

NATURAL RESOURCES COMMISSION
Minutes - December 21, 1996

MEMBERS PRESENT

Michael Kiley, Chair
Patrick Ralston, Secretary
John Goss
Jerry Miller
Jack Arnett
John Rose
Steve Cecil
Damian Schmelz
Joe Siener
Terri Moore

NATURAL RESOURCES COMMISSION STAFF PRESENT

Steve Lucas	Hearings
Bill Teegarden	Hearings
Tim Rider	Hearings
Cheryl Hampton	Hearings

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Jack Costello	Executive Office
David Herbst	Executive Office
Paul Ehret	Executive Office
Louise Krick	Executive Office
Lori Kaplan	Executive Office
Tom Kidd	Outdoor Recreation
Emily Kress	Outdoor Recreation
Virginia Simone	Legal Counsel
Mary Davidsen	Legal Counsel
Bill James	Fish and Wildlife
Randy Lang	Fish and Wildlife
John Friedrich	Forestry
Doug McKinney	Water
Gerald Pagac	State Parks

GUESTS PRESENT

Brendan Kearns	Gary DeLong
John Dornette	Julie Perry
Alvion Kimball	Peter Rusthoven

MONTHLY REPORTS

Michael Kiley, Chair, called to order the regular meeting of the natural resources commission at 1:09 p.m., EST, on December 19, 1996 in the Indiana Government Center South, 402 West Washington Street, Indianapolis. With the presence of ten members, the chair observed a quorum.

Jerry Miller moved to approved the minutes of the November 21, 1996 meeting. The motion was seconded by Damian Schmelz and approved by voice vote of the commission.

Patrick Ralston presented the Director's report. He said the Indiana Natural Resources Foundation and the Indiana Heritage Trust Committee met this month. Ninety-eight projects have so far been approved.

Ralston also reported upon the annual division directors' retreat, held this year at Turkey Run State Park. Tom Hohman was unanimously selected director of the year.

Ralston said he recently had an opportunity to visit and attend a showing at the new IMAX theater in White River State Park. He said the facilities are "really great."

Jerry Miller, Chairman of the Advisory Council for the Bureau of Lands and Cultural Resources, said he was not present at the last council meeting but received an update from Jack Costello. He indicated there were two items on the agenda. For item #4 on the agenda, the council made a correction with an amendment.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, presented preliminary results of the controlled hunt at the state parks, which he said were taken from the Internet. He said the hope was that significant progress was made in the efforts to control deer populations; there was a possibility the hunt would not have to be repeated next year at Pokagon State Park.

Damian Schmelz asked what were the total numbers for deer taken this fall. David Herbst said final numbers were not yet available because the archery season was still open. Herbst indicated, however, that preliminary data indicated the size of the statewide herd was less than last year.

Joe Siener, Chairman of the Advisory Council for the Bureau of Water and Resource Regulation, said his council met for a full day on December 5. He said the meeting included several staff reports and action a number of actions were taken. Jim Hebenstreit and Dawn Deady outlined the Lake Michigan Coastal Coordination Program, including the Technical Task Force created to address beach closings due to bacterial contamination. Bill Pippinger of the advisory council volunteered to participate on the Technical Task Force.

Siener said Bill James made an informative presentation on efforts to control the spread of zebra mussels and other efforts for the control of aquatic nuisance species. The item would also be considered later during this commission meeting.

Siener said Larry Rhinehart of the Division of Law Enforcement and Steve Lucas identified an issue relating to the use of Type I and Type II marine sanitation devices (or "MSDs") on Lake Michigan. These devices allow for the disposal of onboard-treated or partially treated sewage into the lake. Particularly with periodic beach closings along Indiana's Lake Michigan shoreline due to E. coli contamination, these disposals are a concern. The use of Type I and Type II devices has already been prohibited on the Wisconsin and Michigan waters of Lake Michigan, and Indiana and Illinois are considering the same prohibition. He said this item would be on the commission agenda at a later date for final action but had been recommended for approval by the advisory council.

Siener said Ken Smith and the division of water are putting the final touches on a guidance document for conservancy districts. A draft was circulated to the advisory council and will be discussed again, probably early in 1997.

David Herbst, Deputy Director for the Bureau of Water and Resource Regulation, said he was "really proud the advisory council has taken on several major issues. . . . I want to compliment the advisory council to the natural resources commission." In addition to the items mentioned by Siener, he said the advisory council had taken on the difficult issues presented by seawalls and shoreline alterations. He said the issues were "tearing apart staff in many ways" and hopefully the council will be able to help provide some guidelines.

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, said there was a "very successful Indiana Society of Mining and Reclamation meeting at Vincennes." He felt the meeting might have been the best received to date. Ehret said the division of reclamation had received "high marks" from the Office of Surface Mining and Reclamation in its administration of SMCRA.

Ehret reported that Roger Calhoun of the OSM office in Indianapolis was moving to the federal agency's West Virginia office. The move was a return home for Calhoun and a promotion of stature, since West Virginia continues to be a focal point of coal mining activities.

**BUREAU OF LANDS AND CULTURAL RESOURCES
DIVISION OF NATURE PRESERVES**

Consideration of the Dedication of McCloskey's Burr Oak Savanna Nature Preserve, Lake County

John Bacone, Director of the Division of Nature Preserves, presented this item. He said burr oak savannas once covered thousands of acres in Northwest Indiana, but the community type was now one of the rarest in the state. He said the proposed nature preserve is a 55 acre tract located in Hobart. The site was purchased by the McCloskey family in the 1970s, who were interested in its protection, and subsequently purchased by the State of Indiana. He recommended dedication of the site as a nature preserve.

Damian Schmelz asked the extent of state areas now included within nature preserves. Bacone responded there were 155 sites containing approximately 20,000 acres.

Damian Schmelz moved to approve the dedication of McCloskey's Burr Oak Savanna Nature Preserve in Lake County. The motion was seconded by John Goss. Upon a voice vote, the motion carried.

DIVISION OF FORESTRY

Consideration of a request by South Central REMC for a Four-Year Permit for the Installation, Operation, and Maintenance of an Underground Electric Cable Across Yellowwood State Forest

John Friedrich of the division of forestry presented this item. He indicated to supply private customers in the Washington Township, Brown County, South Central REMC uses an above ground electric line that spans a section of Monroe Reservoir. Friedrich stated that this span is vulnerable to storm damage, and if the line breaks, it would be difficult, costly, and time consuming to repair. South Central REMC requests a permit to install, operate, and maintain a 7,200 volt, single phase, underground electric cable across a portion of Yellowwood State Forest.

Friedrich said the division of forestry recommends approval of a four-year permit for the installation, operation, and maintenance of the underground electric cable across a portion of Yellowwood State Forest. A condition of approval was that where needed, archaeological clearance would also be obtained. An additional condition was that South Central REMC must, as soon as practicable, remove overhead lines across Lake Monroe.

Jerry Miller moved, with the amendment, to give South Central REMC a four-year permit for the installation, operation and maintenance of an underground electric cable across Yellowwood State Forest. The motion was seconded by Jodie Perras. Upon voice vote, the motion carried.

Consideration of a Request by Ancil Perkins for a Four-Year Permit for the Use and Maintenance of an Access Road Across Yellowwood State Forest

John Friedrich also presented this item. He stated that Ancil Perkins recently purchased property adjacent to Yellowwood State Forest in Brown County. Perkins is requesting a permit to use and maintain the existing access road across Yellowwood State Forest for access to his property. The access road is approximately twelve feet wide and

approximately 140 feet long. Friedrich indicated the existing access road is surfaced with bricks, and it should require relatively little maintenance. He stated the division of forestry recommends approval of granting a four-year permit for the use and maintenance of the access road across Yellowwood State Forest.

Jerry Miller moved to approve the request by Ancil Perkins for a four-year permit for the use and maintenance of an access road across Yellowwood State Forest. The motion was seconded by Jodie Perras. Upon voice vote, the motion carried.

BUREAU OF WATER AND RESOURCE REGULATIONS

Consideration of the Adoption of a Zebra Mussel Containment Policy as a Nonrule Policy Document of the Natural Resources Commission; Administrative Cause Number 96-216D

Randy Lang, Fisheries Biologist and Indiana Aquatic Nuisance Species Coordinator, presented this item. He explained that the proposal seek the commission's approval of a nonrule policy document to address zebra mussel containment. The effort would focus upon public education and would begin an initiative for state agencies and the private sector to begin controlling biological pollution caused by exotic species. Lang also distributed information to the commission regarding the problems posed by zebra mussels.

Jerry Miller asked whether zebra mussels had assisted in improving water quality. Lang responded there was an element of truth to that perspective, but zebra mussels did not ingest many pollutants. Even where water clarity was improved, the result was often undesirable plant growth. The long-term effects of zebra mussels upon native species was not yet well-understood, but they often appeared to out-compete them for food.

Lang was asked whether there was a methodology or another species which could be used to control the populations of zebra mussels. He responded that there was "no silver bullet," although numerous efforts and great expenditures were put to this effort. "Biological pollution is a big issue."

Chairman Kiley indicated he had had discussions with his daughter concerning the problems associated with zebra mussels. One of the problems was that there was really a lack of data concerning the long-term effects of zebra mussels and other aquatic nuisance species. He said he welcomed the efforts by the DNR to deal with the issue, however, and looked forward to those efforts being made in cooperation with other state and federal agencies.

Joe Siener moved to approve the Zebra Mussel Containment as a nonrule policy document and said he concurred with the recommendations of his advisory council that efforts for its implementation get underway as soon as possible. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

DIVISION OF OUTDOOR RECREATION

Information Item: Assessment of Sherwood Templeton Mine Near Dugger for Acquisition and Use by Off-Road Vehicles

Emily Kress, Director of the Division of Outdoor Recreation, presented this item. She explained that the commission was not being asked to take action. Because efforts were ongoing to assess the possible acquisition of land near Dugger for off-road vehicles and for other purposes, she felt it important to inform the commission concerning those efforts.

There was some discussion of fees associated with off-road vehicles and snowmobiles. Brendan Kearns said the fee for off-road vehicles was voluntary. He urged that recreational opportunities for off-road vehicles should be viewed favorably.

LEGAL PROCEEDINGS

Consideration of Petition to Preliminarily Adopt Rule to Open Silver Lake, Kosciusko County, to High-Speed Boating under IC 14-15-3-11

Chairman Michael Kiley reported this item was continued at the request of the petitioner. He said the item would be rescheduled for consideration when determined by the Chair.

Consideration of the Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge (and Respondents' Objections) in the Matter of Department of Natural Resources v. Marion White and Linda White, d/b/a White Brook Park; Administrative Cause Numbers 95-094W and 95-096W

Tim Rider, Administrative Law Judge, introduced this item. He said the DNR had filed four complaints against the Whites, but two of those were addressed prior to hearing. At issue are piles containing concrete, concrete reinforcing bar, asphalt, rocks, and soil at two locations of the floodway of Brandywine Creek near Greenfield in Hancock county. Roads at this site are "grandfathered" because they were placed before the effective date of the Flood Control Act, and the Whites contend these piles should be similarly "grandfathered." The ALJ found adversely to the Whites on this issue and that the piles should be removed from the floodway. Rider said he recommended a \$500 civil penalty against Linda White and a \$1,500 civil penalty against Marion White. The latter amount was larger because there was unrefuted testimony that Marion White threatened a field inspector with bodily harm.

Rider explained that his nonfinal decision also established a schedule for site restoration. Because the case had been delayed coming to the commission for final action, he recommended that the actions contained in the nonfinal order be extended for 30 days.

Substantial charges in addition to the civil penalties were possible, he said, but only if the Whites failed to comply with the order.

Mary Davidsen spoke as attorney for the DNR. She said the agency generally supported the findings of the ALJ and had not filed objections. She noted for the record, however, that the DNR believed the ALJ was incorrect when he concluded the Flood Control Act was not fully effective until 1973.

Marion White argued the case "all boiled down to a matter of history," and the ALJ failed to understand the history of the site. White said substantial evidence concerning the site was not presented at the hearing, but he had prepared a narrative of the history for the commission. Davidsen objected that Mr. White's narrative was not part of the record and was hearsay. The Chair sustained the objection and explained that the commission must base its decision upon facts in evidence.

Marion White denied threatening a DNR employee. He said that finding by the administrative law judge was not proven.

Steve Cecil asked Marion White if he had a maintenance schedule for the roadways on his property. White responded that the piles predated his acquisition of the property, and he sought to perform maintenance on the roads approximately every six months. Cecil expressed concerns whether some of the materials described were suitable for roadway maintenance or whether they must properly be landfilled. The materials seemed to be demolition debris.

Linda White said she disagreed with Finding 13. She said there was no showing the DNR had demonstrated that the stockpiled materials were used for other than roadway maintenance. She also contended Finding 20 was inaccurate because the property was not acquired until September 1990. Mary Davidsen objected to these arguments because she said neither Finding 13 nor Finding 20 were referenced in the written objections to the ALJ's findings made on behalf of the Whites. Linda White said she was unaware of what her attorney had included in the objections, and Mrs. White indicated her attorney had been discharged. Linda White summarized by saying, "I just want you people to go away."

Patrick Ralston moved to affirm the findings and nonfinal order of the administrative law judge. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

Consideration of the Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge in the Matter of Krovocheck v. Department of Natural Resources, City of Lawrenceburg, and Indiana Gaming Company, L.P. (and Krovocheck's Objections); Administrative Cause Number 96-086W

Steve Lucas, Director of the Division of Hearings, introduced this item by indicating R. Jack Krovocheck had on the previous date sought, by facsimile mail, a cancellation of the

oral argument on objections. Lucas said he faxed a response on the same day stating that only the commission had authority to cancel agenda items where the request was not made at least 48 hours in advance of the meeting. Lucas invited further comment from Krovocheck but did not receive it. (No action was taken by the commission on the request to cancel the objections argument.)

Tim Rider, Administrative Law Judge, provided a brief overview of the case. He said at issue was land used to access a gaming facility in Lawrenceburg. The ALJ found the City of Lawrenceburg had at least a valid easement, and he found there was no evidence to support an intention by the City to abandon the easement.

Mary Davidsen, attorney for the Department of Natural Resources, said the City of Lawrenceburg had an easement which was being appropriately used for access to the casino. In addition, the DNR agreed with the finding by the ALJ that there was no abandonment of the easement.

John Dornette, attorney for the City of Lawrenceburg, said his client supported the conclusion of the administrative law judge, although the City also contended Krovocheck had no interest in the property. He asked the commission to affirm the findings and order by the ALJ.

Peter Rusthoven, attorney for Indiana Gaming Company, said the claim by Krovocheck should be denied for three reasons:

Ownership of the real estate was not technically at issue in the permit;

A survey stipulated by the parties shows the parcel lies within the right-of-way owned by the City of Lawrenceburg; and,

Krovocheck's remedy would be an action for inverse condemnation against the City rather than an administrative review of the permit, even if his claim were valid.

Also, he argued the objections filed by Krovocheck were irrelevant to the findings made by the administrative law judge.

Patrick Ralston moved to affirm the revised findings and nonfinal order of the administrative law judge as contained in the commission packet. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

In the Matter of Final Adoption of Proposed Amendments to 310 IAC 16-2-2 (Water Well Drilling Duplicate Contractor License Fee) and 310 IAC 3.1-11-3 (Fee to Renew Wild Animal Possession Permits); Administrative Cause Numbers 96-083W and 96-079W (LSA #96-107(F) and #96-106(F))

Steve Lucas presented this item on behalf of the hearing officer. He said these items would eliminate two minor fees, for a duplicate water well drilling contractor license and for a wild animal possession permit, and had previously been given final adoption by the commission. The items were returned to the agenda when the Indianapolis Star neglected to publish them so as to notify interested persons of the original public hearings. New publications were accomplished and hearings rescheduled, although no one appeared to comment. He recommended that both provisions be amended to eliminate the fees.

Joe Siener moved to give final adoption to the repeal of the duplicate water well drilling contract license fee and the repeal of the wild animal possession permit renewal fee. Jerry Miller seconded the motion. Upon a voice vote, the motion carried.

At approximately 2:45 p.m., EST, the meeting was adjourned.