

NATURAL RESOURCES COMMISSION

Minutes of July 19, 2011 Meeting

MEMBERS PRESENT

Bryan Poynter, Chair
Robert Carter, Jr., Secretary
Brian Blackford
Michael Cline
Patrick Early
Thomas Easterly
R.T. Green
Donald Ruch
Robert Wright

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Ron McAhron	Executive Office
Chris Smith	Executive Office
Cheryl Hampton	Executive Office
Shelley Reeves	Executive Office
Mike Smith	Executive Office
Scotty Wilson	Law Enforcement
Phil Bloom	Communications
Jim Hebenstreit	Water
Phil Marshall	Entomology
Dan Bortner	State Parks and Reservoirs
Darrell Skinner	State Parks and Reservoirs
Larry Gray	State Parks and Reservoirs
Mark Reiter	Fish and Wildlife
Bill James	Fish and Wildlife
Dale Brier	Outdoor Recreation

GUESTS PRESENT

None

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 7:05 p.m., EDT, on July 19, 2011, at the Overlook Room, Clifty Inn , Clifty Falls State Park, 1650 Clifty Hollow, Madison, Indiana. With the presence of nine members, he observed a quorum.

R. T. Green moved to approve the May 17, 2011 meeting minutes. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

CHAIR AND VICE CHAIR

Updates on Commission and Committee activities

Chairman Poynter said the Commission holds “two out-of-Indianapolis meetings” to help keep a pulse on its great breadth of responsibilities, both in terms of substance and geography, and “to give folks on the corners of the State a chance to meet-and-greet members of the Commission.” Several legislators were also informed of the meeting.

The Chair thanked Darryl Skinner, Property Manager for Clifty Falls State Park, and his staff for their excellent preparations in hosting the meeting. He added his thanks to Chris Smith of DNR’s Executive Office; Dan Bortner, Director of the Division of State Parks and Reservoirs; and Gary Miller, also of State Parks; for their tireless work to make the meeting a success.

Poynter reported on a productive fieldtrip in the afternoon to the bridge reconstruction over the Ohio River between Madison and Milton, Kentucky. Commissioner Michael Cline, Mark Ahearn, and Kevin Hetrick did a “wonderful job” of facilitating the Commission’s introduction to an innovative engineering project that can dramatically reduce costs to taxpayers and shorten disruption for travel over the river. Charlie Gannon, Project Manager for Walsh Construction, provided an onsite summary of the project. James Hebenstreit of DNR’s Division of Water and Lieutenant Anthony Stoll of DNR’s Division of Law Enforcement described coordination with INDOT and Walsh Construction. DNR Deputy Director reviewed efforts to protect Madison’s historic integrity, with particular reference to aesthetics and economics.

The Chair said Kevin Hetrick identified a website dedicated to the project, including frequently updated images, and to the history of the existing bridge that was constructed in the late 1920s. During the Commission meeting, McAhron distributed a handout which summarized the history and provided a link to www.miltonmadisonbridge.com.

Commissioner Cline said the project “is a partnership with the Commonwealth of Kentucky.” High Ohio River elevations early this year delayed progress, but the hope is still that the new bridge can be opened in late 2012.

In another matter, Chairman Poynter reported the Commission’s AOPA Committee has not met since May. He said his understanding was the AOPA Committee would likely meet in late summer or early fall.

ADVISORY COUNCIL

Patrick Early, Chair of the Advisory Council, reported the council did not meet in June. The next meeting is scheduled for August 17 at Fort Harrison State Park.

DNR, EXECUTIVE OFFICE

Director's Report

Director Robert E. Carter, Jr. gave his report. He thanked "Darryl Skinner and Dan Bortner and everybody else on staff who made this meeting happen." He said he was pleased when the Commission can get out and see what the agency is doing around the State.

The Director said he recently visited the Bear Run Mine in Sullivan County with Bruce Stevens, Director of DNR's Division of Reclamation. The Peabody facility is the largest surface coal mine in the U.S. "east of the Mississippi River". He said he also visited petroleum production facilities in Vigo County with Herschel McDivitt, Director of DNR's Division of Oil and Gas.

Carter also reported on positive financial news for Indiana as it recovers from one of the worst recessions in 30 years. Indiana ended fiscal year 2011 with a \$1.18 billion surplus. "A lot of credit goes to State employees and those at DNR for their hard work." He said Governor Mitch Daniels had recently announced a one-time special recognition for State employees as an "efficiency dividend" for those with good performance evaluations from last fall.

Report of Deputy Director for Bureau of Resource Regulation

Ron McAhrn, Deputy Director for the Bureau of Resource Regulation, gave his report. He expressed appreciation for the continuing efforts of Doug Keller, DNR's Aquatic Invasive Species Coordinator, in addressing Asian carp. "Doug has done a fantastic job of employing science in a politically charged atmosphere."

McAhrn reported that Herschel McDivitt and the Division of Oil and Gas has four rule packages underway that would address emerging issues for petroleum production, derived in part from new State legislation. The Division of Oil and Gas is working with Steve Lucas and will first step forward with temporary rules ("what I like to call 'rules on training wheels'") for consideration by Director Carter. "We plan to come back to you guys with proposed permanent rules in six to nine months."

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

No additional topic was identified.

PERSONNEL ACTION

Permanent appointment of William (Bill) Seegers as Property Manager of the Public Access South Unit, headquartered at Glendale State Fish and Wildlife Area

Bill James, Chief Fisheries Biologist with the Division of Fish and Wildlife, made an “unequivocal recommendation for the permanent appointment” of Bill Seegers as Property Manager for Public Access South. He said Seegers has done a great job for the Division and was present to receive any question or comments from the Commission.

The Chair asked Seegers if he would outline his responsibilities as Property Manager for the Public Access South Unit. Seegers responded that the South Unit is responsible for managing the Division’s heavy equipment south of Interstate 70. In addition, assistance is provided to the Division of Forestry for wildlife management and to keep boat ramps in good condition.

Robert Wright recommended that William Seegers be given permanent appointment as Property Manager of the Public Access South Unit of the Division of Fish and Wildlife. Pat Early seconded the motion. On a voice vote, the motion carried.

FISH AND WILDLIFE

Consideration for preliminary adoption of amendments to 312 IAC 9 governing the possession limits of wild animals that are lawfully taken; Administrative Cause No. 11-053D

Colonel Scotty Wilson of DNR’s Division of Law Enforcement presented this item. He said the development of the proposed rule was “a combined effort” and expressed appreciation for the assistance of Linnea Petercheff, DNR’s Division of Fish and Wildlife, and Sandra Jensen, NRC’s Division of Hearings. He said “there is not presently a clear definition” of possession limit. The interpretation of what is to be included, “in counting for determining whether the ‘possession limit’ has been exceeded”, is subject to a wide variety of interpretations. The “heart of the proposed rule amendment” is the clarification that harvested wild game that has been processed and stored at an individual’s primary residence no longer is counted for purposes of determining the possession limit. Contemporaneous with this amendment is the addition of definitions for “primary residence” and “processed”.

Wilson highlighted comments from internet blogs that “clearly reflect confusion on the part of hunters and anglers.” The Division of Law Enforcement surveyed officers and determined that the interpretations among the officers were also numerous. “All affected parties, both the public and the Conservation Officers,” need the clarity and the elimination of inconsistency “that this rule proposal will provide”. He said the proposed rule is consistent with the possession limits of many other States.

Wilson said the proposal would not apply to migratory birds in an effort to avoid controversy associated with an inconsistent interpretation of Federal law. “Federal authorities continue to

consider processed birds stored at a primary residence as a part of the possession limit and therefore, application of this rule to migratory birds would be contrary to the Federal law.” He said possession limits are essentially law enforcement tools and are not directly associated with wildlife management. The Division of Fish and Wildlife addresses wildlife management through the establishment of bag limits and season durations and times. Wilson recommended that the Commission grant preliminary adoption to the proposal.

Director Carter said he believed the rule proposal “has been needed for a long time.” He thanked Col. Wilson and all other staff members for their work.

Chairman Poynter also offered his appreciation “for the work that has gone into developing this rule proposal.”

Thomas Easterly asked “how much trouble are we buying” if Indiana were to apply this rule to migratory birds as well.

Carter responded the DNR has a good relationship with Federal authorities that “we would prefer not to jeopardize.” He said he supported the proposal as presented.

Patrick Early moved to give preliminary adoption to the rule amendments as presented by Wilson. Easterly seconded the motion. On a voice vote, the motion carried.

ENTOMOLOGY AND PLANT PATHOLOGY

Consideration for preliminary adoption of rule amendment to repeal 312 IAC 18-3-12, which governs standards for the control of the larger pine shoot beetle in Indiana; Administrative Cause No. 11-099E

Phil Marshall, Director of the Division of Entomology and Plant Pathology, presented this item. He said Indiana is required to either have a county-by-county quarantine for the larger pine shoot beetle or allow the implementation of a Federal quarantine for the entire State. At present, 69 of the State’s 92 counties are subject to quarantine under 312 IAC 18-3-12. The few unquarantined counties are in the southern part of Indiana. Allowing them to be subjected to the Federal quarantine would have “little impact to businesses.” He said there was “no further need for a State-level quarantine in Indiana.” He recommended that 312 IAC 18-3-12 be repealed. The result would be a Federal quarantine for all counties.

Donald Ruch moved for preliminary adoption of the repeal of 312 IAC 18-3-12 which establishes a quarantine of larger pine shoot beetles in Indiana on a county basis. Robert Wright seconded the motion. On a voice vote the motion carried.

DIVISION OF WATER

Consideration of amendments to Information Bulletin #37, regarding hydraulic modeling for permit applications under IC 14-28-1 and 312 IAC 10, to conform to current practice and to update website links; Administrative Cause No. 11-076W

Steve Lucas introduced this item. He said for consideration were amendments to a nonrule policy document (Information Bulletin #37) that addresses hydraulic modeling for permit applications under IC 14-28-1 (commonly referred to as the “Flood Control Act”). The amendments would cause the nonrule policy document to conform to current agency practices and would update website linkages. He turned to James Hebenstreit, Assistant Director for the Division of Water, to offer additional comments.

Hebenstreit said the amendments helped keep language current. Most importantly, the amendments would “clear up the two-strike rule”. For practical reasons, the concept was never effective. Better understanding by consultants who perform modeling has now also caused the concept to be largely unnecessary. He said the Division of Water recommended that the amendments be approved.

Donald Ruch moved to amend Information Bulletin #37, regarding hydraulic modeling for permit applications subject to the Flood Control Act, as set forth in the Commission materials. Patrick Early seconded on the motion. On a voice vote, the motion carried.

Consideration of Amendments to 312 IAC 11, which assists in implementation of IC 14-26-2 (the “Lakes Preservation Act”), to provide extended license durations for qualified activities; Administrative Cause No. 11-105W

James Hebenstreit, Assistant Director for the Division of Water, presented this item. He said IC 14-26-2 (commonly called the “Lakes Preservation Act”) has traditionally limited the life of a license to a maximum of two years. For most activities, two-year licensure is adequate, but increasingly activities are pursued for which the limitation is problematic.

Hebenstreit said IC 14-26-2-17 now provides that the Commission “may adopt rules under IC 4-22-2 providing that a type of permit” issued under the Lakes Preservation Act extends for more than two years. The amendments would authorize, by permanent rule, extended durations for temporary structures (most notably piers) that are seasonally removed from the water, dredging activities, licenses funded by the Federal government or through LARE, and when a person takes administrative review to the Commission.

Hebenstreit added that Director Carter recently approved a temporary rule to govern the same subject. The temporary rule is published at www.in.gov/legislative/iac/20110629-IR-312110376ERA.xml.pdf and became effective July 1.

Commissioner Easterly said that at IDEM, permits are effective unless a “stay” is granted by an administrative law judge. He asked if DNR functioned differently and if a result of the amendments would be to delay effectiveness until completion of an appeal.

Hebenstreit responded that DNR permits are effective unless stayed by a Commission ALJ, but many applicants do not wish to act upon a permit until finality is achieved in the review process. The amendments would not require an applicant to await the completion of an AOPA proceeding. But the amendments would extend the period of viability for a permit until two years after an appeal is completed, if an applicant chooses to wait.

Thomas Easterly moved to give preliminary adoption to amendments to 312 IAC 11 to extend the effective duration of specified types of permits issued under the Lakes Preservation Act. R. T. Green seconded the motion. On a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of report of hearing officer, including findings and proposal to the Natural Resources Commission in the matter of petition for rate establishment by Pleasure Craft Marina; Administrative Cause No. 11-011P

Sandra Jensen, Hearing Officer, presented this item. Jensen explained that Pleasure Craft Marina filed a petition to set rates for slips that were first rented in 2010 under interim rates established by the Department of Natural Resources. The petition is governed by Information Bulletin #20, which requires marinas to bring interim rates before the Commission for approval and prohibits slips from being rented under interim rates for more than one season. Former management at Pleasure Craft Marina did not comply with the requirements of Information Bulletin #20 because it failed and refused to notify all marina slip renters. In a Report issued June 9, 2011, Jensen concluded Pleasure Craft's new slips could not be rented after close of the 2011 boating season without violating Information Bulletin #20. She deferred to the Commission for direction.

Jensen said after issuance of the Report, she was contacted by the new marina manager for Pleasure Craft Marina, Steve Patterson. Patterson said Pleasure Craft wished to fully comply with Information Bulletin #20, if the Commission could allow him necessary additional time. As a result of subsequent communications with Patterson, Jensen issued an Addendum to the Report in which she recommended this matter be tabled for consideration at the November 2011 meeting. Tabling would allow Pleasure Craft Marina to satisfy Information Bulletin #20. The Commission could then consider the petition and potentially could allow for rates that would be effective for the 2012 boating season.

Donald Ruch moved to table Pleasure Craft Marina's petition for rate establishment until the November 2011 meeting. Michael Cline seconded the motion. Upon a voice vote, the motion carried.

Consideration of report of hearing officer, including findings and proposal to the Natural Resources Commission in the matter of petition for rate establishment and increase by Fourwinds Resort and Marina; Administrative Cause No. 11-010P

This item was also presented by Jensen. She reported that Fourwinds Resort and Marina filed a petition for rate increase on December 30, 2010 and subsequently fulfilled the requirements set forth in Information Bulletin # 20.

Jensen said Gary Miller, Assistant Director of the Division of State Parks and Reservoirs, analyzed rates from two marinas that Fourwinds reported as providing comparable facilities. Miller concluded the two marinas, Kent's Harbor and Jamestown Marina, were comparable. Miller's analysis resulted in a recommendation that rate deviations for same-sized slips within Fourwinds be eliminated. To accomplish this result, Miller suggested some previously established rates that are charged presently by Fourwinds be reduced and that other rates be increased beyond the amount requested by Fourwinds.

Jensen determined Miller's options were not consistent with Information Bulletin #20. She concluded the analysis of comparables indicated that Fourwinds rates were sometimes higher and sometimes lower than the rates of Kent's Harbor and Jamestown, but the rates were generally consistent. With exceptions noted in her report, she recommended that Fourwinds be granted: (1) an increase of 2% when its rates were already higher than rates charged by one of the comparable marinas; and (2) a 4% increase when Fourwinds rates were lower than those charged by one of the comparable marinas.

Jensen said the exceptions to the recommended rate increase were developed to address a large number of instances in which (1) Fourwinds has same-sized slips and varying rates throughout the marina; (2) the generally-recommended percentage increases would exceed the rate increases proposed by Fourwinds; and (3) the generally-recommended percentage increase resulted in rates that remained below the rates charged by one of the comparable marinas. Jensen concluded by recommending that the Commission approve rate increases for Fourwinds Resort and Marina as set forth in the "Hearing Officer Recommended" Column of Exhibit E of her report.

Poynter said the report reflected Fourwinds filed its petition for rate increase on "December 30, 2011". He believed the year should be shown as "2010". Jensen agreed and said she would make a correction.

Poynter recalled past petitions by Fourwinds to increase rates had met with strong opposition by slip renters. He asked about feedback from patrons of the marina. Jensen answered only ten of more than 600 patrons filed any type of correspondence in response to the petition. A person who submitted correspondence related to the Fourwinds petition also received a copy of her June 24 report, and only three of those offered additional input.

Pat Early moved to approve the hearing officer's recommendation for rate increases made in response to the petition by Fourwinds Resort and Marina. R. T. Green seconded the motion. By a voice vote, the motion carried.

Information Item: Submission of notice, under IC 4-22-2-25, to Administrative Rules Oversight Committee with respect to rule proposal for dog training grounds for coyotes and foxes; LSA Document #11-4; Administrative Cause No. 10-195D

Steve Lucas stated this item was informational and did not require Commission action. Correspondence from Chairman Poynter to Indiana State Senator Michael Young caused an extension, until December 31, 2012, for final action on the rule proposal for dog training grounds for coyotes and foxes. The substantive portions of the correspondence were tendered by John Davis, Deputy Director for the Bureau of Lands, Recreation, and Cultural Resources. Lucas said these portions are contained in the last paragraph of the first page and the first paragraph of the second page of the Chair's correspondence.

Chairman Poynter said the level of public interest in the rule proposal warranted placement of his correspondence, as an information item, on the Commission agenda. The Commission does not frequently extend the review period beyond one year from posting of a "Notice of Intent" in the *Indiana Register*, but he believed the circumstances described by Davis showed the need for an extension in this instance.

Consideration of final adoption (following recall) of restructuring of definitions applicable to DNR properties and new standards governing Redbird State Riding Area and Interlake State Recreation Area; LSA Document #10-668(F); Administrative Cause No. 09-025T

Steve Lucas presented this item as Director of the NRC's Division of Hearings. He said in the May meeting, the Commission gave final adoption to new provisions to govern Redbird State Riding Area and to govern Interlake State Recreation Area, as well as changes to definitions applicable generally to a "DNR property". Most changes to definitions were to restructure existing language which included them in a single cumbersome regulatory section. The Commission also initiated several technical changes to the definitions during the May meeting, including the addition of scientific names and rewording the definition of "nut".

Lucas said during the statutory review as to legality, the Attorney General's office identified several items of concern. As a result, the Division of Hearings caused a "recall" of the proposal, agreeing to request the Commission to make adjustments to address the concerns, followed by resubmission to the Attorney General. The adjusted rule proposal corrects a clerical error in the cross-reference for 312 IAC 1-1-23(c), removes gratuitous language in 312 IAC 8-1.5-14, and removes a structural conflict between 312 IAC 8-2-17(e) and 312 IAC 8-2-17(f). The adjusted rule proposal also seeks to incorporate the spirit of Commission modifications made in May in a way that is consistent with stylistic preferences of the Legislative Services Agency. He then recommended LSA Document #10-668 for final adoption consistent with these adjustments.

The Chair inquired about the removal of gratuitous language. Lucas responded that the definition of "motorized cart" repeated statutory language in a way that created an ambiguity.

Tom Easterly moved to give final adoption (following recall) of new standards for Redbird State Riding Area and for Interlake State Recreation Area, including changes to definitions with

general application to the DNR and DNR properties, as recommended in the Commission materials. Patrick Early seconded the motion. On a voice vote, the motion carried.

Consideration of report on rule processing, consideration of public comments, analysis and recommendation regarding final adoption of rule amendments relating to sport and commercial fishing for catfish; LSA Document #10-657(F); Administrative Cause No. 10-112D

Sandra Jensen, Hearing Officer, presented this item. She said the proposed rules would have established bag limits, based on size, and would have established a minimum size limit for catfish taken on certain waters of the State of Indiana. The proposal was an outgrowth of the Commission’s Comprehensive Fish and Wildlife Rules Enhancement Project following the receipt of suggestions for substantive rule amendments from the public. The Advisory Council held public hearings to consider the concept, and the Council recommended the proposal for preliminary adoption. Initially, the Division of Fish and Wildlife concurred.

Following consideration of the public comments received during the hearing process, the Department of Natural Resources concluded that “additional effort is warranted to more specifically identify catfish protection needs.” Based on citizen comment and on the DNR response, Jensen said she recommended the rule proposal be withdrawn.

Mark Reiter, Director of the Division of Fish and Wildlife, said the Department originally believed there was broad-based support for the rule proposal. Public comments revealed a need to gather additional information relating to the health of the catfish industry, however, as well as the need to consult more broadly with the public. He said the Division was interested in a catfish rule that would protect the fishery and could have broad public support. “We’re not there yet with this rule.”

Pat Early moved to accept the hearing officer’s recommendation to withdraw LSA Document #10-657. Donald Ruch seconded the motion. On a voice vote, the motion carried.

Consideration for recommendation of final action on readoption of 312 IAC 11 governing public freshwater lakes; LSA #11-42(F); Administrative Cause No. 11-001W

Steve Lucas presented this item. He said for consideration was readoption of 312 IAC 11 which assists with implementation of IC 14-26-2 (commonly referred to as the “Lakes Preservation Act”). This law is dynamic and seeks to balance a number of sometimes competing interests—public use, private rights, environment, natural resources, navigation, and safety. He suggested the worth of the readoption process might be underlined because it helped motivate the restructuring of 312 IAC 11, which formerly governed diverse “lake construction activities”, to apply exclusively to the Lakes Preservation Act. 312 IAC 11 now references “public freshwater lakes”, the statutory definition that is the threshold for the Lakes Preservation Act. These adjustments were completed before bringing 312 IAC 11 to the Commission for readoption. There were no public comments concerning the readoption, and readoption of the existing language is recommended.

Donald Ruch moved to approve for final readoption 312 IAC 11 governing public freshwater lakes. Brian Blackford seconded the motion. Upon a voice vote, the motion carried.

Consideration for recommendation of final action on readoption of 312 IAC 12 governing water well drilling and groundwater; LSA #11-177(F); Administrative Cause No. 11-002W

Steve Lucas presented this item on behalf of Jennifer Kane, Hearing Officer. He said for consideration was readoption of 312 IAC 12 governing water well drilling and groundwater. The proposal generated no public comments.

Donald Ruch moved to approve for final readoption 312 IAC 12 governing water well drilling and groundwater. R. T. Green seconded the motion. On a voice vote, the motion carried.

Consideration for recommendation of final action on readoption of 312 IAC 23 governing state historic rehabilitation tax credit; LSA #11-103(F); Administrative Cause No. 11-04H

Steve Lucas presented this item on behalf of Jennifer Kane, Hearing Officer. He said for consideration was readoption of 312 IAC 23 governing the state historic rehabilitation tax credit. The proposal generated no public comments.

Brian Blackford moved to approve for final adoption 312 IAC 23 governing the state historic rehabilitation tax credit. Robert Wright seconded the motion. On a voice vote, the motion carried.

ADJOURNMENT

The meeting was adjourned at approximately 8:10 p.m., EDT.