

NATURAL RESOURCES COMMISSION

Minutes - March 19, 1997

MEMBERS PRESENT

Michael J. Kiley, Chair
Jack Arnett, Vice Chair
Larry D. Macklin, Secretary
John Goss
Jodi Perras
Steve Cecil
Damian Schmelz
Joe Siener
Jerry Miller
Terri Moore
Jane Ann Stautz

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas	Hearings
Bill Teegarden	Hearings
Jennifer Kane	Hearings
Sharon Turk	Hearings

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Costello	Executive Office
David Herbst	Executive Office
Paul Ehret	Executive Office
Lori Kaplan	Executive Office
Louise Krick	Executive Office
Sylvia Wilcox	Legal Section
Angila Prather	Legal Section
Burney Fischer	Forestry
Joe Tutterrow	Forestry
Gary Gretter	Forestry
Emily Kress	Outdoor Recreation
Charles Shannon	Law Enforcement
John Stivers	Law Enforcement
John R. Gano	Law Enforcement
Scott McDaniel	Law Enforcement
James Hebenstreit	Water
Jeff Tenuth	Museums and Historic Sites
Gerald Pagac	State Parks and Reservoirs
John Bergman	State Parks and Reservoirs
John Davis	Land Acquisition

GUESTS PRESENT

Spencer Schnaetter	Vicki Carson
Jim Mulligan	Carter Rothrock
Daniel McInerny	Emily Rosko
Douglas Cregor	David Bell
Jeffrey Stant	Tim Maloney

MONTHLY REPORTS

Michael Kiley, Chair, called to order the regular meeting of the natural resources commission at 10:05 a.m., EST, on March 19, 1997 in the Indiana State Museum, 202 North Alabama, Indianapolis, Indiana. With the presence of eleven members, the Chair observed a quorum.

Jerry Miller moved to approve the minutes of the February 1997 meeting. The motion was seconded by Jane Stautz and approved by voice vote of the commission.

Chairman Kiley then recognized Patrick Ralston. "As you all know, Governor O'Bannon has chosen Pat to head the State Emergency Management Agency. We who know Pat well understand how dedicated he was and is to our natural resources. We take solace knowing he is right around the corner protecting our resources still, though not necessarily in their natural state." The Chair then presented Ralston with a plaque in appreciation of his eight years of services to the department of natural resources.

Patrick Ralston expressed his appreciation to the staff of the department of natural resources and the commission for their support during his tenure as DNR Director. He touched upon several high points of his administration, including the "legacy of the Heritage Trust." He reflected, "The thing that I've seen in DNR and SEMA is there are a lot of employees who put in a lot of hard work."

Ralston said his service as Director of SEMA began with the "worst flood since 1964 on the Ohio River. My first day on the job, we went down to observe the damage." He expressed a continuing interest in DNR and in the mutual goals and efforts of the sister agencies.

Chairman Kiley then introduced the new Director of DNR, Larry D. Macklin. He described Macklin as "a man I have known for some years." Kiley said Macklin was "instrumental as a state senator in supporting the legislation which created the Indiana Heritage Trust. There is no question in my mind but that Larry Macklin will represent the DNR well."

Larry Macklin thanked the Chairman for his introduction. "I am very pleased Governor O'Bannon has placed his trust in me as Director. I want to thank the members of the commission for their willingness to serve on this important body."

Macklin said he would present an abbreviated Director's Report this month. "We will speak to Senate Finance for an hour later this week. I think that is a great sign" of the legislative interest in the DNR, its issues, and its personnel.

Macklin then introduced Kurt Wiley, Commissioner of the Indiana Department of Transportation. Wiley said, "We look forward to work with the DNR, and, through Steve Cecil, in continuing to work with the NRC."

Chairman Kiley expressed pleasure that "Steve Cecil will continue to be INDOT's representative on the commission. He has a great knowledge of issues of mutual concern to DNR and INDOT." Jerry Miller, Chairman of the Advisory Council for Lands and Cultural Resources, said his council did not meet in March.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, reported the DNR was looking forward to completing a management contract for the Fort Benjamin Harrison golf course. "Weather permitting," the course should be open in late July.

Joe Siener, Chairman of the Advisory Council for the Bureau of Water and Resource Regulations, said his council reviewed the standards developed by Kenneth Smith and the Division of Water for conservancy districts. In addition, the council recommended for preliminary adoption several amendments to the rules governing public freshwater lakes, most notably those addressing seawalls.

David Herbst, Deputy Director for the Bureau of Water and Resource Regulation, relinquished his report in favor of a discussion by James Hebenstreit, Assistant Director for the Division of Water, concerning Ohio River flooding.

Hebenstreit said there were several gauging systems where "water levels went up 24 feet in 24 hours." He reminded the commission that where flood damage to a home in the floodway is more than 50% of its value, the home cannot be rebuilt. He reported that division personnel have gone to Madison, Utica, and other flood stricken communities to inform them what can be done. Director Macklin reflected, "We will do anything in our power to make things easier, provide technical assistance, and do what we legally can to provide help."

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, said lease holdings on the Ohio River, particularly in Posey County, have been reviewed for leaks and other environmental problems associated with the flood. He also indicated the 50th anniversary of the division of oil and gas was celebrated March 15.

ELECTION OF COMMISSION SECRETARY

The Chair observed that with the resignation of Patrick Ralston, a new secretary needed to be elected to serve the role for the commission. Jerry Miller nominated Larry D. Macklin as secretary. The motion was seconded by Jack Arnett. No other nominations were offered, and Macklin was selected by acclamation.

BUREAU OF LANDS AND CULTURAL RESOURCES

Personnel Interviews

Selection of Deam Lake Assistant Property Manager

Jack Arnett reported that the NRC's personnel selection committee interviewed and met to consider two finalists as Deam Lake Assistant Property Manager. He said the committee recommended Angela Burger. "She has seen the committee before, and we think she'll do a fine job for the department."

Jerry Miller moved to select Angela Burger as the new assistant property manager for Deam Lake. The motion was seconded by Joe Siener. Upon a voice vote, the motion carried.
Division of State Parks and Reservoirs

Consideration of an Adjustment to the Mississinewa Battlefield Reenactment Charges

Gerald Pagac, Director of the Division of State Parks and Reservoirs, presented this item. He explained that the Mississinewa Battlefield Society was seeking to increase the admission fee for the Mississinewa 1812 reenactment to \$5. The \$2 fee for children would remain unchanged. Pagac said the division of state parks supported the proposal.

The Chair reflected that the 1812 reenactment "takes place in my county on the banks of the Mississinewa in Grant County. In excess of 30,000 visitors attend the event annually. There is no objection that I know of to the increase in rates. It all goes back into the program."

John Goss noted the reenactment was an important tourism event for the region and for Indiana. He suggested the amount of the fee increase was "very reasonable."

Jack Arnett moved to approve an increase of \$5 for adults in the admission fee for the Mississinewa 1812 reenactment. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Consideration of a Pedestrian and Bicycle Pass and Fee for Fort Benjamin Harrison State Park and Clifty Falls State Park

Gerry Pagac also presented this item. He said the proposal would establish a pedestrian and bicycle annual pass and fee in the amount of \$5. The pass would allow use of the west entrance bicycle path for Fort Harrison, the office entrance for Clifty Falls, and the main gate entrance at both state parks (during periods when a fee is being charged to visitors at the main gates).

Joe Siener asked if the proposal could "backlash" by encouraging large numbers of visitors to the parks carrying in picnic lunches and paying only minimal fees. Pagac responded that he thought the increase flow was likely to be workable. He said a pedestrian "can already enter these parks by paying 50 cents."

Jodi Perras asked the basis for the \$5 fee. Pagac said it was related to the daily 50-cent pedestrian fee and was designed along lines similar to the annual and daily passes for vehicular traffic.

Terri Moore asked about the cost effectiveness of the proposal since it seemed to anticipate additional employees. Pagac responded that only on busy days would the entrance sites for pedestrian traffic be manned. At other times, there would be no fee charged for park entrance, or fees would be collected from pedestrians and bicyclists on an honor basis.

Jane Stautz moved to establish a \$5 annual pass and fee for the entry of pedestrians and bicyclists into Fort Benjamin Harrison State Park and into Clifty Falls State Park. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

DIVISION OF LAND ACQUISITION

Consideration of Exchange of Real Estate with City of Plymouth for Impacts to Menominee Wetlands Conservation Area, Marshall County

John Davis, Director of the Division of Land Acquisition, presented this item. He explained that the Marshall County Council wished to undertake a county road improvement project which would adversely impact approximately three acres of wetlands located in the Menominee Wetlands Conservation Area. As mitigation, Marshall County would give DNR 47 acres of wetlands which are contiguous to, and would be incorporated within, the Menominee Wetlands Conservation Area. Davis indicated the proposal would be a notable enhancement to the conservation areas and was supported by the division of fish and wildlife.

Joe Siener moved to authorize the exchange of realty between the State of Indiana (Department of Natural Resources) and the Marshall County Council as presented by John Davis and to authorize the Chairman and Secretary to enter a written resolution to implement the exchange. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Information Item: Extension of an Agreement between the Indiana Department of Transportation and the Indiana Department of Natural Resources for an Easement on Pigeon River Fish and Wildlife Area, Steuben County

John Davis also presented this item. He explained that the former Indiana State Highway Commission and the former Indiana Department of Conservation had entered a lease to provide access across a portion of Pigeon River Fish and Wildlife Area along State Rout 327. Davis said the agreement appeared to be in the best interests of the state of Indiana, and the Department would carry forward with the concept barring objections or concerns by the commission. None were expressed. The Chair noted that formal action was not required with respect to this item.

BUREAU OF WATER AND RESOURCE REGULATIONS

Division of Water

Consideration of an Extension of the Contract between the State of Indiana and the Stucker Fork Conservancy District for Water Supply from Hardy Lake

Jim Hebenstreit explained that in 1969, the DNR and the Stucker Fork Conservancy District entered a contract for water supply from Hardy Lake. The conservancy district serves portion of Scott, Jefferson, Washington, Jackson, Clark, and Jennings Counties. The conservancy district withdraws water from the Muscatatuck River at a point several miles downstream from Hardy Lake. Although the river is the district's primary source of supply, releases from Hardy Lake are occasionally used to augment low flows on the river.

Hebenstreit said that in 1988 a dispute occurred over water charges to the conservancy district. Changes made since that date to state statute dictate, however, what the district will pay for future releases. If the extension is approved by the commission, the conservancy district will pay a minimum annual fee of \$2,500, up from the current \$1,000 annual fee. As a result of the regional need for potable water, the uncertainty of whether Indiana would prevail in pending litigation concerning these charges, and a proposed increase in the annual fee, he recommended the district's request for a contract extension be granted and a dismissal of the civil action be approved.

Doug Cregor spoke as attorney for the conservancy district and asked the commission to approve the recommendations made by Hebenstreit.

Damian Schmelz moved to approve the extension of the contract for the sale of water from Hardy Lake to the Stucker Fork Conservancy District as outlined in the commission packet, and to approve the dismissal of the civil action by the department against the conservancy district. The motion was seconded by Joe Siener. Upon a voice vote, the motion carried.

BUREAU OF MINE RECLAMATION

Division of Reclamation

Consideration of a Proposal to Adopt a Nonrule Policy Document to Address the Implementation of Revisions to 310 IAC 12-3-121 ("Minor Field Revisions")

At the request of Paul Ehret, this item was withdrawn by the Chair.

LEGAL PROCEEDINGS

Consideration of Order to Deny a Dismissal upon Threshold Notice Issues; Hoosier Environmental Council v. Department of Natural Resources and Vigo Coal Company; Administrative Cause No. 96-026R

William Teegarden presented this item. He explained that Steve Lucas was originally the administrative law judge and had made the entry currently in issue. Lucas since recused himself to act as mediator concerning the disposal of coal combustion waste in surface coal mines. Teegarden now serves as the ALJ.

Teegarden explained that the substantive issues in the case were framed by the disposal of flyash, but the issues currently before the commission were exclusively procedural. They centered upon the adequacy of the notice by the division of reclamation to interested persons and the sufficiency of the request for review by the Hoosier Environmental Council which framed the case. Teegarden reflected that the original agency notice was lacking in several particulars, including the mine location, the name of the miner, and other details of the mining activity. He said Lucas found the request for review by the Hoosier Environmental Council, which was itself quite sparse, to be sufficient to allow the group to have administrative review.

David Bell was present as attorney for Vigo Coal. "We are here to challenge the findings by Judge Lucas that the request for administrative review was not in itself inadequate." He said the ALJ found the request adequate based upon the indefinite nature of the notice by the division of reclamation, but no notice was required. The Hoosier Environmental Council failed to give a sufficient, timely request for administrative review, and the case should be dismissed.

Jeffrey Stant spoke for the Hoosier Environmental Council. He circulated a letter which had previously been introduced into the record and which, he said, underlined the inadequacy of the DNR's notice effort. He said it would be unreasonable to require HEC to provide a definitive appeal when the notice did not reasonably describe the terms of the permit.

Stant said that for the most part, he supported the determination by the ALJ. He argue, however, that HEC had repeatedly expressed interest in the issuance of SMCRA permits or permit amendments which would authorize the disposal of coal combustion waste in surface coal mines. As a result, Stant urged that the commission should also find HEC has an interest in the subject matter of the permit such that the disposition of the permit in HEC's absence would impede the ability of the Hoosier Environmental Council to protect that interest. The Hoosier Environmental Council should be found entitled to relief pursuant to IC 4-21.5-3-5(b)(6).

Angila Prather was present as attorney for the Department of Natural Resources. She said she was available to answer questions.

Jane Ann Stautz directed the commission's attention to footnote six of the ALJ's decision. The footnote suggested the commission might want to establish a rule or policy limiting the effective duration of citizen requests to be notified of particular licenses or classes of licenses. She asked whether action to this end might be warranted.

Paul Ehret said that in this instance, the division of reclamation was aware of the interest by HEC in coal combustion waste disposal. In many instances, though, division personnel would be hard-pressed to recall years-old requests to be notified of licensing actions. This problem was particularly critical where citizen requests were very general in nature.

The Chair suggested there was always concern with adopting too many rules. Whatever the merits of the concept, however, it could not be accomplished in the current administrative proceeding.

Damian Schmelz moved to approve the "Order to Deny a Dismissal Based Upon Threshold Notice Issues" as a final action of the commission. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

Consideration of Report of Hearing Officer and Recommendation of Final Adoption of 312 IAC 9-12 to Implement Statutory Provisions for Mandatory Hunter Education; Administrative Cause No. 95-064L; LSA #96-267(F)

Stephen Lucas, Hearing Officer, introduced this item. He explained that presented for final adoption were rules to implement mandatory hunter education for younger persons as authorized two or three years ago by the Indiana General Assembly. He said the proposal drew no public comment and was recommended for final adoption.

Sam Purvis spoke for the division of law enforcement. He said anyone born after December 31, 1986 would be covered by the rule. "I think it's our goal to sell more hunting licenses, but our greater purpose is to have a fuller enjoyment by the public of the outdoors and our natural resources." He argued that this rule would serve that purpose.

Jerry Miller moved to give final adoption to 312 IAC 9-12 to help implement the statutory pronouncements favoring mandatory hunter education. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Consideration of Report of Hearing Officer and Recommendation of Final Adoption of 312 IAC 14 and the Repeal of 310 IAC 23 for the Recodification of the Rules which Govern Timber Buyers, Timber Cutters, and Timber Growers; Administrative Cause No. 96-176F; LSA #96-196(F)

Steve Lucas also introduced this item. He said for consideration was final adoption of the recodification of the rules governing timber buyers, timber cutters, and timber growers. For the most part, the recodification carried forward prior law, but a few modifications warranted some note.

Lucas said the timber licensing law was one of the pioneering efforts in Indiana to use mediation, modeled after civil mediation rules, at the administrative level. With the enactment by the Indiana General Assembly in 1996 of new legislation providing broad access to administrative

mediation (codified at IC 4-21.5-3.5), a separate mediation rule was no longer needed in the timber licensing rules. For this reason, references to mediation had been deleted from the recodification.

In addition, the Indiana Hardwood Lumbermens Association urged a clarification that citizens bringing claims against timber buyers must demonstrate the same harm in administrative complaints as would the DNR. To that end, the IHLA had suggested additional language to be incorporated into the rule. Lucas said he believed the language offered by the IHLA was consistent with the legislative intent and in harmony with current practice. He recommended the clarification be included in the recodification. Lucas noted also that the division of forestry was supportive of the IHLA language.

Carter Rothrock, President of the Indiana Hardwood Lumbermens Association, spoke in favor of the final adoption of the rules. With specific reference to the new language pertaining to complaints by timber growers, he "thanked the commission for the work done on clarifying the issues."

Also present on behalf of the IHLA were its attorney, Daniel McInerney, and Jim Mulligan. They indicated a willingness to answer any commission questions.

Jerry Miller moved to give final adoption to the recodification and modification of the rules which govern timber buyers, timber cutters, and timber growers with the new provisions to be codified at 312 IAC 14. The motion was seconded by Jack Arnett. Upon a voice vote, the motion carried.

Consideration of Report of Hearing Officer and Recommendation of Final Adoption of 312 IAC 15 to Recodify and Modify Rules which Govern Timber Management of Classified Forest Plantations and Native Forests; Administrative Cause Number 96-175F; LSA #96-197(F)

Steve Lucas presented this item. He said for consideration was the recodification of rules which govern timber management of classified forest plantations and native forests. Lucas said the recodification was unremarkable and was recommended for final adoption. He noted that Burney Fischer, Director of the Division of Forestry, was present to answer questions.

Jack Arnett moved to give final adoption to the recodification at 312 IAC 15 of the rules which govern timber management of classified forest plantations and native forests. The motion was seconded by Jane Stautz. Upon a voice vote, the motion carried.

Consideration of Report of Hearing Officer and Recommendation of Final Adoption of 312 IAC 23 for Recodification and Modification of the Rules which Govern the State Historic Rehabilitation Tax Credit; Administrative Cause Number 96-177H; LSA #96-198(F)

Steve Lucas also presented this item. He said for consideration was the recodification of rules which govern the state historic rehabilitation tax credit administered by the division of historic preservation and archeology. Lucas said the recodification was unremarkable and was recommended by final adoption.

Jack Arnett moved to give final adoption to the recodification at 312 IAC 23 of the rules which govern the state historic rehabilitation tax credit. The motion was seconded by Jane Stautz. Upon a voice vote, the motion carried.

Consideration of Report of Hearing Officer and Recommendation of Final Adoption of 312 IAC 24 for Recodification and Modification of the Rules which Govern the Division of Museums and Historic Sites; Administrative Cause Number 96-174M; LSA #96-199(F)

Steve Lucas also presented this item. He said for consideration was the recodification of rules which govern the activities of the division of museums and historic sites. Lucas said the recodification was unremarkable and was recommended for final adoption.

Jack Arnett moved to give final adoption to the recodification of 312 IAC 24 of the rules which govern the activities of the division of museums and historic sites. The motion was seconded by Jane Stautz. Upon a voice vote, the motion carried.

Consideration of Report of Hearing Officer and Recommendation for Re-Adoption of Amendments to 310 IAC 12-3 Pertaining to the SMCRA Small Operator Assistance Program ("SOAP"); Administrative Cause Number 95-312R; LSA #96-96(F)

William Teeguarden, Hearing Officer, presented this item. He explained that the rule amendments had previously been given final adoption by the commission and were later submitted to the Attorney General for a review as to legality. The Attorney General caused the recall of the rule amendments, however, upon a finding of a nonascertainable standard for one of its provisions. Teeguarden expressed the belief this concern had been addressed in the modifications contained within the commission packet, and he recommended that the rules again be given final adoption.

Damian Schmelz moved to again give final adoption to the amendments to SMCRA to address the Small Operator Assistance Program ("SOAP"), together with the adjustments suggested by the hearing officer in response to the Attorney General's recall request. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

Consideration of Report of Hearing Officer and Recommendation for Re-Adoption of Recodification of Fish and Wildlife Rules at 312 IAC 9; Administrative Cause Number 96-155D; LSA #96-171(F)

Steve Lucas, Hearing Officer, presented this item. He indicated the rule amendments were given final adoption by the commission in February and were submitted to the Attorney General for a review as to legality. The Attorney General caused the recall of the rule amendments, however, upon a finding of a nonascertainable standard for one of its provisions. In addition, the Attorney General sought copies of several items incorporated by reference into the recodification. Lucas distributed to the commission his recommendations for modification to address the Attorney General's concerns, and he reflected that these modifications had been discussed with the Attorney General's office. Lucas recommended that the rules again be given final adoption.

Jerry Miller moved to again given final adoption to the recodification of the fish and wildlife rules, together with the adjustments suggested by the hearing officer in response to the Attorney General's recall request. The motion was seconded by Joe Siener. Upon a voice vote, the motion carried.

Consideration of Updating the Roster of Indiana Waters Declared Navigable or Non-Navigable; Administrative Cause Number 97-028W

Steve Lucas presented this item. He reminded the commission that in 1992 it adopted a roster of waters declared navigable or non-navigable. At that time, it was anticipated the listing would periodically require adjustments as new decisions were rendered by courts and by agencies or as existing information might come to light. Lucas indicated that the navigable waters roster was one of the more frequently-used nonrule policy documents of the commission, and it was now available on the Internet.

Lucas suggested that there had probably been fewer changes than anticipated in 1992, but with the document now five years old, some changes were required. He noted several examples: A recent decision by the LaGrange Circuit Court concerning the navigability of a portion of Fawn River. Better clarity concerning the Indiana Harbor and Ship Canal and the renaming of "Burns Ditch" as "Portage Burns Waterway." Better historic information concerning the navigability of the North Fork of Salt Creek near Nashville. He recommended the approval of the modified nonrule policy document to address waters declared navigable or non-navigable as set forth in the commission packet.

Jodi Perras moved to adopt the roster of waterways declared navigable or non-navigable as a nonrule policy document, superseding the nonrule policy document issued for the subject in 1992. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Adjournment

At approximately 11:43 a.m., EST, the meeting was adjourned.