

# NATURAL RESOURCES COMMISSION

Minutes of May 22, 2001

## MEMBERS PRESENT

Michael Kiley, Chair  
Rick Cockrum, Vice Chair  
Larry Macklin, Secretary  
Damian Schmelz  
Jack Arnett  
Sylvia Wilcox  
Raymond McCormick  
Jerry Miller  
Steve Cecil

## NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas  
Debbie Michaels

## DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Carrie Bales	Executive Office
Carrie Doehrmann	Executive Office
John Davis	Executive Office
Paul Ehret	Executive Office
Gerald Pagac	State Parks and Reservoirs
Gary Miller	State Parks and Reservoirs
James Gerbract	State Parks and Reservoirs
Gwen White	Fish and Wildlife
Jim Mitchell	Fish and Wildlife
Jeff Wells	Law Enforcement
Bruce Clear	Law Enforcement
John Bacone	Nature Preserves
John Richardson	Reclamation
John Friedrich	Forestry
Jim Ray	Soils
Mark Basch	Water
Bruce Thomson	Water
Greg Ellis	Legal
Eric Myers	INRF

## GUESTS

Anthony Long	Julie Halbig	John Little
Randy Espinoza	Marianne Wiggers	Randy Haymaker

Rita Long  
Tim Rider  
George Parker

Dick Mercier  
Ken Brunswick  
Cleo Duncan (Indiana State Representative)

Phil Bloom  
Gary Conant

## 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 22, 2001, at The Garrison, Fort Benjamin Harrison State Park, Indianapolis, Indiana. With the presence of nine members, the chair observed a quorum.

Jerry Miller moved to approve the minutes of April 24, 2001. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's Report. Macklin reported that since the last Commission Meeting the Legislature session had ended. He said the DNR was pleased with the budget outcome. The Department was fortunate to have received an additional ten million dollars for the restoration and repair of in-house dams across the state, of which \$5 million came from general funds and the remaining \$5 million from Build Indiana Funds. "It was very well thought out by the General Assembly."

Director Macklin reported upon an additional \$700,000 available for the Gypsy Moth program. He added there is available each year \$125,000 for the operation of the contractual work with Purdue in the Gypsy Moth Education and Outreach Program. Macklin said the gypsy moth is present in the Northeast part of Indiana, and commended the Division of Entomology for their efforts in addressing the gypsy moth problem.

Director Macklin reported there is \$1.5 million available to continue the Americans Disability Improvement Program. He said "we always find other opportunities to make recreational facilities more accessible."

Director Macklin reported upon \$2.5 million for the Heritage Trust, and said Eric Myers would give a report on the improvement of our stewardship program as far as advancing more license plate sales. He said the Hometown Indiana has \$500,000 available. The Wabash River Heritage Corridor Program has \$4 million, which ties in somewhat with the "very popular" Clean Water Indiana Program.

Director Macklin said the DNR is promoting a partnership program in the Bureau of Resource Regulation that coordinates with the oil and gas industry to address orphaned and abandoned oil wells throughout the state. Director Macklin said he was pleased the legislature amended the legislation giving the Commission ability to review fish and wildlife fees. He informed Commission members House Bill 1661, sometimes referred to as the "Deer Enclosure Bill," was not enacted. As a result, concerns expressed in April by Ray McCormick and other Commission members should be allayed.

Director Macklin reported he attended the Governor's Conference on the Environment, coordinating with the Department of Environmental Management, traveling to Muncie, South Bend, and Corydon. He said the conferences were very well presented and the activities well attended by sponsors.

Director Macklin reported he and John Davis attended the dedication of the Judy Burton Nature Preserve on May 4, 2001, and commended Eric Myers, John Bacone and others involved in the “wonderful dedication program.” Director Macklin also reported the DNR would hold the annual Employee Awards Ceremony on May 23, 2001 at 2:00 p.m. in the Conference Center. “I am proud of all of the employees and their good work.”

Jerry Miller, Chairman of the Advisory Council for Lands and Cultural Resources, reported there was no monthly meeting held and announced the next meeting would be on June 12, 2001.

John Davis, Deputy Director for the Bureau of Lands, Recreation, and Cultural Resources, reported the Division of Forestry staff traveled the state during the past month celebrating Tree City and attending tree planting ceremonies in Nashville, Evansville, Middlebury, Terre Haute, and South Bend, “to name a few.” Davis said the Division of Forestry announced the opening of about 40 miles of mountain bike trails within Clark, Ferdinand, Jackson-Washington, Martin, and Owen-Putnam State Forests. He said DNR also celebrated a cooperative venture at Ft. Benjamin Harrison, planting about 60 trees in the Millennium Grove. “It gave us a moment to visit the park and the Natural Resources Education Center.”

Davis said John Smith, Director of the Division of Historic Preservation and Archaeology, attended a National Park Service conference in Georgia. Davis said Indiana may become the first Cultural National Park in the United States, celebrating the “underground railroad” and offering visitors a chance to retrace the steps of those that used the railroad to travel north. “It would be a tremendous coup for Indiana.”

Raymond McCormick, Chairman of the Advisory Council for Water and Resource Regulation, reported he met in Decker Chapel, Indiana with a group of landowners who were upset about the floodplain management rule. He said he brought the discussion before the Advisory Council, but after “much thinking and re-thinking” the Council decided not to “revisit” the rule.

McCormick said an informative presentation was made to the Council on the restocking changes at Lake Michigan. Lake Michigan fisheries bring 22,000 jobs, business, commerce, and tourism to Northern Indiana. The Division of Fish and Wildlife has “worked hard to change the percentages in the re-stocking of Lake Michigan.” One of the changes is to increase the percentage of coho salmon. The changes of ratios of fish put into the lake will better utilize the sporting chance for the anglers. McCormick said the sportsmen’s groups that responded supported the changes by 93%. “It was well received and created a lot of goodwill for those interested in the stocking of Lake Michigan.”

McCormick said Bill Maudlin from the Division of Fish and Wildlife outlined the current wetland programs in Indiana. Maudlin explained the different wetland programs and the wetland plan that has been developed. Maudlin also discussed the different mechanisms and funding that is available, as well as the variety of group involvement. McCormick reflected these presentations were very educational and informative.

Chairman Kiley stated, “We really appreciate the restocking work that is ongoing, especially in respect to Lake Michigan fisheries. Jack Arnett and Jerry Miller have been working for a long time to address the issues with respect to the sport fishermen and charter boat captains.” Kiley asked Jack Arnett if he believed the re-stocking ratio was in balance. Arnett said, “This was an excellent step in the right direction. Several of us have been working on this for quite awhile. In fact, the sportsmen

group really drove this issue, and the charter people were right behind it, and I think we have showed that we are really receptive to listening to them. It was a good move.”

Dave Vice, Deputy Director for the Bureau of Resource Management, was not present.

Paul Ehret, Deputy Director for the Bureau of Resource Regulation, said he had attended the annual meeting of the Interstate Mining Compact Commission (IMCC) and the meeting of the Interstate Oil and Gas Compact Commission (IOGCC). The IOGCC named the Southwest Indiana Brine Coalition, a grass-roots citizens group started in Southwest Indiana to address oil problems primarily from salt-brine contamination, as the partnership award winner. Priscilla Kelly of Posey County received the national award on behalf of the Southwestern Brine Coalition. Ehret indicated that he was “extremely proud of the work of the group and their partnership with the Division of Oil and Gas in addressing a substantial environmental problem.”

Ehret said the Indiana General Assembly enacted the Clean Water Indiana Program several years ago, and the program is now funded for the first time—receiving \$2 million. Staff is working to allocate the money to the various soil and water conservation districts. As Director Macklin indicated, DNR also received \$10 million to continue our DNR dam repair program. This initiative is an important one, and “I’m glad to see the program continuing.” The Division of Oil and Gas will be receiving supplemental appropriations for the expansion of the orphaned well program to plug wells causing problems through leaking oil.

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

### **PERMANENT APPOINTMENTS AND PERSONNEL INTERVIEWS**

#### **Personnel Interview for Property Manager at Mixsawbah Fish and Wildlife Area**

Gwen White, Division of Fish and Wildlife presented this item. She said Randy Espinoza has served “admirably” over the past year and recommended him for the position of Property Manager of Mixsawbah Fish and Wildlife area.

Rick Cockrum moved to approve Randy Espinoza as Property Manager at Mixsawbah Fish and Wildlife area. Jack Cecil seconded the motion. Upon a voice vote, the motion carried.

#### **Personal Interview for Position of Assistant Curator at Limberlost State Historic Site**

Steve Cecil presented this item. Cecil said he and Rick Cockrum had the opportunity and pleasure to interview the candidate for this position. Cecil said that Ken Brunswick “is tireless in his efforts up there already and we are glad to have him as the Assistant Curator at Limberlost. Ken Brunswick is recommended for the position.”

Steve Cecil moved to approve Ken Brunswick as Assistant Curator at Limberlost State Historic Site. Jerry Miller seconded the motion. Upon a voice vote, the motion carried.

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

**Consideration of Boundary Adjustment to Portland Arch Nature Preserve, Fountain County**

John Bacone, Division of Nature Preserves, presented this item. He stated the Portland Arch Nature Preserve is a state owned nature preserve in Fountain County. “It was one of the first nature preserves acquired by the state from The Nature Conservancy in 1976, and was recently realized there was a boundary problem when an adjacent landowner tried to sell his property. The survey found that part of the house and septic system is on the state owned land.”

Bacone said that before there was a state chapter of The Nature Conservancy, the Portland Arch was first acquired by the Illinois Chapter of The Nature Conservancy from the Boy Scouts. At about the same time, a neighbor sold their property. “Right after The Nature Conservancy acquired the land, the new owners of the adjacent property apparently built their house without benefit of a survey.” The State subsequently bought the land from The Nature Conservancy and dedicated it as a nature preserve.

Bacone said, to correct the boundary problem, an adjustment is proposed in terms of the land that the DNR owns and the land that is dedicated as a nature preserve. “It would actually result in a better situation than we currently have now. It would be an equivalent acreage swap. It would also result in the state picking up a part of the canyon that is behind the house and road frontage on either piece the state would acquire, which would be an improvement in the existing situation.”

Bacone explained a public hearing was necessary to make a change to the nature preserve, and recommended that a public hearing be set and a hearing officer be appointed. “We would be in favor of proceeding if the Commission were so inclined.”

Damian Schmelz moved to appoint a hearing officer to set a public hearing on the proposed boundary adjustment to Portland Arch Preserve. Jerry Miller seconded the motion. Upon a voice vote, the motion carried. Chairman Kiley appointed Steve Lucas as the hearing officer.

**BUREAU OF RESOURCE REGULATION**  
**DIVISION OF STATE PARKS AND RESERVOIRS**

**Consideration of a Prospectus for the Development of an Inn at Versailles State Park**

Gerald Pagac, Director of Division of State Parks and Reservoirs presented this item. The Commission was provided with a Prospectus for a “Versailles State Park Inn Proposal which would be built by private investment.” Pagac indicated there has been “interest around Versailles State Park for many years to see the development of a state park inn.” Interest in inn development within our state parks is not unique; however, in this situation there is an “extremely strong feeling by folks

locally. He stated the DNR has not built a new state park inn since 1939. “It’s not something that we turn a deaf ear on necessarily, but it is something that takes a great deal of investment.”

Kiley asked for clarification regarding Commission action needed. Pagac explained the prospectus was an information item and was provided for the Commission’s review. DNR was requesting a consensus permission from the Commission to “put it out in the streets to see if there is any interest out there in the private sector to put forth a proposal. If there is, we will then evaluate that and bring it back to the Commission.”

Cleo Duncan, Indiana State Representative, said a House Concurrent Resolution approved several years ago urges the DNR to establish criteria for the construction of additional inns at Indiana state parks by the private sector. She described Versailles State Park as “a treasure” and said it is the second largest park in the state. Representative Duncan added, “Hopefully, with your approval to pursue the building of an inn under the auspices of DNR, with DNR approval on every aspect, it will enhance the park and bring more people in to appreciate its beauty and the beauty of our whole area of the state.”

Marianne Wiggers said she has been working on the inn development project for 13 years, looking at both public and private funding; however, currently there is more focus on the private sector. She said that, over time, three riverboats have come to Southeast Indiana, bringing increased tourism. “The inn will only open additional area and be another avenue to bring in new visitors to take advantage of what we all have in southeast Indiana.”

Randy Haymaker stated that he has grown in his appreciation of the Versailles State Park.. “We helped with the market study a few years ago, and we think this is a great project. We look at the proposed site as a good one for rural development without over-stimulating growth that may result. We stand very much in favor, however, with very strict standards.”

John Little, Ripley County Commissioner, said he has lived within a quarter of a mile of the state park for 30 years. He complimented the DNR on the improvements made in the area. “The County Commissions and County Councils, all county government, are really behind this.”

McCormick recommended the proposal be placed on the agenda of the Land & Cultural Resources Advisory Council for consideration before the Division of State Parks and Reservoirs move forward with the prospectus. Chairman Kiley said “We want as many people to have input for this as we possibly can. It certainly, at first blush, seems to be the thing we are looking for.” John Davis indicated the scheduling of the next advisory council should allow for review without any delay in developing the prospectus. No negative comments were received from the Commission, and no changes suggested to the proposal. The Chairman reflected the Division of State Parks could move forward, but with the understanding the concept would be returned to the Commission for action if an appropriate concept proves economically and environmentally feasible. He also directed input be sought from the Advisory Council for Lands and Cultural Resources.

## **LEGAL PROCEEDINGS**

### **NRC DIVISION OF HEARINGS**

**Consideration of Report, Findings of Fact, and Conclusions of Law with Nonfinal Order of the Administrative Law Judge in the matter of *Carl Underwood v. Department of Natural Resources*, Administrative Cause Number 00-140L**

Tim Rider, Administrative Law Judge, presented this item. The case deals with Carl Underwood's Lifetime Hunting License that he procured in December 1994. There were two issues. The first was legal in nature and determined by summary judgment. The Department properly voided the license, and taking of the license was done properly. The Administrative Law Judge determined, however, that Underwood's residency status on the day that he procured the license was a question of fact. The hearing on the second issue was held in February 2001.

Because of the past decisions by the Commission, the Administrative Law Judge determined the burden of proof was on Mr. Underwood. At hearing, Mr. Underwood presented no evidence he was an Indiana resident in December 1994. The Department presented some evidence suggesting Underwood probably was not a resident. There are two critical statutory sections: IC 14-22-11-15 established a process to revoke a license or permit. IC 14-22-11-13 addresses the voiding of a resident license falsely procured by nonresident. IC 14-22-11-13 declares the license void, as distinguished from voidable. Judge Rider concluded, "I would request the Commission to uphold the nonfinal order, which declared Mr. Underwood a nonresident of Indiana in December 1994."

Anthony Long, attorney for Underwood, urged the nonfinal order is in error. He also informed the Commission of a typographical error in paragraph two of his objections. "We alleged that the Department should have conformed to IC 4-21.5-3-4 and that should be IC 4-21.5-3-8. I think it is important to understand the chronology here before we get to the issue of principle. This is a hunting license quarrel. Obviously, we are not mining 2,000 acres of ground in southern Indiana and millions, perhaps billions, of dollars at stake. We are dealing with a principle."

Long said in 1994, the DNR issued a lifetime hunting license to Carl Underwood. "On December 11, 1998, or thereabouts, an Indiana Conservation Officer issued a citation to Mr. Underwood accusing him of taking a deer illegally and hunting a deer without a valid license—all of it stemming from whether the license was valid. The charges were filed in August of 1999. It was in the court system until February 2000. At that time, the Prosecutor dismissed the case, and said that the issue of the license is for administrative action before the Department of Natural Resources. "On April 26, 2000, Mr. Underwood was walking down a private road carrying turkey calls, a decoy, and a camera. Conservation Officer Gammon stops Mr. Underwood and asked to see Mr. Underwood's license." Officer Gammon confiscated the license under no authority from the Department of Natural Resources. On July 10, 2000, the DNR sent Mr. Underwood a letter informing him his license was 'no good,' and it is up to Mr. Underwood to prove that it is valid. On July 21, we filed our petition for review."

Long argued there are two issues: One is "due process," and within that is the "burden of proof." He said the "confiscation of Mr. Underwood's license is an embarrassment to the Department and certainly to the state of Indiana without any processes by the state. Judge Rider referred to CO Gammon as a delegate of the DNR Director in Conclusion of Law 18. It cannot be found in IC 14-9-8-16 where the conservation officers are delegates or designates to make these types of determinations. Conclusion of Law 18 is wrong, and I have argued that. This is a principle more than anything else is."

Long urged the ALJ “ruled early on that Mr. Underwood had the burden of proof. The authority that Judge Rider cited was *Brown v. DNR and Peabody Coal Company*. The finding was that the license was issued. Therefore, since Brown was challenging the license, Brown had the burden of proof. I do not take exception to *Brown*. What I think the issue is in this case is the license was issued, and the Department decided that it was an invalid license. *Brown* is the authority for the very proposition that the Department had the burden of proof in this case. Those on the Commission that practice law would perhaps recognize that when you have the burden of proof and when you do not, you approach a case entirely differently.”

Long reflected that “Judge Rider said I did not offer any evidence. I did offer the application that was submitted. Maybe Judge Rider did not consider that as much evidence, but we did offer that evidence in our case-in-chief. It was offered and considered by Judge Rider as a nullity or no evidence whatsoever. Judge Rider is simply wrong on that issue.” He argued IC 4-21.5-3-8 provides that when you are going to terminate a person’s legal rights, “you have to give them notice and have a hearing.”

Long continued, “I searched CADDNAR for the cases cited by Judge Rider. I could only find one case that deals with a revocation of a lifetime hunting license (*DNR v. Foster*, 5 Caddnar131 (1989)). Judge Rider wrote that decision, but he did not cite it in this case. There are two things about this case that were significant. One, is the fact that Judge Rider wrote the decision; and secondly, the case dealt with a license suspension. On December 5, 1989, the DNR filed a complaint to revoke the lifetime comprehensive hunting license. The complaint charged that the license was procured by misrepresentation, in that, the respondent was not a resident of the state of Indiana.

Long urged, “Do not allow the State to abuse its power. We, as citizens, are entitled very simply to due process. Give us a judge like Judge Rider. I think he is a fair man and he gave us his best effort to give a fair hearing in this matter. However, I think he is wrong. Judge Rider has approved a procedure that is wrong. It is flawed philosophically, legally, and by precedent of this very agency. I am citing *Foster* for the fact that it showed the procedure that was used, adopted, and conformed.”

Long concluded, “Judge Rider cites the authority that this is a *de novo* proceeding. I agree that it is. I think that when you put the burden of proof on Mr. Underwood, you take it out of the *de novo* proceeding. When the burden of proof is shifted to the person who had the right that was taken away from him, you are giving deference to the action of the agency by revoking the license. You are asking that the status quo be changed. You have to prove them wrong, and that is not *de novo*. *De novo* is when it starts from the beginning. We would respectfully request that you reverse this matter and order his license returned to him. If the Department wants to then go forward and file a charge and do it in a *de novo* fashion, so be it. That is what justice would be.”

Greg Ellis, Counsel for the Department of Natural Resources, argued IC 4-21.5-3-14 sets out the burden of proof issue. “Judge Rider was correct in his ruling, and we would request that it be made a final order.” He reflected “some of the statutes that Mr. Long cited, and specifically *Foster*,” were inapplicable to the present case. “There is a statute, IC 14-22-11-13, which sets out that if there is a license procured by false statement it is voided by a matter of law. DNR sent a letter that stated the license was void. In that letter, there was an indication that if Mr. Underwood disagreed with the decision and he had an opportunity to appeal. We believe that Mr. Underwood had an opportunity to challenge the decision. Officer Gammon testified that he did issue a receipt when he took the license



from Mr. Underwood. That is standard procedure when a police officer confiscates a license. I would like to request that the order be made final.”

Jerry Miller moved to adopt Judge Rider’s decision as final. Chairman Kiley asked for a second to the motion. Kiley stated that the motion failed for the lack of second, and asked for further discussion and explanation.

Greg Ellis stated that the DNR produced certified documents from the Indiana Department of Revenue showing that Mr. Underwood had never filed any Indiana Income Tax Returns. DNR also filed documents from the Bureau of Motor Vehicles. “Mr. Underwood has never had an Indiana Driver’s License nor had any vehicles registered in Indiana. If the burden of proof were on the Department, the evidence submitted would have met the burden that Mr. Underwood was not a resident at the time or after the time Mr. Underwood applied for the license.”

Chairman Kiley questioned DNR counsel regarding the precedent of the previous CADDNAR case rendered by Judge Rider. Ellis stated that the DNR in *Foster* and in the present case followed different procedures. DNR pursued license revocation in the *Foster* case. In the instant case, the Department applied IC 14-22-11-13 to rescind the license because it was void as a matter of law. Kiley asked whether the Department’s position was the agency had an option as to which method to pursue. Ellis answered in the affirmative and that “both methods would be correct.” Kiley observed, that if the option existed, the burden of proof would seemingly change depending on the procedure taken.

Rick Cockrum indicated he was concerned about due process. McCormick questioned the circumstances under which the license was taken. He asked whether the license was confiscated when a deer was taken or when Underwood was photographing turkeys. Kiley indicated he was not aware a license was required to photograph wildlife. Long urged a license was not necessary to photograph wildlife. Long said originally Underwood was issued a ticket for taking deer with a lifetime license, but his license was not confiscated at that time.

Schmelz questioned whether there was any difference whether a license was void as opposed to revoked. Ellis said there was a difference. If a license is revoked, the licensee has a legal privilege to hunt until revocation takes place. If a license is void, “as the statute clearly states, the licensee never had any privilege or rights. In Mr. Underwood’s case, there was a declaration of a void license.” Miller asked clarification regarding where an application is filed and qualified, and then the license is rescinded rather than revoked, would the license “be deemed not effective in the first place?” Kiley said “the license would be void *ab initio*—it is void from the outset even though the license was issued initially.” Cecil asked about Underwood’s current residence. Long answered Underwood currently resides in North Carolina.

Jerry Miller moved to approve the “Report, Findings of Fact and Conclusions of Law, with Nonfinal Order of the Administrative Law Judge” as the Commission’s findings of fact and conclusions of law with final order. Steve Cecil seconded the motion. The motion passed on a voice vote, with two members voting in the negative.

**Consideration of Report of Public Hearing and Presentation for Final Adoption of Rules to Help Implement P.L. 38-2000 (HEA 1075) Regarding Watercraft Engaged in Group or**

**Organized Activities on Public Waters. Administrative Cause Number 00-116A; LSA #00-189(F).**

Stephen Lucas, Hearing Officer, presented this item. He said for consideration was the proposed final adoption of rules to assist in the implementation of a portion of PL 38-2000. This portion of the new legislation places responsibility in the Commission for adopting rules to govern the “regulation of watercraft engaged in group or organized activities or tournaments.” The bill was itself largely responsive to the Lakes Workgroup, a legislatively established entity that met to consider how to improve management of public freshwater lakes, most of which are located along the northern two or three tiers of Indiana counties.

Lucas observed this rule proposal was discussed extensively by the Commission when given preliminary adoption. The philosophy of the proposal was “minimalist regulation—to focus attention on waters where there is or is perceived to be a problem.” He said while it might be a fair characterization the statutory motivation was largely for fishing tournaments on public freshwater lakes, the application of the law is considerably broader. It extends to all “public waters”—including rivers and Lake Michigan. Also, group boating activities other than fishing tournaments are addressed.

Lucas said four points of emphasis should be made:

- The decision to subject fishing tournaments and other organized activities to regulation is not the prerogative of the NRC. That rests with the Indiana General Assembly, and by the enactment of PL 38-2000, the Indiana General Assembly has made a policy decision to subject these activities to regulation. While regulation of these activities does not appear markedly different in philosophy from the regulation of boat races and ski events (activities subject to DNR and NRC regulation for many years), even if different, the decision has already been made by the legislature.
- PL 38-2000 was an effort to respond to ever-increasing user competition for Indiana’s scarce and sensitive public waters. In response to this same concern, last year Director Macklin, by emergency rule, temporarily expanded the accessibility of DNR reservoirs for fishing tournaments. Prior to last summer, only Lake Monroe was available during summer months. The rule proposal currently before the Commission would make last year’s temporary rule a permanent rule, with the hope pressure on inland public freshwater lakes will benefit from a reduction of user competition.
- A key thrust of the rule draft was to encourage local discussion, with that discussion to include tournament sponsors and other affected user groups, even before a proposal comes to the NRC for preliminary adoption. This draft encourages but does not mandate local governmental presentation of a rule petition. Rather than being presented by local officials, it could be presented to the NRC by a Deputy Director for the DNR. The motivation was “to encourage open dialogue.” Tournaments may present serious environmental or safety concerns, but they may also present social concerns. Early-active local participation may mitigate or even eliminate the need for rule adoption on specific bodies of water, particularly if the concern is socially-based rather than safety-or-environmentally-based. Lucas added, “Whatever the local participation, however, and I want to doubly-emphasize this point, the sole and exclusive authority to establish rules to require standards on particular bodies of water rests with the Commission.”
- The proposed rules do not establish any new sites where a license would be required to conduct a tournament. That would occur if, and only if, the NRC (following advice from the DNR and the

affected citizens) determined to give preliminary adoption to a rule for a particular waterway—and if following a public hearing process—the NRC gave the proposal final adoption.

Lucas said based on written comments—those received by telephone and at a public meeting—several modifications are recommended to the language given preliminary adoption. He outlined “some of the most significant:”

- The requirement for posting cash bond and a \$1 per participant user fee would be retained on DNR lakes but would not be included for tournaments on public freshwater lakes and other public waters.
- The requirement for tow boats and EMTs would be eliminated entirely, including even on DNR lakes. Lucas said “DNR personnel have suggested these concepts may be a good idea but are “probably over-kill as regulations,” and, although part of the current regulatory structure for DNR lakes, are not enforced even there.
- Liberalization of the proposed requirement that the “name and logo of the fishing tournament or other organized activity” be displayed on both sides of participating boats. As modified, the requirement would be for a clear “logo, banner, or other visible item” approved by the DNR. “In effect, do enough that a conservation officer can identify a tournament participant but not require the sponsors to incur an unneeded expense.”

Lucas said, in addition to the specific language of the rule proposal, three additional points were suggested. “These would be contingent upon the NRC giving final adoption to the current rule proposal:”

- Regulated fishing tournaments would be required to provide catch data to the DNR’s Division of Fish and Wildlife. In effect, approval of this concept would be for preliminary adoption of an amendment to the current rule proposal and would itself require another full hearing process.
- Upon the designation of the DNR Division as the “point of contact” to administer this regulatory program, the designated Division would be urged to undertake an informal meeting initiative—involving public participation—to develop guidance to maximize consistency and fairness in the implementation of PL 38-2000 and these rules.
- Consider the feasibility of designing a website that would help tournament sponsors and other interested persons know when and where these activities are scheduled. This concept was inspired by the current, noteworthy efforts of the Indiana BASS Federation.

Lucas closed by expressing appreciation “to all those who commented on this proposal and for the dignified manner in which they participated in our public hearing.” He then presented the rules for consideration as to final adoption.

Dick Mercier spoke on behalf of the Indiana Sportsmens Roundtable. “Although I realize this is a legislative problem and not the Commission’s problem, we do feel this concept discriminates against tournament fishermen.” He said the modifications suggested by the hearing officer went a long way to a fair result. In the end, a lot would depend on how the rules were implemented. “We would like to thank Steve Lucas for all his hard work in formulating these recommendations, and request final adoption.”

Chairman Kiley thanked Dick Mercier for his continuing efforts and participation on behalf of sportsmen. He said Mercier had been a continuing friend of natural resources issues and of the DNR, his efforts and those of his constituents were appreciated.

Jerry Miller questioned why the hearing officer recommended the number 15 be retained as the threshold for what constitutes a tournament or other organized boating activity. He observed even a smaller number could have a major impact on a small inland lake. Lucas answered the perspective of the DNR committee that developed the original rule proposal was that a number less than 15 simply was not enough to constitute a significant organized boating activity. He conceded any number was somewhat arbitrary, however, and Lucas added what number to use was a policy decision. The Commission's role was to make policy within statutory parameters, and he believed the Commission could apply a smaller number if it wished. Suggestions received during the public hearing would have reduced the threshold number to as low as six.

Jack Arnett asked why the focus of the rule proposal was upon fishing tournaments and similar organized boating activities. He reflected there are a multitude of factors causing crowding on Indiana's public waters. He questioned whether focusing upon these particular activities was not, indeed, a form of discrimination. Lucas responded Public Law 38-2000 was directed to fishing tournaments and other organized boating activities. Similar legislation in the past focused attention upon boat races and ski events. Also, other legislation enacted in 2000 looked at different boating issues, including the establishment of new authority in the Commission to address the potential adverse environmental impacts by watercraft on sensitive resources at particular locations in a lake or river. This legislation has been, and is likely again in the future, to be considered in rule adoptions. The current rule adoption is directed only to fishing tournaments and other organized boating activities, however, because the current rule adoption is directed exclusively to this aspect of PL 38-2000.

Rick Cockrum said he "was intrigued" by the concept proposed by some commentators that would tie what constitutes a fishing tournament to the resulting density on a particular lake. He suggested the number 15 was probably too low for most waterways where tournaments would take place.

Cockrum said he agreed with the hearing officer analysis that having local participation was good in advance of considering formal rule adoption. Assuring an important role for local government where the Open Door law applies would help provide citizen access at an early stage. Yet he suggested the analysis was misplaced with respect to park departments and conservancy districts which he understood to be appointed rather than elected. Also, with respect to municipalities, he urged that the authority to petition for rule change be placed in the "executive" of the municipality.

Lucas responded that boat density might be a pertinent factor to deciding what lakes should have licensing requirements for tournaments and other organized activities. In addition, density was probably relevant to what numbers to allow on particular public waters when establishing maximum numbers. He said the number 15 was merely a threshold for defining what an organized activity was. If fewer than 15 boats were involved, it fell beneath that threshold and would not be considered a regulated activity under this rule. He repeated that the number to be used was a policy question for the Commission, and the Commission could legitimately increase the number from 15.

Lucas said whether to include park departments and conservancy districts among the class of persons who could petition the Commission for rules to establish a licensing requirement on a particular public water was also a policy decision. He said conservancy districts were initially appointed by the

county commissioners, but were afterwards elected by the freeholders and were subject to the Open Door law.

Arnett asked about concerns expressed in many of the comments, as well as in the media, that suggested the Commission was turning over authority to establish tournament licensing authority to local government. Lucas answered those comments and reports were in error, never a part of the rule proposal, and contrary to the DNR's own press release.

Rick Cockrum moved to amend the rules being considered for final adoption to require that the executive for a municipality be the sponsor of any petition and to delete park departments and conservancy districts from the class of eligible petitioners. The motion was seconded by Jack Arnett. Upon a voice vote, the motion to amend carried.

Ray McCormick expressed concerns the Commission would consider the final adoption of rules where so much opposition to them was expressed by the public. He reflected there seemed to be a "moving target" with the proposal offered by the hearing officer differing considerably from what was given preliminary adoption by the Commission.

Chairman Kiley responded "the most onerous requirements" in the rules given preliminary adoption "or perhaps more accurately the most bureaucratic" were removed by the hearing officer in making his recommendations for final adoption. Kiley reflected he personally had heard negative comments from several citizens on items in the rules as preliminary adoption, such as the tow boat requirement or the \$150 bond requirement. The hearing officer report considered these same kinds of comments and incorporated many of them. Appropriate adjustments were made, and "that's how the rule adoption process is supposed to work."

McCormick asked Dick Mercier to clarify his comments that fishing tournaments were the subject of discrimination. Mercier answered the focus on these kinds of activities was largely a result of how the legislation was written, and the Commission does not control what the legislation says. He suggested the amendments made to the rules since preliminary adoption resolved many of the most serious concerns.

Damian Schmelz moved to give final adoption to the rules as proposed by the hearing officer and as amended by the Commission. The motion was seconded by Steve Cecil. Upon a voice vote, the motion carried.

**Consideration of Report of Public Hearing and Recommendation for Final Adoption of Law Enforcement Personnel Rules Recodification and Modification (312 IAC 4); Repeals 310 IAC 1.2. Administrative Cause Number 99-146L; LSA #01-15(F).**

Steve Lucas, hearing officer, presented this item. He said for consideration as to final adoption were rules governing DNR's Division of Law Enforcement. For the most part, current standards were retained but with some liberalization and simplification of division management functions.

Lucas said the most noteworthy changes were probably to how the administrative review of personnel actions would be addressed:

- The current panel that consists of three conservation officers and one attorney from the NRC’s division of hearings would be replaced with exclusive reference to an NRC administrative law judge. Lucas said the modification was believed necessary to conform with Sunset legislation, as codified at IC 14-10-2-2, that requires all adjudictory proceedings of the NRC to be conducted by an administrative law judge appointed by the Commission. These appoints are implemented through the Commission’s Division of Hearings.
- Administrative reviews would be limited to actions affecting a conservation officer’s proprietary interests—such as demotions and terminations. Lesser actions such as “letters of reprimand,” that carry no monetary penalty and that are expunged after two years, would no longer be addressed.
- The rules would be clarified so only conservation officers are included in this process. Civilian employees of the Division of Law Enforcement are subject to and protected by agreements negotiated through the Union.
- An informal board is authorized for the consideration of grievances within the Division of Law Enforcement to include a variety of issues, including personnel matters. This board would not be subject to the formalities of the Administrative Orders and Procedures Act—IC 4-21.5. Matters resolved through intervention of the board would obviate the need for administrative review by the NRC and its Administrative Law Judges.

Lucas concluded by saying, “I’d like to make one more comment. With final adoption of these rules, and subject to review and approval by the Attorney General and the Governor, the Commission will have completed the extensive task of recodifying DNR rules at Title 310 to become NRC rules at Title 312.” He then said these rules were recommended for final adoption in the form given preliminary adoption.

Jerry Miller moved to give final adoption 312 IAC 4 to govern personnel matters within the Division of Law Enforcement and to repeal 310 IAC 1.2 that currently governs the subject. Raymond McCormick seconded the motion. Upon a voice vote, the motion carried.

**Consideration of Presentation for Preliminary Adoption of Watercraft Rules on Prairie Creek Reservoir in Delaware County. Administrative Cause Number 00-133L; LSA #01-35.**

Steve Lucas presented this item. He said for consideration was preliminary adoption of rules that would govern watercraft operations on Prairie Creek Reservoir in Delaware County. He said currently there were standards that sought to govern boating activities on the reservoir and were implemented by local ordinance. This status presented a potential conflict with the Commission’s rule-writing authority and could cause public confusion, “so there is work yet to be done on the local level before we can go to public hearing.” He asked the Commission to give the proposal preliminary adoption to “show good faith by the agency toward working through any procedural issues” and to move forward with this rule proposal.

Jack Arnett moved to give preliminary adoption to watercraft rules to govern Prairie Creek Reservoir in Delaware County. The motion was seconded by Sylvia Wilcox. Upon a voice vote, the motion carried.

**Consideration of Presentation for Preliminary Adoption of Amendments to 312 IAC 13 Governing Water Well Drillers to Authorize Use of Corrugated Fiberglass Casing in Bucket Wells. Administrative Cause Number 00-033W; LSA #01-106.**

March Basch, Division of Water, presented this item. He said bucket wells or “dug wells” are typically constructed of concrete casing. They are put in areas primarily with very limited groundwater capability. The well acts “like a cross between a cistern and a well, because it does allow for water storage.”

Basch explained a company from Canada approached the DNR about new material in the bucket well industry. The corrugated casing has been approved by the National Sanitation Foundation. Other Midwestern States, including Illinois and Ohio, have approved the material as a viable alternative to the concrete casing. Basch said the corrugated material allows for easier construction of a well. He said “the entire bucket well industry, which constitutes two people in Indiana, was queried regarding the proposed amendments. The industry approves of the amendments.” Basch passed around a sample of the material that would be approved by the rule change.

Chairman Kiley asked where bucket wells were installed. Basch explained, “typically bucket wells are seen in Southern Indiana where there is limited water availability. He said the typical production capability of a bucket well would be one-half gallon a minute to one gallon a minute. There has also been some application, however, in irrigation wells.”

Ray McCormick moved to give preliminary adoption to the amendments governing water well drillers to authorize use of corrugated fiberglass casing in bucket wells. Rick Cockrum seconded the motion. Upon a voice vote, the motion carried.

**Informational Item – Report on whitetail deer in State Parks**

Dr. George Parker presented this item. He stated the Commission accepted the Deer Study Report in 1993, and recommended there be a removal of deer from Brown County State Park that year. “That was the same year we started vegetation studies in Brown County State Park, and since that time we have expanded to look at many parks across the state.” Dr. Parker provided the Commission with a written “Chronology of Events concerning State Park Deer Problem.”

Parker explained “the issue before the Commission is certainly not a short-term issue. In fact, in 1969 there was damage reported in Brown County State Parks. In the 70s and 80s, DNR biologists reported extensive damage within the park from excessive deer populations. The Deer Subcommittee was formed in 1992, which recommended to the Commission there be a reduction of the deer herd in Brown County State Park. The agency has now “entered the maintenance phase” of the program. “I am proud to say that the program is a success. We certainly haven’t solved the problem completely, but we are on the road to solving the problem.”

Parker said since the first reduction in 1993, deer have been removed from 17 of 21 state parks. “We are in still in the process of looking at the last four parks. By 2000, the deer removal data was a much more sensitive indicator of deer density than was the condition data on vegetation. It is clear that the removal program was allowing recovery of those parks with several annual reductions. This determination led to a recommendation to use deer removed/hunter effort per square mile of park area

to determine which parks needed another deer reduction. There has to be some long-term removal plan.”

Parker offered recommendations for long-term maintenance of a balance between deer and their habitat within Indiana’s state parks:

- Continue annual reductions in state parks until all have deer densities at the long-term maintenance level. This level is best indicated by a deer removal level of 0.22 deer per removal effort and/or 12 to 16 deer removed per square mile of park area. Continue to monitor the recovery of the vegetation within each park to insure that deer are being maintained in balance with their habitat.
- Deer removal data should be evaluated in February to determine which parks need another reduction. Deer removal that exceeds .22 deer/hunter effort or 12-16/square mile indicates a removal is needed. This will insure that deer remaining in the park are at a level to allow long-term recovery of the habitat. These criteria may need to be refined and adjusted for individual parks as more data is collected in future years. Annual removal data along with habitat recovery data will provide the information needed to maintain herds and insure the recovery of healthy state park habitats.
- The condition of vegetation in the four parks (Ft. Harrison, Mounds, Quabache, and Summit Lake) that have not had a deer reduction should be used to determine when to initiate a control program. Park naturalists using indicator plant species, deer exclosures, and color photographs should make an annual assessment of vegetative condition.
- A committee of approximately five experts be established to annually review the vegetation data in parks that have not had a deer reduction, to recommend when a reduction program is needed. This could include a plant ecologist from the Division of Nature Preserves, a wildlife biologist from the Division of Fish and Wildlife, a resource specialist with the Division of State Parks and Reservoirs, and two appointments from the Indiana Academy of Sciences.

Kiley inquired about the impact of the understory restoration on the return of other species. Parker indicated a graduate student did a study in several parks in that respect, which found the loss of understory vegetation was having an effect on the insect and bird populations, primarily the subcanopy birds. “We have not followed up in terms at looking at return of other species, but it probably should be done. We are also seeing a lot of plants returning that we thought we might have lost.”

Rick Cockrum asked whether habitat variations within the state parks have an impact on the standard 0.22 deer per removal effort. Parker answered, “It is not the variation in habitat that’s important, it’s the land characteristics surrounding the state park. We are talking primarily forested environments.” Dr. Jim Mitchell explained the .20 deer per hunter effort means there is one in five chance for a deer to be taken. “If it was .25, it only takes four people one day to remove a deer.”

John Davis requested clarification on whether the model of deer removed/hunter effort was a new method to determine necessary deer reduction within a state park. Parker said it was an extension of the model based on what the data showed. He further explained removal data is a much more sensitive indicator of whether or not to remove deer every year or every other year. The response of the vegetation indicates recovery is taking place.



McCormick asked whether there was a “particular burden” upon the DNR personnel in conducting annual hunts. Macklin responded. The parks are closed during the hunts, but regarding personnel it is not an extraordinary burden.” Chairman Kiley added, “It is not as bad as it was initially at Brown County State Park. Law enforcement was necessary due to the opposition to the hunt, but that need has diminished significantly.” Macklin noted the hunts have been “very safe.” Parker said there was opposition at the very beginning of program, but other than at Indiana Dunes State Park, there is very little opposition across the state to what we are doing.

Jerry Miller complimented the staff and those involved as being “very professional in handling” the deer reduction program. He reflected upon the great efforts of Damian Schmelz and others in taking on the task years ago.

George Parker said he would like to see the Commission recommend a “slight change in procedures, because I think we are still stuck on having to show there is damage out there in the vegetation before we move back into the park. I would like to see us move beyond that.” George Parker offered to submit further information to commission. Chairman Kiley complimented his report and stated the commission would look forward to his additional information.

## **ADJOURNMENT**

At 12:40 p.m., the meeting was adjourned.

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## **FUTURE MEETINGS**

June 21, 2001, 7:00 p.m., EST (Pokagon State Park)  
July 19, 2001, 10:00 a.m. (The Garrison, Ft. Benjamin Harrison State Park,  
Indianapolis, Indiana)  
August 21 and 22, (Clifty Falls State Park)  
September 19