

NATURAL RESOURCES COMMISSION

Minutes - February 19, 1997

MEMBERS PRESENT

Michael Kiley, Chair
Patrick Ralston, Secretary
John Goss
Kevin Betz
Steve Cecil
Damian Schmelz
Joe Siener
Terri Moore

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas	Hearings
Bill Teeguarden	Hearings
Jennifer Kane	Hearings

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Costello	Executive Office
David Herbst	Executive Office
Paul Ehret	Executive Office
Lori Kaplan	Executive Office
Louise Krick	Executive Office
Glen Salmon	Fish and Wildlife
Tom Meyer	Fish and Wildlife
Michael Sponsler	Reclamation
Bruce Stevens	Reclamation
John Richardson	Reclamation
Tim Taylor	Reclamation
John Bacone	Nature Preserves
Angila Prather	Legal Section
Ihor Boyko	Legal Section
Sylvia Wilcox	Legal Section
Myra Spicker	Attorney General's Office
Jennifer Morris	Attorney General's Office

GUESTS PRESENT

Kent Moore	Jack Jarrett
Otto Neyhorse	Mark Bush
William A. Miller	Albert Lopez
Barbara Marlowe	Barry Ledbetter
Rich Lee	Don Foertsch
Brian Lee	Dana Meier
Jim Rice	Ted Heemstra

Ken Mann	Dr. and Mrs. R. Robb
Gert Mann	Max Goodwin
David Coker	Jeff Stant
Bobby Atkinson	Robert Armstrong
Nat Noland	Don Mottley
William Lee Gadz	John Gurnitz
Judy Gurnitz	

MONTHLY REPORTS

Michael Kiley, Chair, called to order the regular meeting of the natural resources commission at 10:03 a.m., EST on February 19, 1997 in the Indiana State Museum, 202 North Alabama, Indianapolis, Indiana. With the presence of eight members, the chair observed a quorum.

Damian Schmelz moved to approve the minutes of the January 23, 1997 meeting. The motion was seconded by Joe Siener and approved by voice vote of the commission.

Patrick Ralston presented the Director's Report. "I've had a very busy month and met with several wildlife groups." He said the proposed budget for the DNR for the next biennium was submitted to the House Ways and Means Committee.

Ralston noted that Joyce Martin was the new Executive Assistant to the Governor for IDEM and DNR. He described her as a "caring person" who has an "astute understanding" of environmental and natural and cultural resource issues.

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

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, reported that his advisory council met and recommended for approval to the commission each of the four nature preserves on the current agenda. The proposed nature preserves were described by John Bacone and well-received by the council.

Costello said Jim Hebenstreit, Dawn Deady, and Steve Lucas made presentations to the advisory council concerning the Lake Michigan Coastal Coordination Program. Discussion topics focused upon the Healthy Beaches Initiative and concerns for wastewater discharges into Lake Michigan from boats. "I found the discussions interesting enough to encourage their inclusion in the April agenda of the commission in Northwest Indiana."

Joe Siener, Chairman of the Advisory Council for the Bureau of Water and Resources Regulation, said his council did not meet in February. Siener reflected, however, that his advisory council had also previously taken up the subject of sewage discharges from boats into Lake Michigan and encouraged action to further restrict those discharges. He said a member of the council, Bill Pippinger, had volunteered to participate in the Technical Task Force on E. coli.

David Herbst, Deputy Director for the Bureau of Water and Resource Regulation, reported briefly upon addition releases of river otters in Indiana. He said one otter was shot, and the individual responsible attempted to sell its pelt. Herbst said the individual had been successfully prosecuted for killing of a protected wild animal species. He said another otter was killed by an automobile.

Chairman Kiley asked Herbst if staff might prepare a discussion item on the status of yellow perch and the shutdown of commercial fishing for perch in Lake Michigan for the April commission meeting. Herbst responded that he had already asked the division of fish and wildlife to prepare a report.

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, said the "major preoccupation" of the bureau for the last month has been legislative issues before the Indiana General Assembly. He said the division of reclamation issued a cessation order with respect to a blasting violation at Kindell Mine #3, the first cessation order ("CO") of its kind for some time.

BUREAU OF LANDS AND CULTURAL RESOURCES

Division of Nature Preserves

Consideration of the Dedication of an Addition to Spicer Lake Nature Preserve, St. Joseph County

John Bacone, Director of the Division of Nature Preserves, introduced this item. He explained that Spicer Lake Nature Preserve is currently a 38 acre preserve owned and managed by the St. Joseph County Parks and Recreation Department. The nature preserve is located in the northwest corner of the county, adjacent to LaPorte County, Indiana and Berrien County, Michigan. The proposed addition would result in the inclusion of another 158 acres south and east of the existing preserve. Within the new area is a substantial wetland and Lancaster Lake. In addition, the Master Plan for the nature preserve would be modified.

Bacone reported that a public hearing was held December 10, 1996 at the Nature Center located on the preserve to receive comments regarding the addition. Two representatives of the South Bend Audubon Society spoke in favor of the proposal, and no one spoke in opposition. He said the division recommended approval of the dedication of the additional acreage and of the modified Master Plan.

Damian Schmelz moved to approve the Addition and the modification of the Master Plan for the Spicer Lake Nature Preserve in St. Joseph, County. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Consideration of the Dedication of an Addition to the Art Hammer Wetlands Nature Preserve in Noble County

John Bacone presented this item. He said the proposal would add 217 acres to the existing 115 acres already protected by the Art Hammer Wetlands Nature Preserve. Included are wetlands on both sides of the North Branch of the Elkhart River, and the site is connected to the Rome City Wetland Conservation Area to the north. Bacone explained that the nature preserve is owned by ACRES, Inc. and is part of a large wetland complex located in northern Noble County. He noted that the Master Plan would also be amended to reflect the addition.

Ted Heemstra spoke as President of ACRES, Inc. He expressed support for the proposed addition and noted that his organization owned 35 sensitive properties in northeastern Indiana, 20 of which would now be formally dedicated as nature preserves.

Damian Schmelz moved to approve the Addition and the modification of the Master Plan for the Art Hammer Wetlands Nature Preserve in Noble County. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Consideration of the Dedication of the Robb Hidden Canyon Nature Preserve in Steuben County

John Bacone introduced this item. He said the proposal was for a new nature preserve which would protect a scenic wooded ravine on the south side of Ball Lake in Steuben County. Included is an old second growth mesic upland forest "whose trees grow straight and tall" on the steep slopes of the ravine. The nature preserve would also help protect the water quality for Ball Lake. The nature preserve includes 28 acres and is owned by ACRES, Inc.

Ted Heemstra also expressed support for the dedication of the Robb Hidden Canyon Nature Preserve. He introduced the Robb family whose participation, he said, was instrumental to the success of the effort.

Damian Schmelz moved to approve the Dedication of the Robb Hidden Canyon Nature Preserve in Steuben County. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Consideration of the Dedication of the Emanuel M. Popp Nature Preserve in Allen County

John Bacone also introduced this item. He explained that the proposed Emanuel M. Popp Nature Preserve was a 20-acre tract owned by ACRES, Inc. in Allen County. He said the Indiana Heritage Trust Fund helped to acquire title to this property.

According to Bacone, the majority of the woods are a gently rolling upland with a wide mixture of trees. The woods is in an area north of Fort Wayne which is rapidly becoming urbanized. As the surrounding land is developed, the nature preserve will become ever more valuable as a wooded oasis. Because of its location, ACRES, Inc. hopes the site will become particularly useful for nature education.

Ted Heemstra also expressed support for the dedication of the Emanuel M. Popp Nature Preserve. The preserve would serve a key role in an increasingly urbanized region.

Chairman Michael Kiley praised ACRES, Inc. for its crucial role in encouraging the protection of natural areas like the Popp Nature Preserve in northeastern Indiana. He said ACRES, Inc. "has been a tremendous resource to Indiana. . . in the preservation of invaluable natural areas for posterity."

Damian Schmelz moved to approve the Dedication of the Emanuel M. Popp Nature Preserve in Allen County. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

BUREAU OF WATER AND RESOURCE REGULATIONS

Division of Fish and Wildlife

Consideration of the Permanent Appointment of Assistant Property Manager at Fawn River State Fish Hatchery

Glen Salmon of the Division of Fish and Wildlife presented this item. He introduced Tom Meyer to the commission and explained that Meyer was a "long-term employee" of the division who was "degreed from Iowa State University." Salmon said that Meyer "has done an outstanding job at Fawn River" and indicated he was recommended by the division for permanent appointment.

Joe Siener moved to approve Tom Meyer for permanent appointment as the Assistant Property Manager at Fawn River State Fish Hatchery. The motion was seconded by Damian Schmelz. Upon voice vote, the motion carried.

LEGAL PROCEEDINGS

Consideration of Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge in the Matter Hoosier Environmental Council v. Department of Natural Resources and Foertsch Construction Company, Inc.; Administrative Cause Number 95-169R

[This item was continued from the January 1997 meeting of the commission. Foertsch Construction Company made a timely request to have the commission's court reporter record the oral argument on objections. Pursuant to 312 IAC 2-1-2(a) and 312 IAC 3-1-12(d), the transcript will form the official record in lieu of these minutes. A summary of pertinent motions follows:

John Goss moved to amend the nonfinal order of the administrative law judge to modify the restriction on the disposal of coal combustion waste from 75% to 50% of the coal extracted from a mine. The motion was seconded by Damian Schmelz and carried by voice vote.

Patrick Ralston moved to delete footnote 16 from the findings. The motion was seconded by Steve Cecil. The motion carried by voice vote.

John Goss moved to approve the findings and nonfinal order of the administrative law judge, as amended, as the findings and final order of the commission. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.]

Directive to Adopt Standards to Govern Amicus Curiae Presentations in Adjudicatory Proceedings

The Chair reflected upon confusion which arose during the January meeting relative to a proposal by the Indiana Coal Council, Inc. to present written argument in *Hoosier Environmental Council v. DNR and Foertsch*. Kiley noted that he originally agreed to the proposal then had second thoughts upon reflecting the Indiana Coal Council was not a party to the proceeding. He expressed apologies for the resulting confusion.

Kiley said the question of participation by non-parties in an adjudicatory action, controlled by the administrative orders and procedures act (IC 4-21.5), was an important issue. The commission was often interested in the perspectives of non-parties in adjudicatory cases, particularly where broad public policy questions were presented, but the very sensitive rights of the parties must not be violated. Arguments of non-parties should not come to be seen by the commission as evidence in the case.

Chairman Kiley reflected that the courts address the issue of non-party participation through the presentation of amicus curiae briefs. Literally, the term means "friend of the court." A similar concept would help balance all interests in the adjudicatory cases which come before the commission, he said, since when the commission considers matters coming from its administrative law judges, it is essentially acting as an appellate court.

Kiley instructed Steve Lucas, Director of the NRC's Division of Hearings, to draft a proposed rule or rules to provide for the presentation of amicus curiae presentations by non-parties. When the draft is prepared, he asked that it be returned to the agenda of the commission for discussion and consideration. Any proposal approved by the commission for preliminary adoption would then go to through a public hearing process.

Consideration of the Report of Report of Public Hearings and Recommendation of the Hearing Officer for the Final Adoption of Amendments to Address Significant and Nonsignificant Permit Revisions Under Indiana SMCRA; Administrative Cause Number 94-080R (LSA #96-246(F))

William K. Teegarden, Hearing Officer, introduced this item. He explained that the proposal was for final adoption of amendments to the surface coal mine and reclamation law to address significant and nonsignificant permit revisions. Teegarden reflected that the proposal had a lengthy history, but prior controversies had seemingly been resolved. He reflected upon a few technical modifications to the proposal as set forth in the commission packet, which were

intended to address concerns, expressed previously by the Attorney General's office, and with those modifications recommended the rules for final adoption.

Nathan Noland, President of the Indiana Coal Council, spoke in favor of final adoption. He said the rules were on the NRC agenda for the third time, with the commission having given them approval twice before. For various reasons, final approval had never been achieved. His hope now was that the language was in a form which would become law.

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, also voiced support for the proposal. He expressed optimism that the concerns of the Attorney General had been addressed.

Ehret also noted that a preamble to the rules had been drafted by the division of reclamation but not included in the rule given preliminary adoption. He said the preamble was important to a full understanding of the rule and should be reflected.

Steve Lucas responded that the most-recent language presented by the division of reclamation to the NRC division of hearings had been forwarded to the Legislative Services Agency without modification. Changes were made by LSA, presumably in an effort to maintain conformance with that agency's model for rule drafting. Lucas suggested that Ehret's concerns might be addressed through the development of a nonrule policy document.

Ehret said a nonrule policy document should be adequate to articulate the design of the preamble. He said language to that purpose would be placed on the commission agenda, possibly for its March meeting.

Damian Schmelz moved to give final adoption to the amendments to Indiana SMCRA (310 IAC 12-3-121) to address significant and nonsignificant permit changes. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

ADJOURNMENT

At approximately 11:43 a.m., EST, the meeting was adjourned.