

NATURAL RESOURCES COMMISSION
Minutes - August 26, 1998

MEMBERS PRESENT

Michael J. Kiley, Chair
Jack Arnett, Vice Chair
Larry Macklin, Secretary
Damian Schmelz
Steve Cecil
Jane Ann Stautz
Terri Moore
Joseph Siener
Rick Cockrum
Tom Cobb
Jerry Miller
John Goss

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Lori Kaplan	Executive Office
Jack Costello	Executive Office
Paul Ehret	Executive Office
Angie James	Executive Office
Carrie Doehrmann	Executive Office
Brent Shike	Executive Office
George Bowman	Water
Barbara Nardi	Staff Counsel
Melissa Stefanovich	Staff Counsel
Jerry Pagac	State Parks and Reservoirs
Gary Miller	State Parks and Reservoirs
Bruce Stevens	Reclamation
Scott McDaniel	Law Enforcement

GUESTS

Vanetta Kumar	Jim Meiers	William Mitchell
Nat Noland	Roy Samuels	Marilyn Sandberg
Ray Szarmach	Brenda Samuels	Don Sandberg

MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular monthly meeting of the natural resources commission at 10:03 a.m. (EST), on August 26, 1998 in the Indiana State Museum, Indianapolis. With the presence of twelve members, the chair observed a quorum.

Jerry Miller moved to approve the minutes of July 20, 1998 meeting. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's report. He announced that Mary Chandler resigned from the Commission and thanked her for doing such a "wonderful" job. On behalf of the DNR, Macklin welcomed Rick Cockrum as Chandler's replacement. He said Cockrum is "a dynamic person and will serve the Commission very well." Kiley also welcomed Cockrum to the Commission.

Macklin said the Natural Resources Legislative Study Committee (NRLSC) met for organizational purposes in August. He said DNR's legislative agenda was "small," and the focus was instead to look for legislative concerns. Macklin said the impacts of the new crossbow season will be discussed. He said the crossbow season "went very well without any hitch."

Macklin said the NRLSC also requested a report on the wild turkey hunting season, which has not yet been initiated, and an update on entomology issues. In particular, the gypsy moth migration into Indiana will be considered.

Macklin said Dr. Parker has performed an independent scientific study of deer impacts on vegetation in the state parks. He reported that DNR is looking at Dr. Parker's study, along with DNR research, to decide "which parks may be included in the hunts this year."

Macklin said the state park deer management program is "working, and working well." Macklin thanked DNR staff members who spent "a lot of time" preparing and participating in the Indiana State Fair. He said the upgraded building and displays looked "wonderful." John Goss said lottery and off-track betting proceeds provided funds for the building upgrade. Macklin said he was looking forward to meeting with the State Fair Board to discuss further building improvements.

Jerry Miller, Chair of the Advisory Council for the Bureau of Lands and Cultural Resources, said he missed the meeting; however, Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, would give the report.

Costello said he attended the annual "alumni meeting," an event that includes former members. He said all Council items on the NRC agenda were recommended for approval. Costello also reported that "staff is busy pulling the budget together, and they are pretty close to being done."

Costello said one of the five houses at Prophetstown was purchased from a willing seller, and "things look good." He said he met with the Prophetstown engineering design firm, and "they are progressing."

Joseph Siener, Chair of the Advisory Council for the Bureau for Water and Resource Regulation, said his council met July 29. None of the council's items are, however, before the NRC.

Lori Kaplan, Deputy Director of the Bureau of Water and Resource Regulation, reported that approximately 20,000 people walked through the Pathways to Water Quality State Fair exhibit. She said the exhibit was approximately ½ acres, including examples of erosion control structures and a variety of other water issues. "I think it's an excellent exhibit, and we're very proud of it." Kaplan also reported that the wild game cookout was a great success. She said there were approximately 900 visitors through the line, and more than \$700 in donations were received.

Kaplan said she attended a press conference with Larry Macklin and IDEM Commissioner, John Hamilton, in Gary to announce regarding the agreement by U.S. Steel to clean-up five miles of the Grand Calumet River and to provide in-stream restoration. She said 76 acres at Salt Creek was also donated to DNR, and this acreage will provide much needed tributary fishing access. Kaplan said the total value of the work to be performed by U.S. Steel is over \$30,000,000.

Kaplan reported an Asian longhorn beetle infestation in Chicago. She said Indiana is monitoring for the beetle, but no beetles have been found within Indiana borders. Damian Schmelz asked whether there was a biological control of the Asian longhorn beetle. Kaplan said, unfortunately, cutting down and burning infested trees is currently the only control method.

Steve Cecil asked about the status of the introduction of beetles to control purple loosestrife. Kaplan said there has been some success, but the success is not widespread. Kiley said he saw "before" and "after" pictures of a field of purple loosestrife in which beetles had been introduced as a biocontrol. He recommended having a short presentation given in regards to the purple loosestrife control program. Cecil said purple loosestrife is starting to show up in southern Indiana.

Kaplan also said public hearings are in "full swing" for the rules governing construction on public freshwater lakes. She said there was low attendance at the Indianapolis hearing site; however, the attendance at the northern Indiana hearing sites is projected to be higher.

Paul Ehret, Deputy Director of the Bureau of Mine and Reclamation, reported that the Bond Pool Committee met to review methods of coal company bonding and making bond pooling more attractive to mines. He also said the Indiana Society of Mining and Reclamation will hold its annual meeting in Jasper on December 7 and 8. Ehret said the Office of Surface Mining held a prime farmland reclamation conference in Carbondale,

Illinois. He said the advances in the reclamation and restoration of prime farmland are "unbelievable."

Ehret said a mine tour was given to State Budget Committee. The primary interest was to look at the type of land DNR can buy with the \$5 million appropriated by legislation. He also gave a one and a half day mine tour to Carrie Doehrmann, DNR Chief Legal Counsel, and Trina Saunders-Ray, DNR staff counsel.

Ehret said the Coal Combustion Waste group is coming to conclusion in the rule making initiative. He hoped to have proposed language before the Commission in October. He said Bruce Stevens will give a status report on the fly ash issue.

BUREAU OF LANDS AND CULTURAL RESOURCES PERSONNEL INTERVIEWS

Consideration of Personnel Interviews for Assistant Curator/Property Manager, Harmonie State Historic Site

Terri Moore provided the report of the personnel committee. She said the committee interviewed two "extremely" qualified individuals, the "cream of the crop," for the position of Assistant Curator/Property Manager, Harmonie State Historic Site. The committee determined to recommend Susan Branigin for the appointment.

Damian Schmelz moved to select Susan Branigin as Assistant Curator/Property Manager, Harmonie State Historic Site . The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

PERMANENT APPOINTMENTS

There were no permanent positions appointed for August.

Consideration of the dedication of Fawn River Nature Preserve, LaGrange County
John Bacone presented this item. He described the Fawn River Nature Preserve as a rare "high quality, old-growth flood plain forest," which protects an undisturbed portion of Fawn River and the surrounding wetlands and uplands. Bacone said the area is owned and managed by Acres, Inc., and money from the Indiana Heritage Trust Fund helped to purchase the site.

Damian Schmelz moved to approve the dedication of the Fawn River Nature Preserve in LaGrange County. The motion was seconded by Jack Arnett. Upon a voice vote, the motion carried.

Consideration of request by the Town of New Harmony and the Division of State Parks and Reservoirs to change the rate charged by the Town of New Harmony to the State of Indiana for water at Harmonie State Park

Gerry Pagac, Division Director, presented this item. He said the \$2.65 rate is "very favorable" because there is a contractual agreement in which the state allows the New Harmony to use the state's water tower in the state park. He said the agreement allows for price changes every three years, and no previous rate increases have been sought by New Harmony for the life of the agreement. The proposed new rate "amounts to a 5.9% discount as compared with standard customer rates."

Jerry Miller moved to approve the increase in rate charged by the town of New Harmony to the state of Indiana for water at Harmonie State Park. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

BUREAU OF MINE RECLAMATION

Informational Item: Status report on the Coal Combustion Waste rule making initiative Bruce Stevens, Division of Reclamation, Field Supervisor, reported this item. He thanked the Hoosier Environmental Council, Indiana Department of Environmental Management, Indiana Geological Survey, Indiana Department of Commerce, citizens, and the utility and coal industry for participating in the rule making initiative governing the disposal or usage of coal combustion waste. He also thanked the group facilitator, Deb Lawrence, for her involvement.

Stevens said the definition of "coal combustion waste" was discussed "thoroughly," and a definition would be included in the proposed rule amendments. The proposed amendments would also include a volume disposal limitation based on the percentage of coal removed.

Stevens said the testing of waste material, using specific testing techniques, would be required in order to address toxicity and protective requirements, as well as monitoring and sampling analysis requirements. He said there would be a section in the proposed rule describing "legitimate beneficial use" of waste material. Stevens said the Division of Reclamation will continue to hold meetings with various groups, and he foresees revisions before preliminary language adoption in October.

Kiley asked whether there was "broad spectrum" consensus in the ad hoc committee relative to the work product. Steven said there was consensus on some issues. He said where there was no agreement, DNR would draft preliminary language. Schmelz asked whether the group was against any of the proposed language. Stevens said all parties agreed coal combustion waste can be used beneficially, and all parties understand the need for disposal provisions.

Terri Moore asked whether there was consensus on disposal volume. Stevens said there was no consensus. Kiley asked whether there was consensus on the definition of "coal combustion waste." Stevens said there was "no agreement across the board." Since all waste cannot legally be included, the committee reviewed the 1988 legislation and revised the definition to include what DNR has the authority to regulate.

LEGAL PROCEEDINGS NRC DIVISION OF HEARINGS

Consideration of Nonfinal Order of Summary Judgment in the matter of Department of Natural Resources v. Brenda Samuels v. James G. Busch, Administrative Cause Number 96-019W

Steve Lucas, Administrative Law Judge, introduced this item. He said the DNR initiated an enforcement action against James Busch for unlawfully placing fill in the floodway of Deep River near Lake Station in Lake County. Brenda Samuels requested and was joined as an additional complaining party, with neither DNR nor Busch objecting to the joinder. While the case was pending, Busch applied for and was granted an after-the-fact permit for the construction activity. Samuels did not object to the after-the-fact permit, and that permit is not here in issue.

DNR now seeks to dismiss this case because the controversy with Busch has been resolved. Samuels opposes the dismissal, contending that problems yet exist at the site. The Administrative Law Judge said he entered a nonfinal order granting summary judgment in favor of the DNR and against Samuels relative to the proceeding. The nonfinal order was based on two grounds, either of which would be sufficient individually to sustain the summary judgment.

First, Samuels now effectively seeks to pursue a post-permit enforcement, and she lacks standing under the AOPA to do so since the DNR is not pursuing post-permit enforcement. The original DNR enforcement was resolved by the approval of an after-the-fact permit, and that permit was not contested. Second, Samuels did not present "evidence" to refute documentation in the DNR's summary judgement motion to the effect that continuing violations are not taking place within the floodway. Samuels provided only photographs, and those do not clearly identify where fill is allegedly taken place nor do they delineate the floodway, a critical measure of DNR and NRC jurisdiction.

Barbara Nardi spoke as counsel for the DNR. She expressed support for the nonfinal order by the Administrative Law Judge. Nardi also reflected that DNR has continued to monitor this site, and following six inspections by John Hall, an engineer in the Division of Water, the DNR believes fill is not now being placed in the floodway. There may possibly be issues of unlawful fill relative to authority of the Army Corps of Engineers or the City of Lake Station, because these governmental entities have jurisdiction outside

the floodway, but the NRC cannot act for activities outside the floodway. She said the response by Samuels to the DNR's motion for summary judgment also failed to meet even the most rudimentary standards for responses to summary judgment under the AOPA.

Brenda Samuels spoke on her own behalf. She said she did not fully understand the distinctions among the authority of DNR, IDEM, the Army Corps, and the City of Lake Station. She said fill was continuing to be placed in the area, however, and the fill interfered with her own and her neighbors' enjoyment of their properties. She said she was personally very familiar with conditions at the site, and they had changed markedly since filling activities were begun by James Busch.

Damien Schmelz asked whether there was a violation of the Flood Control Act at the site. Nardi responded that there had been, but fill placed unlawfully by Busch was permissible and had since been approved with the issuance of an after-the-fact permit.

Roy Samuels also requested and was granted permission to speak. He said Busch was piling fill so high in the wetlands that he and his neighbors could no longer view Deep River and its environment. Chairman Kiley reflected that within the floodway, fill could not exceed terms in the permit and could not violate the provisions of the Flood Control Act. Outside the floodway, the DNR had no jurisdiction over the amount of fill.

Kiley also reflected that the NRC was concerned with assuring that no unlawful filling of the floodway take place. He said Samuel's response to the ALJ's nonfinal order was not, however, well-considered. He said the nonfinal order correctly reflected that the AOPA exempted from administrative review, under IC 4-21.5-2-5(8), a determination by an agency not to seek enforcement. In effect, Samuels was asking the NRC to do just that review a decision by the DNR not to seek enforcement following the settlement of its initial enforcement upon approval of an after-the-fact permit. He asked that the DNR continue to monitor the site to be assured that Busch not violate the Flood Control Act in the future, but the NRC was "simply without jurisdiction to entertain the complaint by Mrs. Samuels."

Jack Arnett moved to approve the Nonfinal Order of Summary Judgment by the Administrative Law Judge as the final order of the Commission. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration of the Revised Report, Findings of Fact and Nonfinal Order of the Administrative Law Judge in the matter of Jerry Parker v. Department of Natural Resources, Administrative Cause Number 97-216W and 98-055W.

The chairman announced this item was removed from agenda because no party filed objections to the nonfinal order. As a consequence, the nonfinal order had been finalized upon the signature of the Secretary of the Commission.

Consideration of Report of Hearing Officer, Including Findings and Proposal to the Natural Resources Commission as to Its Recommendations to the U.S. Army Corps of Engineers in the matter of Petition for Rate Increase by Fourwinds Resort & Marina, Administrative Cause Number 98-086P.

Steve Lucas, Hearing Officer, presented this item. He said the Commission adopted a Nonrule Policy Document to implement an informal process for the administrative review of ratemaking recommendations for resorts and marinas under lease with the Department. Lucas said the policy creates a hearing process to gather input from citizens directly affected by slip rate increases. He explained a report is then generated by the hearing officer, and this report is set before the Commission to make its recommendations to the Army Corps of Engineers.

Lucas said State Parks did a rate analysis for similar marinas and determined the existing rates were already very high relative to comparable facilities. Indeed, the only marinas with similar rates were those at popular ocean ports such as San Francisco and Boston.

Lucas said the opposition to the rate increase by slip renters was overwhelming, and both their descriptions and his site view reflected upon substandard conditions. In addition, Lucas said he did not believe the notice of public hearing provided by Fourwinds to the slip renters provided an accurate description of the increase being sought. Lucas said he recommended denial of the slip rate increases. In addition, rate increases were sought for the rack rate at the hotel, and these were seemingly supported by the evidence and recommended for approval.

John Goss, Commission Member and Director of the Indiana Office of Tourism, said there is "significant deterioration in quality" at the resort, and he asked beyond denial of the rate increase what could be done about it. Gary Miller, Assistant Director State Parks and Reservoirs, said DNR is doing as much enforcement as possible. He said state parks is awaiting the appointment of the new resort manager to discuss future management plans for the property. He said there have recently been frequent changes in management personnel at Fourwinds.

Kiley said he receives negative letters "all the time" concerning Fourwinds. He said "citizens are, however, now glad they can participate in the decision process."

Tom Cobb, Commission Member, said "it doesn't make sense to use money generated by increased rates for improvements without a plan." He expressed concern that the record reflected so many people were dissatisfied with the facilities.

Costello said there has been \$2.1 million in improvements, so the resort is not "totally" neglected by the DNR. He emphasized that state parks has been trying to cause Fourwinds to upgrade the facilities.

Goss asked what "rack rates" were sought for the Fourwinds hotel. Gary Miller responded the rack rate would be about \$90, and that was comparable to similar facilities in the Midwest. Goss agreed the rate was not unreasonable for resort hotels.

Damian Schmelz moved to recommend to the U.S. Army Corps of Engineers that the petition for increases for marina slip rates be denied; however, the request for an increase in "rack rates" for hotel rooms was recommended for approval. The motion was seconded by Jerry Miller. Upon voice vote, the motion carried.

Consideration of Report of Hearing Officer, Including Findings and Proposal to the Natural Resources Commission as to Its Recommendations to the U.S. Army Corps of Engineers in the matter of Petition for Rate Increase by Patoka Lake Marina, Inc., Administrative Cause Number 98-087P.

Steve Lucas presented this item. He said there were some negative comments received; however, the fiscal analysis by the Department was essentially unrefuted as being comparable to the rates at similar facilities. Lucas said marina management replaced docks and pump-out facilities, added a new courtesy dock and a new floating marina store. Lucas said the new dock additions upgraded the marina into a "much nicer" facility. Gary Miller clarified that a \$1,500 ceiling would be placed on 40 foot and 60 foot covered slips.

Jerry Miller moved to recommend that the U.S. Army Corps of Engineers approve the request by Patoka Lake Marina, Inc. for increased slip rates, except that a maximum increase of \$1,500 would be approved for 40 foot and 60 foot covered slips. The motion was seconded by Damian Schmelz. Upon voice vote, the motion carried.

Consideration of Report of Hearing Officer, Including Findings and Proposal to the Natural Resources Commission as to Its Recommendations to the U.S. Army Corps of Engineers in the matter of Petition for Rate Increase in the matter of Petition for Rate Increase by Lake Monroe Sailing Club, Inc., Administrative Cause Number 98-088P.

Steve Lucas presented this item. He said the division of state parks and reservoirs completed a comparative review of slip rates, and recommended approval of the 2% increase, which is well within the range of slip and buoy rates for comparable facilities. Lucas said no negative comments were received.

Steve Cecil moved to recommend that the U.S. Army Corps of Engineers approve the request by Lake Monroe Sailing Club, Inc. for increased slip rates. The motion was seconded by Terri Moore. Upon voice vote, the motion carried.

Consideration of Report of Hearing Officer, Including Findings and Proposal to the Natural Resources Commission as to Its Recommendations to the U.S. Army Corps of Engineers in the matter of Petition for Rate Increase by Pleasure Craft Marina, Inc., Administrative Cause Number 98-089P.

Steve Lucas presented this item. He said the division of state parks and reservoirs completed a comparative review of slip rates for Pleasure Craft, and that analysis suggested the increased slip rates were justified. Lucas said no testimony or comments were received that were adverse to the proposed increases.

Jane Ann Stautz noted the "Report of Hearing Officer" contained a clerical error. Reference to the "Petition for Rate Increase by Lake Monroe Sail Club, Inc." should be to the "Petition for Rate Increase by Pleasure Craft Marina, Inc." Lucas thanked Stautz for bringing the error to his attention and said the administrative file would reflect the correction.

Damian Schmelz moved to recommend that the U.S. Army Corps of Engineers approve the request by Lake Monroe Sailing Club, Inc, for increased slip rates. The motion was seconded by Jerry Miller. Upon voice vote, the motion carried.

Consideration of Report of Public Hearing and Written Comments and Recommendation of Hearing Officer in the matter of Recodification of the Rules which Govern Public Usage of DNR Properties, Administrative Cause Number 96-014P; LSA #98-19(F).

Steve Lucas presented this item. He said the recodification package went through an extensive process led by Marian England and other property holding divisions. Lucas said this package impacts the greatest number of citizens in Indiana. Lucas said no member of the public attended the public hearing. Although a press release was prepared and the proposal placed on the NRC's webpage, public comment was received from only one individual. Lucas did not recommend changes based upon those comments. He did, however, recommend technical adjustments as reflected in the written report.

Jane Ann Stautz moved to give final adoption to the recodification of the "property use regulations" from 310 IAC 5 to 312 IAC 8 as set forth in the commission packet. The motion was seconded by Jack Arnett. Upon voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation of Hearing Officer for Final Adoption of Rule Amendments in the matter of Amendments to Procedural Rules of the Natural Resources Commission and Its Division of Hearings Relative to Geologist Certification Board and to Establish a Process for NonParty Participation at Objections Arguments, Administrative Cause Number 97-045A; LSA #98-85(F).

Steve Lucas presented this item on behalf of Jennifer Kane, Hearing Officer. He said for consideration was a two-part amendment to the procedural rules for matters before the NRC.

One part plugs in the review process of the Geological Certification Board. He said these amendments would reflect the Division of Hearings as "ultimate authority" relative to discipline and licensing of professional geologists.

Lucas said the second part addresses requirements for nonparty participation in "objections arguments" before the Commission. He said under the proposal, a nonparty could participate in the proceeding upon filing an amicus curiae brief at least ten days before oral argument is scheduled or as otherwise agreed by the parties. Lucas said this aspect of the proposal was prepared in consultation with Carrie Doehrmann, DNR Legal Counsel, and J. Nathan Noland, Indiana Coal Council. No adverse comments were received from the public regarding either aspect of the proposed amendments. They were both recommended for final adoption.

Jerry Miller moved to give final adoption to the amendments to 312 IAC 1, as set forth in the Commission packet. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

Adjournment

At approximately 11:28 a.m., EST, the meeting adjourned.