

NATURAL RESOURCES COMMISSION

Minutes - April 29, 1999

MEMBERS PRESENT

Michael J. Kiley, Chair
Larry Macklin, Secretary
Damian Schmelz
Jerry Miller
David Hensel
Joe Siener
Jane Ann Stautz
John Goss
Lori Kaplan
Steve Cecil
Terri Moore

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Tim Rider
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Dave Vice	Executive Office
Paul Ehret	Executive Office
Jack Costello	Executive Office
Carrie Doehrmann	Executive Office
Angie James	Executive Office
Brent Shike	Executive Office
Barbara Nardi	Staff Counsel
Melissa Stefanovich	Staff Counsel
Susan Brubeck	Staff Counsel
Susanna Arvin	Outdoor Recreation
Chris Baas	Outdoor Recreation
Katie Smith	Fish and Wildlife
Gregg McCollam	Fish and Wildlife
Arthur Wilson	Law Enforcement
Gerald Jackson	Law Enforcement
Tim Taylor	Reclamation
Jeff Tenuth	Museum and Historic Sites

GUESTS

Ed Roemer	Dale Schoentrup	John Hargis
Beth Breitweiser	Mike Bussema	David Barnard
Nat Noland	Susan Nolan	Tim Maloney
Dan Asher		

MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular monthly meeting of the natural resources commission at 10:10 a.m., on April 29, 1999 in the auditorium of the Indiana State Museum, Indianapolis. With the presence of eleven members, the chair observed a quorum.

Jerry Miller moved to approve the minutes of March 24, 1999. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's report. Director Macklin said the Fourth Annual Governor's Conference was "very successful," and was "very pleased with the staff in the department along with the help provided by IDEM." He said that DNR held a "very interesting" agency-wide awards ceremony on April 15, 1999.

Director Macklin said the new state museum project is progressing rapidly. He said he has reviewed pencil sketches of the exhibits; however, the Ralph Applebaum firm will be arriving in early June with more complete exhibit concepts. Director Macklin said the exhibit designs are imaginative advancements upon previous proposals.

Director Macklin announced the capital budget has passed, which covers preventative maintenance and construction. He said the operation budget "is tight, but we will work through it." Director Macklin said the citizens of Indiana asked for a much "smaller and smarter government," and the General Assembly adhered to the request.

Director Macklin congratulated Bill Stuart, Assistant Director for Public and Planning, for a "job well done" in regards to the legislative session. Director Macklin announced that DNR had no bills in conference committee. He said there will be an "in-depth" budget presentation at next month's NRC meeting.

He announced that Deputy Director Lori Kaplan accepted the position of IDEM Commissioner. Director Macklin said Kaplan's leaving is a "loss for DNR, but a great gain for IDEM." Director Macklin said that, with the vacant position, the executive office has gone through reorganization. He presented Commission members with the new DNR Organizational Chart. Director Macklin said that the four previous bureaus have been consolidated into three: Bureau of Resource Regulation; Bureau of Resource Management; and, Bureau of Lands, Cultural and Recreational Resources. Director Macklin said that Mickey James, Assistant Director for Budget and

Administration/Financial Controller, "has done a wonderful job with the Federal Grants Program."

Director Macklin asked Commission members to review the new organizational concept. He said the Organizational Chart was presented to and reviewed by the Governor's Office, to which they gave their "blessing."

Chairman Kiley reflected that formal approval of a reorganization within the DNR was the statutory prerogative of the Commission, in the form of a resolution to the Governor. He said he understood the Governor supported the new plan, and he urged members to review the chart in anticipation of a possible resolution during the May meeting.

Paul Ehret, Deputy Director of the Bureau of Resources Regulation, said he gained two more divisions due to reorganization. He is spending time with the Division of Water and the Division of Soil Conservation to become "up to date on program issues."

Dave Vice, Deputy Director of the Bureau of Resource Management, said the Division of Fish and Wildlife held 13 "open house" forums statewide to discuss deer and other wildlife issues. He said more than 500 citizens attended the open houses.

Vice said bald eagle monitoring is ongoing. He said 21 pairs of eagles with eggs have been identified. He also reported that peregrine falcon program has been "very successful." He said falcon pairs are located in Fort Wayne, Indianapolis, Kokomo, and East Chicago. Vice said that he has received bids for the aquatic center at the Lieber State Recreational Area.

Vice said that early morning and early evening treatments for gypsy moth have begun in Marion and Allen Counties. He also announced the Division of Law Enforcement's canine program has expanded to seven handlers. Vice said the handlers have been geographically placed to achieve a one-hour response time. He said Law Enforcement has purchased dry suits for use in cold water scuba diving, and have been used over ten times this season.

Jack Costello, Deputy Director of the Bureau of Lands, Cultural and Recreational Resources, said the Festival of Growth was held on the Governor's Mansion grounds, where Tree City USA awards were presented. He also said the dedication of the Knobstone Trailhead in honor of John Stuart Oxley was successful. Costello said the IDNR Awards Day was "well received and very successfully done."

BUREAU OF LANDS AND CULTURAL RESOURCES DIVISION OF MUSEUMS AND HISTORIC SITES

Consideration of a Request by the Board of Trustees of the Indiana State Museum and Historic Sites for the Deaccession of 557 items from the Division's Collection

Jeff Tenuth, Division of Museums and Historic Sites, presented this item. He explained that the Indiana Administrative Code provides criteria and the procedure for the deaccession of unsuitable items maintained in the Division's collection. Tenuth said the items primarily consist of tools, clothing, decorative arts, and political memorabilia. He said the Indiana State Museum and Historic Sites Board of Trustees recommends approval.

Joe Seiner moved to approve the deaccession of 557 items from the Division of Museums and Historic Sites collection. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

Information Item: Presentation of Recently Completed Participation Survey on Outdoor Recreation to be Included in the 1999 SCORP Scheduled to be Completed Late this Year

Chris Baas, Division of Outdoor Recreation, presented this item. Baas distributed copies of the Indiana Department of Natural Resources, division of Outdoor Recreation 1998 SCORP (State Comprehensive Outdoor Recreation Plan) Survey. He said his division is "in the middle of writing SCORP," which is updated every five years. Baas explained that SCORP is a "snapshot" of the stage of recreation in Indiana, and the purpose of which is to identify those recreational deficiencies throughout Indiana.

Baas said SCORP sets the priorities and goals for the Division Outdoor Recreation's grants program, as well as, to gather information on a region level. He said the National Park Service requires the state of Indiana to maintain a SCORP.

Jerry Miller voiced concern regarding the areas surveyed. He pointed out that most surveys done were in rural areas, and there were "hardly any surveys done in metropolitan areas." Miller said he feared the survey may not be a "good makeup of the state of Indiana." Susanna Arvin explained that Indiana was sectioned into 17 regions of economic development. She said the survey was compiled by region.

Jack Costello suggested that the company that conducted the survey prepare a technical response or an explanation of the survey to present to the Commission. Kiley asked what percentage of minorities were surveyed. Arvin said the percentage of minorities surveyed was low. Kiley suggested taking the survey to Black Expo in July. Arvin said they have already planned to conduct the survey at Black Expo. Kiley requested the Division of Outdoor Recreation to report back to the Commission regarding survey results.

**BUREAU OF MINE RECLAMATION
DIVISION OF RECLAMATION**

Consideration of Nonrule Policy Document for the Beneficial Utilization of Coal Combustion Wastes at Surface Coal Mines; Administrative Cause No. 99-078R

Tim Taylor of the Division of Reclamation presented this item. He explained that for consideration was a nonrule policy document to address the disposal of coal combustion waste (CCW) at surface coal mines. The policy would support the beneficial use of CCW within surface coal mines, but the policy would not apply where the CCW is to be mixed with any substance classified as "hazardous." If approved, the policy would mean the Director would not otherwise regulate the use of CCW on permitted sites regulated by Indiana SMCRA (IC 14-34), provided the waste is used for a legitimate beneficial use. Taylor said the nonrule policy document outlines uses that would be considered beneficial uses. These were as follows:

1. The extraction or recovery of materials and compounds contained within the CCW.
2. Bottom ash used as an antiskid material.
3. Raw material for manufacturing another product.
4. Mine sealing, mine subsidence control, or mine fire control.
5. Structural fill, when combined with cement, sand, or water, to produce a controlled-strength fill material for uses including parking lot base and building base.
6. Road construction base.

Taylor said the Division of Reclamation recommended the Commission give approval to the proposed nonrule policy document.

J. Nathan Noland, Executive Director of the Indiana Coal Council, reported his trade association was "supportive of the policy." He said the Council was "hopeful, however, that the staff does not see this policy as a new regulatory program."

Tim Maloney, Executive Director of the Hoosier Environmental Council, said, "We support the beneficial use of CCW with adequate safeguards, but we don't see the proposed policy as providing adequate safeguards." He distributed a copy the Illinois Department of Natural Resources (Office of Mines and Minerals) Memorandum No. 95-8 entitled Beneficial Use of Coal Combustion By-Product and Storage or Disposal of Coal Combustion Waste at Permitted Facilities (October 31, 1995). Maloney argued the Illinois approach provided key testing safeguards not included in the proposal tendered by DNR's Division of Reclamation.

According to Maloney, "A beneficial use does not imply a benign use." He said HEC urged the NRC to request DNR staff to "do more work" to assure that environmental concerns are properly addressed, then return with an amended nonrule policy document for possible Commission action.

Steve Cecil asked whether the Division of Reclamation proposal provided for testing. Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, responded that portions of the CCW to be disposed would be tested but acknowledged not all CCW would be disposed. He said a contractor using the CCW off-site was statutorily exempted from testing, and the proposed nonrule policy would simply give the CCW the same legal

status as if utilized off-site. "If the law says it's unregulated off a mine area, then it should be unregulated on-site."

Terri Moore asked whether there would be limits on the quantity of CCW to be used for a beneficial use at a particular site. "Common sense would tell you," that where large quantities of coal combustion waste are used, the waste should be tested. Ehret responded there was no statutory framework for such testing, and testing would not be required off-site, "but there has to be a logical basis for the utilization" in terms of a beneficial use or uses. Because the usage must be beneficial, there is a practical limit on how much CCW would be used at a particular site.

Chairman Kiley reflected that the Commission could approve the nonrule policy document as written, amend the policy, or remand the policy to staff of the Division of Reclamation with instructions. He added that his "own judgment is this proposal is a pretty good start."

Damian Schmelz moved to approve the proposed Nonrule Policy Document for the Beneficial Utilization of Coal Combustion Waste at Surface Coal Mines. The motion was seconded by Jane Stautz. Upon a voice vote, the motion carried. Cecil and Moore voted against the motion.

LEGAL MATTERS NRC DIVISION OF HEARINGS

Consideration of Corrected Version of Report, Findings of Fact and Conclusions of Law with Nonfinal Order of the Administrative Law Judge; Objections Attached; Department of Natural Resources v. Glenn Fortune, et al.; Administrative Cause No. 97-189W

Tim Rider, Administrative Law Judge, introduced this item. He said for consideration under the AOPA were his findings and nonfinal order relative to a complaint filed by the DNR against Glenn Fortune alleging the unlawful construction of a residence in the floodway of the Ohio River. The complaint was supported by a summary judgment motion, and the ALJ said he found there were no facts in genuine dispute. The law supported the DNR's position: the house and adjacent fill should be removed and Fortune issued a civil penalty of \$1,000. Rider indicated the DNR was represented by its attorney, Melissa Stefanovich, and Fortune was represented by his attorney, John Hargis.

Hargis said he had practiced law in Rockport for 25 years. His clients built a "nice retirement home" on the Ohio River, and he believes the DNR should not require its demolition. "You only have to realize what the Ohio River was like 100 years ago" to know how much the water quality has improved. "I think government has done a wonderful job for the Ohio River but not a wonderful job for this case." Hargis said the "DNR has ignored the construction of residences in the floodway" in this area for many years, and it would be inequitable to now pursue enforcement against Fortune. Hargis

said his client went to the county building inspector, who said building permits were never required, and they "wouldn't be required now." He urged the decision of the ALJ be reversed.

Stefanovich responded that "this case is a simple case." Judge Rider applied the law, "and his decision should be upheld." The general proposition of the Flood Control Act (IC 14-28-1) is that residences must not be constructed in floodways. The prohibition is based primarily upon concerns for public safety and welfare. She acknowledged some limited exceptions to the prohibition existed, but she analyzed an exemption clause for the Ohio River floodway and illustrated why she did not believe it applied to this case.

John Goss asked whether there were other residences in the vicinity of the Fortune residence where DNR was not pursuing enforcement. Steve Cecil said he understood that uneven enforcement could be very frustrating to the regulated community, whether individual citizens, companies, or other state agencies. Stefanovich responded that other residences were not properly in issue. If an interested person believed a residence to be in violation, the DNR would conduct an investigation and make a determination whether an enforcement action should ensue. She reflected that whether a residence was in violation is dependent both upon the timing of construction and its location within or outside the floodway.

Terri Moore asked, "If we say yea' in this case, will we have an avalanche of other cases?" The Chair responded that he believed, "We are obliged, as much as we may hate to based on the equities. . . , to apply the statute before us."

Lori Kaplan announced that she was abstaining from voting in this matter. Neither did she participate in the deliberations.

Steve Cecil moved to affirm the findings and nonfinal order of the Administrative Law Judge as the findings and final order of the Commission. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing, Comments by Citizens and Responses by the Department of Natural Resources, Analysis by the Division of Hearings, and Recommendation for Final Adoption of Reptile and Amphibian Rule Amendments; Administrative Cause No. 98-142D; LSA #98-238(F)

Steve Lucas, Hearing Officer, introduced this item. He said that for consideration were fundamental amendments to the rules governing the management of reptiles and amphibians. The rules would regulate the sale and transport of reptiles and amphibians native to Indiana, as well as the sale and transport of dangerous reptiles. A captive breeding permit would be established for qualified species of reptiles. The "wild animal permit" sections would be supplemented to include venomous snakes among the animals requiring a permit and enclosure.

Lucas reminded the Commission this proposal was a refinement of LSA Document #97-347 that sought to prohibit the sale and transport of reptiles and amphibians native to Indiana; to prohibit the sale and transport of dangerous reptiles; and, to prohibit the sale and transport of dangerous amphibians. The earlier proposal was committed to public hearings last year, and numerous concerns were raised. Based largely upon public input, many amendments were made, and the Commission was asked to give the current rule adoption preliminary adoption rather than to proceed to final adoption with the prior package. He said the current proposal was also taken to public hearing, and the number of negative comments was greatly reduced. A few additional changes were also made as a result of comments received during the current rule adoption process, and these were identified in the hearing officer's report to the Commission.

Lucas conceded no first-effort at rule adoption in this complex area would be perfect, and he expected that if the Commission gave final adoption, changes would be sought in the near future. Yet he believed this effort was a good one and recommended it for final adoption. Lucas said in the audience were Katie Smith, Capt. Tony Wilson, and Gregg McCollam to answer any scientific and technical questions concerning the rule proposal.

Beth Breitweiser, DVM, spoke in favor of the proposal. She reflected she was a Purdue graduate who worked regularly with exotic species. "I can't begin to tell you the horrors I see on a daily basis, and the worst atrocities I see are with reptiles." Species which might ordinarily live decades live only three or four years due to inappropriate care and treatment by their owners. Frequently, "by the time I see the reptiles," they are extremely ill and cannot be saved. Dr. Breitweiser reflected that she did not think the rules were stringent enough but were a good step forward. In particular, she expressed the opinion that cage requirements were insufficient. "I beg you to pass the rules, and I urge you to do more."

Mike Bussema expressed opposition to the rule proposal. He said, "My position is I agree there needs to be regulation," but he said the focus should be upon animal mistreatment. The proposed "broad spectrum law doesn't say everything you need to protect the animals" but would interfere with his enjoyment of the animals. Bussema argued that "because of furry animal prejudice," the proposed rules are more stringent than for birds and mammals. He expressed particular displeasure for the use of passive integrated transponders to help identify individual reptiles traded by captive breeders. In response to a question from the Commission, he said his occupation was "rough-frame carpenter," but that "I take these animals to another level."

Susan Nolan also expressed opposition to the proposal. Nolan said, "I've been involved with box turtles in particular since I was a child. . . . They never suffer. I wouldn't allow that. I think that I should be allowed to pursue a hobby that I care about." She urged, "If people choose to mistreat these animals, go after them." Nolan also expressed dissatisfaction with the use of species rather than subspecies to govern the possession of box turtles.

Tim Maloney of the Hoosier Environmental Council said, "We support the rule going forward." In particular, he said HEC supported the added protection the rule amendments would provide for native species. He noted, "We also share concerns for the release of exotics."

Ed Roemer, a wild animal dealer in Anderson, also expressed support for the proposal. He thanked the agencies for working with the regulated community in developing rule language. "I feel that the Commission and the DNR has listened to the people. They have listened to us in a lot of manners."

Jerry Miller moved to give final adoption to the amendments to 312 IAC 9 pertaining to reptiles and amphibians as recommended by the hearing officer. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation of Hearing Officer for Final Adoption of Rule Amendments Adding 310 IAC 12-5-159 to Require Coal Mine Operators to Submit an Annual Report of Affected Areas; Administrative Cause Number 98-144R; LSA #98-177(F).

Jennifer Kane, Hearing Officer, presented this item. She explained that 310 IAC 12-5-159 requires coal mine operators to submit annual affected areas, and sets forth what is to be included in the report. Kane said representatives of the Indiana Coal Council and the Indiana Geological Survey attended the public hearing and proposed additional amendments. She said the DNR's Division of Reclamation reviewed the amendments and approved them for inclusion as proposed final language.

Steve Cecil reflected that as someone who was formerly involved in surface coal mining, he believed the information contained in an annual report was helpful to the industry as well as to the agency. He said he believed the proposed amendment was well-founded.

Cecil moved to give final adoption to the amendments to 310 IAC 12-5-159 governing submissions of annual report of affected areas as recommended by the hearing officer. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation of Hearing Officer for Final Adoption of Rule Amendments Adding 310 IAC 210 IAC 12-5-64.1 and 310 IAC 12-5-128.1 Governing Target Yields for Revegetation Standards of Success for Nonprime Farmland Reclamation for Surface and Underground Coal Mining and Reclamation Operations; Administrative Cause Number 98-145R; LSA #98-176(F).

Jennifer Kane, Hearing Officer, presented this item. She said the proposal would amend rule sections governing target yields for revegetation standards of success for nonprime farmland reclamation for surface and underground coal mining. She said the Division of

Reclamation asserts the amendments are necessary based on an analysis by the Office of Surface Mining (OSM) of federal revegetation standards. She said OSM indicated in a report published in the Federal Register (60 Fed. Reg. 47692) that Indiana's revegetation standards were less effective than federal regulations; however, OSM found that the current rules were not inconsistent when used as a correction factor with federal standards.

Kane said there were two additional amendments proposed to correct clerical errors. She said the requisite legal obligations have been fulfilled for rule promulgation. As a result, the proposed rule package was ripe for NRC consideration as to final adoption.

Jerry Miller moved to give final adoption to the amendments to 310 IAC 12-5-64.1 and 310 IAC 12-5-128.1 pertaining target yields for revegetation standards of success for nonprime farmland reclamation. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration of Amendments to the Nonrule Policy Document for "Pilot Project for the Use of Mediation and Facilitation in Administrative Proceedings" to Make the Project Permanent; Administrative Cause No. 99-002A

Steve Lucas, Director of the NRC Division of Hearings, presented this item. He said in 1996 the Commission approved, as a nonrule policy document, a pilot project for the use of mediation in administrative proceedings. The pilot project was occasioned by 1996 statutory amendments (codified at IC 4-21.5-3.5) for the use of mediation by agencies using the AOPA. The pilot project governed the use of mediation both by the Natural Resources Commission and by the Department of Natural Resources. When the pilot project was given approval, the Commission directed that there be a follow-up to report on the success of mediation and whether the use of mediation should be continued.

Lucas said that the number of cases applying mediation has been fewer than hoped but that mediation has proven effective in several instances, with few if any administrative difficulties. He recommended the 1996 nonrule policy document be amended to make mediation a permanent option for dispute resolution at the administrative level. In addition, the amendments would acknowledge the availability of mediation relative to lake pier disputes and to surface water disputes.

Chairman Kiley reflected he is a certified mediator and has seen the benefits of the process on many occasions. While not every case can be mediated, having mediation as an option is often a cost-effective method for dispute resolution.

Jerry Miller moved to approve the amendments to the "Pilot Project for the Use of Mediation and Facilitation in Administrative Proceedings" to make the mediation a permanent option in administrative proceedings before the Natural Resources Commission and the Department of Natural Resources. The motion was seconded by Lori Kaplan. Upon a voice vote, the motion carried.

ADJOURNMENT

At approximately 12:04 p.m., EST, the meeting adjourned.