

NATURAL RESOURCES COMMISSION

Meeting Minutes, November 14, 2017

MEMBERS PRESENT

Bryan Poynter, Chair
Cameron Clark, Secretary
Bruno Pigott
Laura Hilden
Jeffrey Holland
Phil French
Patrick Early
John Wright
Bart Herriman
Bruce Walkup

NATURAL RESOURCES COMMISSION STAFF PRESENT

Sandra Jensen
Dawn Wilson
Scott Allen

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Chris Smith	Executive Office
David Bausman	Executive Office
Elizabeth Gamboa	Legal
Linnea Petercheff	Fish and Wildlife
Scott Johnson	Fish and Wildlife
Amanda Wuestefeld	Fish and Wildlife
Dan Bortner	State Parks
Marty Benson	Communications
John Bacone	Nature Preserve
Russell Retherford	Oil and Gas

GUESTS PRESENT

Lynn Burry	Erin Huang
Jason Masnick	Herb Higgins

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:05 a.m., EST, on November 14, 2017 at Fort Harrison State Park, Garrison, 6002 North Post Road, Ballroom, Indianapolis. With the presence of ten members, the Chair observed a quorum.

APPROVAL OF MINUTES

The Chair asked for a motion for the approval of the Commission's September 19, 2017 minutes.

Bart Herriman moved to approve the minutes of the meeting held on September 19, 2017, as presented. John Wright, seconded the motion. Upon a voice vote, the motion carried.

REPORTS OF THE DNR DIRECTOR, DEPUTIES DIRECTOR, AND THE CHAIR OF THE ADVISORY COUNCIL

Director Clark provided his report. The Director stated that David Bausman was recently hired as the new DNR Legislative Director. Bausman previously was employed with the Office of the Indiana Attorney General and the Indiana State Department of Agriculture (ISDA). The Director noted that Bausman, in his employment with ISDA, worked with the Department on common issues. The Director noted that Bausman has knowledge of how the Department functions and is ready for the task.

The Director stated that Lloyd Arnold was newly hired as the Director of the Division of Law Enforcement. He noted that Arnold, from southern Indiana, was a former Indiana State Representative and plans to attend the January 16, 2018 Commission meeting.

The Director stated that the bidding for the Yellowwood State Forest timber sale was completed on November 9, 2017. He stated that Hamilton Logging, Inc. was awarded the bid, a company who has also conducted other timber harvests on state forest property. The Director stated that timber contract requires Hamilton Logging to complete the harvest by the spring of 2018. He noted that there is opposition to timber harvests in state forests, and opponents were present at the Yellowwood State Forest timber sale voicing their objections civilly. The Director stated that those opposed to timber harvests in state forest properties indicated they would continue efforts to prevent the timber harvest from going forward.

The Director stated that the Division of State Parks will hold its #OptOutside Scavenger Hunt, an event where people can complete ten activities in a state park or reservoir on Friday, November 24, 2017. The Director stated that those competing in the activities will be entered in a drawing for a 2018 Annual State Park Pass. He stated that on November 24, 2017 there will be free admission to any state park or reservoir; 20% off of meals at any Indiana State Park Inn; a discount on toboggan rental at Pokagon State Park; and everyone who posts a photo or participates in the scavenger hunt will be entered into a grand prize drawing for a gift pack from the outdoor gear retailer, REI, located in Castleton.

The Director noted that the toboggan run at Pokagon State Park opens on November 24, 2017 and will close sometime in February 2018. He stated that the toboggan run will bring in business for the Potawatomi Inn Resort and Conference Center.

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, provided his report. Davis stated that November 14, 2017 begins the first day of deer reductions at several state parks and some select nature preserves, which also coincides with the beginning of prescribed burn season. He noted that some prescribed burns will be conducted during the winter. He explained that prescribed burns are an important part of controlling vegetation succession and the promotion of habitat for Indiana's wildlife.

Davis stated that a sign was erected at the Ten O'clock Line Nature Preserve in the Brown County State Park and dedicated to honor Bob Vollmer, a land surveyor with the Department. He explained that Vollmer turned 100 years old this year and continues to conduct surveys for the Department.

Davis stated that the Department removed the dam at the Fawn River State Fish Hatchery, located in Orland, Indiana. He stated that the Town of Orland built the dam in the 1930s, and the removal of the dam returns the Fawn River to a more natural state.

Chris Smith, Deputy Director of the Bureau of Water Resource and Regulation, reported that the Department hired Ryan Mueller as the Director of the Division of Water. Smith stated that Mueller was formerly the director of the water program in Missouri and brings with him a wealth of knowledge.

Smith stated that the Division of Reclamation is preparing for the Indiana Society of Mining and Reclamation Annual Technology Session scheduled for December 4 and 5, 2017, in Evansville, Indiana. He stated that there will be operators from Indiana attending the technology session to learn about professional development and to obtain needed license certifications. Smith stated that the second day of the session will focus on new mining techniques and equipment.

Smith stated that the Division of Entomology and Plant Pathology has seen an increase in the number of Phytosanitary Certificate inspections. He stated that the Division has achieved a record high for 2017 with approximately 15,000 more certifications than the previous year. Smith stated that the Federal Grain Inspection Service conducts official sampling and inspections of grain offered for export under the U.S. Grain Standards Act and the Agriculture Marketing Act of 1946. He stated that the Division is unsure at this time if the increase is a result of more grain moving across state borders and out of the Country, or is a result of more requests for inspections coming to the Division instead of the United States Department of Agriculture.

Patrick Early, Chair of the Advisory Council, provided an update on the activities of the Advisory Council. He stated that since there were no items referred to the Advisory Council for consideration, a meeting has not been necessary.

CHAIR, AND VICE CHAIR

Information: Remaining 2018 meeting dates (Fort Harrison State Park–Garrison, Indianapolis)

The Chair noted that the 2018 Commission meeting dates have been set out in the agenda.

January 16	March 20	May 15
July 17	September 18	November 13

Updates on Commission and AOPA Committee

Jane Ann Stautz, Chair of the Commission’s AOPA Committee, was not present.

Sandra Jensen, Director of the Natural Resources Commission, Division of Hearings, provided an update. Jensen stated that there was a meeting scheduled for December but that it had been postponed to January or February of 2018.

DNR, EXECUTIVE OFFICE

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

No items were identified for referral to the Advisory Council.

DNR, DIVISION OF NATURE PRESERVES

Consideration of the dedication of the Lucas Hollow Nature Preserve in Brown County

John Bacone, Director of the Division of Nature Preserves, presented this item. Bacone noted that the dedication of the Lucas Hollow Nature Preserve had previously been tabled at the September meeting due to the proposed dedication overlapping with the Hardwood Ecosystem Experiment (HEE), which involves a 100-year contract between Purdue University and the Department’s Division of Forestry to study the area. Bacone stated that the property is a very high quality dry-mesic forest encompassing 42 acres within Yellowwood State Forest. He said that the proposed nature preserve is located within the buffer area of the HEE. Bacone explained that the extreme southern 100 meters of the nature preserve will be subject to selective timber harvest every 20 years in order to achieve a uniformity of the study area. He noted that the preserve will not be publicized to attract visitation or construct trails because data collecting instruments are set up in the area to monitor bird and insect populations. Bacone then recommended the property be dedicated as a nature preserve.

Bruno Pigott moved to approve the dedication of the Lucas Hollow Nature Preserve. John Wright seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF FISH AND WILDLIFE

Consideration of report on petition for rule change seeking to amend rules governing the captive breeding and selling of reptiles; Administrative Cause No. 17-088D

Linnea Petercheff, Division of Fish and Wildlife, presented this item. Petercheff stated that Jason Masnick petitioned the Commission to change the rule governing the breeding and selling of reptiles in Indiana. Petercheff stated that Masnick's first request was to amend the list of native species in Indiana by including the subspecies name for each species of snake. She noted that the Division must consider the difficulty in distinguishing between native and non-native subspecies for enforcement purposes. Petercheff stated that the Division agrees that at least some of the native species of snakes can be listed down to the subspecies without affecting the protections in place for Indiana's native species. She said that the Division plans to amend the list of native species of snakes to include the subspecies name, where appropriate.

Petercheff stated that in 312 IAC 9-5-7, the proposed changes would amend the ring-necked snake by adding the subspecies Northern ring-necked snake and the Mississippi ring-necked snake. She stated that the common gartersnake would be changed to add the subspecies Eastern gartersnake and Chicago gartersnake.

She noted that these snakes are native snakes that Masnick noted in his proposal.

Petercheff stated that the Department already allows native species of snakes to be sold under the reptile captive breeder's license, if they are not an endangered species, and not collected from the wild. She stated that Masnick's request includes an expansion of the list of snakes that can be sold under the reptile captive breeder's license. Petercheff noted that under IC 14-22-2-3, the Department must provide for the conservation, protection, and management of wild animals including reptiles, in Indiana. She explained that when a species of snake or other reptile is allowed to be sold, it provides a motivation for people to take more of these reptiles from the wild to add to their genetic stock for breeding purposes and sale.

Petercheff explained that snakes, like Indiana's other native reptiles, are impacted by factors that include the loss of habitat, diseases, and predation. She said that diseases that are known to affect the survival of wild reptiles, include ranavirus and snake fungal disease. She stated that snake fungal disease was found in Indiana in 2017 in several Northern water snakes, two racers, and a milk snake and there is currently additional research being conducted on Indiana snakes. She stated that herpetologists and biologists working in Indiana have recently noted declines in some of Indiana's snake species, including the Eastern hog-nosed snake and Midland watersnake.

Petercheff stated that there are species whose overall ranges extend just inside of Indiana's borders may be vulnerable simply due to their naturally restricted distribution in the state. She

explained that certain types of biological and ecological features should be taken into consideration when dealing with proposed expansions of herpetological collecting laws. Petercheff stated that the reptile captive breeding license allows the collection of four of those native species of snakes from the wild each year. She said the Division must ensure that the additional take from the wild does not result in added mortality resulting in a decline in snake population. Petercheff stated that the Division must consider multiple factors, including loss of habitat, loss of prey, disease, and predation.

Petercheff stated that the Department does not support breeders having the ability and motivation to take additional stock of even more species of snakes from the wild to sell and profit from a public resource.

Petercheff stated that the Division is responsible for providing for the conservation, protection, and management of Indiana's fish and wildlife resources, including reptiles. She said that the Division does not support the sale of any additional native species of snakes. Petercheff said that the rule changes that would modify the native species of snakes to include the subspecies name would be proposed in the biennial rule change process, scheduled to begin in the fall of 2018. Petercheff noted that species of snakes that are not native to Indiana and not venomous or federally endangered, such as corn snakes and boa constrictors, can be possessed and sold in Indiana without a permit from the Department.

Walkup asked how many venomous snakes were native to Indiana.

Petercheff replied that there are four species of venomous snakes in Indiana: the timber rattlesnake, Eastern massasauga rattlesnake, Northern copperhead, and cottonmouth.

The Chair recognized Jason Masnick.

Masnick stated that his proposal included more species of snakes than the Department considered. He stated that those two examples were meant only as examples, far from inclusive, and does not address the issue. He noted that, if necessary, he could submit an individual exemption proposal for each species of snake. With respect to the Department's statement that there would be difficulty in distinguishing between native and non-native subspecies for enforcement purposes, Masnick stated that there would be no identification or enforcement issues that do not already exist. Masnick offered an example of a permit inspection where the inspecting Conservation Officer, who was there to inspect his Eastern hognose snakes, could not identify a Western Hognose snake. He stated that Department staff are not well enough informed to identify the difference between native and non-native species. Masnick stated that if the proposal were implemented it would eliminate the need for law enforcement to do identifications because the responsibility would be with those people best acquainted with the species.

Masnick stated that the rules governing the sale of native reptiles and amphibians were originally written in 1998 and were intended to allow the sale of the most common native species of snakes sold as pets at that time. He noted that much has changed since the legislation was drafted. He said that he had only two weeks to prepare for the Commission meeting and has not been able to put together a list of snake species that are commonly used as pets. He noted that reptile

enthusiasts are interested in a much broader range of snakes than in the past. Masnick agreed that under IC 14-22-2-3, the Department must provide for the conservation, protection, and management of wild animals. Masnick stated that the Department should manage wild animals and not exclude certain reptiles. He stated that the current Department list of snakes is outdated and arbitrary.

Masnick stated that there are other wild animals that can currently be bred, but that he cannot breed to sell gartersnakes, one of the most popular snakes in North America. Masnick stated that he disagrees with the Department's position that when a species of snake or other reptile is allowed to be sold, it provides a motivation for people to take more of these reptiles from the wild to add to their genetic stock for breeding purposes and sale. Masnick stated that when he inquired he was told that he was the only person to hold the reptile captive breeder's license in Indiana. He stated that an example of animals that have thrived while in captivity is the American Alligator. He stated that the alligator was once listed on the U.S. Fish and Wildlife Service Endangered Species list and the population has thrived while being in captivity under a law that allows the alligator breeder to keep two-thirds of their alligators. He stated that the breeder would give Louisiana the other third to be released back into the wild and the alligator's populations have recovered.

Masnick stated that he had proposed a change in the way that snakes are microchipped. Masnick stated that he holds an Indiana game breeder's license and does not believe that opossums and snakes should be treated any differently when it comes to annual reporting on the sale, gifting, breeding, and death of an animal. He stated that snakes should not be singled out as needing to be microchipped. He noted that microchipping causes a health risk to the snake and the process is expensive. Masnick explained that snakes should be treated like mammals with regard to record keeping and identification. He stated that, then, enforcement officers could focus on the containment housing and health of the snakes during inspections, which is more beneficial to the snake than identification.

Masnick stated that he is not against regulation, but that he is against exclusion of one species over another. He explained that he is not against management of the species but that he is not in favor of rules and legislation that is overly exclusive and arbitrary. He noted that the current rules are outdated and overly arbitrary, not protecting snakes, and harms the individuals who would like to work with snake species in a legal manner.

Masnick requested that the snake list be expanded to allow it to be subspecies specific, to allow the breeding of all native non-threatened or endangered species of snakes, and to allow snakes to be reported annually for the purposes of identification. Masnick stated that there are 28 species of snakes in Indiana and that four are endangered and five are venomous.

The Chair asked if the Department would like to respond.

Petercheff stated that the Department has not been able to look at every snake species and make a determination on what should be divided into subspecies and which should not. She noted that the Department has a new herpetologist who has not been able to look at the proposed rule change. Petercheff stated that more time is needed to bring Masnick's information to the

herpetologist and that the Department could come back to the Commission in 2018. Petercheff stated that the Department could agree not to require the microchipping for identification and require scute clipping as an alternative solution. She stated that the Department would not agree to add any more native species to the reptile captive breeder's license.

Davis asked if the subspecies of snakes would be part of the biennial wildlife rule amendment package.

Petercheff answered in the affirmative and stated that the reptile list will be reviewed and some of the species will be changed to subspecies. She stated that by the Department making those changes the subspecies that are not currently on the reptile list would be able to be sold.

The Chair asked Masnick if he would be opposed to tabling the rule change seeking to amend rules governing the captive breeding and selling of reptiles and continuing to work with the Department to address the proposal in the biennial wildlife rule amendment package.

Masnick stated that he had concerns working with the Department and he felt like that he had tried in the past to work with the Department. He explained that he felt like there were snakes that were excluded from the Department's list that would make great pets.

The Chair stated that the two options are that the agenda item would be tabled to give the Department and Masnick additional time to work together on the proposal to be included in the biennial wildlife rule amendment package or that the Commission would take a vote with respect to the Department's report regarding his petition for rule change to amend rules governing the captive breeding and selling of reptiles.

Masnick and Petercheff, representing the Department, agreed that the Commission should table the petition for rule change to amend rules governing the captive breeding and selling of reptiles to allow the petition to be addressed through the biennial wildlife rule amendment process.

The Chair then tabled the petition.

Consideration of report on petitions for rule change seeking to amend rules governing use of crossbows, spring wild turkey season, Eastern snapping turtle, and muskellunge size limit in Bass Lake, Sullivan County; Administrative Cause No. 17-003D; Administrative Cause No. 17-059D; Administrative Cause No. 17-086D; Administrative Cause No. 17-097D

Linnea Petercheff, also presented this item. Petercheff explained that the Commission received five petitions to amend rules governing fish and wildlife in 2017, one of which was addressed in the previous agenda item and the remaining four being identified as:

1. Allow crossbows to be used that propel an arrow by means of compressed air (pre-charged pneumatic devices). (Administrative Cause No. 17-03D)
2. Change the spring wild turkey season to start earlier in April. (Administrative Cause No. 17-059D)

3. Remove the minimum size requirement for eastern snapping turtles or exempt the size limit from snapping turtles taken on private land. (Administrative Cause No. 17-086D)
4. Increase the minimum size limit of muskellunge at Bass Lake in Sullivan County from 36" to 44" with a maximum limit of 1 fish per day. (Administrative Cause No. 17-097D)

Petercheff stated that the Department seeks to incorporate the four existing proposed rule amendment petitions into the biennial wildlife rule revision process, which will begin in 2018.

Petercheff noted that the Division of Fish and Wildlife just completed its fisheries rule package (LSA Document #17-262(F)), which will become effective in late November, and has forwarded the proposed wildlife rule amendments (LSA Document #17-436) to the Office of Management and Budget for moratorium exemption approval in September. She stated the Division of Fish and Wildlife will be starting the next biennial rule revision process in 2018 and will solicit comments from the public through its website. Petercheff stated that the Division will review these four petitions; other ideas submitted by the public; and proposals from Department staff, for potential rule changes. The biennial rule review will begin in June and go through August of 2018. She indicated that the Division plans to present rule changes to the Commission for preliminary adoption in November of 2018.

Jensen asked whether the Division of Fish and Wildlife intended to also incorporate any future received petitions into the biennial wildlife rule amendment package as well. Petercheff answered in the affirmative.

Early asked if the Commission would be voting to incorporate the proposed petitions for rule change into the biennial wildlife rule amendment package. He noted that there was no recommendation of preliminary adoption and any vote would be to include the petitions in the biennial wildlife rule amendment review process beginning in June 2018.

The Chair answered in the affirmative and confirmed that the petitions would follow the normal rule amendment process, through the biennial rule review process.

Jensen stated that each petitioner was notified of the Department's request to incorporate their petitions into the biennial wildlife rule amendment process. She stated that she did not think any of the petitioners elected to attend the Commission meeting.

Patrick Early moved to accept the Department's request to consider the four identified petitions to amend rules as well as additional citizen's petitions to amend fish and wildlife rules received through August 2018 through the 2018 biennial rule review process. Cameron Clark seconded the motion. Upon a voice vote, the motion carried.

Consideration of request for approval of amendments to nonrule policy document, Information Bulletin # 2, Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern); Administrative Cause No. 17-122D

Linnea Petercheff, also presented this item. Petercheff stated that the Department established the Nongame Technical Advisory Committee in 1984 to serve as an advisory body for the Division of Fish and Wildlife in fulfilling its statutory responsibility for nongame and endangered species conservation in Indiana, including an annual review of the state's list of endangered and special concern species. Petercheff explained that the proposed amendments to the nonrule policy document, Information Bulletin #2, Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern), is the result of that annual review. She stated that the proposed amendments reflect changes that have been reviewed by staff.

Petercheff stated that proposed changes include adding the black bear to the endangered list. Proposed to be added to the list of species of "special concern" are the Northern bobwhite, the American woodcock, and the American eel. Petercheff explained that the red-shouldered hawk is proposed to be removed from the list of "special concern" as well as the longnose sucker, Ohio River muskellunge, lake whitefish, cypress darter, and the Tippecanoe darter. She stated that there were no changes to the plants and insects section of the nonrule policy document. Petercheff noted that "special concern" means that the species requires monitoring, but the designation does not prohibit the species being taken from the wild.

Patrick Early moved to approve amendments to nonrule policy document, Information Bulletin #2, Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern), as presented. Cameron Clark seconded the motion. Upon a voice vote, the motion carried.

NRC DIVISION OF HEARINGS

Consideration for preliminary adoption of amendments to 312 IAC 3, which provides standards for proceedings subject to the Administrative Orders and Procedures Act ("AOPA"); Administrative Cause No. 17-002A

Dawn Wilson, Hearing Officer, presented this item. Wilson stated that currently 312 IAC 3-1-7 is void of a description of the date when pleadings and documents are filed with the Commission's Division of Hearings. She explained that proposed are amendments to provide clarification of the date of delivery, to define "delivery", and to add a requirement that emailed documents be emailed to nrcaopa@nrc.in.gov to capture filings that may have previously been sent to Administrative Law Judge's (ALJ) directly. Wilson explained that delivery of documents or pleadings by different methods in the proposed rule specify the filing date. For example, for filings by email or another method by which the filing date is determined by the date the document is received, that is delivered after 4:30 p.m., ET, the document filing date is the next business day. She said this amendment is intended to provide clarity for participants, especially when deadlines are critical.

Wilson stated that 312 IAC 3-1-9 currently provides that the secretary of the Commission may approve or affirm an ALJ entry approving an agreed order (a settlement agreement entered by parties). She explained that in instances, such as some reclamation cases, the ALJ may be

designated as the ultimate authority for the Commission. Wilson stated that the proposed amendment to 312 IAC 3-1-9(g) adds language to recognize that the ALJ may be designated as the ultimate authority for the Commission, clarifying that the Commission's secretary may affirm an agreed order when the ALJ is not the ultimate authority.

Wilson stated that in 2014, the Commission's Division of Hearings determined that there were duplication of definitions within 312 IAC 1. Proposed is the repeal of those definitions at 312 IAC 1-1-7, 312 IAC 1-1-8, 312 IAC 1-1-9, 312 IAC 1-1-10, 312 IAC 1-1-11, 312 IAC 1-1-12, 312 IAC 1-1-19.5 and 312 IAC 3-1-16. She noted that the Commission gave preliminary adoption to a portion of the proposed amendments in 2014; however, subsequently there were additional amendments made in 2016.

Wilson noted that on April 20, 2017, the proposed rule amendment package was presented to the AOPA Committee. Wilson recommended the amendments be given preliminary adoption as presented.

Bruno Pigott moved to give preliminary adoption of amendments to 312 IAC 3, which provides standards for proceedings subject to the Administrative Orders and Procedures Act, as presented. John Wright seconded the motion. Upon voice vote, the motion carried.

Consideration of report on petition to amend nonrule policy document, Information Bulletin #20 (5th Amendment), governing the ratemaking process for resorts and marinas under lease with the Department of Natural Resources; Administrative Cause No. 17-070P

Dawn Wilson also presented this item. Wilson stated that on May 28, 2017, the Commission's Division of Hearings received correspondence from Jim Behrman requesting a revision to Information Bulletin (IB) #20, which provides guidance regarding the ratemaking process for resorts and marinas under lease with the Department.

Wilson stated that the Commission considered Behrman's correspondence as a petition to amend a nonrule policy document governed by Indiana Bulletin (IB) #7. A review committee was established to consider the petition comprised of representatives from the Department, Terry Coleman, Assistant Director of the Division of State Parks and Christie Sorrels, Business Services Program Director of the Division. Wilson stated that she was assigned to participate and provide assistance on behalf of the Commission's Division of Hearings as the Chair of the Committee and the Commission's Hearing Officer. Behrman was notified of the Committee's composition along with contact information for the Department's staff.

Wilson stated that she contacted Behrman for clarification; and subsequently, she determined that Behrman's petition sought to revise the obligations of the Commission's hearing officer during marina ratemaking proceedings, rather than seeking to alter the responsibilities of staff employed by the Department. Wilson stated that the petition requested two changes to IB #20.

Wilson stated that Behrman first requested a change of location of the rate hearings from Marion County to the marina requesting the rate change, with the hearing officer being a guest of the marina. Wilson stated that the Director of the Division of Hearings, Sandra Jensen, assisted the

Committee with her recollection of the basis for the former decision by the Commission to designate Marion County as the location for all rate hearings. Wilson explained that rate hearings were held in Marion County, since it was previously determined that slip renters were very frequently not local to the marina. She stated that Department staff indicated no reason to believe any change in slip renter demographics had occurred.

Regarding Behrman's request to have the hearing officer appear as a guest of the marina if the rate hearing was held at the marina, Wilson said that Department staff expressed great concern that the requested change could have the potential for a perception of bias by the hearing officer toward the marina. Wilson said that all members of the Committee were in agreement that the independent nature of the ratemaking process, as well as the clear appearance of independence of the hearing officer, is critical. Wilson stated that the review committee concluded that there would be minimal benefit to conducting a rate hearing at a marina and that such a change would be inefficient and not fiscally responsible.

Wilson stated that Behrman requested a revision to IB #20 to include consideration of information beyond that which is currently considered by a hearing officer for a marina rate establishment or increase, to include information submitted by slip renters regarding marina operations and observations of the marina culture at the public hearing. Wilson explained that the Commission's ratemaking efforts rely on Department's expertise in evaluating information supplied by a marina with a rate request to determine appropriate comparable facilities. Wilson stated that the Department's authority includes oversight of the day-to-day operation of a marina, including repairs, amenities and routine maintenance that are primarily controlled by the requirements, obligations and terms of the lease entered into between the Department and the marina operator, of which the Commission lacks knowledge. She stated that the Commission's responsibilities for ratemaking determinations would only overlap with the Department's responsibilities in the event that the day-to-day failures of a marina impacted marinas that would be appropriately "comparable" marinas. Wilson stated that because of the content of the comments often received by the hearing officer during the ratemaking process, the Department reviewed its mechanism for receipt of public comments on leased marinas. As a result, the Department's website (<http://www.in.gov/dnr/parklake/7880.htm>) was recently updated to identify the suggested course for submitting concerns or comments on marina operations. Wilson concluded, and stated that the review committee does not recommend any changes to IB #20.

Bart Herriman moved to approve the review committee's report and recommendation to not amend the nonrule policy document, Information Bulletin #20 (5th Amendment), governing the ratemaking process for resorts and marinas under lease with the Department. Cameron Clark seconded the motion. Upon voice vote, the motion carried.

Consideration of final adoption (following recall) of report on rule processing, public hearing, and Hearing Officer analyses with recommendations regarding final action of rule amendments adding 312 IAC 29 governing oil and gas well activities and repealing 312 IAC 16; LSA Document #16-230(F); Administrative Cause No. 15-073G

Sandra Jensen, Hearing Officer, presented this item. Jensen acknowledged that several of the members would recollect that this rule package was granted final adoption by the Commission during the September Commission meeting. She explained that the rule package includes the addition of 312 IAC 29, which will govern all oil and gas production activities, and the repeal of 312 IAC 16.

Jensen updated the Commission by advising that after the Commission granted final adoption in September, the rule package was submitted to the Office of the Attorney General (OAG) for review, as required by law. She elaborated that the OAG identified five concerns. Jensen explained that after engaging in some discussion with the OAG, four of the concerns were determined to be acceptable although not ideal, but one of the concerns caused the need to recall the rule on November 9, 2017, so it was agreed that all of the OAG concerns with the rule language would be addressed at this time. Jensen confirmed that because the rule was recalled, the Commission must now consider the rule package for final adoption a second time.

Jensen observed that certain members present for the November 14, 2017 meeting were not in attendance at the September 19, 2017 meeting and certain members present in September are not in attendance in November. She explained that to facilitate the full consideration of the rule for final adoption at the present time, it was necessary to incorporate the hearing officer report considered by the Commission in September into the report, dated November 13, 2017, being presented at this time. She clarified that the rule language incorporated into the November 13, 2017 report as Exhibit C contains all of the revisions identified in both reports.

Jensen explained that because the content of the September report was discussed in detail previously and the discussion was summarized in the meeting minutes, now approved, she did not intend to discuss the content of that report or the revisions recommended in that report at length. However, Jensen advised the members that she would be happy to respond to any inquiries regarding that report or the content of the September meeting minutes.

Jensen offered that the OAG concern that caused the need to recall the rule focused on language contained within certain documents incorporated into the rule by reference. She observed that the incorporated documents referenced secondary sources and materials, including such things as revisions, amendments, and updated editions of those secondary sources and materials. Jensen explained that the incorporation of future editions or revised documents not presently in existence has the effect of amending a rule without fulfilling the rule adoption requirements set forth by law. Jensen explained that such an outcome is prohibited. Jensen explained that because there is no means by which the incorporated documents and secondary sources and materials can be revised, she was able to work with the OAG to develop a solution, which required the addition of a rule at 312 IAC 29-1-3. That additional rule, according to Jensen, specifies that despite the language contained within the incorporated documents, the versions of the incorporated documents and all secondary sources and materials will be the version specifically stated in the incorporated document or the version in effect on the effective date of 312 IAC 29.

Bart Herriman inquired as to the type of documents that had been incorporated by reference into the rule.

Jensen responded that the documents relate primarily to industry standards, including such things as specifications for fiberglass casing and the cementing of casings. Jensen added that some of the documents identify test methods required by the Environmental Protection Agency.

Jensen continued that the remaining revisions being presented for final adoption are the revisions identified in the November 13, 2017 report as well as the revisions identified in the hearing officer's report presented during the September Commission meeting. The revisions that were not considered by the Commission during the September meeting include the addition of citations in 312 IAC 29-23-2(b)(2) and 312 IAC 29-21-3(a)(3) identifying the statutes related to NPDES permitting, the correction of an erroneous code citation in 312 IAC 29-2-114 and the removal of duplicated language from 312 IAC 29-33-5(a)(1). Jensen explained that the newly crafted revisions also included a more specific source identification in 312 IAC 29-22-9(b) and the removal of language from 312 IAC 29-33-20(e) to clarify that compliance with Mine Safety and Health Administration requirements is not necessary to request the identified additional coal seam protections. Finally, Jensen noted that 312 IAC 29-34-4(c) would be revised to eliminate the appearance of conflict with IC 4-21.5-3.

Jensen further noted that while the OAG indicated that additional review of the revisions by the State Budget Agency (SBA) would not be required. However, she observed that Samantha DeWester and Chris Smith were able to obtain confirmation from SBA that the revisions made to address the OAG's concerns did not alter its prior approval of the rules.

Jensen offered this rule package to add 312 IAC 29 with the revisions identified in the November 13, 2017 Hearing Officer Report, which incorporates the Hearing Officer Report considered by the Commission on September 19, 2017, and to contemporaneously repeal 312 IAC 16 for final adoption.

Herriman stated, "I just want to commend you; I mean it's a lot to go through the whole process to do this with the AG's office...so thank you for all your time on that." Herriman also inquired how easy it is to identify the incorporated documents and the secondary sources and materials.

Jensen observed that "if any of those secondarily referenced documents are amended and the Division of Oil and Gas intends to, or wants to, rely on them, it's going to require a revision of this rule. That is going to be a constant issue." Jensen noted her intent to discuss this situation with the Division of Oil and Gas to identify any possible way to address this to avoid the need to constantly amend the rule in order to remain up to date with industry standards.

Jensen referred to Rusty Retherford, Director of the Division of Oil and Gas, for a direct response regarding the ease of identifying the materials. Retherford explained that for someone in the oil and gas industry locating the incorporated documents and secondarily referenced material is fairly easy. However, Retherford stated that while older versions of the materials are frequently maintained online for a short period of time, those old versions are not readily available after the passage of time.

Herriman stated, “It seems like DNR should keep that...and have it posted somewhere on the website so people can find it and don’t have to go through all that research to try to locate it.”

Jensen agreed, noting that having the material available might also be beneficial in ensuring that the Division is relying on the correct version for compliance and enforcement reviews. Retherford concurred.

Chris Smith noted that “between the last meeting and this meeting no changes were made that put any further burdens on operators.”

Bruno Pigott moved to give final adoption, following recall, to 312 IAC 29 governing oil and gas well activities, as revised and presented, along with the repeal of 312 IAC 16. Bruce Walkup seconded the motion. Upon voice vote, the motion carried.

Adjournment

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