

**NATURAL RESOURCES COMMISSION**

Minutes - April 29, 1998

**MEMBERS PRESENT**

Michael J. Kiley, Chair  
Larry Macklin, Secretary  
Joe Siener  
John Goss  
Damian Schmelz  
Steve Cecil  
Tom Cobb  
Jane Ann Stautz  
Terri Moore

**NATURAL RESOURCES COMMISSION STAFF PRESENT**

Stephen Lucas  
Tim Rider

**DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT**

Jack Costello	Executive Office
Paul Ehret	Executive Office
Angie James	Executive Office
Carrie Doehrmann	Executive Office
Brent Shike	Executive Office
Bill Stuart	Executive Office
John Bacone	Nature Preserves
James Slutz	Oil and Gas
Mike Nickolaus	Oil and Gas
Gary Miller	State Parks and Reservoirs
John Bergman	State Parks and Reservoirs
Susanna Arvin	Outdoor Recreation
Mike Neyer	Water
George Bowman	Water
Melissa Stefanovich	Water
Virginia Simone	Water
John Gano	Law Enforcement

**GUESTS**

Stephen R. Snyder  
Bruce Bowman

Jim Keeler  
Kevin Strunk

## MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular meeting of the natural resources commission at 10:06 a.m., EST, on April 29, 1998 in the Indiana State Museum, 202 North Alabama Street, Indianapolis, Indiana. With the presence of nine members, the chair observed a quorum.

Damian Schmelz moved to approve the minutes of the March 24, 1998 meeting. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's Report. Macklin related that he, DJ Sigler, and Eric Myers participated in a classroom discussion of DNR activities at Indiana University. The discussion was lead by Professor James Ridenour, former Director of the Department of Natural Resources, and it included simultaneous transmissions to several other IU campuses.

Macklin said he attended the Great Lakes Commission meeting with Lori Kaplan. A major discussion topic was the probable impact of global warming upon the Great Lakes region.

Macklin reported upon the tragic death of First Sgt. Karl Kelley. He said Kelley died April 17 from injuries sustained when attempting to rescue crew members who had been thrown from their boat during a training exercise. A conservation officer for 28 years, Kelley was an instructor and member of Indiana's highly respected river rescue team. Kelley and other members of the team received a commendation for the life-saving rescue of a stranded motorist during the March 1997 Ohio River flood. Macklin said there was "a huge crowd of well-wishers" at Kelley's funeral in Shelbyville, "all paying tribute to this wonderful individual."

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, said his advisory council had a good meeting and generally approved the items on this month's commission agenda. He said, "this is a busy time with people coming to our properties, and the grass is growing." Costello outlined "Forest Legacy," a pilot project developed in conjunction with the U.S. Forest Service to purchase "development rights" to help "preserve open space into the future."

Joe Siener, Chair of the Advisory Council for the Bureau of Water and Resource Regulation, said his council will next meet May 13.

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, said the Coal Combustion Waste Workgroup has held two meetings. The first was primarily a "technical meeting" with participation by persons with special expertise in the treatment

and disposal of coal combustion waste. The second meeting focused upon the proposed new rules. Ehret said the next of these weekly meetings would be held in the Jasonville Field Office.

**BUREAU OF LANDS AND CULTURAL RESOURCES  
DIVISION OF STATE PARKS AND RECREATION**

**Consideration of Establishment of Design and Development Criteria for Inns and Lodges on Indiana State Parks and Reservoirs Properties**

Garry Miller of the division of state parks and reservoirs presented this item. He said that largely as a result of resolutions from the Indiana General Assembly, the division had developed general design and development criteria for possible new inns and lodges on Indiana State Parks and Reservoirs properties. These criteria were included in the commission packet and included minimum square footage projections. In addition, the criteria would establish:

- All designs shall conform to the requirements of the Americans with Disabilities Act.
- All federal, state, and local building codes shall be observed.
- Designs shall be sympathetic to the character of the park or reservoir property and other buildings located on the property.
- Exteriors shall consist of brick, stone, stucco, or a similar material appropriate to the site.
- Guest rooms and meeting rooms shall be designed to provide low-noise transmission.
- A four pipe zoned heating and cooling system shall be used.
- Windows shall be energy efficient and shall be vinyl clad wood.
- Minimum 25 year architectural shingles or roof tile shall be provided, and flat roofs shall be kept to a minimum.
- Corridors shall have chair rails and wood bases.
- Commercial grade wall vinyl shall be used in rooms and corridors.
- Commercial grade hospitality carpeting shall be used, and hallways shall be bordered.
- Quality counter tops and fixtures shall be used in public and guest baths.
- Copper plumbing or other approved plumbing methods shall be used, as well as low-flow plumbing fixtures.
- Furnishings shall be mid-range contract casegoods.
- A lodge shall have interior guest room corridors.
- Soil conditions shall be addressed in the design.
- Surveys shall be the responsibility of the operator.
- Plans shall be reviewed by the division of state parks and reservoirs and the division of engineering.
- Plans shall be reviewed by Fire and Building Services.

- Rates shall be similar to those for existing state park inns.
- No alcohol shall be sold by the operator.

Jane Ann Stautz asked about the possibility of including computer and telephone connection standards. Miller said these were important considerations for any new inn or lodge, but because technology was advancing so rapidly relative to communications, he believed any standards which might now be set would rapidly become obsolete.

Stautz moved to approve the design and development criteria for inns and lodges as offered by the division of state parks and reservoirs. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

## **DIVISION OF FORESTRY**

### **Consideration of a Series of Permits on Morgan-Monroe State Forest and on Yellowwood State Forest**

John Friedrich of the division of forestry presented several proposed permits for facilities across Morgan-Monroe State Forest. These were as follows:

South Central Indiana REMC for four-year permit for the installation, operation, and maintenance of an electric line at North Shore Drive.

South Central Indiana REMC for a four-year permit for the installation, operation, and maintenance of an electric line at Derrett Road.

Ameritech for a four-year permit for the installation, operation, and maintenance of a telephone line at North Shore Drive.

Ameritech for a four-year permit for the installation, operation, and maintenance of a telephone line at Derrett Road.

Ameritech for a four-year permit for the installation, operation, and maintenance of an underground telephone line at Main Forest Road.

Ameritech for a four-year permit for the installation, operation, and maintenance of an underground telephone line at County Road 800 East.

Friedrich explained that each of the permits was for utility lines which had, in fact, been present at the sites for many years. In some instances, the lines were placed more than 50 years ago. Details as to the location of the lines was included in the commission packet. Friedrich indicated the division of forestry recommended approval of each of these permits.

Terri Moore moved to approve the four-year permits as recommended by the division of forestry. The motion was seconded by Joe Siener. Upon a voice vote, the motion carried.

Friedrich discussed a request by James Keeler for a four-year permit for the construction, use, and maintenance of an access road across Yellowwood State Forest. He said Keeler owns property adjacent to state forest land in Brown County, and an access route had been tentatively identified, but the department of natural resources now hopes the commission will delegate authority to select an access route from among four alternatives. These routes were identified as A, B, C, and D in a portion of a topographic map distributed to the commission members.

Jack Costello explained that the path for the Keeler access road originally identified by the division of forestry would sever a proposed nature preserve. "We're trying to put this together" in a way which would allow department personnel to select a specific easement. Any of the four alternatives would meet Keeler's needs and yet provide flexibility to proceed in the manner most protective of natural resources.

Joe Siener moved to delegate to the division of forestry and the division of nature preserves, acting under the supervision of the deputy director of the bureau of lands and cultural resources, the authority to select from the four routes identified as A, B, C, and D, an access route across Yellowwood State Forest in favor of James Keeler. This access route would be described in a four-year permit otherwise consistent with the terms of Item 4(G) in the commission packet. Terri Moore seconded the motion. Upon a voice vote, the motion carried.

### **Consideration of "Mountain Bike Demonstration Trail Draft Report" and Directions for Future Action Based Upon the Report**

Susanna Arvin of the division of outdoor recreation introduced the "Mountain Bike Demonstration Trail Draft Report" for a pilot project at Huntington Lake to evaluate the use of mountain bikes on selected DNR properties. In 1994, the Indiana Bicycling Coalition met with the department to discuss a prior policy banning mountain bike use on DNR properties. Due to their growing popularity, the Indiana Bicycling Coalition had requested the department to re-evaluate the policy. The position of the Indiana Bicycling Coalition is that mountain biking is a very popular activity, and there is a social need to provide riding areas.

In 1995, the department took the request by the Indiana Bicycling Coalition to the commission, with the suggestion that a designated area at the DNR property along Huntington Lake be established as a pilot project. Originally, the project was to have been completed in 1996, but heavy rains closed some portions of the bike trail and limited the department's ability to monitor the effects of usage. Rather than a final report, an interim report was provided to the commission. Preliminary observations at that time indicated mountain bikes caused somewhat more erosion than hikers but considerably

less than horses. With an understanding additional monitoring was needed, the NRC agreed in 1996 to extend the pilot project.

During the current meeting, the division of outdoor recreation provided the commission with a follow-up report. Arvin indicated that in general, the impact of mountain bikes on the pilot-project trail was found to be minimal. "None of the points exhibited signs of severe wear, nor did the trail as a whole." Tread depths typically were found not to exceed one inch deep. Although the designed trail width was between eight and ten feet, a single track developed that was a maximum of one foot wide in places, with this tendency most obvious in grassy areas. The soil held its shape well, with some compacting but not enough to be classified as severe. There was some evidence of vegetation kill, but it was neither severe nor complete, and Kentucky blue grass provided the best vegetation base in both open and shaded areas. Arvin said erosion on the trail was more directly attributable to the original trail construction than to the use of mountain bikes.

John Bergman, Assistant Director of the Division of State Parks and Reservoirs, said his division was asking for direction from the commission at two levels. First, should the pilot project at Huntington Lake be made permanent? Second, should the department move forward to develop a strategy for identifying other agency properties where mountain bike trails might be properly developed?

Chairman Kiley reflected that "this seems to have been a very successful program. There is little or no damage to our resources but a huge positive for the citizens using our facilities."

Damian Schmelz moved (1) to extend the pilot project for mountain bikes at Huntington Lake for an additional five years (through 2002); and, (2) to direct personnel within the bureau of lands and cultural resources to develop a set of criteria for evaluating the suitability of other sites on agency properties for usage as mountain bike trails. The motion was seconded by Joe Siener. Upon a voice vote, the motion carried.

## **BUREAU OF MINE RECLAMATION DIVISION OF OIL AND GAS**

### **Consideration of the Approval of a Nonrule Policy Document to Establish Oil and Gas Drilling Procedures for Karst Prone Areas; Administrative Cause No. 98-073G**

James Slutz, Director of the Division of Oil and Gas, introduced this item. He said for consideration was a proposed nonrule policy document which "has to do with new permit conditions in a relatively new exploratory area for oil and gas in Indiana--the karst area." Slutz described the proposed document as an important effort, designed to protect important natural resources without unduly restricting the activities of the petroleum production industry. He stressed, however, that "there are still some unresolved issues, and we may come back later for more formal rule adoption as those issues are resolved."

In response to a question from the commission, Slutz reflected that there were approximately 135 wells permitted in the karst area. Successful wells from this type of formation produced modest quantities of gas, but the formation might continue to produce for 50 years as opposed to more typical formations which might only produce commercial gas quantities for ten to 15 years. He said the Borden Group in Indiana had a serious potential for commercial development.

Mike Nickolaus, Assistant Director for the Division of Oil and Gas, offered a presentation to the commission concerning the proposed nonrule policy document. The presentation explained the purposes of the document and outlined the history of its development. He said the division recommended approval of the document.

Bruce Bowman, President of the Indiana Karst Conservancy, said the conservancy was a not-for profit association "dedicated to the protection and proper management of caves and other karst features." He said that with the assistance of Kevin Strunk, "it was our organization that initiated the discussions" to obtain additional drilling permit requirements in karst areas of the state.

Bowman reflected, "It's the nature of compromise that no one gets everything they wants, and there remain portions of this document that I would prefer to see strengthened." He said, for example, "it does not address development of pumping stations. There is also a lot of work to be done on a nomination process of excluded caves, sharing of cave data between the non-profit and public sector, and reasonable buffer zones around caves. The only thing this document actually addresses is best practice' drilling approaches for wells in these areas."

Even so, Bowman said the proposed nonrule policy document was "a major first step. Given the increased attention to the New Albany Shale, it's important that we get something in place as soon as possible." He expressed the opinion that the document would help serve as a "cornerstone on which to build a comprehensive plan. Ultimately, we hope that a more complete system of policies will be established which can eventually be promulgated as a rule. To that end, the Indiana Karst Conservancy endorses this policy."

Damian Schmelz complimented Bowman and the Indiana Karst Conservancy upon its positive approach to the issue. "The way to get things done is to work with the department."

Kevin Strunk, a certified geologist, also spoke in favor of the proposal, although he also offered "a couple of caveats." He urged that in addition to the Borden Group, a smaller karst area in southeastern Indiana known as the "Maquoketa Group" also be included. Nickolaus said the division of oil and gas was not opposed to this recommendation.

In addition, Strunk said "I'd like to see this proposal go to regulation." As part of the rule adoption process, he urged that the agency "begin soon to address the confidentiality of cave site issues."

Steve Cecil, who represents the Indiana Department of Transportation on the Natural Resources Commission, said the proposed nonrule policy document was another indication "karst features are being recognized and protected, which is appropriate, but we also need to coordinate with other initiatives directed to the same resource." He cited recent efforts at cave protection by INDOT and by DNR's Division of Forestry and Division of Nature Preserves. "I see inconsistencies in the approaches," and some of these inconsistencies "are of concern to me. For example, how are ancillary facilities such as pump stations to be factored?"

Damian Schmelz moved to approve, as a nonrule policy document, the oil and gas Drilling Procedures for Karst Prone Areas, including coverage for the Borden Group and the Maquoketa Group. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

## **LEGAL PROCEEDINGS**

### **NATURAL RESOURCES COMMISSION, DIVISION OF HEARINGS**

#### **Consideration of Report, Findings of Fact and Conclusions of Law with Nonfinal Order of the Administrative Law Judge (and Objections to the Nonfinal Order by the Department of Natural Resources) in Snyder v. DNR; Administrative Cause No. 97-166W**

Tim Rider, Administrative Law Judge, introduced this item. He explained that at issue was application of the "public trust doctrine" to the proposed reconstruction of a boathouse by Stephen Snyder along Lake Wawasee in Kosciusko County. Rider said he found the public trust doctrine was not violated by reconstruction of the structure and found in Snyder's favor. From this finding, the DNR had filed written objections. Two days prior to the commission meeting, the NRC division of hearings received a written response by Snyder to those objections.

Rider indicated the foundation for his nonfinal order was that the "public trust doctrine should not be applied arbitrarily in all situations but should instead be looked at on a case-by-case basis." He said the boathouse here at issue was in a channel of Lake Wawasee, rather than on its natural shoreline, and would not obstruct boat traffic. Upon the facts, the boathouse would not violate the public trust doctrine.

Virginia Simone spoke as counsel for the Department of Natural Resources. She said the DNR did not contest that the boathouse would not interfere with public use of the lake. Simone urged, however, that the administrative law judge had improperly interpreted the public trust doctrine. "The public trust doctrine is about keeping and holding the public waters for the use and enjoyment of the citizens of Indiana." She argued what is important about the public trust doctrine is that "it is a blanket doctrine" with a few well-defined exceptions. She said the ALJ would "turn the public trust doctrine upside down and place the burden upon the Department of Natural Resources to show its violation."



Simone urged that the Administrative Law Judge placed misdirected reliance upon two decisions. She said *Lauder and Starke County Commissioners v. DNR* was an administrative decision by the commission which applied to its facts the public use exception to the public trust doctrine. *Zapfee v. Srbeny* was a decision by the Indiana Court of Appeals, and citation by the ALJ to this decision was "just wrong. The case is about reasonableness' and not about the public trust doctrine.'" Simone said the "reasonableness" standard which would be created by Judge Rider would be impossible to implement in the absence of standards. She asked that the commission either reverse the administrative law judge on this point or remand the case to define how to identify "reasonableness."

Steve Snyder said he was in the unusual posture of being both client and attorney. He advised the commission that the case was decided upon cross-motions for summary judgment. The exclusive evidence was his own affidavit which said the only public use of the site was occasionally for fishing, and that was usually during bass tournaments. He said the evidence was unrefuted that the reconstruction of the boathouse would not invoke the permitting jurisdiction of the public freshwater lakes chapter (IC 14-26-2) since there was no alteration to the bed or shoreline.

At the same time, Snyder agreed "if there is an interference with the public's use of a public freshwater lake," the DNR has the jurisdiction to regulate the activity. The boathouse was built in 1937, when boats were typically about 17 feet long, but now they are more commonly 23 feet long. The proposed reconstructed boathouse would accommodate this longer length, but because of the width of the channel and its current usage, would not interfere with public usage. "The public trust doctrine requires the administrative law judge and the natural resources commission, in each case, to determine whether public use of the public waters is interfered with." He said the key language was set forth in Finding 36: "If there is no showing of deprivation of use by the public then the project cannot be prohibited as a violation of the public trust doctrine." Snyder said upon the undisputed facts presented by this case, there was no deprivation.

Tom Cobb said he believed the conclusion of nonfinal order of the administrative law judge was supportable. At the same time, "the interjection of a reasonableness test' can be troubling to the Department's future administration of this program." Cobb suggested reworking or deleting Findings 24 through 31 as tendered by Judge Rider.

Schmelz said the commission was sometimes called upon to interpret what was reasonable in a particular situation. For example, he noted the Flood Control Act prescribed "unreasonable" impacts to biota. The Chair agreed but reflected that the semantics of reasonableness were not essential to defining application of the public trust doctrine.

Cobb moved to affirm the "Report, Findings of Fact and Conclusions of Law with Nonfinal Order of the Administrative Law Judge" as filed on March 24, 1998, but with Findings 24 through 31 deleted and the subsequent findings renumbered accordingly. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

**Consideration of Report of Public Hearing, Recommendation of Hearing Officer for Final Adoption of Ginseng Rule, and Presentation for Consideration of Nonbinding Resolution; Administrative Cause No. 97-215N; LSA #97-355(F)**

*[NOTE: This item was inadvertently omitted from the draft minutes and added during the regular monthly meeting of the natural resources commission held on May 21, 1998.]*

Steve Lucas, Hearing Officer, introduced this item. He explained that for consideration was final adoption of the recodification of rules which govern ginseng harvest and sale. The program is administered by the division of nature preserves.

Lucas said in addition to traditional functions of recodification, the new rules would establish a harvesting quota at 312 IAC 19-1-8. The quota is needed to help assure plants are allowed to mature and propagate. In addition, the quota is needed so that ginseng can continue to be exported from Indiana. He said the language given preliminary adoption would have determined plant maturity exclusively through the identification of leaves and a flowering or fruiting stalk. Based upon comments received at public hearing, a second methodology would also be approved: counting internodes on the rhizome. He said that based on discussions by John Bacone with university botanists, this second methodology was determined to be scientifically supportable.

Lucas said the public hearing drew considerable interest. A noteworthy aspect of the public comments, however, was that no one spoke in opposition to the need to determine ginseng plants were mature before harvest. In fact, citizens asked that the opening date for harvesting ginseng be made later in the season and that the possession of immature ginseng by dealers be made unlawful. Both of these changes would require statutory changes. He said the citizens were told proposals requiring statutory change would be tendered to the commission for consideration as a possible nonbinding resolution.

John Bacone, Director of the Division of Nature Preserves, urged the commission to give final adoption to the recodification of the ginseng rules. He said the division was concerned with maintaining ginseng in the wild, and the new harvesting quota should help address that concern. In response to a question from the commission, Bacone noted that ginseng tended to mature sooner in southern Indiana than in northern Indiana, but changing the opening date of the harvest season from August 15 to September 1 would be more protective of the resource.

Damian Schmelz moved to give final adoption to the recodification of the ginseng rules, from 310 IAC 11 to 312 IAC 19, as set forth in the commission packet. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

Jane Ann Stautz moved for approval of the following nonbinding resolution:  
The Natural Resources Commission urges the Indiana General Assembly to consider enacting amendments to IC 14-31-3 in order to help assure the continue vitality of ginseng in the wild:

1. To change the opening date for harvesting ginseng from August 15 to September 1 since the experience of ginseng dealers is that ginseng harvested before September 1 typically has not had an adequate opportunity to produce mature fruit and seeds critical to propagation of the species.
2. To make it unlawful for ginseng dealers to possess ginseng which is not mature, as determined by rule, within Indiana's harvest quota for ginseng.

The motion was seconded by Tom Cobb. Upon a voice vote, the motion carried.

**Consideration of Preliminary Adoption of Amendments to Procedural Rules of the Natural Resources Commission and its Division of Hearings Relative to the Geologist Certification Board and to Establish a Process for Nonparty Participation at Objections Arguments; Administrative Cause No. 97-054A**

Steve Lucas, Director of the NRC Division of Hearings, presented this item. He stated that for consideration as to preliminary adoption were amendments to 312 IAC 3-1 which govern its adjudicatory procedures. He said there were two unrelated items contained in the proposal. The first would allow 312 IAC 3-1 to be linked and used by the division of hearings in performing as the "ultimate authority" for the Indiana Board of Certification for Professional Geologists, a responsibility of the division of hearings made effective beginning this year. The second was set forth in proposed 312 IAC 3-1-12(d) and would establish a process for non-parties to participate in objections arguments before the commission. He said the latter provision was developed in response to direction from the commission. Lucas presented both items for preliminary adoption.

Damian Schmelz moved to give preliminary adoption and to commit to public hearing the proposed amendments to 312 IAC 3-1. The motion was seconded by John Goss. Upon a voice vote, the motion carried.

**Adjournment**

At approximately 11:48 a.m., the meeting adjourned.