NATURAL RESOURCES COMMISSION

March 18, 2014 Meeting Minutes

MEMBERS PRESENT

Bryan Poynter, Chair
Jane Ann Stautz, Vice Chair
Cameron Clark, Secretary
Thomas Easterly
Jennifer Jansen
Jake Oakman
Donald Ruch
Phil French
Patrick Early
R. T. Green
Doug Grant
Robert Wright

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandy Jensen
Debbie Freije

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Chris Smith	Executive Office
Joseph Hoage	Executive Office
Cheryl Hampton	Executive Office
Steve Hunter	Division of Law Enforcement
Danny East	Division of Law Enforcement
Terry Hyndman	Division of Law Enforcement
Phil Bloom	Communications
Linnea Petercheff	Division of Fish and Wildlife
John Bacone	Division of Nature Preserves
Monique Riggs	Division of Water
Andrew Wells	Office of Legal Counsel

GUESTS PRESENT

Jack Corpuz
Barb Simpson
Tim Maloney

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:02 a.m., EDT, on March 18 at The Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis. With the presence of twelve members, the Chair observed a quorum.

The Chair recognized Jennifer Jansen, Managing Attorney for the Indiana Department of Transportation, as proxy for Karl Browning. He noted Jansen also serves on the AOPA Committee and expressed appreciation for her continuing service.

Doug Grant moved to approve the minutes for the meeting held on January 21, 2014. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

REPORTS OF THE DIRECTOR, DEPUTIES DIRECTOR, AND ADVISORY COUNCIL

Director Cameron Clark provided his report. He referenced Asian carp and other aquatic nuisance species. There is concern of carp entering into the Great Lakes and concern regarding nuisance species exiting the Great Lakes into the Mississippi River Basin. There has been a lot of discussion with various interested groups concerning nuisance species. The Midwestern Governors' Association meeting was held March 11 and 12 in Washington, D.C., and was productive. "It was interesting to hear that other DNRs around the Midwest are experiencing some of the same issues that we are." It was the consensus of the representatives at the Midwest Governors' Association meeting to approach the U.S. Fish and Wildlife Service concerning taking the role as the head agency in the effort of combating the movement of the aquatic nuisance species.

The Director said, "There were some interesting moments" during the legislative session. But "DNR did not come out of this year's session with anything too concerning. There was another run at the high fence hunt." He said SB 52 was designed to restructure the criminal code within Title 14. SB 52 "made it through but towards the end it was agreed to pull out that which pertained to IC 14-22, the wildlife violations, for further study." SB 61 passed to allow DNR to contract with persons at the state park inns for the sale of alcohol. Also passed was SB 1217 to implement a process to provide efficiency and transparency for DNR and IDEM permits.

The Chair recognized visitors Barb Simpson, Executive Director of the Indiana Wildlife Federation; Tim Maloney, Senior Policy Director with the Hoosier Environmental Council; and Lynn Dennis, Director of Government Relations with the Indiana Nature Conservancy, who participated in this year's legislative session. "I just wanted to say 'thank you' on behalf of the Commission. Even though this is a short Legislative session, it had an awful lot of moving parts. I just wanted to thank everybody who went to the Legislature and spent time managing that process either on behalf of DNR or issues that the DNR was supporting. It was a rodeo at times, and you guys really did a good job advocating on behalf of sportsmen and conservationists in the State. Thank you for all that you did."

Director Clark reflected, "If I could add to that shout-out, Linnea Petercheff, Terry Hyndman, and Steve Hunter were very instrumental in working both internally and with supporting information and documentation relative to Senate Bill 52. They put in a lot of time and great work in helping to educate certain Legislators as to the best way to craft that bill."

The Chair resumed, "As we all know, sometimes bills that have worthy intentions can really have detrimental effects on the Department of Natural Resources. The Executive Office and the staff did a wonderful job in particular with [SB 52]. Thank you again for everybody's efforts."

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, provided his report. The Eagle Marsh invasive species prevention project in Fort Wayne is moving forward. "We still hope to move dirt this year. The reason that is so important is because the McCallough Ditch washed out three times last year, and we're fearful that every wet month that goes by we're in risk of having to do emergency repairs again." DNR is also moving forward with the In-Lieu Fee Mitigation Program with the Corp of Engineers. "We hope to 'go-live' in 2015. We continue to make comments on Mounds Lake which is the proposal to dam White River in Anderson and to construct a reservoir. I know that IDEM and INDOT, probably Tourism also, will all be asked to comment on that, as well as Federal agencies, as part of the scoping."

Davis referenced a "profound turnover" of DNR staff recently that will continue in the next few years. Four state park managers were replaced this year, and four more will likely be replaced before year-end. Approximately 50% of the Division of Fish and Wildlife staff is eligible for retirement. "We will have lots of changes and that will be something we'll all probably notice."

Chris Smith, Deputy Director for the Bureau of Water Resource and Regulation, provided his report. He said the Division of Water and the Department of Homeland Security participated in its annual conference, Operations Stay Afloat. The conference involves the response to flooding, after-the-fact community recovery, facilitating permitting, and "getting them back on their feet quickly". Marion County will soon release revised preliminary flood insurance rate maps. With Marion County being one of the most populated counties, the revisions would "be looked at very critically, receive a lot of comments, and likely have multiple public meetings." Due to almost three-fold rate increases for some residents, the proposed increases have been delayed on the Federal level. "It's not the first time they've delayed the rate increase, and probably won't be the last, because it kind of puts you in a the trick bag of not being able to afford flood insurance and then not being able to sell your residence to someone else who can't afford flood insurance."

CHAIR, VICE CHAIR, AND CHAIR OF ADVISORY COUNCIL

Updates on Commission and Committee activities

Patrick Early, Chair of the Advisory Council, reported the Advisory Council did not meet in February or March, 2014.

Jane Ann Stautz, Chair of the Commission's AOPA Committee, said the Committee was scheduled to meet immediately after adjournment of the Commission meeting.

DNR, EXECUTIVE OFFICE

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

No items were referred to the Advisory Council.

DNR, DIVISION OF NATURE PRESERVES

Consideration of the dedication of the Cave River Valley Nature Preserve in Washington County

John Bacone, Director of the Division of Nature Preserves, presented this item. He said the proposed nature preserve is owned and managed by the DNR's Division of State Parks and Reservoirs, Spring Mill State Park. The nature preserve was in an "incredibly significant cave system", which has been well known and used by cavers for many years, and which contains a number of very rare species. The nature preserve was included in Dr. Ensley's inventory of natural areas of Indiana. Many persons actively supported protection of the area. "It has been nice to see it did get protected." The nature preserve was acquired with assistance of a Federal–State wildlife grant from U.S. Fish and Wildlife Services and from the Indiana Heritage Trust.

Thomas Easterly asked what species of bat was endangered.

Bacone replied that the Indiana bat is listed by the Federal Government as an endangered species. He said two other bats are proposed for a Federal listing "especially now that the white-nose syndrome is decimating populations. There may be others that will be listed soon."

R. T. Green moved to approve dedication of the Cave River Valley Nature Preserve. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

Consideration of the dedication of an Addition to the Portland Arch Nature Preserve in Fountain County

John Bacone, Director of the Division of Nature Preserves, also presented this item. He said Portland Arch was one of the first nature preserves dedicated by the Commission in the early 1970s. The nature preserve consists of topography of sandstone cliffs–erosional sandstone formations known locally as "Tecumseh's Cave". Bacone said the Division of Nature Preserves had been trying to acquire the tract for several years. Bacone said the Division of Nature Preserves recommended the dedication of the Portland Arch addition.

Thomas Easterly moved to approve dedication of the Addition to the Portland Arch Nature Preserve. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF WATER

Consideration of request for preliminary adoption of amendments to 312 IAC 12-2 that provides standards for water well drillers and water well pump installers; Administrative Cause No. 13-080W

Monique Riggs, Environmental Specialist with the Division of Water, presented this item. She said the proposed amendments would provide standards for water well drillers and pump installers. The amendments would specify minimum pump setting depths for small capacity water wells that are required to qualify for protection under Indiana Code 14-25-4. The amendments are in response to 2010 amendments to IC 25-39 and 312 IAC 13. The statute and rule provide well construction standards, licensing for water well drillers and water well pump installers, and mandatory available drawdown requirements for water well pumping equipment. The proposed rules would reduce regulatory burden on water well drillers and pump installers to inform homeowners of the provisions of IC 25-39. The amendments would help owners of small capacity domestic wells to meet the requirements for protections provided under the law if the domestic wells are impacted by local high-capacity pumping. Riggs said the Division of Water recommended the preliminary adoption of the rule amendments.

Thomas Easterly asked if the DNR considered a rule to inform any future buyers of a property.

Riggs responded, "It's not currently a provision in our rules, but something we may want to consider. I believe that water wells are subject to being disclosed at the time of a real estate transaction. Any issues with a water well would have to be disclosed at that time, but that would be outside our regulatory authority."

Riggs continued, "In a nut shell the standards would prevent there being a choice in play." She said prior to the requirements, the well drillers or pump installers would propose, to be decided by the homeowner, the pump setting depth subject to whether the well would meet the requirements of Indiana's Water Rights Law and be protected under that law. "This takes the choice out of it and puts the emphasis on the well driller to install a pump in a way that meets a certain minimum standard that would guarantee protection under those provisions. There can be a variance issue in the case that the minimum pump setting depths cannot be met. The bedrock conditions or the wells being installed, they can still get a variance from the Division by calling in and explaining a particular situation. We just have to determine whether or not to issue a variance for that particular situation."

The Chair asked, "What was the genesis of this?"

Riggs said the rule amendments were initiated due to amendments to IC 25-39, and the associated rules 312 IAC 13, which establish minimum pump setting standards. The standards require 20 feet of available drawdown in an unconsolidated water well finished in sand and gravel, or 50 feet of available drawdown in a well finished in consolidated or bedrock materials. "This is sort of a 'sister rule' to the Indiana Water Rights Law, so it needed to be updated to match the well construction standards in 312 IAC 13."

Doug Grant moved to give preliminary adoption to the amendments to 312 IAC 12-2 that provides standards for water well drillers and water well pump installers. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of request for preliminary adoption of proposed amendments to 312 IAC 13 to allow for the use of industry standard grout materials, and provide for Division of Water

approval of grout additives, for vertical closed loop geothermal wells; Administrative Cause Number 14-022W

Monique Riggs also presented this item. The proposed amendments relate to the well construction standards set forth in 312 IAC 13 and would assist with the implementation of IC 25-39. In particular, the amendments respond to the developing use of high solids bentonite grout containing graphite, or other neat cement based geothermal grouts, for vertical closed loop geothermal systems. These additives enhance the thermal conductivity and pump ability of the group material. A temporary rule, LSA Document #13-499(E), is currently in place to authorize the use of graphite in geothermal grout material.

Riggs reported the use of graphite to thermally enhance geothermal grout material has proven effective and environmentally safe and has been approved by several Midwestern States, including Michigan, Kansas and Wisconsin. High solids geothermal grout enhanced with graphite has also been specified for use in Ball State University's current $33.1 million geothermal well installation project. Other neat cement based geothermal grouts have also been found to be effective and environmentally safe and have been approved for use in ten States. 312 IAC 13-8-1 currently allows only the addition of sand to enhance the thermal conductivity and pump-ability of geothermal grout. The proposed amendments would authorize: (1) the addition of graphite to high solids bentonite grout; (2) the use of neat cement based grouts; and, (3) the ability of the Division of Water to approve the use of other geothermal grout additives.

Riggs said that the Division of Water recommends the Commission give preliminary adoption to amendments to 312 IAC 13, as provided in "Exhibit A".

Thomas Easterly moved to approve for preliminary adoption the proposed amendments to 312 IAC 13 to allow for the use of industry standard grout materials, and to authorize Division of Water approval of other grout additives for vertical closed loop geothermal wells. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF WATER

Consideration of approval for amendments to Information Bulletin #61 governing the Listing of Public Freshwater Lakes; Administrative Cause No. 14-048W

Linnea Petercheff, Staff Specialist in the Division of Fish and Wildlife, presented this item. She said the DNR is requesting technical changes to the description of the locations for the following lakes: Lake George (Hobart) in Lake County; Saugany Lake in LaPorte County; and Green Lake located in LaGrange and Steuben Counties. The DNR is also requesting to remove Dog Lake in Porter County from the Listing of Public Freshwater Lakes since it is nearly dry and no longer covers an area of at least five acres—a statutory requirement for "public freshwater lakes".

Chairman Poynter asked if the nonrule policy document, Information Bulletin #61, was reviewed annually.

Petercheff responded that a review of Bulletin #61 usually occurs when the Department receives either outside calls or when the Division of Water is contacted by a person informing the latitude and longitude of a particular lake may be inaccurate. The Division of Law Enforcement and the Division of Water also receive inquiries why a particular lake is included in or excluded from the list. She noted that a petition to amend the nonrule policy document can also be filed with the Commission's Division of Hearings.

Steve Lucas added, "We have had petitions to change this nonrule policy document. That's part of what's anticipated by the document, and we've received formal petitions three or four times."

Chris Smith asked, "On Dog Lake you were saying that the control structure seems to be the problem with why the lake is reducing below minimum size. Is there any discussion about repairing or replacing it in the future?"

Petercheff indicated Division of Water Assistant Directors, Jim Hebenstreit and George Bowman, viewed the lake with the county surveyor recently. "All agreed that Dog Lake should be removed from the lakes list." Repair or replacement of the control structure is possible. "If the structure is repaired or reinstalled in the future, it could be recommended for return to the list of public freshwater lakes."

Petercheff also requested authority to make technical changes to the listing without placing an item on the Commission agenda. She said corrections to longitude or latitude numbers or names of lakes might be adjusted, but substantive decisions as to which lakes should be listed would not be made as technical changes.

Chairman Poynter asked Steve Lucas why the listing exists. Steve Lucas responded that the listing as a nonrule policy document is required by IC 14-26-2-24.

Doug Grant moved to approve amendments to Information Bulletin #61 governing the Listing of Public Freshwater Lakes as presented by Petercheff. He also included authorization to the DNR and the Commission Division of Hearings to make future technical changes without advance Commission approval. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of approval of a nonrule policy document to address dispute resolution services by an employee of the Commission's Division of Hearings for other state or local government entities; Administrative Cause No. 14-046A

Steve Lucas, Director of the Division of Hearings, presented this item. He said P.L. 126-2012 and P.L. 158-2013 modified statutes pertaining to "ghost employment" to clarify State employees performing qualified functions are not engaged in ghost employment. The long-standing practice was that administrative law judges, hearing officers, and mediators would assist other agencies, on an occasional basis. Small agencies may not have administrative law judges because the need arises only irregularly. In other instances, an agency's administrative law judge

may be disqualified from hearing a matter by a conflict of interest. In those circumstances, administrative law judges were shared among agencies. The Shared Neutrals Program was also a cooperative and reciprocal arrangement among a number of agencies by which registered mediators were available to serve other agencies. Part of the concept of the Shared Neutrals Program was to provide citizens the option to use a mediator from a different agency.

A few years ago during a continuing legal education seminar, an official with responsibilities for ethics suggested that sharing administrative law judges and mediators among agencies might constitute ghost employment. The suggestion was a "disturbing perspective for State employees, and was not welcomed by private attorneys and their clients who wish service by an administrative law judge who has no conflict of interest, or by a mediator who does not have an agency bias." In the wake of the CLE discussion, amendments were made to IC 34-44.1-1-3. In particular, a new subsection (f) provided an exemption—what has popularly been deemed a "safe harbor"—for services that are much broader than sharing among agencies, including potentially service to organizations with 501(c)(3) status. "But all we're asking here today is sharing among agencies and not an extension of authority to 501(c)(3) organizations." To receive the exemption, there must be a written document from the employees' executive officer, and there must be conditions, such as limits on time expended. The Commission appoints its administrative law judges, and the Division of Hearings is created by the Commission under IC 14-10-2-2. The Commission Chair is presumably the executive officer, and the Chair in November implemented IC 35-44.1-1-3(f) through a temporary document. "But our perspective is that seeking the imprimatur of the whole Commission in an inclusive document, and its publication in the Indiana *Register* as a 'nonrule policy document', serves transparency and the integrity of the process."

Lucas stated the proposed nonrule document contains an important exemption from time limits for services provided by the Division of Hearings to boards under the legal umbrella of the Commission. The exemption would apply to services by Division of Hearings personnel to the Commission's AOPA Committee, the Advisory Council, the Historic Preservation Review Board, the Geologist Licensure Board, and the Soil Scientist Registration Board.

Lucas added that current HB 1121 would re-emphasize the course set by IC 35-44.1.1-3(f). HB 1121 would specify at IC 4-21.5-3-8.5(a) that an "agency may share an administrative law judge with another agency:

(1) to avoid bias, prejudice, interest in the outcome, or another conflict of interest;
(2) if a party requests a change of administrative law judge;
(3) to east scheduling difficulties; or
(4) for another good cause."

HB 1121 would apply only to administrative law judge services, however, and does not specify how the process would be implemented. Our thought is the proposed nonrule policy document would also serve the function of implementing HB 1121 if it becomes law. He then recommended proposed Information Bulletin #73 for approval as a Commission nonrule policy document.

R. T. Green moved to approve proposed Information Bulletin #73 as a nonrule policy document. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Information Item: **Conducting Natural Resources Commission meetings by electronic means**

The Chair said the information item was to advise Commission members of the recent statutory ability to hold meetings electronically, but it was not the practice of the Commission due to the nature the Commission's functions. "This is more of anomalous opportunity for business to be conducted electronically but with it come other issues, and the Commission would not necessarily participate or entertain the legislation at this time."

Information Item: **Overview of recent Court of Appeals decisions construing easements and riparian rights along public freshwater lakes and request for input concerning development of a nonrule policy document to assist in distinguishing private easements and public easements**

Steve Lucas presented this item. He said that a subject that generates significant action within the Division of Hearings is the resolution of user disputes in public freshwater lakes. The disputes may be among riparian owners or easement holders that have acquired riparian rights, or disputes between private usage and public usage. The DNR is the trustee for the protection of public rights within public freshwater lakes.

Lucas provided a two-part packet containing the Indiana Court of Appeals opinion in *Kranz v. Meyers Subdivision.* "The more important of these I'll call *"Kranz One".* *Kranz One* was decided by a Commission ALJ, and Gunther Kranz filed objections for review by the AOPA Committee. The AOPA Committee affirmed most parts, and *Kranz* took judicial review to the Starke Circuit Court. The court affirmed, and *Kranz* appealed. The Court of Appeals again affirmed. *Kranz* sought but was denied to the Indiana Supreme Court.

The Court of Appeals decision in *Kranz One* considered an important matter of first impression. The court determined the Commission and its administrative law judges have jurisdiction to determine the property rights of parties because those rights govern DNR permitting authority. The jurisdiction is not exclusive, so a Circuit Court or a Superior Court could first decide the property interests, and the court disposition would then govern a subsequent permit evaluation. But if not already decided by a court, the NRC may properly decide. "This holding is useful in a variety of permitting contexts because property rights are often a core issue. Also, the Court of Appeals recognized and thus effectively endorsed the Commission's nonrule policy document listing northern Indiana's public freshwater lakes." The Court of Appeals implemented 312 IAC 11-4-8 that authorizes DNR to place onditions on individual permits for group piers. The Court of Appeals ruled that the allocation of riparian rights among private contestants did not constitute an unconstitutional taking, particular as juxtaposed to the DNR's responsibility to protect the public trust. As stated on page 1081 of the decision:

> The NRC's decision was designed to enable all the property owners in the Subdivision to enjoy the lake safely, something that the property owners themselves had not been able to accomplish without government intervention. The character of the government action is to resolve a dispute among property owners and to protect the public interest in the lake.

Lucas suggested *"Kranz One"* is also significant because it continued a line of decisions, most prominently *Klotz v. Horn* decided by the Indiana Supreme Court in 1990, which articulated how to decide whether a private easement granted rights to off-lake lot owners to place improvements such as piers within public freshwater lakes. "*Kranz One"* and *Klotz* diverge significantly from *Bass v. Salyer,* which in 2010 articulated how to evaluate a public easement (sometimes called a "public highway") as opposed to a private easement.

Lucas said that in 2008, the Commission approved a nonrule policy document, "Riparian Zones within Public Freshwater lakes and Navigable Waters" (Information Bulletin #56). "Our experiences suggest Bulletin #56 has been helpful in resolving numerous user disputes in public freshwater lakes without resort to adjudication. When adjudications are initiated, information Bulletin #56 has also assisted with achieving resolutions—particularly through mediation."

Lucas said that confusion with respect to the construction of public easements and private easements might be lessened by a nonrule policy document. Such a nonrule policy document would probably be more ambitious than Bulletin #56. Lucas said that his query to the Commission is whether it believes the development of a draft information bulletin, with invited input from the DNR (particularly the Division of Law Enforcement and the Division of Water), and subsequent review by the AOPA Committee, may be viewed as a worthy expenditure of labor. If a document were developed, it could be tendered to the Commission for approval and posting in the Indiana *Register*.

Easterly asked, "Is this for *Bass v. Salyer*?" He added that he read both *Kranz One* and *Bass*, and they seemed to conflict.

Lucas responded there was considerable confusion as to the relationship of the two lines of cases, but one is directed to private easements and the other to public easements. A nonrule policy document would try to reconcile the principles of *Bass v. Salyer* with those of *"Kranz One"* and *Klotz v. Horn*. They have different consequences.

The Chair recognized Stephen Snyder, a private attorney from Syracuse who is experienced with riparian rights issues, to provide comment.

Stephen Snyder addressed the Commission. He said "there is a distinction. It's a very complicated distinction between a private easement, which is usually relatively simple to define, and a public easement, which normally is a public street that runs to the water's edge. The public is much more confusing because ownership of the land under that public right-of-way is usually vested in the adjacent property owners—not always, but usually, which means the riparian rights go with the fee title and not necessarily with the public's access rights, if there are any access rights. The elephant in the room is, if that fee title is owned underneath a public right-of-way that goes to the water by the adjacent property owners, are there any riparian rights that go to the public, or is there an invisible barrier at the shoreline that prevents the public from even accessing the lake? It hasn't been litigated to my knowledge, but it will be someday." He questioned whether a nonrule policy document could provide effective "answers until such time as that question is answered by the Court. I think ultimately it will be. I think trying to put together a set of guidelines as was established in Information Bulletin #56, may be difficult to do, because the law is simply not that clear at this stage."

The Chair thanked Stephen Snyder for his comment.

Thomas Easterly commented, "When I read *Bass*, I said 'now wait, this looks like the opposite of the other one', so it's because it's public and they abandoned the roads and maybe the people could never have put the dock there in the first place?"

Stephen Lucas replied, "It's not a function of abandonment or vacation. It's a distinction between whether it's a private easement or a public easement. The subject is really confusing, and it is complex as Mr. Snyder indicates. I certainly wouldn't have my feelings hurt if the Commission said, 'No, don't do anything now.' On the other hand, if you thought it appropriate, we could go through the exercise and just having the discussion might help bring clarity—even if you didn't ultimate decide to approve a nonrule policy document."

Jane Ann Stautz commented, "As Chair of the AOPA Committee, and for the other members of the committee, these matters come before us. I think some of us have seen a number of these and the nuances of the current case law there. I think it would be very helpful to at least go forward with the exercise and get the input of others and counselors who have been before the ALJ as well as AOPA Committee, to see what that might look like. It is very confusing and can be challenging when the matters come before us. I think it would be of use to at least see what it may look like. I think it's a very challenging undertaking, but I think it would serve the AOPA Committee."

Chairman Poynter asked "Under who's purview would that process be?"

Lucas replied, "We would start with a draft, but then we would carry it forward. Specifically, we would look to Division of Law Enforcement and the Division of Water, and then we would take it to the AOPA Committee for public discussion."

Easterly asked, "Wouldn't this move the ball forward even if it turns out what we come up with might not be the right answer? The Courts will help us understand it."

The Chair asked what the timeframe would be for presenting a draft of the nonrule policy document.

Lucas replied that he could provide a draft copy within 30 days to be shared with Division of Law Enforcement and Division of Water, and then presented to the AOPA Committee either at the May or July Commission meeting.

R. T. Green asked, "Have States like Minnesota, Wisconsin, and Michigan tacked these problems before, since they have more lakes?"

Lucas replied, "A whole lot of Indiana riparian law borrows from Minnesota, Michigan, and particularly Wisconsin.

The Chair commented, "What I'm hearing is that this would be helpful to the AOPA Committee. It would be my recommendation that if there's a willingness and a desire—and it could ultimately offer guidance to the AOPA Committee—it would be my recommendation that if there's a willingness to do that in a timeframe that doesn't distract from your other obligations and it would be helpful to the AOPA Committee, that we should take that step." The Chair's recommendation was taken by consensus.

***Information Item*: Overview of U.S. Supreme Court decision governing navigable waters in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), and two more recent Indiana decisions**

Steve Lucas also presented this item. He said several DNR professionals have cited to him the *PFL Montana, LLC* decision and asked that he speak to the Commission about it. Lucas said he had been reluctant because he wasn't sure he could add anything. But with a pair of related recent Indiana decisions, and a relatively light agenda, he thought a brief discussion could be productive.

In 2012, the U.S. Supreme Court issued a far-reaching decision concerning navigable waters principles in *PFL Montana, LLC v. Montana*. Whether a watercourse is navigable governs DNR and NRC jurisdiction in numerous regulatory and proprietary contexts. The facts in the decision are not helpful. The decision is based largely on non-navigability due to rapids and waterfalls in mountainous areas, which Indiana does not have. But the Supreme Court's legal analyses has a broad reach.

Lucas said there are perhaps four primary meanings for "navigable", and *PFL Montana* considers three.

(1) "Navigable" is as used in the Clean Water Act. The term for the Clean Water Act was seemingly a Congressional attempt to include as many waters under Federal jurisdiction as the Commerce Clause would allow. While of great consequence to the U.S. Army Corps, EPA, and IDEM for regulatory functions, Clean Water Act navigability is not considered in *PFL Montana* and is not typically a basis for DNR jurisdiction.

(2) "Navigable" is used for purposes of admiralty jurisdiction. *PFL Montana* considers admiralty jurisdiction briefly, but the concept is entirely a matter of Federal authority. Again, the DNR and the Commission have no direct role.

(3) "Navigable" is within the context of the equal-footing doctrine. *PFL Montana* underlines that a State gains title within its borders to the bed of water if navigable when admitted to statehood. The court cited and reaffirmed an old decision called *Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law, which are navigable in fact. And, they are navigable in fact when they are used, or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

PFL Montana continues by stating that "present-day recreational use of the river [does] not bear on navigability for purposes of title under the equal-footing doctrine." The equal-footing doctrine is a function of Federal constitutional and common law.

(4) "Navigable" is also used in implementing the public trust doctrine. *PFL Montana* indicates the doctrine has ancient origins but is today a matter of State law. Exercise by a State of public trust doctrine is subordinate to the Federal Interests through the "navigational servitude". "Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."

Lucas suggested Indiana state statutes within DNR and Commission jurisdiction are probably in some parts applications of both the equal-footing doctrine and the public trust doctrine. If bed ownership is at issue, the equal-footing doctrine is more prominent. For most recreational uses, though, the public trust doctrine may be more significant.

Lucas said *U.S. v. Carstens* was decided in November by the Federal Court in the Northern District of Indiana at Hammond. The decision applies regulations adopted by the National Park Service as an appropriate exercise of federal authority—affirming a conviction for the unauthorized launching of a boat at the Indiana Dunes National Lakeshore in the Town of Dune Acres. In addition, it acknowledges "The land between the edge of the water of lake Michigan and the ordinary high water mark is held in public trust by the State of Indiana." But, Indiana ownership is subordinate to Federal regulation under the navigational servitude.

LBLHA, LLC v. Town of Long Beach is an unreported decision issued in December by the LaPorte Circuit Court and applies *U.S. v. Carstens*. Lucas said his understanding is neither party sought review by the Indiana Court of Appeals. Because the decision is unreported, it has little or no legal significance for other than the parties. Neither DNR nor the State of Indiana was a party, but the decision is included because of the Commission's prior exposure to disputes concerning use of the beach in the Town of Long Beach.

Thomas Easterly asked, "So, in *Carstens*, would that apply in Beverly Shores and Ogden Dunes also since they're in the park?"

Lucas replied, "Yes, that's right. Any place that the National Park Service has made their regulations applicable. It would include those places."

Easterly asked about the implications of *Carstens* to the Port of Indiana. Lucas responded that the Port of Indiana is a special situation. For most areas along Indiana's Lake Michigan shoreline, the Commission is the State entity for rules. This authority is subject generally to the navigational servitude. But the Port of Indiana has separate rule adoption authority and has exercised it. Lucas said his best guess was that the result in *Carstens* would not apply to the Port of Indiana because the Port is not included in the National Lakeshore, but he was unsure.

MEETING ADJOURNMENT

The meeting was adjourned at approximately 11:28 a.m., EST.