

NATURAL RESOURCES COMMISSION

Minutes - July 22, 1997

MEMBERS PRESENT

Michael Kiley, Chair
Jack Arnett, Vice Chair
Larry Macklin, Secretary
Mary Titsworth Chandler
John Goss
Jerry Miller
Steve Cecil
Damian Schmelz
Terri Moore
Tom Cobb
Joe Siener

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
William Teegarden
Sharon Turk

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Jack Costello	Executive Office
Paul Ehret	Executive Office
Lori Kaplan	Executive Office
D.J. Sigler	Executive Office
Angie James	Executive Office
Bill Stuart	Executive Office
Bill Maudlin	Fish and Wildlife
Glenn Lange	Fish and Wildlife
Jim Mitchell	Fish and Wildlife
Mary Ann Habeeb	Fish and Wildlife
John Friedrich	Forestry
Jim Mohow	Historic Preservation and Archeology
Rick Jones	Historic Preservation and Archeology
Lt. Col. John Stivers	Law Enforcement
Lt. Ed Troche	Law Enforcement
John Bacone	Nature Preserves
Tom Kidd	Outdoor Recreation
Steve Morris	Outdoor Recreation
Angila Prather	Reclamation
Sylvia Wilcox	Reclamation
Gerald Pagac	State Parks and Reservoirs

Mike Neyer
Bobbi Nardi
Melissa Stefanovich

Water
Legal Section
Legal Section

GUESTS PRESENT

Larry Miinch
Jeff T. Valovich
Jerome Schneider
Gordon Phillips
Charlie Hunen
Walter Goodman
Mike Mullett
Kirby Mullen
Suzanne Kayi
Albert Kaegi
Jeff Phillips
Phillip Ohmit
Charles Hiltunen
Jon Voelz

Walter Schulz
Maurice Byrne
Tim Janowski
Dick Mercier
Goldee Goldman
Bruce Mason
Bob Felar
Shirley Turner
Janet Williams
Carol Jones
Susan Myers
Tim Mahoney
Susan Thomas
Doug Allman

Sean Schneider
Laura Karagery
Michael Grimshaw
Bill Holder
Lee Zimmerman
Tom Thompson
Earl Becker
Judith Thompson
Harry Haully
Michael Phillips
Emily Rosko
Don Mottley
Yvonne Skole

MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular meeting of the natural resources commission at 10:05 a.m., EST, on July 22, 1997 in Indiana State Museum, 202 North Alabama, Indianapolis, Indiana. With the presence of ten members, the Chair observed a quorum.

Jerry Miller moved to approve the minutes of the June 26 (and June 27), 1997 meeting. The motion was seconded by Jack Arnett. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's Report. He said the department was working diligently on the preparation of coal combustion waste disposal rules. Discussions were taking place with the department of administration and the state budget agency regarding construction of the new state museum. He met this month with historic site curators at the Potawatomi Inn. The historic preservation review board met to address issues pertinent to the new Indiana Pacers arena. Macklin also outlined preliminary meetings with citizens who had volunteered to promote consistency of DNR properties with the Americans with Disabilities Act. He said the department had participated actively in the recently completed Black Expo.

Macklin announced that the department had selected Lori Kaplan as the new Deputy Director for the Bureau of Water and Resource Regulation. He indicated the selection process was extremely difficult, with several well-qualified candidates. Kaplan was ultimately selected as the candidate with the knowledge of the department and the energy needed for the challenges ahead.

Lori Kaplan said she looked forward to the shift in her role as the DNR's Chief Legal Counsel to that of Deputy Director. "I'm starting out on an agenda of total emersion." She distributed the Hoosier Outdoor Calendar for the coming year and invited the commission to the wild game cookout, to be held August 8 at the Indiana State Fair.

Kaplan said she did a "walk-through" on the new computerized permitting program developed by the division of water and Access Indiana. "The public will be able to do permitting on the Internet." One feature is that an application cannot be submitted until all information is provided. A common problem today is that incomplete applications demand an inordinate amount of staff time, and incomplete applications can result in longer turn-around times for citizens who submit approvable permits. The design of the computer program should encourage complete applications and reward diligent applicants. "The program is a model for Indiana and for the nation."

Jerry Miller, Chairman of the Advisory Council for the Bureau of Lands and Cultural Resources, said his council did not meet in July.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, announced that Jon Smith had been appointed Director of the Division of Historic Preservation and Archeology. He said Smith was an experienced staff member and well-deserving of the appointment.

Costello said a 2 mile trail for hiking and biking has recently been opened in Ft. Benjamin Harrison State Park. The golf course was busy, with usage somewhat restricted this summer to allow recent plantings to become well-established. "It's our first experience with an urban park, and it's going very well."

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, said that Mike Sponsler recently received the "Silver Hammer Award" in Washington, DC, as part of Vice President Al Gore's National Performance Review. The award honored Sponsler for innovations supporting governmental efficiency in the oversight of state programs nationally. Ehret said he was leaving later in the day for a meeting with OSM to address issues of mutual concern to DNR and the federal oversight agency.

BUREAU OF LANDS AND CULTURAL RESOURCES

Division of State Parks and Reservoirs

Consideration of a Request by the City of Lawrence for a Waterline Easement within Fort Benjamin Harrison State Park

Gerry Pagac, Director of the Division of State Parks and Reservoirs, presented this item. He explained the waterline would be located on land, now included within the northeast portion of Fort Harrison State Park, that was purchased in 1995 as a buffer strip. Pagac explained that the proposed easement would be located in a tract that has been disturbed previously and will be allowed to regenerate. He said his division recommended approval.

Damian Schmelz moved to approve the waterline easement as requested by the City of Lawrence and recommended by the division of state parks and reservoirs. The motion was seconded by Tom Cobb. Upon a voice vote, the motion carried.

MULTIDIVISIONAL TASK FORCE

Consideration of Approval of a Nonrule Policy Document to Govern the Collection of Plants, Animals, Fossils, and Similar Materials on Properties Administered by the Department of Natural Resources

John Bacone, Director of the Division of Nature Preserves, presented this item. He explained that a multidivisional task force within the department has been reviewing policies for the collection of plants, animals, fossils, and similar materials on agency properties. The task force has concluded a greater emphasis must be placed upon resource protection, and it urged the commission to adopt a policy document to reflect the emphasis.

Bacone illustrated task force concerns by reference to demands on the collection of ginseng root. Currently, dried wild ginseng sells for between \$400 and \$600 a pound. Because of accelerating demands, smaller and smaller plants are being harvested. On the average in 1996, more than 500 plants were required to make one pound of dry ginseng. Almost 12,000 pounds were reported as having been collected statewide. These increasing demands are impacting populations of ginseng adversely, with a fear the viability of wild populations will become threatened.

Similar reports could be made for goldenseal, orchids, turtles, gold panning, rare butterflies, and slippery elm bark. Bacone said the commission was being asked to support greater controls on collections of these items and to encourage more rigorous enforcement of violators. He noted that excepted from the policy would be noncommercial nut, berry, and mushroom picking. Also excepted would be firewood collection by campers as authorized on properties administered by the division of forestry.

Tom Cobb moved to approve, as outlined by Bacone and as presented in the commission packet, a policy to govern the collection of plants, animals, fossils, and similar materials on agency properties, with the emphasis upon resource protection. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

BUREAU OF WATER AND RESOURCE REGULATION

Division of Fish and Wildlife

Consideration of a Nonrule Policy Document to Establish Wetland and Habitat Mitigation Guidelines for Projects Requiring DNR Approval or Anticipating Coordinated DNR Comment; Administrative Cause No. 97-118D

Bill Maudlin of the Division of Fish and Wildlife presented this item. He reminded the commission that in early 1995, a draft wetlands mitigation policy was presented to the commission for discussion. Since that time, the draft has been reviewed by numerous state and federal agencies, organizations, developers, and consultants. The proposal currently before the commission would establish a wetlands mitigation policy, as well as a habitat mitigation policy, for use on projects where the DNR is the permitting authority or where the DNR comments to another agency.

Maudlin said that DNR has, in fact, required mitigation "for wetlands and habitat damage for years." The current proposal was modeled after a memorandum of understanding entered some time ago between the IDNR and the Indiana Department of Transportation. The policy should aid in predictability, providing "up front knowledge of wetlands and habitat concerns to developers and to our own staff in Indiana state government."

Tim Maloney of the Hoosier Environmental Council offered "our general support" for the guidelines. He said that "compensating mitigation" is expressed in the document, and rightly so, to be the "last option" applied during development. "Avoidance and limitation should come first." Maloney urged that Indiana has already lost 85% of its pre-settlement wetlands, and those remaining should be treated with great respect.

He said "we would, however, like to offer a few strengthening improvements." Rather than the standard minimum mitigation ratio of two-to-one for nonwetland forest, the ration should be three-to-one. Rather than four-to-one for palustrine forested wetland, the ration should be five-to-one. He urged the commission to make these adjustments to the guidelines.

Susan Thomas of the Sierra Club (Wetlands Project Chapter) also commended the DNR for "providing improved wetland flexibility." She described the proposal as a "significant improvement" from the draft circulated in 1995, particularly with its emphasis upon "avoidance and minimization." She said the Sierra Club was "concerned with cumulative impacts." Thomas asked, however, that lacustrine wetlands be included in the guidelines. Also, she asked that the definition of "wetland" be expanded to reference "isolated wetlands, since not all wetlands are transitional in nature."

The Chair suggested that modifications might be made after obtaining experience with the guidelines. He said that in his opinion, however, the "wetlands mitigation guidelines are long-overdue, and they need to be moved forward."

Damian Schmelz moved to approve the wetlands and habitat mitigation guidelines, as presented by the DNR, for publication in the Indiana Register. The motion was seconded by Tom Cobb.

Steve Cecil urged that there are "trade-offs you have to consider." He reflected that the memorandum of understanding between IDNR and INDOT covered wetlands only, and not habitats. He urged that expanding the guidelines to other habitats could place an onerous burden upon permit applicants and might exceed the regulatory authority of the agency. Cecil said the mitigation ratios were more demanding than they appeared. "I'm not saying the development of

mitigation guidelines is a bad idea, but we need to do so in a manner which will give the flexibility to assure the guidelines will not be treated as law."

Following some additional conversation by the commission, the chair called the motion for a vote. The motion carried by voice vote, with Steve Cecil opposed.

Consideration of a Proposal for Preliminary Adoption of Rule Amendments to Authorize a Season for Cross-Bow Deer Hunting; Administrative Cause No. 97-085D

Larry Macklin introduced the item. He noted that whether cross-bows should be lawful for taking deer in Indiana had been before the state "for some time. It has been almost a perennial issue before the General Assembly and the DNR." Macklin said that whatever the merits of a particular season, he was "convinced the seasons should be set by the DNR and not by the legislature."

Macklin explained that in the most-recent session, there was considerable support for a cross-bow season. "If we don't address the issue, the legislature probably will." He asked the commission to consider giving the proposal preliminary adoption and moving it forward for public comment.

Chairman Kiley stressed, that if preliminary adoption were given to the rule, all parties would have the ability to testify at length before the hearing office. Preliminary adoption is not mandate for final adoption.

Mike Phillips of Horton Manufacturing commended the natural resources commission and the department of natural resources for "moving this matter forward." Michael Grimshaw of the Indiana Wildlife Federation said "we just want it to go to public hearing and stay out of the legislature." Dick Mercier of the Indiana Sportsmen's Roundtable said he agreed that the proposal should be moved along to public hearing.

Joe Siener moved to give preliminary adoption to rule amendments to establish a cross-bow season in Indiana and to commit the proposal to public hearing. The motion was seconded by Jack Arnett. Upon a voice vote, the motion carried. Larry Macklin abstained.

BUREAU OF LAW ENFORCEMENT AND ADMINISTRATION

Division of Law Enforcement

Consideration of a Proposal to Modify "No-Boat" Zones Adjacent to Whihala Beach (Near Whiting) in Lake Michigan, Lake County, Indiana; Administrative Cause No. 97-072L

Lt. Ed Troche of the Division of Law Enforcement introduced this item. He explained that the Lake County Park Department petitioned to expand an existing no-boat zone and to add two additional Lake Michigan "no-boat" zones adjacent to Whihala beach near Whiting. The purpose

of these zones would be to protect swimmers. He said accommodations for boat-in beaches are available nearby, and the proposed restricted areas are not frequently used by boaters. He recommended the proposal be given preliminary adoption and committed to public hearing.

Tim Janowski, Property Manager for Whihala Beach, said the rule amendments were needed for public safety and were consistent with the park's master plan. He said 1,300 feet were available adjacent to the proposed no-boat zones where boaters could moor. He asked the commission to give the rule amendments preliminary adoption.

Steve Lucas presented the written comments of the DNR Division of Outdoor Recreation. On July 21, 1997, Jodi Dickey wrote that, *"Initially, there was some concern that there would be too much beach lost to boat access. A survey was conducted along the Lake Michigan shore during the summer of 1996. This survey showed power boating to be the second most popular activity."* She wrote that 40% of those using the shore did so from a boat, and 46% participated in lake swimming. After reviewing the plans submitted by the Lake County Parks Department, however, Dickey indicated she had *"no concerns about a loss of boating access along this part of the shoreline. The plans clearly show approximately 1300 feet of shoreline being used as boat-in' beach mooring. The extended No Boat' Zone will not adversely impact recreation along the shoreline."*

Jerry Miller moved to give preliminary adoption to the amendments to extend and enlarge the no-boat zones adjacent to Whihala Beach near Whiting. The motion was seconded by Jack Arnett. Upon a voice vote, the motion carried.

LEGAL PROCEEDINGS

Natural Resources Commission, Division of Hearings

Consideration of Report, Findings of Fact and Stay Order of the Administrative Law Judge (and Objections to the Order) in the matter of Edwardsville Water Corporation and Citizens Against the Pit v. Department of Natural Resources and Silver Creek Sand and Gravel; Administrative Cause No. 96-138W

Immediately prior to consideration of this item, Tom Cobb recused himself from participation. He explained that he had a potential conflict of interest. One of the parties had contacted him regarding possible legal representation before his employment with the Indiana Department of Environmental Management.

William Teegarden, Administrative Law Judge, outlined a complex history of procedural motions. He granted a partial stay. Although not typically considered ripe for review by the commission, both he and the parties agreed this partial stay should be reviewed because of its broad legal ramifications. First-impression issues are presented as to the relationship of the Flood Control Act and amendments to the Historic Preservation Act intended to provide protection to archaeological resources on private lands. He said that at the heart of the stay was whether a Flood Control Act permit could be conditioned upon compliance with the terms of a permit issued by DNR's Division of Historic Preservation and Archeology to protect cultural resources.

Teegarden explained that although Edwardsville Water Corporation was a party, the issues presented by the partial stay were not among its concerns, and the corporation determined not to attend the commission meeting.

Barbara Nardi spoke as attorney for the Department of Natural Resources. She argued that solely at issue in the case was a Flood Control Act permit issued pursuant to IC 14-28-1. The Flood Control Act considers a variety of issues, including impacts to the carrying capacity of the floodway and impacts to fish and wildlife, but it does not consider cultural resources. Nardi urged that the decision by the ALJ was erroneous. If allowed to stand, there would be a "significant impact on the regulatory efforts of the DNR," and a Flood Control Act permit could be challenged under any law administered by the agency.

Nardi said previously the administrative law judge had dismissed the stay request on the basis there was no cultural resource authority within the Flood Control Act. He later reversed himself and entered the stay order currently at issue. Nardi asked the commission to set aside the present stay order and to reinstate the previous order by Judge Teegarden.

Maurice Byrne spoke as attorney for Silver Creek Sand and Gravel. He introduced officers in the business and said the company "does not necessarily disagree with the provisions of the final order of the administrative law judge." He did take exception to any implication that the company had not complied with laws pertaining to the protection of archeological resources. Byrne said the DNR Division of Historic Preservation and Archeology had requested site mitigation, and his client had contracted with Ball State University to perform the mitigation. He said the company "has been seriously harassed in this case." Byrne added that he believed his client had addressed the concerns of Edwardsville Water Corporation with the placement of a monitoring well, even though the well was not required by the DNR.

Mary Titsworth Chandler moved to bifurcate the regulatory issue presented by the Flood Control Act from the regulatory issue presented by the Historic Preservation Act. She questioned whether the cultural resource issue was "ripe" for adjudication. Steve Cecil seconded the motion.

Bruce Mason, Executive Director of Indiana Mineral Aggregates Association, spoke on behalf of Silver Creek Sand and Gravel. He said the company was "a responsible business" which has "proceeded with its work as it was charged to do." He said his association had worked with IDEM to prepare a complete regulatory manual, but despite circulation of the manual to IDNR and other state agencies, no reference was made to historic preservation. He encouraged the agency to decide its internal conflicts in advance. "This process has to end someplace."

Michael Mullett spoke as attorney for the Citizens Against the Pit. He said the DNR's position was "bad law and bad policy." Mullett argued there was "no question the department had the authority to place conditions on the Flood Control Act permit." He referenced precedent in commission decisions which brought other DNR authority into consideration for a Flood Control Act permit and said the commission would be inconsistent if it did not apply the precedent here.

Mullett said it was unquestioned that the area is a "world class archeological site." The boundaries of the Reid Site are virtually coexistent with the boundaries of the Flood Control Act

permit. He said the reason "we have this interplay of permits" is that if the construction authorized under the Flood Control Act is completed, the cultural resources will be destroyed and the archeological issues mooted. Mullett agreed that his client had responsibility to show a substantial likelihood of success on the merits, but he believed the evidence presented at hearing met this burden.

Mullett informed the commission the Citizens Against the Pit had, in fact, initiated administrative review of the Division of Historic Preservation permit (Administrative Cause No. 97-064H). That proceeding was subsequently consolidated with the review taken from the Flood Control Act permit (Administrative Cause No. 96-138).

Chandler noted that the Flood Control Act is designed to protect against endangerment to property. She asked why, then, archeological resources were not protected. Nardi responded that the DNR considered property to include items such as houses, buildings, businesses, and bridges but not archeological resources. Cecil argued that archeological resources are generally owned by the person who owns the real estate.

Mullett said Silver Creek Sand and Gravel did not have title to a shell mound within the site. He said human remains had also been identified in the vicinity, and the company would not have title to human remains.

Rick Jones, State Archeologist, said a permit was required to disturb a known archeological site pursuant to IC 14-21-1 and 310 IAC 20. The DNR has no ability to require landowners to search for sites, but once cultural resources are discovered, the law does provide some protections. Jones said he favored upholding the order by Judge Teeguarden.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, said he understood the concerns by the Division of Water relative to unknown archeological sites. Requiring every Flood Control Act permit applicant to consider cultural resources would be time-consuming and unjustified under Indiana law. He argued, however, that the present case was distinguishable. The Reid Site was well-known, and the Division of Historic Preservation and Archeology had issued a permit requiring mitigation. Where a site is "already known, and there is already a permit, there would not seem to be a problem with asking the applicant to please obey the permit."

Carol Jones said she spoke on behalf of Native Americans. She said she was "aghast" at what the commission might allow to be done to archeological resources. Carol Jones suggested that activities contemplated by Silver Creek Sand and Gravel would violate federal law.

Titsworth asked to withdraw her motion to bifurcate the regulatory issues presented by the case. Cecil said he agreed to withdrawal of the motion. The Chair then declared the motion withdrawn.

Titsworth said she was convinced the DNR lacked jurisdiction to consider historic preservation issues as part of a Flood Control Act permit. The Citizens would be required to seek injunctive relief from a civil court. She moved to set aside the order and stay entered by the administrative

law judge and to reinstate his prior order which denied a stay. The motion was seconded by Damian Schmelz.

Terri Moore asked whether, with the archeology permitting process in place, Silver Creek Sand and Gravel "could go out and bulldoze?" Chairman Kiley responded that the company could act under the Flood Control Act permit, but the commission was not exempting Silver Creek Sand and Gravel from its responsibility to comply with the permit from the Division of Historic Preservation and Archeology.

The Chair called the motion for a vote. Upon a voice vote, the motion carried. Cobb abstained.

Consideration of the Report of Public Hearing, Analysis, and Recommendation for Final Adoption of New Rule Sections to Establish a General Permit for Logjam Removals (and a Permit Exemption for Logjam Removals and Sandbar Removals from Beneath Bridges); Administrative Cause No. 97-029W; LSA #97-123(F)

Steve Lucas, Hearing Officer, presented this item. He said that for consideration was the final adoption of a rule to

1. establish a general permit for qualified logjam removals; and,
2. provide a permit exemption for logjam removals and sandbar removals from beneath bridges.

Lucas said no public comments were received regarding the proposal. For the most part, it made permanent a similar emergency rule now in place. One addition to language in the emergency rule was for the removal of sandbars from beneath bridges.

Steve Cecil said the permit exemption was helpful to bridge maintenance. He argued that it "was advantageous to safety and bridge maintenance without significantly impacting the environment."

Damian Schmelz moved to give final adoption to 310 IAC 6-1-30 and 310 IAC 6-1-31 to establish a general permit for qualified logjam removals and to provide a permit exemption for logjam removals and sandbar removals from beneath bridges. The motion was seconded by Joe Siener. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation for Final Adoption of a Rule Amendments to the Watercraft Speed Zones on Laughery Creek in Dearborn County and Ohio County; Administrative Cause No. 95-198L; LSA #97-1(F)

Steve Lucas presented this item on behalf of Tim Rider, Hearing Officer. He said for consideration were amendments to the watercraft speed zones placed on Laughery Creek in Dearborn County and Ohio County. The amendments were presented for consideration as to final adoption.

Lt. Col. John Stivers said he was "well-familiar with Laughery Creek." The proposed changes would allow a "long, relatively straight stretch of the creek to be opened up" and would be extended farther upstream to provide additional protections in an area of boat traffic congestion. Stivers said the Division of Law Enforcement had advised landowners of the proposed change and met with little if any opposition. He said the division recommended the changes for final adoption.

Jerry Miller moved to give final adoption to the amendments proposed to the watercraft speed restrictions on Laughery Creek in Dearborn County and Ohio County. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation for Final Adoption of a Rule Amendments the Watercraft Speed Zones on Geist Reservoir (located in Hamilton County, Marion County, and Hancock County); Administrative Cause No. 95-224L; LSA #97-2(F)

Lucas also presented this item for Tim Rider, Hearing Officer. The proposal would give final adoption to amended watercraft speed restrictions on Geist Reservoir to reflect increasing boat traffic and changing traffic patterns. The only public comments were two letters supporting the changes.

Jerry Miller moved to give final adoption to amendments to 310 IAC 2.1-8-2 which governs watercraft speed zones on Geist Reservoir. The motion was seconded by Mary Titsworth Chandler. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation for Final Adoption of Rule Amendments to Govern "Public Participation" in Permitting Functions under Indiana SMCRA; Administrative Cause No. 95-319R; LSA #97-8(F)

Bill Teegarden, Hearing Officer, presented this item. He said that for consideration was a proposal to give final adoption to rule amendments to govern "public participation" in permitting and other functions under the Indiana Surface Mining Control and Reclamation Act. Teegarden explained that the proposal was noncontroversial and was recommended for final adoption.

Mary Titsworth Chandler moved to give final adoption to amendments to 310 IAC 12 governing public participation in surface coal mining activities of the DNR. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Adjournment

The meeting adjourned at approximately 12:28 p.m., EST.