

## NATURAL RESOURCES COMMISSION

Minutes - May 22, 1997

### MEMBERS PRESENT

Michael Kiley, Chair  
Larry Macklin, Secretary  
Mary Titsworth Chandler  
Jane Ann Stautz  
Joseph Siener  
John Goss  
Jerry Miller  
Steve Cecil  
Damian Schmelz  
Steve Cecil  
Tom Cobb

### NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas	William Teegarden
Jennifer Kane	Sharon Turk

### DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Paul Ehret	Executive Office
Lori Kaplan	Executive Office
Dave Herbst	Executive Office
D. J. Sigler	Executive Office
Angie James	Executive Office
Virginia Simone	Legal Counsel
Melissa Stefanovich	Legal Counsel
Angila Prather	Legal Counsel
Barbara Nardi	Legal Counsel
Mary Ann Habeeb	Legal Counsel
John Simpson	Water
Mike Neyer	Water
George Bowman	Water
Jim Hebenstreit	Water
Janet Henderson	Water
Robert Waltz	Entomology
Gregg McCollam	Fish and Wildlife
Glenn Lange	Fish and Wildlife
Steve Jose	Fish and Wildlife
Jim Mitchell	Fish and Wildlife
Neil Ledet	Fish and Wildlife
Jim Slutz	Oil and Gas

Jim AmRhein	Oil and Gas
Harry Nikides	Soil Conservation
Harold Doremire	Soil Conservation
John Davis	Land Acquisition
Jerry Pagac	State Parks and Reservoirs
Gary Miller	State Parks and Reservoirs

**GUESTS PRESENT**

Earl Buckley	Chris Jolivette
Doug Allman	Peter Racher
Bill Solomon	Dona Masson
John Hillis	Rex Harris
Linda Lasley	Dick Mercier
Mike Grimshaw	Tom Kinder
Jim Brugh	Faye Wells
Jon Voelz	Sue Shadley

**MONTHLY REPORTS**

Michael J. Kiley, Chair, called to order the regular meeting of the natural resources commission at 10:08 a.m., EST, on May 22, 1997 in the Indiana State Museum, Indianapolis, Indiana. With the presence of eleven members, the Chair observed a quorum.

Joe Siener noted that the proposed minutes of the previous meeting incorrectly reflected it was held on April 28 and April 29. Instead, the meeting was held on April 29 and April 30. He asked the minutes be amended to correct the error. The correction was taken by consensus.

Jerry Miller moved to approve the minutes of the April 1997 meeting, including the amendment to reflect it was held on April 29 and April 30. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's Report. He expressed great appreciation for the efforts of Joyce Martin, the Governor's Executive Assistant for the Environment, in working with the DNR. He said she provided notable support in communication with the Governor, as well as with the Indiana General Assembly.

Macklin said that he was generally pleased with how the DNR had faired with the legislature this session. Ed Hansen was singled out for his dependable service in working with individual legislators. Macklin said the DNR received \$5,000,000 for Heritage Trust initiatives and another \$5,000,000 to purchase reclaimed mine lands. One major disappointment was the decision of the legislature not to provide improved funding for DNR professional personnel.

Macklin reported that he participated in the dedication of the Heritage Trail near Lafayette as part of the Wabash Corridor effort. With Paul Ehret, he visited several active and reclaimed

surface coal mines in southwestern Indiana. He reviewed the Fort Wayne levee project with David Herbst, D. J. Sigler, and Tom Dustin of the Izaak Walton League. "We were very pleased that we may proceed with bonding for the Indiana State Museum."

Director Macklin said the DNR was seeking to recruit lifeguards for all the public beaches within its properties, but the effort had not yet been fully successful. Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, added that the lifeguard problem was most pronounced at Patoka Lake, where high waters have precluded swimming the past two spring seasons. One possible approach would be to allow swimming "at your own risk" for periods and sites where lifeguards are unavailable. Macklin clarified that the difficulty in filling lifeguard positions was a problem only for beaches, and all swimming pools would be staffed.

Jerry Miller, Chairman of the Advisory Council for the Bureau of Lands and Cultural Resources, said his council did not meet in May.

Joe Siener, Chairman of the Advisory Council for the Bureau of Water and Resource Regulation, said his council received a report from Jim Mitchell concerning the proposed rule amendments to govern antlerless deer bag limits and the extra deer license distribution system. He said these proposed amendments were received favorably by the advisory council and would be considered later in the meeting by the commission. Siener noted the advisory council also received a report from the division of water concerning conservancy district issues, and proposed rules would be presented to the commission on this issue at a later date.

David Herbst, Deputy Director for the Bureau of Water and Resource Regulation, reported that wildlife biologists have identified five active American bald eagle nests in the state this spring. "We are well on the way to re-establishing this previously extirpated species to Indiana. It is to the credit of our dedicated staff and the support of a more-enlightened public."

Herbst also reported that a broad-based working group had been established to address bass tournament fishing on the state's public freshwater lakes. He said that joining in the effort were legitimate fishing organizations who shared concerns from abuses by a handful of irresponsible fishermen.

Herbst outlined a "televised interactive forum" produced by the Indiana University School of Continuing Studies entitled Water! The program was taped May 12 and included participation by Gwen White, a biologist with the division of soil conservation; and Dan Willard, a SPEA professor from IU and member of the advisory council for water and resource regulation. Herbst said the program would be televised on May 29 by WTIU in Bloomington and by other Indiana public television stations in early June.

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, expressed concerns for Congressional restraints placed on abandoned mine land ("AML") funding. He explained that dollars attributable to coal tonnage from Indiana and other coal mining states are not being returned in a timely fashion. "Under funding that program contributes to environmental harm in southwestern Indiana." Ehret explained that he was working with several national organizations

to secure prompt return of funding. Ehret also noted that Andy Gilmore is the new director of the Indiana OSM office.

Chairman Kiley introduced Tom Cobb as the new IDEM representative on the commission. He said Cobb was an experienced environmental attorney and criminal law attorney whose presence would make an important contribution.

Lori Kaplan, Chief Legal Counsel for the Department of Natural Resources, introduced the newest member of her legal section. She said Melissa Stefanovich was a practicing attorney from Lake County whose previous work experience included representation of the Little Calumet River Development Commission.

## **BUREAU OF MINE RECLAMATION**

### **Division of Oil and Gas**

#### **Consideration of a Nonrule Policy Document to Establish a Schedule to Assist in Consistent Application of Penalty Assessments by the Division of Oil and Gas**

Angila Prather, Legal Counsel for the Division of Oil and Gas, introduced this item. She explained that the division sought to design a penalty policy which would deter owners and operators from violating environmental provisions in the state's oil and gas law. A schedule or matrix would be developed to provide incentives to take precautions against falling into noncompliance.

Prather explained that, typically, penalties would not be sought for minor first-time violations, but repeat offenders would be assessed civil penalties. Also, any significant violation would result in the assessment of a penalty. For example, the intentional dumping of waste fluid or an exceedance of the maximum permitted injection pressure for a Class II well (which might pollute an Underground Source of Drinking Water ("USDW")) would result in a civil penalty. In these cases, the DNR may assess a maximum penalty of \$10,000 for each day a violation exists. Prather noted that the three primary factors to be used in determining the amount of a civil penalty were

1. history of violations by the operator;
2. seriousness of the subject violation; and,
3. fault of the operator in causing the violation.

Prather distributed handouts which helped further clarify the penalty schedule. She asked that the commission approve the schedule as a nonrule policy document and authorize its publication in the Indiana Register.

James Slutz, Director of the Division of Oil and Gas, also spoke briefly in support of the nonrule policy document. The Chair reflected that the schedule was "very much needed" and congratulated Slutz and his staff for its preparation.

In response to a question from the commission, Slutz reflected that oil and gas production continued to be an important industry, particularly near Evansville. He said an encouraging new development was exploration and production of gas in south central Indiana.

Jerry Miller moved to approve the schedule and matrix for the assessment of civil penalties under IC 14-37 and 310 IAC 7-1, as a nonrule policy document of the commission, and for its publication in the Indiana Register. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

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

### **Division of Land Acquisition**

#### **Consideration of the Transfer of Property Rights to Patriot Water Company for the Installation of Waterline Equipment to Serve Western Switzerland County, including the Splinter Ridge Fish and Wildlife Area**

John Davis, Director of the Division of Land Acquisition, presented this item. He explained that the Patriot Town Council wishes to obtain an easement across the Splinter Ridge Fish and Wildlife Area in Switzerland County to provide water supply. The Patriot Water Company has agreed to provide the DNR with free waterline hook-ups in the portion of the fish and wildlife area located in Switzerland County, if the easement is granted. A portion of the Splinter Ridge Fish and Wildlife Area is also located in Jefferson County. Davis suggested the arrangement appeared to support both local interests and those of the DNR and was recommended for approval.

Joe Siener moved to approve a written resolution instructing the Indiana Department of Natural Resources to cooperate with the Town of Patriot and the Patriot Water Company to provide an easement across the Splinter Ridge Fish and Wildlife Area, conditioned grant of the easement upon free waterline hook-ups for the department within the portion of the fish and wildlife area located in Switzerland County. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

## **DIVISION OF STATE PARKS AND RESERVOIRS**

#### **Consideration of the Establishment of Fees for The Fort Golf Course at Fort Benjamin Harrison State Park**

Gerald Pagac, Director of the Division of State Parks and Reservoirs, presented this item. He explained that the proposal would establish green fees and cart fees during the 1997-1998 season at The Fort Golf Course. The division recommended that green fees per player be set at \$39 for 18 holes; \$22 for nine holes; and \$25 at twilight. The cart fees per player would be \$12 for 18 holes; \$7 for nine holes; and \$10 at twilight. Golf outings per player for 18 holes would be \$60, covering green fees and cart fees only.

Chairman Kiley asked whether the proposal would include a discount for military personnel. Pagac said there would be a 25% discount for active and retired military personnel, applicable to green fees only. He said the discount was consistent with the terms under which the DNR acquired the golf course from the U.S. Army.

Jack Costello reflected that the greens fees proposed for The Fort Golf Course were competitive with comparable courses in Indiana. Modifications made following acquisition by the DNR had made a good course even more attractive. Costello reflected, "It's a tremendous course, but it's not easy."

Jerry Miller moved to approve the establishment of fees for The Fort Golf Course at Fort Benjamin Harrison State Park upon the schedule recommended by the division of state parks and reservoirs. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

## **BUREAU OF WATER AND RESOURCE REGULATION**

### **Division of Soil Conservation**

#### **Informational Item: Roles and Responsibilities of Soil and Water Conservation Districts**

Harold Doremire, Assistant Director of the Division of Soil Conservation, presented this item. He explained soil conservation districts were formed as a consequence of the 1930s drought and dust storms which caused topsoil erosion and land to become unproductive. He further explained the federal government formed the USDA Soil Conservation Service to address soil erosion issues. Under President Franklin D. Roosevelt, model legislation was drafted and sent to all states in hopes that local soil and water conservation districts would be formed in partnership with the USDA Soil Conservation Service. In Indiana, the law was adopted in 1937. In the 1970s, Gibson was the last county in Indiana to organize a soil and water conservation district.

Doremire defined a soil and water conservation district as a unit of state government which is responsible for soil and water conservation. The purpose stated in law is to provide means for interested local people to come together and voice concerns about the natural resource problems and issues in their county, then to prioritize the resolution of those problems.

Doremire explained soil and water districts are controlled by three elected officials and two appointed supervisors serving staggered three-year terms. Districts employ professionals locally to provide assistance to landowners, and they typically share offices with USDA employees. Resource specialists and others within IDNR work in partnership to help serve districts by providing natural resources technical assistance and by providing information to land users. He explained the division of soil conservation helps organize the district elections.

Doremire explained a district's legal powers include:

1. carrying out conservation measures on public and private land;

2. the construction, improvement, operation and maintenance of conservation structures;
3. providing financial and other assistance to land users for needed conservation projects;
4. acquiring and disposing of property;
5. managing property;
6. providing seed, fertilizer, and equipment to assist landowners in adopting soil conservation practices;
7. helping to develop conservation plans;
8. assuming control over managed projects started by other units of governments; and,
9. requiring land users to contribute money, services, or material, or to utilize land in a way that enhances conservation.

Districts are not authorized to do any of the following:

1. exercise the power of eminent domain;
2. borrow money, levee taxes, sell bonds or demand contributions;
3. buy or sell farm products except those used in conservation;
4. conduct agricultural research (although districts can conduct demonstration plots in cooperation with Purdue University).

Doremire explained many demonstration plots are geared toward planner-developer construction to illustrate the value of reducing soil erosion and off-site sedimentation. He said "it is more than just a farm-related agency."

Doremire said the state legislature requires soil and water districts to conduct county landfill erosion and sedimentation reviews. District supervisors are required to visit two landfills yearly and to submit a report containing current erosion and sedimentation problems, as well as recommendations for mitigating those problems. He noted, however, there are "no teeth" to the rule which could force a landfill to adopt prescribed conservation measures.

Doremire explained that for commercial developments which are five acres or larger, the developer or planner must submit a conservation plan for the control of erosion and off-site sedimentation. Developers must submit the plan to the local soil and water conservation district. The district reviews the plan and provides technical assistance to IDEM, the agency which is empowered to enforce what is commonly called "Rule 5" (327 IAC 15-5).

Doremire explained soil and water districts are funded primarily through the counties. He said districts request funds to cover operating budget and district employees (considered county employees) from the county council. He said division of soil conservation also provides operating grants and additional money totaling approximately \$13,000 dollars; \$3,000 of that money is channeled toward operating expenses and the remaining \$10,000 is used for soil and water conservation programs. Doremire said there is increased visibility for districts, with "a lot more people coming onboard with more enthusiasm for getting the job done."

## **DIVISION OF WATER**

## **Informational Item: Video of the 1997 Flood on the Ohio River and the 1996 Flood at the Hamilton Lake Dam**

The division of water presented a video tape depicting the 1997 flood event on the Ohio River, as well as the 1996 flood at Hamilton Lake Dam. These two unrelated events are documented in a single video tape.

### **Ohio River**

According to the video tape, the 1997 flood on the Ohio River destroyed or substantially damaged 100 homes. The flood adversely impacted both commercial and residential structures in the floodplain. On March 6, the federal government declared a federal disaster for 13 counties in Indiana along the Ohio River (Clarke, Crawford, Dearborn, Floyd, Harrison, Jefferson, Ohio, Jay, Posey, Spencer, Switzerland, Vanderburgh, and Warren Counties).

At some points, the Ohio River rose 24 feet in 24 hours. The event was a 50-year frequency flood, a flood having a 2% chance of being equaled or exceeded in any given year. In addition to structural damage, some sections of highway were closed or inaccessible due to high water or "wash outs."

An especially hard-hit area was the town of Patriot. The water rose 20 feet above the bank elevation, causing damage to homes, cars, and the town hall. In an effort to curtail the effects of the flood, the citizens of Patriot sand-bagged areas of high risk. In the town of Troy, the water rose 38 feet above the bank elevation. Despite a flood wall and numerous pumps in Troy, a back up levee was needed for flood protection. In the town of Utica, a large number of homes below the base flood elevation were substantially damaged.

In a past administrative case, *Stanton v. DNR*, the agency correctly concluded that a residence was improperly built in the floodway and ordered removed. Flood levels around the home reached approximately 14 feet. Had there been a 100-year flood event, the water level would have been even higher.

### **Hamilton Lake**

In 1996, a life-threatening situation occurred at Hamilton Lake located in northern Indiana. Hamilton Lake has two dams located in a crucial outwash area on the south end of the 790 acre lake. The dams were built in 1832 and 1840 for mill purposes. Today, Old State Road 1 crosses the north dam and State Road 427 crosses the south dam.

A 1959 topographic map showed the dams raised the elevation of a pre-existing, natural lake by approximately 14 feet. The state highway department acquired ownership of the dams in 1936; in 1958, ownership was transferred to DNR. In the 1970s, the DNR performed work on dams. The north dam (approximately 16 feet high and 104 feet long) is located on Fish Creek and considered as a high hazard dam. A reinforced concrete arch through the dam constructed in 1923 is only outlet to the lake that will pass any significant overflow. In mid 1930s, the state highway department widened the embankment and extended the concrete culvert outlet. The



1981 US Army Corps of Engineers Phase I Report classified the north dam as unsafe because of an inadequate spillway, the poor condition of the concrete arch culvert, and the lack of structural maintenance.

According to the video, the south dam is built across the old mill race leading to Fish Creek and is also considered a high hazard structure (21 feet high 280 feet in length). A box culvert goes through embankment and is no longer capable of passing any significant flow. In the 1930s, the state highway department widened the embankment and extended the box culvert. In 1981, the US Army Corps of Engineers also classified this dam as unsafe due to possible overtopping of dam, disturbed soil areas, trees on the downward stream flow, and generally poor maintenance.

On May 17, 1996, the dam safety staff from the division of water, along with other state officials, responded to an emergency. The north dam was overtopped and inundated with the state highway embankment acting as a dam. The lake was within one foot of overtopping the highway embankment and the pool level was still rising. The south dam, which had been plugged in the 1970s, provided no relief to the flood pool. In addition, the highway embankment was weakening and showing signs of failure under pressure from the lake. State officials and highway crews tried to stabilize highway embankment with rock, and volunteers sandbagged low lying southwest areas.

"Miraculously everything held," and damage was limited to water being discharged through the adjacent mobile home park and to high water that flooded structures along the lake. If the structures had failed, loss of life would have been possible with extensive downstream flooding and property damage also likely to occur. Currently, the Hamilton Lake dam issue is deemed a high priority by the DNR.

### **Commission Discussion**

Chairman Kiley described the video as a "very good piece," and he asked about future plans for Hamilton Lake. Herbst responded that approximately \$5,000,000 was requested to start on the Hamilton Lake project, plus \$2,500,000 to address the other 40 dams on state property (i.e. state parks and forests). He said there is currently a total of \$2,000,000. Herbst explained that "we are going to have to go back and regroup."

Kiley also asked about the status of the Stanton case. Lori Kaplan said Stanton is currently on judicial review with the Attorney General's Office representing the DNR.

Macklin complimented the DNR staff, describing the presentations as "tremendous." He recommended showing the video to members of the Indiana General Assembly.

Damian Schmelz suggested continuing to have informational presentations on the agenda "if not every meeting, several times a year because I think they are needed." Kiley expressed concurrence.

## **LEGAL PROCEEDINGS**

## Natural Resources Commission, Division of Hearings

### **Consideration of Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge (and of Objections by the Department of Natural Resources) in the matter of Joan A. Kinder v. Department of Natural Resources; Administrative Cause No. 96-036W**

William Teeguarden, Administrative Law Judge, introduced this item. He said that at issue is the application by Joan Kinder for a permit to place a concrete seawall along the shoreline of Jimmerson Lake in Dekalb County. Currently, Kinder has a decaying seawall built of railroad ties, which though lawful when placed, cannot be replaced as a wooden seawall. By rule, a seawall must now generally be constructed of stone, concrete, or steel.

Teeguarden explained that the DNR approved the seawall application but conditioned the approval upon the use of glacial stone. Kinder took administrative review of the condition, maintaining the need for a concrete seawall. Teeguarden said he ultimately found for Kinder on the basis that there is no differentiation in the rule among the three approved materials, and the DNR could not here preclude the use of concrete. He said his nonfinal order would allow the use of concrete, and to this order, the DNR had filed timely objections.

The Chair asked if there were other concrete seawalls in the vicinity. Judge Teeguarden indicated there were other concrete seawalls along Jimmerson Lake but not immediately contiguous to the Kinder property. Barbara Nardi, attorney for the DNR, said there were concrete seawalls to the north but not to the south of the property.

Nardi reminded the commission that it had approved mapping of several northern Indiana lakes to help better delineate wetlands, as well as areas of particular concern. Although not within a "wetland," she said the Kinder property was identified as an area of "particular concern." She said denial of a concrete seawall was based upon concerns by the division of fish and wildlife for aesthetics and the natural scenic beauty of the lake. Nardi explained that a biologist for the DNR testified the division would recommend approval of a concrete seawall within an area of particular concern only where warranted to prohibit erosion, and erosion was not a problem at this site. She urged that the ALJ had failed to properly consider the expert testimony of the DNR's biologist in this regard.

In addition, Nardi argued that the administrative law judge failed to implement the provisions within the rule for the placement of permanent structures requiring there be a showing of no environmental harm. The DNR provided an expert showing the placement of a concrete seawall would result in environmental harm to Jimmerson Lake, and Kinder offered no expert testimony regarding environmental harm.

Tom Kinder spoke on behalf of Joan Kinder. He said he was a civil engineer and competent to design and construct an appropriate concrete seawall. "I'm going to put in a professionally-engineered, well-designed concrete seawall." He argued the DNR lacked standards and specifications for seawall placement, but a concrete seawall was more effective for soils control than a stone seawall. Tom Kinder conceded that uniform wave refraction might be an issue on some inland lakes, making a stone seawall preferable to a concrete seawall, but he denied wave

refraction was a significant issue for this portion of Jimmerson Lake. He contended there was no scientific basis for denying a concrete seawall in this instance. "Let's be consistent and uniform."

David Herbst urged that DNR biologists had knowledge of what were natural conditions on public freshwater lakes. As a consequence, biologists were the proper persons to testify as to natural scenic beauty.

Damian Schmelz moved to approve the concrete seawall application by Joan Kinder, upon the condition that the seawall be professionally designed and placed to minimize site disruption. Mary Titsworth Chandler seconded the motion.

Herbst argued that Finding 48 and Finding 49 removed the ability of biologists to review lake issues. He said the area south of the Kinder property was a natural cover and in need of protection. He expressed fears that if Kinder were permitted to place a concrete seawall, a "domino effect" would eventually result in concrete seawalls encircling the lake.

Tom Cobb said he was persuaded that DNR personnel were the ones with the expertise to determine what types of seawalls should be placed and where. "I think DNR has the role of deciding whether a particular seawall is appropriate at a specific place."

Steve Cecil suggested Finding 49 was the focus of sensitivity by DNR personnel. Although not necessarily intended or anticipated by the administrative law judge, he said Finding 49 might be inflammatory. Finding 49 provides "There is no reason to believe that a fish and wildlife biologist qualifies as an expert on natural scenic beauty." Cecil recommended the commission delete the finding from its final order.

Kiley asked Schmelz and Chandler whether they would accept Cecil's suggestion as a friendly amendment. They indicated they would.

The Chair then called the motion for a vote as to approval of the findings and nonfinal order of the administrative law judge as entered on April 18, 1997, with the modifications that Finding 49 be deleted and the final order specify the seawall be professionally designed and placed to minimize site disruption. By a count of hands, seven voted in favor of the motion. Tom Cobb voted against the motion. The Chair ruled the motion had carried.

**Consideration of Report, Findings of Fact and Nonfinal Order of the Administrative Law Judge (and of Objections by the Claimant Concerning the Merits and of Objections by the Respondents Concerning Standing) in the matter of Faye Wells v. Department of Natural Resources, Cass County Board of Commissioners, and American Timber, Bridge & Culvert, Inc.; Administrative Cause No. 95-173W**

The Chair called this matter to order and called upon Jim Brugh, attorney for Faye Wells, to present his oral argument. Brugh introduced his client, Faye Wells, and proceeded with his argument.

Brugh represented that Faye Wells was a 17-year resident of Cass County who has enjoyed the use of Pipe Creek for the past ten years. Brugh said that for consideration is the replacement by the Cass County Commissioners of a steel bridge over Pipe Creek with a creosote-treated timber bridge. The administrative law judge had, he said, determined to affirm approval of a floodway permit granted in favor of the Cass County Commissioners. Brugh argued the ALJ committed several factual and legal errors in affirming the permit.

Brugh argued that "creosote leaks out of bridges constructed of treated timbers" and will always continue to do so. The chemical is "carcinogenic." He said the issue is whether this continuing release of a toxic chemical is harmful to aquatic resources within the floodway of Pipe Creek. "The granting of this permit is the grant of permission to pollute."

Brugh urged that the policy of the state "is to protect our waters." In support of the policy, creosote-treated timbers should be prohibited on public waterways. He said the commission supports this policy for public freshwater lakes where, by rule, the use of treated timbers for seawalls is forbidden. According to Brugh, it is "intellectually inconsistent" not to also prohibit creosote-treated timbers on bridges.

"Judge Rider missed it," according to Brugh, by accepting the expert testimony of Dr. Brooks and rejecting the expert testimony of Dr. Spacie. Spacie reflected upon the potential phototoxicity of even small quantities of polycyclic aromatic hydrocarbons (PAHs) emitted by creosote. Phototoxicity can result when PAHs become more toxic to organisms based upon exposure to sunlight. Dr. Brooks is a frequent spokesman for the industry, and his testimony has limited credibility.

Brugh related that Faye Wells wrote to Mike Kuss of the Indiana Department of Environmental Management to complain about the placement of creosote-treated timbers on Pipe Creek. For whatever reason, IDEM declined to issue a notice of violation based upon its rules to administer the Clean Water Act. He urged the commission to correct this deficiency and to ban the use of creosote-treated timbers within the permitted site and generally on Indiana rivers and streams.

Brugh reviewed briefly the objections by the respondents to Judge Rider's finding that Wells had standing to initiate this action. He said Wells was seeking to bring the regulatory authorities' attention to a serious environmental problem. The effort was not just for herself, but for all citizens and should not be thwarted.

Virginia Simone spoke as the attorney for the Department of Natural Resources. She said Brugh's argument was well-crafted and "emotionally compelling." She urged the commission decision be made on "sound scientific evidence." According to Simone, when the case was stripped of its emotional appeal, the issues were relatively simple.

First, Simone stated the DNR does not have jurisdiction over rules of the Water Pollution Control Board. "The fact of the matter is, IDEM's rules are not interchangeable with DNR's. IDEM's jurisdiction is not interchangeable with DNR's." She directed the attention of the commission to a letter by Tim Method, Deputy Commissioner for IDEM, which indicated he was

aware of the DNR's policy with respect to the use of creosote-treated timbers; and his acknowledgment the DNR policy did not violate any IDEM practice.

Second, Simone argued that Faye Wells had the burden of proving erroneous the initial determination by the division of water of the DNR to grant the permit to the Cass County Board of Commissioners. Wells must show construction of the bridge using creosote-treated timbers would have unreasonable detrimental affects upon the fish, wildlife, or botanical resources of Pipe Creek. Instead, what Wells provided through her experts was general speculation. Simone noted the evidence showed that even the U.S. Fish and Wildlife Service uses creosote-treated timbers for its fish ladders.

John Hillis spoke as the attorney for the Cass County Board of Commissioners. He reported the county has constructed eleven bridges using treated timbers. He said there was no evidence of fish kills, no evidence of vegetation kills, and no evidence of personal injury resulting from the use of creosote-treated timbers for this purpose. Today, creosote-treated timbers are less expensive to install than steel bridges. "The commissioners feel that this is the way to go." Hillis noted that the experts for the respondents visited the site and performed analyses based upon site conditions, but the experts for Wells did not. He urged the natural resources commission to give final adoption to the findings and nonfinal order of Judge Rider.

Peter Racher spoke as the attorney for American Timber Bridge & Culvert, Inc. He re-emphasized that neither of the experts for Wells ever visited the bridge site or performed testing on Pipe Creek. "There is no evidence. . . of any unreasonable impact of any kind to fish, wildlife, or botanical resources." Racher argued that, to the contrary, Dr. Kenneth Brooks visited the site and took samples. According to Racher, Brooks is a renowned expert on creosote impacts. Brooks found no PAHs in the water, and levels detected from sediments were generally below expected background levels. "The petitioner has not carried her burden."

Racher urged that creosote is not bioaccumulative and does not pose a hazard to wildlife or to humans at the low levels detected in Pipe Creek sediments or present at the bridge site. He reflected that creosote-treated timbers are used on streams within Indiana state parks, as well as on sensitive salmonid streams for fish ladders.

Brugh requested and was provided a brief opportunity to respond to arguments by counsel for the respondents. He said the concerns raised by Dr. Spacie as to phototoxicity could not be addressed in a simple one-time test but rather resulted from weather conditions which could arise sporadically. "Being at the creek is not the name of the game." He argued that there is broad scientific evidence against the use of creosote-treated timbers in waterways.

Tom Cobb said the question of creosote-treated timbers in public waters presented broad rule issues rather than the fact-specific elements of an adjudicatory case. According to Cobb, even though Tim Method reflected that no rules exist prohibiting the use of creosote-treated timbers on bridges that does not mean rules should not exist. New rules could be adopted if scientific evidence warranted.

Damian Schmelz thanked Faye Wells for her efforts. He said citizens should keep us "on our toes" regarding the use of creosote-treated timbers in public waters. Schmelz said he felt "today the evidence supports the conclusions of the ALJ, but new evidence may well lead to a different conclusion in the future."

Jerry Miller expressed concerns for what might be the cumulative effects of multiple bridges using treated timbers with the resulting accumulations of PAHs. At the same time, he expressed concurrence with Schmelz that the evidence in the present case supported the findings of the administrative law judge.

Kiley reflected that he had carefully reviewed the findings of the ALJ. He characterized the amount of PAHs detected in Pipe Creek as being "miniscule" relative to EPA standards.

Damian Schmelz moved to approve the findings and nonfinal order of the administrative law judge as the findings and final order of the commission and to affirm issuance of permit FW-16,608 in favor of the Cass County Board of Commissioners. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

#### **Consideration of Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge (and of Objections by Buckley) in the matter of Earl Buckley v. Department of Natural Resources and Lake County Highway Department; Administrative Cause No. 96-145W**

William Teegarden, Administrative Law Judge, introduced this item. He explained that the substantive issue in the case related to the granting of a floodway permit by the DNR to the Lake County Highway Department. The basis for his decision, however, was completely procedural. Pursuant to the administrative orders and procedures act (IC 4-21.5), an affected person generally has 18 days to seek administrative review. Buckley is an affected person, but he did not initiate his review request until four months after notification. The ALJ said Buckley offered no reason or excuse for the delinquent filing, and the ALJ had no choice but to grant the DNR's motion to dismiss.

Teegarden explained that Earl Buckley was present in person, and the DNR was represented by its attorney, Virginia Simone. He said Duane Alverson of the Lake County Highway Department telephoned to indicate he would not appear for the oral argument before the commission. The dismissal was based upon the DNR's procedural motion, and Lake County did not believe it had information to contribute concerning the motion.

Earl Buckley, a retired attorney, spoke on his own behalf. He said the request for review was based upon the discovery of "certain facts" not properly considered by the DNR in granting permit FW-16,502.

Chairman Kiley advised Buckley that the NRC lacked jurisdiction to hear the case unless Buckley could show a valid reason for the tardiness of his request for review. Buckley said he understood, but a bridge occasioned by the permit had been designed improperly. "With no

skew" to the stream following construction, he said, it was about to "break out and flood virgin wetlands" located within another watershed. "My real interest is in the protection of the environment." Buckley asked the DNR "to reopen the case and have all agencies" cooperate "to rework the project."

Virginia Simone spoke briefly as attorney for the DNR. She urged affirmation of the dismissal by the administrative law judge, asserting again that Buckley's request for review was not timely. Simone said she also had representatives of the DNR present who could speak to the merits of the case.

Kiley said he would ask the DNR to informally review Buckley's concerns and determine whether any action could be taken. He said there was no ability to provide formal administrative review, however, because the request for review was late. He advised Buckley, "As a citizen, you have the right to address this body, but we as a commission can only act where authorized by law. Here we simply have no jurisdiction." In response to a question by Buckley, Kiley said Buckley would receive notification when the DNR acted.

Jerry Miller moved to affirm the findings and nonfinal order by the administrative law judge in which the request for review by Earl Buckley was dismissed. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

**Consideration of the Report of Hearing Officer Regarding Public Hearings and Final Adoption of Amendments to 312 IAC 9-3-7 in the matter of Proposed Amendments to the Rule Section which Governs Antlerless Deer Bag Limits and the Extra Deer License Distribution System; Administrative Cause No. 97-004D; LSA #97-42(F)**

Steve Lucas, Hearing Officer, introduced this item. He explained that for consideration were proposed amendments to the rule section governing deer hunting. Lucas said the proposal had been reviewed at a well-attended public hearing in Indianapolis on March 25, 1997, and during additional public hearings held in March in Plymouth and Bedford. Each of the three hearing officers for the division of hearings conducted one hearing, with information provided to the public during all three meetings by Glenn Lange and Jim Mitchell of the division of fish and wildlife.

Lucas said Tim Rider, Bill Teegarden, and he concurred in the findings contained in the written report to the commission. These findings concluded that the commission has broad discretion to regulate deer hunting and has the legal authority to write the proposed rule. In addition, there was no competent evidence to support the contentions of some hunters that white-tailed deer were about to be "wiped-out" in some areas, based upon the system proposed in the rule and applied during the past hunting season through an emergency rule. The methodology proposed by the division of fish and wildlife was lawful and supportable. Whether to implement the methodology was almost purely a policy question resting within the discretion of the commission.

Jim Mitchell reminded the commission that the proposed rule was brought before it for preliminary adoption in January 1997. He said the principles recommended in January are also

contained in language presented for final adoption, but the proposed "county take" numbers have been modified in several instances.

Mitchell identified three modifications to the section 4 of the hearing officer's report which provided an overview of perspectives from the division of fish and wildlife. He said 36% rather than 34% of hunters interviewed responded that there were too few deer. Reference to 30,000 antlered deer taken was based upon the 1987 hunt and not the 1988 hunt. The number of bucks taken peaked two years ago at 51,000 and not 54,000.

Mitchell said that comments were received as to the appropriate number of deer to be taken with reference to 44 Indiana counties. In each of these counties, the data was reviewed and reassessed. In five counties, the number of deer which could lawfully be taken was reduced based upon the comments. In one county, the take was increased. Other changes were also proposed to specific county takes based upon DNR research. He asked the commission to give final adoption to the rules as modified by the map attached to the hearing officer's report.

Doug Alman of Noblesville spoke on behalf of the Indiana Deer Hunters Association. He said his association wanted a limit on the number of permits granted per county and made "verifiable" as to where a deer is taken. He said conservation officers with whom he had spoken agreed.

Alman said he had no objection to over-the-counter sales but favored a return to the lottery system. His concern was that "we're not measuring hunter success" but rather following numerical and opinion trends factored by the division of fish and wildlife. "We're looking for a balance between hunter concerns and farmer concerns" instead of focusing on biology. He urged the DNR to get back to "real numbers" and to make decisions based upon "real science rather than perception." He argued that the division of fish and wildlife was not doing what it could to improve farmer perceptions because its contacts with farmers were actually decreasing. Alman argued that the primacy source of damage to crops was raccoons and not deer.

Jane Ann Stautz asked whether the division of fish and wildlife should consider return to a lottery for distribution of hunting licenses. Mitchell responded that the current system had been reviewed with leadership in the division of law enforcement and that division was supportive. Also, "we did a random survey of 509 hunters last spring," and 81% said they were satisfied with the system now being considered for adoption as a permanent rule. When asked specifically about the use of a lottery, 78% indicated a desire to keep the current system, and 17% favored a return to the lottery. The determination not to use a lottery was based in large measure upon preferences expressed by the vast majority of hunters.

Joe Siener moved to give final adoption to the amendments to 312 IAC 9-3-7 governing county antlerless deer bag limits and the extra deer license distribution system as supported by the division of fish and wildlife. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

## **Adjournment**

At approximately 1:15 p.m., EST, the meeting adjourned.