

NATURAL RESOURCES COMMISSION
Minutes - September 18, 1996

MEMBERS PRESENT

Michael Kiley, Chair
Jerry Miller
Barbara Lollar
Mary Titsworth
Steve Cecil
Damian Schmelz
Joe Siener
Terri Moore

NATURAL RESOURCES COMMISSION STAFF PRESENT

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

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Jack Costello	Executive Office
David Herbst	Executive Office
Louise Krick	Executive Office
Lori Kaplan	Executive Office
Glen Salmon	Fish and Wildlife
Glenn Lange	Fish and Wildlife
Lt. Col. John Stivers	Law Enforcement
Lt. Eugene Hubbard	Law Enforcement
Jim Slutz	Oil and Gas
Scott McClarney	Water
Robert Waltz	Entomology and Plant Pathology
Emily Kress	Outdoor Recreation
Jerry Sears	Outdoor Recreation
Sylvia Wilcox	Legal Counsel
Virginia Simone	Legal Counsel
Mary Davidsen	Legal Counsel

GUESTS PRESENT

Greg Hockemeyer	David and Mary Gator
Brian McLaughlin	Marilyn Kirkpatrick
Tom Williams	Jed Pearson

MONTHLY REPORTS

Michael Kiley, Chair, called to order the regular meeting of the natural resources commission at 10:05 a.m., EST on September 18, 1996 in the Indiana State Museum, 202 North Alabama, Indianapolis, Indiana. With the presence of eight members, the chair observed a quorum.

Jerry Miller moved to approve the minutes of the August 15, 1996 meeting. The motion was seconded by Damian Schmelz and approved by voice vote of the commission.

Jack Costello presented the Director's Report on behalf of Patrick Ralston. He indicated that the Director was in Ontario for a meeting of the Great Lakes Fisheries Commission.

Costello also reported that the Director had a very busy month speaking at various meetings. He spoke at the COGMA meeting, attended IRPA, and met on budget issues. He said Ralston also attended a press conference in Hammond regarding a settlement agreement with three major industries that were responsible for polluting Grand Calumet River.

Jerry Miller, Chairman of the Advisory Council for Lands and Cultural Resources, noted that two items on the present NRC agenda were recommended for approval.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, reported upon the deer reduction program in seven state parks. He also reported upon several important dates: dedication at Charlestown State Park on October 12th at 3:00 p.m. with Congressman Hamilton and Lt. Governor Frank O'Bannon; Midwestern Directors meeting in Indianapolis on October 16 and 17; 80th anniversary of the state parks system at Turkey Run on October 26; and the Governor's Conference on the Environment on November 9.

Joe Siener, Chairman of the Advisory Council for the Bureau of Water and Resource Regulation, reported his council met last Thursday.

David Herbst, Deputy Director for the Bureau of Water and Resource Regulation, also reported upon the press conference in Hammond that Pat Ralston, Steve Sellers and he attended. The conference announced an agreement with three major industries responsible for polluting Grand Calumet River. He noted this settlement agreement amounts to five and half million dollars to help dredge out the contamination sediments and restore wetlands and wildlife habitats. Herbst said, "It's one of the largest settlements of this type."

Herbst reported the bureau had a lake management meeting in Angola on August 20 to address various problems. Herbst indicated it "was a tremendous turn-out of somewhere between 325 to 350 people." He also noted that there will be a follow-up meeting on October 10 at the request of Senator Meeks.

**BUREAU OF WATER AND RESOURCE REGULATIONS
DIVISION OF OUTDOOR RECREATION**

Recommendation to the Director on the Distribution of Pittman-Robertson Funds for Fiscal Year 1996 DNR Shooting Range Program Projects

Jerry Sears of the division of outdoor recreation presented this item. He noted this item was for information only. Sears explained that the division of outdoor recreation received six grant applications totaling \$274,773.32, and in addition fish and wildlife division made \$231,400.00 available to fund this program. Sears reported there was enough money to fund the top applications: Henry County Conservation Club, CERAland Park in Columbus, Bird/Gibson Recreation Club in Terre Haute, and the Kosko County Club in Kosciusko County.

Michael Kiley noted for the record that this item did not call for action.

DIVISION OF FISH AND WILDLIFE

Request by Smithville Telephone Company, Ellettsville, Indiana for Utility Easement

Glenn Lange of the division of fish and wildlife presented this item. He stated the Smithville Telephone Company is constructing a fiber optic route to upgrade service to the Chippendale substation and the surrounding area, and the division of fish and wildlife does not have any objections to the easement.

Joe Siener moved to approve the request by Smithville Telephone Company, Ellettsville, Indiana for a utility easement. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration of Signage at Two Public Access Sites to Honor Family Members

Glen Salmon of the division of fish and wildlife presented this item. He indicated there were two public access sites to be considered. One is to be named G. Walter Langohr Public Access Site in Noble County and the other site is to honor John and Madelon Lentz in St. Joseph County. Salmon noted that both sites have been recommended or requested by either family members of the deceased or by the St. Joseph County Commissioners. The division of fish and wildlife recommend approval.

Jerry Miller moved to dedicate the two public access sites in honor of John and Madelon Lentz in St. Joseph County and G. Walter Langohr in Noble County. The motion was seconded by Terri Moore. Upon voice vote, the motion carried.

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

"Direct Dialogue" - Video Tape Presentation

Jim Slutz, Director of the Division of Oil and Gas, introduced this video tape presentation.

LEGAL PROCEEDINGS

Consideration of the Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge in the matter of Jed Pearson v. Department of Natural Resources and David and Mary Gator; Administrative Cause Number 95-041W

Tim Rider, the Administrative Law Judge, introduced this item. He explained that in issue was the denial of a permit for a pier on Loon Lake, a public freshwater lake in Whitley County. The ALJ explained that Jed Pearson had an easement for ingress and egress to the lake through real estate owned by David and Mary Gator. Although in the past the Gators had given Pearson permission to locate a pier adjacent to their property, they had recently denied permission.

The ALJ reflected that the DNR denied the permit, and after hearing the evidence pertaining to the easement, he affirmed the denial. By rule, a person must be a riparian owner to qualify for the placement of a temporary structure (including a pier), and Pearson had not demonstrated himself to be a riparian owner. Nothing in the easement reflected any right to place a pier, and correspondence accompanying the easement at the time of its issuance (from the Gators' attorney) indicated no right was conferred other than lake access.

Jed Pearson argued that he should receive permission to place a pier. He said that two riparian owners granted the easement, and the riparian owner other than the Gators had expressed an intention that Pearson receive permission to place a pier. Pearson said the easement was ambiguous, and the ambiguity should be resolved in his favor.

Virginia Simone spoke as attorney for the DNR. She said the case was about an easement issued in May 1991. By its terms, the easement merely provided Pearson with the right to "ingress and egress to and from the water's edge on Loon Lake." As a matter of law, no right to place a pier could be inferred.

Gregory Hockemeyer spoke as attorney for the Gators. He said that Pearson was given permission to use the site for a pier before the 1990s. At that time, a personality conflict arose among the neighbors, and the permission was terminated. He said there was no evidence that Pearson had established the right to an easement based upon adverse possession. Hockemeyer complained that Pearson, an employee of the DNR, was being allowed to pursue his case in an administrative forum. He urged the Natural Resources

Commission to defer action on the case, allowing the property dispute to be resolved by a local civil court.

Jerry Miller asked Stephen Lucas to comment on the case. He asked if resolution along the lines proposed by the ALJ would create a bad precedent.

Steve Lucas said he would not comment on the merits of the case. He said he felt the parties had done a good job of describing the substantive issues, and Lucas said they and the ALJ were in a better position to reflect upon the hearing than was he.

With respect to Hockemeyer's request that the case be deferred, Lucas said the principle at issue was not a new one. Even though the NRC did not have competence to determine property rights issues, that issue could not be separated from permitting of structures on public freshwater lakes pursuant to IC 14-26-2. The NRC was the proper entity to decide the permit question, with permit review governed by the administrative orders and procedures act or AOPA (IC 4-21.5). Once a decision was rendered by the ALJ, it became subject to review by the NRC (and subsequently by a court), and the AOPA set a time limit of 90 days from the hearing for a final decision to be rendered. Lucas said where administrative and civil matters were mixed, as in this case, the "doctrine of primary jurisdiction" applied. He urged the NRC to render a final decision either affirming or denying what the ALJ had written.

Jerry Miller moved to reverse the findings of the ALJ and to grant the permit to Jed Pearson. There was no second to the motion.

Mary Titsworth moved to affirm the findings and nonfinal order of the Administrative Law Judge. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried with Jerry Miller opposed.

Consideration of the Report of Hearing Officer and Recommendation for Final Adoption of the Recodification of Rules Governing the Division of Entomology and Plant Pathology, Administrative Cause Number 95-185E

Steve Lucas, hearing officer, introduced this item. He said for consideration was the recodification of the rules administered by the Division of Entomology and Plant Pathology. Included within the recodification were several substantive changes:

The streamlining of the rule by eliminating several repetitive sections and a few sections focused upon procedures, a subject now though adequately addressed in 312 IAC 3 and IC 4-21.5.

Fee reductions for a few nominal charges no longer collected by the DNR.

Implementation of a permitting structure for native species of purple loosestrife.

Addition of Randolph County to the pine shoot beetle quarantine, a quarantine extension required by the federal government and already implemented in fact.

Robert Waltz, State Entomologist, was present. He requested the commission to give the rule recodification final adoption. Waltz was asked by the commission about the new permitting authority with respect to purple loosestrife. He responded that the authority applied to all *Lythrum* species (including purple loosestrife) but would be cautiously applied so as to maintain native species. He explained that the varieties of purple loosestrife which invaded wetlands were aggressive exotics, but native varieties posed no environmental threat. Waltz also reflected that biological control efforts to control purple loosestrife were showing promise.

Consideration of the Presentation for Preliminary Adoption of Amendments to the Geist Reservoir Boating Rule, Administrative Cause Number 95-224L

Steve Lucas introduced this item. He explained that presented for preliminary adoption was a proposed amendment to 310 IAC 2.1-8-2 which governs watercraft operations on Geist Reservoir. Lucas said that the amendments were triggered initially by citizen requests, but following the receipt of those requests, the Division of Law Enforcement performed investigations and determined several changes were appropriate.

Lt. Eugene Hubbard spoke on behalf of the Division of Law Enforcement. He circulated a map showing where changes were proposed and the reason for those changes.

The Chair asked Lucas to clarify the status of the proposal. Lucas responded that, if the commission gave the proposal preliminary adoption, a public hearing would be held to receive comment on the proposed amendments, and he anticipated a lively discussion. A written report and recommendations would be tendered to the commission for action as to final adoption sometime in 1997.

Brian McLaughlin, a local property owner, was also present. He said he agreed with the recommendations by Lt. Hubbard.

Damian Schmelz moved to give preliminary adoption to amendments to 310 IAC 2.1-8-2 governing boating operations on Geist Reservoir. The motion was seconded by Joe Siener. Upon a voice vote, the motion carried.

Consideration of the Report and Recommendation of Hearing Officer for Final Adoption of Rules Governing (1) Water Well Drilling Contractor Permits (310 IAC 16-2-2) Administrative Cause Number 96-083W, and (2) Wild Animal Possession Permit (310 IAC 3.1-11-3) Administrative Cause Number 96-079D

Steve Lucas presented this item on behalf of Tim Rider, hearing officer. Lucas said two minor license fees would be repealed by approval of hearing officer's report and for final

adoption. These fees established a duplicate fee for a water well driller license and a renewal fee for a wild animal possession permit. No one appeared for the public hearing, and no comments were received regarding the proposals. Lucas said that Rider recommended both for final adoption.

Jerry Miller moved to give final adoption to the repeal of the duplicate license fee for water well drilling contractors (LSA 96-107) and to the repeal of the renewal fee for wild animal possession permits (LSA 96-106). The motion was seconded by Mary Titsworth. Upon a voice vote, the motion carried.

Consideration of the Motion to Reinstate Special Order 1353 and 1354 Pursuant to Marion County Circuit Court Order (Cause Number 49-C01-9408-CP-2880) in the Matter of Dean Jenkins v. Department of Natural Resources [Administrative Cause Number 91-472L] and Steven Gerber v. Department of Natural Resources [Administrative Cause Number 91-471L]

Steve Lucas reported that the parties had requested this item be deferred. The Chair ordered the item deferred.

At approximately 11:30 a.m., EST, the meeting was adjourned.