

## **NATURAL RESOURCES COMMISSION**

Minutes - October 29, 1997

### **MEMBERS PRESENT**

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

### **NATURAL RESOURCES COMMISSION STAFF PRESENT**

Stephen Lucas  
Jennifer Kane  
Sylvia Wilcox

### **DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT**

Jack Costello	Executive Office
Paul Ehret	Executive Office
Lori Kaplan	Executive Office
Angie James	Executive Office
Carrie Doehrmann	Chief Legal Counsel
Virginia Simone	Legal Counsel
Melissa Stefanovich	Legal Counsel
Barbara Nardi	Legal Counsel
Ihor Boyko	Legal Counsel
Mary Ann Habeeb	Legal Counsel
Glen Lange	Fish and Wildlife
Burney Fischer	Forestry
Ben Hubbard	Forestry
Gary Gretter	Forestry
Mike Neyer	Water
Gerald Pagac	State Parks and Reservoirs
Gary Miller	State Parks and Reservoirs
Jim Cassidy	State Parks and Reservoirs
Larry Allen	Law Enforcement
John R. Gano	Law Enforcement
Lee Casebere	Nature Preserves

## **GUESTS**

Pat Clark	Jon Voelz	George Plews	Donna Marron
James Welch	Tim Maloney	William Eads	Jeff Phillips
Tom Byle	Lou Belch	Sandie Sinclair	Ray Collier
Edythe Collier	Charles Wilson	Marlon Slayton	Brent Dice
Bob Spencer	Lisa Lee	Barbara Marlowe	Jerry Tague
Tom Montgomery	Brad Snyder	Page Jarboe	Matt Waldo
Don Tabbert	Don Clark	David Robb	Howard Lawrence
Larry Miinch	William Pott	David Wallsmith	Steven Dodge
Dennis Shields	Greg Black	Pete Miller	Dick Mercier
William Miller	Tom Sterner	William Decker	Doug Allman
Grant Monahan	Tony Slayton	Joe Lackey	

## **MONTHLY REPORTS**

Michael J. Kiley, Chair, called to order the regular meeting of the natural resources commission at 10:03 a.m., EST, on October 29, 1997 in the 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 September 25, 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 he would keep his remarks brief because of the day's "ambitious agenda." Macklin indicated the DNR was busy preparing for the upcoming session of the Indiana General Assembly but that it was "not necessarily proposing legislation." He said there was a "great meeting" of the Historic Preservation Review Board at Purdue University.

Macklin reflected that the Agricultural Matters Study Committee of the Indiana General Assembly was reviewing the impact of land purchases by the Heritage Trust. He said a thorough analysis by the Legislative Services Agency showed the impact was minimal.

He noted that in early October he attended in Chicago his first meeting as a member of the Great Lakes Commission. During the meeting, Macklin noted that Steve Lucas made a "very well-received presentation" on the efforts of Indiana's Multi-Agency Task force on E. coli. A resolution resulted in which the GLC urged Great Lakes states to work together to solve problems associated with periodic bacterial contamination of beaches.

Jerry Miller, Chairman of the Advisory Council for the Bureau of Lands and Cultural Resources, said his council met most-recently in the historic former state capitol building in Corydon. He said most items on the agenda were approved without controversy. Miller reflected, however, that the advisory council did suggest some modifications to the proposed policy for cave and karst management on DNR properties.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, said staff was working to develop standards for new inns at state parks. The goal was to provide a level of "quality control" which would be met as a minimum. He said the hope was to bring the standards to the NRC for consideration during the November meeting.

Joe Siener, Chairman of the Advisory Council for the Bureau of Water and Resource Regulation, said his council met this month in Indianapolis. "All items were approved during a very successful meeting."

Lori Kaplan, Deputy Director for the Bureau of Water and Resource Regulation, said her bureau was "very busy" this month with legislative issues. She said accelerated "surface water runoff" was a primary concern with several legislators and could form the basis for new enactments during the coming session. Kaplan said the appointments had been completed for a study committee which would focus on challenges facing the state's inland lakes. She reported that counts from gypsy moth traps doubled in 1997 over those trapped in 1996.

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, reminded the members the Indiana Society of Mining and Reclamation Seminar was scheduled for December 8 and 9. He emphasized that commission members had attended in the past and were again welcomed. Ehret also noted that the federal Office of Surface Coal Mining and Reclamation has completed its analysis of coal combustion waste disposal in Indiana and determined the state program generally meets federal requirements.

## **BUREAU OF LANDS AND CULTURAL RESOURCES**

### **Personnel Interviews**

#### **Consideration of Personnel Interview for the Curator (Property Manager) of Ernie Pyle State Historic Site**

Terri Moore presented the report of the NRC's personnel committee. She reflected upon the consistently high quality of applicants for professional positions at DNR properties and said the candidates for Curator at Ernie Pyle State Historic Site were no exception. Moore said that after some deliberation, the committee voted to recommend the appointment of Richard Bray. She explained that Bray currently serves as Acting Curator.

Jerry Miller moved to appoint Richard Bray as Curator of Ernie Pyle State Historic Site. The motion was seconded by Jack Arnett. Upon a voice vote, the motion carried.

## **DIVISION OF NATURE PRESERVES**

#### **Consideration of the Dedication of the Smith Cemetery Nature Preserve, Vermillion County**

Lee Casebere of the Division of Nature Preserves presented this item. He said the proposed nature preserve was a one-acre site located in a pioneer cemetery in Vermillion County, approximately two miles southwest of Perrysville. Burials date from the 1820s.

According to Casebere, the division's interest in the site began in 1979 when botanists from the Indiana Natural Heritage Data Center discovered royal catchfly (*Silene regia*), a state endangered plant, growing in a fencerow in the cemetery. At the time, a number of other prairie plants were found in the cemetery. With the help of the township trustee, mowing was discontinued at the site, and management began as a natural resource in 1981. Subsequently, the cemetery has responded favorably and 30 species of prairie plants have been identified. Among those present are prairie dock, culver's root, yellow coneflower, leadplant, pale purple coneflower, white prairie clover, prairie alumroot, hoary puccoon, New Jersey tea, wild quinine, showy tick-trefoil, Indian grass, big bluestem, and little bluestem.

Casebere said Indiana has not previously recommended the approval of a cemetery as a nature preserve. He noted there are, however, at least 15 cemeteries dedicated as nature preserves in Illinois and two more in Ohio. He recommended the site for dedication.

Damian Schmelz moved to dedicate the Smith Cemetery Nature Preserve in Vermillion County. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.  
Interdivisional Task Force

### **Consideration of a Proposed Policy for Caves and Karst Management on Properties of the Department of Natural Resources**

Ben Hubbard of the division of forestry presented this item. He explained that an interdivisional task force had developed, and was now presenting to the NRC for approval as a nonrule policy document, what has been called the "Caves and Karst Resource Management Policy on DNR Properties." In addition, "Caves and Karst Resource Management Guidelines" were offered. He said members of the task force included the division of fish and wildlife, the division of forestry, the division of historic preservation and archeology, the division of law enforcement, the division of nature preserves, and the division of state parks and reservoirs. He said participation outside DNR included the Indiana Karst Conservancy, Harrison County Hospital, the Bloomington Grotto, and the US Forest Service.

Hubbard explained that recreational and scientific use of cave and karst resources on DNR properties is a popular and expanding activity. Because there currently is no agency policy on the management of these important resources, inconsistencies have resulted. The lack of consistency has led to concern as to whether proper protection is being provided.

In response to a question from the commission, Hubbard said 400 caves are known to exist on DNR properties, and others undoubtedly exist. He praised the participation and knowledge of cavers. "The caving community is more of a technical expert than is the DNR. We need to know more about what we have."

Jerry Miller said his advisory council had suggested several amendments to the policy. For clarity, the council recommendation was that the title be changed from "Caves and Karst Resource Management Policy" to "Caves and Karst Resource Management Policy on DNR Properties." While the policy might encourage sound practices by private property owners, its direct application was exclusively to DNR properties. In addition, the advisory council urged that two references to the decision making of the "property manager and his/her representative" be changed to the "director or the designee of the director" to assure an understanding by the director of significant policy decisions with respect to individual caves. A reference to "IC 35-43-1-1" was corrected to "IC 35-43-1-3." Hubbard said the task force agreed to each of the modifications sought by the advisory council.

Steve Cecil asked whether the task force had considered the MOU involving DNR and INDOT in preparing the draft policy. Hubbard responded that the task force was cognizant of the policy but had not incorporated it because the policy was directed exclusively to DNR properties. Cecil expressed concerns that the policy sometimes lacked specificity, and he urged its modification to incorporate principles from the MOU.

Chairman Kiley reflected that Cecil made a "good point." Although the proposed policy might reflect an important step forward, Hubbard or the task force should meet with Cecil to determine how best to include elements of the MOU.

Jerry Miller moved to approve the "Caves and Karst Resource Management Policy on DNR Properties" as a nonrule policy document. The motion included the amendments offered by the advisory council and was made on condition a representative of the task force would meet with a representative of the Indiana Department of Transportation. The purpose of the meeting would be to assure terms were properly incorporated from the memorandum of understanding on cave and karst management. In addition, the commission acknowledged the "Caves and Karst Resource Management Guidelines." Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

## **DIVISION OF STATE PARKS AND RESERVOIRS**

### **Consideration of the Establishment of New Marina Rates for 1998 by Patoka Lake Marina, Inc. at the Newton Stewart Marina, Patoka Lake**

Gerald Pagac, Director of the Division of State Parks and Reservoirs, introduced this item. He said the commission had previously authorized a ground lease with Patoka Lake Marina, Inc. to operate and develop Newton-Stewart Marina on Patoka Lake.

Gary Miller, Assistant Director for Inns and Concessions for State Parks and Reservoirs, discussed the establishment of rates for the previously approved lessee for the Newton-Stewart Marina. He recommended approval of the rates.

Pagac said, within a few months, the commission would receive a draft procedure concerning rate determinations on Army Corps and DNR reservoirs. The impetus for the procedure were the

concerns raised by a group of dockholders at the Inn of the Fourwinds on Lake Monroe. The group said, during a meeting with the Director and DNR staff, they felt the process used for marina rate determinations was unfair because it did not provide adequate participation by dockholders. The group suggested the dockholders be given notice and an opportunity to present their opinions and concerns before the DNR determined rates.

Chuck Wilson spoke in opposition to approval of the agenda item. He identified himself as a dockholder at Inn of the Fourwinds. Wilson voiced concerns about the present system for reviewing and setting rates for marina slip and buoy rentals. He argued rates should not be set or raised until a new procedure is adopted, pointing out what he saw as unfairness in the current system. Wilson asked that this item and item 6 be deferred until the new procedure is developed and approved by the NRC.

In response to a question by the commission, Pagac explained that rates needed to be set now in order to be advertised and applied in 1998. He suggested a delay could pose difficulties both to private marina operators and to marinas managed by the DNR, but he said he was anxious to work with Chuck Wilson and others in order to develop a more sophisticated process for receiving input from dockholders in the future.

The Chair reflected that immediate action on 1998 rates seemed warranted.

Jack Arnett moved to approve the establishment of new marina rates in favor of Patoka Lake Marina, Inc. at the Newton Stewart State Recreation Area of Patoka Lake as set forth below:

10 feet by 20 feet single-sided slips (no utilities available)	\$480/season
12 feet by 24 feet double-sided slips (no utilities available)	\$575/season
12 feet by 24 feet double-sided slips (no utilities available)	\$650/season
16 feet by 40 feet double-sided slips (utilities available--winter wet storage included)	\$1,680/year
16 feet by 60 feet double-sided slips (utilities available--winter wet storage included)	\$1,850/year
Winter storage for seasonal slips (if space available)	\$165/winter
Buoys	\$325/season
["Utilities available" includes free water hookups, free TV antenna hookup, and metered electricity]	

The motion was seconded by Jerry Miller. Upon a voice vote, the motion carried.  
Consideration of Proposed Rate Increases at Various Marinas Reservoirs Managed by the Department of Natural Resources

Gary Miller introduced this item. He explained that for consideration were rate increases at several marinas on reservoirs managed by the Indiana Department of Natural Resources. He explained that the rates for the Lake Monroe Sailing Association at Lake Monroe were self-imposed by the membership and had already been approved by its board of directors. At Lick Fork Marina, Inc. on Patoka Lake, Miller said no increases had been sought in four years, and the division believed the current requests were justified.

James Cassidy of the division of state parks and reservoirs spoke to increases sought be state-operated facilities at Monroe Lake, Brookville Lake, Hardy Lake, Lieber State Recreation Area, and Raccoon State Recreation Area. He noted that there had been no increases at these sites since at least 1991, and the division felt the current proposals were appropriate.

The Chair reflected that comments received by citizens on the previous item should also be reflected here. He suggested that action was needed, however, in preparation for the 1998 boating season.

Jerry Miller moved to approve the following rates as recommended by the division of state parks and reservoirs:

**Lake Monroe Sailing Association, Inc.**

**Dry Storage**

First year user (less than 20 feet)	\$260
Less than 20 feet	340
More than 20 feet	400
Second boat	150

**Buoy Field**

Less than 23 feet	630
23 feet to 26 feet	630
More than 26 feet	630

**Wet Slip**

Less than 23 feet	820
23 feet to 26 feet	855
More than 26 feet	910

**Board Boat**

First boat	70
Second boat	60
Trailer/cradle	60

**Winter Storage**

Less than 20 feet	85
20 feet to 26 feet	120
More than 26 feet to 30 feet	145
Trailer/cradle	40
Facility Use Only	65
Daily Use Fee	5

**Lick Fork Marina**

**Buoys (April-October)**

Boats 30 feet or less	\$400
Boats over 30 feet	450

<b>Cruiser Dock (Dock B)</b>	
9 feet by 20 feet	700
10 feet by 24 feet	850
<b>Houseboat Dock (Dock A)</b>	
16 feet by 45 feet	1,700
18 feet by 50 feet	2,100
18 feet by 60 feet	2,300
18 feet by 70 feet	3,300

## Department of Natural Resources

### Dock Fees

#### Monroe Lake

12 feet by 16 feet	450
14 feet by 16 feet	480

#### Brookville Lake (Fairfield Marina)

10 feet by 18 feet	435
10 feet by 18 feet (with electric)	535
10 feet by 20 feet	460
10 feet by 20 feet (with electric)	560
12 feet by 40 feet (with electric)	905
14 feet by 20 feet (with electric)	640

#### Brookville Lake (Hanna Creek Sailing Marina)

10 feet by 20 feet (with electric)	560
14 feet by 20 feet (with electric)	640
14 feet by 30 feet (with electric)	785

#### Hardy Lake

10 feet by 16 feet	415
10 feet by 18 feet	435
15 feet by 14 feet	425
15 feet by 18 feet	475

#### Lieber State Recreation Area

14 feet by 22 feet	570
16 feet by 20 feet	415

#### Raccoon Lake State Recreation Area

10 feet by 20 feet (with electric)	560
10 feet by 20 feet	460
14 feet by 20 feet	540

*(Surcharge per additional boat length  
over 5 feet longer than slip: \$20 for each 5 feet or less)*

Buoys	\$350
Landowner Bank Tie at Raccoon Lake SRA	60/3 year (Fee will applied at a prorated amount to establish a schedule approximately 1/3 of landowners renewing each year.)
Mooring Permits/Bank Tie	50



Improved Mooring Area Permit (where seawalls or other improvements have been made)	75
Replacement Mooring Permit	5
Single Landowner Dock	75
Group Docks	150 + 25/slip
Boat Storage	25
Hanna Creek Dry Storage	250
Hanna Creek Rack Storage	40
Jib Hoist Fee	35

The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

**BUREAU OF MINE RECLAMATION**  
**Division of Reclamation**

**Petition by Hoosier Environmental Council For Rule Change Relative to Coal Combustion Waste Disposal at Surface Coal Mines; Administrative Cause No.**

The Chair recognized Matt Waldo of the Hoosier Environmental Council. Waldo said HEC "has been working for almost ten years" on the issue coal combustion waste disposal in surface coal mines. He presented a written document entitled "Petition by the Hoosier Environmental Council to the Natural Resources Commission of the State of Indiana for Regulations Governing the Disposal of Coal Combustion Wastes in Surface Mines." He said no rules have been adopted despite the fact permits are being issued. "The reason why we are coming before you is disposal is already occurring." Waldo said, "We're not asking for a decision right now on this."

Chairman Kiley observed that "We can't ignore flyash. It has to go somewhere."

Steve Lucas said typically petitions for rule change are filed with the NRC Division of Hearings. One copy of the petition was then tendered to the division to form the basis for a filing under IC 14-34-2-7.

Bill Decker, Vigo County Commissioner, also spoke briefly. He said a person "can't dump trash" in Vigo County except at an approved landfill. We have a "state of the art landfill" with liners. He urged the NRC to move forward on the coal combustion waste issue.

Larry Macklin said, "I think it's important to note we don't take coal combustion wastes lightly." He said the DNR and its Division of Reclamation has been working with HEC and the Indiana Coal Council to formulate a rational approach to the issue. Macklin said the DNR has prepared a "rough draft" for disposal rules. At the same time, IDEM is working on groundwater quality standards which would set the foundation for water quality analysis at a waste disposal site.

The Chair said the regulation of coal combustion waste disposal was a responsibility which the NRC accepted with "some trepidation" from the Indiana General Assembly. Having been given the responsibility, however, the commission would move forward, bearing in mind the

seriousness of what could also be an emotional issue. Kiley concluded the discussion by noting that flyash disposal was not formally on the agenda, and other than accepting the petition for filing, no action could now be taken.

**LEGAL PROCEEDINGS**  
**Natural Resources Commission, Division of Hearings**

**Consideration of Amended Findings of Fact and Conclusions of Law in the matter of George Lauder and Joan Lauder v. Department of Natural Resources and Starke County Commissioners; Administrative Cause No. 94-365W**

Stephen Lucas, Administrative Law Judge, introduced the item. He explained that at issue was an application by George and Joan Lauder to place a seawall along the shoreline of Bass Lake in Starke County. Lucas said Bass Lake is the state's third largest inland lake of natural origin but is shallow, with an average depth of 3.5 feet. One result is the lake suffers significant shoreline erosion due to winter ice. At the subject property, recent erosion has pushed the lake along the Lauders' property beyond adjacent seawalls. The case is further complicated because the paved portion of the primary road which services residents of Bass Lake, CR 210, is located in proximity to the site where the DNR urges the seawall should be placed. The site is so close to the roadway, in fact, that the Starke County Commissioners argue a safety hazard would be posed unless the seawall is placed at least as far from the shoreline as are adjacent seawalls. Lucas said that his recommendation would cause the seawall to be placed along a straight line between the existing seawalls.

Barbara Nardi spoke as the attorney for the Department of Natural Resources. She said the DNR filed objections to the nonfinal order of the administrative law judge because his findings were inconsistent with prior commission precedents and would violate the "public trust doctrine."

Nardi distributed photographs to commission members which had been introduced into evidence and which depicted the conditions at the time of the permit application. She said, "The reason the DNR opposes allowing Mr. Lauder to connect adjoining properties is that doing so would allow fill in the public lake." Nardi acknowledged that traffic safety concerns had been raised, which were not at issue in previous cases, but she said there were other areas along the lake where the shoreline was even closer to the roadway than along the Lauder property. Nardi suggested the safety issue was an afterthought, and the real design of the permit application was to fill public waters for a private purpose. "We felt it was a policy decision which should come to you for final action."

David Wallsmith spoke as the attorney for George and Joan Lauder. He said, "Basically I'm in support of the administrative law judge's opinion. It's a common sense approach resulting in a win-win-win situation." He said the lake had eroded the shoreline twelve feet toward the roadway in recent years. Wallsmith said the first "win" is that placing the seawall would help control erosion and reduce turbidity to the lake, a serious summer problem. The second "win" is that placement of the seawall as urged by the DNR would place it within two or three feet of the road, causing a serious safety hazard. "By placing it as proposed by the administrative law

judge," he said, "to a large extent" the safety hazard would be resolved. The third "win" is that this safety improvement would be done at the expense of a private landowner without the expenditure of public funds. If erosion were allowed to continue, the Starke County Commissioners would have to intervene to protect CR 210.

Wallsmith also reflected the DNR in its written arguments had urged that, if the seawall were placed as referenced by the administrative law judge, a public access site should be provided. He said this argument was not legally supportable. The land over which access would be secured was private property owned by the Lauders. To approve this aspect of the DNR's argument would constitute an unlawful taking of property without compensation.

Steve Dodge spoke as counsel for the Starke County Commissioners. He said his client supported the findings of the administrative law judge. Dodge suggested that the reason his clients had not taken a more active role in past seawall permitting activities along CR 210 is that the DNR had not invited their participation. He said the administrative law judge recognized the need to consider the county right-of-way and had brought the Starke County Commissioners into the case as necessary parties. Dodge argued that having the Lauder seawall "lined up with the adjoining seawalls supports safety."

Damian Schmelz moved to approve the findings and nonfinal order of the administrative law judge as the findings of fact, conclusions of law, and final order of the natural resources commission. The motion was seconded by John Goss.

Steve Cecil said he wished to speak as the commission member who also represented INDOT. He said there needed to be a balancing of interests. "Regardless of whether public safety was the initial concern," it should be weighed here. Cecil said he believed the commission should always be cognizant of public safety issues when making its decisions.

Jack Arnett said he was troubled that approving the findings of the administrative law judge would sanction filling public waters for the placement of a private seawall. He asked Lucas to respond to the concern.

Lucas said he agreed the "public trust doctrine" applied and that the commission was rightfully cautious in determining to approve filling of public waters. As testified at hearing, the practice of the division of water was to determine the shoreline calculated at the legal elevation of a lake and based upon site conditions existing on the date of inspection. Lucas said he did not question the practice as a "rule of thumb," but he said it should properly be tempered by practical and historical factors. In this instance, the size of the fill would be small, there had been very significant recent erosion, the adjoining seawalls were farther into the lake than the division's proposal, and the evidence supported a finding that placement of the seawall using the division's approach would result in a safety hazard. Lucas said applying the division's "rule of thumb" inflexibly would mean, if erosion had reached the edge of a pavement before an inspection occurred, the seawall would then have to be placed at the edge of the pavement. Lucas said in his perspective this result was not the design of the "public trust doctrine."

Damian Schmelz said he favored the approach by the administrative law judge to the arguments of the DNR's counsel. In dealing with construction issues along waterways, whether those issues arise from recent erosion or from the recent development of wetlands, "common sense" should prevail. "If the DNR exercises black and white judgment" without considering the surrounding circumstances, "we've lost common sense."

Jerry Miller said he was familiar with this portion of Bass Lake and that it was subject to the predominant northwest wind. He said wave action also contributed to erosion problems in the area, and erosion should be a consideration in deciding where to allow placement of a seawall.

Chairman Kiley called the motion to a vote. Upon a voice vote, the motion carried.

**Consideration of "Motion to Reinstate Special Orders 1353 and 1354 Pursuant to Court Order" in Department of Natural Resources v. Dean Jenkins and Steve Gerber; Administrative Cause Nos. 91-471L and 91-472L**

The Chair reported this item withdrawn.

**Consideration of Findings of Fact and Nonfinal Order of Panel of Administrative Law Judges (and Objections) in the matter of Lyle Enyeart v. Department of Natural Resources; Administrative Cause No. 95-293L**

The Chair reported this item withdrawn.

**Consideration of Findings of Fact, Conclusions of Law, and Nonfinal Order of the Administrative Law Judge in the matter of Jim Welch v. Department of Natural Resources (and Objections; Administrative Cause No. 96-195W**

The Chair reflected that the findings and nonfinal order in this proceeding were written by former Administrative Law Judge, William Teegarden, before his transfer to the State Emergency Management Agency. The presentations moved immediately to arguments by counsel.

Donna Marron, as counsel for Jim Welch, presented her client's objections to the findings by the administrative law judge. She argued that the NRC had previously authorized the residential development near Mooresville which is at issue in this proceeding. In 1995, she said the commission approved a permit for ten residential parcels. The case was now again on the commission agenda because the DNR had taken judicial review of the NRC's 1995 decision.

Marron argued that in 1975, the commission allowed the removal of land from the floodway of White Lick Creek at the site in question by raising the land above the 100-year frequency flood event. Residences have been built along other areas in a subdivision developed by Welch upon agency approval. The area at issue in this case is for four remaining lots, located north of a

former gravel pit. The lots are five feet above the elevation of the regulated flood and, consequently, outside the floodway of White Lick Creek.

Marron urged that the DNR placement of the four subject lots in the floodway was itself unreliable. She said there was no detailed mapping for the site. The DNR conclusion was based on a general FEMA review, which was itself unsupported by detailed analysis. She said the DNR and the NRC were not bound to implement the FEMA mapping. "This is not a case about preserving life and property," she argued, but rather about the DNR pursuing a legal technicality which was not based on suitable science. She said *Yater v. Hancock Co. Board of Health and Yater v. DNR*, both of which were cited by the administrative law judge in his findings, were not supportive of those findings but rather supported the position of her client.

Barbara Nardi spoke as legal counsel for the Department of Natural Resources. She said the foundation for denial of the permit application by Welch was a provision in the Flood Control Act which prohibits the erection of an abode or place of residence in a floodway. She said an agreed order was entered between the DNR and Welch following judicial review from the NRC's 1995 decision, and the agreed order specifically excluded the area in question from a final resolution, leaving it for further argument.

Nardi also took exception with the position stated by Marron that the 1975 permit granted authority to Welch to place residences north of the pond and former gravel pit. She distributed copies of the 1975 permit, previously entered into evidence, which indicated the permit was issued in favor of U.S. Aggregates, Inc. for a levee. She also distributed copies of a 1978 permit modification, also previously admitted into evidence, which removed "a portion of the erosion control levee at the upstream end of the site that is no longer needed." Nardi queried the commission, "I would ask you whether it's likely to build houses on a levee?" Nardi argued that, if the current elevation north of the pond is as high as is contended by Welch, that elevation is based upon unauthorized and unlawful fill of the floodway.

"We presented evidence, which Judge Teeguarden accepted, . . . that the FEMA floodway was designated, and this area was within the FEMA floodway." Nardi said that Welch argues a floodway has a vertical limit, but she said the DNR has consistently rejected this position. "I think the decision by Judge Teeguarden is well-supported" and should be affirmed.

Steve Cecil said, "This case has troubled me from the beginning." He said that he could not imagine "over the many years" the DNR had signaled to the landowner that he could move forward with a residential subdivision, and "now we're saying no."

Jerry Miller moved to grant the permit as sought by Jim Welch and to reform the findings of fact and nonfinal order of the administrative law judge accordingly. Damian Schmelz seconded the motion.

Terri Moore asked whether the 1975 and 1978 permits to U.S. Aggregates, Inc. formed the sole basis for Welch's claim he had previously been authorized to build residences at the site. Nardi responded that was, from her understanding, the sole basis. George Plews, co-counsel for Jim

Welch, said it was always his client's expressed intention to develop the site for residential purposes.

Chairman Kiley clarified that for consideration was an action subject to the administrative orders and procedures act. For this reason, a majority of those members of the commission present and voting was sufficient for a motion to carry.

Kiley said because there was apparent disagreement by commission members concerning the appropriate resolution of the case, he was calling the matter for a vote by a show of hands. Miller, Schmelz, and Cecil voted in favor of the motion. Arnett, Moore, Goss, Siener, and Chandler voted against. Macklin and Kiley abstained. The motion failed.

Arnett moved to affirm the findings and nonfinal order of the administrative law judge. The motion was seconded by Chandler. Moore, Goss, Siener, Chandler, and Arnett voted in favor of the motion. Miller, Schmelz, and Cecil voted against. Macklin and Kiley abstained. The motion carried.

**Consideration of Findings of Fact, Conclusions of Law, and Nonfinal Order of the Administrative Law Judge (with Objections) in the matter of Norman Cowper v. Collier Timber and John Collier Logging; Administrative Cause No. 94-276F**

Steve Lucas, Director of the NRC Division of Hearings, introduced this item. He explained that the case was heard by former administrative law judge, Bill Teegarden. Lucas said the case was an important one of first-impression, involving complex application of the Uniform Commercial Code to the statute controlling complaints by landowners against timber buyers (IC 25-36.5-1). He said the DNR was not a party, but both the landowner and the timber buyer were represented by counsel.

Gregory Black, acting as counsel for Collier Timber and John Collier Logging, presented his clients' objections to the findings and nonfinal order of the administrative law judge. He said the case involved the interpretation of a written contract between Norman Cowper and Collier Timber for the purchase and sale of timber. "We took 500 good trees" and paid for the trees as interpreted in the contract. Black said that in dispute is whether the contract was limited to storm-damaged trees. "We're saying this is a matter of contract construction," which pursuant to *Austin Lakes Joint Venture v. Avon Utilities* must be decided by a trial court and not an administrative tribunal. He said that a civil action to construe the contract was currently pending before Judge Tom Gray in the Morgan Circuit Court. Black urged applying appropriate principles of contract construction, however, ambiguities must be construed against the draftsman, in this case Norman Cowper. "We're saying the statute [IC 25-36.5-1] does not apply," because Collier performed as required under the contract.

Don Tabbert spoke as counsel for the landowner, Norman Cowper. "Judge Teegarden has rendered an outstanding opinion" following a five-day hearing, a site view, and extensive legal argument by the parties. He took exception with the contention by Black that the contract was written by Cowper, arguing instead that both parties had drafted the contract. Tabbert said

Cowper was really uninterested in selling trees; he only wanted to sell storm-damaged trees. The contract ultimately authorized the sale of 175 trees plus 25 storm-damaged trees, but Collier Timber cut 550 trees. Tabbert said the administrative law judge considered the testimony and determined there was "no meeting of the minds" and so no contract. He found the stumpage value of trees taken was \$32,000, for which Cowper was paid \$16,000. Triple damages were awarded for trees not paid for: three times \$16,000 yielding damages of \$48,000. Tabbert said the "commission absolutely has jurisdiction," and as noted by the administrative law judge in his findings, Austin Lakes simply does not apply to the facts of the present case. Tabbert emphasized that the suit in the Morgan Circuit Court was not filed until 18 months after the present case was initiated, and Judge Gray had stayed his own action until this case is finalized. He said Black argued the terms of the contract in his objections, but the ALJ found there was no contract.

Black responded that there was a contract. In essence, he said, the administrative law judge was construing the terms of a contract.

Mary Titsworth Chandler asked if the amount of damages would be different had the administrative law judge found, rather than that there was no contract, there was a contract and Collier Timber breached its terms? Tabbert said the amount of damages would be essentially the same.

Chandler said her choice was between finding Collier Timber had breached its contract and finding there was no contract. She then moved to approve the findings, conclusions, and nonfinal order of the administrative law judge as the final order of the commission. Joe Siener seconded the motion. Upon a voice vote, the motion carried.

**Consideration of Report of Hearing Officers and Presentation for Determination by the Natural Resources Commission as to Final Adoption in the matter of Proposed Amendments to Allow the Use of Crossbow to take Deer During the Late Archery Season; Administrative Cause No. 97-085D; LSA #97-192(F)**

The Chair said he believed the report of the hearing officers was self-explanatory. For consideration were proposed rule amendments which would authorize the use of crossbows to take white-tailed deer. He then asked the division of law enforcement to give its perspectives on the rule proposal.

Col. Larry Allen, Director of the Division of Law Enforcement, analogized authorization for the use of crossbows to take deer to authorization granted to take deer with the use of handguns. That recent change in hunting rules had not posed additional enforcement problems. "We don't foresee any additional law enforcement duties" if the commission approves the use of crossbows to take deer.

Members of the public were invited to speak briefly to the issue:

Brad Snyder of Union County said, "I'm for the crossbows."

Grant Monihan, President of the Indiana Retail Council, said he supported the proposed rule. He said he believed it could benefit "retailers across the state."

Jon Voelz of the Indiana Wildlife Federation provided the commission with a handout support the approval of crossbows to take deer. He said his organization represented 30,000 members across the state. Originally, the IWF had merely supported the principle that hunting issues should be decided in the normal rule-promulgation process of the NRC, but after reviewing the issue, its board of directors had also determined to support the concept.

William Pott said he supported the proposed rule because it would increase license fees and provide new hunting opportunities.

Dick Mercier said he spoke for the Sportsmens Roundtable, the largest organization of its type in Indiana. Mercier said the Sportsmens Roundtable had fought a crossbow season for "*over two years*." He also distributed a commentary to the fall issue of Indiana Conservation Afield in which Sgt. Dean Shadley, TIP Coordinator for the DNR, said he did "not appreciate it when anyone attempts to associate themselves with TIP merely to benefit themselves." The article references efforts by Horton Crossbow Manufacturing and Precision Shooting Equipment, Inc. in this regard.

Brent Dice said the state's bowhunters opposed approval of the crossbow in archery season because the "mechanics" of a crossbow and traditional bow and arrow are so different. He said a crossbow is more like a gun. "The difference between shooting a crossbow and a bow is so vast. We don't want it in the archery season."

Howard Lawrence said "if you don't limit the maximum" pull for a crossbow, it will function more like a gun than archery equipment.

Marlon Slayton said he sees the crossbow as a threat to small business. The longbow requires a special set-up, which the crossbow does not, meaning most crossbow sales will be made by larger retailers.

Tony Slayton said approving the crossbow to take deer will "take away from the challenge of bow hunting."

Joe Lackey, President of the Indiana Grocery and Convenience Store Association, said in other states where crossbows can generally be used for hunting, they were a significant sales element. "We sell a lot of products like crossbows," and approval of their use to take deer in Indiana would be a welcomed sales item. "On a personal note, I've hunted with a compound bow a lot." He said he favored approval of the rule, not as a substitute for hunting with traditional bow and arrow but as a supplement. He said the commission should "allow the citizens to make their choices."

Doug Allman said he also favored the proposed rule amendments. "I'm for the crossbow. I'm for increasing opportunities" for people to enjoy themselves in the woods. He said there were many



Indiana citizens who might find it physically difficult if not impossible to use a traditional bow, but they could manage the use of a crossbow.

The Chair then called for discussion of the issue by the NRC. Jerry Miller asked for a clarification on the season which would be authorized by the proposed rule. Macklin responded that "It's the back half of the archery season." Miller said he felt "very, very responsible" that the commission should seek to add opportunities for people to hunt who might not now be hunting. He argued the use of crossbows to take deer would open hunting opportunities to some people not currently hunting.

Miller moved to approve for final adoption the amendments to 312 IAC 9-3-4 and 312 IAC 9-3-5, as set forth in the attachment to the report of the hearing officers, to allow the use of crossbows to take deer. The motion was seconded by John Goss. Upon a voice vote, the motion carried.

The Chair asked Director Larry Macklin if he would provide a follow-up report on the success of, or any problems resulting from, the authorization to take deer with crossbows. The Director responded that he would have staff do so.

### **Adjournment**

At 1:08 p.m., EST, the meeting adjourned.