

NATURAL RESOURCES COMMISSION
Atterbury Fish and Wildlife Area Office
7970 South Rowe Street, Edinburgh, Indiana

Minutes of July 18, 2006

MEMBERS PRESENT

Richard J. Cockrum, Chair
Jane Ann Stautz, Vice Chair
Kyle Hupfer, Secretary
Matthew T. Klein
Bryan Poynter
Damian Schmelz
Chad Frahm

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Glen Salmon	Fish and Wildlife
Linnea Petercheff	Fish and Wildlife
Bill James	Fish and Wildlife
Larry Lehman	Fish and Wildlife
Clinton Kowalik	Fish and Wildlife
Mark Reiter	Fish and Wildlife
John Bergman	State Parks and Reservoirs
Dan Bortner	State Parks and Reservoirs
Lucas Green	State Parks and Reservoirs
Chastity Spindler	State Parks and Reservoirs
Samuel Purvis	Law Enforcement

GUESTS PRESENT

Lynn Burry	Bill Herring	Chastity Spindler
Danny East	Jim Phillips	Michael Beachy
Bob Robertson	Jack Corpuz	Dick Mercier
Ray Schwomeyer	Bud Dennemann	

Richard J. Cockrum, Chair, called to order the regular meeting of the Natural Resources Commission at 1:00 p.m., EDT, on July 18, 2006 at the Atterbury Fish and Wildlife Area Office

7970 South Rowe Street, Edinburgh, Indiana. With the presence of seven members, the Chair observed a quorum.

Chair Cockrum thanked the Division of Fish and Wildlife staff for the “wonderful” tour of the Atterbury Fish and Wildlife property. Current renovations and project designs were shown for the new state-of-the-art shooting range. Techniques were demonstrated at Pisgah Lake for monitoring game fish species. The challenges of plant succession, and methods for addressing those challenges, were explained.

Jane Ann Stautz moved to approve the minutes of May 16, 2006. Chad Frahm seconded the motion. Upon a voice vote, the motion carried.

Director Kyle Hupfer explained that the Commission, at its November 15, 2005 meeting, approved Department fee ranges, with those fees set at the Director’s discretion. With the fee range approval, the Commission requested the Director provide financial reports at meetings held in May, July and September of each year. Hupfer provided the Commission with a report of revenue and sales comparison. “You will see that revenue is up in every category except for non-motorized lake permits. Sales are down at about what we expected them to be based upon a fee increase.” He explained, “With historical trends you would see a drop the first year and pick it back up in the next two or three years. Again, revenue is up across the board.”

Bryan Poynter, Commission member, indicated that he “appreciated” the financial reporting. “I am glad it has worked out for the benefit of the Department.”

DIVISION OF STATE PARKS AND RESERVOIRS

Personnel Interview

Consideration of a recommendation by the Personnel Committee for the appointment to the assistant property manager position at Lieber State Recreation Area

Commissioner Bryan Poynter presented this item. Poynter said he had a “pleasant” conversation with the candidate, Mike Grismer, and recommended Grismer for appointment to Assistant Property Manager at Lieber State Recreation Area. “Kudos to the staff.”

John Bergman, Assistant Director of the Division of State Parks and Reservoirs, noted that Grismer is currently a full-time employee at the Indiana Dunes State Park. Poynter added, “This is the second in two months where we had an appointment like this, and both of them had expressed great comment about their relationships within the Department. I think it shows great confidence in the staff and others within the Division of State Parks and Reservoirs.”

Bryan Poynter moved to recommend Mike Grismer for appointment to Assistant Property Manager at Lieber State Recreation Area. Matthew Klein seconded the motion. Upon a voice vote, the motion carried.

Permanent Appointments

Consideration of Permanent Appointment of Lucas Green for Assistant Manager at Versailles State Park

Chair Cockrum introduced the two permanent appointment items. He explained that the two permanent appointment recommendations are for Lucas Green as Assistant Manager at Versailles State Park and Chastity Spindler as Assistant Manager at Harmonie State Park. Green and Spindler were “temporarily appointed a year ago and they are here today.” Hupfer also noted that “Lucas and Chastity were on their probationary period, and when that expires” the candidates come back before the Commission as recommendations for permanent appointment.

Lucas Green introduced himself to the Commission. He said he is currently employed with the DNR at Versailles State Park. “Actually, I’ve only been in Indiana for about five years. I grew up in Kentucky.” He thanked the Commission for giving him the “opportunity, and I don’t think I could have found a better organization to work for.” He concluded, “The network of people that we have is amazing.”

Cockrum said it was “a great idea” to have the candidates present at the Commission meetings, and congratulated the candidates.

Jane Ann Stautz moved for permanent appointment of Lucas Green for Assistant Manager at Versailles State Park. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Permanent Appointment of Chastity Spindler for Assistant Manager at Harmonie State Park

Chastity Spindler introduced herself to the Commission. Spindler said she is originally from Evansville and working at Harmonie State Park. She thanked the Commission for the opportunity to remain with the Department.

Jane Ann Stautz moved for permanent appointment of Chastity Spindler for Assistant Manager at Harmonie State Park. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF ENTOMOLOGY AND PLANT PATHOLOGY

Consideration of Request for Preliminary Adoption of Amendments to the 312 IAC 18-3-18 Governing the Emerald Ash Borer Quarantine to Address Changes in Regulatory Procedures and to Add Areas of Adams, Hamilton, Huntington, Lagrange, Marion,

Randolph, and St. Joseph Counties to the Quarantine (Administrative Cause Number 06-014E)

Robert Waltz, Ph.D., State Entomologist and Director of the Division of Entomology and Plant Pathology, presented this item. Waltz explained that the proposed amendment adds area infested with the emerald ash borer to the quarantine. He noted changes are also proposed to the quarantine structure, which “includes a quarantine of a township as well as the county.” A proposed amendment would eliminate the requirement to remove ash within a half mile from the infested plant. “The language is still retained as an option in case we have a situation where it impacts a desirable activity. As a normal practice, it has been eliminated.”

Damian Schmelz, Commission member, inquired of the standard removal of infected plants. Waltz explained that removal of ash in the area of the infected plant would not be required under the proposed amendment. “We are not doing any removal beyond quarantine activity.”

Matthew Klein moved to approve for preliminary adoption of amendments to 312 IAC 18-3-18 governing the emerald ash borer quarantine. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Request for Preliminary Adoption of a New Rule, 312 IAC 18-3-20, for the Control and Sale of Brazilian Elodea (*Egeria densa*) as a Pest or Pathogen (Administrative Cause Number 06-011E)

Waltz also presented this item. He explained the proposal was a rule to regulate a newly discovered aquatic plant in Indiana known as “Brazilian elodea” (*Egeria densa*), a species sold in the aquarium trade. Waltz said the plant has been established in certain localities “typically in the southern part of the state.” He noted that currently there are nine infested sites, which include one major area, Griffey Lake in Bloomington, and some private ponds. “Those areas are all under eradication. This is a very serious and aggressive plant.” Waltz said watercraft can transport the plant from one lake to another. Waltz likened the Brazilian elodea infestation with the Eurasian milfoil problem. He noted that in Griffey Lake Brazilian elodea was even “overpowering a strong establishment” of Eurasian milfoil.

Waltz noted that a temporary rule is in effect addressing the regulation of Brazilian elodea. Damian Schmelz asked whether Brazilian elodea is the species that has been “around for years and years in the aquarium trade?” Waltz answered, “Yes, it has been in the trade for many years, and probably 80 years ago.” Schmelz also asked whether there are more than one species of elodea available to aquariums. Waltz answered in the affirmative.

Damian Schmelz moved to approve for the preliminary adoption of 312 IAC 18-3-20 governing the control and sale of Brazilian elodea (*Egeria densa*). Matthew Klein seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF FISH AND WILDLIFE

Consideration of Request for Preliminary Adoption of Amendments to 312 IAC 9, including: Definitions Pertaining to Fish and Fishing Activities; Fish Measurement; Areas Closed to Fishing; Sport Fishing Methods, except on the Ohio River; Black Bass; Trout and Salmon; Fish with No Bag limit, Possession Limit or Size Limit; Shovelnose Sturgeon; Commercial Fishing, except on the Ohio River; and Commercial Fishing on the Ohio River (Administrative Cause Number 06-081D)

Linnea Petercheff, with the Division of Fish and Wildlife presented this item and gave a brief summary of the proposal. She said an amendment would add nine streams to the areas closed to fishing to start April 15, instead of April 20, to continue until the last Saturday in April. Petercheff explained that the increase in the closure period allows DNR to complete the stocking of streams with rainbow trout. Another change would allow bowfishing day or night on the eight streams listed in 312 IAC 9-7-2. "Bowfishing day or night is currently only allowed on lakes, so this would allow it on rivers and streams as well." An amendment removes the use of pitchforks as a legal means of taking fish.

Petercheff said the regulations governing bass would be amended by removing Delaney Park Lake in Washington County from the list of 12 to 15 inch slot limit lakes, and return the lake to a 14-inch minimum size. Proposed is an 18-inch size limit and two fish bag limit at J. C. Murphey Lake at Willow Slough Fish and Wildlife Area, and removed is a no-harvest restriction on bass at Dove Hollow Lake at Glendale Fish and Wildlife Area. "Proposed is a brand new restriction on the Blue River in Harrison, Crawford, and Washington Counties to establish a slot limit particularly for smallmouth bass." Another amendment would establish a 20-inch minimum bass size limit and a one fish daily bag limit on Sugar Creek encompassed in Parke, Montgomery, Boone, Clinton, and Tipton Counties. "Those two proposals are part of a result of a five-year research study conducted by DNR's fisheries biologists." Petercheff noted that a fish advisory is added for most of Sugar Creek.

Proposed is a "catch and release only" season on streams from January 1 through April 14. There would be a brown trout bag limit of one fish statewide with the exception of three named stream segments in Elkhart County. "Those stream segments total 2.8 miles and are primarily accessed by private property owners. They will also be designated for artificial lures or flies only and 'catch and release'."

Petercheff said on J.C. Murphey Lake, Willow Slough Fish and Wildlife Area, an aggregate daily bag limit of 25 for bluegill, redear and crappie would be established. J.C. Murphey Lake is a very heavily fished lake in the northern part of the state. We wanted to limit the numbers of fish that are taken for the near future." A new rule is proposed to establish a season for the commercial taking of shovelnose sturgeon. Petercheff noted that the shovelnose sturgeon is a "late maturing fish species, and several states around the country are already enacting laws to help protect them against an increasing demand for shovelnose eggs sold as caviar." The season would be established from October 1 through May 31. A 25-inch minimum fork length size limit on shovelnose sturgeon for both sport and commercial fishing is proposed. "We had to define minimum fork length for being the measure for the shovelnose and make several other

clarifications for the species.” Petercheff indicated that Bill James, Chief Fisheries Biologist, was present to answer any questions.

Chair Cockrum complimented DNR staff. “A lot of the ideas here are pretty progressive in our fisheries management, particularly in the area of smallmouth and trout fishery. I know they have worked with several of the groups that are going to speak here today. I commend you for that work.”

Jim Phillips, representing the St. Joseph River Valley Fly Fishers, noted that the St. Joseph River Valley Fly Fishers met with other conservation groups to “begin our effort to gather the biological data and support from anglers and importantly the DNR Division [of Fish and Wildlife] to establish first time in Indiana a catch and release areas.” Phillips said, “We provide most of the trout. We raise our own ‘browns’ in Elkhart. We need to get this established so that we can begin Phase 2 of our program.” He said a Trout Unlimited Chapter was formed in Middlebury, and its purpose is to “initiate and fund stream improvements. He said a hydrobiologist design and plan needed improvements, which we will build and finance to improve the water quality and trout habitat.” Phillips said private brown trout hatchery production and stream stocking has been expanded. He also indicated that the private landowners along the three stream segments proposed in 312 IAC 9-7-13 are “overwhelmingly in support of our plans”. Phillips asked the Commission to preliminarily adopt the rule proposal without amendments so that “we can move forward and create a much higher quality industry of trout fishing.”

Michael Beachy, representing Elkhart Conservation Club, noted that the Elkhart Conservation Club “raises and plants the brown trout in northern Indiana’s trout streams.” Beachy indicated he was also the Vice President of the Middlebury Trout Unlimited chapter. “Our groups highly support the catch and release proposal for trout, and I am a co-author of that proposal.” He added, “I think the time has come for Indiana to have catch and release waters, and it is highly supported by the trout fisherman in our areas.” Beachy added that the “biggest problem we have right now in Indiana with trout fishing is the season is very short because of the life span of the rainbow trout. What we are trying to do is change the focus to brown trout, and we are willing to raise and plant these fish.”

Chair Cockrum noted that he had received several emails from Central Indiana Trout Unlimited in Columbus regarding similar plans for improvement of the trout fishery in Brookville. He asked Beachy, “Do you know how many Trout Unlimited chapters there are in Indiana?” Beachy responded that there were two. Cockrum continued, “You are the second one?” Beachy answered, “Yes.”

Bob Robertson spoke on his own behalf. He said he was “more or less a neophyte as it relates to fly fishing as a whole,” and he added that he began fishing about two years ago. Robertson said he was a member of the Trout Unlimited in Elkhart, and commended the Division of Fish and Wildlife for “working with our group.” He said the DNR “obviously wants to support the local people.”

Lynn Burry, Vice President of the Northeastern Indiana Trout Association, said the Northeastern Indiana Trout Association specializes in raising and stocking legal size fish. “We stock Oliver Lake at this time, which is managed for trophy fish, and Clear Lake, which is normal regulations, in Pigeon River Fish and Wildlife Area.” Burry also said, “We have worked very hard over the years with DNR, and it is well worth the wait.” Burry added that along with catch and release, he would like to see a one-brown-trout bag limit to help protect the species.

Dick Mercier from the Indiana Sportsmen’s Roundtable indicated that the Board of Directors of the Roundtable, along with many other conservation groups, supported the proposal.

Ray Schwomeyer spoke on behalf of the Indianapolis Fly Fishing Federation. He favored the proposed amendments, but he asked for additional rules to be developed that were directed to the smallmouth bass fishery. He believed these would help protect the resource.

Jane Ann Stautz moved to give preliminary adoption to amendments to 312 IAC 9 governing fish management. Bryan Poynter seconded the motion. Upon a voice vote, the motion carried.

Request for Preliminary Adoption of Amendments to 312 IAC 9. Includes Amended Sections Pertaining to Hunting Deer by Firearms; Hunting Deer by Bow and Arrows; Endangered Species of Mammals; Migratory Birds and Waterfowl; Endangered Species of Reptiles and Amphibians; Endangered Species of Birds; Endangered Species of Fish and Endangered Species of Invertebrates (Administrative Cause Number 06-125D)

Linnea Petercheff also presented this item. She gave a brief summary of the rule proposal. The proposed amendments to 312 IAC 9-3-3 would clarify the license requirements for hunting deer in the firearms and muzzleloader seasons. Petercheff explained that a firearms license is required in the firearms season and a muzzleloader license is required to hunt deer with a muzzleloader in the muzzleloader season. The amendments also would list the youth license and lifetime license (issued before July 1, 2005) that can be used to take deer during the seasons.

Rifles with only pistol cartridges would also be authorized when hunting deer during the firearms season. “Over the years, we have received a lot of comments relative to the use of rifles. The amendments would allow the use of rifles, but limit the cartridge dimensions to those common to pistol rounds, to try to maintain our position of keeping short to midrange equipment for taking deer. Rifles that would be included are the .357 mag., .41 mag., .44 special, and .44 mag.” Petercheff indicated that the DNR has already received comments regarding this rule amendment.

An amendment to 312 IAC 9-3-19 would remove the Southeastern bat (*Myotis austroriparius*) from the endangered species list. Petercheff said, “The Southeastern bat has not been verified as being present in Indiana since 1977.” She noted that the Division’s Nongame Technical Advisory Committee in the Division’s Wildlife Diversity Section “feels that the Southeastern bat should just be a species of special concern and not endangered.”

Another amendment would clarify that the list of mammals is for those that are “endangered” but does not address the concept of “threatened”. “Threatened” is not a term that has meaning in the statute.

A new provision would exempt youth hunters that hunt during the new free youth hunting days designated by the director from having to register with the Harvest Information Program (HIP). Other amendments would clarify that the species of reptiles and amphibians listed at 312 IAC 9-5-4 are considered “endangered” and, again, would remove the term “threatened”. The amendments would update scientific names of two species. At 312 IAC 9-4-14, the Cerulean warbler (*Dendroica cerulean*) is added to the list of endangered species of birds. “They are tropical migrants and populations have been declining throughout their range. They breed here in the summer primarily in the southern part of the state.” Petercheff indicated that the Nongame Technical Advisory Committee supports this recommendation.

An amendment at 312 IAC 9-6-9 removes Southern cavefish (*Amblyopsidae* species) from the endangered fish species list. Pethercheff explained, “Basically, the Northern cavefish remains on the list, but the Southern cavefish is definitely extirpated based on surveys we had done.” Amendments are proposed to correct the common and scientific names of endangered species of invertebrates listed at 312 IAC 9-9-4.

Stephen Lucas, Director of the NRC’s Division of Hearings, noted that email comments regarding the proposal already have been presented to the Commission. Each Commission member was provided a hard copy of those citizen comments immediately prior to the meeting. Chair Cockrum inquired whether the comments would be incorporated into the record and included in the Hearing Officer’s report. Lucas answered that they would be.

Director Hupfer spoke to the proposed amendment to 312 IAC 9-3-3 which would authorize the use of pistol cartridges in rifles during deer season. “This is something where I have received significant interest from legislators, from both sides, and from various folks in the public.” He said, “Unlike some things that come to the Commission with a position, we do not necessarily have a position.” He added, “I don’t think you will see us exceed the cartridge requirement that is proposed, for safety reasons, but there are at least three things already that we think are going to be commented on. We are anxious to hear those comments.” Hupfer listed the following as items where the DNR was particularly seeking additional comment: magazine capacity limits; types of weapons, such as carbines versus lever action; and, scaling back cartridges currently allowed in pistols to a more traditional pistol cartridge limit. “Again, we are very open on these issues at this point in time, and we are looking for preliminary adoption to get it into the public comment phase.”

Dick Mercier from the Indiana Sportsmen’s Roundtable spoke in favor of the proposal. “We agree with everything in this particular administrative rule.” He said a ballistics expert was consulted regarding the proposed rule amendment to allow pistol cartridges in rifles. “The ballistics expert tells us that there is absolutely no problem with the distance and range of this particular cartridge. [He] says that shotguns, pump guns, and automatic shotguns will fire just as fast if not faster than a lever action rifle.” Mercier asked the Department and the Commission to consider a “standardization” of the pistol and rifle cartridges.

Bill Herring indicated that he has hunted since the age of eleven, and he has participated in competitive shooting with rifles, handguns, and shotguns. He said he authored a 1974 book on ballistics and muzzle loading rifle. "I and several other people over the years wanted to see DNR adopt a rule that would allow, to some extent, center-fire rifles." Herring said the rule proposal is "a very good compromise that considers safety and maximum effective ranges." He said the rule amendment "might encourage a few more people to take up the sport of deer hunting." A hunter can "more effectively control his shot and be more accurate" using a rifle with a pistol cartridge. He concluded, "I see no disadvantage whatsoever as defined in the proposed rule."

Danny East, a member of the Sportsmen's Roundtable, spoke on his own behalf. "I have been advocating this for at least 15 years." He observed that "some of these rifles are nothing but pistols with a long barrel." East said, "I would be more comfortable in the woods with knowing that on the next hill there was someone with a lever action .44 magnum than I would with a guy who borrowed his uncle's 12 gauge semiautomatic shotgun without a scope." He continued, "I am fully in favor of this and have been working on it for years."

Bryan Poynter moved to approve for preliminary adoption miscellaneous rule amendments under 312 IAC 9, as presented by DNR staff, governing wildlife management. Chad Frahm seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of Report of Public Hearing and Comments, and Recommendation for Final Adoption of Miscellaneous Amendments to 312 IAC 25 (I-SMCRA) (LSA #06-68(F); (Administrative Cause Number 06-046R)

Sandra Jensen, Hearing Officer, presented this item. She noted that the proposed rule amendments were "simply to maintain consistency with federal counterpart" of the Surface Mining Control and Reclamation Act. Jensen also noted that the instant rule package was preliminarily adopted on May 17, 2005 as Administrative Cause Number 04-159R with assigned Legislative Services Document #05-126. Approval from the State Budget Agency was not received until December 2005. "As a result of that, we realized very quickly that we were not going to have sufficient time to complete the rule promulgation process within the one year period." A new "notice of intent" to adopt a rule was published on April 1, 2006 with LSA Document #06-68. She noted that while minor language changes have been made the proposed rule language for final adoption is "absolutely identical in substance" to the 2005 preliminary adopted language. There is no indication that the proposed rule package would have any statutory impacts on small businesses.

Jensen said a public hearing was held as scheduled on June 2, 2006. The only comment received was from Bruce Stevens, Director of the Division of Reclamation. Jensen said that the Division of Reclamation discussed the proposed rule amendments with Indiana's coal industry throughout the rule adoption process, and no objection was received.

Damian Schmelz moved to approve for final adoption of miscellaneous rule amendment to 312 IAC 25 governing surface mining and reclamation activities. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of report of Public Hearing and Comments, and Recommendation for Final Adoption of amendments 312 IAC 25-6 governing commercial forest resources on reclaimed prime farmland, (LSA #06-67(F); Administrative Cause Number 06-045R

Sandra Jensen also presented this item. The proposed rule amendments to 312 IAC 25-4 and 312 IAC 25-6 would allow commercial forest resources on reclaimed prime farmland provided soil productivity is demonstrated according to soil productivity standards. She explained that consideration of this rule package was delayed for the same reasons given in the previous agenda item. The Commission gave preliminary adoption to the proposed amendments on May 17, 2005 under Administrative Cause Number 05-056R with assigned LSA #05-125.

The rule package was re-initiated as Administrative Cause Number 06-045R, and a new Notice of Intent to Adopt a Rule was published on April 1, 2006 with assigned LSA #06-67. Jensen said the language proposed for final adoption “absolutely had no change, not language or substance, between its original preliminary adoption on May 17, 2005 and the present”. She said the rule proposal was initiated at the suggestion of the coal industry.

Damian Schmelz moved to give final adoption to amendments to 312 IAC 25-4-102 and 312 IAC 25-6-143 to allow commercial forest resources on reclaimed prime farmland. Jane Ann Stautz seconded the motion.

Information Item: Commission Litigation Update (Administrative Cause Number 06-104X)

Steve Lucas presented this item. “When the Commission delegated some of its authority to deal with adjudicative matters to what we call the ‘AOPA Committee’, one of the provisos was that we periodically give an update on some of the cases that have been decided.” He said the AOPA Committee is chaired by Jane Ann Stautz, and Mark Ahearn and Linda Runkle (or Matt Klein) serve as members. The AOPA Committee met most recently on July 13, 2006. Lucas thanked them for their “tireless and mostly thankless service”.

Lucas listed and briefly updated the Commission on several adjudications that have “reached their finality.” He said there are several other items pending before the AOPA Committee or on judicial review, and they would be reported in a subsequent meeting.

Lucas outlined three cases decided under the Timber Buyers Act (IC 25-36.5). He said the Timber Buyers Act was designed to help assure responsible conduct and the good reputations of those involved in harvesting standing timber. Timber buyers, neighbors, brokers and even surveyors could be held accountable for conduct result in loss to landowners for improper timber harvests.

In *Cowper v. Collier*, the Court of Appeals of Indiana determined in 1999 that the administrative law judge and the NRC wrongly determined there was no contract for the sale of timber. At the administrative level, the proceeding had been decided on a theory of quasi-contract. The case was remanded for reconsideration on a contract theory. Upon remand, the parties agreed that upon the facts specific to the case, the measure of damages was the same for quasi-contract as for contract. A payment plan was entered and a \$48,000 judgment recently satisfied.

In *Pike Lumber v. Cruse*, timber was harvested without seeking a survey or consulting with a neighbor concerning location of the property line. The deed description was flawed in that it did not provide for actual closure. After the harvest was completed, the neighbor obtained a survey which showed the timber buyer had crossed the line. This surveyor and two other surveyors testified as to the proper method for determining the line. The expert testimonies were compared and the property line was determined in the administrative proceeding. Based upon this determination, the timber grower received an award, which included treble stumpage damage but not reimbursement for litigation expenses, of approximately \$15,000.

In *Fischer v. Stodghill and Hartford Fire Insurance*, land was owned individually by the wife. The husband entered an agreement with a timber buyer for sale of standing timber, but the wife was not a party to the agreement. The timber buyer tendered a check in the individual name of the husband. The husband and the wife divorced. By the time the check was tendered for payment, the timber buyer had taken bankruptcy. The proceeding was further complicated because the timber buyer functioned sometimes as a corporation and sometimes as an individual, with distinctions between the two entities seriously blurred. An award of approximately \$20,000 was made to the wife, which was satisfied by the timber buyer's surety. The award was for actual not treble damages because the wife was aware of the sale and took no action to stop the harvest.

Lucas said four cases were outlined that were determined under the Lakes Preservation Act (IC 14-26-2). He said this act provides for the regulation of Indiana's public inland lakes and is designed to help implement the Public Trust Doctrine while it balances the special interests of riparian owners with environmental protection.

In *Hazelett v. Walbridge and DNR*, the administrative law judge determined a set of temporary piers along Lake James did not qualify for a "general license" provided by NRC rule for most temporary piers. The piers were disqualified for either or both of the following reasons: (1) They were unusually long. (2) They constituted a marina. As a result, the persons seeking placement of the piers needed to complete the full licensure process that is administered by the DNR's Division of Water. Judicial review was initiated but dismissed on a procedural ground.

In *Barbee Villia Condominium Owners Assoc. v. Shrock*, the determination was that a person cannot moor his boats in a neighbor's riparian zone, even where pier to which the boat was moored was located entirely in the person's own riparian zone. The person could, however, use the neighbor's riparian zone for ingress and egress to the person's pier.

In *Sedberry v. DNR*, the agency's denial of a license to dredge a "significant wetland" was upheld. The riparian owner had exercised good stewardship by using hand tools to remove waste

disposed by prior owners in the wetland, and he could continue to use hand tools for this purpose.

In *Gunkel v. DNR*, the agency's denial of a license to extend a 150-foot long pier to a length of 170 feet was upheld. The evidence demonstrated that a 170-foot long pier would pose navigational safety hazards. In addition, the applicant maintained a boat station that was nearer to the shoreline than 150 feet so he made no particular showing of need.

Steve Lucas outlined two cases decided under the Flood Control Act (IC 14-28-1). The act is designed to regulate floodways to help control flood hazards and to minimize adverse impacts to fish, wildlife and botanical resources.

In *Crafton v. DNR and Hopkins*, a portion of the channel of White Lick Creek in Hendricks County was determined to be outside the flood plain, as established by FEMA and as applied by the DNR. The administrative law judge determined the floodway of the actual channel must be regulated under the Flood Control Act, although there would be no commensurate diminution in geographic extent of the flood plain until new delineation maps could be developed and approved by FEMA and the DNR.

In *Save Our Rivers v. Guenther, et al.*, the regulatory flood (sometimes called the "100-year frequency flood") was found to be unaffected by a small levee along the Wabash River in Posey County. The levee did, however, raise stages for some lesser flood events. The administrative law judge ruled the DNR's jurisdiction for determining damages was limited to the "regulatory flood". Citizens opposed to the levee had no Commission remedy, but the decision specifically reserved their abilities to seek relief from a local court on a theory other than violation of the Flood Control Act.

Lucas outlined three cases decided under the Indiana Surface Coal Mining and Reclamation Act (IC 14-34). The enactment is the Indiana version of a federal law providing pervasive environmental regulation of the surface coal mining industry.

In *Wall v. DNR*, the administrative law judge found there was legal authority to provide administrative review of a determination under the Abandoned Mine Lands ("AML") Program. The determination would have relocated a Green County Road, over an abandoned mine and considerably nearer to the Wall residence, in order to address a safety hazard. The administrative law judge ruled the DNR could, over Wall's objections, exercise the "police power" to perform this function upon proper circumstances. Indiana SMCRA required that measures taken could not, however, exceed those reasonably necessary to achieve the stated objective of protecting the general public from traffic hazards posed by the abandoned mine lands. Because the DNR had not made the requisite analyses and findings, its determination was vacated and remanded.

In *Black Beauty v. DNR*, the agency issued an NOV based upon the alleged failure of the coal company to "monitor" a gob pile. The term "monitor" was not defined in this context by statute or rule or in the license. The coal company urged the term "monitor" was different from "testing", but the DNR urged that testing was required. Prior to issuance of the NOV, an

extended period had passed during which the agency did not require testing of the gob pile. The administrative law judge found the term “monitor” was ambiguous, and when a term in an environmental license is ambiguous, it should be construed as under contract law. Prior history could be used in resolving the ambiguity, and the history here supported a finding that “monitor” did not include testing. The NOV was reversed. The DNR took judicial review to the Marion Superior (Environmental) Court where the decision was affirmed.

In *Musgrave v. IDNR and Squaw Creek Coal*, a group of neighbors objected to a DNR bond release for Squaw Creek Mine Permit S-009. The administrative law judge rejected a contention based upon *Huffman v. IDEM* that the neighbors lacked sufficient “standing” to seek administrative review, observing that SMCRA provides for much broader “standing” than is accorded under standard Indiana administrative law. On the merits, the determination was the neighbors failed to establish a right to relief on either or both of two grounds. First, the subject of the citizen complaint related to Squaw Creek Mine Permit S-008, not the mine for which bond relief was sought (Permit S-009). Second, the theory of the complaint was that there had been illegal toxic dumping, a subject within the jurisdiction of IDEM not the DNR.

Chair Cockrum thanked Lucas for the report. “I know it was rather tedious, but it is important. This is a committee that was created by the Commission to review technical and legal matters that get appealed. It is important for the full Commission to understand the gravity of some of the cases reviewed.”

COMMISSION TOUR OF ATTERBURY FISH AND WILDLIFE AREA

In the morning, the Division of Fish and Wildlife staff guided Commission members on a tour of several key areas within the Atterbury Fish and Wildlife Area. Commission members viewed the ongoing construction of the new shooting range with presentation by Mark Reiter. Larry Lehman and Clinton Kowalik provided an electro-fishing demonstration at Pisgah Lake.

Adjournment

At approximately 2:15 p.m., the meeting adjourned.