

**NATURAL RESOURCES COMMISSION**

Minutes - November 19, 1998

**MEMBERS PRESENT**

Michael J. Kiley, Chair  
Larry Macklin, Secretary  
Damian Schmelz  
Jerry Miller  
David Hensel  
Rick Cockrum  
Joe Siener  
Jane Ann Stautz  
John Goss  
Steve Cecil

**NATURAL RESOURCES COMMISSION STAFF PRESENT**

Stephen Lucas  
Sylvia Wilcox  
Jennifer Kane

**DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT**

Paul Ehret	Executive Office
Jack Costello	Executive Office
Carrie Doehrmann	Executive Office
Angie James	Executive Office
Lori Kaplan	Executive Office
Brent Shike	Executive Office
Dave Vice	Executive Office
Greg Ellis	Staff Counsel
Stephen Sellers	Public Information
Katie Smith	Fish and Wildlife
Randy Lang	Fish and Wildlife
Anthony Wilson	Law Enforcement
Bruce Stevens	Reclamation

**GUESTS**

Brett Nelson	Richard Marrs	James Nelson
Dave Hotle	Michael Caudill	Joe Street
Robert Clampitt	Vince Griffin	Sean Griggs
David Barnard	John Humes	Mary Runnells

Nat Noland	Bruce Palin	Robert Fry
Linda Ford	Carl Ford	Ruth White
Clifford White	Jack Jarrett	Keith Mulholland
Nick Hess	Jim Tarnowski	Robert Pederson
Theresa Harvey	Don Mottley	Susan Thomas
Sam Flenner	Brad Reynolds	Brian Wright
Don Dixon	Richard Harvey	Linda Buckner
Kim Winter	Antoinette Verdé	William Miller
Pam Fortney	Rachel Fortney	Gordon Thompson
Dana Nixon	Bill Fortney	Gary Eck
Clarke Kahlo	Mary Ann Kieffner	Harold Kieffner
Daniel Lefler	Charles Petri	Tomás Heyartz
Ben Sallee	Kenneth Eck	Nancy Gehlhausen
Greg Foote	Kellie Waterhouse	Judy Thompson
Steve Jackson	Bryce Waterhouse	Arthur Edelstein
Bobby Atkinson	Jack Miller	Bill Hayden
Max Goodwin	Jeffrey Stant	Andrew Knott
Rebekah Fortney	Holly Carter	Velma Lee Moore
Sarah Fortney	Sandra Tokowski	John Comer
Rae Schnapp	Jim Hauck	Joe Street
Mary Neyhouse	Anthony Hodge	Dave Morris
Ron Billingsley	Joyce Mullendun	Alice Schloss
Natalie Stant	Dana Meier	M.T. Bookwalter
Gary Seibert	Otto Neyhouse	Myra Spicker
Judy Gurnitz	Linda Dively	

## MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular monthly meeting of the natural resources commission at 10:08 a.m., on November 19, 1998 in the lobby of the IMAX Theater, White River State Park, Indianapolis. With the presence of ten members, the chair observed a quorum.

Jerry Miller moved to approved the minutes of October 28, 1998. The motion was seconded by Damian Schmelz. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's report. He said the department of natural resources continued to work with the project review team for development of the new Indiana State Museum. He said the room where the commission was currently meeting would eventually be a shared lobby between the IMAX Theater and the Indiana State Museum. "I believe that I can report today that we're very close to a final product relative to the footprints, the exterior dimensions, and the interior floor plans." Macklin said the Indiana State Office Building Commission was the lead agency for construction of the museum. He said the annual division directors meeting was held at Spring Mill State Park. "It was a very good, interactive exercise. The theme was being connected,' and we used an

agenda by which every bureau made presentations or demonstrations that were new or unique that they could share with us."

Macklin closed in saying that "a little before noon today, I'm scheduled to give our capital budget presentation to the state budget committee that is meeting this morning. A little before noon today, I'll ask for your permission to take leave."

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

Jack Costello, Deputy Director of the Bureau of Lands and Cultural Resources, distributed written summaries of the first phase, held November 16 and November 17, for controlled deer herd reductions on state parks. He said the goal of the deer herd reductions is to help restore the ecological balance in the parks. According to the summaries, a total of 206 white-tailed deer were taken at Chain O'Lakes State Park; 38 at Charlestown State Park; 86 at Clifty Falls State Park; 132 at Indiana Dunes State Park; 269 at Harmonie State Park; 31 at Pokagon State Park; 107 at Potato Creek State Park; 108 at Shades State Park; 186 at Versailles State Park; and 80 at Whitewater State Park. "I might note that Clifty Falls State Park was strictly archery." He said he anticipated a staff presentation in January to evaluate the deer reduction program.

Costello said, "The other document we handed out is to give you an idea how we keep score for the state park system." He reflected the "Comparative Revenue Report" shows that "we're up almost 6% from last year on attendance and revenue."

Joe Siener, Chair of the Advisory Council for the Bureau of Water and Resource Regulation, said his council met earlier this month at Jasper Pulaski State Fish and Wildlife Area. "We saw about 11,000 sandhill cranes come in the evening of the fifth. We had a very good, informative meeting on different subjects. The next day some of the group had a tour of Lake Shafer and the work they're doing up there on soil conservation."

Lori Kaplan, Deputy Director for the Bureau of Water and Resource Regulation, reported in 1997 the "total number of deer-vehicle collisions was down 11.8% from 1996, which was lower than it has been since 1989." She said a better indicator is the number of deer-vehicle accidents per billion miles traveled, and that figure was down 19.2%. "That's lower than it has been since before 1986. That's good improvement, although there still are a considerable number of deer vehicle collisions."

Kaplan also outlined the annual raccoon survey "showing that the raccoon population is still extremely high." She distributed a poster for the "Indiana Nuisance Wildlife Information Hotline." The poster identifies 1-800-893-4116 as a toll free telephone number where an individual can receive advice as to how to manage conflicts with raccoons and other wild animals. The poster also identifies the Nuisance Wildlife Hotline website at <http://www.anr.ces.purdue.edu/Wild/wild.html>.

Kaplan said last meeting there were several questions concerning the status of yellow perch in Lake Michigan. In response to those questions, she distributed a copy of the "Lake Michigan/Yellow Perch Update" presented to the Indiana General Assembly, Natural Resources Study Committee, by Bill James, Chief of Fisheries. The report reflects upon more encouraging perch news. James reflected in his report, "Through our ongoing perch research contract with Ball State University, documentation was obtained this summer of what appears to be production of a very strong perch year class--the third highest we have ever recorded and much higher than any other year in the 1990s. . . . Undoubtedly, protection of the perch spawning stock through harvest restrictions contributed to its ability to take advantage of the relatively low alewife abundance in 1998." James concludes, however, it "would be premature to relax harvest restrictions in response to the apparent strength of this one year class any time soon. Female perch from this 1998 class will not spawn for the first time until the year 2001."

Paul Ehret, Deputy Director for the Bureau of Mine Reclamation, said he was "happy to announce we have been working cooperatively on several issues with the Indiana Department of Environmental Management." One result of those efforts would be "an awarding ceremony for an abandoned mine lands site in southern Indiana." He said the two agencies were joining to restore the site. "A combination of AML money and IDEM 319 money" would be used for the project. Ehret said, "it was a site that had somewhat fallen between the cracks relative to legal responsibility. It has particularly been a problem."

Ehret also reported upon meeting with the Indiana Oil and Gas Association. Their membership has expressed concerns relative to fee issues and bonding issues. "We're trying to work out some sort of innovative funding in trying to work out their problems."

## **BUREAU OF WATER AND RESOURCE REGULATION DIVISION OF FISH AND WILDLIFE**

### **Consideration of Proposal for a One-Rod Wide Easement for a Buried Telephone Cable to Cross Boone's Pond Fishing Area in Boone County**

Randy Lang, Fisheries Program Specialist with the Division of Fish and Wildlife, presented this item. He said Boone's Pond Fishing Area in Boone County has been managed by the division of fish and wildlife for about the last 30 years. He said Communications Corporation of Indiana (CCI) has submitted a written request with the division to allow a new buried telephone cable to provide service to new residences in the area. Following discussions between the division and CCI, the agency has determined authorization for the easement, which would be placed adjacent to an existing easement for an electrical line, would have little or no long-term adverse impact on the public use of the property. Lang said the division of fish and wildlife recommended approval of the easement under the terms reflected in the commission packet.

Damian Schmelz moved to approve a one-rod wide easement for a buried telephone cable across Boone's Pond Fishing Area in Boone County, as depicted in the commission packet, provided the easement would not impede public access or access for property management by the department of natural resources. The motion was seconded by John Goss. Upon a voice vote, the motion carried.

**Consideration of Withdrawal of Proposed Rule Amendments Concerning the Sale and Transport of Reptiles and Amphibians; Administrative Cause No. 98-039D; LSA Document #97-347**

Katie Smith, Ph.D., Nongame Supervisor for the Division of Fish and Wildlife, suggested this item and the following item be considered together. "They're connected." The Chair responded that they could be reviewed jointly. [For this reason, aspects of the minutes contained in the following item also bear upon this item.]

With preliminary adoption of the rules as described in the following agenda item (Administrative Cause No. 98-142D), Lt. Tony Wilson asked that the rules represented by LSA Document #97-347 be withdrawn.

Michael E. Caudill, attorney for the Indiana Council on Reptile and Amphibian Laws, said he supported the withdrawal of the rule proposal.

Jerry Miller moved to withdraw LSA Document #97-347 from consideration as to final adoption. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

**Consideration of Preliminary Adoption of Amendments to 312 IAC 9 to Govern the Collection, Sale, and Treatment of Reptiles and Amphibians; Administrative Cause No. 98-142D**

Lt. Tony Wilson of the Division of Law Enforcement introduced this item. "On December 3, 1997, the DNR adopted an emergency rule to clarify regulations related to the conservation of native reptiles and amphibians and to protect Indiana citizens from dangerous reptiles and amphibians. At the January 20th meeting of the natural resources commission, the divisions of fish and wildlife and law enforcement were instructed to work with the stakeholders in the development of the reptile and amphibian regulations. The objective of this presentation is to provide the commission with the history and the results of that effort. It is important that future guidance from the commission be based upon an understanding of the efforts made to identify and work with these diverse stakeholders. Today's presentation will cover the regulatory sideboards, the various ways in which input was received, and the department's response."

Wilson explained that "Two of the department's legislative mandates are germane to this process. First, its responsibility to provide for the protection, reproduction, care, management, survival, and regulation of wild animals. Second, the requirement to consider the welfare of the people. Therefore, the two divisions agreed that the final

regulations developed should be first, protective of the reptiles and amphibians; second, protective of human safety; and, third, enforceable, in order to achieve the first two objectives."

According to Wilson, "The department took every opportunity to gather information. As a result of the comments made at the commission and advisory council meetings, the emergency rule was amended to allow the commercial trade in a limited number of subspecies and unique color morphologies. From the beginning, the department received public inquiries, and the division of fish and wildlife maintains a mailing list of people who required notification of public meetings or other actions regarding this issue. In addition to the normal notification process, these people have been directly notified of all comment opportunities. Three public meetings were held during April of 1998-- one each in the north, central, and southern portions of Indiana. Written comment was also accepted."

Wilson continued. "In direct response to the comments received at those meetings, and in writing, immediate regulatory relief was provided to academic institutions, zoological parks, and the aquaculture industry by a second modification of the emergency rule. All oral and written comments were reviewed. Major issues were identified in the area of collection limits, captive breeding, licensing, dangerous reptile' definition, and other public safety issues. Within the framework of protective and enforceable, the department drafted new regulations that addressed many of these concerns. This draft was addressed to all registered participants of the previous public meetings, the individuals on the department's mailing list, the nongame reptile and amphibian technical advisory committee, and any interested individual that required a copy. Written comments were received from 14 individuals. As a result of the comments, minor revisions were incorporated, resulting in the rule which is presented today for your preliminary adoption. Throughout this process, the department has been responsive to the stakeholders. The emergency rule was modified twice to address immediate needs."

Wilson concluded, "The regulations presented to you today address many of the concerns of stakeholders, while remaining faithful to the department's requirement that the rules be enforceable and protective of both the native animals and human safety. These proposed regulations allow for the commercial trade of commercially valuable native reptiles. As suggested by one of the stakeholders at the commission meeting, breeding stock would have to be marked by passive transponders similar to those used to identify pet dogs or cats, and the offspring of those animals would have to be sold before reaching a specific size, to insure that they are captive-bred. Commercial trade in turtles is still prohibited, since there is a federal regulation prohibiting the sale of young turtles, making the captive breeding of turtles economically unfeasible. The issue of game reptiles and amphibians has been clarified. A hunting or fishing license would also be required to collect nongame reptiles and amphibians from the wild. Indiana youth are exempted from the license requirement until they are 17. A possession limit has been set at four nongame specimens. Dangerous reptiles are limited to venomous reptiles or crocodylians at least five feet or longer. Dangerous reptiles may be possessed under a Class III wild animal possession permit which currently covers other dangerous animals such as large cats and

bears. The safe housing and public notification procedures incumbent upon holders of Class III permits will protect public safety. Finally, the proposed regulation contains provisions to allow the use of native and dangerous reptile and amphibian species in education, zoological parks, and research, as well as the legal commercial of amphibians produced as a legitimate by-product of the aquaculture industry." Lt. Wilson asked that the preliminary rules, as included in the commission packet, be given preliminary adoption.

Michael E. Caudill, attorney for the Indiana Council on Reptile and Amphibian Laws, said the new proposal "is a major step in the right direction." He said rather than a "whole-sale ban on the sale or transport for sale of these animals within Indiana," the new proposal would address "the actual issues that were needed by the DNR. We have rules that address the collection of these animals from the wild. We have rules that address the captive breeding of these animals, and we have rules that govern the safe-keeping of the more dangerous types of reptiles and amphibians. This new proposal is certainly a huge step in the right direction, and, in my opinion, indicates a wonderful step by the DNR, taking into account some very serious problems with the original rule."

At the same time, Caudill said, "We would ask that the commission, if you do adopt the new rule proposal today, that we be sure that we be given plenty of time to provide the input like we did before. In this case, we still have some substantial problems. The types of animals that the captive breeding permit allows really only address those commercially beneficial snakes that are indigenous to Indiana. A lot of people are hobbyists. . . that don't raise snakes to make money. They don't raise reptiles and amphibians to earn a living. They raise these things as a hobby. They have pets. They sell a few to pay for their hobby. This new rule doesn't adequately address that. Further, this new rule also requires the implantation of transponders. In a lot of these animals, it is our position that there are some serious practical considerations about the size of animals and the cost factors involved there. One of the issues that needs to be examined is that by requiring the implantation of these transponders in animals that breeders use in Indiana, the cost of these animals as they're produced in Indiana will be substantially higher than they will be in other states. One of the things we're concerned about is possibly working with the DNR (they have the fundamentals of this in this new proposal) on some sort of paperwork trail that would serve the same purpose. There are substantial issues that remain, and we would simply ask the council when determining to implement the new rule to be certain that we are given substantial time to provide written comments as we did before so that DNR could respond."

David Hotle, Senior Keeper for the Indianapolis Zoo, said the zoo submitted recommendations for changes from the prior language given preliminary adoption. "We are quite pleased with" the changes as reflected in the language now offered for preliminary adoption.

Speaking as an individual and not on behalf of the Indianapolis Zoo, Hotle said, "I have seen this regulation grow. I know why this rule was adopted to begin with. I think that the proposed amendments are fair, reasonable, and in line with conservation efforts for native

herptiles, as well as promoting responsible behavior and accountability to those who choose to keep potentially dangerous reptiles. I would ask that these amendments definitely be preliminary adopted. They are clear. They are very well thought out." Brett Nelson of Bloomington said, "I would like to echo Mike Caudill's sentiments of appreciating the efforts that the DNR has made to hear us out. I would also echo that the primary concern with the adoption would seem to have been with commercial dealers, and the needs of hobbyists are fairly well in neglect." He expressed concerned with the requirement for transponders. "I am in favor of adopting the amendments. I am also in favor of continued communication between DNR and hobbyists to make some further amendments."

Steve Cecil asked whether this rule adoption was an example of where a rule was given preliminary adoption and returned with substantial changes. Steve Lucas responded that it was. Following discussions between the NRC hearing officers and the DNR staff in the division of law enforcement and the division of fish and wildlife, it was determined the changes were so great that the agency should start again with the rule adoption process. Lucas said, "We thought it was so different, we had to start over." Cecil observed, "So it can be done."

Jerry Miller moved to give preliminary adoption to rule amendments (as set forth in the commission packet) to govern the sale, transportation, breeding, and captivity of dangerous reptiles, as well as reptiles and amphibians native to Indiana. The motion was seconded by Jane Ann Stautz. Upon a voice vote, the motion carried.

### **Consideration of a Request to Name the Newly-Acquired "Salt Creek State Fishing Area" in Porter County as the "Chustak State Fishing Area"**

Randy Lang, Fisheries Program Specialist with the Division of Fish and Wildlife, presented this item. He said a 76-acre property was recently acquired adjacent to Salt Creek in Porter County as a result of a settlement with USX Corporation and the state and federal Natural Resource Trustees to compensate the public for losses to natural resources in and around the Grand Calumet River. He said the previous owner, Rose Chustak, requested the DNR name the property for her family. Lang circulated photographs of the site and explained its importance to public access and fisheries management.

Jerry Miller moved to rename the "Salt Creek State Fishing Area" the "Chustak State Fishing Area." The motion was seconded by Rick Cockrum. Upon a voice vote, the motion carried.

## **BUREAU OF MINE RECLAMATION DIVISION OF RECLAMATION**

### **Consideration of Preliminary Adoption of Rules to Govern the Disposal of Coal Combustion Waste in Surface Coal Mines; Administrative Cause No. 97-223R; LSA #98-133**

Michael Kiley announced the commission would devote approximately one hour to consideration of preliminary adoption of rules to govern the disposal of coal combustion waste in surface coal mines. "The one hour is not etched in stone, but we would like to set that as a guideline for the presentations." He asked that spokespersons for the various interests would help coordinate the discussions. Kiley acknowledged that more than 30 persons had signed cards expressing opposition to the proposal.

Bruce Stevens, a field supervisor for the division of reclamation, presented the proposed rule amendments. He said he had been involved with the coal combustion waste disposal rules workgroup since its inception in January 1998. "I updated the commission with respect to the substantive issues in this rule during the August meeting and am before you today to describe the specifics of these issues as they appear in the rule in which we are requesting preliminary adoption." Stevens expressed the department's "appreciation to the stakeholders and others who participated in the workgroup meetings. A tremendous amount of time was required from these participants, and we wish to recognize this fact." Stevens said the definition of "coal combustion waste" generated considerable discussion within the group. "In several drafts, we tried to provide a definition which included all" statutory provisions which give the agency regulatory authority over coal combustion waste. "At the time the statute was adopted, combustion practices included the use of non-coal fuels in quantities that have no material effect on the composition of the resulting ash that is generated. Since the statute's adoption, it has been applied consistently with this practice. It seemed as though the more specific the language became in the draft, the more ambiguous the meaning became. The rule before you today contains a definition of coal combustion waste which is drafted consistent with the statute."

Stevens continued that "coal combustion waste which is proposed for disposal will be classified into two groups: Class A and Class B. The Class A waste is that which leachate analyzes at or below 10% of the standard for RCRA metals. This waste correlates to IDEM's Class III restricted waste material and is similar to most mine spoil materials. Class B waste is that which leachate analyzes at greater than 10% but less than 25% of the standard for RCRA metals and correlates to IDEM's Type II restricted waste. Disposal for any waste which leaches greater than 25% of the RCRA standard is not allowed for disposal in a mine by this rule."

Stevens said there were two types of disposal methods recognized in the rule. "The first is the backfill method, which occurs with the ongoing advance of the surface mining pit, and in which the thickness of the coal combustion waste in the pit cannot exceed ten feet. The second type is the monofill method in which disposal takes place in a specific designated area and can exceed ten feet in thickness. Disposal of Class A waste can take place in either the backfill or monofills. Class B waste is restricted to monofill disposal and has additional monitoring requirements associated with it. The reason for the monofill restriction for Class B waste is because the Class A material is considered to be quite benign and similar to mine spoil chemistry. While the department believes that Class B material can be disposed in a mine setting without adverse impact, we recognize

that it does warrant additional precaution. Requiring this material to be placed in monofills will enable monitoring to be conducted in a more precise manner that will confine this type of waste to specific areas."

Stevens said "there have been numerous test methods discussed during the various stages of rule drafting. The test method which is included in the rule before you today" is commonly known "as the neutral leach test.' This test method is the one which is currently in place, and is often-times allowed for coal combustion waste landfills at IDEM-regulated sites, when requested. While we recognize that there is no test which has been developed typically for coal combustion waste in a mine setting within the Illinois coal basin, we believe that this is the test that is most representative and which has been upheld previously in adjudicatory matters and will get critical data on the waste which is proposed for disposal."

Stevens noted the "current regulatory program requires one sample to be analyzed prior to disposal. The proposed rule requires a minimum of three samples be analyzed prior to disposal.

The current program requires one sample be analyzed on a quarterly basis after approval for disposal. The proposed rule requires one sample on a monthly basis for the first twelve months of disposal, four more samples on a quarterly basis following the initial twelve months of disposal, and then analysis on an annual basis. Including the three samples for initial characterization, this means a minimum of 15 samples in the first twelve months will be submitted. The initial three characterization samples will be averaged for initial permitting purposes, then throughout disposal, the most recent twelve samples will be averaged as a growing average for the purposes of insuring that waste classification does not change. This is a tremendous amount of data which will be available and will enable the department to insure that we have an excellent blueprint of how the waste reacts or is capable of reacting."

According to Stevens, "after any initial testing or retesting takes place, a report is required to be submitted to the director in which the generator of the coal combustion waste certifies that the material tested and to be disposed under this rule meets the definition of coal combustion waste,' that the material shipped or to be shipped is representative of that which is tested, and that collection and analysis has taken place in accordance with the requirements of the rule. The generator will also certify regarding where the waste is being sent."

Stevens noted "the program currently in place does not contain volume restrictions. The rule before you today does contain volume limitations based on the amount of coal ash compared to the amount of coal mined. For Class A material, the volume which can be disposed is up to a maximum of 50% of the coal tonnage removed. For Class B material, the volume which can be disposed is up to a maximum of 25% of the coal tonnage removed. At no time can the volume of Class A and Class B cumulatively exceed 50% of the tonnage of coal removed. Quarterly reports are required to be submitted which state

the tonnage of coal waste disposed on the permit and the tonnage of coal sold from the permit which will insure volume restrictions are adhered to."

Stevens said, "as stated previously, Class A waste is considered to be similar to mine spoil and relatively benign in nature. Groundwater monitoring for Class A waste is to be consistent with current SMCRA rules. Monitoring for Class B placed-waste has several requirements, including perimeter monitoring and vertical monitoring for strata which exist below the elevation of the pit floor. Wells are to be placed no more than 300 feet from the mined-out area. This distance was determined after consideration of current rules and consideration of the direction that IDEM appears to be going in their groundwater standards rule. The rule currently does not contain groundwater standards. IDEM was the agency designated by the legislature to develop groundwater standards, and the department has no legal authority to do so. The second notice for IDEM's groundwater standards rule should occur" after January 1, 1999. "We expect that the IDEM groundwater standards" will become final before the coal combustion waste disposal rules are given final adoption. "The groundwater standards which are developed by IDEM will apply to this rule."

Stevens reflected that "there are corrective action requirements in this rule. In the event of a release which exceeds applicable groundwater standards, at the compliance monitoring well location, the permittee is required to submit to the director a plan which describes in detail the actions which should be taken and a timetable for taking such action. This action includes, when applicable, treatment, replacement of water supplies, additional monitoring to determine the magnitude of the release, the prevention or removal of water from contact with the coal combustion waste, and the cessation of the disposal operations."

Stevens said there "are currently no provisions for financial assurance if contamination should occur long-term, although there is a section which has been placed in the rule referring to it. There is no current statutory authority under the Surface Mine Control and Reclamation Act from which the department can require funds to be reserved in the event of cleanup being necessary after the release of reclamation bonds, and there are no provisions for extension of time of reclamation bonds. We are hopeful that legislative action will take place to provide a fund in the event that it is needed for cleanup of a site." Stevens thanked the commission for its attention. "I request that you consider preliminary adoption of this rule."

Bruce Palin, Assistant Commissioner for the Office of Solid and Hazardous Waste Management, Indiana Department of Environmental Management, spoke next. He thanked the commission for the opportunity to address proposed rules for coal combustion waste disposal. "I have participated on the workgroup which reviewed these rules. I have to say it has been one of the most difficult rule-makings that I have been involved with during my 22 years with the state. It was difficult for me because it required that I adjust my frame of reference, from typical landfill situations that I've dealt with for years, to ones which I was not as familiar with but through the course of the meetings learned a great deal about.

Palin reflected, "Typical landfill sites deal with establishing a landfill in a relatively pristine and undisturbed environment where groundwater flow direction is well-established, and the environment is in a relatively steady state. This is not the case with a mine site where millions of tons of soil have been excavated and backfilled and where metals and contaminants naturally occurring in the soils have been exposed to the air and redeposited in a manner that allows direct contact with surface and rain water percolating through the more porous structure creating chemical reactions that do not normally occur within a landfill site. It is these types of differences that have had to have been taken into account in developing these regulations and is what makes them different from our solid waste disposal regulations."

According to Palin, "While our rules are different from those proposed, the proposed rules do have features to provide environmental protection. Some of those include limitations on the amount of waste material that can go back into the mine site, banning the disposal of coal combustion waste that leaches contaminants above the 25% RCRA level, more frequent sampling and analysis of waste that what our current solid waste regulations require, and reliance on a thickness of naturally occurring fire clay beneath the mine site which, in most cases, is more confining than the clay barrier that we require."

Palin concluded his remarks. "In closing, I would like to say, that given the environment that these waste materials are going into, which is not a pristine one, I believe that these regulations provide the appropriate level of protection to prevent the coal combustion waste from exacerbating the situation. I believe that given the same set of circumstances, my office would have arrived at a very similar type rule."

J. Nathan Noland spoke as President of the Indiana Coal Council, a trade association representing Indiana's coal mine producers. He thanked the commission for the opportunity to address the proposed rules. "We come to you today to concur with preliminary adoption. We don't necessarily concur with all the provisions in the rule proposal, but we understand it's time to move forward. We've had ten years of debate, and it's time for the coal industry to have some regulatory certainty, but when we come back for final adoption, I hope that we can concentrate on having a workable rule for both environmental protection and the implementation by the coal operators in the field. This is a very technical rule. I'm not going to get into a lot of technical specifics today, but I am going to point out some things we will be discussing during the public hearings, assuming the commission goes forward with preliminary adoption."

Noland said, "Mr. Stevens discussed with you and explained that the rule has two classes of ash--the Class A and the Class B materials. Ironically, the state of Illinois has no 25% of RCRA limits, and in my recollection, neither does Kentucky. These are both our competitor states, and they allow coal ash disposal in excess of 25% of RCRA standards. The Class A materials, which are the materials that are 10% of RCRA or less, are by far the majority of material that would be back hauled to a coal mine. These materials have similar leachate characteristics as normal mine spoil, which was discussed many times during the meetings that we had over the last year. The ash is the same as the IDEM Type

III and Type IV ash, as was pointed out, and it's the same materials that EPA determined in its 1993 regulatory determination were low-risk and warranted no further analysis. Remember EPA's determination as we discuss this rule further today."

Noland said, "The coal industry believes that the rule proposal is overly restrictive. It ignores the fact that ash can, in many cases, improve water quality in mine spoil. In the meetings this year, there was testimony discussing the benefits that ash can have when mixed with mine spoil. Other states recognize this and encourage ash disposal for those purposes. The use of ash in the backfill should be encouraged in many cases and not discouraged by excessive regulatory requirements. Without discussing a lot of the technical issues in the rule proposal, I do want to point out to you several different issues that we will be discussing during the public hearing stage that we think are classic examples of regulatory overkill."

Noland continued. "As Mr. Palin pointed out to you, we will have to collect over 20 coal combustion samples over the permit term compared to IDEM, which collects three samples initially and no further samples until the end of the permit term at five years. Sampling costs between \$400 and \$1,000 per sample, so we will be expending over \$10,000 in sampling costs alone, compared to probably less than \$3,000 for an IDEM permit for these same materials. Initially, we will have to run three different types of tests for three different samples. IDEM does not require three different testing protocols. Noland said, "As mentioned earlier, the rules will contain volume restrictions. Kentucky and Illinois have no volume restrictions, and we will have a limit of 50%, which does not take into consideration different transportation modes." He said mines which typically ship by railroad will "likely have no coal combustion waste disposal under this rule." Noland urged that "a pH limitation of not below four' is overly stringent. We backfill millions of tons of green shale every year with pH levels of between two and three without environmental problem."

He observed, "This rule proposal limits backfilling in a pit to no more than ten feet. Kentucky is 40 feet, and Illinois has no such backfill limit. The vertical monitoring requirements that will be necessary for Class B material will require a separate monitoring well with additional cost to the permittee. We wonder why the permittee can't just extend the normal monitoring well ten feet below the ash disposal level to accomplish this requirement. Class B materials, as was pointed in Mr. Stevens's presentation, will not be allowed to be backfilled in the pit, and will have to be put and placed in a monofill. If an operator wants to backfill and install the necessary perimeter monitoring wells for this type of material, they should be permitted to do so." Noland argued that "the rule requires excessive reports. As pointed out to you earlier, we will have to do quarterly reporting which, in Illinois for example, is done on an annual basis. The reports take man-hours to prepare and are not necessary to achieve environmental protection."

He contended the "definition of coal combustion waste' is extremely narrow and does not take into consideration *de minimis* amounts of other fuels that may be used by electric utilities in their boiler." He said this exclusion "raises the question whether starter fuels, which are not coal, but are used by an electric utility, would prevent any ash from that

boiler to be disposed in a mine. These are issues we have to address during the public meetings."

Noland said the "rule requires the division of reclamation to regulate air issues, in this proposal, that are also regulated by IDEM. This is an example where we'll have dual enforcement of air issues."

He summarized by saying, "this is just a small sampling of some of the issues that we believe demonstrates the regulatory overkill of this proposal. We will be discussing these issues in detail, as we go through the public hearings, assuming that this rule is moved forward after today."

Noland then reflected, "I was stunned yesterday when I read the Sullivan Times and Evansville Courier clips, where the Hoosier Environmental Council was quoted as saying this proposal is literally devoid of any environmental protection. I have spent the last several months trying to explain to my coal operators why this rule proposal, and the proposals we discussed throughout this year, are in many cases more restrictive than IDEM rules and are clearly more restrictive than similar regulatory programs in Illinois and Kentucky. The stories also said that financial responsibility requirements were deleted from this proposal. That's accurate, and Mary Runnells will speak to you about that issue briefly when I conclude here."

Noland closed his remarks. "When the rule comes back to the NRC for final action, at a minimum you will have to address two issues. We're hopeful that you will take into consideration other issues at that time, but as a minimum, you will have to address the groundwater standards issue. Mr. Stevens discussed that with you. We would think that the department of environmental management will likely have a final groundwater standard rule in place, and so those will have to be specifically referenced in this rule to clean up the language of that section. Secondly, there is an annual map requirement provision in this rule that we think, at final adoption, should be changed to refer and allow us to include that information on an annual affected area map that we will have to file with the division of reclamation." He said the annual affected area map requirement was "currently in a proposed rule stage and will likely be a final rule by the time this rule proposal has concluded. Both of these issues will come back at final adoption, along with others, and be discussed for your consideration. In conclusion, I will tell you that I hope the hearing officer will listen to our comments as this rule goes forward and will work hard to come back to the commission with a proposed final rule that will be workable for all parties. We need a sound rule, and we need regulatory certainty, and it's time to move forward."

Mary Runnells, in-house counsel for Solar Sources, Inc. and Solar Sources Underground Coal Mining Company of Indiana, as well as chair for the legal committee of the Indiana Coal Council, addressed "long-term financial responsibility." She said proposed standards in the rule regarding long-term responsibility were deleted because "there is no statutory authority to include those in these rules. Under Indiana Title 14, liability under the reclamation bond that we're required to post is for a period coincident with the

responsibility for revegetation under another section of Title 14. That section provides that we must restore the recharge capacity of the mined area; not that water needs to be recharged but we have to have the capacity to charge it. This will be a shorter period, probably, than recharge, and, therefore, we cannot provide for something that goes beyond the statutorily provided period. Another problem with using reclamation bonds is that it doesn't cover off-site damage. This is something that is going to have to be addressed by the legislature. This was recognized in our case. I don't know if you recall, but Solar Sources was the first one to get a reclamation permit under Memorandum 92-1. In that case it was decided, and the commission approved language that said this was a matter that would have to be dealt with legislatively. Just simply, that's the reason that it was taken out of the regulations. There is no authority legally to do that."

John Humes of Hoosier Energy spoke briefly "lending qualified support for preliminary adoption of the rule and also providing technical information from one of our trade groups." He then distributed copies of Coal Ash: Its Origin, Disposal, Use, and Potential Health Hazards from Environmental Focus, an issue report of EPRI's Environmental Division. A written statement was also provided from Paul E. Reynolds, PE, who is Manager, Environmental & Plant Safety Services for Hoosier Energy REC, Inc. The written statement provides in part:

....

It has been an incredible arduous journey, but the rule has finally arrived. Hoosier Energy is grateful for the opportunity to participate, and greatly appreciates the efforts of the DNR staff, the Governor's Office and other to lay a foundation for a policy, which protects Indiana's citizens and environment, and provides a viable coal combustion waste management option for Indiana coal consumers.

Indiana surface coal mines produce about 30 million tons of coal annually, and burning coal generates the vast majority of electrical energy produced in Indiana. Over the years we have learned to produce electrical energy from coal in an environmentally responsible manner. Using coal to produce energy is a wise use of a natural resource, good stewardship. Returning CCW to the surface coal mines for disposal is a continuation of a good stewardship practice.

CCW, along with practically any other naturally occurring materials contain elements that can pose a threat to the environment and human health. However, human health and environmental risks from CCW are minimal.

Although CCW may contain undesirable trace elements, its leaching characteristics and behavior in the disturbed mine site setting, where natural processes of attenuation and absorption take place, greatly minimize impacts which can be attributed to the presence of CCW.

A rulemaking founded on common sense, sound science and practical experience can protect the environment and minimize loss of green space.

The rule before you today does not please everyone. This should come as no surprise to anyone familiar with this contentious issue. For the most part it gets a passing grade, but does not get a perfect score. Hoosier Energy looks forward to a continuation of dialogue with DNR staff and others as the rule making process goes forward.

We recommend preliminary adoption of the rule as proposed. However we respectfully reserve the right to provide more specific comments, including suggested modifications, at a later date.

. . . .

David B. Barnard, counsel for Indianapolis Power and Light, thanked the department and the workgroup for the opportunity to participate in the rule drafting process. He continued, "Coal powered electric generation is fundamental to Indiana's economy. Common sense rules are needed to keep Indiana competitive with its neighboring states. Groundwater monitoring data from Indianapolis Power and Light's Petersburg station landfill has been incorrectly stated as showing how coal combustion waste can contaminate groundwater. IPL is aware of this data and has worked with IDEM to demonstrate the results are not do to the landfill but are likely from a nearby abandoned underground mine."

Barnard said, "The proposed rule is a result of months of effort from all involved. The drafters made many compromises to reach this result. Testing of the coal combustion waste, before and during disposal, will document that the coal combustion waste will not be hazardous to human health and the environment. Certain portions of the rule, however, go beyond what is necessary to be protective of human health and the environment. This rule, on the whole, is much more restrictive than most, if not all, other states with similar regulations. IPL is looking forward to improvement of this rule through the rule-making process. We will submit our comments on our concerns at the appropriate time. We believe that, with proper changes in the rule, a workable rule will result. IPL recommends preliminary adoption."

Sean Griggs spoke as counsel for the Indiana Electric Association. He said the Indiana Electric Association represents five electric generators in Indiana. "These generators are the largest generators of coal combustion by-products in the state, and we have a very close and vested interest in the outcome of this rule. My comments this morning are mercifully brief, but I do want to take a moment and thank the DNR staff--particularly Paul Ehret and Bruce Stevens and Carrie Doehrmann-- for their endless hours of work on this rule." He also thank "Bruce Palin of IDEM, Deb Lawrence who facilitated these discussions, and also the Governor's liaison, Joyce Martin, for their contributions to the rule that is before you today."

Griggs said, "It's a fact of life that we all use electricity. It's an equal fact of life that the generation of electricity produces a by-product called coal combustion waste' or coal

combustion by-product.' We have to do something with this material. There is really no other answer than it's got to go somewhere. Our choices are limited. We can go into landfills. We can go into on-sight repositories. We can place the material back in a natural environment from whence it came. The IEA is committed to supporting the rule, and the rulemaking process. We do have some specific concerns in areas that the rule may not be supported by sound science and by sound scientific principles. We will make appropriate comments, assuming the rule moves forward on those issues."

Vince Griffin, Director of Energy and Environmental Policy for the State Chamber of Commerce, said he has "spent a substantial portion of my life in the coal burning industry before going to the Chamber. I've watched this issue. I've sat on national task forces. I've worked on local task forces and with people at all different levels. I think what we have here today is a significant and unique opportunity for this commission to adopt a rule, preliminarily, and help the state both from a business perspective and from an environmental perspective. Coal ash does not present a risk at an unreasonable level, especially in the way that it's going to be controlled in this context. I think rather what we need to look at here is what are the beneficial ways this ash can be used. It's a great substitute for aggregate. It can be used as a fill material. It can be used in concrete. I think we're really missing the mark a bit. We're beating on how we handle this as a waste product, when, in fact, I think it's a significant resource that the state is overlooking."

Chairman Kiley then asked whether there were "any more statements to be made by persons who are proponents for preliminary adoption." There was no response to his question. He continued, "Let's now call on the representative of the Hoosier Environmental Council, Mr. Jeff Stant who is their Executive Director." The Chair said the Hoosier Environmental Council "has about 35 or 40 minutes" to make its presentations.

Jeffrey Stant, Executive Director of the Hoosier Environmental Council, said "what we'd like to do is have a couple of people from each of the major coal fields that have come up today, people that have gotten up at three o'clock in the morning to drive up here. I want everyone who wants to speak who has driven from that distance to be able to, but we'll need to have a couple of people from each area." He described the four major areas as being Warrick County and near Evansville; Pike and Gibson Counties; Dubois County; and the Farmersburg-Riley area.

Stant said he first wanted "to respond to some of the statements that have been made. As you know, we don't want you to preliminarily adopt these rules today, and it's because there are a lot of statements that have been made today, that are just unsubstantiated, that we consider to be myths, that are being perpetuated simply because people believe that if they say it enough, that eventually it will be believed. The truth is that substantive provisions that we put on the table, in writing, to the workgroup are not in this rule. The effort to reach a middle ground failed in that process, but it's not as though we can't go back and try to achieve that effort. If we can go back to where we were in June and not have any private meetings between the Governor's office, the facilitator, and any of the parties, and just hang in there until we get that resolved, we're committed to that."

He asked the commission to remember "there will be no constructed isolation, no constructed barriers. It's not like the landfills that are constructed above the water table. These are in the water table, so you need a test that is going to simulate what will happen in the disposal environment. That test is deliberately not designed to do that. The ASTM is the first entity to tell you that. We presented a test that would. There was agreement at the outset of these negotiations that we should use a test that would. This rule rejected that, and that process was done through these private meetings. There was disagreement with the test we proposed. I'll concede that, but we never got to finally trying to work out what test to use."

Stant urged the "50% volume limit that is being talked about will really allow three times as much ash as would be produced from coal taken from a mine to be dumped back in that mine. Let's keep that in mind. It is some restriction, theoretically, but it's three times what the coal from that mine would produce."

He continued. "Now, it has been stated that the states of Illinois and Kentucky have no RCRA limits on the ash they dump, or that they'll allow to dump, and that they have no volume restrictions. What they have, which is so much more fundamentally important than that, is they have groundwater standards, which are set right at drinking water level or background, whichever is higher, and that applies in mine disposal sites, which if exceeded, require corrective action. In the case of Kentucky, the legislature passed a law that said you can't put this stuff within four feet of the upper-most aquifer without a whole host of demonstrations. Not one time has somebody attempted to make those demonstrations. So, there are fundamental differences between what Illinois and Kentucky are doing. We would gladly take their approach over this approach. We need to focus on what are the real environmental protection standards in the rule and get away from volume limits and leachate tests, unless that test is designed to simulate the disposal setting."

Stant argued, "EPA has never said, the ash is of low risk and warrants no further assessment.' In fact, they're doing a regulatory determination now and two risk assessments to decide what to do as far as solid waste requirements for coal ash and other fossil fuel waste related in the burning of coal. So, they are not at all dismissing that. They just simply said they weren't going to regulate the four major utility CCWs as a hazardous waste in 1993."

He agreed, "Yes, the rule requires more samples to be collected than are collected for IDEM landfills. Keep in mind the rule does something that IDEM landfill rules don't. It allows them to take those samples and average the results. You can get huge tonnages of type B ash, ash that's even worse than type B ash, going in, and then being able to average those results with twelve other tests of benign ash that were deliberately tested for that purpose. With that kind of loophole, averaging allowance in there, this rule will allow toxic ash to be dumped in the mines in huge quantities. There are large quantities of that kind of ash being produced in the state of Indiana that this rule would authorize for disposal in mines."

Stant continued. "The spoil has a pH of below four. Well, that's what SMCRA is all about--putting that spoil down in a de-oxygenated environment where it doesn't leach waters that have that pH, and it's succeeding in doing that. Coal combustion waste in a de-oxygenated environment leaches leachates that are over twelve. Twelve is the technical cut-off for what determines a hazardous waste in the EPA regs,' even though that political exemption is there. If it's over twelve, it's considered too hazardous to dump in a site that's above the water table with a liner."

Stant said, "IPL maintains that the nearby mines are contaminating the groundwater around the Petersburg landfill." He argued the existing data did not support IPL's contention. Instead, the data says that "the sulfate levels that are tens of thousands of parts per million, thousands of parts per million, way over the standard, in the down-gradient wells at the Petersburg landfill contrast with levels of sulfate in the underground mines there that are at no-detect' to up to 100 parts per million, way below the secondary drinking water standard and the primary drinking water standard. The mines aren't producing the pollution that's causing that problem. The spoil water data shows they're not producing the kinds of conditions that Bruce Palin alluded to. That is a myth. Yes, there is some degradation that happens from mining, but as the water becomes more de-oxygenated, again, it recovers. The problem is that these folks want to turn mines into sites where there will be permanent degradation because of non-mine waste being dumped there, and that is illegal, we say, and it's unethical."

He continued. "Now, regretfully, we're here today asking that you not preliminarily adopt the proposed rule provisions to allow coal combustion waste to be dumped into active surface mines. It has nothing to do with beneficial use for acid mine run-off. We're all for that. These rules don't cover that. When the Governor's office requested eleven months ago that we participate in a facilitated workgroup and negotiate rules, we had a lot of fears. After all, this was going to be the third attempt. The workgroup that state officials put together was comprised of three times as many representatives wanting lax disposal standards, in our opinion, as environmentalists or citizens living next to mines, but we felt we owed it to the new Administration to try one more time to resolve our differences and realize that this was an opportunity, through facilitated negotiation, to reach a compromise that would protect the environment and meet the needs of industry. In that spirit, we tried to participate in a process to resolve issues. We, and only we, were the ones who put written rule draft proposals on the table, and I've brought them all today to distribute if you would like. We made compromise proposals to address the concerns that the other side raised. Unfortunately, eleven months later, what the state officials did, cutting off that negotiation in June and starting private meetings, has only contributed to increasing polarization on the issues. Instead of a middle ground, efforts to gain some protection for the environment and water supplies, gained nothing. Those wanting to dump with minimal restrictions, and no liability for protecting against the pollution it will create, got exactly what they want."

Stant contended, "The rule provisions before you have the following fundamental deficiencies which can't be corrected after preliminary adoption under the rule-making law. We don't think they can. (1) They won't require a permit applicants to provide

crucially important information about the groundwater at a site before dumping starts. It's crucially important if you're going to turn mines into dumps. (2) They don't require permit applicants to determine how the CCW they want to dump is going to react with groundwater at the site. Given that you're not going to have any engineered containment, that's another crucially important deficiency that's being left out, which cripples these rules. (3) They will allow toxic-forming waste to be dumped into groundwater, violating one of the most fundamental requirements, which is repeated again and again in the environmental performance standards of mining law and its rules. You're going to have a total contradiction going on here. The law and its rules saying one thing, and this rule saying something totally different if they decide to dump non-mine waste in a mine. How are you going to reconcile that? (4) There will be no trigger levels of pollution requiring any cleanup. A permit to dispose under these rule provisions will be an unlimited license to pollute. (5) The monitoring wells can be thousands of feet from the waste. This allows gross pollution of groundwater under hundreds if not thousands of acres before contamination is going to be detected. It compares with 50 feet from the solid waste boundary in the IDEM landfill rules. We were debating between 50 and 300 feet from the waste boundary before they started the private discussions, and then we end up with 300 feet from the property boundary. In Farmersburg, it's 8,000 feet from where the monofill disposal is going to take place, where those monitoring wells are going to be. (6) The final thing is that the monitoring wells can be pulled before they ever detect a problem. By deleting the language that you adopted in the Foertsch decision, which required that those bonds had to be held until the mine is fully resaturated, the wells are actually monitoring groundwater leaving the mine and finding that no adverse impact is occurring to neighbors' water, what you're going to do is allow DoR to continue its practice of allowing those wells to be pulled long before that point. That's something that we don't think mining law ever allowed, much less this rule should ever allow."

Stant concluded his remarks. "We believe that you can craft a rule that will allow disposal of large quantities of CCW in surface mines-- that will protect water supplies, the environment, and property values. In our opinion, this rule will require substantive changes to achieve that balance. Opponents to those changes will likely argue that they will not be logical outgrowths of the propose rule defined under the Indiana rulemaking act. Rather than facing legal challenges or a DNR staff resistant to going back to preliminary adoption, we urge you to either start a new facilitated workgroup or require the existing group to go back to the open negotiations that were stopped in June to draft a rule that will achieve a reasonable protection of the environment, while taking care of the needs of industry. We ask that no private meetings between the facilitator or the Governor's office, and any of the parties take place, over the contents of the rule as part of those negotiations. All proposals should be put on the table and subjected to the rigors of facilitated negotiation forcing all sides to find a middle ground, based on the merit of their arguments and the data supporting their position. The door shouldn't be open to go home until resolution is found. That makes people bend and come to common ground. That was not attempted in this workgroup effort, and the private meetings completely torpedoed any hope of that." Stant then distributed data which he indicated shows "serious contamination in the down-gradient wells around five find different coal combustion waste disposal sites, four of them are CCW landfills where you have it being

dumped above the water table, and in three of these cases with constructed liners. This is CCW which would listed as type A ash in these rules, and yet it is trashing the down-gradient groundwater, making it more saline than ocean water, in orders of magnitude higher levels of metals and sulfates and chlorides than the water flowing through mine spoil. We're asking you today not to adopt a rule that will allow them to permanently degrade groundwater far worse than what the mine spoils and mining does at mining sites."

Stant then asked whether he could have "everyone stand today who is opposing preliminary adoption of these rules." [Citizens then stood and applauded.]

Bill Fortney of Families in the Ireland Field from Dubois County said he was "here today as a father. My daughters are with me. We're concerned with what this ruling might do to their future. I also am here today as a businessman. I'm a member of consumer products industry and very much know what it means to be competitive, what it takes to survive in today's marketplace, and this is a difficult issue before us. As one of the gentlemen stated before, we all need coal. None of us would want to survive without electricity. None of us would want to give up the comforts that we have that the mining of coal, the burning of it; the production of electricity brings to us. Jeff has already presented a lot of the facts--specific things he's concerned about with the rules."

Fortney said, "I guess what I would want to do today is beseech you as a council to consider the seriousness of what you are doing today in the preliminary adoption of these rules. Because what you are doing is making a decision that will affect my life, it potentially could affect my daughters' lives, and every person's life that lives near a coal mine. You are adopting the preliminary rules to allow CCW to come into my backyard, not in a landfill anymore, not in a dump site at a power plant, but my backyard. I would ask you, do you have enough information to responsibly preliminary adopt these rules? I've seen several things that have been handed out to you today. Have you had time to process that information well enough to make an informed decision on it? Have you studied these rules personally? And can you say comfortably that I'm protected? For example, have you looked at 310 IAC 12-3-93.1(k) and seen the hardship variance in the rules that basically provides a loophole that would allow somebody to completely circumvent all the rules that have just been adopted? Have you seen that? Are you comfortable putting your name and adopting that provision? We were told by Bruce Stevens that there is no test specifically designed for CCW in the leachate, and yet that test to classify what kind of waste it is critical to every aspect of the rule and how that waste is dealt with. Are you sure that the test is being used that you can put your name on and say, 'Yes, it will accurately classify that waste so the wrong stuff doesn't get put in my backyard.' I think the bottom line is that we do not know the impact that CCW is going to have on our groundwater."

Fortney continued, "I'm a scientist. I have a Ph.D. in engineering, and I have seen no scientific studies showing what's going to happen when we take this waste, put it in a mine where it will have direct contact with groundwater. HEC has shown you their graphs. They've passed them out, showing from several mine sites, increases in various

elements." He noted, "The power company has an explanation for that. The bottom line is we don't know. They're both theories. HEC has a theory for why these elements have increased. The power plant has a theory for why they have not, but there has been no scientific research done to show the impact that this is going to have if it's used in this manner. I guess in closing I would ask you, can you personally adopt these rules knowing that they will protect my family and I? Are you sure that the dumping of CCW in my backyard is, in fact, safe? Are you sure that 15 or 20 years from now that CCW is not going to be the next asbestos scandal with your name on it? If you're not, then I would submit that in good faith you cannot preliminary adopt these rules."

The next person to speak was Nancy Gehlhausen of Oakland City. "I'm a French teacher. I've taken off a day of work to be here because this is important to me. I can't offer you the technical information that other people have provided, but I can give you a citizen's perspective. I live about three or four miles from the Francisco Mine, about two or three miles from the Sommerville Mine, and probably four or five miles from the Buckskin Mine. Have any of you been to coal mine country lately? Coal mines are no longer out in the country somewhere. They're mining in our backyards. They're mining up to 300 feet of our homes. I'm here because the regulations you are proposing are wrong. No one has the right to knowingly pollute our water and our land and not be held accountable for it. Dumps, landfills, gas stations, all other industries have strict guidelines that they must follow. Why should coal companies and utilities be treated any differently? I understand that something has to be done to the coal combustion waste. That's an evil we have to deal with. It must be done responsibly, and the regulations you're looking at today do not do this. They would not require a study of the disposal sites and testing of the waste to determine what might happen when they are disposed of. They would allow ash with high levels of toxins to be dumped directly into groundwater, causing contamination. You mix a toxin with water you've got contaminated water. It's a given."

Gehlhausen continued, "And dumping in large quantities-- The regulations do not include any standards that, if exceeded, the water has to be cleaned up. The regulations would not require the utility companies or the coal mine to clean it up when the pollution occurred. Who is going to clean it up when it occurs? The state? The DNR? You? Me? Who is responsible for the clean up when it does occur down the road? The regulations do not require the monitoring sites be placed close to the wells to insure that detection can be found early. Unfortunately, what you don't know can hurt you. Studies from IDEM prove that pollution is going on. We know it happens, and coal combustion waste can contaminate beyond what is already being done at the coal mine sites. I personally do not have ground well water, but many of my neighbors do. I have a pond into which groundwater seeps about six months of the year. My children swim in this pond. We eat fish from this pond. I personally have invested a significant amount of money creating a wildlife habitat. It has four wetlands and a lake. Everything I am doing to contribute to my community, your regulations are working against. As I look around the room, I see several of you are drinking bottled water. If the water I brought with me today were from one of these monitoring sites, it could contain as much as 87 times the amount of lead, 25 times the amount of mercury and arsenic, 50 times the amount of cadmium, five to 25 times of other toxic pollutants. Would you drink this water? Would you want your

children or grandchildren to drink this water? Why, then, would you ask us to do that? I'd like for you to take this into your consideration, and I thank you for your time and consideration."

Gordon Thompson of Terre Haute said he represented Heritage Acres Farms. "Our farm is a century award farm. It has been in our farm since 1856. I plan to leave that farm to my grand kids, and their kids, and their kids, and their kids. And, by God, I want safe water and safe land and safe atmosphere for future generations! That's why I'm here. I have to pay each month to have my trash hauled away." [The comments by Thompson were interspersed with applause.]

Chairman Kiley reflected the commission wanted to give Thompson the opportunity "to say whatever you want to say in whatever way you want to say it. But, please, let me ask the audience to withhold any applause or anything you might have in mind from the standpoint of being a little overly subjective to the presentation. We understand your sentiment. We appreciate it very much, but it will help us a good deal with respect to the orderly conduct of this meeting if you'll refrain from that. I'm sorry to interrupt you, sir. Please go ahead."

Thompson continued. "I have to pay each month to have my trash hauled away from my house. Now, if you ok this dumping trash, as I'll call it, in the strip pits, why can't I just haul my trash over to the strip pit and throw it in there? Are you going to pay my trash hauling bill now? I urge you and I beg with you to please vote no' on this consideration. Thank you."

The next person to speak was Don Mottley of Warrick County. "I worked on these rules from January to June. I didn't make every meeting, but I made the majority of the meetings. What you have before you now is not what I left those negotiations with. There was things that were brought to the table that were compromises on several issues in that draft that have changed completely in this final draft. It may be because of the private meetings that took place from June to now outside of the group. I ask that you not adopt this preliminary draft; that we go back to the table. I believe there's some giving that can be there on both sides. I ask that you protect the groundwater of the state of Indiana."

Keith Mullholland, Ph.D., said he recently "became the owner of 70 acres of beautiful forest in Pike County. Just today I learned that I'm in the watershed for the largest of the Pride's Creek disposal site. I wanted to share with you some of my perspective. I'm also a research chemist and know a little bit about the geology in the area and the very high water tables. The heavy metals that are present in this area in the coal mines under normal circumstances are stabilized as sulfides. In the conditions where these will be redeposited back in these areas, they are much more mobile, and without assuring that oxygen-free conditions will be preserved in these areas with the addition of clay caps and other stabilizing procedures, it's a certainty that these metals will be leaking out and, for a very long time, creating essentially brownfields' that cannot be utilized for anything else. Especially in Pike County, which tends to be an economically undeserved county where there is great effort to bring in businesses and encourage development in this area, I think

this would cause serious harm, in the long run, to this area. I don't know what the rules regarding future use of these areas--50, 20 years down the road--but I know there are reclaimed areas in that area right now which are being sold as hunting land and development land. My understanding is there are no regulations that prevent that from happening or require any sort of special precautions to insure that the people that put the wells that build on those areas will be protected or are even aware of what is in the ground. So, I would just urge to be very careful that the flyash has to be dealt with. I think everybody in this state uses electricity, and the recommendation of the person from the Chamber of Commerce sounded pretty good to me, if there are other alternate ways of disposal such as using in aggregates and road fill, where the risk is spread over the entire state and not concentrated in poor areas which will be permanently or for a very long time, prevented from any kind of other use of that land, would be a wise approach to dealing with this problem."

William A. Miller, who lives in Gibson County near the Black Beauty Francisco Mine, said "it is hard for me to believe that the rules I reviewed are the same rules discussed by two speakers speaking for the rules. We ask for equal protection as provided by the constitution. The proposed rules do not provide that protection. If we live near the landfill on Public Service Indiana property in Gibson County, we would be protected by rules formulated and enforced by the Indiana Department of Environmental Management. Any similarity between the IDEM rules and the proposed rules before you today is purely coincidental and certainly unintended. I attended most of the meetings held earlier this year to formulate appropriate rules for disposal of waste on coal mine property which were generated primarily by the electrical generating stations. It was obvious the electrical utilities and the coal producers want rules to permit the disposal of almost any waste, and in spite of what Mr. Palin says, gives only lipservice to environmental concerns. The meetings were a waste of my time, except they did permit me to see and hear first-hand the often-repeated position of the electrical utilities and the coal producers. I ask that this commission delay any approval action on these rules until such time as we can be assured of equal protection as provided by the constitution."

Rachel Fortney, the daughter of Bill and Ann Fortney, spoke next. "I live by Otwell, Indiana. I just wanted to say that I just hope that the coal company or whoever is doing this does their best to make sure that out water is protected. I don't know all the facts and stuff, but I hope that all this will get worked out for the benefit of the citizens who live by coal mines. Thank you."

Bill Hayden, Conservation Chair for the Hoosier Chapter of the Sierra Club, said "I participated in the negotiations at the request of the Governor's office. I must agree with Mr. Miller and the other environmentalists and landowners who participated that it seems like we wasted our time. I'm very disappointed in this rule. There were many very significant provisions that are in this draft that were never brought to the table for discussion by the members of that workgroup. However, HEC brought many provisions to the table, which were discussed by the people who are proposing that you adopt this rule today. It seems to me that if the law does not allow the use of bond money to hold the disposers of CCW to financial responsibility, then you should be banning the disposal

of CCW waste until the law has been changed to allow for adequate financial responsibility. Thank you."

Max Goodwin then addressed the commission. He referenced graphs and charts which he indicated "shows, after a period of time, the pollution of lead, arsenic, and barium, which were being found at the Hoosier Energy Coal Combustion Waste Landfill that were corrected, because they can be in an above-ground landfill. I know a lot about the history of that landfill, and I know that Hoosier Energy, when these problems are found, has been able to correct them. You cannot do that under the rule that is proposed here."

Goodwin reflected, "I noticed as I was reviewing the records from the Foertsch case which this commission considered, I believe, a year ago in March, a reference there by Chairman Kiley to the fact that it would be nice if the parties had been able to agree on something here because there was waste that needed to be dealt with. Of course, there is. Some of these utilities were hoping, that instead of having to deal with this waste in proper landfills where the problems will be found, and can be corrected, that they could simply move that waste to a coal mine, which is the reason, of course, that they wanted to have a right to dump more into the mine than the coal coming out of the mine."

He explained, "I picked only three items to hand out to you because of the shortness of time. I was the lawyer who represented HEC in twelve days of evidentiary hearings with experts in the Foertsch case on exactly what conditions on permits were a minimum in order to meet the requirements of SMCRA. That's really what that decided. When we came here a year ago March, as I look back through it, . . . I found this passage from our post-hearing brief where we quoted the Coal Council's witness. That was Mr. Hassett, who also came and appeared in the workgroup this year, from North Dakota. My brief said there:

Indeed, there is no debate about the fact that CCW commonly contaminates the environment and water supplies. Respondent witness Hassett summed up the consensus well by concluding, "If I wanted to go out and search for bad [contaminated] sites, I could inundate you. . . . Yes, there are so many sites. . . ." (Hassett, Day 9, p. 111.) [Page 66, HEC's Post-Hearing Brief, Foertsch Case.]

"It was the point at which everyone had to stop saying, 'This is benign don't-worry-about-it sort of material.' And we did begin to face up to that. We started out listening to it a little bit in the workgroups this year, but as HEC brought on more and more data for more and more sites, finally by the end of the public part of the workgroups, we really didn't have anybody saying anymore, 'This stuff is no problem.' We didn't hear anything like Mr. Noland was saying this morning. It's really good for you. Go ahead and dump it in your well water."

Goodwin said, "The second page I've selected, and I did give you a copy of this, were nine requirements that you would have to have in a rule for reasonable protection. Any time you shorten something you take a risk of being inaccurate, but we tried to be

completely accurate and yet understandably put it all on one page." The nine items were listed as follows:

1. Appropriate information and analysis of land and water in the area of the dump prior to permit approval;
2. Appropriate sampling and analysis of all waste to be dumped;
3. No dumping of toxic waste directly into ground water;
4. Specific ground water standards that trigger cleanup action by coal and utility companies;
5. Adequate sampling, reporting and analysis of waste actually dumped;
6. Adequate ground water monitoring to detect violations;
7. Mandatory cleanup of ground water if violations occur or are certain to occur;
8. Bonds to cover the cost of potential ground water problems;
9. Not releasing the bonds until the mines are fully resaturated after mining ends and outward ground water flow is established.

Goodwin said he did not "have time to go through the nine of them, but most of them, people would even agree on. Yes, it has to be accurate in this respect and that respect. What is adequate, of course, is the question you have to answer."

He said "the last page I've given you is the reason that I would hope, instead of preliminarily adopting something, you would today table. I've appeared before the commission many times, and I never before yesterday ever attempted to contact a commission member directly. I certainly think citizens have the right to do that. As a lawyer, I don't feel comfortable doing it. I did try to call all of you--left messages for many. I finally found out I had Chairman Kiley's wrong area code. By the time I found that at the end of the day, I missed you, sir. But I was advising you that we would be asking for either outright refusal of this rule or, at least, tabling it and not preliminarily adopting it. If you preliminarily adopt, you're up against the provisions of IC 4-22-2-29 that say the final rule needs to be "substantially similar," and what is needed here really would not be any more substantially similar than a Lincoln Continental would be similar to a Ford Pinto--maybe one they had already crashed and burned. We need something much better than substantially similar to this. The last page here, that I've handed out, deals with points eight and nine here. Bonds to cover the costs of potential groundwater problems and not releasing those bonds until mines are fully resaturated after mining ends and groundwater flow is re-established."

Goodwin recalled. "I don't know if any of that will sound familiar to you. I am on the environmental quality service council, and I have found how hard it is for me to get packets and get through everything and remember what was said in a meeting a year ago. It's very difficult for me, I know. But these conditions were exactly what this commission adopted in the Foertsch decision a year ago March. You might remember there was one amendment by Mr. Goss. We were very sorry to see the amendment, but nevertheless it was one where he said go from double the amount of waste that was put in from what the administrative law judge said."

John Goss acknowledged the Foertsch amendment.

Goodwin continued. "But nevertheless, the other three conditions were affirmed. One of those specifically was you must monitor until after the mine recharges. The reason for that is simply that in many or most instances, the groundwater is flowing into the mine while the mining is going on because there is so much pumping of water, which then goes down the stream, so they can keep the pits open. It takes several years after the mining stops before the groundwater would recharge, and the flow would go out again. Usually, during mining the problem is with people losing their well water. After the mining stops, that flow will eventually come back. But it is not an illogical thing--it's supported by DNR testimony in Foertsch, as well as the Hoosier Environmental Council's testimony in the Foertsch case, and so the judge made findings that that was necessary, and this commission adopted those and agreed with the judge on that. That decision is the permit that was issued, then, to Foertsch Mining. It is on judicial review. The Natural Resources Commission, Department of Natural Resources, and Hoosier Environmental Council, are on the same side on that issue. It has not yet been decided because we all agreed to put it off because we thought that these rules were going to supersede the need for that case. There wasn't one of us, on any side, who dreamed at the end of the public sessions here in June that we were going to end up with a rule that didn't have that condition in it."

Goodwin pointed out to the commission language from a previous rule draft which would have provided. "Final bond may not be released until such time that the director determines that the mine has fully recharged and groundwater elevations in wells used for coal combustion waste monitoring are representative of the post-mining hydrologic balance, and that no adverse impact has occurred to the hydrologic balance." He said originally "that is the version that the DNR drafted and came to the public meetings with as our working document to talk about. Paul Ehret was at all our meetings. Other DNR people--Bruce Stevens was there. Contrary to what was implied here this morning, never in those public meetings was there any argument or legal authority submitted to suggest that this rule requiring the monitoring until after the recharge, and no final bond release until it was demonstrated there would be no polluting of the groundwater around the permit area, there was no argument that the commission doesn't have legal authority for that. Such an argument is really silly because you wouldn't have authority to do any of this, except for the requirements of SMCRA, and SMCRA allows regulations that protect the groundwater, and it requires them, in fact. Now that you're doing something new there, you need an additional regulation, and that is certainly the requirement. I went back and reviewed all of the Foertsch evidence, the post-hearing brief (that is where I happened to pick out this language where we first turned the corner, and even their side said yes, this can be a serious problem'); I have read the transcript before you; I have read and talked with every lawyer I could find. The first time we saw this, there wasn't some understanding that we're going to have six months of public meetings, and then private meetings, that's not what we were promised when we were induced to get into the long laborious sessions where we hired a technical witness to come and be at every meeting. We were told DNR would write the regulations after the public meeting. And what took

place at the so-called private meetings, and I take it there's no doubt that is what happened, because here is what the Evansville paper carried yesterday under A.P.: After months of negotiating, state officials and utility lobbyists have come up with a proposal to regulate coal combustion waste in southwestern Indiana, but environmentalists say it's no good. The group charged with making regulations met openly for six months, but in June it switched to private meetings with the individual interest groups involved, said Joyce Martin, an attorney in Governor Frank O'Bannon's office.' Well, what happened with us was that Joyce called and said she'd like to have a meeting with us at the HEC office, and I drove over from Terre Haute for that, and we were presented with this. This wasn't a lets discuss a fine tuning of what everybody said in the public meeting. When I said, Where has this come from?' she said, Well, we've been told there may not be legal authority for this. 'I said, You mean your DNR attorneys. You mean the Attorney General?' And she refused to say who. Perhaps this morning I've learned who for the first time, since Mary Runnells says it's not lawful."

Goodwin continued. "Well, the Foertsch case will be decided now. We know that it will have to be. We ask that you not go into a preliminary adoption mode where you are turning your back on the very case that you yourself decided on the evidence. It makes us look silly to do that. Finally, it does not keep the faith with the public. As Chairman Kiley said, you're here to serve the public. When things get done this way, we need to step back and say, Wait a minute, this wasn't the public process. This isn't public at all. This isn't serving the public. We're tabling or rejecting this for the time-being. You all get back together and do it properly and come back to us when you're ready.' We asked for the regulations. We petitioned for the regulations, but we didn't petition for a utility lobbyist and the Governor--and I do not believe Frank O'Bannon has any knowledge of this; I know he doesn't because I asked him a week ago, and he said he didn't--we need to get back in the open process and hear what these legal authorities are because they're not there. When Mr. Noland referred to the Sullivan Daily Times, and I think you've been given a copy of that--I don't know this staff writer, but this is a wonderful editorial, and I would read just two paragraphs to you:

The Indiana Department of Environmental Management has rules requiring that municipal waste landfills install clay soil liners to isolate trash from groundwater. Power plants are required to have a liner if their CCW is disposed of in an onsite landfill, but dump it into the gaping pit of a strip mine, and no liner is required. Groundwater and CCW can mingle freely. This is unequal protection of the law.

.....

The electric utilities have much to gain by cheap CCW disposal in mine pits, and they will promise low electric rates for us, but water is life for families, for livestock, for crops. Water is too important to risk for a few dollars a month off our electric bills.

Goodwin then closed. "That's what these rules would do, and in order to show that we have a process that respects the public, we ask that the not be preliminarily adopted today. The last thing I would like to say is most of these people, of course you know, have to take time off from work unless they're retired. They've come, I know some of them, 175 miles because I recognize the faces out there. I know when I attend council meetings I at least get my mileage paid--I think \$50 a day or something. Most of the people around the mines don't have the incomes that almost everybody at this table has. They are the unrepresented except when they come and try to tell you themselves. This is the public, and they deserve better than they got in this process, deleting the most important part of the Foertsch decision. That was Jeff Stant's note to me when he faxed it to me. We were so shocked about this. You think HEC is a bunch of elite people? It's not. It's an ad hoc group a lot of times. People join who never heard of HEC when they find out situations like this. Most of these people aren't what you would call any sort of career environmentalists, and the HEC people that I know are working in their offices late at night sorting through data to give you and working to get a proper rule on this, and they make less money than most anybody in here, too. That's why after so many years they have to go work somewhere else. They deserve better treatment. They've worked hard on this, and in the meetings we could always talk on the merits, and not one of our proposals was ever turned down on the merits. We have an alternative draft rule for every bit of this. We would like for you to at least consider that as an alternative, and you can't do that today, but don't just preliminarily adopt this package. Either table or defeat this rule and say we should come back. We will come back. I do believe this will be taken care of. It will have to be. It has to be, but it won't if we're off on the wrong foot completely if this preliminary rule is adopted. It will be too big a hill to climb for us. Thank you."

Michael Kiley said, "Thank you, Max. Ladies and gentlemen, that concludes the public participation portion of the meeting" for this agenda item. He then opened the item "for discussion by the members of the commission, who may also have questions which they may want to ask of some of the participants. Questions or comments from members of the commission? John--"

John Goss then observed, "Mr. Chairman, I am concerned about the long-term financial responsibility. It has been suggested it may take legislation to correct this, but can someone talk to us about what the options are for this. I think it's unclear to me what the choices are."

Kiley asked, "Paul, do you hear that?"

Paul Ehret responded, "Yes, I think the issue relative to the financial responsibility is, I think, that the legal opinion in the agency is that it may be somewhat tenuous relative to rely on SMCRA bonds for the protection that would be necessary. We felt as though that was shaky legal grounds. As Mr. Goodwin pointed out that issue is under litigation in the Foertsch case, and it is certainly one of the arguments, if I'm not mistaken, that certainly will come up in that litigation. If we put all our eggs in the basket of using the SMCRA bonds, only to lose (and there is the potential for that because there are some very good arguments that it will not be applicable), there has been an interest by DNR to, perhaps,

pursue some other mechanism that would take the question about SMCRA bonds out of the mix. Looking, perhaps, to an alternate form of financial responsibility, I understand there has been some preliminary discussions with some of the parties that participated in the workgroup discussion. I don't want to put any words in anybody's mouth, but I understand the coal industry and the utility industry have expressed an interest in seeking some other form of financial responsibility outside of SMCRA bonds. I can't really say that I can speak for the Hoosier Environmental Council, either, on that issue, but I think your [HEC] position was that SMCRA as written would work. I don't want to speak on your behalf, but I want to paraphrase my understanding on that issue."

Kiley continued. "Okay, are there questions or comments from members of the commission?"

Jerry Miller asked, "Paul, these comments that Mr. Stant made concerning deficiencies, have these been addressed?"

Ehret responded, "Well, I think there is one of the things that we look at is that we look at the total environmental situation relative to a surface mine. There is virtually no comparison relative to the hydrologic environment that you get, the nature of the groundwater, as a result of surface mining. The disposal of the ash in that sort of an environment is a much more complementary type of activity than you get with the purpose of a landfill. There is a paradigm issue here, I think, as much as anything else, that not everything is a landfill issue. A surface coal mine is not a landfill. Hydrologically speaking it's very different. The protections that you have in a landfill are necessary because of the nature of where you're making that disposal occur. The agency's position is that a surface mine is a very different environment, and you don't need to duplicate a landfill-type of regulation in a surface mining environment. That is primarily where the agency has come from."

Miller continued, "I guess I was concerned about the first statement on there about the quality of the groundwater prior to disposal. Is there any ongoing system before, after, and during?"

Ehret answered, "I believe the nature of the mine site's groundwater and the nature of the mine site's hydrology are adequately accounted for in SMCRA permits to begin with. I think we've got enough information relative to mining hydrology to be able to make those interpretations."

Chairman Kiley then recognized Steve Cecil.

Cecil said, "Yes, I have a couple of questions. First of all, back to financial assurance, I don't quite understand what the options are. I'll go to the second part of my question first. I'll ask Steve or Carrie to refresh me on what preliminary adoption means and what options there are after that to make substantial changes or substantive changes, and whether or not as pointed out in Mr. Stant's handout, certain things are off limits?"

Steve Lucas responded, "I'll start and then Carrie can give it a shot. I think that there are two scenarios." The general principle for rule adoption is changes cannot "substantially differ" from the language given preliminary adoption. "That's the general principle. There is an exception to that with written comments that is a little bit more flexible process. Changes can be within the parameters of logical outgrowth' of the proposed rule. Certainly, I think it's accurate that neither one of those standards are carte blanche. Preliminary adoption of a rule allows some flexibility for change, but it does set some sideboards, also."

Carrie Doehrmann then inquired. "Steve, can you maybe comment a little on the hearing process that will happen next after preliminary adoption? I don't know if that was part of Steve Cecil's question."

Lucas continued. "If the commission opted to give the rule preliminary adoption, we would have a hearing officer appointed. The hearing officer would conduct at least one hearing and more than that if instructed by the commission. Public comments would be received at that public hearing. Also an opportunity would be provided to interested citizens to provide written comments. The oral comments and written comments would then be assimilated into a report. With a rule of this complexity, typically what we do is provide an opportunity to DNR to comment or respond initially to the comments that are received. Subsequent to that, then, the hearing officer would make her own analysis. All of that would be put together in a written report and tendered to the commission for consideration as to final adoption."

Miller asked, "What do you think the time process would be on this one?"

Lucas answered, "All of the prerequisites are not in place yet so I have to be a little bit speculative, but if I were to give you a guesstimate, Jerry, my 'guesstimate' would be that the public hearing would be perhaps be in February. That's assuming you give preliminary adoption today. That would mean coming back to the commission probably about May."

Rick Cockrum then inquired, "Mr. Chairman, I would like a clarification on the IDEM role and the overlap. IDEM as I understand is currently promulgating water rules that have a bearing on this. Could you help me out a little bit, David?"

David Hensel responded. "Rick, to an extent I can. It's true. As it was represented today, the agency is in the process of developing water standards. My understanding is this proposed rule will adopt those water standards once they become effective. I can't add more other than that's the process."

Chairman Kiley asked if there were additional questions.

Hensel asked, "If I can put Steve back--he's doing so well--with another question. Given your explanation of what it means to preliminary adopt, does putting in essence a holding place for something on financial responsibility in these preliminary rules, does that allow

almost any kind of financial assurance program to be inserted later, if there is statutory authority or whatever fix there is?"

Lucas answered, "I'm not sure how to respond to that question. All I can say is that if it's accurate there is not now statutory authority to address that issue, then that would either have to be addressed directly by the General Assembly by setting the standards, or the General Assembly could provide broader principles, and then have the commission adopt a set of rules."

Hensel continued, "I'm sorry. What I meant was, assuming that is the case and the legislature responds and does grant the necessary authority, this preliminary adoption would allow then the development of a financial responsibility provision in these rules by this holding place. It could happen later, as these rules are developed."

Jane Ann Stautz added, "If we would amend the language given preliminary adoption?" Lucas continued. "Well, certainly, you could amend any rule that you have. I don't know that you could do it all in one process. I wouldn't necessarily say that was the case. I don't know. It would depend on the specifics."

Stautz then inquired. "I just have some questions regarding the location of the monitoring wells. I would like a little more detail on the rationale for the locations of those monitoring wells. It seems to be somewhat controversial."

Ehret said, "I'm going to ask Bruce to address that."

Stevens then spoke. "If I can rephrase the question: was it what is the rationale as to the locations of the monitoring wells?"

Stautz indicated that was her question.

Stevens continued, "There are a couple actually. One, the first that I mentioned, was that after conversations with individuals at IDEM, in the groundwater section, who are involved in the drafting of the groundwater standards rule, the 300 foot location is the point of standards application they are considering for coal mining. That is 300 feet beyond the excavated area. The other one is that it is very difficult to distinguish between water which may have been mineralized by spoil with no ash disposal whatsoever, or that which may be a combination thereof, or that which may be totally due to the ash itself. You can install up-gradient wells and down-gradient wells within the spoil, but depending upon the strata (and the strata does change with elevation changes and the chemistry of strata differs considerable) and as water migrates and becomes either more mineralized or less mineralized, there are so, so many questions which are raised when looking at the data of the spoil water, that it was our determination it was better to pick a location where. . . (with the exception of the possibility of diminution of the water supply that is draining aquifers nearby while the mining is taking place) there is steady state chemistry going on in that area where we can get baseline data, and then monitor later, and compare back to that data or the standards which will be developed."

Cecil asked a follow-up question. "You mentioned 300 feet from the excavated area. Now, that is something different than 300 feet from the disposal area."

Stevens responded. "Correct. Yes, it is. Yes, it is. It is actually 300 from the area in which coal is removed."

Cecil then reflected. "So, as indicated before, it could be a considerable distance from the disposal area."

Stevens said, "Yes, it could be. It could be. Again, the rationale for that is what I just went through. Not only the IDEM rules but the fact that the chemistry changes so dramatically within the area of the mine it is hard to make determinations as to what's taking place by what."

Cecil asked, "In the current surface mining regulations, I guess the protection of the hydrologic balance issues, are there monitoring wells within the spoil required for that program?"

Stevens answered, "No. No, there are not."

The Chair asked, "Are there any other questions or comments?"

Cecil said, "I have one or maybe two. You're probably the one to comment on this. Is there consideration in the siting--now, I know in my long-ago experience with coal waste disposal application to permit and that sort of thing--what consideration to siting within the permitted area is there with regard to coal combustion waste?"

Stevens responded. "First of all, with the exception of leaving an environment of deposition consistent with coal deposition during the Pennsylvanian period millions of years ago, the geology of southwestern Indiana in those areas is pretty well known. Now, if you move into an alluvial environment along the major rivers--

Cecil reflected. "I think you're misunderstanding my question. Within a previously mined area, are there siting requirements for the areas where you can dispose of coal combustion waste similar to those for solid mine waste disposal areas?"

Stevens responded. "The way that it is set up with the Class A material is that there is not as much requirements as there is for the B. Now, with the B there has to be either a demonstration that the strata beneath the pit floor where the material would be placed meets the same provision that an IDEM landfill would, which is three feet of material at ten to minus six centimeters per second at each one of those, or the vertical monitoring has to take place. We have no plans whatsoever, nor will we, allow the disposal of ash in a location at which we feel there could be an adverse impact to a drinking water source which is significant or well-known. The other thing is in this rule, in section 161, there is a requirement for characterization of the site prior to disposal, and it includes narratives

based upon the hydrology or the hydrogeology of the area. We also have the mining permit application itself and everything within SMCRA, which apply as well. Hopefully, I answered your question."

Cecil said, "Yes, I think you have."

Ehret added. "I think to some extent these rules are not necessarily stand-alone from a certain aspect. There is a tremendous amount of environmental data that's in a SMCRA permit to begin with. This information certainly supplements that, but these rules are not necessarily stand-alone, so the department does not necessarily make a decision based specifically on just information submitted under these regs,' but it also makes an assessment based on a lot of geologic and groundwater information submitted under a SMCRA permit to begin with. It's a combination of the two from which it makes its judgment about groundwater flows and groundwater quality and siting placement and everything else. So, it's kind of brought together. It's a little unfair, I think, from the standpoint that you get just a little piece of the pie,' if you will, from looking at these regs,' when there are a lot of other requirements under SMCRA that supplement it." Kiley asked for "further questions or comments." When no more were offered, he said, "If there are none, the Chair would entertain a motion."

Damian Schmelz said, "I move that we preliminarily adopt these regulations."

Kiley said, "Thank you, Father. We have a motion for preliminary adoption. Is there a second?"

Hensel said, "I second the motion."

Kiley continued, "We have a motion and a second. Is there any further discussion with respect to the motion? [There was no response.] Let me say, I have no idea what the vote will be, but if the vote is positive, the hearings will be held down in your area, and there may be more than one. We'll see what the needs are in that respect. Having said that, the Chair will call for the question. All those in favor of the motion, signify by saying aye."

[Several commission members responded in the affirmative.]

Kiley continued, "Opposed?"

[There was no response.]

Kiley concluded, "The motion is carried. Thank you very much for your courtesy, ladies and gentlemen. The rule is preliminary adopted."

**LEGAL PROCEEDINGS  
DIVISION OF HEARINGS**

**Consideration of Public Hearing and Recommendation of Hearing Officer for Final Adoption of Rule Amendments in the matter of Amendments to Rule Section which Governs Larger Pine Shoot Beetles to Add Hancock, Howard, and Tipton Counties to the State Quarantine; Administrative Cause No. 98-067E; LSA #98-123(F)**

Jennifer Kane, hearing officer, presented this item. She directed the attention of the commission to a map in the packet which showed the counties now under quarantine for larger pine shoot beetles and the three counties to be included in the state quarantine. She noted a federal quarantine already applied on an interim basis. If Indiana did not add these counties to those already quarantine, U.S. Department of Agriculture would apply a statewide quarantine. Kane said the rule amendments were recommended for approval.

Jerry Miller moved to amend 312 IAC 18-3-12 by adding Hancock, Howard, and Tipton Counties to those included in the quarantine of larger pine shoot beetles. The motion was seconded by John Goss. Upon a voice vote, the motion carried.

**Consideration of Public Hearing and Recommendation of Hearing Officer for Final Adoption of Rule Amendments in the Matter of Amendments to Rule Section which Governs Gypsy Moths to Establish a State Quarantine in Steuben County; Administrative Cause No. 98-115(E); LSA #98-154(F)**

Jennifer Kane, hearing officer, also presented this item. She explained that a gypsy moth quarantine was already in effect through emergency rule for Steuben County. This proposal would give adoption to a permanent rule. Kane explained that in the absence of a state rule, the U.S. Department of Agriculture would implement a statewide quarantine. She said during the public hearing, Robert Waltz explained the quarantine to interested citizens. Following his explanation, no one expressed opposition to the proposal. She recommended the rule amendment for preliminary adoption.

Joe Siener moved to give final adoption to amendments to 312 IAC 18-3-14 to establish a gypsy moth quarantine in Steuben County. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

**Consideration of Approval for a Proposed Nonrule Policy Document to Establish a Process to Govern Any Petition for Seaplane Bases on Public Waters; Administrative Cause No. 98-146L**

Steve Lucas presented this item. He said the proposal would set a basic process for the receipt and consideration of petitions to establish seaplane bases on public waters. Although navigable waters and DNR reservoirs would also be covered by the nonrule policy document, he said the primary interest in new seaplane bases is on "public freshwater lakes" in the northern part of the state. Lucas said this proposal did not seek to establish substantive standards, although boating safety and environmental resource issues could be considered. He explained the division of law enforcement would become

the point of contact for the petitions. Any site approved by the DNR would be subject to review by the Indiana Department of Transportation, the state regulatory agency for airports. Lucas said the proposed nonrule policy document had been formulated with the participation of the division of law enforcement and was recommended for approval.

Jack Costello asked how many of these kinds of proposals were active. Lucas responded there were four pending petitions, and he had been advised another eight were being drafted. He also reflected that he was informed several seaplane enthusiasts were working with INDOT to determine whether some of their lower-impact activities might be exempted from the INDOT permitting requirements for seaplane bases. Lucas said he expected the commission would hear more about the issue in coming months.

Joe Siener moved to approve the procedures for a "Petition for Seaplane Base on Public Waters" as a nonrule policy document. The motion was seconded by John Goss. Upon a voice vote, the motion carried.

## **ADJOURNMENT**

At approximately 12:35 p.m., EST, the meeting adjourned.