

NATURAL RESOURCES COMMISSION
The Garrison, Ft. Harrison State Park, Lawrence
Minutes of January 20, 2004

MEMBERS PRESENT

Michael Kiley, Chair
Rick Cockrum, Vice Chair
John Goss, Secretary
Damian Schmelz
Jack Arnett
Jane Anne Stautz
Maryann Habeeb
Robert Murphy
Raymond McCormick, II

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Debra Michaels

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Krystal Wethington	Executive Office
John Davis	Executive Office
Paul Ehret	Executive Office
Bob Waltz	Entomology and Plant Pathology
Glen Salmon	Fish and Wildlife
John Olson	Fish and Wildlife
Lennea Petercheff	Fish and Wildlife
Scott McDaniel	Law Enforcement
Sam Purvis	Law Enforcement
Mike Nickolaus	Oil and Gas
Bob Bronson	Outdoor Recreation
Brock Mayes	Reclamation
Bruce Stevens	Reclamation
George Morris	Reclamation
Steve Weinzapfel	Reclamation
Mike Molnar	Soil Conservation
Ann Walker	State Museums and Historic Sites
George Bowman	Water
Jim Hebenstreit	Water

GUESTS PRESENT

Kevin Strunk	Kevin Stanton	Ronald E. Name	Rob Keck
Robin Lenberger	Carla Bare	Bud Dennemann	Doug Allman
Rich Rennick, Jr.	David McKeeman	Dennis Ogle	
Randy Strebig	Dick Mercier	Jeffrey Long	

ELECTIONS OF OFFICERS AND MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular meeting of the Natural Resources Commission at 10:15 a.m., EST, on January 20, 2004, at the Garrison, Fort Harrison State Park, Lawrence, Indiana. With the presence of nine members, the chair observed a quorum.

Damian Schmelz moved to approve the minutes of November 18, 2003. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

ELECTION OF OFFICERS

Chairman Kiley opened the floor for nominations to elect officers.

Jack Arnett nominated Michael Kiley as Chairman, Rick Cockrum as Vice Chairman, and John Goss as Secretary. No other nominations were offered. Upon a voice vote, these officers were re-elected unanimously.

REGULAR REPORTS

Director John Goss reminded the Commission of its grant of authority to present discounts on various DNR property campsites. There are seven properties that are not being well utilized. The rate at those seven properties is \$4 per night. He said that there is a \$4 discount when camping Sunday through Thursday at all other properties. Goss reported the State Park Inns also are offering two nights for the price of one, Sunday through Thursday, during the winter.

Goss reported a dam problem on Brush Creek Reservoir in North Vernon has “been in the news”. A “sinkhole has opened up on the side of the dam”. He said the dam is the backup water supply for North Vernon. Other dam projects have been postponed in order to “put North Vernon at the top of the list.” Goss said the agency was reassuring local residents the reservoir would continue as the town’s backup water supply. There was a scheduled meeting with the Mayor of North Vernon on January 21, 2004, as well as an evening public meeting on that date.

Goss gave an update on the Whitewater Canal. The State Budget Committee has given the Department appropriations for improvements. The plan is to pump water from Whitewater River into the canal by using a natural system that allows water to come in several miles upstream. He said, “Silt has filled up the canal many times; we had to clean it out about a half dozen times since last season. But, if we push the pumping system, we can regulate the water flow without a lot of silt.”

The Director noted, “We’re making progress for a new Director at the State Museum.” The hope is to have a new Division Director by spring. Goss referenced the new E-store called “*Mother Nature’s Mercantile*” on DNR’s website with such items as such as toys, gifts, clothing, and books, available for purchase. The site is <http://estore.dnr.state.in.us/>

Goss concluded, “We’ve had a number of meetings with new mayors. There were a lot of new mayors elected this past election. I think we’ve had at least ten or twelve come into our office to talk about ways the cities can work with us on DNR projects. I think we’re off to a good start with the newly elected officials.”

Jerry Miller, Chair of the Advisory Council for Lands and Cultural Resources, was not present.

John Davis, Deputy Director, provided a table with the history of the deer reduction within the state parks. Davis reflected, “The program continues and has been very helpful and will continue to be, in keeping the parks in balance.”

Davis said a Citizen Advisory Council meeting was held at Fort Benjamin Harrison on January 17, 2004. There was public input concerning what should be the rules between the NRC and the Board of Animal Health regarding elk, rehabilitation, and hunting and the whole captive issue. "We hope to have that Advisory group finishing this summer or spring and we'll have a set of advisories, set of suggestions, whether they be for rules or legislation for us to pursue and implement."

Davis reported on 1,500 acres in Morgan County the DNR purchased from Indianapolis Power and Light Company. The agency was able to work with Indianapolis Power and Light and with partners at INDOT. He added, "No one is here today from INDOT, but they certainly get a round of applause from us and everybody else involved in trying to preserve this stretch of area." Davis said that DNR was able to begin work with the successful bidders for the other 2,500 acres. "We think that we will be able to perhaps capture all that as forest. A lot of work from John Goss, the Governor, and INDOT."

Davis reported on refurbishing the campgrounds at Indiana Dunes State Park. The campgrounds would be closed for an entire season beginning May 1, 2004. Closing the park for one entire season posed the least impact to the Department's revenue and to campers, as well maximizing good construction weather.

Davis announced that the Boat, Sport and Travel Show begins on February 21, 2004. "This is a big event for a lot of divisions. We will have, as we did last year, a stand there that will have information on all our properties, and we will be selling hunting and fishing licenses."

Raymond McCormick, Chair of the Advisory Council for Water and Resource Regulation, reported that the Advisory Council met on December 16, 2003. He said that the meeting was well attended by both councils. "There was much testimony on Agenda Items 7 and 13. Item 7, which were the Biennial Fish and Wildlife Amendments. Item 13, which was on Lake James; there was much testimony there." McCormick reserved comments on the items until the Commission considered them.

Paul Ehret, Deputy Director, reported that staff has been "working very hard" on a number of legislative bills. There has been a lot of activity in Entomology and Plant Pathology. Ehret reported on the plant disease "*ralstonia solanacearum*." He said there has been a second importation of geraniums with *ralstonia*. "It's a very prolific lethal disease." The geraniums were imported to nine different Indiana growers from Guatemala. Ehret said efforts are being pursued to destroy the plants.

Damian Schmelz asked if the plant stock was checked at a location before reaching Indiana nurseries. Ehret deferred to Robert Waltz, State Entomologist. Waltz explained these foreign plant producers entered into what is called a "compliance agreement", which is set up by the federal government. The compliance agreement requires the issuing greenhouses in Guatemala to perform production practices to achieve a set of standards. He said the growers apparently failed to comply with all the standards required by USDA, and this failure resulted in infected plants being shipped into the United States.

Damian Schmelz asked Waltz, if payment on the diseased plant materials were already made prior to shipment. Waltz answered saying that the greenhouses usually paid before shipment and that the company shipping the materials is offering reimbursements.

Ehret reported the Division of Entomology and Plant Pathology will hold a series of public meetings regarding gypsy moth treatments. The public meetings are likely to take place mid-February, mostly in northern Indiana. "We have 34 treatment sites we have identified for treatment of pheromone plates. The Btk (*Bacillus thuringiensis var. kurstaki*) treatment and others are also being considered.

Ehret said the DNR is supporting Senate Bill 183 that would allow Indiana to join Interstate Pest Compact. Indiana would gain access to emergency insurance monies and allow DNR to assist in the treatment of trouble spots and to invasive species. "We're looking forward to approval of participation in that compact."

Ehret reported that the Division of Reclamation has been working with the Federal Office of Surface Mining and several states on reorganization and bankruptcy issues due to the bankruptcy of Horizon. Horizon is the parent company for Kindill Mining, which operates the former Old Ben 1 and 2 Mines and the former AMAX Chinook Mine. “This has some potential impact on some bond sureties, so it is a very important issue. Horizon Company operates extensively in Illinois, Kentucky and West Virginia, so it has some multi-state impact. We’re keeping an eye on that one.”

PERMANENT APPOINTMENTS AND PERSONNEL INTERVIEWS

Consideration of a Recommendation by the Division of Forestry that Beth A. Hippensteel not be Granted Permanent Appointment

John Davis presented this item. He said Beth Hippensteel was selected as the Assistant Property Manager at Green-Sullivan State Forest after service in a clerk position with the agency. Two years were spent working with Hippensteel with the hopes she would achieve a satisfactory performance level. Unfortunately, he said, “it didn’t work out.” She was then transferred to Jackson-Washington State Forest to allow for additional training and further evaluation. Again, “it just has not worked out.” He said that Hippensteel would leave the property management system, but would be provided an opportunity to return to a clerk position within the DNR.

Ray McCormick moved to terminate Beth Hippensteel as Assistant Property Manager at Green-Sullivan State Forest. Rick Cockrum seconded the motion. Upon a voice vote, the motion carried.

Personnel Interview for the Position of Assistant Property Manager at McCormick’s Creek State Park

Rick Cockrum presented this item. Jane Anne Stautz and he interviewed the candidates. “We are pleased to recommend Eric Ferguson” for the Assistant Property Manager at McCormick’s Creek State Park. Cockrum said, “Eric was born in Indiana, left here as a young man and was raised in Virginia. He has worked the last several years in the parks systems in Virginia. So, we get the best of both worlds, getting somebody who is from Indiana with experience from another state.”

Rick Cockrum moved to approve Eric Ferguson for the position of Assistant Property Manager at McCormick’s Creek State Park. Ray McCormick seconded the motion. Upon a voice vote, the motion carried.

Personnel Interview for the Position of Assistant Property Manager at Pigeon River Fish and Wildlife Area

Rick Cockrum presented this item. He said he and Jane Stautz recommended Mike Holcomb for the Assistant Property Manager position at Pigeon River Fish and Wildlife Area. “Mr. Holcomb has been a longtime laborer there and knows the property well.”

Rick Cockrum moved to approve Mike Holcomb for the position of Assistant Property Manager at Pigeon River Fish and Wildlife Area. Ray McCormick seconded the motion. Upon a voice vote, the motion carried.

STATE MUSEUMS AND HISTORICAL SITES

Consideration of Indiana State Museum Schedule of Fees

This item was removed from the agenda at the request of Deputy Director, Mickey James.

DIVISION OF STATE PARKS AND RESERVOIRS

Consideration of Recommendation of Room Rates for the State Park Inns

This item was removed from the agenda at the request of Deputy Director, Mickey James.

Consideration of the Transfer of Approximately 0.866 Acres of Land at Versailles State Park to the Ripley County Commissioners

Mike List, Planner with the Division of State Parks and Reservoirs, presented this item. He said, "We have looked at the proposal, both on plans and on site, and we are in favor of the transfer."

Jane Anne Stautz moved to approve the transfer of land at Versailles State Park to the Ripley County Commissioners. Raymond McCormick seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF FISH AND WILDLIFE

Consideration for Preliminary Adoption of Biennial Fish and Wildlife Amendments (312 IAC 9) (Administrative Cause Number 03-202D; LSA Document #03-311)

Glenn Salmon, Director of Fish and Wildlife introduced this item. He thanked the Commission for its attention then deferred to Linnea Petercheff, EPO Staff Specialist for Division of Fish and Wildlife.

Petercheff said that every two to three years the Division of Fish and Wildlife and the Division of Law Enforcement perform a comprehensive review of rules to implement the Fish and Wildlife Code. Beginning in June 2003, the Division of Fish and Wildlife hosted 19 open houses in the state. Comments were received during the open houses and 500 additional comments were received outside that process. "We drafted rules, we reviewed all the public comments, and we announced our rules in October of last year and posted them on our website." She said that the draft of the proposed rules was also mailed to individuals who attended an open house or who sent written comments. A survey was also provided, which could be filled out and submitted online or by regular mail, to voice opposition or support of the proposals.

Petercheff said numerous citizens expressed interest in a fall turkey season, the extension of the coyote season, and establishing new brown trout regulations at Brookville Tailwater. She reported that the Division of Fish and Wildlife proposed to change the time requirements for checking in deer and turkey from 24 hours to 48 hours. The amendments would also remove some species from the endangered species list, while adding others, and amend ice-fishing tagging requirements to accommodate the portable or pop-up shelters.

Petercheff said, "Again, we received comments from over 1,500 people by either on-line or by mail." She said the proposal with the most opposition would have banded the use of smokeless powder and muzzleloaders. Based largely upon public comments, this proposal was withdrawn. "It needed to be dealt with separately as far as validity and use of different weapons in the muzzleloader's season."

Dick Mercier, Indiana Sportsman's Roundtable addressed the Commission. "Our members do support a Fall Turkey Season, but we oppose the orange blaze limitations being put on it. And, you're going to hear a great deal about that from some other people, and we agree with what they had to say about not having to wear blaze orange."

Rob Keck, CEO of the National Wildlife Turkey Federation, addressed the Commission. Keck said, “I’d like to first of all thank you for allowing me to speak today on the behalf of over half a million members of the National Wild Turkey Federation; there are 14,000 members here in the State of Indiana. I want to compliment the Indiana DNR for the work that you have done—an outstanding job in restoring the wild turkey. It’s an all-day, modern-day high record numbers, and it’s a tribute to your agency. It’s also a tribute to the hunters of this state who wanted to pay the freight for this great wildlife success story. We as an organization, appreciate the partnership we share with this agency. It’s very important to us.”

Keck said that the National Wildlife Turkey Federation supported the implementation of the fall turkey season, but was in opposition to the implementation of blaze orange. “Turkey hunting, both fall and spring, is a very, very safe sport. In fact, it has become amongst the safest of hunting pursuits of the last decade.” Looking at turkey hunting from a national perspective, there has been a “huge drop” in turkey hunting incidents, dropping from eight incidents for every 100,000 hunters in 1991, to an “all time low” presently of 2.95 per 100,000. Keck stressed that the current ratio was achieved without the mandatory use of blaze orange and said that the decline occurred as the number of turkey hunters climbed to a record number of over 2.6 million. “There is not a problem existing today with turkey hunting safety as it relates to a fall and spring hunting.” Keck said that the National Wild Turkey Hunter Safety Task Force had been working with the International Hunter Education Association and developed a number of strategies. The strategies have been “successfully implemented” around the country. The strategies developed by the Task Force represented the nation’s experts on hunter safety, including conservation officers, hunter safety instructors, wildlife biologists, medical doctors, legal experts, state wildlife agency administrators, representatives of the International Hunter’s Education Association, the Outdoor Products Industry, and the Federation.

Keck said that of the strategies developed by the Task Force, none recommended blaze orange. “Instead the Task Force encouraged educational efforts as the most effective method in creating awareness and reducing incident waste. The results speak for themselves.” Since the first Task Force meeting, which was twelve years ago, the number of incidents has reduced more than 50% nationwide. He indicated that safety education was the “much better solution” over the requirement of blaze orange. “There’s no doubt that general hunting incidents or accidents nationwide have been reduced and reduced significantly since mandatory blaze orange implemented for firearms deer seasons and for small game pursuits. The National Wild Turkey Federation recognizes the success rates, and we certainly herald the results. Safety is first in our minds. However, during turkey season, blaze orange has never been the answer.” Keck said that some states require blaze orange during the fall turkey season when overlapping with deer season, for obvious reasons. Pennsylvania is the only state in the nation that requires fall turkey hunters to wear florescent orange during the gun portion of the fall season.” He pointed out that at present day, the Pennsylvania’s incident rate is unchanged since one year prior to implementing blaze orange regulations. Keck said, “In fact, it has climbed. It should be noted that Pennsylvania’s incident rate is higher than any of the other states, none of which require blaze orange.”

Keck provided statistics for the following states not requiring blaze orange during the fall turkey-hunting season:

- Wisconsin – 2.7 incidents per 100,000 hunters
- Texas – 2.7 incidents per 100,000
- Virginia – 70,000 hunters, 1.6 incidents
- New York – 300,000 hunters, 1.4 incidents
- Missouri – 125,000 hunters, less than 1 incident per 100,000 hunters
- Michigan with nearly 100,000 hunters, 0 incident rates, and 0 accidents in 2002

Keck provided that from 1992 to 1994, Pennsylvania’s incidents or accidents dropped. He said that during that drop, Pennsylvania had implemented blaze orange and immediately 40,000 people did not purchase a license to hunt fall turkeys. Keck informed that Pennsylvania was his home state and

commented, “implementing blaze orange has been divisive. It has been divisive between the hunters and the Pennsylvania Game Commission. And, I can tell you the trust is ver, very strained. The notion that fall turkey hunting is dangerous is absolutely unfounded.”

Keck argued that there is no data to establish that fall turkey hunting is more dangerous than spring turkey hunting, except possibly in Pennsylvania, Virginia and West Virginia, where rifles are permissible. He argued, “I ask, if turkey hunting is already the safest of hunting pursuits, why would the agency want to adopt this type of approach? It’s not dangerous; it’s not broken; and it doesn’t need fixed. Not only are the safety benefits of blaze orange unproven in turkey hunting, wearing it has actually drawn fire and caused accidents.” Keck reported that in Pennsylvania, a hunter who had successfully taken his turkey during the fall season, was shot in the head while wearing a blaze orange cap. “He thought he was making himself safe. The victim is now blind.” In Minnesota, a hunter carrying a decoy in a blaze orange bag, was shot in the back. A Florida hunter was shot while wearing a blaze orange patch over his camouflage jacket. “These are simply a few examples where actually it has drawn fire. We call it the tricks of the eyes and mind. It’s something that’s also known in Hunter Ed circles as ‘premature closure’.”

Keck said that blaze orange has not solved the problem in Pennsylvania and said that more orange “could actually make it worse. Maybe, more importantly, and it could alienate your customers. Hunters have been a big part of this noble tradition. And, to continue to sell hunting licenses and fund wildlife management, I think we have to do everything we can to remove barriers. To keep hunters in the field, we have to be creative in developing solutions to balance wildlife management needs, safety measures, and, maybe, more importantly, customer satisfaction. Without hunters, there’s no hunting. Without hunting, there is no conservation. Without conservation, there is no wildlife. Is the importance of taking a turkey greater than the safety of a hunter? Absolutely not. There’s not a problem. Turkey hunters’ safety education works. Blaze orange for turkey hunting—I can tell you it is not a safe bet. For all the reasons I’ve mentioned, I urge this Commission to remove and defeat this proposed blaze orange requirement. And, I thank you for your time.”

Bud Dennemann, Hunter Education Instructor, addressed the Commission. “Thank you for this opportunity to speak to you today.” Dennemann said he had been a turkey hunter for approximately 24 years and a hunter education instructor for 21 years in the State of Indiana. “We’ve waited a long time for this fall turkey season. It indicates that we’ve been very, very successful in our replacement program for wild turkeys in Indiana—it’s just a signal of our success. For the past ten years there has been a desire for a fall turkey season. We’ve always told our membership that a fall season would happen in Indiana, if it were biologically based. We trusted our state turkey biologists with the facts to make those decisions for us in order to have a fall turkey season and not damage the population.” Dennemann said that the Indiana Chapter deems that education is the key to hunter safety and said that having been a Hunter Education Instructor for 21 years, “I know it works.” Indiana has an “excellent hunter education program.” To blend in with the woods and become one with nature is part of the outdoor hunting experience. “You feel it in your heart—it’s just a great feeling. And, that comes from being totally camouflaged.” He said that being totally camouflaged is very important to the successful outcome when hunting wild birds since the birds can distinguish color. The use of blaze orange would present a success barrier particular for the inexperienced hunter. He concluded, “So, we’d like to see the hunter orange portion of that rule eliminated.”

Kevin Stanton, State Chapter President for the National Wild Turkey Federation (NWTFF) addressed the Commission. “I’ve received many phone calls and many emails on this subject. I actually have attended many meetings locally on this issue.” Not one person was in agreement with the proposed rule for the use of hunter orange. His organization believes it would hinder hunter success in the woods, and he said that they desired to have the proposed rule removed.

Cockrum asked Stanton if the National Wild Turkey Federation members were concerned that the blaze orange would eventually carry over into the spring season if it were adopted for the fall season.

Stanton replied, “yes”, and he said that the bow hunters were also concerned that it would eventually be required for them.

Cockrum continued, “So, your members, I would assume, are torn because they are happy that there is a fall season coming, but prefer it not include hunter orange? If they had a choice they would prefer the fall season with the hunter orange out?”

Stanton replied, “Correct.”

Cockrum added, “So, it’s all or nothing?”

Stanton replied, “I’ve actually heard a lot of members say that they are not going to go with it if there is hunter orange, but I cannot speak for everyone.”

Rich Rennick, an attorney from Covington addressed the Commission. “I’ve been a turkey hunter for 20 years, and I was the State Chapter President of the National Wild Turkey Federation (NWTf), prior to Kevin Stanton. I am an avid turkey hunter.” He said he was opposed to blaze orange and agreed with comments made by the previous speakers. “In my practice and in my day-to-day handling of my life, one of the things I look at is common sense. This is new to us in Indiana, and we have had a fall season before, and it was my understanding there were approximately 40 states in this Union that have experience with fall turkey hunting. The minority, only three states have hunter orange in their programs.” He continued, “So, when you look at doing something new, one of the things that jumps out to me is you look at what other states are doing that have had that same experience.... Missouri isn’t doing it. Why if we were going to do it, would you jump and go on the bandwagon and go with Pennsylvania, a minority position? I don’t think you folks do that for other things. And, I wouldn’t think you would want to do that for this situation either.” Rennick concluded, “We ask that you not bring hunter orange into this situation.”

Rick Cockrum asked Rennick whether Missouri and other states, without the hunter orange requirement, has an overlap with other types of hunting. “It seems to me that this issue isn’t safety of fellow turkey hunters, it’s other people in the field with firearms, as well.”

Rennick replied, “I don’t know that exactly. I know when I hunted in Missouri, there were deer hunters and bow hunting at the same time. And, none of us had to wear any hunter orange.”

Dick Mercier, Indiana Sportsman Roundtable, also addressed the Commission with concerns directed to crossbow hunting season. He told the Commission that the members of the Indiana Sportsman Roundtable agreed with the crossbow season, but they believed there should be a crossbow hunting season and a license specifically for crossbow hunting. “We really have no objection to the crossbow people being able to take bucks sometimes, we would just like to see some provision made for a proper season for them and a license for them to do so.”

Doug Allman, Indiana Wildlife Association (IWA), addressed the Commission on behalf of the ruffed grouse and the taking of a buck with a crossbow. “I think the confusion lies in that apparently when the crossbow was adopted, it was put at the end of the late season. Late season includes archery, and it also includes two periods of muzzle loading season. So, that crossbow was added. I think Dick was asking that the crossbow season be defined and limited to a specific season. It was done the way it is, and it’s really not an issue. But, we would support that.”

Allman reported that he was also associated with the Ruffed Grouse Association. He said, "In terms of the ruffed grouse, we understand the need to cut the season short. It's due to a decline in ruffed grouse population—I believe it's 93% grouse population decline in our state. We have not lost basically any of the major range of the ruffed grouse. We haven't lost the land, what we've lost is the habitat. I want to make you aware that's due to the way we manage the forest in the Hoosier National Forest, and the way that we manage our state forest. We do manage it. They don't manage the Hoosier. They don't cut trees. But, they do manage our state forest, but it's selective cuts. This is not conducive to the ruffed grouse population. Not only ruffed grouse, but many other species that require early successional forest. Many species, I think, experts will verify, receive benefits from early successional forest." He said that the IWA would encourage the DNR to "actively engage" and work with other agencies to address the problem.

Rick Cockrum said, "We have come probably full circle on a proposed rule. I would like to make a couple of points." First, about three years ago, there was a discussion about the use of private funding to stock the stretch below the Brookville Lake dam with brown trout. This portion of the East Fork of the Whitewater River has good water quality and cold temperatures. The stocking was accomplished and has been very successful. "I want to compliment the Division of Fish and Wildlife" for recognizing the initiative's success and for proposing rule amendments at 312 IAC 9-7-13(d) to provide size limits for brown trout downstream from Brookville Lake.

Cockrum said his second point was directed to modifications to size limits for smallmouth bass. The Commission considered this subject "a couple of years ago." Cockrum said he believed there was widespread support among the sporting public for increasing the minimum size limit from twelve to 14 inches for smallmouth bass. He offered an amendment to establish a general size limit of 14 inches for smallmouth bass. Damian Schmelz seconded the motion.

Bill James, Chief of Fisheries Biologist for the Division of Fish and Wildlife, responded. "We certainly appreciate Rick Cockrum's interest and support for smallmouth bass." He said "my recommendation would be to bring to the Commission, at your convenience, an information item of 20 or 25 minutes...on what we are doing with smallmouth bass management in Indiana. We're getting near the end of what was set out to be a six-year project to evaluate the twelve-inch size limit that was instituted statewide in 1998. Although we've got 2004 data to review before that report is complete, we do see some trends in there. We see the major differences in smallmouth bass populations around the state which strongly suggests, from a scientific management basis, there is probably some tailored regulations that would be very positive in terms of creating better small mouth fishing and maybe more big fish. We also see some strong indications that, for example, a statewide 14-inch limit would be counterproductive in some areas." He said the Division of Fish and Wildlife was currently looking at the budget for 2005-2007, and one of the considerations was some experimental size regulations directed to smallmouth bass. "We'd like the opportunity for sharing that information with you at a time and place of your choosing."

Chairman Kiley suggested that an educational presentation by the Division of Fish and Wildlife concerning smallmouth bass "could be very helpful to us as a Commission."

Cockrum said, "I'm open to that, but what I'm concerned about is waiting for another two or three year cycle." He said he agreed to work with the Division of Fish and Wildlife, if the Division committed to making appropriate changes "in an emergency rule" or otherwise in a timely fashion, but he did not want to wait for the next two or three year cycle.

Glen Salmon, Director of the Division of Fish and Wildlife, said, "I would propose that we commit to working with Commissioner Cockrum here and try to get you the scientific information as quickly as possible. We obviously don't want to have to waste several years if we need to make any kind of move, but we do need to let science speak. What I would like to do, if we could, is not have the proposal in this rule package. This is a large package. It has gone out to public comment."

Cockrum added, "I think what I'm hearing is workable, and I can get the word to some of the organizations who have worked on it. If it's clear that we're not going to wait another two or three years for Commission action, I can withdraw my motion." With the stated understanding, the Division of Fish and Wildlife would report in the near future upon its scientific data and would continue to work with Commissioner Cockrum and other interested persons on rules to improve smallmouth fisheries, Cockrum withdrew his motion. Schmelz withdrew his second.

Raymond McCormick reported that the Advisory Councils jointly recommended preliminary adoption of the biennial fish and wildlife rule amendments as offered by the Division of Fish and Wildlife and the Division of Law Enforcement. "However, in my best judgment, I recommend approval with the following amendments:"

1. Section 13(a) IAC 312 9-4-5 in that the amendment be scratched and to keep current ruffed grouse season October 1 through December 31.
2. Section 14(n) IAC 9-4-11 in that all the hunter orange language be removed for the turkey fall season.

Damian Schmelz seconded the motion.

Jack Arnett asked that if the hunter orange language was removed if it would remove any future debate on hunter orange. Stephen Lucas said doing so would remove debate from the current rule package.

McCormick argued there was no scientific evidence to support shortening the season for hunting grouse. "There's not scientific evidence that would back up the statement that preserving a few birds with the few number of grouse hunters out there would have any impact, whatsoever, on the residual population of grouse within the state. You're penalizing the few dedicated hunters out there who often times report the habitat changes needed to increase the grouse population."

Cockrum asked for comments from the DNR's Division of Law Enforcement on the subject of requiring hunter orange during the proposed fall turkey season.

Capt. Mike Crider, Hunter Education Administrator for the Division of Law Enforcement, addressed the Commission. He gave a brief history on how the proposed hunter orange rule became part of the rule package. "When we first heard about the season, we decided to look at other states and a template of the factors that go into deciding what factors you consider in a hunting season. Of course, safety is one of our utmost interests in the Division of Law Enforcement. We decided to look at what currently is out there; what is available in the other states for use."

Crider said he met with the Hunter Education Administrator for Pennsylvania to examine factors considered in its rules. The Indiana Division of Law Enforcement is "concerned with the number of accidents which occur during hunting seasons that do not require, by rule, a hunter orange garment to be worn. In the last five years, there have been 54 accidents reported. Half of those injured in those 54 accidents were not wearing hunter orange. "So, we're talking about a season where a group of hunters will be put into the fall season where we're already seeing accidents occur. That caused us some concern."

Crider said the technique by which turkeys are hunted in the fall is "a little bit different" than during the spring season. If Indiana has one accident during the turkey season, based on the 20,000 – 25,000 hunters in the state, that is four accidents per 100,000. "So, we're really not doing any better than the other states in that regard."

Crider addressed issues raised by the opposition to the proposed hunter orange requirement. "Certainly there is disagreement between the two positions. Our position is we believe the science. We believe the

Fish and Wildlife division has done their job and has addressed a biological aspect to the season. We think that it's a conservative season. But, we feel like, based on our numbers, based on the number of accidents that are occurring during the season which the hunters are not required to wear hunter orange, that we need to consider that added safety feature." Five of the six fatalities that occurred, during the proposed fall turkey hunting season, involved hunters who were not wearing hunter orange. Crider stressed that when looking at Indiana's statistics, the numbers are significant in the category that does not require hunter orange. "That's the reason we proposed the rule; that's the reason we stand behind the rule. We feel like hunter orange is the way to go. It will add an added safety—a layer of safety to those people that participate in the fall season. So, we're asking for orange to be included; we feel like it's the right way to go. We understand that there's a difference of opinion. However, we feel based on our staff of professionals, the job that we do investigating these accidents, that orange has been proven over the years to be probably the most effective tool besides education."

Crider said other states have implemented hunters education programs "a lot longer" than Indiana and said that those states still have accidents. "It's hard to call them accidents because this is a situation where someone points a firearm at something they don't know what it is and pulls the trigger. We're trying to keep that from even occurring, because when they do occur, figures tell us that the injury is significant, and certainly the orange can help keep that from occurring. We feel like orange is recognized universally as a sign that another hunter is in the area. We want you to consider that when you're making your decision."

McCormick spoke next. "So if we follow your argument there, there is justification for the fear that hunter orange could be added to other seasons: the waterfowl season, the squirrel season, the bow-hunting season. Because your argument is it saves lives so we should have it added onto this season. You just admitted that 50% of the people that are shot in accidents in this state are wearing hunter orange." He argued that not requiring hunter orange for all hunters during the fall season would only create confusion. He also reflected that the proposed hunter orange requirement was not included in early surveys by the Division of Fish and Wildlife to measure interest in a fall hunting season. "In this particular case, I think the will of the sportsmen should be not requiring something that they did not have input on."

Jack Arnett responded, "Addressing the point of not having input, I think if we put this out for hearing, that the opportunity for input would be there. And, if that's a concern, then we probably should stay on course and put it out for hearing. I know that's a concern for Ray. He established that a couple of times."

Arnett asked Capt. Crider, "How many seasons and what other types of hunters would be out in the field during this overlap?"

Crider said there could be a variety of hunters and activities going on at the same time. He said the Division of Law Enforcement concluded it was best to address each season separately, which would give people more of an opportunity to have input. "To make a blanket requirement that everybody wears hunter orange after a certain date makes it simple, but we didn't want to open up a whole bunch of different rules. We wanted to address the rule that was in front of us at the time. When more and more hunters are put in the field, it increases opportunity, and what we want to do is try to address safety." When hunter orange was enacted in 1976, there was a "significant drop" in the number of accidents as well as the seriousness of the accidents. Hunter education has "worked very well for us in this state", but education is only one part of the toolbox used. Crider said "in his opinion" a hunter mistaking orange for the red on a turkey's head is not a valid argument. "They made a bad choice."

McCormick said requiring hunter orange "would certainly reduce the number of incidents in the fall, because if we look at the statistics in other states, there will be a 50% reduction in those that will go fall turkey hunting if hunter orange is required. That's the way it has happened in other states. That will certainly keep a lot of people out of the field and stop them from recreating because a lot of people, like myself, will not believe that there will be much opportunity to harvest a turkey if you're wearing

something out there that's highly visible to a species whose main defense is eyesight. You're already requiring or asking for the requirement that if you're moving through the field that you wear hunter orange, for in all fall turkey season that's the main mode of hunt. So we're asking hunters to expose themselves on the main mode of hunting and then to hang something that's visible to a bird whose main defense is their keen vision, something that they can readily see. You will certainly reduce the accidents because people aren't going to hunt if that's the requirement. I don't think that's fair to the turkey hunters."

Rick Cockrum said he believed both Jack Arnett and Ray McCormick raised good points. He expressed concern with taking the proposal for hunter orange out of language given preliminary adoption, however, because the result would be to foreclose discussion through the public forum. He noted the Commission could "always take hunter orange out at final adoption if that seems to make sense."

Cockrum asked McCormick if he would consent to bifurcation of his motion so that hunter orange during turkey season and the shortened ruffed grouse season would be separately considered. McCormick responded, "I respectfully decline."

The Chair then called for a vote on the McCormick amendment to remove the hunter orange requirement for the proposed fall hunting season, and to remove the proposal to shorten the ruffed grouse season, from language to be given preliminary adoption. The vote was taken by a show of hands. Two members voted in favor of the motion, and the Chair reported the motion failed.

Mary Anne Habeeb moved to approve the biennial fish and wildlife amendments for preliminary adoption as recommended by the Division of Fish and Wildlife and the Division of Law Enforcement. Jack Arnett seconded the motion. Upon a voice vote, the motion carried. McCormick voted against the motion.

Jane Anne Stautz recommended that accident statistics from other states be included in the report to the Commission for rule adoption. She expressed particular interest in statistics pertaining to overlapping seasons where some hunters were required to wear orange and others were not.

In response to a question, Steve Lucas said the proposed rule would likely be published in the March 1, 2004 or the April 1, 2004 INDIANA REGISTER. At least one public hearing would be scheduled, and interested citizens could also comment by email, regular mail, or telephone.

DIVISION OF WATER

Consideration for Preliminary Adoption of Amendments to 312 IAC 11 Governing Lake Construction Activities Concerning Concrete and Steel Sheet Bulkhead Seawalls Along Manmade Channels on Public Freshwater Lakes (Administrative Cause Number 03-194W); Consideration of Non-Binding Resolution for Emergency Rule in 2004 to Address Seawalls Along Manmade Channels

George Bowman, Assistant Director of Division of Water, presented this item. He said the Division of Water is requesting preliminary adoption of amendments to the public freshwater lake rules that would "enable us to allow the issuance of permits for the construction of either concrete or steel sheet piling bulkhead seawalls along manmade channels of our public freshwater lakes." Bowman explained that amendments to existing definitions were proposed along with adding a new definition—natural shoreline. "The 'natural shoreline' came about because of some problems we have been having with the classification of significant wetlands." In the past, a shoreline property could be classified a "significant wetland" vegetation being present, "causing a lot of confusion for homeowners." To reduce confusion, the areas without vegetation would be classified as natural shoreline, "but we are still regulating it and we

are still restricting certain types of activities in those areas. We are not really changing our authority in those situations.”

Bowman said the existing definition of “area of special concern” was inconsistent with IC 14-22-9-10 governing aquatic weed control—a program administered by the Division of Fish and Wildlife. Under existing 312 IAC 11-2-2, a criterion for “area of special concern” is 100 square feet of contiguous emergent vegetation. Under IC 14-22-9-10, “it is possible for a homeowner to treat up to 625 square feet of area without requiring an aquatic weed control permit.” Bowman said 312 IAC 11-2-2 would be amended from 100 square feet to 625 square feet for consistency.

Additionally, 312 IAC 11-5-3 would be added to allow variances for the issuance of a permit when it is demonstrated the activity would “would actually enhance public access to the lake” or protect the lake resources from excessive, uncontrolled erosion of the lake’s shoreline.

Chairman Kiley said the amendments were “sort of a change in policy from the original ruling” which currently does not authorize concrete and steel sheet bulkhead in the channels, because glacial stone can prevent erosion, but has not proved to be very practical. In soft bottoms characteristic of many channels, it doesn’t hold, and it just simply doesn’t work. So, this represents, it seems, a good compromise with respect to those rules to help maintain the integrity of those channels.”

Rick Cockrum moved to approve the preliminary adoption of amendments to 312 IAC 11. Jack Arnett seconded the motion. Upon a voice vote, the motion carried.

George Bowman said the Division of Water hoped to make the new regulatory flexibility for channels available in the 2004 construction season. He asked the Commission to consider recommending to the Director that he adopt an emergency rule to implement the standards for channels beginning this spring. The Chair observed the emergency rule would become effective immediately “in order to assist the folks who want to do this sort of thing during this spring construction season.”

Jack Arnett moved to approve a non-binding resolution recommending Director John Goss adopt an emergency rule for 2004 for greater flexibility in seawall placement and maintenance along the manmade channels of public freshwater lakes. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF OIL AND GAS

Consideration for Preliminary Adoption of Amendments to 312 IAC 17-3 Governing Geophysical Survey Operations (Administrative Cause Number 03-178G)

Mike Nickolaus, Director for the Division of Oil and Gas, presented this item. He said geophysical survey operations “have been taking place for several decades.” The rules have not changed substantially over the years, however, “the industry has moved forward significantly in that period of time.” In the 1960s, it was not uncommon for seismic surveying operations to use as much as 50 pounds of explosives in a single shot when measuring the waves against the rock. Presently one-third to one-half of a pound of explosives is used. “As such, we feel it’s appropriate for us to request a change to geophysical survey rules that relate to public notice and relate to the binding of these particular operations.”

Nickolaus said, “Since the 1960s, residents living within a mile of a particular “shothole” were to be notified when the “shothole” was to be detonated. With today’s much smaller charges, it would be “very unlikely, if a charge were set off outside this room in a “shothole” that you would even feel it. Therefore, that requirement is a substantial hardship on the geophysical survey industry.”

Nickolaus told the Commission that the Division of Oil and Gas requests that the rule be changed to reflect a specific standard for ground movement, being two inches per second at point of contact with any items such as a home, a cistern, or a well. The Division additionally requested changing the bonding provisions. The current surety bond amount of \$5,000 per seismic operations would remain the same, but non-intrusive methods of surveying such as gravity measurements or electrical measurements be reduced to a \$100 bond.

Damian Schmelz moved to give preliminary adoption to amendments to 312 IAC 17, governing geophysical survey operations, as requested by the Division of Oil and Gas. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration for Preliminary Adoption of Amendments to 312 IAC 16-5-14 Governing Class II Wells (Administrative Cause Number 03-193G)

Mike Nickolaus, Director for the Division of Oil and Gas, also presented this item. He said, “This is a technical update to the rule.” Nickolaus explained that when the Underground Injection Control (UIC) program was enacted in 1991, the Division of Oil and Gas took over primary enforcement from the EPA. Since obtaining primacy, the Division has followed a consistent process for notifying an operator when injection can begin, but the process is not explicitly recognized in the rule. This amendment would clarify and conform the rule language to agency practice.

Ray McCormick moved to approve the amendments to 312 IAC 16-5-14 governing Class II Wells. Jack Arnett seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF LAW ENFORCEMENT

Consideration for Preliminary Adoption of Amendment Adding 312 IAC 5-12.5-1 Concerning Exemption of Placement of Watercraft Tax Sticker (Administrative Cause Number 03-160L; LSA Document #03-316)

Major Sam Purvis presented this item. He said the proposed rule was offered in response to a citizen petition and would allow an alternative location for certain types of watercraft to display excise tax stickers. The authorization is authorized by statute and pertains mostly to sailboats engaged in racing.

Ray McCormick moved to approve the preliminary adoption of amendment adding 312 IAC 5-12.5-1 concerning exemption of placement of excise tax stickers. Robert Murphy seconded the motion. Upon a voice vote, the motion carried.

Consideration of Preliminary Adoption of Amendments to Rules Governing Pumpouts at Marinas on Public Waters (Administrative Cause Number 03-192A)

Major Sam Purvis also presented this item. He said the regulation of “marinas” is covered under three different sets of Commission rules. One is for navigable waters; another is for public freshwater lakes; and the third is for manmade lakes administered through DNR’s Division of State Parks and Reservoirs. He said that the Commission originally endorsed the requirement for marinas to possess a license for marine sewage.

Purvis said the amendments would better clarify that each marina is generally required to have a pumpout for the collection of sewage from boats. He said a few marinas do not service watercraft likely to have wastewater holding tanks, or a marina may be located in close proximity to another marina where

pumpout services are already provided. The amendments would give discretion to the Division of Law Enforcement to accommodate these special circumstances. Reasoned implementation of this discretion would support a more measured and realistic regulatory program.

Damian Schmelz moved to approve the preliminary adoption of amendments to rules governing pumpouts at marinas on public waters, as recommended by the Division of Law Enforcement. Jack Arnett seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of Report of Public Hearing, and Public Comment Regarding Final Adoption of Rule Amendments to 312 IAC 5-6-5 Governing Special Watercraft Restrictions on Lake James Chain of Lakes (Administrative Cause Number 00-021W; LSA #03-92(F))

Major Sam Purvis, Indiana State Boating Law Administrator presented this item. He said the Division's recommendations would govern three areas on the Lake James Chain. He said the first area is Follett Creek. Typically, a large wetland surrounds the creek and it is more than 200 feet from the legal shoreline of the lake, although the channel is itself quite narrow. A ten-mile per hour speed limit was recommended for Follett Creek, and this proposal enjoys broad local support.

Purvis said that the second area is a narrow passage between Snow Lake and the Upper Basin of Lake James. There is emergent vegetation and a small passageway for boats to pass through. "With points on shoreline, we established an area of governing that area to where boats coming into that area that had to make a turn to get in there, that it be an idle speed zone." He said that "because it's more than 200 feet from shore, traveling faster than idle speed causes some danger in that area. That area has been marked in the past, but with no rule authority for idle speed zone. It has been remarked rather vaguely by local law enforcement officers that boating laws would be enforced. A lot of residents or boaters assumed that meant an idle speed zone, but legally it isn't." He said these amendments drew negative comment from several citizens as creating an idle speed zone that would be excessively large, but the boundaries have been reduced from the original proposal and most citizens appear to support the current proposal. Both the Division of Law Enforcement and the Commission's Hearing Officer, Sylvia Wilcox, support the idle speed zone for this area in the reduced configuration.

Purvis said that the third area that was recommended for idle speed zone is for what is sometimes called the "Narrows". This is an area between the Middle Basin and the Upper Basin of Lake James adjacent to Pokagon State Park. Following instructions from the Natural Resources Commission during the November meeting, this proposed zone was sent to the joint meeting of the Advisory Councils. During the December meeting of the Advisory Councils, this proposal was debated extensively.

Purvis said he offered statistical data to the Advisory Councils as to accidents in the "Narrows" area. "Looking at those numbers, they weren't giant totals." He noted, however, that "with one or two accidents per year in the 'Narrows', and with anywhere from three to five accidents on Lake James out of the 150 reported boat accidents for the whole state, that's kind of significant for an area." Purvis provided that because of accidents involving personal watercraft at high-speed through the "Narrows", and the creation of "such a wash, which is enticing for personal watercraft", the Division of Law Enforcement recommends the "Narrows" be an idle zone area.

Purvis noted the Commission's hearing officer recommended the "Narrows" not be given final adoption as an idle speed zone. Instead, an intensive education effort would be pursued with the Lake James Property Owners Association and with other interested local boaters.

Chairman Kiley asked Ray McCormick for perspectives from the joint meeting of the Advisory Councils. McCormick responded, “there was one presentation by the public and Lake James Association. It was pretty much consistent on Follett Creek and the [area between Lake James and] Snow Lake that idle zones were appropriate. But, after much testimony, questioning and suggestions on behalf of the Council to buoys, restricting traffic to one-way on each side, reducing the speed limit to something greater than idle speed, there was no consensus among the Council as far as a recommendation” for the “Narrows”.

John Davis clarified saying that the Advisory Councils approved the recommended of idle zones at Follett Creek and Snow Lake, but they did not recommend approval of an idle speed for the “Narrows” on Lake James. He said that the Advisory Councils recommended more discussion between the Division of Law Enforcement and local boaters, with a follow-up report and further recommendations at a subsequent meeting.

Paul Ehret added, “Short of a restricted zone on the “Narrows”, there was some discussion on the possibility of the Division of Law Enforcement putting up cautionary buoys, warning people that there is a cautionary condition of getting into a potential high traffic area. That was more of a discussion point and was an alternative suggestion.” Ehret concurred with McCormick that the Advisory Councils recommended approval at the other two areas.

Kiley said, “It seems like then that that provision of the rule amendments would be favorable for adoption except for that area of the “Narrows”.

Jack Arnett moved to give final adoption to the proposed rule amendments as recommended by staff.

Cockrum asked Steve Lucas whether the recommended rule amendments could be geographically split. Could some be given final adoption without giving final adoption to others?

Lucas answered, “Yes.”

Randy Strebis, a property owner on Lake James addressed the Commission. Most residents seemed to agree that Follett Creek and the area between Lake James and Snow Lake should be idle zones. “The idea is to make sure the boats are going at idle speed in the channel area only. It seems that the rule does not show lines greatly beyond where the markers are for confusion and interpretation further in the future when other people who have not been on the administration during this time. It would be my suggestion that the markings at the channel be consistent with the way that the paperwork shows.”

Strebis said, “In regards to the ‘Narrows’, the Advisory Councils’ recommendation was to come back. We were pleased with that. There was a telephone conversation between Sam Purvis and the President of Lake James Cottage Owner’s Association and myself, indicating that it did make some sense. Through further education and better understanding by the Cottage Owner’s Association and the DNR and all the awareness that has been brought to that area through this whole thing, that further study and further education should be taken into consideration to this area before something drastic was done. As the Cottage Owner’s Association, we would like to stick with the idea that we further study this area and possibly a cautionary buoy, work through the education and awareness process to see if we can’t create a better area in this zone, without the drastic measures that we feel are going to create further problems.”

Dave McKeeman addressed the Commission and said, “I, too, believe that Follett Creek and Snow Lake are behind us. I believe we have an agreement on that. I’m not sure how many people here were at the advisory board, but my recollection was that they asked us to go and meet as citizens with DNR, which we committed to, but that meeting did not take place. The value of those kinds of meetings is information sharing where we can come up with something that works for everybody. I had requested accident data. I didn’t get accident data. I got a summary. One of the things that the summary of the accidents showed is that there is an existing law that a temporary force would have prevented any one of those accidents,

and that's the 100-foot rule between vehicles. Every one of these accidents, except for two exceptions, was PWC to PWC accidents. And, it has been my observation that PWC operators are not trained adequately. They are not trained to enforce the distance of 100 foot from craft to craft. We really caution against a Lake James 'Narrows' rule until we actually sit down as citizens that are concerned about this issue. We'd like to see that before it comes to the Commission. I think that something good could come out of that, and we thank you."

Jack Arnett moved to give final adoption to the rule amendments in the Lake James Chain as recommended by staff. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried. Rick Cockrum voted against the motion.

Consideration of Report of Public Hearing, Analysis, and Recommendation for Final Adoption of Miscellaneous Rule Amendments to 312 IAC 25 Regarding SMCRA (Administrative Cause Number 03-066R; LSA Document #03-93(F))

Steve Lucas presented this item on behalf of the Hearing Officer, Jennifer Kane. He said this extensive set of amendments was primarily motivated by comments from the Office of Surface Mining and Reclamation, the Federal oversight agency for SMCRA. There were also extensive discussions between the DNR's Division of Reclamation and J. Nathan Noland of the Indiana Coal Council during the course of the public comment period. The discussions resulted in several corrections and clarifications, and with two exceptions, these have been incorporated in the hearing officer's report. Additional changes from what was included in the hearing officer's report were also now being recommended to 312 IAC 25-6-23(a)(4)(C)(ii) to reference "mitigate" rather than "comply", as well as to 312 IAC 25-6-25 where "other relevant information" could be included.

Bruce Stevens, Director of the Division of Reclamation, and Brock Mayes of the Division of Reclamation were present to answer questions. Mayes served a key role in drafting the rules and amendments to them in response to concerns raised by the Indiana Coal Council.

Jane Anne Stautz moved to give final adoption to the miscellaneous amendments to 312 IAC 25 that helps administer Indiana SMCRA. The amendments were as set forth in the Commission packet with the addition of the amendments referenced to 312 IAC 25-6-23 and 25. Jack Arnett seconded the motion. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing, Analysis, and Consideration for Final Adoption of Amendments to Entomology and Plant Pathology (312 IAC 18) with Respect to the Release of a Beneficial Organism or a Plant or Pathogen, the Regulation of Kudzu, the Establishment of a Technical Committee, and Other Matters (Administrative Cause Number 03-109E; LSA Document #03-213(F))

Steve Lucas, Hearing Officer, presented this item. He said the proposal would make profound changes to the exercise of regulatory authority by the Division of Entomology and Plant Pathology. He said there were several noteworthy items in the rule language, "but one area in particular has a great significance. This change would provide the Division of Entomology and Plant Pathology with a process to regulate the dissemination of a beneficial organism as well as a pest or pathogen." The proposal would be "a very important rule change", and its significance seems likely to become more obvious in the long term.

Lucas said a critical element for measured and equitable implementation of the new provisions was set forth in 312 IAC 18-3-15(d). This subsection would authorize the Division Director to establish a list of beneficial organisms that are exempted from the licensure requirement. In the absence of a listing, distributors of a myriad of common species would be required to obtain a license from the Division of

Entomology and Plant Pathology before allowing for their dissemination. For example, a license would be required before a bait dealer could sell a species of earthworm or crayfish that is already widely distributed. Lucas directed the attention of the Commission to a draft nonrule policy document, distributed just prior to the start of the meeting.

Robert Waltz, Ph. D., Director of the Division of Entomology and Plant Pathology, addressed the Commission. He referenced particularly the draft nonrule policy document. “As we work through this process with the universities and some of the distributors of this material through the state, as well as our permits issues, we will be adding or deleting some organisms to the list. As it is, this is the concept that we have working. These are beneficial organisms on the list. We will be working again with university researchers and others to supplement and fine-tune this list.”

Ray McCormick asked why the joint Advisory Councils had not reviewed this proposal. Lucas responded that the Advisory Councils had reviewed and recommended the rule amendments for preliminary adoption. The nonrule policy document was an outgrowth of the rule adoption process and was yet in formulation. When the Division of Entomology and Plant Pathology was reasonably comfortable with the development of the nonrule policy document, both the Advisory Councils and the Natural Resources Commission should review and act upon it.

Jane Anne Stautz moved to approve the amendments to the Entomology and Plant Pathology rules with respect to the release of a beneficial organism or a plant or pathogen, the regulation of kudzu, the establishment of a technical committee, and other matters contained in the language given preliminary adoption. Damian Schmelz second the motion. Upon a voice vote, the motion carried.

Stautz then re-emphasized the need to carry through on the nonrule policy document to list beneficial organisms that are already widely distributed and that would be exempted from licensure. She urged that the listing be developed as soon as practicable.

Consideration of Proposed Nonrule Policy Document to Apply the “Public Trust Doctrine” to Navigable Waters and Public Freshwater Lakes (Administrative Cause Number 03-196A; Information Bulletin #41)

Steve Lucas, Director of the NRC’s Division of Hearings, presented this item. He said the document described how legislation enacted in 2000 and 2003 implemented important efforts by the General Assembly’s Lakes Management Work Group. A large portion of these efforts was effectively directed to what is commonly referred to as the “public trust doctrine”. Lucas said this document helped trace the work group’s efforts, the legislation, and the Commission’s implementation of the legislation through rule adoption. The document can help heighten public and agency awareness of the public trust doctrine, and, more generally, the need for sharing equitably our public freshwater lakes and navigable waters. He said Information Bulletin 41 was developed from a previous “white paper” prepared for Director John Goss with assistance from professionals in the Division of Soil Conservation, the Division of Law Enforcement, the Division of Fish and Wildlife, and the Division of Water.

Lucas said a large and growing percentage of the energy of the Department of Natural Resources and the Commission’s Division of Hearings was spent on challenges pertaining to competing usage for public waters, including application of the public trust doctrine. There are those in the DNR that see this trend as productive and others that see it as troubling, but “either way the trend is a reality that seems unlikely to be reversed anytime soon.”

John Goss said members of the Indiana General Assembly had expressed appreciation for the promptness with which the Commission adopted rules as directed in the 2000 legislation that was motivated by the

Lakes Management Work Group. He said he believed rules had been pursued in all areas covered by the legislation.

Jane Stautz said she wanted to highlight the comment about the need to “improve public awareness” of the public trust doctrine and the need to wisely share our limited public waters. “I can see the value of that.”

Ray McCormick moved to adopt the nonrule policy document pertaining to recent legislation and the “public trust doctrine” on public freshwater lakes and navigable waters, as set forth in Information Bulletin 41. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

Chairman Kiley concluded, “I would like to see a copy of this document sent to all of the various constituent groups, including property owners associations and conservancy foundations. Most of those groups are pretty sophisticated and understand what we do, but some of them don’t.”

Consideration of Proposed Nonrule Policy Document to Assist with Administration of the Commission’s AOPA Committee (Administrative Cause Number 03-200A; Information Bulletin #42)

Steve Lucas, Director of the NRC’s Division of Hearings, presented this item. He said the nonrule policy document would help implement how the Commission’s AOPA Committee, recently established by rule, would function. The AOPA Committee would be authorized to take final agency action where “objections” are filed to a nonfinal order by one of its Administrative Law Judges, as well as to decide several related topics that arise mostly at the conclusion of a proceeding governed by IC 4-21.5.

Chairman Kiley appointed the AOPA Committee. These are Jane Anne Stautz, Chair; Lori Kaplan or a designate, member; and, himself, member. In addition, other Commission members would be requested to augment the Committee as advisors, particularly where the matter in controversy involved a subject matter where the member has substantive professional expertise.

Jack Arnett moved to adopt the nonrule policy document on administration of the AOPA Committee as set forth in Information Bulletin 42. Damien Schmelz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Proposed Nonrule Policy Document Regarding Coastal Zone Management (CZM) for Indiana’s Lake Michigan Coastal Area; Administrative Cause Number 02-043W; Information Bulletin #43)

Mike Molnar, Program Manager for the Lake Michigan Coastal Program, presented this item. He said the U.S. Department of Commerce, Office of Coastal Resource Management, approved Indiana’s Lake Michigan Coastal Program effective in August 2002. With the approval of the program, other requirements “were put into place”. Notable among these are “Federal Consistency” requirements. Molnar explained the program is broken down into three main components:

- A Federal Pass-Through a Grant Program, administered by the Lake Michigan Coastal Program within the DNR’s Division of Soil Conservation
- Nonpoint Pollution Control Plan
- Federal Consistency

Molnar said, “The document before is the culmination of a combined effort” chaired initially by Steve Lucas and supported by representatives of each of the key DNR Divisions. “Appendix A was developed

as the program was being developed and approved as part of our agreement with NOAA, which is a federal oversight agency within the U.S. Department of Commerce.” Molnar explained that the Federal Consistency responsibility “is a unique opportunity” whereby federal projects are reviewed prior to the federal agency making the decision. “It does not apply state-wide. Rather, it only applies to our Lake Michigan Coastal area, which is generally the northern half of Lake, Porter and LaPorte Counties.” The document provides guidelines for implementation of “Federal Consistency” by the Indiana Lake Michigan Coastal Program, with limited review opportunities to the NRC’s Division of Hearings. “We have some guidelines to abide by, and this is our attempt to abide by those.”

Molnar explained that there are three “triggers” which precipitate a Federal Consistency determination. The triggers are as follows:

- By a federal agency conducting an activity that will affect the Lake Michigan Coastal Area;
- By an applicant for a federal license for an activity that will affect the Lake Michigan Coastal Area;
- By an applicant for a federal assistance project that will affect the Lake Michigan Coastal Area.

Molnar noted there would be activities exempted from Federal Consistency review. He said that the exemptions would consist of activities that are “under a general license, whether it’s a state or federal general license. We figure those are going to have a minimal impact.” Other exemptions are also described in the Information Bulletin 43.

Molnar provided that there is no fee for applications to demonstrate federal consistency. The Federal Consistency application is initiated when the LMCP receives information for one of the following:

- A consistency determination from a federal agency conducting an activity;
- A copy of an application for a federal license, from the license applicant, accompanied by a Federal Consistency certification;
- A copy of an application for federal financial assistance accompanied by a Federal Consistency certification

Molnar outlined the review procedures for Federal Consistency. He said that a public notice of the proposed activity is published to allow for public comment. He added that public comments would be considered when making a Federal Consistency determination. He said there were abbreviated processes where necessitated by an emergency.

Molnar said, “I’d just like to mention that this was brought before a joint meeting of the Advisory Councils this summer. It was at the July meeting where it received approval at that time. I’d like to thank the people who played an intricate part of this process.”

Chairman Kiley asked, “Are you subject to the traditional construction in a floodway permitting process, for permitting like you would get with public freshwater lakes, or does this supercede that?”

Molnar responded that Federal Consistency review neither adds or subtracts from Indiana law. The requirement is that, at least to the extent practicable, federal licensure and grant programs are to be consistent with Indiana law.

Paul Ehret added, “If there was a federal license that involved construction in a floodway, that would be one of the comments that we could make, whether or not that the activity performed or authorized by the federal government would be compliant with our floodway laws.”

Damian Schmelz moved to approve the proposed nonrule policy document to establish, as Information Bulletin 43, a process for establishing CZM Federal Consistency within Indiana's Lake Michigan Coastal Area. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

ADJOURNMENT

At approximately 1:10 p.m., the meeting adjourned.

NEXT MEETING

March 16, 2004 at 1:00 p.m. EST at Clifty Falls State Park Inn, Madison, Indiana