

**NATURAL RESOURCES COMMISSION**

Minutes - October 28, 1998

**MEMBERS PRESENT**

Michael J. Kiley, Chair  
Jack Arnett, Vice Chair  
Larry Macklin, Secretary  
Damian Schmelz  
Jerry Miller  
David Hensel  
Terri Moore  
Rick Cockrum

**NATURAL RESOURCES COMMISSION STAFF PRESENT**

Stephen Lucas  
Jennifer Kane  
Sylvia Wilcox

**DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT**

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| Lori Kaplan         | Executive Office |
| Jack Costello       | Executive Office |
| Angie James         | Executive Office |
| Brent Shike         | Executive Office |
| Carrie Doehrmann    | Executive Office |
| Melissa Stefanovich | Staff Counsel    |
| Bobbi Nardi         | Staff Counsel    |
| Greg Ellis          | Staff Counsel    |
| Scott McClarney     | Water            |
| Paul Ehret          | Reclamation      |
| Paul Bykowski       | Law Enforcement  |
| Dennis Talley       | Law Enforcement  |

**GUESTS**

Rosemary Hamer (Attorney General's Office)

**MONTHLY REPORTS**

Michael J. Kiley, Chair, called to order the regular monthly meeting of the natural resources commission at 10:07 a.m., on October 28, 1998 in the Indiana State Museum, Indianapolis. With the presence of eight members, the chair observed a quorum.

Jerry Miller moved to approve the minutes of September 17 and 18, 1998. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's report. He said the State Office Commission is continuing to proceed with the plans for the new museum. He said plans have been "very successful" in mapping out the administrative and exhibit areas. Schmelz asked whether it was possible to have a sketch of the White River State Park presented to the Commission. Macklin said he would see to it that a sketch was provided.

Macklin said he hosted a "very productive" one-day seminar with IDEM to discuss overlapping issues between the two agencies and "bring forces together to resolve those issues." He congratulated Lori Kaplan for orchestrating the seminar.

Macklin said he attended the "black tie" unveiling of the partially restored West Baden Springs Resort. He said it was a "gorgeous and great" facility.

Macklin said he also attended the Great Lakes Commission meeting held in Buffalo, New York. He said he was assisted by Steve Lucas in presenting a resolution to develop a workshop on the use of Marine Sanitation Devices (MSD) in the Great Lakes. The subject hit a "home run" with the GLC members and resulted in unanimous approval of the resolution.

Macklin met with the Midwest DNR directors in Nashville. He said it was a "good opportunity" to discuss programs and legislation. Macklin said staff is putting together the capital budget for presentation to the State Budget Agency.

Jerry Miller, Chair of the Advisory Council for the Bureau of Lands and Cultural Resources, said his council met in Lafayette last week. The council traveled to Jasper-Pulaski Fish and Wildlife Area to observe the migrating Sandhill cranes. The council also toured the developing Prophetstown State Park.

Jack Costello, Deputy Director of the Bureau of Lands and Cultural Resources, provided an overview of efforts by the Division of Forestry regarding tree seedling production. As projected in a previous NRC meeting, production was increased from 4 ½ million to 5 ½ million seedlings. He said since the 1998 orders for trees exceeded 6 ½ million, however, a lottery distribution system was required in order to compensate for the inadequate supply. Costello said the DNR expected to increase seedling production to 6 ½ million trees next year.

Costello said DNR is preparing to hold deer control hunts at ten state parks, with an archery hunt at Clifty Falls State Park. Kiley said he has received calls from hunters complaining of not seeing as many deer as in the past. Kiley asked whether the DNR needs to reevaluate the deer harvest program. Kaplan responded that the DNR monitors the harvest and keeps track of the deer herds to adjust the hunts. She said it is a difficult balance between farmer's need and hunter's needs. Schmelz said "Jim Mitchell is a fine biologist, and we must trust the biologists and staff to monitor the deer population and

make the appropriate recommendations." Kiley said Law Enforcement reported 3,500 car-deer collisions.

Kaplan reported for Joseph Siener, Chair of the Advisory Council for the Bureau for Water and Resource Regulation. She said his council did not meet in October.

Lori Kaplan, Deputy Director of the Bureau of Water and Resource Regulation, said there was hope of creating a joint IDEM-DNR committee to address overlapping responsibilities. She also said Ball State University will be offering a course entitled Green TV. Ball State is putting together a test pilot program to sell to PBS stations in the future. Kiley observed Ball State has an outstanding aquatic biology masters program.

Miller asked about the status of Lake Michigan yellow perch. Kaplan said 1998 has seen the strongest "young of the year" class since early 1990s, but these fish will not be mature until 2002. Kaplan explained that fisheries biologists believe two factors may have contributed to the good perch year. First, waters in southern Lake Michigan were unusually warm this spring, with the result that yellow perch spawning occurred after alewives had generally left spawning waters. Second, the overall population of alewives, thought to be a primary predator of perch eggs and larvae, is low.

Paul Ehret, Bureau of Mine Reclamation, said the division of reclamation is targeting coal combustion waste preliminary rules for the November NRC agenda. He said he was pleased to also announce the division of reclamation received the 1998 Quality Improvement Award given by the Lt. Governor. The division is the first state agency to receive the award. Ehret listed the improvements of the division as being: (1) staff reduction from 105 to 89; (2) operating expenses reduced to below 1988 levels; (3) number of inspectors reduced by 20% due to retraining and re-routing; and (4) reduction from 545 days to 304 days to issue a mining permit, and a reduction of 100 days to 15 days to approve amendments to permits. Rick Cockrum asked whether the NRC, through a letter, could recognize the Division of Reclamation for the Quality Award. Kiley said he agreed that a commendation was in order.

Ehret outlined discussions of the year 2000 budget for the Federal Office of Surface Mining. He said DNR is hoping to receive as much as \$1,000,000 for the AML program. Ehret invited commission members to the Twelfth Annual Indiana Society of Mining and Reclamation meeting to be held in Jasper on December 7 and 8.

Schmelz invited the Commission to the fall meeting of the Indiana Academy of Sciences. He said the meeting was set for Park Tudor Preparatory School on October 29.

## **BUREAU OF LANDS AND CULTURAL RESOURCES**

**Consideration of resolution for transfer of land to the city of Huntington for economic development purposes. No loss of open space or recreational uses**

Jack Costello, Deputy Director of the Bureau of Lands and Cultural Resources, presented this item. Several years ago, the NRC transferred its ½ interest in former Erie-Lackawana railway lands to the city of Huntington for economic redevelopment. He said the city had, however, identified additional land tracts totaling 1.79 acres, most of which are located under a parking lot, in which DNR yet holds a ½ interest. Costello said the resolution would convey this acreage to the city and would not result in any loss of green space. "These lands are surplus to the needs of the department." Costello circulated a draft resolution to the commission.

Jack Arnett moved to adopt the resolution for transfer of land to the city of Huntington for economic development purposes. The motion was seconded by Jerry Miller. Upon voice vote, the motion carried.

## **LEGAL PROCEEDINGS NRC DIVISION OF HEARINGS**

### **Consideration of Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge in the matter of Danny Putnam and Robert Hootman v. Department of Natural Resources, Administrative Cause Number 96-187W and 96-190W**

Sylvia Wilcox, Administrative Law Judge, introduced this item. She said Danny Putnam and Robert Hootman are adjoining landowners on Pretty Lake, a public freshwater lake subject to DNR jurisdiction pursuant to IC 14-26-2. They both requested authorization for the placement of concrete seawalls, but their requests were denied by the DNR. From this denial, the two individuals took administrative review. She said the evidence showed a stone seawall is currently located along the Hootman property, and there is no seawall along the Putnam property.

Wilcox found the evidence supported a finding there would likely be significant environmental harm if the two riparian owners were allowed to place concrete seawalls. As a result, she affirmed denial of the requests for concrete seawalls, but said Hootman and Putnam could place stone seawalls along their shorelines.

Wilcox also found the existence of a stone seawall negated the status of "natural scenic beauty" at the site since the stone seawall was man-made. On this basis, she determined the licenses could not have been denied based upon concerns for natural scenic beauty. Barbara Nardi spoke as attorney for the DNR. She said "basically, the department is very happy with the ALJ's decision." She noted there was an apparent clerical error in Finding 23; the word "erosion" should have been preceded immediately by the word "shoreline." Nardi said, as a substantive matter, the DNR also objected to the ALJ's finding that "the existence of a stone seawall precluded the agency from considerations of natural scenic beauty." While she agreed that the presence of a seawall might be a factor to consider in evaluating "natural scenic beauty," she argued it should not act as a bar to the department's analysis of a permit application.

Neither Danny Putnam nor Robert Hootman appeared for the commission meeting. Neither person was represented by counsel.

The Chair said the case presented important policy questions. There was increasing evidence of the damage concrete seawalls do to the environmental integrity of public freshwater lakes. He said the NRC should consider carefully the precedent which would be established by saying the existence of a stone seawall would preclude consideration of "natural scenic beauty" in the licensing processes of the public freshwater lake law.

Jack Arnett said he agreed with the arguments made by the DNR and with the agency objections to the findings by the administrative law judge. He urged the commission to modify the ALJ's nonfinal order so as to incorporate those arguments.

Schmelz moved to affirm the "Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge" as filed on September 15, 1998 in line with the DNR's objections. The following modifications would be made:

Finding 23: In the second sentence of Finding 23, the word "erosion" should be added after the word "shoreline," to read in pertinent part:

These memos and his testimony show that he recommended that no concrete, steel, plastic or wood sea walls be used on Pretty Lake, because the shoreline erosion was minimal, a 10 mph speed limit was in effect and because glacial stone dominates that lake, an attempt should be made to "keep it that way."

In addition, Findings 29, 30, 32, 33, and 34 would be deleted, and subsequent findings renumbered accordingly.

The motion was seconded by Arnett. Upon a voice vote, the motion carried.

**Consideration of Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge in the matter of Joan A. Kinder v. Department of Natural Resources, Administrative Cause Number 96-036W.**

Sylvia Wilcox, Administrative Law Judge, also introduced this item. She said the case was similar in most aspects to the Putnam and Hootman cases decided moments earlier by the commission. Once again, at issue was the placement of a concrete seawall along the shores of a public freshwater lake, in this instance Jimmerson Lake in Steuben County.

Wilcox said one important distinction was that this case comes to the commission following remand by the Steuben Superior Court (Case No. D-9706-CO-425). "You've heard the Kinder case previously. In 1997, the NRC adopted ALJ findings granting a permit." The remand contained instructions to make specific findings as to whether the placement of a concrete seawall would result in significant environmental harm. Findings

relative to whether the existence of an existing railroad-tie seawall would preclude consideration of scenic beauty were included in the original disposition by the commission, and she believed these were not within the scope of the court ordered remand.

DNR attorney, Barbara Nardi, urged that the commission was not limited to the scope of the remand from the Steuben Superior Court. On remand, the commission could correct any errors made in its prior decision. She said that for consistency and to establish appropriate precedent, language should be deleted from the prior decision which said scenic beauty could not be considered where a railroad-tie seawall previously existed.

Joan Kinder was not present and was not represented by counsel.

Jerry Miller said he believed it was important for the commission to be consistent in its determinations. Arnett agreed.

Arnett moved to affirm the findings of the administrative law judge but with amendments consistent with the objections filed by the DNR. In accordance with the objections, Findings 39, 40, and 54 would be deleted; the subsequent findings would be renumbered accordingly. The motion was seconded by Miller. Upon voice vote, the motion carried.

## **OTHER MATTERS**

### **Consideration of Recent Activities of the Interagency Task Force on E. coli for Lake Michigan Beaches and For Possible Resolutions or Directions Relative to the Task Force**

Steve Lucas presented this item. He said one initiative developed by the Lake Michigan Coastal Coordination Program was the Interagency Task Force on E. coli. The current discussion was intended to update the commission on the activities of the task force and to ask for commission guidance relative to the task force.

With the aid of an overhead projector, Lucas provided an overview of current projects. Among them is the development of a voluntary monitoring network, coordinated by IDEM, for 75 sites in the Indiana watershed of Lake Michigan. Within this network, major public and private operators of wastewater treatment facilities have performed testing beyond their legal requirements for waters both above and below outfall structures. A second project, funded by EPA and led by the Indiana Geological Survey, would model and monitor source areas of E. coli contamination in the Little Calumet River watershed, beginning with Burns Portage Waterway ("Burns Ditch"). Another initiative would involve local health departments and the ISDH, with funding from IDEM and DNR and technical support from IGS, in placing private septic systems on a geographic information system. The Clean Vessel Act program, administered by IDEM and funded through the US Fish and Wildlife Service, received technical support from

DNR's Division of Law Enforcement and legal support from NRC rules requiring pumpout facilities at marinas.

Lucas said another current project was directed to a better understanding of the impact of marine sanitation devices (or "MSDs") on Lake Michigan and the Great Lakes generally. He reflected that treated waste could be discharged from Type I and Type II marine sanitation devices into the Illinois waters and the Indiana waters of Lake Michigan. Michigan and Wisconsin have successfully petitioned the US EPA to prohibit discharges into their portions of Lake Michigan. He said that while members of the task force generally believe landside sources of bacterial contamination are the most significant, there are some concerns for possible contamination from vessels (including discharges from marine sanitation devices).

Lucas said a task force committee recommended Indiana meet with Illinois on this issue. During an informal spring meeting in Chicago, water quality and boating regulators from the two states agreed that a better understanding was needed of the operation of marine sanitation devices. They determined to ask Larry Macklin to consider requesting the Great Lakes Commission to sponsor a workshop on the operation and regulation of MSDs, as well as their potential impact on the ecosystem. Macklin agreed to do so, and as reflected in the Director's report, the Great Lakes Commission approved a workshop resolution during its October meeting in Buffalo.

Lucas reflected the DNR had previously endorsed the vision of the task force, but the NRC had not formally done so. He asked if the commission might now consider such a resolution.

More specifically with regard to the issues pertaining to MSDs, Lucas observed the Indiana Natural Resources Commission and the Indiana Water Pollution Control Board had interlocking responsibilities for Lake Michigan and its water quality protection. Lucas said he was sometimes asked what governmental entity would be appropriate to act relative to discharges from MSDs, and his response was that a joint response from the two boards might be the most persuasive. He asked whether the NRC might consider a resolution urging a joint session with the Water Pollution Control Board to consider any recommendations concerning the use of marine sanitation devices in the Indiana waters of Lake Michigan.

Chairman Kiley reflected that Lucas and the NRC's Division of Hearings has long been actively involved in issues affecting Lake Michigan. He said Lake Michigan was a critical natural resource and one in which the commission had a major responsibility. Terri Moore said she believed investigation of the possible impact of MSDs on Lake Michigan was "a very good idea." She urged those efforts to continue.

Jerry Miller asked who was responsible for monitoring the effectiveness of marine sanitation devices on Lake Michigan. Lucas responded that the US Coast Guard apparently bore the primary responsibility, but how the responsibility was carried-out in practice was a concern of the Illinois and Indiana agency representatives who met in

Chicago. A better understanding of monitoring efforts is one result which is hoped will be achieved from the GLC's workshop.

Damian Schmelz asked how soon the workshop would be conducted. He urged progress be made on the issue as soon as possible. Macklin responded that he had discussed the resolution with staff for the Great Lakes Commission subsequent to its passage, and he believed there would be prompt action.

Jerry Miller presented the following resolution for action: The Natural Resources Commission resolves to endorse the continuing participation by its staff in the activities of the Interagency Task Force on E. coli and further resolves to support the general vision of the task force. The motion was seconded by Jack Arnett. Upon a voice vote, the motion carried.

Damian Schmelz moved to endorse the concept of a joint session with the Water Pollution Control Board to consider recommendations with respect to the use and regulation of marine sanitation devices in the Indiana waters of Lake Michigan. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

#### **ADJOURNMENT**

At approximately 11:31 a.m., EST, the meeting adjourned.