

NATURAL RESOURCES COMMISSION
Minutes - January 24, 1996

MEMBERS PRESENT

Michael Kiley, Chair
Jack Arnett, Vice Chair
Patrick Ralston, Secretary
John Goss
Joseph Siener
Jerry Miller
Damian Schmelz
Steve Cecil
Kevin Betz
Terri Moore
Sherman Anderson
Mary Titsworth

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas	Hearings
Bill Teegarden	Hearings
Tim Rider	Hearings
Cheryl Hampton	Hearings

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Jack Costello	Executive Office
David Herbst	Executive Office
Paul Ehret	Executive Office
Louise Krick	Executive Office
Chuck Cooper	Law Enforcement
John Stivers	Law Enforcement
Chuck Shannon	Law Enforcement
Lori Kaplan	Chief Legal Counsel
Angila Prather	Legal Counsel
Mary Davidsen	Legal Counsel
Mary Ann Habeeb	Legal Counsel
Jim Slutz	Oil and Gas
John Bacone	Nature Preserves
Stephen Sellers	Public Information and Education
Bob Bronson	Outdoor Recreation
Matt Abriani	Water
John Simpson	Water
Mark Basch	Water
George Bowman	Water
Rick Jones	Historic Preservation and Archaeology

Jim Mohow

Historic Preservation and Archaeology

GUESTS PRESENT

David Hollenbeck	Lloyd Wright
Walter Goodman	Judy Thompson
Rosie Cissell	Jerry Schneider
Ruth Tate	Bob Klawitter
Tim Maloney	Matthew Price
Jerry Schneider	David Dillham
Michael Eckerk	John Kraft
Jon Voelz	Charlie Kaelin
Jim Wichman	Don Woodward
Rebecca Tennill	Nathaniel Thompson
glenn Deuser	Thomas Thompson
Russell Getty	Louise Bowman
Judy Thompson	Helen Bailey
Harry Harrby	Earl Becker
Joe Bowman	Goldie Goodman
Norma Wade	

MONTHLY REPORTS

Michael Kiley, Chair, called to order the regular meeting of the commission at 10:05 a.m., EST, in the Indiana State Museum, 202 North Alabama, Indianapolis, Indiana. With the presence of all twelve commission members, the chair observed a quorum.

Damian Schmelz moved to approve the minutes of the November 30, 1995 meeting. The motion was seconded by Jack Arnett and approved by voice vote of the commission.

Patrick Ralston gave the Director's Report. "It has been a very busy two months" since the last commission meeting. He reported that the Great Lakes Commission would meet in Indianapolis in May and that the head of the Sea Grant Program would be a participant. Ralston also noted that he, Steve Lucas, and Dawn Deady met with Frank G. Martin, Jr., Executive Director of the Indiana Port Commission, concerning efforts to improve communication and coordination in Northwest Indiana. The Indiana General Assembly is a focus of efforts, he said, and activities were feverish in this year's short session.

Jerry Miller, Chairman of the Advisory Council for Lands and Cultural Resources, stated that due to "inclement weather," his council did not meet in December.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, said he is optimistic with progress of the new museum site at the White River State Park. He also reflected positively upon the efforts of the Indiana Heritage Trust and suggested the

commission might, at a future meeting, be interested in a more detailed report upon its acquisitions.

Joe Siener, Chairman of the Advisory Council for the Bureau of Water and Resource Regulation, reported his council met last Thursday. Siener announced he has been re-elected Chairman of the Advisory Council for the Bureau of Water and Resources Regulation. The primary effort of the council continues to be upon the establishment and regulation of conservancy districts.

David Herbst, Deputy Director for the Bureau of Water and Resource Regulation, said "it has been a hectic short session" of the legislature. He reported that of the 25 river otters released last spring, 20 have survived. Seventy-five more will be released this winter, including several at Tippecanoe River State Park and others at a site in Kosciusko County.

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, said the U.S. Congress is considering legislation which would limit OSM enforcement in Indiana and other primacy states. Ehret reported that Ted Biggs, Senior Staff Attorney for the Bureau of Mine Reclamation, has resigned the agency and "will be sorely missed." Angila Prather, a veteran DNR attorney, has been selected as the replacement for Biggs.

ANNUAL ELECTION OF OFFICERS

The commission proceeded to its annual election of officers. Patrick Ralston made the following nominations:

Michael Kiley, Chair
Jack Arnett, Vice Chair

The motion was seconded by Terri Moore.

Stephen Lucas observed that, by statute, the secretary of the commission was also an elected office. Joe Siener then nominated Patrick Ralston as Secretary. The motion was seconded by Jerry Miller.

The Chair called for additional nominations. None were offered. Jerry Miller then moved that the nominations be closed, and the motion was seconded by Damian Schmelz. The motion passed and the officers were elected by acclamation.

BUREAU OF LANDS AND CULTURAL RESOURCES PERMANENT APPOINTMENTS

Jim Wichman, Nursery Supervisor of the Division of Forestry, recommended permanent appointment for David Dillman, Assistant Property Manager at Vallonia Tree Nursery.

Sherman Anderson moved to approve David Dillman for permanent ("indefinite") appointment. The motion was seconded by Jerry Miller. Upon a voice vote, the motion carried.

Jim Wichman requested that the probation period for Geoffrey Fulton, Assistant Property Manger at Jasper-Pulaski Tree Nursery, be extended until July 1996. The chair granted the request for deferral and indicated the permanent appointment of Fulton would be placed on the agenda of the commission for the August 1996 meeting.

DIVISION OF NATURE PRESERVES

Consideration of the Dedication of an Addition to Fern Cliff Nature Preserve, Putnam County

John Bacone, Director of the Division of Nature Preserves, presented this item. He explained that the Fern Cliff Nature Preserve is owned and managed by The Nature Conservancy. The nature preserve contains several sandstone ravines and cliffs which support impressive growths of ferns, mosses, and liverworts. Bacone reflected that the diversity of mosses and liverworts is one of the most noteworthy features of the site. The addition would increase the area of the nature preserve by 35 acres, including considerable frontage along Snake Creek. Bacone said a public hearing was conducted to consider the proposed addition, that no negative comment was received, and that he recommended approval of the addition.

Damian Schmelz moved to approve the dedication of the addition to the Fern Cliff Nature Preserve in Putnam County. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Consideration of the Dedication of an Addition to Portland Arch Nature Preserve, Fountain County

John Bacone also presented this item. He explained that the nature preserve includes 253 acres near the town of Fountain in Fountain County and is owned and managed by the division of nature preserves. The proposed addition would add 40 acres to the preserve. It includes a deeply dissected, wooded ravine and adds important buffer to the property to provide watershed protection and to protect it from future encroachments. Bacone reported that a public hearing was conducted to review the proposed addition, that no negative comment was received, and that he recommended its dedication.

Joe Siener moved to approve the dedication of the 40 acre addition to Portland Arch Nature Preserve in Fountain County. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

Consideration of the Dedication of Twin Swamp Nature Preserve, Posey County

John Bacone also presented this item. Bacone noted the proposed nature preserve is owned and managed by the division of nature preserves and was purchased using funds from the Indiana Natural Heritage Protection Campaign, with assistance from The Nature Conservancy. Bacone stated, "We're really pleased to bring this tract to you. . . . This site is probably the highest quality cypress slough in Indiana." He explained that petroleum extraction rights beneath the nature preserve have been retained in private ownership, but any oil or gas would be required to be extracted by "slant drilling." Bacone urged approval of the Twin Swamps Nature Preserve.

Jerry Miller moved to approve the dedication of Twin Swamps Nature Preserve in Posey County. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

BUREAU OF WATER AND RESOURCE REGULATION DIVISION OF WATER

Consideration of the Approval of an Extension of Time to Submit the District Plan for the Lake Lemon Conservancy District; Monroe Circuit Court (Cause No. 53CO5-9410-CP-1187)

Matt Abriani of the division of water presented this item. He stated that the Lake Lemon Conservancy District reasonably required an extension of time to prepare and submit its district plan because of complexities in negotiations with the City of Bloomington for lease of the lake.

Damian Schmelz moved to grant the Lake Lemon Conservancy District until March 6, 1996 to complete its district plan. The motion was seconded by Sherman Anderson. Upon a voice vote, the motion carried.

Consideration of the Approval of the District Plan for the Nature Works Conservancy District; Porter Circuit Court (Cause No. 64CO1-9412-CP-109)

Matt Abriani also presented this item. He explained that the Nature Works Conservancy District was created to provide for the collection, treatment, and disposal of sewage and other liquid wastes in a new development south of Valparaiso. The need for a sewer system is the result of poor soils, slow drainage, and high and sometimes perched water tables. He said the division of water had reviewed the district plan, found it consistent with the needs and purposes of the district, and in conformance with IC 14-33. He recommended its approval, subject to findings set forth in the commission packet.

David Hollenbeck, attorney for the conservancy district, was present to answer questions. John Goss moved to approve the district plan of the Nature Works Conservancy District pursuant to the following findings: 1. The district plan meets the requirements of IC 14-

33-6-2 and 4 of the Indiana Conservancy District Act. 2. The district plan has been reviewed by the division of water of the department of natural resources. 3. The district plan accomplishes the purpose of collection, treatment and disposal of sewage and other liquid wastes. 4. This approval is only granted under IC 14-33, the Indiana Conservancy District Act, and as such does not assess impacts or present conditions related to fish, wildlife, botanical resources or any other areas of concern which may be raised during reviews for any other department of natural resources administered permit. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration for Transfer and Revision of the Contract for the Sale of Water to the Pointe Associates

John Simpson, Director of the Division of Water, presented this item. He explained that the State of Indiana entered into a contract with The Pointe Associates (formerly Caslon Development Company) for the sale of water from Monroe Lake to irrigate a golf course. The Pointe Associates now anticipates selling its assets to Brennan Holdings LTC. For this reason, Simpson recommended that the water contract responsibilities be transferred to Brennan Holdings with corrected statutory citations and the rate for the sale of water as established by statute.

John Goss said he would support approval of the agenda item. He suggested, however, that the statutory price of \$33 per 1,000,000 gallons of water was inadequate to properly reflect the worth of the water. He urged the DNR to raise the issue next summer with the Natural Resources Study Committee of the Indiana General Assembly.

Patrick Ralston moved to approve the transfer of the contract of sale of water from The Pointe Associates to Brennan Holdings LTC as more particularly set forth in the commission packet. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

DIVISION OF OUTDOOR RECREATION

Recommendation to the Director on the Distribution of Dingell-Johnson Funds (Indiana Waters Projects) for Fiscal Year 1996

Bob Bronson of the division of outdoor recreation presented this item. He urged approval of Indiana Waters Projects funding for each of the following: 1. Arnold Creek Ramp (Ohio County) in the amount of \$29,000. 2. Meadowlark Park in Carmel (Hamilton County) in the amount of \$25,000. 3. Delaney Park (Washington County) in the amount of \$26,000. 4. Hayden Park (Elkhart County) in the amount of \$20,000.

Sherman Anderson moved to recommend that the Director of the Indiana Department of Natural Resources approve funding as urged by the division of outdoor recreation. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

**NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS**

Consideration of Request for Ruling by the Ultimate Authority in the Matter of Citizens Against the Pit by Rebecca L. Tennill v. Department of Natural Resources and Silver Creek Sand and Gravel Co., Inc.; Administrative Cause No. 95-250W

Tim Rider, Administrative Law Judge, introduced this item. He explained the case presented an important first-impression question. Where there has been a complete failure by a permit applicant to provide notice to affected persons, should (1) the permit be revoked or rescinded and remanded to the issuing division (here the division of water), or; (2) does the "due process" hearing conducted by an administrative law judge pursuant to IC 4-21.5 (the administrative orders and procedures act or AOPA) cure any harm?

Judge Rider reflected that the consistent position of the division of hearings has been that an AOPA hearing cures an ordinary defect in notice, but never before has the division been confronted with a failure which is so gross. He explained that he had made an interlocutory order finding the error would be cured, but because he thought the extraordinary facts presented a close case and one which included important policy elements, it was being placed before the commission for disposition before proceeding to a hearing on the merits. Rider indicated that remonstrants to the permit had also urged that the permit applicant engaged in fraudulent conduct concerning the lack of notice, but he found the evidence did not support that allegation.

Michael Mullett spoke as attorney for the remonstrants to the permit, a group called "Citizens Against the Pit." He said the case was not typical of notice problems and that there was "a complete and absolute failure" to inform adjacent property owners of the pending application. He urged the permit should be found void ab initio or should be revoked because of the applicant's fraud. Mullett said the administrative law judge found the permit applicant's consultant did not commit fraud because his actions were not "knowing." He argued that conclusion was erroneous as a matter of law and should be reversed by the commission.

John Kraft said he was appearing as the attorney for the Edwardsville Water Corporation. He echoed the argument by Mullett and said the applicant also failed to notify his client.

Mary Davidsen spoke as the attorney for the Department of Natural Resources. She said that a hearing de novo which would be conducted by the ALJ pursuant to AOPA would cure any error. She also urged that several groundwater issues raised by Citizens Against the Pit were outside the jurisdiction of the Flood Control Act, the law which she said was exclusively applicable to the case. For this reason, she asked the commission to make a legal finding that the groundwater issues not be reviewed.

Jerome Schneider, President of Silver Creek Sand & Gravel Co., Inc. (the permittee) spoke briefly. He stated that any error concerning notice was inadvertent, not at the instruction of his company, and due to a misunderstanding by the consultant. He stated

that revoking the permit would cause him an economic hardship and would cause the layoff of several employees. He asked the commission to allow the administrative proceeding to continue.

Kevin Betz said he believed the AOPA hearing would provide the parties with due process. He said, however, that agencies must take their statutory notice requirements seriously. Important citizen rights are involved, and the parties are placed in a different legal posture after the initial determination by the agency to grant or deny a permit. He urged that the case be remanded and the permit revoked in order to allow full citizen participation.

Jack Arnett expressed concerns that revoking the permit based upon a notice deficiency might set a bad precedent, particularly since a full hearing opportunity is yet accorded. Similar concerns were expressed by Steve Cecil, who reflected upon the time and expense notice efforts by INDOT often entail. The Chair responded that he believed every case must be viewed upon its peculiar facts; he suggested that the commission might properly distinguish between a good faith effort at notice which fails to reach all possible affected persons and one, such as is currently presented, which seemingly fails to provide any meaningful notification.

Terri Moore reflected that she did not believe the facts supported a determination that the permit applicant or its consultant committed fraud. The Chair expressed agreement with her perspective.

Patrick Ralston noted that most of the technical reviews have already been performed by DNR staff with respect to the Silver Creek Sand & Gravel permit. As a result, if the case were remanded to the division of water, processing should require a considerably shorter period than what is typically required for a new permit.

John Goss moved to revoke Permit FW-16,819 issued to Silver Creek Sand & Gravel and to remand the matter to the Department of Natural Resources for processing. The sole basis upon which the revocation and remand would be based was a total failure by Silver Creek to provide notice to adjacent property owners. The motion would not go to the merits of the permit and any other pending motions should be considered mooted or denied. If Silver Creek Sand & Gravel were to pursue the permit, the Department of Natural Resources should expedite its processing. The motion was seconded by Jerry Miller. Upon a voice vote, the motion carried unanimously.

Consideration of Report of Public Hearing and Recommendation of Rule for Final Adoption of Amendments to Commercial Deer Processing Standards; Administrative Cause No. 95-048L; LSA # 95-219

Steve Lucas, Hearing Officer, presented this item. He said that for consideration was an amendment to 310 IAC 3.1-3-10 which would eliminate the requirement that establishments which process deer meat must mail a copy of their records to the division

of law enforcement. Records would continue to be maintained on site. He said this modes effort at governmental streamlining was noncontroversial and appropriate for final adoption.

Patrick Ralston moved to give final adoption to the amendments to 310 IAC 3.1-3-10 to eliminate the requirement that deer processors mail a copy of their records to the division of law enforcement. The motion was seconded by Jerry Miller. Upon a voice vote, the motion carried.

Consideration of Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge in the Matter of Gladys Stanton v. Department of Natural Resources, Administrative Cause No. 90-221W; and Department of Natural Resources v. Gladys Stanton, Administrative Cause No. 90-233W

The Chair announced this item had been deferred on the motion of the Department of Natural Resources.

Consideration of the Report of Public Hearing, and Recommendation for Final Adoption of Rule Amendments Governing Responsibilities of Conservation Officers; Administrative Cause No. 95-090L; LSA #95-157(F)

Steve Lucas explained this item. He said that for consideration were amendments to 310 IAC 1.2-3-1 which governs the primary and secondary law enforcement responsibilities of conservation officers. Lucas indicated that no one commented on the rule proposal during the public hearing and that at issue was a policy determination for the commission. He said Charles Shannon, Director of the Division of Law Enforcement, was present to answer questions.

Jack Arnett moved to give final adoption to the amendments to 310 IAC 1.2-3-1, the section which governs the primary and secondary responsibilities of conservation officers. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation of Hearing Officer for Final Adoption of Amendments to Oil and Gas Temporary Abandonment Provisions; Administrative Cause No. 95-040G; LSA #94-231(F)

Steve Lucas, Hearing Officer, introduced this item. He said that for consideration were amendments proposed to 310 IAC 7-1-33.5. This section governs the process for testing and placing oil and gas wells on temporary abandonment status. He said the proposal was developed by the division of oil and gas in consultation with the industry. The proposal proved noncontroversial and was understood to enjoy general industry support. Lucas said that James Slutz, Director of the Division of Oil and Gas, and Angila Prather, Legal Counsel for the Bureau of Mine Reclamation, were present to answer questions.

Patrick Ralston moved to give final adoption to the amendments to 310 IAC 7-1-33.5 governing the temporary abandonment of oil and gas wells. The motion was seconded by Jerry Miller. Upon a voice vote, the motion carried.