ADVISORY COUNCIL
Meeting Minutes of June 12, 2013

ADVISORY COUNCIL MEMBERS PRESENT

Patrick Early, Chair
Hon. Thomas Johnson
Bart Herriman
Bill Freeman
Ross William

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Cameron Clark	Executive Office
John Davis	Executive Office
Chris Smith	Executive Office
Cheryl Hampton	Executive Office
Scotty Wilson	Law Enforcement
Steve Hunter	Law Enforcement
Mark Reiter	Fish and Wildlife
Linnea Petercheff	Fish and Wildlife
Phil Bloom	Communications
Mark Basch	Water

GUESTS PRESENT

Lyan Derns	Barbara Simpson
Dean From	

Call to order

Patrick Early called the meeting to order at 10:22 a.m., EDT, at the Fort Harrison State Park Inn, 5830 North Post Road, Roosevelt Room, Indianapolis, Indiana. With the presence of five members, he recognized a quorum.

The Chair introduced Cameron Clark, the newly appointed Director of the Department of Natural Resources. Clark is also the Secretary of the Natural Resources Commission.

Clark said that he plans to attend future Advisory Council meetings to "see you in action and listen". He invited Advisory Council members to contact him at any time.

The Chair also introduced and congratulated Chris Smith for his recent appointment as the Deputy Director for the Bureau of Resource Regulation.

Chris Smith thanked Mark Basch and his staff in the Division of Water for "putting up with a lot of inquiries, complaints, and questions during the past summer season where we did have the drought going on. In my previous position, we got a lot of contacts from local Legislators and local government officials on people who had well issues. Mark and his staff find themselves continually in the middle of those arguments, and they present themselves in a very professional manner and often times are very good at settling it with very reasonable methods."

John Davis, Deputy Director of the Bureau of Lands and Cultural Resources, congratulated Chris Smith on his recent appointment as the Deputy Director for the Bureau of Resource Regulation. He said Smith was previously "Acting Deputy Director and replaced Ron McAhron, who retired several months ago.

Approval of minutes of meeting held on February 13, 2013

Bart Herriman moved to approve the minutes of the meeting held on February 13, 2013. Hon. Thomas Johnson seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommendations for preliminary adoption of amendments to IC 14-25-4 and 312 IAC 12 governing water well drillers and pump installers; Administrative Cause No. 13-080W

Mark Basch, Section Head for Water Rights/Use in the Division of Water, presented this item. Initially, he provided newly designed brochures that explain water rights law (IC 14-24) and the well drillers construction standards (312 IAC 12). The brochures were designed by DNR's Division of Communications.

Basch said proposed are amendments to IC 14-25-4 and 312 IAC 12 governing water well drillers and pump installers. IC 14-25-4 addresses the emergency regulation of groundwater, which provides protection to small capacity well owners against the impacts of high capacity groundwater pumping. He said IC 14-25-4 "was used several times this past summer as you can imagine." 312 IAC 12 establishes minimum construction requirements, primarily dealing with "available drawdown" if a pump must be set at a certain well depth for protection under IC 14-25-4. "These provisions are not mandatory. They were left up to the discretion of the homeowner. However, if you didn't meet these standards, and your well was drilled after January 1, 1996, a small capacity well, if it was affected by a high capacity pumping, you didn't have protection under [IC 14-25-4]. Actually, it was somewhat of a compromise that allowed water levels to be impacted by large capacity users to some extent, up to a point, where then they would allow some water above the pump setting at the time when the wells were installed."

Basch said the Water Well Drillers Act (IC 25-39) was amended in 2010 to require the licensing of water well pump installers. Continuing education was required for licensed water well drillers and water well pump installers. In addition, the rule now includes minimum construction standards in regards to the available drawdown. The standards require a 20-foot drawdown in a well drilled in unconsolidated aquifer system, such as a sand-and-gravel well. "That means the pump has to be at least 20 feet below static water level at the time the well is installed." In a bedrock well, such as a limestone well or shale, the pump setting is required to be 50 feet below the static water level. "These standards are no longer voluntary but are statewide water well construction standard requirements." A variance from the required standards can be approved.

Basch said the proposed amendments to IC 14-25-4 and 312 IAC 12 would provide consistency with the statewide standards for well construction. Legislative action would be required to amend IC 14-25-4. Basch said the Division of Water requested the Advisory Council to recommend to the Natural Resources Commission that preliminary adoption be given to the proposed rule amendments.

Bill Freeman asked whether the rule proposal would affect cisterns or ponds used for domestic water.

Basch answered, "No. A cistern, a true cistern, where it is just a holding tank, the amendments wouldn't address that." The Surface Water Rights Act (IC 14-25-1) provides protection for persons with freshwater lakes of at least ten acres if impacted by high capacity pumping. "The proposed standards would not affect either situation."

Basch stated that the "Water Rights statute is somewhat self-regulating. Usually, where there are areas where you don't have any groundwater availability, which is why folks have ponds, typically you are not going to have high-capacity wells pumping and lowering water levels and causing failures. Most of [the Division of Water's] involvement in the Water Rights statute is north of Indianapolis where there is substantial groundwater availability".

The Chair asked whether the high capacity water withdrawal facilities were "dropping the water levels? Is that something you've had to deal with already?"

Basch noted that the "water rights statute was enacted in the early 1980s, due to the Prudential incident, and was expanded statewide a couple of years after enactment." In 2012, the Division of Water investigated over 200 water rights complaints from "folks who believed they were being impacted by high capacity pumping." He said "high capacity" means 100,000 gallons per day or greater, and the impacts withdrawals high-capacity "facilities are having on wells that are less than that capacity. A lot of the investigations we made last summer involved impacts, and the owners of the high-capacity facilities were required to reimburse folks for well work, which was mainly costs to lower pumps in existing wells and sometimes replace well, or hooking up to city water. The statute provides that recourse for folks." He said last year's drought,

combined with agricultural irrigation and public water supply withdrawals, resulted in many complaints and ensuing investigations.

Freeman continued, "If I wanted to circumvent the law, can I just build two 95,000-gallon-per-day wells spaced 50 feet apart and be within the law, or is it per user?"

Basch responded that under the IC 14-25, the Division of Water "looks at the facility, and it is the aggregate of water withdraw capacity. Really, 70 gallons per minute is about the cutoff line for 100,000 gallons. It is just capacity that we are registering. If you have two 35-gallons-per-minute wells, and they both supply the same end point, then that would be considered a significant groundwater withdraw facility."

Bart Herriman asked whether the requirement in 312 IAC 12-2-4(a)(1) was to protect a homeowner from a noncompliant facility that is located nearby.

Basch responded, "The reason the amendments were made initially to the well drillers statute is because a lot, at the time, of the plumbers and well drillers didn't understand what the water rights statute really required them to do to inform homeowners. Because if they were to put a well in that didn't meet these standards, the statute requires the homeowners to be informed of the provisions of the water rights law. In fact, that there were these available drawdown requirements, and particularly if their well didn't meet those standards, that they wouldn't have the protection under the water right law. That burden was kind of put on the plumbers and well drillers under the statute. Again, even though we provided information for them, like these brochures, a lot of them really didn't understand what their responsibility was." He said the amendments proposed to 312 IAC 12-2-4 would provide that the water well driller or pump installer would need to notify the homeowner of the water well construction requirements. "But also, drillers and pump installers would contact the Division of Water to request a variance to be able to install a well that doesn't meet these provisions under the well driller's statute. Really, these aren't burdensome at all. Most drillers and pump installers install wells that meet these standards regardless of what the rule requires. The rule amendment requires notification to homeowner if their well would not meet these standards." Basch said the variances are given a number and logged by the Division of Water.

Herriman then asked about the criteria used to determine whether or not the nonconforming installations can be made.

Basch responded, "It would be a variety of things. Generally, it would be a situation where the resource itself wouldn't support a well installed in that manner, sand, gravel, or just the limited thickness of the well. If a well is installed too deep, they run into poor water quality or run out of the water altogether. Typically, that would be the type of situation where they would not necessarily meet these provisions. Again, they are not burdensome, and most wells in the state follow these standards." He added that IC 14-25 uses a maximum drawdown of a particular aquifer. "So there is another check and balance there, too. Usually if you have a very limited amount of water availability, there is not going to be a high capacity facility licensed in the area."

Ross Williams asked if it was the purchaser's responsibility or the driller's responsibility to follow the construction standards.

Basch said it is the responsibility of the water well driller and the pump installer to meet these standards.

John Davis observed for the proposed amendments to IC 14-25-4, "this Council could do what you've asked and the Commission does the preliminary adoption. Then I guess that action would just turn into testimony in the Legislature that these two bodies recommended this change to the [Indiana] Code?" Basch answered in the affirmative.

Davis asked about the average depth of water wells in Indiana. Basch said the average well depth in the State of Indiana, depending on location, is about 150 feet. "In northern Indiana wells may only be 50 feet in depth, and in the southern part of Indiana and other areas wells could be 200 to 300 feet in depth."

Davis reported IC 14-25 was enacted as a result of the 1985 decision in *Prohosky v. Prudenital Ins. Co. of Am.* The Karlock/Fair Oaks Farm irrigation system in Newton County straddled I-65 and affected adversely several neighbors. DNR staff now review rules and existing situations "to fill the gaps" of jurisdictional authority.

The Chair said, "We don't put regulations in place for the sake of regulations. We are just trying to make sure the public good is served, right?"

Davis answered, "The ultimate test—is there is often a little crack in [a rule]? The public, in a few years of [experience with] a rule, will find whatever little place that is in there to construct a project just below" the Department's jurisdictional authority.

Judge Thomas Johnson asked how many high capacity withdraw facilities are located in Indiana. Basch answered there are over 3,800 registered significant water withdraw facilities, including wells and surface water intakes, that can withdraw 100,000 gallons per day or more. "There are over 4,000 domestic well records in the Division of Water's database, which probably represents about half or less of existing domestic wells."

Judge Johnson then asked if "a homeowner is going to drill a well out in the country, can he go somewhere and find out if someone else in the area has a high capacity well that may affect them getting water?"

Basch responded the Division of Water has received many calls. "In the last couple of years, we've had about 150 new registered facilities in the irrigation category…. About two-thirds of the registered facilities in the state are in the irrigation category." The database is available on the Division of Water's webpage, and many of the drillers and pump installers inform homeowners of the existing facilities. "We will actually check water levels and document baseline water levels for folks in a lot of areas to be able to validate. We don't have to do that under the law, but it helps us to evaluate things."

Freeman asked if municipalities with high-capacity wells "fall under the same regulations?" Basch answered in the affirmative, and he added several municipalities "were actively involved last summer in reimbursing owners of impacted wells."

Bill Freeman moved to recommend preliminary adoption of amendments to 312 IAC 12-2-4 and to recommend the Commission endorse the amendments to IC 14-25-4, as presented by the Division of Water, governing water well drillers and pump installers. Bart Herriman seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommendations for approval of new rules to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit issued by the Division of Water under IC 14-26-2, IC 14-28-1, or IC 14-29-1; Administrative Cause No. 13-088W

Linnea Petercheff, Information Specialist with the DNR, Division of Fish and Wildlife, presented this item. She said the Division of Water is the licensing authority for IC 14-26-2 (sometimes referred to as the "Lakes Preservation Act"), IC 14-28-1 (sometimes referred to as the "Flood Control Act") and IC 14-29-1 (sometimes referred to as the "Navigable Waters Act"). The Division of Fish and Wildlife also reviews applications for each of these Acts with respect to impacts to fish, wildlife or botanical resources. The Division of Fish and Wildlife is proposing to add a new option for mitigation of the adverse environmental consequences result from some of the activities that can be licensed through these Acts. Mitigation plans are often required and submitted that restore and establish habitat as a result of a permitted project, and the habitat is usually onsite or near the construction site and within the watershed. The proposed rules would allow an applicant to submit a payment to the Indiana Natural Resources Foundation to serve "as their mitigation for these impacts. The funds would be used to establish or restore, or a combination of…habitat for fish and wildlife resources."

Petercheff said both Kentucky and North Carolina have an in-lieu fee program, and it is also used for permit mitigation through the U.S. Army Corps of Engineers. "This option is especially important for INDOT and other businesses that do large-scale projects around the state." INDOT and pipeline company projects usually span multiple stream crossings and multiple counties. INDOT is currently working with the Corps and IDEM on establishing the in-lieu fee program through the Corps. "They have a whole separate document, an instrument that has to be prepared for the Corps to approve in-lieu fee for their permits."

Petercheff explained an applicant would be required to submit a request to use the in-lieu fee option and explain steps to avoid, offset, or minimize impacts at the project site; the reasons for the request; and the proposed fee amount. The request would be subject to DNR approval. She said minimum and maximum fees would be established either by habitat or region within Indiana in a nonrule policy document approved by the Natural Resources Commission. "Since this is a new program and flexibility is needed, we believe for the fees, as we first get started in this, we thought a nonrule policy would be

better to establish those fees in case changes are needed over the course of time." She said the Department routinely establishes fees through nonrule policy documents, such as the hunting, fishing, and trapping fees. The proposed fee nonrule policy would be presented to the Advisory Council later this year.

Petercheff said the in-lieu fees would be deposited and managed through the Indiana Natural Resources Foundation. "Having small mitigation sites scattered throughout the state is not only expensive and labor intensive, but it may not result in the best benefit for our fish and wildlife resources". The in-lieu fee option can provide "better habitat and desired locations, usually larger sites and in certain locations where we believe the work needs to be done that could be of the most benefit."

The Chair asked for clarification. "Right now, when [license holders] are doing things that have impact, they have to do a mitigation project, and it might be wetlands or something else. You're saying in lieu of [license holders] doing small scale mitigation projects, let the [license holders] pay a fee?" The funds would be paid to the Indiana Natural Resources Foundation. The Foundation would then "decide where the money should best be spent on these wildlife type projects. Is that what you're talking about?"

Petercheff said the Natural Resources Foundation would have a committee to review projects, a review process similar what is used for projects funded by the Lake and River Enhancement Program. Habitat would be performed by other than a license holder. A license holder would pay "into a program instead of doing that work on the ground." She said developing an onsite mitigation plan is very detailed

Davis added an applicant's proposed mitigation plan responsibilities would be translated into costs. "That's why the cost per acre will probably be big because it will be about monitoring, keeping people off, planting the right things, [and] making sure they survive." The Natural Resources Foundation will "only be able to spend [the funds] under certain guidelines... It's not exactly that the Foundation gets to decide, because they have to decide within the guidelines of the agreement, which will have some guidelines about watershed, how far away, right?"

Petercheff said, "Yes. There is a review team that would review and approve projects, and make sure the funds are being used for the purposes for which they were deposited." Kentucky sets its in-lieu fee structure based on region in the state, and North Carolina sets fees based on habitat type. "We have a document that has twelve natural regions in the State of Indiana, and we are looking at setting fees maybe based on regions." The in-lieu fee program is "not intended to make it an easy way out for people, but to provide better mitigation for our resources. There are a lot of factors that will be reviewed. They can't just wipe out a mussel bed…or an endangered species".

Davis said, "We are very careful. We're not giving up the old saw 'avoid, minimize, mitigate'."

The Chair asked who would be a typical applicant.

Petercheff said that it could be "INDOT, businesses, pipeline companies, urban subdivisions, so both public and private entities may be approved to pay an in-lieu fee."

The Chair asked, "If the imposition of fee is through a nonrule policy document, "is anybody going to pay it?"

Petercheff said the requirement to pay the in-lieu is in the proposed rule. "We have rule language that says they would have to pay a fee, and the Department has to approve that fee. It's just that we had discussion with the INDOT and the IDEM already on this, and they were very concerned about fees being set in rule where they are very difficult to change, especially as we are starting the program, and the Corps may be involved in some of these. We want to have a little flexibility." She then provided the Advisory Council copies of North Carolina's fee structure. "It's not necessarily cheap, especially if there is a wetland involved. We would be looking at a minimum and maximum. If the habitat is really high quality, it would be more along the lines of the maximum."

Smith noted that the hunting and fishing license fees are set through a nonrule policy document. "In the end, they are either going to agree to pay the fee or they're not going to get the permit to do the work. So there is a hammer to that".

Davis asked whether the nonrule policy document would cover the fee amount only.

Petercheff responded the Department is requesting a recommendation for approval of rule language by adding 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impact to fish, wildlife, or botanical resources. 312 IAC 9.5-3-1 sets forth the requirements, and 312 IAC 9.5-3-3 addresses the Department's review and evaluation of requests to pay an in-lieu fee. If an applicant proposes a fee that is not in the fee range in the nonrule policy document, the Department would deny the request. "The rule language sets process and evaluation. The nonrule policy [document] would just set the fees."

Herriman asked whether the Department consulted with the conservation groups in drafting the proposed rule.

Petercheff said the Department did not consult with conservation groups in drafting the in-lieu program proposal. "This is something that INDOT has asked for, for many years. Several other States have it. The Corps would like us to do this. It is something that we think would be very helpful for some large-scale projects that we have been dealing with the past couple years. It has been extremely difficult for some of these businesses and INDOT to be able to do the mitigation at the project site or within the…watershed. We need to have another option for them. This is something that other States have done, and it has been very successful in doing some great restoration projects on the ground." She said, "Kentucky has great information on its Website for all projects funded through its in-lieu fee program." The Department would enter discussions with the conservation groups and other groups as the rule proposal moves through the rule adoption process.

Herriman asked about DNR authority to address failure by a license holder to comply with a mitigation plan.

Petercheff explained a mitigation plan is typically a license requirement. Action can be taken if license requirements are not fulfilled.

Herriman stated, "In 1996, I think, the City of Indianapolis and the Corps of Engineers pulled a permit to build in a floodplain for a levee project. They were supposed to remediate. They never remediated anything, and they have come back to get another permit, which was granted by the Division of Fish and Wildlife."

Petercheff again noted the licenses under consideration are issued through the Division of Water. The Department can bring an administrative action to suspend or revoke a permit, to assess civil penalties, or "to stop a project that is being done without a permit. I cannot answer to why a particular project that something was done and not enforced."

Davis asked if the license Herriman referenced was issued to the Corps.

Herriman responded, "No. This was a Corps project and the City of Indianapolis was a sponsor. The City applied as a sponsor to build a levee back in 1996." The City agreed to mitigate "30 to 50 acres of hardwoods that were cut down and…didn't do it. I think Fish and Wildlife…drafted a fairly scathing letter that [the City and Corps] are out of compliance, but then issued the permit to them…. It seems to me that if someone is in violation of their remediation obligations in the past, they shouldn't be issued a permit."

Davis said he would look into the permits and remediation plan.

Freeman asked who controls and owns the Natural Resources Foundation funds. "My concern is…the Legislature may take that money."

Davis said the Foundation was deliberately chosen "so that the money would be there only to be used for specific use." The Legislature created the Foundation as a "body corporate and politic." The Legislature does not have the ability to take funds from the Foundation's restricted accounts. Those paying the in-lieu fee are "going to want assurance that that money is safe, that it's going to be spent for mitigation."

Freeman asked whether the in-lieu funds are being collected to complete a mitigation project on the scale of Goose Pond, and whether a large project would be constructed on private or public lands. "My other concern is that government always seems to underestimate the cost of things…."

Petercheff said, "The intent is not to let the person who gets the permit off the hook. The work would be done on public or private land. It isn't intended for work to all be done on State property."

Freeman asked, "So how would work get done on private property—through grants?"

Davis responded, "This is just a piece of our options, this payment in-lieu." There are also wetland banks being established around Indiana, about five or six, and one in Henry County located at the head of the White River. "All of the mitigation will have to be in watersheds related to where the disturbance was." Private contractors can work with a private landowner. The Nature Conservancy may have a roll in the privately-owned wetland bank—as an option to fulfill mitigation. "A contractor can come through our program and pay an in-lieu fee, and we would do a project in that same watershed," such as at Mounds State Park. "It's possible we could have a wetland restoration in Mounds State Park that fed into the river…, or we could have another Fish and Wildlife Area. There could be a private person that we know through our partnership with the Natural Resources Conservation Service." A farmer may have a wetland that could be restored funded by the Foundation for an in-lieu project. "We wouldn't own it, but there might be an NRCS conservation easement or a long-term DNR conservation easement." He said there would be further discussion regarding the intricacies of the project review process.

Freeman added, "My biggest concern is that we try and have a program that will increase the number of wetlands and mitigation areas in the State and not decrease it." He asked whether funds from the in-lieu fee program could be used to buy private land that may lend itself to a mitigation site.

Davis answered, "Absolutely. I think we think that's probably the most common model. We buy a piece, and do a restoration, and have it be permanently protected."

Barbara Simpson, Executive Director of the Indiana Wildlife Federation, said her comments had "not been well-worked with our board or anyone. The in-lieu fee is something we are all learning a little bit about." She understood an in-lieu fee program "can be very good," but she did not have personal experience. "Conceptually, in-lieu fee can be a very good program. It can really address issues that have come up about habitat fragmentation." Aggregating restoration sites is beneficial, which may increase the success of a mitigation project. "The failure rate on these restorations is pretty high, so you have to go in and redo it to be really serious about it being permanent." The program would need to be set up properly right from the beginning. "If we get it wrong, it is going to be difficult to change that. I tend to like what I heard about the nonrule approach at first, but these fees that are going to be charged have to be high enough to cover the fully loaded cost of the mitigation project. That means the staffing, the monitoring, the maintenance to ensure the success, and then redoing the projects that fail. It's a long-term commitment. The end result has to be mitigation that is stable and permanent."

Simpson suggested that language be added to the draft rule to include clarifying points on details, such as defining habitat. "A big point that has come up that we need to be aware of is staying in the same watershed…control it by watershed level". A HUC (hydrologic unit code) 8 "may be a little bit big, maybe more like a HUC 10". More attention should be given to restoration of nongame species habitat, and detailed performance criteria are needed. "We need to have detailed requirements spelled out…for a mitigation ratio. If

you foul up one acre, do you have to do two or five? There is a larger ratio. It's not a one-to-one replacement." Funding for long-term maintenance and management should be included, and projects need to be completed in a timely manner. "Many of the mitigation projects are in the headwater streams, and that's why it's important to do them right, and to do them early and help protect the bigger rivers down the watershed." It must be clear who controls the mitigation project, and there must be accountability. The Division of Fish and Wildlife is short of staff and resources. "I think it makes sense" for the in-lieu program to be in the Division of Fish and Wildlife. "The practical expertise of wetland restoration is probably the Fish and Wildlife group, generally, but hunters and anglers don't want to see this be a burden to the budget they already have."

Simpson noted proposed 312 IAC 9.5-3-1(c)(3) would require an applicant to propose amount of fee. "I definitely think the State needs to indicate what the fee will be…. The State should have guidelines" with "all the fully loaded costs".

The Chair expressed appreciation for comments and suggestions. "What we are really talking about is instead of a lot of little tiny (in some cases, meaningless) mitigation…, you are taking a more strategic approach to it." The proposed in-lieu fee program can be more beneficial to Indiana.

Freeman said he agreed with the Chair and supported the general concept of the in-lieu fee program.

Herriman asked whether the Advisory Council should address Simpson's comments regarding 312 IAC 9.5-3-1(c)(3) today.

The Chair stated, "I don't think so, because again, this has…a long way to go as it works its way through the rule process. I think this is very preliminary. Do we agree conceptually that this is a good route to go, rather than trying to work through the details of how we address the fees? We typically won't get into specific detail on things like that because it's going to change, and really the experts try to assess the best way to go."

Freeman said, "I think the experts have heard the concerns that we have come up with, and they will have to decide whether they want to change their approach."

Herriman added, "I just don't want to kind of rubber stamp something… There have been good points brought up. I guess I would certainly support this so long as the experts do consider many of the issues that were brought up by Barbara" Simpson.

Davis asked Steve Lucas, Director of the Commission's Division of Hearings, regarding whether amending the rule proposal at a later time would be problematic.

Lucas said his impression was the Division of Fish and Wildlife also anticipated "a nonrule policy document to kind of paint between the lines. It could be that the fee-related issues would be massaged by the nonrule policy document. There is no reason that the nonrule policy document could not also come to the Advisory Council to begin to

give more substance to the structure that is in the rule…. It would be my suggestion…to look at the nonrule policy document" before the rule is committed to public hearing.

Davis asked, "So you feel…the way it is would allow us to receive a proposer's suggestion of a fee, have a nonrule policy document that set out fees for various kinds of disturbance…for us to make the decision that we are not going to accept the proposed fee, that the fee needs to within the range in our nonrule policy document…? I just want to make sure the rule is the framework that lets us make those decisions."

Petercheff suggested language could be added to the proposed rule that the amount of the fee must be in accordance with a nonrule policy document approved by the Commission.

The Chair suggested, "Couldn't we also put in some statement that says something to the effect, that because conditions vary…, the reasonableness of the fee will be determined based upon the site and the amount of mitigation the DNR determines needs to be completed".

Davis suggested removing subsection (c)(3), but asked "What would we lose, anything?"

Lucas responded a structure for the fee is needed. "I think you can legitimately do it the way Linnea [Petercheff] suggested, and that is you cross-reference a nonrule policy document. The way rule adoptions work is that if you are cross-referencing a nonrule policy document, you have to have a specific nonrule policy document."

Davis said he agreed with Lucas's assessment. But "I don't see what the proposer naming a fee accomplishes. Do we do that anywhere else? Does a proposer come and say I want a water permit, or I want to buy a license, and I propose this fee? It seems an odd thing to me."

Lucas said use of the term "fee" in the rule proposal might be a little confusing. "What we are really talking about is mitigation. If you talk about mitigation now…, I think the applicant comes forward and says 'This is the mitigation that we propose to do.'" With the proposed rule, instead of proposing to do mitigation, the applicant is proposing an amount of money for someone else to do mitigation.

Davis continued, "It's related to the idea that the applicant proposes and submits a mitigation plan…. We say 'You have to replace an acre of forested wetlands', and the applicant then goes out, looks for an acre of forested wetlands. And then says 'How about this acre of forested wetlands?' …I can see the connection, but still proposing a fee, I guess, that the applicant saying 'I disturbed a $50,000 acre as opposed to a $75,000 acre.' So he is proposing what will be replaced."

The Chair said, "I'm not sure we are going to get here in this setting, right now…. I don't hear something that sounds like it's ready to go to the Commission yet as a proposed rule, unless you have some way to fix what these concerns are."

Petercheff said that 312 IAC 9.5-3-1(c)(3) could be deleted. "So it's not something they propose to us. We review it and tell them what the fee is." If 312 IAC 9.5-3-1(c)(3) is removed, then the applicants will not have the option to propose the fee.

The Chair observed applicants will not "have to accept the fee in-lieu. They can do the mitigation. I think it makes more sense…that [DNR] tells them this is what the fee in-lieu of is. That's a site specific determination that somebody who knows what they are doing makes…. We are all more comfortable with [DNR] telling them what the fee is than them proposing the fee."

Director Clark said removing the requirement in subsection (c)(3) "is probably a good idea. In either case, an agreement has to be reached. If an agreement isn't reached they can default back to doing [the mitigation] themselves, or it's reviewable." He said the Department would focus on the fee schedule, whether the fee range is based on region or habitat type. "But I think it's probably important to have a range within a nonrule policy document so the applicant can make an informed decision right off the bat." He said the rule language would be fine-tuned through a nonrule policy document and presented to the Advisory Council for discussion.

The Chair asked, "Would the process be that we go forward with the [recommendation for] preliminary adoption of the rule that refers to a nonrule policy document that is in process?"

The Director said the rule adoption process is "long enough that in the interim we could be working on the finer details" of the nonrule policy document. "You would all then be able to focus in on what you would think would be the potential loopholes that a contractor might be looking to take advantage of."

Bill Freeman moved to recommend preliminary adoption of 312 IAC 9.5-3 establishing an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a license issued by the Division of Water under IC 14-16-2, IC 14-28-1, or IC 14-29-1. The recommendation would implement the proposal from the Advisory Council, but with removal of 312 IAC 9.5-3-1(c)(3). Ross Williams seconded the motion. Upon a voice vote, the motion carried.

Introduction to consideration of recommendations for shooting preserve welfare standards; Administrative Cause No. 13-098D

Steve Lucas introduced this item and said it was coming before the Advisory Council "from an unusual angle". He explained the Commission's Division of Hearings does a "variety of things for the Commission, most of those relate to DNR functions" including facilitating rule adoptions and adjudications of decisions that come through the Department, such as licensure or enforcement. Administrative law judges in the Division of Hearings also serve the Geologist Licensure Board and the Soil Scientists Registration Board. But for most proceedings, the Department is a party or is regulating part of the

functions. "The most common scenario…is that after the administrative law judge goes through the process and conducts a hearing…then [the administrative law judge] enters findings of fact and conclusions of law with a nonfinal order." A party can file objections to the nonfinal order, and the objections are reviewed by the Commission's Administrative Orders and Procedures Act (AOPA) Committee. This five-member committee appointed by the Commission Chair hears oral argument and makes a disposition that may affirm, modify or remand the nonfinal order to the administrative law judge. The AOPA Committee's final decision is subject to judicial review.

Lucas said he was the administrative law judge in *Markland v. Crack of Dawn Hunt Club & DNR*, Administrative Cause Numbers 11-171D and 12-125D. The nonfinal order was included in the Advisory Council's agenda packet, and objections were filed by Markland. The AOPA Committee may hear the objections in July. Lucas emphasized that he would not discuss or participate in a discussion of the merits of the nonfinal order, and the Advisory Council could not modify the nonfinal order. After introducing the agenda item, he said he would excuse himself from the meeting.

Lucas indicated *Markland* is about a shooting preserve, and Findings 39 and 40 set forth the crux of the matter "as I see it before the Advisory Council":

> 39. …IC 14-22-2-6(b)(2) requires that rules be based on data relative to the following:
>
> (A) The welfare of the wild animal.
> (B) The relationship of the wild animal to other animals.
> (C) The welfare of the people.
>
> The Fish and Wildlife Act anticipates the issuance of a license to conduct a shooting preserve would be based on an inspection performed under IC 14-22-31-12(b) and IC 14-22-2-6(b)(2).
>
> 40. Rules have not been adopted that consider issues particular to IC 14-22-31 and the operation of shooting preserves. Nothing in the record indicates that the Commission has been requested to consider whether rules should be adopted to implement IC 14-22-2-6(b)(2) for a shooting preserve.

Lucas said Finding 42 sets forth a previous example of the initiation of rule adoption as a result of an administrative decision regarding a separate matter involving group pier placement in public freshwater lakes.

Lucas continued, "I certainly have no recommendations, what rules there should be, or if there should be any rules. I don't think that's my business…. A nonrule policy document might be considered. We have the two [Department] divisions here that are most intimately involved with this law, the Division of Fish and Wildlife and the Division of Law Enforcement. They may have ideas, and I hope they will share whatever ideas they have after I leave…. I'm not asking that any action be taken today. I'm not asking this go on to the Commission. I'm putting it on your plate and asking you to take a look at it."

The Chair asked, "You're saying that there was some action that came before you relating to shooting preserve?"

Lucas responded the information contained in the Advisory Council agenda packet is the nonfinal decision regarding a shooting preserve license issued to the Crack of Dawn Shooting Preserve in Jasper County.

The Chair then asked, "What you are saying is that [DNR] really [doesn't] have at this point in time…rules that relate to shooting preserves?"

Lucas answered, "I think actually that is an accurate blanket statement, although [Markland's] particular concern here had to do with the welfare aspect."

The Chair asked, "So the question that you are putting on the table is…usually when we identify some gap in our rules that creates interpretation problems for you guys judicially or even on up the line, then we try to close those gaps. In the way we typically close them is by adopting rules. So, there is some question as to whether or not there need to be more complete rules adopted that would relate to shooting preserves. Is that accurate?"

Lucas answered in the affirmative. "If you focus in on [Findings] 39 and 40, you will see at least what I saw as a concern based on the evidence that was given to me. Finding 42 talks about how the AOPA Committee addressed this in a totally different context but similar problem."

The Chair asked whether shooting preserves were licensed in Indiana.

Lucas answered that shooting preserves are licensed in Indiana. The subject matter is a particular shooting preserve license. "In this case, the applicant sought a license for a shooting preserve. DNR granted that application, and a neighbor…remonstrated against the granting of the license."

The Chair asked whether shooting preserves in Indiana were limited to birds. Petercheff answered in the affirmative.

Davis observed, "You had the case. You had the objections. You looked and saw that there were no standards. You're thinking there should be standards to issue a license or maybe not? You're bringing it up. So this is just a route to a discussion here that might result in a rule or something or it might not…."

Lucas answered in the affirmative and repeated he would leave the room when substantive discussions are held. "I would frankly probably just sit on this for a few months, but this shooting preserve license is for one year, and this proceeding started with the 2011 license. The proceeding took long enough that we then also incorporated the 2012 license. At least it was my hope there could be…consideration of 'yes', 'no',

'maybe' [to rules under IC 14-22-2-6(b)(2)] before the next licensure cycle comes up in September."

Herriman noted, "Just to be clear, it is my understanding that you cannot pass a law or a rule that has retroactive application."

Lucas said he agreed with Herriman's assessment. "I told the parties that I was going to present this to you today…, and I said to them that this would have only prospective effect. It wouldn't apply to this particular case." He said he invited the parties to attend the Advisory Council meeting but did not believe any party other than the Department was present. Lucas then left the meeting.

The Chair asked how many shooting preserves are licensed in Indiana.

Mark Reiter, Director of the Division of Fish and Wildlife, said there are 39 licensed shooting preserves.

The Chair asked whether adjacent landowners to shooting preserves typically protest licenses.

Reiter answered, "I don't think we get very many protests." The Claimants were concerned about the shooting and the noise. Reiter said he is an NRA shooting range technician and reviews locations where people want to start a shooting ranges. "A lot of that kind of goes back to zoning. All the counties zone shooting ranges differently." Some counties categorize shooting ranges under agriculture, and other counties as commercial enterprises. Counties review shooting ranges and take into account the noise, and whether the noise is a nuisance to surrounding property owners. "I think that at some point, because of the noise generated at a shooting range and at a shooting preserve, the proximity of neighbors and tract sizes are getting smaller and smaller. You have a better chance of having more neighbors all the time…that maybe it's something that should be taken under consideration. Zoning usually does that, and it gives the opportunity for the public and the neighbors, in particular, to kind of weigh in on what's going on in that tract of land. We thought that that is where we ought to start is require a shooting range to have the [applicant] to talk to the [county] zoning board and make sure it's zoned" and to provide public comment. "If the [county] zoning commission doesn't have a problem with it, we don't."

The Chair asked, "So, you don't think that it's necessary that DNR have more rules relating to this? Just leave it to the counties to deal with it from a zoning standpoint?"

Reiter answered, "Right. I think especially in this particular situation where Steve [Lucas] is kind of homing in on the noise of the shooting is that we would have to establish some protocol to have meetings with the neighbors and things like that. I think there is already a process out there for that".

Freeman stated that he thought the issue was the welfare of the animal.

Reiter said that among other issues associated with the adjudicatory case, there were concerns regarding welfare of the animals, welfare of the people, and relationship to those animals to other animals. "It says DNR shall make rules under those considerations."

Davis asked whether DNR has any rules regarding shooting ranges.

Reiter said a rule is proposed regarding the requirement to post signs on the perimeter of shooting preserves.

Petercheff said that proposed rule to post signs at shooting preserves was given preliminary adoption by the Commission in November 2012. "I have been involved in this case, and I am the one who issues shooting preserve licenses…and conservation officers do inspections every year and do an inspection report. [Conservation officers] check several different things to make sure they are in compliance with the statute, but there has not been a rule in place in the past to deal with the situation with adjacent landowners." The applicant was issued a shooting preserve license and has local zoning board approval. The shooting preserve is in a rural area and the nearest residence is hundreds of yards away. She said the Claimant, who operates a farm adjacent to the shooting preserve property, objected because of the noise. Petercheff said the Claimant objected, and claimed that DNR should have taken into consideration the noise level impact to the Claimant in consideration for the issuance of a license. "There is no rule or policy that talks to that effect. There is a statute that sets forth requirements for notice to adjacent landowners for certain licenses that the Department issues and this is not one of them." She added, "The rule that is in the process now only deals with signs. We were not given approval to move forward with language that would further regulate these shooting preserves."

Reiter said that "since so few appeals are received, and based on a lot of other things, we never felt like we needed to have other rules or further regulate shooting preserves."

Herriman noted not all counties have zoning boards or commissions.

Davis noted that there are standards in different rules regarding animal welfare. "Do we have statutes for cage sizes? Do we have that for birds?"

Petercheff explained that under game breeder licenses individuals are allowed to possess quail and pheasants, and there are standards for the enclosures for the birds. "When officers do inspections for shooting preserves, we already have them inspect those enclosures. In some cases, they already have a game breeder license…. In some cases, shooting preserves just buy the birds from a breeder and release them right away. They won't even house them. They just buy them and release them the same day." Conservation officers also review the daily records of the shooting preserve and boundary fences and signs.

Davis observed there are standards for animal welfare in the Indiana Code and the Indiana Administrative Code about which the "conservation officers are mindful of when they inspect the properties."

Reiter indicated that those not holding a game breeder's license can hold the birds for a couple days. If the owner of a shooting preserve holds a game breeder license, the conservation officers would inspect the holding facilities.

Johnson said, "Provided that [Lucas] had to present this to the Advisory Council today about the shooting preserve, and then he has to go back and tell those people that he did [present], and then he says that [the Advisory Council] didn't do anything, or that we tabled it".

The Chair explained that Lucas presented the agenda item, but he was not asking the Advisory Council to take any action. "I think he was using that one particular case as sort of saying there are issues that arise. I think what he was asking us is to consider whether or not we think there needs to be the preliminary steps of adopting a rule. [Lucas] left the room, and I think what Fish and Wildlife…told us is that they believe that these places are either in rural areas where hunting is part of the landscape anyway, or they are in areas that are subject to zoning. I think what I heard [Fish and Wildlife] say is that [Fish and Wildlife] didn't feel like any further rules or regulations were necessary. It's somewhat of an isolated case that someone has brought this up." He added, "It's possible that depending on what would happen in the courts, we may be forced to deal with it—not just from a practical standpoint that it makes more sense to have more rules. We all feel like there are enough rules."

Johnson said, "What I was thinking that since [Lucas] presented this…, then he let the DNR comment on it. The DNR's comment was 'We don't think we need any more rules.' I think that should be in the minutes."

Davis said, "I think we feel like the noise question is a zoning question."

Johnson said, "Right, but not every county has zoning."

Davis said, "That's right. They don't. So then there's not much relief for somebody who thinks their neighbor is doing something that is a nuisance." Davis said, "I feel uncomfortable having the law saying that the DNR is to write rules about this, and then it looks like we haven't written any rules. I guess I would contend that the animal welfare part, we have rules, but they are arrived at through a series of other" codified standards. "I think we're covered, but I can see how we might need to come back and make and maybe duplicate something, or say something, or reference to something."

Clark said, "Getting away from the animal welfare questions, we find ourselves, particularly Law Enforcement, taking a sideline seat when a local unit wants to initiate an ordinance that may not be congruent with some of our laws that our Law Enforcement Division has to enforce. There is the Home Rule Act out there, but there are times that

they will, either prior to us learning about it or even over our advice that they take into consideration, pass an ordinance that we don't necessarily agree with. With the difficulty for enforcement is that we can't go out and enforce every local ordinance out there. Zoning ordinance is a perfect example. We leave that up to the local units, local people, to establish and enforce. We are not in the business in setting noise, dust, and other standards that you would typically leave up to other authorities to do. The other part is if we start now trying to put together those rules, we're going to put together rules that are sometimes more strict and sometimes less strict than local standards that are already in place. Then you get into which ones are enforceable…. That's another reason we leave certain...human factors like this up to the local authorities. Animal welfare certainly falls on us."

Adjournment

The meeting adjourned at 12:35 p.m., EDT.