

NATURAL RESOURCES COMMISSION

Minutes, May 21, 1998

MEMBERS PRESENT

Michael J. Kiley, Chair
Larry Macklin, Secretary
Damian Schmelz
Steve Cecil
Jane Ann Stautz
Terri Moore
Mary Chandler
Jerry Miller

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Jack Costello	Executive Office
Paul Ehret	Executive Office
Lori Kaplan	Executive Office
Angie James	Executive Office
Carrie Doehrmann	Executive Office
Brent Shike	Executive Office
Bill Stuart	Executive Office
Gerald Pagac	State Parks and Reservoirs
Marian England	State Parks and Reservoirs
Dawn Deady	Water
George Bowman	Water
Scott McClarney	Water
Craig Bair	Engineering
Ed Troche	Law Enforcement
Tom Gross	Museums and Historic Sites
Bill Maudlin	Fish and Wildlife
John Davis	Land Acquisition
Gwen White	Soil Conservation

GUESTS

Charlotte Read	Nick Clark
Mike Gery	Dennis Dunn

MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular monthly meeting of the natural resources commission at 10:05 a.m., EST, on May 21, 1998 in the Trails Banquet Facility, Burnett Road, Tippecanoe County, near West Lafayette, Indiana. With the presence of eight members, the chair observed a quorum.

Kiley also reported upon the Indiana Muskellunge Federation Tournament held recently in Kosciusko County. He spoke positively of the tournament control measures designed to return "muskie's unharmed to the lake." Kiley said 39 fish, averaging 45 inches long and weighing approximately 30 pounds, were caught from Lake Webster. The tournament also included catches from other lakes in the Barbee Chain. He said the tournament organizers were "very complimentary of our fisheries people."

Steve Lucas noted that, due to a computer failure in performing word processing, the segment of the April 29 minutes covering final adoption of recodification of the ginseng rule was omitted from the draft minutes. He distributed the applicable language. Jerry Miller moved to approve the minutes of the April 29, 1998 meeting with the addition of language covering final adoption of the ginseng rule recodification. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's report. He said he attended the monthly meeting of the Historic Preservation Review Board in West Baden. Macklin indicated that, with the great generosity of the Cook Foundation and the leadership of Historic Landmarks, remarkable progress is being made on refurbishment of the West Baden Springs Hotel. "It's a gorgeous project." The chair suggested West Baden would make a good site for a spring meeting.

Macklin reported upon participation in the Arbor Day celebration. He said internal budget meetings were underway. He visited Charlestown State Park, viewing the current facilities and land expected to be transferred from the federal government. Macklin also referenced continuing efforts to restore Peregrine falcon populations.

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

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, said his divisions are busy developing their budgets for the coming biennium.

Lori Kaplan, Deputy Director of the Bureau of Water and Resource Regulation, provided an update on the emergency paddlefish rule. She said following the implementation of the emergency rule, violations resulted in the issuance of 14 criminal arrest warrants. Kaplan also reported upon the department's coming participation in the Clean Water Action Plan. Paul Ehret, Deputy Director of the Bureau of Mine and Reclamation, said the Coal Combustion Waste Workgroup held two more "very interesting" meetings in May. He

reported that the division of oil and gas and the division of reclamation made their budget presentations to the director.

**BUREAU OF WATER AND RESOURCE REGULATION
DIVISION OF WATER**

Consideration of Preliminary Adoption of Recodification of Rules Governing Public Freshwater Lakes; Administrative Cause No. 97-032W; LSA #98-52

George Bowman, Assistant Director of the Division of Water, introduced this item. He said for consideration was the preliminary adoption of the recodification of rules to govern public freshwater lakes. He said the rule draft was a joint effort by the division of water, the division of fish and wildlife, the division of soil conservation, the commission's division of hearings, the legal section, lake groups, contractors, and environmentalists.

Gwen White, biologist for the Lake and River Enhancement program, who also participates in the IDEM Clean Lakes Program, discussed the design of the proposed new rules relative to shoreline protection. She said public education was a key element to any lake protection program, and the effort was to cause riparian owners to consider the waters adjacent to their properties as an "aquatic garden."

White said concrete seawalls can have an adverse physical impact on the shoreline environment. In addition, concrete seawalls provide little diversity for aquatic plants and animals. She explained that the proposed rules would encourage persons wishing to place seawalls to use bioengineered seawalls along natural segments of lake shorelines. For more developed areas, seawalls constructed of glacial stone were generally preferable to concrete seawalls. White noted that homeowners associations along both Lake Wawasee and Lake Maxinkuckee now encouraged existing concrete seawalls to be refaced with glacial stone rather than reconstructed.

White also noted that the new rules encouraged the use of pea gravel rather than sand for the placement of underwater beaches. She said pea gravel was less inclined to erosion than sand. As a result, pea gravel would last longer and cause fewer adverse environmental impacts to lakes than would sand.

Bill Maudlin, biologist for the division of fish and wildlife, said the rules divided lake shorelines into three basic categories. The category warranting the greatest environmental protection is the significant wetland. Within significant wetlands, only bioengineered seawalls would be authorized. An intermediate category was described as one of special concern, and within areas of special concern, generally either bioengineered seawalls or glacial stone seawalls would be placed. The third category is a developed area, and within a developed area, a variety of types of seawalls might be permitted (bioengineered, glacial stone, concrete, riprap, or steel sheet piling).

Steve Cecil asked why four separate sources would be referenced under proposed 312 IAC 11-2-24 as authorization for identifying a wetland: (1) the National Wetlands Inventory; (2) the U.S. Army Corps of Engineers Wetlands Delineation Manual (1987); (3) the National Food Security Act Manual (1994); and (4) another similar or updated method. He urged that the use of four different identification sources would be confusing to the public, particularly since the last source was so open-ended.

Bowman then highlighted some of the more important changes from the current rules which would be incorporated within 312 IAC 11. In addition, he referenced changes made by the advisory council. Under 312 IAC 11-1-2, the division director would be delegated authority to grant, condition, or deny any license for activities under the public freshwater lake. Within proposed 312 IAC 11-2-11, the requirement that glacial stone be quarried from northern Indiana would be deleted. Dry hydrants would be added within 312 IAC 11-3-1 to the category of structures eligible for a general permit. Disputes concerning the placement of temporary piers and other seawalls would be submitted to mediation rather than undergo a complete licensing process. Under 312 IAC 11-4-1, new marinas could receive licenses subject to the condition that they provide pumpouts for proper sewage disposal, rather than that the pumpouts and disposals be a condition precedent. The advisory council directed that the limitation to one-half of a riparian owner's shoreline for the placement of pea gravel, as proposed under 312 IAC 11-4-4(e) in developed areas, would also apply to areas of special concern under 312 IAC 11-4-4(d). In 312 IAC 11-4-5(b), the advisory council urged the term "permit" be changed to "license" to conform to other portions of the rules. In innovative practices, controlled by 312 IAC 11-5-1, ineligible activities "would be spelled out."

Kiley praised the effort to recodify and update the public freshwater lake rules. He urged that public hearings be held in Kosciusko county, Steuben county, and near "Lake Shafer-Lake Freeman area." He said the department and commission needed to emphasize education. "We need to preserve as much of the lake wetlands as we possibly can."

Damian Schmelz moved to give preliminary adoption to the recodification of the public freshwater lake rules under 312 IAC 11, as set forth in the commission packet but with the modifications suggested by the advisory council for the bureau of water and resource regulation. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

BUREAU OF LANDS AND CULTURAL RESOURCES DIVISION OF MUSEUMS AND HISTORIC SITES

Consideration of Progress Report on the Bed & Breakfast Project at the Commandant's Home, West Lafayette Tom Gross of the division of museums and historic sites presented this item. He reminded the commission of the approval it had given for leasing of a privately managed bed & breakfast at the Commandant's home.

Gross said developing the concession contract for the property was a first in state government and required extensive participation by Lori Kaplan in her former capacity as the DNR's chief legal counsel. He said the property had now been successfully refurbished by the managers and was a very positive addition to DNR properties. He invited the commission members to visit the site, which he said was just a few minutes south of the meeting site on S.R. 43.

DIVISION OF STATE PARKS AND RESERVOIRS

Information Item: Partnership with The Museums at Prophetstown

Nick Clark, Executive Director of The Museums at Prophetstown, presented this item. He said the Museums at Prophetstown was an impressive public-private partnership, including the department of natural resources, Greater Lafayette businesses and individuals, Native American Tribes, and a variety of governmental agencies. Formed in 1995, the Museums received a \$250,000 grant for architectural and operations planning from major Lafayette businesses. The department of natural resources is coordinating approximately \$600,000 in land acquisition fees. In addition, a 1997 grant of \$375,000 was received from the Build Indiana Fund to assist with initial development.

Clark said development of the 300-acre campus of The Museums at Prophetstown will be performed in two phases. The first phase will include the Eagle Wing Center, the Wabash Valley Farm, site infrastructure, Prophetstown Village, and Prophetstown Prairie Center. Later, the Native American Center, the Festival Grounds and Pavilion, the Prehistoric Living Village, and the River Trails with Canoe Access will be developed.

Clark reported upon the initial effort, supported by 222 volunteers, to restore native grasses and wildflowers to a portion of the park. He said volunteers have also been assisting with removing exotic species from the surrounding woods.

Dennis Dunn, Prophetstown President, provided an overview of the Woodland Native American Cultural Center. He said the center will provide a place to celebrate the traditions of the Great Lakes Native Americans through education programs for the enrichment of its visitors. Dunn also described a family supported fund-raising effort which will use concrete footprints with the name and residence of the donor at birth imprinted.

PREVIEW OF FIELD TRIP OF PROPHETSTOWN STATE PARK

Indiana State Senator, Mike Gery, welcomed the commission to Tippecanoe County and expressed enthusiasm for its tour of developing Prophetstown State Park. He said the ten-year-old dream of a park in north-central Indiana was being turned into a reality by a "great synergy" of the private and public sectors.

Gerald Pagac, Director of the Division of State Parks and Reservoirs, provided a brief introduction to the afternoon tour of developing Prophetstown State Park. In response to a question from the commission, he reported that one of the parcels at issue in the access road controversy has subsequently been purchased by the department of natural resources.

He said the agency has taken possession, and the commission would be able to view the property during the tour.

LEGAL PROCEEDINGS NRC DIVISION OF HEARINGS

Consideration of Preliminary Adoption of Recodification of Rules which Govern Public Use of Agency Properties from 310 IAC 5 to 312 IAC 8; Administrative Cause No. 96-014P

Steve Lucas, Director of the Division of Hearings, presented this item. He said Marian England had chaired a multidivisional task force to recodify the rules which govern public use of state parks, reservoirs, forests, nature preserves, museums, and fish and wildlife properties. The recommendation was that the rule amendments be given preliminary adoption.

Jerry Miller moved to give preliminary adoption to the recodification of the "property use regs" from 310 IAC 5 to 312 IAC 8 as set forth in the commission packet. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing and Recommendation of Hearing Officer for Final Adoption of Proposed No-Boat Zone along Blue Chip Channel to Trail Creek; Administrative Cause No. 97-175L; LSA #97-321(F)

Steve Lucas, hearing officer, introduced this item. He said for consideration was the final adoption of rule amendments which would establish a no-boat zone in a channel, commonly called the "Blue Chip Channel," which harbors the Blue Chip gaming boat. He said the channel was artificial and connected to Trail Creek, a navigable waterway, in Michigan City.

Lucas said the rule followed a petition for rule change tendered by Blue Chip Casino. Filing of the petition was a condition to receipt of a permit issued to Blue Chip through the division of water for construction in a floodway and construction of a channel adjacent to a navigable waterway. The basis for requiring the petition was concern by the division of law enforcement for public safety. The calm waters of what is essentially a calm oxbow of Trail Creek are likely to attract small craft.

Lucas said during the public hearing, the Save the Dunes Council expressed opposition to the proposal because of fears that public waters were being privatized. The point was also offered that adopting the rule would violate the public trust doctrine.

Lucas said the area around Trail Creek was currently undergoing a revitalization, and what would be the final configuration of usage was yet uncertain. He said the legal basis for determining whether or not to grant a no-boat zone was public safety, and no one had refuted concerns by the division of law enforcement that public safety was a serious concern in the absence of a no-boat zone. As a result, Lucas recommended that the no-boat zone be created, but only for a two-year period, while site conditions were evaluated and development was given an opportunity to stabilize.

Lucas said he also recommended that the signage at the no-boat zone conform to U.S. Coast Guard specifications and refrain from any suggestion the waters were privately owned by the Blue Chip Casino.

Mary Chandler asked for a clarification as to whether boats could enter the channel directly from Trail Creek. Lucas responded that small craft could enter from the downstream end, but the upstream end was connected to Trail Creek only by a culvert. Jerry Miller asked whether the concern was boats would enter Blue Chip channel for fishing. Lucas responded that was a concern. In addition, the channel might also prove attractive to personal watercraft.

Lt. Ed Troche, whose district includes Trail Creek, said his concern was for dangers posed to public safety by the very large gaming boat in comparison to small craft which might enter the channel. He said the channel was a dead end, accessible only from the northern (downstream) end and was not far from the mouth of Trail Creek on Lake Michigan. He said he believed the no-boat zone was essential to public safety.

Charlotte Read of the Save the Dunes Council expressed opposition to the proposed rule. She said the Council believed establishing a no-boat zone for the benefit of the Blue Chip Casino was a bad precedent. Would gaming casinos in Hammond, East Chicago, and Gary later ask for their own private waters at the expense of public usage? Read expressed dismay for the "boat in a moat" and the appropriation of public waters for private profit. She said the Save the Dunes Council appreciated the hearing officer was at least recommending a no-boat zone of limited duration, but she asked that the period of application be reduced from two years to one year. She also expressed opposition to use of the term "Blue Chip channel" since the waterway was in public ownership. She noted the Blue Chip Casino had already placed signage, at the mouth of the channel on Trail Creek, which inappropriately implied private ownership. Read acknowledged many of the Council's concerns related to development of the site for a gaming boat, permitting issues which were decided earlier, and not the proposed no-boat zone.

Lucas responded by saying that naming the site the "Blue Chip channel" was not essential to the rule proposal. Although the common usage seemed to reference the waterway as the "Blue Chip channel," the formal rule might be modified to simply describe the site

generally as being adjacent to the east bank of Trail Creek approximately 500 feet upstream from the U.S. 12 bridge. He said his recommendation did reflect that signage should be modified so as not to imply the channel was in private ownership.

Kiley said making the signage conform to U.S. Coast Guard standards was implicit to the adoption of any watercraft zone on Lake Michigan or its navigable tributaries. This point did not require formal action by the commission but should be enforced administratively by the division of law enforcement.

Terri Moore asked whether the channel was developed at private expense or public expense and asked who owned the properties adjoining the channel. Troche responded that one side of the channel was owned by Blue Chip Casino, and the other side was owned by Michigan City. The channel was developed at private expense. Lucas said a condition of the navigable waters permit issued through the division of water, however, was that waters be dedicated to the public.

Steve Cecil moved to approve final adoption of the rule amendments to 310 IAC 2.1-7 to establish a no-boat zone at Blue Chip channel adjacent to Trail Creek. The motion was seconded by Jerry Miller.

Damian Schmelz said he was going to vote in opposition to the rule proposal. He said he was not adverse to concerns directed to public safety, but he wanted to send a message that the commission was not enthusiastic in its endorsement of the proposition. Schmelz said he believed the development of the channel for the limited purpose of facilitating a gaming boat was very disappointing. "My negative vote will disallow false claims in the future about how wonderful the commission thinks this all is."

Moore expressed her concurrence with the opinion expressed by Schmelz. Moore indicated she also intended to vote in opposition to the rule proposal.

The Chair called the motion for a vote. Six members of the commission voted in favor. Schmelz and Moore voted in opposition. Because seven affirmative votes are required from the commission to adopt a rule, the motion failed.

Schmelz said his intention was not to preclude final adoption but rather to communicate broader concerns of public policy. He moved to reconsider the issue. The motion was seconded by Moore and carried unanimously.

Miller said he could hardly imagine a circumstance where a greater potential for harm was posed to boaters. He said he was very familiar with the site, and there was just enough room for the gaming boat to move up-and-down the channel and slightly from side to side. Miller said the gaming boat was like a ten-story building, and there was "no way" a small craft adjacent to the gaming boat could be seen by a boat captain.

The chair expressed his perspective that the commission needed to adopt the rule. While he understood there were fundamental concerns about development of the channel for a

gaming facility, and about its current private usage, he said the purpose of the governing legislation was to address public safety. Nothing in the record refuted that public safety was a serious issue at this site.

Jane Ann Stautz asked whether the proposed rule could be amended to describe the site generically rather than as the Blue Chip channel. Lucas said reference in the formal rule to "Blue Chip channel" could be removed. She then urged that the rule proposal be modified accordingly.

Moore said with this change, she could vote in favor of the proposed rule. "I want to be clear that I am opposed to privatization of public waters."

Jerry Miller moved to give final adoption to the amendments to 310 IAC 2.1-7 but modified so the rule not reference the "Blue Chip channel." The motion was seconded by Jane Ann Stautz.

The Chair called the motion for a roll call vote, with an opportunity for each commission member to explain the reason for his or her vote.

Steve Cecil voted in favor of the motion.

Mary Chandler voted in favor.

Larry Macklin voted in favor.

Jerry Miller voted in favor.

Terri Moore voted in favor of the motion, with the clarification that it should not be viewed as a precedent for the privatization of public waters.

Damian Schmelz voted in favor of the motion "only because it's the better option of the two."

Jane Ann Stautz voted in favor of the motion because it was seemingly needed to support public safety.

Chairman Kiley voted in favor of the motion. "I hope this discussion shows the public the concern we have for these issues."

The chair reported the motion carried by a vote of 8-0.

OTHER MATTERS

Lake Michigan Coastal Coordination Program

Annual Report of the Lake Michigan Coastal Coordination Program

Dawn Deady, Lake Michigan Coastal Coordinator, presented this item. She distributed the 1997 Annual Report of the Lake Michigan Coastal Coordination Program to the Natural Resources Commission. She reflected that during 1997, substantial progress was made on the identification of recreation sites in the coastal region. Staff of the DNR and NRC met monthly to coordinate shoreline activities in what is known as the "Lake Michigan Coastal Club." The Blue Ribbon Advisory Panel for Lake Michigan issues conducted its final meeting and sunsetted. There was participation in the National Healthy Beaches Symposium at Indiana Dunes State Park.

Deady presented Boating Laws on Indiana Waters of Lake Michigan. She said this online publication focuses upon issues of concern to recreational boaters in the Indiana waters of Lake Michigan. Linkages are provided to the general state boating laws and U.S. Coast Guard Internet pages. The "ten most violated" boating laws are identified. Sketches of access to marinas and gaming boats on Lake Michigan are provided. Facilities offered by both public and private marinas are described. A special emphasis is placed upon where sewage pumpout facilities are available, and materials are provided which are aimed at arresting the spread of zebra mussels and other aquatic nuisance species. Detailed state and federal laws are also available. Deady said this document was developed largely because of a resolution passed by the Lake Michigan Marina Development Commission, and it was presented to the LMMDC at the May meeting of that agency.

Adjournment

At approximately 12:15 p.m., the meeting adjourned.