

**ADVISORY COUNCIL**  
Minutes of October 15, 2008 Meeting

**MEMBERS PRESENT:**

Patrick Early, Chair  
William Wert  
Rick Cockrum  
James Snyder  
Kari Evans

**NATURAL RESOURCES COMMISSION STAFF PRESENT:**

Stephen Lucas  
Jennifer Kane

**DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT:**

John Davis	Executive Office
Adam Warnke	Executive Office
Cheryl Hampton	Human Resources
James Hebenstreit	Water
Bill James	Fish and Wildlife
Mitch Marcus	Fish and Wildlife
Mike Crider	Law Enforcement

**GUESTS PRESENT:**

Dick Mercier

Patrick Early, Chair of the Advisory Council, called the meeting to order at 10:36 a.m., at The Garrison, Fort Harrison State Park, 6001 North Post Road, Indianapolis, Indiana. With the presence of five members, the Chair did not observe a quorum.

The Chair explained that without a quorum the minutes of August 13, 2008 meeting could not be approved. Rick Cockrum, Council member, noted that his last name was incorrectly spelled in the draft August minutes. John Davis, Deputy Director for the Bureau of Lands, Recreation and Cultural Resources, said that the minutes would be corrected.

The Chair indicated that because a quorum was not present, “instead of making recommendations to the Commission for preliminary adoption of agenda items, we have no choice but to just talk about them.”

**Consideration of recommendation for preliminary adoption of amendments to provisions in 312 IAC 9 that govern the taking of paddlefish; Administrative Cause No. 08-163D**

Bill James, Chief of Fisheries with the Department's Division of Fish and Wildlife, presented this item. He explained that the agenda item is a permanent rule proposal to provide additional protections for paddlefish. He said Director Carter adopted an emergency rule a year ago to protect the fishery as a "direct result of about a two year covert law enforcement investigation on the Ohio River that found widespread violations of commercial fishing relative to paddlefish." James said the paddlefish is also known as "spoonbill catfish", and is a prehistoric scale-less fish that can grow to over 100 pounds.

James said paddlefish have been "catapulted into prominence due to changes in the global caviar market." He noted that the world's caviar resource was formerly Eastern Europe and the former Soviet Union in the Caspian Sea and Black Sea. He said the sturgeon populations have been "severely depleted" and most of the areas are closed to the taking of sturgeon. "That has put out a worldwide search for substitute caviar and the paddlefish from the Mississippi River drainage really fits the bill. The egg quality and size is apparently a pretty good substitute." James said the pressure on the paddlefish stock has "really escalated" in recent years.

James said that Illinois, Kentucky, and Indiana allow commercial fishing of paddlefish and all three states have reported escalation of paddlefish harvest. "One paddlefish could be worth \$1,000. These eggs are valued from a range of \$100 a pound." He said that 15% to 20% of the weight of a female paddlefish could be attributed to eggs. "It's like a gold rush mentality. People are trying to mine these fish out of the river as fast as they can and unfortunately that leads to some people choosing to take illegal shortcuts to get the job done." James said the two year Law Enforcement covert operation resulted in the arrest of over 20 individuals and over 300 separate charges filed, including money laundering, racketeering, and other felonies. "Those cases are working their way through the courts now." James said that with the "new knowledge" resulting from the investigation an emergency rule was adopted last year creating a paddlefish season, a minimum size limit, and some controls on methods of take. He said the emergency rule expired this September, but it has been renewed by another modified emergency rule. The rule proposal before the Council would make the current emergency rule permanent.

James said the first emergency rule put "immediate" protections in place on Indiana's portion of the Ohio River, but Kentucky and Illinois did not have similar protections. "We spent this past year working with particularly Kentucky...to try to work with them and assist them in working with [its] constituents to put those same protections in place on Kentucky's side". He said "a lot of compromise" was made, because there "was a lot of effective lobbying going on" in Kentucky by commercial interests "making it a very difficult process". James noted, however, that Kentucky recently adopted a permanent rule that provides a closed and open season, size limits, and other protections Indiana had sought. "We want to match those regulations" in a permanent rule. He also noted that

Illinois has also taken action to copy the regulations so there will be uniform protection on the Ohio River.

James said most of the harvest of paddlefish eggs occurs in the winter and early spring. The proposed rule would set the season from November 1<sup>st</sup> through April. “The rest of the year it would be illegal to possess paddlefish in Indiana.” James noted that no other river in Indiana is open to paddlefish commercial harvest. “We no longer allow even sport harvest of paddlefish.” Previously allowed was a two-fish bag limit per day, but the investigation discovered that there were “networks of sports fishermen snagging paddlefish in areas below dams, which are closed to commercial fishing, and illegally selling them into the commercial market because of the lucrative prices.” James said the paddlefish market is “global, and it is big bucks”.

James said the Department did not intend to put commercial fishing out of business, but to allow for sustained commercial harvest. “It can’t be sustained when they are being removed faster than they can be replaced.” He explained that the paddlefish is slow growing, long lived, and it may take more than ten years for the fish to reach maturity.

John Davis added, “Bill James did a lot of the work in Kentucky and communicated with policy making leaders and appeared before the [Kentucky’s] commission, and led the team.” He said the Division of Law Enforcement had a “huge piece” in this project and was an “outstanding effort.... It’s great cooperation that Illinois and Kentucky joined [Indiana] in trying to make this uniform. That’s a pretty good effort for a year and a half of work.”

Davis also announced that President Bush appointed Bill James to the Great Lakes Fisheries Commission—“a great honor and an award for the professionalism that [Bill] has exhibited all this time.”

The Chair asked how the Department checks the paddlefish population. “Do we shock” the river “to see what’s still there?” James said the question of population was difficult to answer out in the field. Monthly catch reports are required to be submitted by the commercial fishermen. “Yes, that’s self reporting, but they do so under penalty of perjury and losing their license in the future. It is what it is.” He said the Department tracks the reporting and is able to see any trends that may emerge over time. James said a 28-state group in the Mississippi Basin, called the “Mississippi Interstate Cooperative Resources Association” (or “MICRA”), is made up of fisheries people who are “trying to do things together that no one state can do by itself. One project undertaken by MICRA is a “massive micro-tagging” to track paddlefish distribution and movement to answer “do they stay put? Are our fish Indiana fish, or do they end up in Missouri part of the year, or Tennessee?” He said that 17 of the 28 states participated in the project. The results of tracking provided information about movement and distribution but not population numbers. “Electro-fish” is not effective on paddlefish and “electro-fishing is pretty rough” on these cartilaginous fish.

James said Hovey Lake was populated by paddlefish, which spent at least part of the year there. He said the Department had been netting Hovey Lake regularly through the years. “Suddenly, our catch rates started to really go down. It was very hard to find fish.... We discovered that we had commercial fishermen illegally fishing at night at Hovey Lake.” He said the Division of Law Enforcement was able to “make a good case” resulting in a \$10,000 fine, revocation of a license for five years, and court confiscation of a boat, motor, vehicle, and all the equipment used in the illegal activity.

The Chair noted that an Ohio regulation requires fines equaling the value of the illegally taken animal. Colonel Mike Crider, Director of the Division of Law Enforcement, said, “That’s a very interesting law. It’s something we discussed in pretty good detail in the last Tri-State meeting.” Ohio’s last legislative session created an enhanced penalty table based on the “green score” of the racks of deer that are poached. Col. Crider said the fines can reach up to \$15,000. “It’s something that is interesting, and it is something that we will watch.” James said there are legitimate commercial fishermen, but they are “overshadowed when you see how vulnerable” the paddlefish population is to over harvest.

James said Indiana is number three on the list of export of paddlefish eggs to the global market. The U.S. Fish and Wildlife Service requires sellers of caviar taken in the United States, for export out of the country, to acquire an export permit through the federal Office of Scientific Authority. Indiana is notified of any application, and Indiana has to “sign or send a statement” to the U.S. Fish and Wildlife Service “saying the source of those eggs, and we attest that the export of those eggs will not damage the population. This puts a lot of responsibility on us to be able to say we have a regulated, protected, and well-managed population that can sustain that level of harvest.” He noted the European Union is requesting the U.S. Fish and Wildlife Service to provide “more documentation on the protection” of the paddlefish. James said the concerns for the paddlefish population are on a global, national, regional, and state level.

Rick Cockrum said the Department and the Commission have had to make “tough decisions” for such occurrences as deer hunts in state parks and commercial fishing in the Great Lakes, and he was concerned about lower standards due to Kentucky’s “more effective lobbying campaign”. James said that Indiana shares approximately 300 miles of river with Kentucky, and our state “must work” with Kentucky. At least 90% of the Ohio River is in Kentucky. “We have the ability, you might say, to protect 10% of the population in any given time.” The majority of the protection authority falls within Kentucky’s jurisdiction, but Indiana “did lead” on the adoption of the current standards. Kentucky has requested more scientific data if there is to be additional regulation of the commercial fishery. Indiana takes the approach, “when in doubt, err on the side of the resource. [Kentucky] was put in a position of when in doubt you err on the side of the commercial fishermen. That’s just the difference in management and policy.”

Cockrum asked how the Department enforces the regulation on the Ohio River. Col Crider said there is a statute that requires Indiana and Kentucky “laws to mirror each other.” Enforcement is “bank to bank.” The emergency rule adopted last year was

“unprecedented in that we changed the regulations, and [Kentucky] wasn’t there yet”. Col. Crider said that the existing protection is “100 times or 1,000 times greater than what we had before”.

James Snyder asked whether there is a “stop loss measure” for Indiana, as far as relating to the European Union, where Indiana can report the paddlefish population is not protected. James said that it would be “very awkward if we did, and Kentucky didn’t. There would have to be some important coordinations.” Davis added that Indiana and Kentucky have concurrent jurisdiction on the Ohio River.

The Chair thanked Bill James and Department staff for their presentation. He said the Advisory Council could not vote on a recommendation in the absence of a quorum, but he would “convey to the Commission that the [Council members] present are in agreement with moving it forward.”

**Consideration of recommendation for adoption of new nonrule policy document to establish the Free Fishing Days for the years 2009 and 2010; Administrative Cause No. 08-162D**

Bill James also presented this item. He explained that several years ago a statute authorized the DNR Director to designate two days a year, with the approval of the Commission, as free fishing days in Indiana. The days do not need to be consecutive, but the Department has chosen the first full weekend of the National Fishing and Boating Week held in early June. James said the Free Fishing Days would be selected and approved through a nonrule policy document. “It’s important that we look ahead and get these done ahead of time” due to print schedules” of fishing guides, outdoor calendars, and other brochures.

James said the Department would track the impact of the free fishing days to stimulate license sales. With the point of sale computer system available for the last four years, “there is an opportunity to start maybe teasing some of that information out of the system looking at sales right before and right after” the free fishing days. He explained the “idea” behind free fishing days is to get people introduced to fishing without having to purchase a fishing license. If those participating in the free fishing days decide “they liked [fishing] and maybe...want to do it some more during the year, then they could buy a license.”

The Chair again thanked Bill James. He said if there were no questions, he would again reflect to the Commission the support of individual Advisory Council members for the proposal.

**Information Item: 2008 “Lakes” cases from the Court of Appeals of Indiana:**

(A) *DNR v. Lake George Cottagers, Ass’n*

(B) *Daisy Farms Ltd. Partnership v. Morrolf*

- (C) *Lukis v. Ray*
- (D) *Bowyer v. DNR*

Stephen Lucas, Director of the Commission's Division of Hearings, introduced this item. He said in a "typical year we probably don't get one case from the Court of Appeals that helps tell us what the law is regarding public freshwater lakes, and this year we've gotten four, which is probably a reflection of what a hot item it is right now." Lucas indicated that he would discuss three of the cases listed, and Adam Warnke, Chief Legal Counsel for the Department, would discuss the *Lake George Cottagers Ass'n* case, as well as a navigable waters case that was not listed in this item. Lucas said the Court of Appeals in the last five or ten years has "continually merged" navigable water cases with public freshwater lakes cases, so Warnke's discussion of the navigable waters case was particularly appropriate.

Adam Warnke explained that *Lake George Cottagers Ass'n* was "fairly interesting" with "pretty significant financial implications" for the state, specifically the Department and Indiana's taxpayers. He said Millpond Dam that created Lake George in Steuben County is the subject of the case. Warnke said the land under Lake George was "sold" to the Lake George Cottagers Association (the "Association") in 1928 "a few years after" the Millpond Dam was constructed, and has been owned "continuously" by the Association to the present. He said that in 1947 the Lakes Preservation Act was enacted, which "changed the landscape" and "put the state in a regulatory position with lakes and levels."

Warnke explained that "eventually" the Millpond Dam "fell into disrepair, and the Association "thought that the state should pay for those repairs." The Association brought declaratory action in Steuben Circuit Court "asking the court to determine that the state does own the dam and is responsible for the repairs."

Warnke said that the Steuben Circuit Court agreed with the Association's claim that (A) the Association does not own any of the lakebed under Lake George; and, (B) the cottage owners do not have any property rights beyond the lakeshore. The Steuben Court granted summary judgment to the Association and said "since the Legislature could not have intended a joint venture where the state and the Association pay for these repairs, it was obviously the responsibility of the state because due to some regulatory authority over dams and activities on the lake that the state became the owner of the lake." Warnke said that if the Steuben Circuit Court decision were to stand, considering all the lakes in Indiana and particularly those manmade, it would have "huge possible financial implications". He added, "If the state through some regulatory authority is responsible for the repairs and maintenance on every dam in every lake in the state, that's massive."

Warnke said the Department appealed, and the Court of Appeals reversed and ordered summary judgment in favor of the Department, which is a "pretty strong reversal". The Court of Appeals decision said the Lakes Preservation Act "First, gives [the Department] the right only to regulate and control and hold in trust these freshwater lakes for the people of the State of Indiana. The Lakes Preservation Act could not have intended to make the state the owner of all these dams, and that the dam authority is for the

supervision of building, repairs, and maintenance of the dams.” Warnke said another statute allows the Department to recover emergency dam repair costs from the owner of a dam. He said the Association has petitioned for transfer, but Warnke indicated that he expected the Supreme Court to deny the petition.

Warnke then discussed *Nugent Sand Company, et al. v. DNR*, a navigational servitude case involving a small lake called Utica Hole located along the Ohio River near Utica, Indiana. Nugent has been mining sand in this location and “dug a hole that filled in with water and became a lake. [Nugent] decided that it would be a lot easier for them if they could just pull barges in there and take sand a little more quickly so [it] cut a channel to the Ohio River. The channel is 100 feet long by 300 feet wide. Effectively, [Nugent] created an embayment on the Ohio River.” Warnke said the channel has become a “real favorite place for party cove activities.”

Warnke said that the Department and the U.S. Army Corps of Engineers permitted the channel construction with terms requiring that the “water created be dedicated to public use. Ten years later [Nugent] decided that maybe [Utica Hole and channel] shouldn’t be public water.” He said that Nugent requested the Department to “stop” the boating activity, but the Department responded that Nugent did not have a basis for its complaint. Warnke said Nugent filed a declaratory action seeking an injunction, and Nugent has used Federal navigational servitude case law, from the US Supreme Court, primarily originating out of Hawaii’s, to support its claim that Utica Hole remains a private lake even after connection by a channel to a navigable waterway. Warnke said that Indiana’s state law differs from Hawaii and explained that “waters that can have fish move in and out, to and from public waters, even in times of flood, are public waters. So, from the beginning when [Utica Hole] was cut and filled in with water it was public waters because it’s right in the Ohio River floodway.”

Warnke noted that there are a “good number” of channels cut to navigational rivers in Indiana. “If this goes the wrong way..., we’ve got a significant issue with a lot of channels.”

Dick Mercier noted he has a relative in New Albany who boats on the Ohio River. He asked, “What’s the position of the Law Enforcement Division on the channel as far as Nugent asking for our Law Enforcement Division to protect [Nugent’s] private property?” Warnke answered, “Unfortunately, the local court has entered an injunction against [the Department]. Our Law Enforcement Division is to tell the public that a court has preliminarily determined that it’s private water, and it’s under litigation.”

Rick Cockrum said, “Good luck with it. It defies common sense because the definition of ‘navigable waterway’ is commercial activity. [Nugent] cut a channel to do commercial activity and wants access to our river”. Warnke noted that it “is hard to claim that water is not navigable when the entire purpose for it and the entire use of it is as a navigable interstate commerce, a shipping lane.” He then returned the floor to Steve Lucas.

Lucas said the decision in *Lake George Cottagers Association* was also important to adjudications before the Natural Resources Commission where the public trust is at issue. The decision “makes clear” the Department’s role and the Commission’s role with respect to public freshwater lakes, and “makes it clear that it isn’t a matter of state ownership.” He reflected there was dictum from a previous decision, *Parkison*, that suggested the Department “did own public freshwater lakes; however, the instant case clarifies that DNR doesn’t. DNR is the trustee for the public trust.”

Lucas then discussed *Daisy Farms Ltd. Partnership v. Morrolf*. He said *Daisy Farms* is at the core of many cases pending before the Commission “that are trying to identify what are the various relationships between the neighboring riparian owners on a public freshwater lake, as well as between riparian owners and the public.” These cases often require “drawing the lines between property owners out into the lake.” Lucas referenced *Bath* that “drew the lines initially for Indiana...in a situation where [there] was a pretty straight shoreline and the property lines approaching the shoreline between property owners were at a perpendicular”. The *Bath* court decided that where property lines are perpendicular to a relatively straight shoreline, “you would just extend the line [dividing riparian zones] straight out”.

Lucas observed that ultimately, “Lakes are circles” so the *Bath* principle “doesn’t always work, but that’s the principle the Court of Appeals applied” in *Daisy Farms*. *Bath* was based on *Nosek*, a Wisconsin case that provided three principles regarding extending property lines into the lake based on lake configurations. The Court of Appeals in *Daisy Farms* affirmed the lower court’s application of the first principle of *Bath*, and affirmed that the lower court did not have to “go beyond” the first principle. The Appeals Court “didn’t say it was wrong to go to a different principle from *Nosek* but said the trial court didn’t have to.” Neither the Department nor the Natural Resources Commission was involved in the *Daisy Farms* case. *Daisy Farms* was “purely a private decision”.

Lucas then discussed *Lukis v. Ray*, which came before the Natural Resources Commission’s Administrative Orders and Procedures Act Committee (the “AOPA Committee”). He explained that Administrative Law Judge Jensen decided the “straight line” principle “didn’t work with the situation in *Lukis*.” She instead applied principles “further down the list” from *Nosek*, and the AOPA Committee agreed. The Steuben Circuit Court reversed, and *Lukis* appealed. The Court of Appeals reversed the trial court noting in its decision that the trial court “can’t reweigh evidence”. He said a request for transfer to the Indiana Supreme Court was very recently denied, meaning the *Lukis* decision is now final.

Steve Lucas said in terms of what the Commission’s Administrative Law Judges “do on a day to day basis,” *Lukis* “might be the “most important” of the four cases. The Court Appeals decision approves *Nosek*’s three principles, and it adds a new principle to address existing homeowner association bylaws that define how the property lines should be extended past the shoreline. The Court of Appeals reflected that using the existing bylaws “would have been a good way” to draw the property lines. “Essentially, what

[Jensen decided] was equivalent” to the directions provided in the bylaws, and the Court of Appeals affirmed her decision.

Lucas then discussed *Bowyer v. DNR*. He said that *Bowyer* addresses how to draw the line for “where the shoreline is” on a public freshwater lake. Lucas said there are two primary statutes addressing shoreline delineations, but the statutes are a “little bit confusing because they don’t really use the same principles.” In *Bowyer*, the Department’s Division of Water had an opportunity to apply the principles on Lake Cicott. In effect, the Court of Appeals decided that as long as the Department considers both statutes and “comes up with a reasonable number, it’s okay.” He added, “That marries together two statutes that probably didn’t know of each other when they were written.”

Lucas said *Bowyer* would be important when the Department drafts its list of public freshwater lakes, because one of the requirements to be a public freshwater lake is that the lake includes a minimum of five acres. “So you need to know where the outline of the lake is drawn so you know how big the lake is.” He said Jim Hebenstreit would next speak in more detail about the DNR initiative to prepare the list of public freshwater lakes.

### **Status Report on Progress of Department of Natural Resources toward the Development of a List of “Public Freshwater Lakes”; Administrative Cause No. 08-059W**

James Hebenstreit, Assistant Director of the Division of Water, presented this information item. He said the Department has been issuing permits for construction activities on lakes since the enactment of the Public Freshwater Lakes Act in 1947, “but we’ve never actually compiled a list of what lakes are considered to be public freshwater lakes. It’s kind of done on a case by case basis.” In the last 15 years, the Division of Water has “come across more” permits for construction on smaller lakes that “we don’t have a lot of experience with, where people are starting to build, because all the big lakes are developed”.

Hebenstreit said the Division of Water worked with the Lake Management Work Group to amend the definition of “public freshwater lake” and to obtain a directive to develop a list of Indiana’s public freshwater lakes. He said that the Legislature enacted P.L.6-2008 (SEA 41) requiring the Commission to adopt and maintain a nonrule policy document that lists public freshwater lakes. A “public freshwater lake” is to mean “a lake that has been used by the public with the acquiescence of riparian owner. There is always a question of what constitutes ‘acquiescence’.” Hebenstreit said P.L. 6-2008 amended the term “lake” and codified the definition at IC 14-26-2-1.5.

Hebenstreit noted the Department has “for years generally” permitted construction activities on public freshwater lakes in the northern third of the state. “I think there is a

question whether [the amended] definition actually might mean that this would apply to some other lakes in the southern parts of the state. So we will have to look at that.”

Hebenstreit said that in the 1990s Department biologists and staff from the Division of Law Enforcement compiled a master list of lakes, which has been “pared down to...2,600 lines. What we probably will do is come back with an initial list, which will probably include more of the lakes in the northern third of the state where we have experience, and then we will probably augment that list at a later date.” He said the master list would be reviewed by the Division of Water in order to identify those lakes where there is previous history of permit activity.

Hebenstreit also explained that the statute also clarified “acquiescence” allowing the Department to use evidence the general public has used the lake for recreational purposes and evidence that the riparian owner did not object to the operation of another person or privately owned boat rental business, campground, or commercial enterprise that allowed non-riparian owners to gain access throughout the lake. The amended statute also allows the Department to consider previous history of regulation of the lake. Hebenstreit said when the DNR has prepared a preliminary list of public freshwater lakes, the agency would present the list for review by the Advisory Council and the ultimate approval of the Natural Resources Commission.

Cockrum said, “It seems to me that this would be a dramatic increase in the number of bodies of water that we would have regulatory authority over?” Hebenstreit said that depending on how the lakes in the southern two thirds of the state are reviewed, “it could, but I don’t think that is true. I don’t see that it would be unreasonable.”

### **Selection of Advisory Council Meeting Dates, Times and Locations for 2009**

The Chair commented that the previous format of meeting the second Tuesday of every other month and meeting at 10:30 a.m. to accommodate travel was appropriate for the 2009 meeting dates. He suggested February 11, April 8, June 10, August 12, October 14, and December 9 as the 2009 meeting dates. Members present were in agreement.

### **Adjournment**

The meeting adjourned at 11:57 a.m., EDT (12:45 p.m., CDT).