

NATURAL RESOURCES COMMISSION

Minutes of January 21, 2003

MEMBERS PRESENT

Rick Cockrum, Vice Chair
John Goss, Secretary
Damian Schmelz
Jack Arnett
Jerry Miller
Bob Murphy
Lori Kaplan
Raymond McCormick, II
Larry Goode

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Debra Michaels

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Carrie Bales	Executive Office
John Davis	Executive Office
Carrie Doehrmann	Executive Office
Paul Ehret	Executive Office
Glen Salmon	Fish and Wildlife
Gwen White	Fish and Wildlife
Sam Purvis	Law Enforcement
Scott McDaniel	Law Enforcement
Stephanie Roth	Legal
Ihor Boyko	Legal
John Bacone	Nature Preserves
Gerald Pagac	State Parks and Reservoirs
George Bowman	Water

GUESTS

Ted Harris
Larry Geede
Michael A. Howard

MONTHLY REPORTS

Rick Cockrum, Vice Chair, called to order the regular meeting of the Natural Resources Commission at 10:00 a.m., EST, on January 21, 2003, at The Garrison, Fort Benjamin Harrison State Park, Indianapolis, Indiana. Chairman Kiley was absent following recent surgery. With the presence of nine members, the vice chair observed a quorum.

Damian Schmelz moved to approve the minutes of November 19, 2002. Jerry Miller seconded the motion. Upon a voice vote, the motion carried.

John Goss provided the Director's Report. He reported Chairman Michael Kiley was recovering from his recent triple by-pass surgery. Goss said that Kiley was doing well, but was expected to be hospitalized for a week to ten days.

Chair Rick Cockrum welcomed Bob Murphy, proxy for Lieutenant Governor's Office.

Goss reported the election of officers would take place in the March 2003 meeting. Goss said John Hillenbrand has resigned as Chairman of the Natural Resources Foundation and of the Heritage Trust. He said there would be a "special farewell" for Hillenbrand possibly in March.

Goss said, "funding is a serious problem. All we got on the funding side is the license plate revenue money of about \$1.25 million. It's going to be quite a bit less than we have had in the past few years. We need to talk about priorities of the Trust."

Goss said the State Budget Committee process is in full motion. The DNR's budget presentation to the General Assembly was "pretty well received." He said DNR asked that the operation budget continue at the same level, still providing DNR a capital budget of approximately \$60 million. Goss said he believed the House Ways and Means Committee was "pretty positive on trying to help us out."

Goss said the Director of the State Museum, Doug Noble, has resigned effective on completion of his two-year contract. Susan Williams, State Office Building Commissioner, will "step in" for the time being and occupy the position as Director of the Museum. Goss reflected that Williams was instrumental in the successful completion of the new State Museum facilities and that she is very familiar with its operations.

Goss said the first national event in observance of the "Lewis and Clark" expedition took place in the past week at Monticello. The second of ten national events will take place in Indiana at the Falls of the Ohio State Park during the third week of October. Goss said there would be a sneak preview of the Lewis and Clark film at the IMAX Theatre on February 11, 2003. Showing of the film will continue through the fall of 2003 at the IMAX Theatre.

Goss said Indiana wetlands protection is a major issue for this session of the Indiana General Assembly. The Indiana Department of Environmental Management and the Department of Natural Resources are working in partnership. Goss said a wetlands newsletter will be printed every week or two while the General Assembly is in session to help "update the public on this very important issue."

Lori Kaplan expressed her appreciation for the partnership with DNR, IDEM, the Department of Agriculture, and the Governor's Office which all recognize the importance of having the ability, at the state level, to protect the wetlands. "I do truly appreciate the partnership that is being formed."

The Director asked Glen Salmon, Director of the Division of Fish and Wildlife, to provide an overview of a meeting scheduled for later in the day. Salmon responded by saying there would be a legislative reception on the topic of wetlands at the downtown Indianapolis Embassy Suites at 6:00 p.m. He said the Indiana chapters of the American Fisheries Society and the American Wildlife Society were vitally interested in the topic and were participants in the reception. He added that approximately 40 members of the General Assembly were also scheduled to attend.

Goss provided a short briefing on the new I-69 project. "We have a good communication between INDOT and our DNR staff. The recommendations that were made by DNR concerning the sensitive environmental areas were taken heavily into account in the route selection and decision. We're doing everything we can to protect the resources. INDOT has been very open to the recommendations of our staff and experts. I think we're going to be very seriously involved in the next year in the final route and mitigation projects."

Larry Goode said INDOT was "glad the selection has been made by the Governor, and it is time to move forward." He indicated he looked forward to implementation of the I-69 project.

Director Goss announced the DNR's central reservation system "went live" in December 2002. The system fundamentally modernizes how the agency handles campground and similar reservations. Goss congratulated Gerald Pagac, Director of Division of State Parks and Reservoirs, and his staff for their hard work. He said the new system "is a big milestone for us and it went off without a flaw."

Jerry Miller, Chair of the Advisory Council for Lands and Cultural Resources, reported that the Advisory Councils met jointly on December 11, 2002. There was a thorough fish and wildlife report, a discussion of issues on Lake Wawasee and Syracuse Lake, a briefing on wetlands policy, and a presentation regarding fees for entrance to State Historic Sites.

John Davis, Deputy Director, reported on the deer Chronic Waste Disease (CWD) monitoring efforts. He said Illinois has identified seven infected deer through its scientific research, most of these being west of Chicago, south of the Wisconsin border. He said Indiana has tested 650 deer heads of the projected 1,000 to be sampled. "Thus far, all the tests are negative for CWD." Davis said if any of the tests of the 1,000 deer head confirm the presence CWD, or if Illinois reports CWD within 40 miles of Indiana, the remaining 2,000 deer heads within Indiana custody would also be tested.

Davis said the Boat, Sport and Travel Show begins on February 14, 2003. The first Division of Forestry open house for 2003 will be at the Pike State Forest. Later open houses are scheduled for Jackson-Washington State Forest and for Martin State Forest. There was a recent timber sale at the Putnamville Department of Corrections unit. The sale grossed approximately \$125,000 of income for the Department of Corrections.

Ray McCormick, II, Chair of the Advisory Council for Water and Resource Regulation, reported he did not attend the Advisory Council meeting last month due to scheduling conflict.

Paul Ehret, Deputy Director, said the SMCRA groundwater rule proposal would be on the agenda for final adoption in March 2003. He said DNR has been working closely with the Indiana Coal Council and the Hoosier Environmental Council in an attempt to resolve outstanding issues. There have also been several meetings with IDEM concerning possible amendments.

Ehret reported there also have been discussions concerning new statutory authority obtained in 2002 for the DNR to issue Notice of Violations (NOVs) for violations of the Flood Control Act, the Lakes Preservation Act, the Navigable Waters Act, and other key waterway construction laws administered by the Division of Water.

Previously, administrative enforcement required the filing of a complaint with the NRC Division of Hearings, but with the enactment of the new legislation, the DNR is empowered to bring direct enforcement similarly to how enforcement is performed by the Division of Reclamation and the Division of Oil and Gas. A person who is dissatisfied with the receipt of an NOV could then seek review through the Division of Hearings.

Ehret said the new authority came to the forefront because the Indianapolis Museum of Art filled a portion of the floodway of the West Fork of the White River without first obtaining a license pursuant to the Flood Control Act. The Indianapolis Museum of Art subsequently sought an after-the-fact license, but the previously unauthorized activity drew some media attention. At the time of the museum actions, an operating procedure for issuance of NOVs under the 2002 legislation was not yet in place. Ehret said, “We are examining our procedures relative to notices of violation” and hope to soon have the authority fully operative. The plan is to have a document prepared for consideration by the Advisory Councils during their February joint meeting.

Ehret explained that another issue to be brought before the Advisory Councils in February is “floodway compensation.” There is an increasing reliance on floodway compensation for construction projects where a developer fills a portion of a floodway then constructs an offsetting channel to compensate for the fill. “This practice is bringing a lot of issues relating to long-term maintenance, the property rights, etc., which frankly places the Division of Water in somewhat of a quandary.” Ehret said the agency will seek policy guidance from the Advisory Councils relative to floodway compensation.

Ehret reported the Indiana State Ethics Commission issued a \$2,500 fine to a former inspector for the Division of Oil and Gas for a conflict of interest. The investigation uncovered additional issues, and Conservation Officers are now investigating these issues.

Ehret said the Division of Entomology and Plant Pathology will hold a series of February public meetings regarding gypsy moth treatments. A press release will provide the dates, locations, and times of the meetings.

Ehret said the NRC Division of Hearings will hold a public hearing in Syracuse on January 27 to consider proposed amendments to rules governing fishing tournaments and other organized boating activities. A second hearing to consider the same subject is scheduled for January 29 in Indianapolis. The amendments propose a regulatory structure for fishing tournaments on Lake Wawasee and Syracuse Lake and also address several issues regarding organized boating activities that have statewide application. Ehret said that it is hoped that after the public hearings, the amendments will be ready for final adoption before the NRC in March.

Ehret reported the Governor last week signed the Conservation Reserve Enhancement Program (CREP) agreement. The agreement will be forwarded to the U.S. Department of Agriculture for review. “Hopefully, we will get that agreement approved, which could bring up as much as \$58 million to the State for application for conservation practices in three select watersheds within the state.” He said these are the Upper White River, the Tippecanoe River, and Highland/Pigeon Rivers.

DIVISION OF NATURE PRESERVES

Consideration of the Dedication of the Black Rock Barrens Nature Preserve, Warren County

John Bacone, Director of the Division of Nature Preserves, presented this item. Bacone said the proposed Black Rock Barrens Nature Preserve is a 100-acre tract located along the Wabash River. Bacone provided members of the Commission with handouts that included photographs depicting the proposed nature preserve. He said

the tract was acquired with Indiana Heritage Trust in partnership with NICHES Land Trust, Corp., which is the owner and manager of the site.

Ted Harris, President of NICHES Land Trust Corp., addressed the Commission. He explained that NICHES is a not-for-profit corporation based in West Lafayette. The trust has been in existence since 1995 and currently protects 1,419 acres. NICHES trust owns 979 acres, and the other 440 acres are protected by conservation easements. Harris closed by saying, “We’re very pleased that this will be the first dedicated nature preserve that NICHES Land Trust owns, and we very much appreciate your support and the protections afforded by the Nature Preserve Act.”

Damian Schmelz moved to approve the dedication of Black Rock Barrens Nature Preserve. Jerry Miller seconded the motion. Upon a voice vote, the motion carried.

Consideration of the Dedication of Blue River Gravel Wash Barrens Nature Preserve, Crawford County

John Bacone, Director of the Division of Nature Preserves, also presented this item. He said this site is similar to the Black Rock Barrens Nature Preserve but is located in southern Indiana. It is a narrow piece of ground along the Blue River and is part of the Harrison-Crawford State Forest. Bacone explained the property was a cooperative purchase involving funds from the Division of Outdoor Recreation, the Division of Forestry, and the Division of Nature Preserves, together with assistance from The Nature Conservancy.

Bacone said that the Division of Nature Preserves and the Division of Forestry recommend the dedication of the most natural parts of the Blue River Gravel Wash Barrens Nature Preserve.

Damian Schmelz moved to approve the dedication of the Blue River Gravel Wash Barrens Nature Preserve. Jack Arnett seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF FISH AND WILDLIFE

Consideration of Preliminary Adoption of Rule Amendments to Add Several Species of Asian Carp, White Perch, and Snakeheads to the List of Fish that are Illegal to Possess Live in Indiana; Administrative Cause Number 02-157D; LSA Document #02-318

Gwen White, Division of Fish and Wildlife, presented this item. She narrated an electronic audio report that depicted several exotic fish species posing an economic and environmental threat to Indiana waters. These are bighead carp, black carp, silver carp, white perch, snakehead, and genetically altered fish of these species. She reflected that recent incidents with snakeheads in Maryland had generated more media interest in Indiana than any other issue during her years with the DNR.

White said for consideration by the NRC was the preliminary adoption of a rule to make it unlawful in Indiana to possess live fish of these species. She said that currently the ban is the subject of an emergency rule.

Ray McCormick moved to give preliminary adoption to the rule amendments to add several species of fish to those prohibited for live possession in Indiana. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

**NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS**

Consideration of Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge in the matter of *Messenger v. Lenz*; Administrative Cause Number 01-161L

Stephen Lucas, Director of the NRC Division of Hearings, indicated the parties wished for this item to be continued. He said Sylvia Wilcox is the Administrative Law Judge, and following the filing of objections by Messenger, she supplemented her findings and nonfinal order. As a result, the Messenger objections may be withdrawn, but Lenz may file new objections. The parties are conferring with the ALJ, and the item will either be resolved or returned to the NRC agenda for consideration during the March meeting.

The Vice Chair reported the item withdrawn from the agenda.

Consideration of Findings of Fact and Conclusions of Law and Nonfinal Order of Summary Judgment in the matter of *Gregor W. King v. Hamilton County Commissioners and Department of Natural Resources*; Administrative Cause Number 02-047W

Stephen Lucas, Administrative Law Judge, introduced this matter. For consideration is a nonfinal summary judgment rendered in favor of the Hamilton County Commissioners for a floodway license to place a bridge over Mud Creek. Lucas found that King had not raised any issue over which the Commission had jurisdiction. King filed objections to the finding, and those objections were scheduled for oral argument before the NRC. King recently determined not to appear to argue his objections, but he did not withdraw them. Lucas directed the attention of the Commission to recent correspondence by King indicated he would not appear and to an entry by the ALJ concerning the correspondence. The ALJ said his reason for ruling against King was really underscored by King's own objections. King wrote that statutory review standards in IC 14-28-1-22(e) for a floodway license are "so narrow in scope they miss the widespread adverse conditions...causing the Commission to become an accomplice by giving sanction to abuse by the applicant under the guise of application approval. This is by design and legislative intent." Lucas said the Indiana General Assembly determines the scope of agency review, and if King were dissatisfied with that scope, he needed to pursue a statutory amendment to the Flood Control Act.

Michael A. Howard spoke as attorney for the Hamilton County Commissioners. He thanked the NRC for the opportunity to speak and asked for affirmation of the findings and nonfinal order by the Administrative Law Judge. Howard indicated that the ALJ had gone to considerable efforts during a prehearing conference to explain to Gregor King that, if the DNR determination to issue a floodway license to the Hamilton County Commissioners were to be overturned, King would be required to present evidence supportive of his position. Howard reflected that King voiced several complaints, but none of them related to DNR or NRC responsibilities under the Flood Control Act.

Howard also noted the ALJ had made a finding requiring the Hamilton County Commissioners to have lawful authority before entering King's property. Howard said he was well aware of the responsibility to either purchase or use the power of Eminent Domain to move forward with a public purpose on what is private land. The ALJ entry in this regard had merely made explicit what was already implicit.

Howard said it was time to move forward. The Hamilton County Commissioners had met their legal obligations under the Flood Control Act. He asked that the NRC affirm the nonfinal order of the Administrative Law Judge.

Carrie Doehrmann spoke for the Department of Natural Resources. She said a member of her staff, Mary Baird, was the attorney of record but that Baird was on maternity leave. Doehrmann said she agreed with Howard that the findings and nonfinal order by the Administrative Law Judge should be affirmed. The NRC could set aside a license granted under the Flood Control Act only if the license were inconsistent with the Flood Control Act. The license for FW-21,415 was properly granted and conditioned by the Division of Water. Gregor King received a full opportunity but offered no evidence the license was inconsistent with the Flood Control Act.

Jerry Miller moved to affirm the nonfinal order of summary judgment with findings of fact and conclusions of law as entered by the Administrative Law Judge. Jack Arnett seconded the motion. Upon a voice vote, the motion carried.

Consideration of Repeal of Nonrule Policy Document Addressing Wetlands and Areas of Special Concern in Public Freshwater Lakes; Administrative Cause Number 03-012W

Stephen Lucas, Director of the NRC Division of Hearings, introduced this item. He said for consideration was the repeal of a nonrule policy document that approved maps to identify wetlands and areas of special concern on several public freshwater lakes. He said the nonrule policy document had become obsolete, because the subject was now addressed in detail by rule and because GPS and other improved technologies provided greater specificity than the maps contained in the document. Lucas said the proposed repeal was a reflection that both the law and the science had advanced beyond the effectiveness of the rule.

George Bowman, Assistant Director of the Division of Water, spoke in favor of the repeal. He said the nonrule policy document was a good tool when it was developed, but no longer served a positive purpose. With new technologies and review processes within the DNR, the document was unproductive and probably “a source of confusion” to the public. He urged its repeal.

Jack Arnett moved to repeal the nonrule policy document that provides mapping of wetlands and areas of special concern within public freshwater lakes. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Preliminary Adoption of Rule Amendments to Define Waters of Concurrent Jurisdiction and to Require Children under Age 13 to Wear Personal Flotation Devices on Them; Administrative Cause Number 03-007L

Sam Purvis, Indiana State Boating Law Officer, presented this item. For consideration is the preliminary adoption of amendments governing the operation of boats on Indiana public waters. More particularly, these amendments would add the portion of the Wabash River that forms the border with Illinois and a small portion of the Great Miami River to the concept of “waters of concurrent jurisdiction”. Currently, the definition includes only the Indiana portions of the Ohio River and Lake Michigan. He said that by Indiana statute, “with the waters of concurrent jurisdiction come watercraft rules not otherwise applicable in Indiana.”

Maj. Purvis explained that the U.S. Coast Guard regulations require children under age 13 to wear personal flotation devices on waters the Coast Guard patrols. For waters of concurrent jurisdiction, the requirement pertaining to children wearing PFDs should also be made applicable under state law. He said the Division of Law Enforcement asked that these amendments be given preliminary adoption as rules.

Jerry Miller moved to give preliminary rule adoption to an amended definition of waters of concurrent jurisdiction, to require children under age 13 to wear personal flotation devices on those waters, and to make other changes as recommended by the Division of Law Enforcement. Jack Arnett seconded the motion. On a voice vote, the motion carried.

OTHER MATTERS

Informational Item: Cost Reimbursement for Data Requests to the Division of Nature Preserves

John Bacone, Director of the Division of Nature Preserves, presented this item. He said there are numerous costs associated with providing users with information managed through the Indiana Natural Heritage Data Center. Bacone said that following consultations with legal counsel, the agency determined that the state public records law allows the reimbursement of such costs. The proposed fee for reimbursement would be \$30 per half-hour with a minimum \$30 fee, but the amount would be waived for non-profits, other governmental agencies, and educational research projects. He said the DNR might later seek a resolution from the NRC in support of the concept that reimbursement was consistent with the fair operation of the agency.

Deputy Director, John Davis, reflected that “these fees are really about the land use of the State.” Having users reimburse the DNR for the costs associated with providing the data was a reasonable expense of doing business and equitable to the taxpayers who support agency functions.

The Vice Chair took this item by consent.

Consideration of an Agreement for the Restoration of 330 Acres to Prairie at Prophetstown State Park, Tippecanoe County

Gerald Pagac, Director of the Division of State Parks and Reservoirs, presented this item. He said the DNR had an opportunity to save approximately \$64,816 in its effort to restore a native prairie at Prophetstown State Park by entering an agreement with Cinergy. The agreement would be an implementation of the carbon credit program previously approved by the NRC. He said the agreement would restrict the planted acres for 50 years so only land identified as undeveloped in the park’s Master Plan would be included. Pagac indicated that Cinergy had agreed to purchase the quantity, species, and genotype identified by our staff. To the extent practicable, Great Lakes Region plant sources would be used. If the NRC were to approve the request, a written agreement would be prepared through the legal staffs of the DNR and Cinergy.

Raymond McCormick reflected that approval of carbon credits is speculative and might never be of financial benefit to Cinergy. Even if approved, the costs to Cinergy would likely far exceed its financial gains. To a large extent, the effort reflects an initiative by the company to be a good corporate citizen.

Larry Goode observed that INDOT was establishing a nursery so wild plant species could be placed within State properties on a more cost-effective basis. He suggested the DNR might in the future wish to work with INDOT to use the services of its nursery. Pagac responded that the DNR also has a small nursery within Prophetstown State Park for this purpose, but the Cinergy project would significantly supplement the limited capacity of the his division to provide plantings. John Davis said the INDOT initiative was a positive development, and he urged INDOT to work with DNR to obtain plant sources that would be consistent with Indiana genotypes.

Lori Kaplan moved to authorize the DNR to develop an agreement with Cinergy to implement the carbon credit program for the restoration of a native prairie at Prophetstown State Park upon the terms outlined by Pagac. Jerry Miller seconded the motion. Upon a voice vote, the motion carried.

Information Item: Legislative Update

Director John Goss provided a legislative update on the opening stages of the current Indiana General Assembly. He said consistent with the NRC resolution on user fees, the agency was pursuing several initiatives designed to raise fees so they more closely matched the costs of DNR services. Goss again emphasized the importance of legislation pertaining to the protection of wetlands, and he spoke about a number of other bills of interest to the DNR and the NRC.

ADJOURNMENT

At 12:25 p.m., EST, the meeting adjourned

FUTURE MEETINGS

March 18, 2003 — The Garrison, Fort Benjamin Harrison, Indianapolis, Indiana

May 20, 2003 — Location to be announced.