabody] is looking to go across Greene-Sullivan State Forest on the far north side impacting about 40 acres." Peabody would construct a barrow pit and railroad spur along the north side and across private land to the mine. Heinzelman said in exchange for the 40 acres, Peabody would grant its rights in the three corridors to the Department and fee simple rights on approximately 19 acres, which are in-holdings within Greene-Sullivan State Forest. The three corridors are "surrounded by Greene-Sullivan State Forest. It will clean up several property boundary issues for us."

Mark Ahearn asked whether the Department took into consideration the proposed I-69 corridor. John Davis responded the affected area is on the Greene-Sullivan County line, and I-69 would be approximately twelve miles away on the other side of Greene County.

Donald Ruch asked about the types of habitats existing on the 40 acres where the railroad spur would be constructed. Heinzelman said the land is unreclaimed coal land. "They've already mined it once. There are quite a few spoil piles and that type of thing."

Patrick Early reported the Advisory Council reviewed the proposal and recommended approval.

Doug Grant moved to approve 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. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

## **DIVISION OF STATE MUSEUMS AND HISTORIC SITES**

### **Consideration of deaccession of items from the collections of the Indiana State Museum**

Katherine Gould, Indiana State Museum Curator and Chair of Collections Review Committee, presented this item. She explained deaccession of items from the Indiana State Museum’s collection is an ongoing process to “improve the quality” of the collection. She said that all items presented for deaccession have been reviewed by the curators, the Collections Review Committee, and the Museum’s Board of Directors.

Gould said the listed items are generally duplicates and have “very little” probative information connecting the item to Indiana, or the items are generally in poor condition. The review of the items was conducted in a “very cautious and deliberate manner”.

Robert Wright moved to approve for deaccession of items from the collections of the Indiana State Museum as presented. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

## **NRC, DIVISION OF HEARINGS**

### **Consideration of recommended report of the Natural Resources Commission with respect to the petition for creation of the Graybrook Lake Conservancy District (Owen Circuit Court Cause No. 60C01-0810-MI-628); Administrative Cause No. 08-180C**

Sandra Jensen, Hearing Officer, presented this item. She explained the Owen Circuit Court referred the Petition for the creation of the Graybrook Lake Conservancy District to the Commission on December 9, 2008. The Petition was processed in accordance with the Commission’s nonrule policy, Information Bulletin #36, and a public hearing was conducted on January 30, 2009.

Jensen noted the appearance of Alan Hux, attorney for the Petitioners, who presented evidence at the public hearing in support of the Petition. She said those attending the public hearing signed in on an attendance sheet, which is attached to the recommended report and designated Exhibit A. Jensen said Hux solicited from “each and every person who is signed onto the list their affirmation of support for the establishment of the conservancy district”. An open comment period was maintained following the public hearing, but no opposition to the establishment was noted or received.

Jensen said the evidence presented by the Petitioners, the Department's Division of Water, and the Indiana State Department of Health, and the Owen County Emergency Management Office "caused me to write this report, which indicates that the Graybrook Lake Conservancy District is necessary; does hold promise of economic and engineering feasibility; offers benefits in excess of costs; proposes to serve and cover a proper area; and can be established and operated compatible with other conservancy districts, flood control projects, reservoirs, lakes, drains, and levees." She recommended Commission approval of the proposed report for filing with the Owen Circuit Court.

Alan Hux indicated that he had no presentation or statement, but was present to answer any questions by the Commission.

Thomas Easterly moved to approve the recommendations of the hearing officer as the Commission's recommendations to the Owen Circuit Court for the proposed Graybrook Lake Conservancy District. Larry Klein seconded the motion. Upon a voice vote, the motion carried.

**Consideration of final adoption of amendments to 312 IAC 6 for navigable waters, and 312 IAC 10 for nonnavigable waters, to address general licenses and individual licenses for the extraction of sand, gravel, rock, and slab rock; LSA Document #08-614(F); Administrative Cause No. 07-203W**

Sandra Jensen presented this item on behalf of the hearing officer, Stephen Lucas. She noted that Commission members were provided this morning with an amended copy of the proposed rule printed on green paper, which differs from the version previously included in the Commission agenda packets. Jensen said the proposed rule addresses the extraction of creek rock from floodways and navigable waterways. The rule proposal was initially considered by the Advisory Council in February and again in April 2008 before presentation to the Commission for preliminary adoption in May 2008. "At that time, the proposal included language that pertained to prospecting. The prospecting component of this rule was separated...and is not being considered with regard to this particular item".

Jensen said the proposed rule establishes two general licenses, one that will occur without notice to the Department and one that requires notice to the Department. A general license without notice allows for an individual to conduct certain activities without need to notify the Department, but those activities must meet specific conditions set forth in the rule. The general license with notice requires the individuals to submit an application for a review by the Department's Division of Water. "That review could result in the denial of the application or the imposition of certain conditions, but it must be acted on by the Department within ten days or it is deemed approved."

Jensen said that following preliminary adoption, the hearing officer complied with the statutory rule adoption requirements. The Office of Management and Budget approved the rule, and the Indiana Economic Development Corporation commented on January 15, 2009 that it "does not object". She noted that two public hearings were held as scheduled on January 27, 2009. Justin

Schneider, Staff Attorney for the Indiana Farm Bureau, attended one of the public hearings and also twice submitted written comments. The comment period for the proposed rule remained open until February 10, 2009, and a total of eight comments were received.

Jensen said the Department, following its review of the public comments, has offered revisions to the language given preliminary adoption and published in the Indiana *Register*. She noted the revisions were formatted by the Hearing Officer and depicted in underline or stricken font in Exhibit A of the Hearing Officer's Report. She noted that the Department now recommends additional amendments to those depicted in Exhibit A. These additional amendments were printed on the green paper and placed this morning at the seats of the Commission members. The additional amendments are to 312 IAC 10-5-9(b)(3) and 312 10-5-10(c)(4)(D). They would expand the ability of a person to take creek rock, other than slab rock, in a flood situation for which the Governor declares a disaster. "It adds an additional ability to take creek rock that is not slab rock under a general license without notice."

Jensen read the recommendations as written by the Hearing Officer's Report:

The hearing officer believes the Commission could appropriately give final adoption to language as published for preliminary adoption. Also, any modifications offered through written comments, and which are a logical outgrowth of the rule proposal, could be adopted. Finally, the Commission could elect not to give the rule amendments final adoption.

Patrick Early said, "It's been some time since we discussed this in detail, and obviously we're concerned with the property rights versus water quality and navigable waters and so on. It's a difficult situation." He added, "I think we need some standards, and I think we have done as good a job of defining this as we can. I think it is important that we move forward." For approximately 15 years, creek rock extractions have had "virtually no enforcement. In the absence of any guidelines whatsoever, it became apparent that people could somewhat do anything that they wanted to do. We have to narrow that gap somehow and get something in place for reasonable environmental and resource protection. I think this is as good as we can do as far as getting some guidelines and still protecting property rights. In terms of whether or not the Advisory Council would recommend approval, we certainly would."

Patrick Early moved to approve for final adoption the amendments to 312 IAC 6 for navigable waters, and 312 IAC 10 for nonnavigable waters, incorporating the substantive modifications recommended by the Department, to address general licenses and individual licenses for the extraction of sand, gravel, rock, and slab rock. Robert Wright seconded the motion. Upon a voice vote, the motion carried.

**Consideration of final adoption of amendments to 312 IAC 9-4-11, which governs the taking of wild turkeys, to clarify license and hunting requirements; LSA Document #08-740(F); Administrative Cause No. 08-122D**

Sandra Jensen, Hearing Officer, presented this item. She explained that the amendments as preliminarily adopted were proposed at 312 IAC 9-2-3 to allow for the sale, purchase, shipment,

transport, delivery and receipt of the head, feet and skin of wild turkeys. The amendments would also be reworded and reformatted for clarity. The amendments proposed at 312 IAC 9-4-11 would open the entire state to a spring turkey season and clarify the prohibitions of using dogs, live or electronic decoys, calls, and bait while hunting.

Jensen said a public hearing was held as scheduled on January 20, 2009, but no member of the public attended. She said six written comments were received, and four of the six written comments “noted opposition” to the amendments to 312 IAC 9-2-3. “As a result of those comments, the Department withdrew its support for the proposed amendments relating to the sale of the head, feet, and skin of a wild turkeys at this time for this rule package with a note [the Department] intends to go forward with [another proposal] along those lines in a full migratory bird rule amendment package”. She noted that the reformatting changes to 312 IAC 9-3-2 that were made for clarification had been included in the rule package and presented in Agenda Item #7, which the Commission considered and gave preliminary adoption.

Jensen recommended final adoption of the amendments to 312 IAC 9-4-11 as attached to the Hearing Officer’s Report as Appendix A, and as presented in the Commission agenda packet.

Jane Ann Stautz moved to give final adoption of amendments to 312 IAC 9-4-11 governing the taking of wild turkeys and clarifying license and hunting requirements as recommended by the Hearing Officer. Patrick Early seconded the motion. Upon a voice vote, the motion carried.

**Consideration of final adoption of amendments to 312 IAC 3-1 concerning procedural rules for the Natural Resources Commission, Division of Hearings, to help implement the conduct of consolidated proceedings with the Office of Environmental Adjudication as required by Public Law 84-2008; LSA Document #08-688(F); Administrative Cause No. 08-057A**

Sandra Jensen presented this item on behalf of the Hearing Officer, Stephen Lucas. She explained that legislation authored by Senator Robert Meeks authorizes parties to seek to consolidate proceedings before the Commission’s Division of Hearings with those of the Office of Environmental Adjudication, if the proceedings involve common questions of water quality or water quantity. The statute requires the two agencies to adopt joint rules to assist in the implementation of the statute.

Jensen said the Commission gave preliminary adoption to the proposed rules on July 15, 2008, and a joint public hearing was held as scheduled on January 16, 2009. The Environmental Section of the Indiana State Bar offered suggestions for language changes before preliminary adoption, and these were incorporated. She noted, however, that no public comments were received subsequent to preliminary adoption based upon language published in the *Indiana Register*. “The proposed amendments to 312 IAC 3-1 are in response to a legislative directive. If approved, the rules would provide litigants before both the Commission and the Office of Environmental Adjudication with latitude to more efficiently deal with adjudications pending before both agencies.” She recommend the Commission give final adoption of the rule



amendments as attached to the Hearing Officer's Report as Exhibit A, and as included in the Commission agenda packet.

Larry Klein asked whether an example could be provided of the type of proceeding that would be involved and governed by the rule proposal. Jensen responded that a matter may arise where someone is required to have a permit issued by the Department to take some action in a floodway, and the person may also be required to have a permit from the Indiana Department of Environmental Management. The Office of Environmental Adjudication serves "essentially as the Division of Hearings" for IDEM. "Sometimes the issues are so intertwined that it would make good sense to have both administrative proceedings held in one hearing as opposed to requiring the litigant to go through two individual hearings with two individual agencies."

Thomas Easterly said, "The hardest thing for the public to understand is when either DNR or IDEM says, 'Yeah, that's okay', and the other one says, 'It's not okay'."

Jensen said the new legislation and the proposed rule are efforts to "attempt to alleviate" this confusion.

Larry Klein moved to approve for final adoption of amendments to 312 IAC 3-1 concerning procedural rules for the Natural Resources Commission, Division of Hearings, to help implement the conduct of consolidated proceedings with the Office of Environmental Adjudication under Public Law 84-2008, as attached to the Hearing Officer's Report as Exhibit A. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

#### **ADJOURNMENT**

The meeting was adjourned at approximately 11:26 a.m., EDT.