

NATURAL RESOURCES COMMISSION

Minutes of March 21, 2002

MEMBERS PRESENT

Michael J. Kiley, Chair
John Goss, Secretary
Damian Schmelz
Jack Arnett
Jane Anne Stautz
Janice Osadcuk
Jerry Miller
Lori Kaplan
Megan Murphy
Raymond McCormick, II

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane
Debbie Michaels

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Carrie Bales	Executive Office
John Davis	Executive Office
David Vice	Executive Office
Paul Ehret	Executive Office
Bob Waltz	Entomology
John Friedrich	Forestry
Jim Wichmon	Forestry
Gregg McCollum	Fish and Wildlife
Gwen White	Fish and Wildlife
Linnea Floyd	Fish and Wildlife
Samuel Purvis	Law Enforcement
Jerry Pagac	State Parks and Reservoirs
John Baker	State Parks and Reservoirs
Terri Swoveland	Water

GUESTS

Jim Andrews	Dick Marsh	Cheryl McCormick	Brad Thomas
Coleen Snyder	Glen Snyder	Ronald Gifford	Jeffrey Hammond
Chris Irick	Chuck Wilson	Jody Weldy	Tim Dale
Carolyn Linder	Ed Linder	Dane Tubergen	Dan Reid
David Fitterling	Dick Mercier	Margo Reid	Larry Christle
Timothy Julien			

MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular meeting of the Natural Resources Commission at 10:05 a.m., EST, on March 21, 2002, at Mounds State Park, Anderson, Indiana. With the presence of ten members, the chair observed a quorum.

Jerry Miller moved to approve the minutes of January 22, 2002. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

John Goss provided the Director's Report. He said the DNR "is facing a lot of challenges right now with the DNR budget. We are looking for creative ways to turn each of those into an opportunity." Goss explained new partnerships were being formed to help provide services, avoid property closures, and to prevent complete shut-down of programs. He said there would be significant cutbacks on the hours of operation of properties. He confirmed there will be a 15% permanent cut in the operating budget effective July 1, 2002. Goss also reported intermittent staff for summer 2002 would be down at least 1/3 from the customary summer number of 1,800 to 1,200.

Director Goss reported on the capital budget. He said the legislature had approved over \$50 million for the building of treatment plants as well as other individual projects. "As of this moment, we know that at least half of that will have to be given up. We are working with the Budget Agency and Governor's staff to try to keep a lot of projects on our list." Goss said health and safety issues would be at the top of the project list. "It is possible that we could lose the whole 50 million with the budget crunch." Goss said there was a press conference at the end of the legislative session concerning the use of dedicated funds generated by lifetime licenses. He explained the legislators suggested transferring those monies into the general fund. Goss said the funds have not been transferred at this time, but said press conferences continue that consider the use of these dedicated funds. "We're going to have to remain vigilant on that issue. We will keep everyone informed."

Director Goss referenced the DNR Foundation and the Heritage Trust Program. There have been ten years of successful land acquisition using environmental license plate money and appropriations from the General Assembly. "We're going to put together a plan for a very proactive campaign to raise money for DNR programs." Goss said the campaigns would be another way to ask the communities and citizens of the state of Indiana to help maintain DNR operations.

Director Goss announced the new Indiana State Museum "continues to be on schedule" and should open in approximately 60 days. He reported the fund raising has been successful and the primary goal has been met to qualify for national grants. Goss also said there would be several museum grand-opening events in the third week of May.

Director Goss noted budget communications are ongoing with DNR employees, the media, and constituents. "We made that a priority in this time of crisis. Particularly, we have asked the employees to be informed and to feel free to speak with people about what the impacts of these changes are of our operations. We want to continue that policy."

Jerry Miller, Chairman of the Advisory Council for Lands and Cultural Resources, reported the Advisory Council did not meet this month.

John Davis, Deputy Director for the Bureau of Lands, Recreation, and Cultural Resources, reported on changes due to the budget cuts. Davis listed several changes as follows:

1. Closing the swimming pool at Wyandotte State Recreation Area in Harrison County.
2. Consideration of privatizing the Wyandotte Cave tours.
3. Closure of Bass Lake State Beach.
4. Cutting the DNR Cultural Arts Program.
5. Closure of the Spring Mill Twin Caves tour at Spring Mill State Park.
6. Closure of several campgrounds, including: Huntington Lake, Salamonie Lake, Fisherman's Campground at Patoka Lake, Raccoon State Recreation Area Campground, Mississinewa Lake, Minnehaha Campground, and the western section of New Harmony State Park.

Davis reported the DNR property cabin hours would be altered. Boat ramp closures include five at Patoka Lake, two at Salamonie Lake, and four at Monroe Lake. He said "closure of the boat ramps elicited some response from the public." The agency is working with several groups who have volunteered to help maintain and police these areas in order to keep the boat ramps open.

Davis said the Potato Creek Horsemen's Campground would not be closing due to a partnership with the Indiana Trail Rider's Association. The Association has raised funds to keep the campground open. Jody Wealthy, a representative from the Association addressed the Commission: "We would like to see the price of the user's fees for horses increased to \$2.00 a day for a daily pass, and perhaps \$20 to \$25 dollars for an annual pass. We feel that this will help increase revenue quite a bit throughout the state."

Gerald Pagac, Director of State Parks and Reservoirs, introduced the Mounds State Park staff and informed the Commission its new Nature Center was near completion. He said there would be a tour of the Bronnengberg House and the Great Mound after the meeting.

Ray McCormick, Chairman of the Advisory Council for Water and Resource Regulation, reported that the Advisory Council did meet this month.

David Vice, Deputy Director for the Bureau of Resource Management, reported the hunting, fishing and wildlife rules became effective January 25, 2002. The revision process took two years instead of a few months as in the past. Division of Fish and Wildlife staff held 29 open-house meetings to gather comment from more than 800 people. Vice said conservation and citizen advisory groups were also consulted.

Vice distributed "Ohio River Fisheries Management Team" brochures—noting the pamphlet was a product of a "collaborative effort among Indiana, Illinois, Kentucky, Ohio, Pennsylvania, and West Virginia." He gave an update on the demand for lifetime fishing and hunting licenses. He said proceeds from license sales "brought in over \$10 million. We will have an accurate accounting after Internal Audit completes its review."

Vice reported the Division of Law Enforcement completed its in-services in one twelve-hour day rather than the normal two-day process. He reported the Division of Entomology and Plant Pathology scheduled public meetings in Northwest Indiana to discuss gypsy moth treatment procedures and the proposed treatment areas.

Paul Ehret provided an update on legislative activities relating to the Bureau of Resources Regulation. He said House Bill 1227 established improved revenue flows for the DNR with respect to the regulation of petroleum production wells. New fees will be deposited into the Division of Oil and Gas dedicated environmental fund and used to plug orphaned oil and gas wells. The bill also increases bond requirements on individual wells from \$2,000 to \$2,500 and blanket bonds from \$30,000 to \$45,000.

Ehret explained House Bill 1241 related primarily to fish and wildlife issues, but was used as a vehicle to increase the Division of Reclamation's fee assessed on the annual coal tonnage production. The amount assessed increases on surface-mined coal from \$0.03 to \$0.055 per ton and on underground-mined coal from \$0.02 to \$0.03 per ton. The fee increase will generate about \$500,000 to \$600,000 additional revenue and will be critical in helping the division through this biennial budget. The funds are needed to provide the state's match share to qualify for the federal OSM grant. The increase was critical due to the serious shortfall in the division's "general fund" dollars.

Ehret said Senate Bill 417 vastly improved and streamlined the Division of Water's enforcement authority. The bill removes several intermediate steps that made enforcement actions extremely slow and unresponsive to problems and conditions. He reported Senate Bill 508 made several changes to the Division of Water's dam inspection program. The required frequency of inspections is decreased for low hazard dams, allowing greater concentration on dams with a higher risk. It also requires the owners of high hazard dams to have them assessed by a professional engineer every two years.

Ehret said Senate Bill 439, referred to as the "Ditch Bill," did not pass. The bill would have removed the Division of Water's ability to deny or modify plans submitted by county surveyors and drainage board. The agency could have offered recommendations, but it would have been mandated to issue the permit regardless of circumstances. While the bill did not pass, it caused the agency to examine internal permitting processes and to make fundamental procedural changes addressing some of the surveyors' complaints. Ehret said several meetings were held with the regulated community before final bill action, and these meetings will continue.

Ehret said Bill James, Gwen White, Major Sam Purvis, and he met with interested persons regarding group boating activities and tournament rulemaking initiatives for Syracuse Lake and Lake Wawasee. He said they met in Kosciusko County with the tournament anglers in the morning and property owners in the afternoon. "The meetings with both groups went very well." Although there were differences of opinion between the parties, the overall approach taken by the agency was "generally accepted by both."

PERMANENT APPOINTMENTS AND PERSONNEL INTERVIEWS

Permanent Appointment for the Position of Assistant Property Manager at Vallonia State Nursery.

James Wichman, Program Supervisor, presented this item. He said Jonathan Crossley is a “very competent and valuable” employee. “He is very good with our employees and involved with the local community.” Wichman recommended Crossley for permanent appointment as Assistant Manager at Vallonia State Nursery.

Jerry Miller moved to approve Jonathan Crossley for permanent appointment as Assistant Property Manager of the Vallonia State Nursery. Jack Arnett seconded the motion. Upon a voice vote, the motion carried.

RESOLUTIONS

Consideration of Resolution in Appreciation of Larry D. Macklin for his Services to the Department of Natural Resources, to the Natural Resources Commission, and to the Natural and Cultural Resources of Indiana.

The Natural Resources Commission, in honor of Larry D. Macklin, adopted a draft resolution in appreciation of Larry Macklin’s service to the Department of Natural Resources, the Natural Resources Commission, and generally on behalf of the natural and cultural resources of Indiana. The Natural Resources Commission extends its sincere appreciation and gratitude to Larry Macklin for his commitment and dedication to preserving and protecting Indiana natural resources for the citizens of the State of Indiana.

Jane Anne Stautz moved to approve the draft resolution in honor of Larry D. Macklin. Ray McCormick seconded the motion. Upon a voice vote, the motion carried.

Chairman Kiley said Larry Macklin would be properly notified of this resolution and that a presentation would be scheduled.

Consideration of Resolution in Support of Efforts by the Department of Natural Resources Regarding User Fees.

During the January 2002 meeting, the Natural Resources Commission directed a draft resolution be prepared concerning the efforts by the Department of Natural Resources with respect to user fees. At the request of the Chair, Stephen Lucas read the draft resolution to the Commission.

Jack Arnett moved to approve the draft resolution regarding the increase of user fees. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

John Davis said, “DNR appreciates the consideration for the fee increase,” and he reported the DNR plans to hold a series of meetings this season with the public and

various groups throughout the state to discuss the whole range of fees. Davis concluded, “probably about October or November we will come back to the Commission with another recommendation that will put us in even better shape next season.”

BUREAU OF LANDS, RECREATIONAL AND CULTURAL RESOURCES

DIVISION OF FORESTRY

Consideration of a Request by David A. and Rebecca A. Fitterling for an easement for ingress and egress across an access road on Yellowwood State Forest.

John Friedrich, Division of Forestry, presented this item. He said Gladys Jones has since 1989 had a renewable four-year permit for access to her property using a road at Yellowwood State Forest. Friedrich said David and Rebecca Fitterling recently purchased the Jones property, and they now request a 40-year easement on the same road. Friedrich said the Fitterling’s have offered to pay \$35 per year for the easement at a total compensation of \$1,400.00. Friedrich recommended, however, payment be similar to most real estate transactions as one single payment at the execution of the easement.

Jerry Miller moved to approve an easement for ingress and egress across an access road on Yellowwood State Forest to David A. and Rebecca A. Fitterling as recommended by Friedrich. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Consideration of a Request by Metro Xmit, LLC for an Easement for a Fiber Optic Line Across Morgan-Monroe State Forest.

John Friedrich also presented this item. He explained that Metro Xmit is requesting an easement for a fiber optic line that they installed across Morgan-Monroe State Forest in 1999. He said that at the time of installation, Metro Xmit did not realize that they needed a permit from the state to cross state property along the roadways. Friedrich said that he met with Metro in 1999, and it “seemed like we had something worked out and Metro was to pursue an easement.” Friedrich reported that, in fact, Metro took initial steps such as procuring an archaeological field review. Friedrich said that communication from Metro ceased in the spring of 2000, which necessitated the issuance of a notice of violation to get this issue resolved.

Friedrich said that negotiations have been ongoing for almost a year now “in getting all the items lined up.” He said the last item to be agreed upon is the possible price. Friedrich explained that the final cost analysis used figures that Metro supplied regarding prices they have paid for easements for other property in the area. Using those figures, the compensation for this easement is in the amount of \$23,000 for a 20-year easement.

John Davis stated that Metro, in front of the Bureau of Lands, Recreational and Cultural Resources Advisory Council meeting, commented that it was thought that the project would stay within the road right-of-way. Davis said Metro did contact the County Road Supervisor, so Metro was aware that permission was necessary to install a line. “I guess, in [Metro’s] favor, they did at least seek permission from the County Engineer.” Davis

stated that Metro is currently in Chapter 11 bankruptcy, and “it may be a little difficult to get payment first of all.” He explained that since the line is already installed and in use, the Advisory Council decided it was “best to go forward, get in line, and try to get this payment perhaps after they reorganize.”

Chairman Kiley asked Jim Andrews, the Public Affairs Manager for Metro Xmit, whether a trustee to the bankruptcy claim had been appointed. Andrews stated that a trustee had been appointed, and added that Metro was currently operating under Chapter 11 and has filed a plan for reorganization. Kiley asked whether the court has approved the reorganization plan. Andrews stated that his records do not indicate court approval.

Chairman Kiley also asked whether Andrews knew where the State stands with respect to the payment on the reorganization plan. Andrews responded that he was not aware of the status.

Chairman Kiley questioned whether amount of area encroached upon was 12,851 feet. Friedrich explained that 12,851 was the figure submitted by Metro; however, it is the total length where it enters Morgan-Monroe State Forest and where it exits Morgan-Monroe State Forest and that includes land that is in the county road right-of-way. Kiley requests further analysis be completed regarding the bankruptcy reorganization in order for further discussion at the April Commission Meeting. John Davis stated that further investigation will be completed to provide more information.

Raymond McCormick asserted that there is an ongoing problem of persons going across state property without securing permission. “At some point we have to say we are tired of it, and we are not going to put up with it.” Kiley stated that the issue presented is “if we do not grant it and fix a dollar amount, then we have a problem with bankruptcy court from the standpoint of the amount of our claim.”

Kiley stated that if the notice of violation was a civil violation, then the bankruptcy stay would apply to the DNR and the Commission from the standpoint of being able to proceed. McCormick questioned the ramifications of an easement denial. Kiley commented that as long as Metro is under Chapter 11, “we cannot serve claim against them because they are protected by the bankruptcy code.” Kiley asked whether Metro was a publicly traded or a privately owned company. Andrews explained that Metro was privately held, but is a public utility.

Damian Schmelz stated that the request by Metro for a 100 years easement is “ridiculous,” and asked whether the Commission could lessen the recommended 20-year easement term until the claim is straightened out. Kiley stated that it was possible to decrease the easement term.

Kiley requested clarification of the arrival at \$23,000 as the end cost. Friedrich explained that he used the figures supplied by Metro. Easements that Metro purchased were permanent easements so there are economic formulas where you can plug in interest rates and get an actual figure for today. I used another formula for a 20-year period and came up with \$23,000. Davis asked whether the result compared favorably with the formula used from the U. S. Forest Service. Friedrich stated that there was no comparison

because there were available comparables. The Forest Service formula is used pursuant to the Commission policy when there are no comparables.

McCormick offered that since it “seems like we are most likely not to get our money, or at least all our money, wouldn’t it be wiser to cut that term to a shorter period?” Kiley stated that it was possible to shorten the easement term, and subsequently asked for a recommendation. Davis stated that another option is to delay in order to allow time for bankruptcy law investigation.

Kiley stated that Metro does not have anything in writing from the Commission now. “Metro is respectively a trespasser.” Andrews said that Metro had “verbal permission to proceed with the project as long as we agreed to obtain the permit.” Friedrich added that Metro did eventually have verbal permission, but only after the issuance of the notice of violation.

Chairman Kiley entertained a motion to defer approval of the easement until such time more pertinent information would be provided. Jerry Miller moved to approve the easement. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF NATURE PRESERVES

Consideration of the Dedication of McCormick’s Cove Nature Preserve, Owen County

John Bacone presented this item. Bacone said he was “pleased” to bring the Cove Nature Preserve dedication before the Commission. The proposed nature preserve is a “pretty well-known and famous” natural area that was included in the book *NATURAL AREAS IN INDIANA AND THEIR PRESERVATION* of which Father Damian Schmelz was one of the prime authors. Bacone described the proposed preserve as a “very high quality forest and limestone canyon” in McCormick’s Creek State Park. “We worked closely with the state parks planner and the property manager to make sure there is enough room behind the cabins to make any necessary renovations so the cabins are not inadvertently boxed in.” Bacone recommended dedication of McCormick’s Creek Cove as a state nature preserve.

McCormick asked why cabins were within a “pristine” area. Bacone said the cabins have been there for a long time. He added the area was the first acquisition in McCormick’s State Park, and the cabins have been there since the late 1960s.

Damian Schmelz moved to approve dedication of the McCormick’s Cove Nature Preserve. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

BUREAU OF RESOURCE MANAGEMENT

DIVISION OF FISH AND WILDLIFE

Consideration of a Request for Preliminary Adoption of the Revised Nuisance Wild Animal Control Permit Administrative Rule (312 IAC 9-10-11); Administrative Cause Number 01-223D.

Linnea Floyd, Environmental Protection and Operations Staff Specialist in the Division of Fish and Wildlife, presented this item. She said there are currently more than 200 licensed nuisance wild animal control operators in Indiana, the majority of whom operate as full-time or part-time businesses to remove nuisance wild animals from homes, businesses, and properties.

Floyd explained currently a person can obtain a free permit to take nuisance wild animals upon the signature of a conservation officer on a DNR form. The person can then charge a fee for every animal removed. The person is not required to have education or training in trapping or control methods or in the behavior of wild animals.

Floyd said public input was requested for the proposed rule revisions by sending a letter to every nuisance wild animal control and rehabilitation permit holder. The primary issues considered were the lack of education or training requirements for the trapping; handling and care of wild animals; the lack of regulations for disposing or euthanizing wild animals; and the need to inform clients how to prevent future problems. More than 90 permit holders responded, and the responses were sent to an advisory group.

Floyd said the advisory group consisted of 13 members representing every stakeholder and included representatives from the National Wildlife Control Operators Association; the Indiana Animal Damage Control Association; an attorney for an animal welfare group (the ASPCA); two wildlife rehabilitators; a veterinarian from the State Board of Animal Health; a law enforcement officer; a member of the Indiana State Trapper's Association and the Fur-Takers of America; the Division's furbearer biologist; a wildlife biologist; and Floyd. The advisory group had four facilitated meetings, in which these issues were addressed and additional public comment was received and discussed. She added that most points in the revised rule were agreed by consensus.

Floyd said the most important proposed rule changes included: changing the permit to a year-round permit instead of limiting the permit to outside of trapping seasons only; requiring a test for all permit holders and continuing education each year; requiring humane handling of the animals captured; establishing guidelines for euthanizing the animals; setting restrictions where animals can be released; and, allowing the DNR to suspend or revoke or a license if necessary. She said the entire committee, including members of the Indiana Animal Damage Control Association, support the testing requirement as a means of ensuring permittees have basic knowledge of state and federal regulations, animal identification and behavior, and the safe and proper trapping and handling techniques. Floyd added the proposed education requirements would also help ensure endangered species and other non-target animals are not accidentally captured.

Floyd explained proposed language would require the humane handling and care of animals that are live-trapped and released. In order to prevent the spread of zoonotic diseases, including rabies, animals that are not killed immediately upon capture or euthanized must be released on-site or in the county of capture. Euthanization must be performed by the safest, quickest and most painless available method. The property

owner can still obtain a permit without having to take a test but would have to follow the same rules for capturing, releasing, and euthanizing the animals. Floyd said the Division of Fish and Wildlife recommended preliminary adoption of the proposed rule changes.

Damian Schmelz pointed out a clerical error. In 312 IAC 9-10-11(d)(1), “eight” should be amended to “eighty.” Kiley asked for clarification of a “penetrating captive bolt.” Floyd deferred to Timothy Julien, the President of the National Wildlife Control Operators Association. Julien explained a penetrating captive bolt is a firearm that injects a bolt to kill an animal as is used in slaughterhouses.

Jack Arnett moved to give preliminary adoption to the revised nuisance wild animal control permit rules. Ray McCormick seconded the motion. Upon a voice vote, the motion carried.

LEGAL PROCEEDINGS

NRC DIVISION OF HEARINGS

Consideration of Nonfinal Summary Judgment of Administrative Law Judge with Respect to Riparian Rights in the Matter of *Coleen Snyder, et al. v. Linder, et al.*; Administrative Cause Number 01-105L.

Steve Lucas, Administrative Law Judge, introduced this item. He said for consideration was the “Nonfinal Summary Judgment of Administrative Law Judge with Respect to Riparian Rights” and formal objections to the entry that were filed by the Claimants, Coleen Snyder and others. As the “ultimate authority” for the proceeding under the administrative orders and procedures act, the Natural Resources Commission was responsible for determining whether to make the nonfinal summary judgment a final order or whether to approve the Claimants’ objections and substitute a different final order.

Lucas said the factual and legal issues were complex and detailed and focused on who among the parties had sufficient riparian rights to give them standing to place temporary piers along a portion of Hamilton Lake in Steuben County. Not yet at issue is the appropriate dimensions or configurations that would apply to the piers. To resolve that question, the regulatory authority of the DNR would also be considered as it applied to navigation, the environment, and the public trust doctrine.

Lucas said an underlying principle to summary judgment is that the facts are not in dispute. The Claimants and Respondents disagree fundamentally as to the legal consequences of those facts. The case is of great concern to the parties, but it is also one of first impression in implementation of amendments made in 2000 to IC 14-26-2 (sometimes called the “Lakes Preservation Act”).

Lucas said the parties were “very ably represented by legal counsel who are both broadly experienced and specifically attuned to the nuances of riparian law in Indiana.” He said Bradley Thomas represented the Claimants and has filed objections that are in the Commission packet. He would present oral argument first. Dane L. Tubergen

represented the Respondents and would present argument second. Although the DNR would be the licensing authority if piers were to be placed, it was not an active party to the current proceeding.

Chairman Kiley then welcomed Bradley Thomas and Dane Tubergen. He explained most members of the Commission were not attorneys. He invited Thomas to begin oral argument.

Bradley Thomas said he appreciated the opening remarks by the Administrative Law Judge in that they clarified the current action was not the final step in licensing the contested piers. Issues pertaining to their positioning would yet be subject to the DNR's licensing requirements and to contest by affected persons, regardless of the final disposition of the summary judgment.

Thomas said the Administrative Law Judge found a pier can be placed along the shoreline of a public freshwater lake, such as Hamilton Lake, only if it is done by or with the acquiescence of a riparian owner. "Our position is that it wasn't by their agreement or by their acquiescence." He said "this is a plat of land, not uncommon in Indiana on lakes." It was developed on July 25, 1912, and there were several easements that went to the lake. Thomas said on this plat of land, the "lot owners were excluded from doing certain things." The lot owners were not allowed to build any structure, boathouse, pond, or other lake front improvement, except by written permission of the grantor. The lot owners were allowed "to use the docks and shore for landing boats and the use of the bathing beaches in common with all other owners of lots in Oakwood. If a grantor puts a dock out, or puts a beach out, they have the right to use it, in common with everybody else. In specific, I think that's important in lake property now with its value. As the affidavit cited by Judge Lucas refers to, it says there is a dock presently existing on one of the easements, which has been there for 'many years.' Two apparent lot owners have put those piers there. We don't know how many 'many years' are. But, the affidavit specifically says that they erected the pier and they own it, which is in direct contradiction of what the grant was. No one lot-owner may own the pier. He may not control it; ownership is a proposition of control and they cannot hold it individually as opposed to all other lot owners."

Thomas argued the Administrative Law Judge found the grant given by the grantor was "ambiguous." Thomas said, "my position is that it is not ambiguous." A lot owner "may only use what is there. There is no question in the facts of this case that the grantees, individual lot owners, cannot be the grantor. So, the acts of the grantees must be done and then the grantor has to acquiescence to accomplish the intent of the grantor. The only way to do that if you're not the grantor, and you didn't get written permission, then is you must acquiesce in the acts of the grantees so it becomes the rule. So, what do we have? We have a plat that was done in 1912. It's been 90 years since 1912 when these easements were done." He said there were three remaining easements, but no demonstration of a history of usage for piers. "What I know is, there could have been a pier put on any one of those three easements, or on all three easements each summer for the last 90 years. That's 270 opportunities to place a pier on that easement, or one of those easements, three easements, 90 years. So, there has been one there for one year, and one there for many. I don't know what many is. It's never been defined." He said use by the lot owners "is not the ability to build. So, the findings that the grantor,

whoever the grantor is, that would have to be determined first. Who's the grantor right now—who controls the riparian rights? We have our opinion that it is the association of all the lot owners that exist and was passed to them. That's the true grantor now, and they can control it. But I don't think there's any question that the individual lot owners, the grantees cannot control it. And I don't think that 10 or 15 years, or 20 years, out of a possible 270 replacement piers is acquiescence in anything in the erection of piers or any other structures."

Dane Tubergen presented the argument of the Respondents. He said his clients are owners of property within the plat of Oakwood Place on Hamilton Lake who are owners of "back lots." These lots are part of the plat but are not on the lakefront. The Claimants—those who object to pier placement—are owners of lake front property. "When Oakwood Place was originally platted, all of the lakeshore, streets and alley ways going down to the lake and the lake front property was common property, dedicated to the use of the owners of all the property in the plat. Several years ago, the lake front owners obtained in the Steuben Circuit Court a quiet title to the lake front land between their lots and the lake, effectively cutting off the back lot owners from use of the entire lakeshore that was originally granted. That left the back lot owners with the only access to the lake through streets that go down to the lake and terminate at the lake. The issue in this is whether or not my clients erected a temporary dock, in other words a pier, so they could land boats there during the season, and the lake front owners objected to that. The question is, did my clients put out that dock under the authority of the original grantors or with the acquiescence of the original grantors? The dock was erected at the end of Dock Street which terminated at the lake."

Tubergen disagreed with the contention by Thomas that the Administrative Law Judge found the plat and deeds were ambiguous. Thomas "made a serious misstatement that I have to correct." Tubergen referenced Finding 47. "Judge Lucas specifically found that this plat and these deeds granting the rights are not ambiguous." Tubergen also referenced Finding 28 which included language from the plat: "The said land is platted for the purpose of establishing a place for summer homes and the streets, alleys and shore line is hereby dedicated to the use of the lot owners of said Village of Oakwood subject however to the rules and regulations to be hereafter promulgated by said owners and subject to the conditions named in deeds of conveyance hereafter made by the DeKalb Mortgage Company of Auburn, Indiana, to the Purchasers of said lots in said Village of Oakwood." What the Administrative Law Judge found was that even if the deed and plats were ambiguous, extrinsic evidence would support a conclusion the Claimants had standing to place piers, but he found the language was unambiguous in support of that standing.

Tubergen added, "now I think that is pretty clear—'is hereby dedicated to the use of the lot owners.' Now, the lake front owners have already taken away part of that, leaving only the streets that terminate at the lake, and they are clearly dedicated to the use of the lot owner. Now, it also refers to subject to rules and regulations that are set out in the first deeds and the first deeds...all contain this language. 'It is further agreed between the parties to this conveyance that the grantee shall have the right to the use any and all streets dedicated as shown by the plat, together with the right to pass over and upon the land on the lake front which is not platted into the lots. He shall have no right to erect any boathouse or building on the water's edge.' And somehow the Claimants are trying

to assert that a pier is a building or a boathouse, but it clearly is not if you go by the plain language.”

Chairman Kiley directed the attention of the Commission to Finding 47 and Finding 48. He said these were the really the holdings of the Administrative Law Judge in his nonfinal order. He then recognized Bradley Thomas for brief rebuttal.

Thomas said Tubergen’s argument failed to distinguish between the opportunity to use and the opportunity to “own a pier on the lakefront to the exclusion of all the other lot owners.” He said neither the deed nor the plats distinguished between front-lot owners and back-lot owners. He also said it was irrelevant whether a person does or does not have a house on a lot; the rights accrue to all lot owners. “Every lot owner has rights.” He said he did not disagree with the interpretation of who was the grantor in 1912. The question is who is the grantor today.

The Chair presented the item for deliberation by the Commission and for any questions of the attorneys for the parties or the Administrative Law Judge. He asked for the perspective of Jane Anne Stautz. She responded, “I agree with the Administrative Law Judge.”

Jack Arnett moved to approve the nonfinal summary judgment with respect to riparian rights and make it the final order of the Commission. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommended Report of the Natural Resources Commission with Respect to the “Petition for Creation of the Pretty Lake Conservancy District” Referred January 7, 2002; Administrative Cause Number 01-222C (Marshall Circuit Court Cause Number 50C01-0111-MI-50).

Jennifer Kane, Hearing Officer, presented this item. She said the Marshall Circuit Court found the petition to Establish the Pretty Lake Conservancy District conformed to the requirements in the Conservancy District Act and referred the petition to the Commission for its recommendations and report. Kane said the purpose for which the Pretty Lake Conservancy District would be established is to provide for the collection, treatment, and disposal of sewage and other liquid wastes from the homes and other properties in the immediate vicinity of Pretty Lake and the golf country club. She said Pretty Lake contains approximately 185 acres, and the adjoining community is typical of those along developed inland lakes in that it has aging and failing septic systems.

Kane said a public hearing was held in Plymouth on February 5 to gather evidence. Five factors are considered by the Commission relative to the evidence. Ronald Gifford, attorney for Petitioner, presented sufficient evidence to support a finding the district appears to be necessary. The septic systems around Pretty Lake are approaching their functionality span and the added pressure of residents converting summer cottages into full-time residences increases the probability of failure. Kane said the Marshall County Public Health Officer also supported establishment of the conservancy district.

Kane said the Petitioner presented sufficient evidence the proposed central sewage treatment system is feasible in terms of economics and engineering. She explained waste

water will be collected and pumped to Plymouth for treatment. A central sewage collection system reduces the likelihood of sewage contamination to Pretty Lake, so the public health would be served immediately by the establishment of the district. Kane noted that evidence presented by the Petitioner and the DNR's Division of Water supports a finding the proposed district would not interfere with any other local water management project.

Kane said there was not sufficient evidence to make a finding whether the proposed district would cover and serve a proper area. She noted several maps depicting the proposed district boundaries were entered into evidence, but the maps submitted have apparent conflicts in boundary depiction and do not show contiguity. They also lack sufficient specificity to allow for a satisfactory description.

Kane explained that the Marshall Circuit Court has exclusive authority to approve or decline the establishment of a conservancy district. Kane recommended the Natural Resources Commission adopt the report as its analysis of the proposed Pretty Lake Conservancy District and that the report be forwarded to the Marshall Circuit Court. She also recommended the Commission urge the Petitioner to work with the Division of Water in order to identify a definite and contiguous boundary before the petition is set for final hearing in the Marshall Circuit Court.

Chairman Kiley noted defining appropriate boundaries for the district was critical to its final approval and success. He noted another proposed district had failed to gain approval because boundaries could not be fixed. He asked Ronald Gifford whether he was satisfied with the recommendations of the hearing officer. Gifford answered he was, and he would work with the DNR's Division of Water to precisely define the boundaries.

Damian Schmelz moved to approve the recommendations of the hearing officer as the Commission's recommendations and report to the Marshall Circuit Court with respect to establishment of the Pretty Lake Conservancy District. Lori Kaplan seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommendations of the Hearing Officer in the matter of Traina Enterprises Petition for Rate Increase at Fourwinds Resort & Marina. Administrative Cause Number 01-217P.

Steve Lucas, Hearing Officer, introduced this item. He said the central element of his recommendation was the petition was premature and should be reviewed, as detailed in the Commission's nonrule policy document on the subject, with a public hearing in Indianapolis in July and final action by the Commission in August. Lucas said he made other recommendations in the report as well, but he asked that they now be withdrawn from consideration. He emphasized the recommendations did not address whether the requested rate increase was or was not supported by the evidence—that the recommendation was purely procedural and based upon inappropriate timing.

Chairman Kiley noted there were at least three persons in the audience who might wish to speak to the agenda item. He noted the recommendations by the hearing officer were straight-forward and supported by the Commission's nonrule policy document on this subject. He asked whether there were public comments on the item. There were none.

Damian Schmelz moved to approve the recommended findings by the hearing officer that the petition for rate increase was premature and should be resubmitted for review upon the schedule set forth in the Commission's nonrule policy document. Ray McCormick seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommendations by Hearing Officer for Final Adoption of Proposed Rule Amendments to the Idle Speed Zone at Devil's Elbow, Geist Reservoir (312 IAC 5-9-2); Administrative Cause Number 00-204 (LSA #01-238(F)).

Stephen Lucas, Hearing Officer, presented this item. He said the proposal would amend existing watercraft rules at Geist Reservoir. Several citizens had petitioned to reconfigure an idle speed zone at Devil's Elbow, and this action was responsive to the petition. The result would be to diminish the size of the existing idle speed zone to allow for high-speed watercraft. "In reality, it is probably what the practice has been on-site anyway." Lucas said eight or ten people attended the public hearing, all of whom supported the proposed changes, and he recommended final adoption.

Damian Schmelz moved to approve final adoption of the rule amendments to the idle speed zone at Devil's Elbow at Geist Reservoir. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommendations by Hearing Officer for Final Adoption of New Rule Section to Establish Special Watercraft Standards on Prairie Creek Reservoir (312 IAC 5-9-4); Administrative Cause Number 00-133L (LSA #01-232(F)).

Stephen Lucas, Hearing Officer, presented this item. He said the proposal was again the final stage of a citizen petition. A local park department operates Prairie Creek Reservoir. Currently, the park department seeks to manage boating activities through a local ordinance, but the lake contains waters subject to state watercraft jurisdiction. As a result, the Commission is the agency authorized to adopt watercraft rules. To achieve effective law enforcement, the park department petitioned the Commission to adopt rules. Lucas said only one person appeared for hearing, and he supported the proposition. Lucas said the proposed new rule section was presented for final adoption.

Jerry Miller moved to give final adoption to a new rule section (312 IAC 5-9-4) to establish special watercraft standards on Prairie Creek Reservoir in Delaware County. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommendation for Final Adoption of Rules Establishing Reporting Requirements for Fishing Tournament License Holders; Administrative Cause Number 01-124D; (LSA #01-295(F)).

Steve Lucas, Hearing Officer, introduced the item. He said for consideration were proposed amendments to the procedural rules governing organized boating activities on public waters. If implemented, the amendments would authorize the Division of Fish and Wildlife to require fish catch data during licensed tournaments. Lucas said the proposal was initiated by the Division of Fish and Wildlife and presented a policy question for the

Commission. He offered no recommendation but said the rule proposal had completed the review process and was ripe for final action.

Gwen White spoke on behalf of the Division of Fish and Wildlife. She said catches at fishing tournaments potentially would provide an important source of data in its efforts to manage the resource. Although she did not anticipate there would be a need to collect the data in all instances, having the ability to require its collection would sometimes serve an important function.

Richard Mercier spoke on behalf of the Indiana Sportsmen's Roundtable. He said there were serious concerns in the regulated community that the authority could be used to harass sport fishermen participating in tournament activities. He did not question the integrity of the current management and fisheries biologists within the DNR, but there was no assurance the authority would not be abused in the future. He noted that some of his constituents had also expressed concerns for increased mortality rates among fish that were almost certain to result from implementation of the proposed amendment.

Ray McCormick asked Gwen White whether the data that might be collected warranted the imposition of increased fish mortality rates caused by data collection. She responded, "absolutely."

Jack Arnett moved to give final adoption to amendments that would allow the DNR to require the collection of fish catch data during licensed tournaments. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommendation for Final Adoption of Rule Amendments to Petitioning Standards that Require Licenses for Fishing Tournaments and Other Organized Watercraft Activities to Delete References to Special Terms and Conditions and Amendments to Fish and Wildlife Rules to Deleting an Exemption from Unlawful Possession of Endangered Species if Transported in Interstate Commerce; Administrative Cause Number 01-106L (LSA #01-359).

Stephen Lucas presented this item. He stated the proposal considers two "only vaguely" related topics. The first was sought by the Lakes Management Workgroup to delete one subsection (312 IAC 2-4-3(b)(5)) that is viewed by some as an open-ended invitation for persons hostile to fishing tournaments to place unreasonable conditions on licensing requirements. The second item was sought by the Division of Fish and Wildlife and the Division of Law Enforcement because of concerns the current rule language provides a loophole to persons transporting endangered species in interstate commerce. Lucas noted the latter subject is already covered by statute, and "there is probably no reason to muddy the already complicated statutory and constitutional issue of endangered species and interstate commerce with a rule that is, at best, redundant." He recommended both proposals for final adoption.

Jane Anne Stautz moved to give final adoption to the amendments dealing with petitions to establish organized boating activity license requirements and to delete potentially confusing rule language addressing the interstate transport of endangered species. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Report of Public Hearing, Analysis, and Recommendation of Hearing Officer for Final Adoption of Amendments to 312 IAC 18-3-12, which Governs Standards for Control of Larger Pine Shoot Beetle by Adding Brown, Fayette, Hendricks and Owen Counties to the Quarantine Area; Administrative Cause Number 01-162E (LSA #01-360(F)).

Jennifer Kane, Hearing Officer, presented this item. She said preliminary adoption was given to this rule at the September 2001 meeting. The proposed amendments would add Brown, Fayette, Hendricks, and Owen Counties to the growing list of counties declared to be generally infested with larger pine shoot beetle and subject to quarantine.

Kane said the existing rule language at 312 IAC 18-3-12 lists the counties under quarantine, and with final adoption, there would be 55 Indiana counties under quarantine. Since more than half of Indiana's counties would be quarantined, the proposed rule would list those counties not subject to the quarantine rather than those that are. Kane said an emergency rule effective August 27 already places Brown, Fayette, Hendricks, and Owen Counties under a temporary quarantine. In the absence of county-specific quarantines, the Federal Government through Department of Agriculture, Animal and Plant Health Inspection Service is empowered to establish the entirety of Indiana as a quarantine area. She recommended final adoption of the proposed amendments.

Damian Schmelz moved to give final adoption of standards for control of larger pine shoot beetle by adding counties to the quarantine area. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommendation for Preliminary Adoption of Amendments to the AOPA Procedural Rule to Incorporate Responsibilities of Division of Hearings Relative to Soil Scientist Registration Board. (Administrative Cause Number 01-100Z)

Stephen Lucas presented this item. He said the proposed amendments would allow the Division of Hearings to use its procedural rules where an administrative law judge is the "ultimate authority" for disputes from the Soil Scientist Registration Board. He said these disputes will not come to the Commission. He recommended preliminary adoption.

Damian Schmelz moved to give preliminary adoption to amendments to AOPA procedural rules to incorporate responsibilities of Division of Hearings to the Soil Scientist Registration Board. Jane Anne Stautz seconded the motion. Upon a voice vote, the motion carried.

MISCELLANEOUS

Informational Item—2002 Legislative Update

Director John Goss introduced this item. He said House Bill 301 dealing with domestic deer farms was not passed. He complimented the biologists who testified before the

General Assembly. Goss said the DNR was strongly opposed to the bill and would “stand firm” in its opposition if another bill is offered on the same subject.

John Davis reported on House Bill 1342 that would have banned logging from state forests. “We were happy that the bill did not go forward,” but he added the DNR was sensitive to concerns expressed by the author and would seek to broaden public input. The Division of Forestry has already held two open houses as part of its “public outreach” efforts. He said there would additionally be an open house at Yellowwood State Forest on March 26 and at Owen-Putnam State Forest on March 27, 2002.

Paul Ehret reported on House Bill 72 directed to the disposal of coal combustion waste. The legislation would have required the disposal of this waste in coal mines to be treated in the same way as IDEM treats solid waste in landfills. The legislation failed.

John Davis reported on House Bill 235 that would have formed the State Museums Commission. He said the bill “did not make any progress this session. The State Museum will continue to be a part of DNR unless the legislature makes the change” in the future. The DNR supports the concept of a separate museum entity, but some legislators have raised concerns.

Ray McCormick questioned Lori Kaplan about House Bill 1306 concerning wetlands management. She answered the legal status of wetlands protection at the federal level was seriously impacted by a recent decision from the U.S. Supreme Court. The court found where wetlands are isolated and not associated with a navigable waterway, they are generally not subject to the Commerce Clause and outside the ability of the federal government to regulate. This decision has the effect of placing greater emphasis upon state laws protecting wetlands. She said the status of wetlands protection under state law is the subject of a decision from a Marion Superior Court, a decision that was adverse to IDEM but the effect of which was stayed pending an appeal. The state legislation established a study group but did not change the law. With pending activities at the federal and state levels, and with the involvement of all three branches of government, the future of wetlands protection is yet to be determined.

ADJOURNMENT

At 12:50 p.m., EST, the meeting adjourned.

FUTURE MEETINGS

April 24, 2002, 10:00 a.m., (The Garrison, Ft. Benjamin Harrison State Park, Indianapolis, Indiana)