NATURAL RESOURCES COMMISSION

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The Public Trust Doctrine on Navigable Waters and Public Freshwater Lakes and the Lake Management Work Groups

1. Prologue: The Public Trust Doctrine[1]

In 1997, the Coastal States Organization described the "public trust doctrine":

> The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The doctrine also sets limits on the States, the public, and private owners, as well as establishing the responsibilities of the States when managing these public trust assets.[2]

The origins of the public trust doctrine are ancient and traced "to the sixth century Institutes and Digest of Justinian, which collectively formed Roman civil law"[3]. The best-known application of the public trust doctrine has been for navigable waters. Even before Indiana achieved statehood, the Northwest Ordinance of 1787 recognized the public interest in our territory's navigable waters. The ordinance declared:

> [T]he navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and of those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Without using the phrase "public trust doctrine", Indiana's high courts have long recognized the concept. In 1918, for example, the Indiana Appellate Court found the state held the bed of Lake Michigan in trust for the people.[4] Several courts have addressed the public interest in navigable waters, including a 1950 decision holding that the test of navigability was whether a river or lake was capable of commercial navigation when Indiana was admitted to statehood in 1816. The West Fork of the White River in Morgan County was found to be legally navigable, and the sand and gravel within the bed of the river to be assets of Indiana citizens.[5]

In 1947, the Indiana General Assembly extended environmental protections to Indiana's "public freshwater lakes".[6] There are important statutory exceptions, but a "public freshwater lake" is generally any "lake that has been used by the public with the acquiescence of a riparian owner".[7] Public freshwater lakes may or may not meet the judicial test for navigability. Examples of public freshwater lakes include Cedar Lake in Lake County, Pine Lake in LaPorte County, Bass Lake in Starke County, Lake Maxinkuckee in Marshall County, Lake Wawasee in Kosciusko County, and Lake James in Steuben County. The statutory chapter that provided for the protection of public freshwater lakes is commonly called the "Lakes Preservation Act". This act provides the state has "full power and control of all the public freshwater lakes" and holds and controls "all public freshwater lakes in trust for the use of all citizens of Indiana for recreational purposes".[8]

In 2001, the Court of Appeals of Indiana reflected that the Lakes Preservation Act was "[p]ublic trust legislation" intended to recognize "the public's right to preserve the natural scenic beauty of our lakes and to recreational values upon the lakes". The Court observed that "Riparian landowners...continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must be balanced with the public's rights".[9] In 2005, the Court of Appeals indicated the rights of riparian owners along public freshwater lakes were equivalent to those of riparian owners along navigable waters.[10]

The Indiana General Assembly has assigned regulatory responsibility to the Department of Natural Resources with respect to both navigable waters and public freshwater lakes. The Department has "general charge" of the state's navigable waters[11] and is the licensing authority for navigable waters[12]. The Department is the regulatory authority for public freshwater lakes.[13] For these public waters, the Department is also the state agency with primary responsibility for administering boating laws.[14] Amendments made to the Lakes Preservation Act in 2006 clarify that its provisions and those of the boating laws are to be coordinated.[15]

An essential element in the Department's analyses for administering its responsibilities, for navigable waters and for public freshwater lakes, must be an appropriate consideration of the public trust doctrine. The agency shall seek to achieve a fair balance among competing users, both public and private. This information bulletin seeks to bring attention to these responsibilities and to acknowledge a new focus on the public trust. In particular, the Natural Resources Commission reflects upon the import of a work group process that began in 1997 and has

repeatedly helped develop important legislation.

2. Citizens and Legislators Seeking Solutions: the Indiana Lakes Management Work Group

The Indiana General Assembly enacted legislation[16] to form the Indiana Lakes Management Work Group in 1997. The initial work group consisted of 26 members chosen from a broad base of lakes organizations, users, and researchers. Included were Senator Robert Meeks (R-LaGrange), Senator Katie Wolf (D-Monticello), State Representative Dennis Kruse (R-Auburn), and State Representative Claire Leuck (D-Fowler). The work group was directed to do the following:

1. Conduct public meetings to hear testimony and receive written comments concerning problems affecting the lakes of Indiana.
2. Develop proposed solutions to problems affecting the lakes of Indiana.
3. Issue reports to the Natural Resources Study Committee of the Indiana General Assembly.
4. Issue an interim report before July 1, 1998, and a final report before December 31, 1999.

Upon completion of its proposed solutions, the work group was to make those solutions available in writing to the Natural Resources Study Committee, the Department of Natural Resources, and the public.

The mission statement for the work group offered a perspective harmonious with the public trust doctrine. "The mission of the Indiana Lakes Management Work Group" was "to develop solutions to problems facing Indiana lakes–solutions that result in:

- Improved water quality–lakes getting better instead of worse.
- Better management of lakes that respects and accommodates multiple users.
- Increased and broadened interest among Hoosiers in safeguarding lakes for future generations.
- Improved recreational opportunities for all lake users".[17]

The work group met 24 times between 1997 and 1999 and adopted 113 recommendations in 48 categories to help implement these solutions. Several of the recommendations anticipated new legislation, sometimes with the need for subsequent rule adoption by the Natural Resources Commission. Others sought renewed focus upon existing legislation. Those that resulted in new legislation, and the rules to assist in implementing the legislation, are discussed next. To be noted is that each of the 48 categories was a consensus document approved by diverse user interests. The resolutions and resulting legislation share a commonality in seeking to protect our great natural resources and in seeking to assure fair enjoyment among competing users. They support the principles of the public trust doctrine.

3. Work Group Resolutions Advanced: 2000 Legislation, 2003 Legislation and 2006 Legislation, with Resulting DNR Programs and NRC Rule Adoptions

Legislation was enacted in 2000[18], 2003[19], 2006[20], 2008[21], and 2009[22] that the Indiana Lake Management Work Group either initiated or reviewed and analyzed. The work group categories of recommendations and pertinent new legislation, programs, and rules are considered:

Category 3

During the September 28, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

> The littoral zone of a lake or reservoir is that area having water shallow enough to support the growth of rooted aquatic plants. While this area is usually associated with shallow, near-shore areas, it also includes shallow bars away from the shoreline where plants can grow. A diverse, native plant community has important functions for a healthy lake ecosystem. Native plants in the littoral zone provide habitat for fish, aquatic insects and other aquatic organisms; dampen wave energy; stabilize lake sediments; and add essential oxygen to the water.
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> Motorboat use is a major form of recreation on Indiana's lakes and reservoirs. While this activity brings great enjoyment to boat users, motorboats can create significant negative effects on lake quality. When motorboats operate within or too close to rooted floating-leafed and emergent aquatic plant communities, the growth and health of the plants can be reduced three-fold by turbulence and scouring caused by motorboats and their wakes. Research has shown that weakly rooted plant species are eliminated beneath water ski runs to a depth of 10 feet. In addition, boat propellers can cut plant stems and this has been shown to increase the spread of exotic invasive species such as Eurasian watermilfoil. The Wisconsin Department of Natural Resources recommends limiting boat speeds in water depths up to the maximum rooting zone of aquatic plants (10-13 feet in most Indiana lakes.)
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> Other research has shown that a 50-hp outboard motorboat can resuspend fine clay sediments from lake bottoms to depths of ten feet. Larger motors common on Indiana lakes would likely have effects deeper than 10 feet. Sediment resuspension increases turbidity, decreased water clarity, and liberates sediment phosphorus into the water column that contributes to excessive algal blooms.

The work group noted the then current state statute restricted boat speeds to ten miles per hour within 200 feet of public lake shorelines. A further reduction to speeds in shallow waters would promote "safer use of those waters by canoes, sailboards, and anglers. Due to the plowing effect of boats with large drafts", a ten-mile per hour speed could "increase rather than decrease the intensity of waves generated by the boat wake. Therefore, minimizing damage to shorelines and other aquatic resources can only be guaranteed by instituting a standard that reduces wake and wash, such as implementing a no-wake or idle speed standard". A recommendation of the work group was that the ten-mile per hour speed limit within 200 feet of a lake shoreline be changed to an idle speed limit.[23]

Legislative Response to Recommendations in Category 3

For most lakes, the Indiana General Assembly reduced the maximum speed, at which a person may lawfully operate a motorboat within 200 feet of the shoreline, from ten-miles per hour to idle speed.[24] "Idle speed" means the slowest possible speed, not exceeding five miles per hour, that maintains steerage so that the wake and wash created by the boat is minimal.[25]

Category 20

During the May 19, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

> During the Tri-State University meetings in 1996 that led to the formation of the Lakes Management Work Group, law enforcement was the second highest ranked concern of public freshwater lake users. The view was that more enforcement presence on the water was a significant priority. The greatest support was for additional traditional conservation officers; however, there was also support for the use of other types of enforcement officers as an alternative (i.e., reserve conservation officers or officers from sheriff reserves).

The work group recommended:

> a. over the next 4 years, increase the number of full-time conservation officers in areas of Indiana that have a concentration of public lakes by a minimum of 25%; and
> b. provide funding to be directed to the Law Enforcement Division of DNR to be utilized on waterway enforcement.[26]

Legislative Response to Recommendations in Category 20

With the enactment of P.L.233-2003, the Indiana General Assembly increased the boat excise tax, on a graduated basis, for boats valued at more than $1,000. Indiana began collection of the increased taxes on January 1, 2004. The Legislative Services Agency estimated total additional revenues of approximately $2,500,000.[27] Pursuant to IC 6-6-11-12, one-third of the total revenues from the boat excise tax (roughly $1,200,000 annually) are deposited in the "conservation officers marine environment fund". The Department of Natural Resources is to "expend the money in the fund exclusively for marine enforcement efforts associated with recreational boating on Indiana waters", including support for the "special boat patrol needs fund" in an amount not to exceed 20% of total in the marine environmental fund.[28] The Department was to develop a formula for the distribution of grants through the special boat patrol needs fund to counties based on the number and size of lakes located in a county, the extent to which law enforcement is provided on the lakes by the county, and "[a]ny other pertinent factor".[29] This legislative response is also pertinent to the recommendations discussed later in Category 34.

Department of Natural Resources Implementation of Legislative Response to Recommendations in Category 20

The Department's Division of Law Enforcement identified priorities for enhanced boating enforcement. These included assistance in the administration of the "special boat patrol needs fund". With the Conservation Officers Marine Enforcement Fund ("COMEF"), moneys are distributed for marine patrol assistance grants, boating safety education, marine law enforcement and implementation of the state waterway marking system. Acting through its Sheriff, an Indiana county with special boat patrol needs may seek marine patrol assistance grants. To be eligible, a county must regulate boating activities exclusively in conformance with Indiana statutes and Natural Resources Commission rules. At least one representative from a participating marine patrol may be required to attend the Division of Law Enforcement's annual Marine Patrol Conference. Each marine patrol officer is required to be current in CPR and advanced first-aid training. Also, each new marine patrol officer must successfully complete the Indiana Boating Education Course. Training costs may be included in a county's grant application.

Category 21

During the September 28, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

> On October 16, 1997, the Court of Appeals ruled that the Indiana Department of Natural Resources (DNR)

has no statutory authority under [the] Lakes Preservation Act to require permits for seasonal installation of piers or other structures that are of a temporary nature, so long as the installation method has minimal impact on the bed of the lake.[30]

Although there are other areas of law that suggest DNR has the authority to regulate temporary structures in public freshwater lakes, the authority is not definitive and is cumbersome to apply. The result of this condition of law is that DNR is unable to effectively manage public freshwater lakes in the full spirit of "public trust" as mandated by law. Additionally, the ability of public freshwater lakes, users, property owners, and local governments to resolve disputes short of expensive court battles is unrealistically limited.

Structures that are considered temporary, and have "de minimis" impact on the lake bed are left to uncontrolled proliferation. The result is loss of public usage of areas within 150 feet of shore, an increase in riparian owner disputes, and environmental harm to the lakes.

DNR has attempted to manage this problem through agency rule-making authority. This process has not adequately dealt with the problem, and clear authority must be re-established by the legislature to protect Indiana's public freshwater lakes for property owners, current users, and future stakeholders.

The work group recommended:

The Indiana Lakes Management Work Group recommends that the Indiana General Assembly amend the public freshwater lake law to add a new section that reads as follows:

IC 14-26-2-5.5. The Commission shall adopt rules under IC 14-10-2-4 to assist in the administration of this chapter. The rules must, as a minimum, do the following:

(1) Provide objective standards for licensing the placement of any temporary or permanent structure or material, or the extraction of material, over, along, or within the shoreline or waterline. These standards shall exempt any class of activities from licensing where the Commission finds the class is unlikely to pose more than a minimal potential for harm to the public rights or public trust as described in IC 14-26-2-5.

(2) Establish a process under IC 4-21.5 for the mediation of a dispute among riparian owners, or by a riparian owner against the department, relative to the usage of an area over, along, or within the shoreline or waterline for a matter within the jurisdiction of this chapter. If after a good faith effort mediation under this subdivision fails to achieve a settlement, the department shall make a determination of the dispute. A person affected by the determination may seek administrative review by the Commission.[31]

Legislative Response to Recommendations in Category 21

The Indiana General Assembly enacted IC 14-26-2-23 to implement the recommendations in Category 21. As enacted in 2000 and until amendments made in 2006, this statutory section provided:

Sec. 23. The commission shall adopt rules in the manner provided in IC 14-10-2-4 to do the following:

(1) Assist in the administration of this [Lakes Preservation Act] chapter.

(2) Provide objective standards for licensing:

(A) the placement of a temporary or permanent structure or material; or

(B) the extraction of material; over, along, or within the shoreline or waterline. The standard shall exempt any class of activities from licensing if the commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in section 5 of this chapter.

(3) Establish a process under IC 4-21.5 for the mediation of disputes among riparian owners or between a riparian owner and the department concerning usage of an area over, along, or within a shoreline or waterline for a matter within the jurisdiction of this chapter. The rule must provide that:

(A) if good faith mediation under the process fails to achieve a settlement, the department shall make a determination of the dispute; and

(B) a person affected by the determination of the department may seek administrative review by the commission.

Natural Resources Commission Rules to Implement Legislative Response to Recommendations in Category 21

Rules to address construction within and along the shorelines of public freshwater lakes already existed before the 2000 statutory reforms. These were called into question by the Department of Natural Resources v. Town of Syracuse decision that was at the heart of Recommendation 21. Included in the rules was a general license for temporary piers that meet specifications designed to minimize the likelihood of harm to the environment and the public trust.[32] With the enactment of IC 14-26-2-23 to clarify agency jurisdiction over temporary structures, the Commission reconsidered the rules. The Commission adopted new rule provisions to help implement the mediation process required by the legislation.[33]

Category 26

During the July 28, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

Problems related to boat density and user conflict have been brought forth by lake users of all types. Boat speed limits, wakes, placid fishing locations, shallow water soils damage, wetlands protection, and Eurasian watermilfoil expansion are samples of the related problems brought forth. Due to current Indiana Law, the Indiana Department of Natural Resources (DNR) cannot effectively manage boater density and its associated impacts on the public freshwater lakes.

The DNR needs greater authority to regulate public freshwater lakes. The general public seems to believe the DNR can do anything it needs to do to correct lake problems and user conflicts, but the enabling laws necessary to regulate public freshwater lakes to address specific lake or local needs are not in place.

The work group recommended:

The Indiana Lakes Management Work Group recommends that the General Assembly modify IC 14-15-7-3, giving DNR the ability to regulate public freshwater lakes to the same degree it can already regulate reservoirs. By adding the proposed language below to the existing statute, DNR will be able to consider local issues that relate to individual lakes based on myriad regulatory needs.

a. Add a sixth paragraph stating: "(6) The establishment of zones in which the use of watercraft may be limited or prohibited for the purposes of fish, wildlife or botanical resource management or for the protection of users".

b. Add a seventh paragraph stating: "(7) Watercraft engaged in group or organized activities or tournaments".

Legislative Response to Recommendations in Category 26

The Indiana General Assembly amended IC 14-15-7-3(a) by authorizing the Natural Resources Commission to adopt rules for the following purposes:

(6) The establishment of zones where the use of watercraft may be limited or prohibited for the following purposes:

(A) Fish, wildlife, or botanical resource management.

(B) The protection of users.

(7) The regulation of watercraft engaged in group or organized activities or tournaments.

Natural Resources Commission Rules to Implement Legislative Response to Recommendations in Category 26

The first stage to implementing this legislation was the Commission's incorporation of IC 14-15-7-3(a)(6) into a recodification process for all the state's special boating rules. This stage was an acknowledgment of the new authority but made no substantive changes.[34]

The second stage was the adoption of rules to establish a process for reviewing petitions to establish a licensing requirement under IC 14-15-7-3(a)(7) for fishing tournaments on a designated river or lake. The rules authorize a petition to be filed with the Commission by the County Executive where the waters are located, the Municipal Executive for the municipality if the waters are located in a municipality, or a Deputy Director for the Department of Natural Resources. Unless a river or lake is designated through this process, a licensing requirement does not apply for fishing tournaments held on public rivers or lakes.

Similarly to the first stage, the second stage made no substantive changes. In other words, no new waters were designated for regulation.[35]

The third stage was the adoption of rules to protect designated wetlands on Lake Wawasee and Syracuse Lake in Kosciusko County. This stage followed requests by the Wawasee Area Conservancy Foundation, the Lake Wawasee Property Owners Association, and the Syracuse Lake Association to establish special watercraft zones to protect these fragile resources. Amendments made to 312 IAC 5-6-6 established idle speed zones for the protection of major wetlands on Lake Wawasee and Syracuse Lake, as well as two small zones where boats were prohibited on Lake Wawasee.[36] Following another citizen's group request, the Commission in 2005 provided at 312 IAC 5-6-5.5 similar protections for wetlands on Lake Manitou in Fulton County.

The fourth stage was rule adoption pertaining to two aspects of the 2000 statutory amendments. First, new standards were provided for the management of major organized boating activities on public waters. A "major organized boating activity" is generally one that involves more than 15 participating boats, more than 50 spectators, a prearranged schedule of limited duration, or is reasonably expected to significantly disrupt boat traffic.[37] Examples of a "major organized boating activity" include fireworks displays, flotillas, and regattas.[38]

Second, amendments were directed to fishing tournaments. There were several adjustments and clarifications to the rules described in the second stage, and on-site standards were developed for fishing tournaments on Lake Wawasee and Syracuse Lake.[39] As observed by the Commission's hearing officer, they represented "a final stage in implementation of the 2000 reform legislation. The current amendments are also a logical outgrowth of the values represented by the public trust doctrine".[40]

Category 34

During its November 18, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

> The Indiana Lakes Management Work Group has developed several recommendations that will improve Indiana's surface water quality, ensure recreational opportunities, and safeguard the future of the public lakes for its citizens. However, lake and watershed funding resources of all types are limited and therefore have had an adverse effect on programs that promote lake management efforts. In addition to the limited financial resources that are in place at this time, monies needed to carry forth many of the recommendations set forth in this report cannot be accomplished without additional financial support.

The work group recommended:

> The Indiana Lakes Management Work Group recommends that the "Lake Enhancement Fee" of five dollars ($5.00) paid annually at the time of boat registration be increased to fifteen ($15.00) annually and be allocated as follows:
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> a. one-third to be appropriated as is currently set forth by statute;
>
> b. one-third to be appropriated to the Law Enforcement Division of the Indiana Department of Natural Resources to be utilized for enforcement, navigation aids programs, boater education programs, and other public awareness programs related to Indiana's waterways; and
>
> c. one-third to be used for sediment removal within the boundaries of publicly accessible lakes, where sediment was derived from watershed sources, as well as control of non-native, invasive plant and animal species in all waters where there is a clear public benefit.

Legislative Response to Recommendations in Category 34

The enactment of P.L.233-2003 was outlined previously in the consideration of the recommendations in Category 20. As requested by the work group, the legislation retained existing funding for the Lake and River Enhancement ("LARE") program as provided by statute.[38] Revenues provided for the new "conservation officers marine enforcement fund" were discussed previously in this information bulletin in the consideration of Category 20.

The third and final element of recommendations in Category 34 is funded in P.L.233 through amendments to IC 6-6-11-12.5(b)(2). In an augmentation to the LARE program, funding is provided for "lake projects, including projects to: (A) remove sediment; or (B) control exotic or invasive plants or animals". As with the "conservation officers marine enforcement fund", Indiana began the collection of increased taxes on January 1, 2004. These were projected to produce approximately $1,200,000 annually for the removal of sediment and the control of invasive species.

Department of Natural Resources Implementation of Legislative Response to Recommendations in Category 34 Regarding Sediment Removal and the Control of Exotic Species in Lakes

As provided in IC 14-32-7-12(b)(7), IC 15-9-4-3(c) and IC 6-6-11-12.5(b), the LARE program is administered by the Director of the DNR. The Director has delegated administrative responsibilities to the LARE Program Office within the DNR's Division of Fish and Wildlife.

4. Informal DNR Lake Management Work Group

At the expiration of the statutory authorization for the Lake Management Work Group, several of the original participants, as well as additional citizen volunteers, met informally under the auspices of the Department of Natural Resources. Amendments made to IC 14-26-2-23 by P.L.152-2006, SEC.3, were attributable, in part, to their efforts. During an October 2002 meeting of the informal Work Group, concern was expressed about the remaining uncertainty for Department authority to regulate structures, which functioned as seawalls, but that were placed landward of a lake's shoreline.

Responsive to these concerns, amendments were made to IC 14-26-2-23 to address a number of issues, including walls placed outside a lake's shoreline. With respect to this issue, the new language provided that jurisdiction of the Department of Natural Resources was extended ten feet landward of the shoreline in order to regulate the construction of a wall whose lowest point would be below the elevation of the shoreline.

Additionally, the 2006 amendments sought to coordinate existing regulatory authorities by bringing multiple

licensure requirements into Section 23 and by cross-referencing the boating standards of IC 14-15. Contractors were made jointly responsible with landowners for compliance with licensure requirements. The Department was authorized to require common use of a pier or similar lake facility if needed to accommodate the needs of multiple owners of the same property. The amendments also clarified that the licensure provisions had direct application to piers, boat stations, platforms, and similar structures.

With the amendments of P.L. 152-2006, IC 14-26-2-23 provides:

Sec. 23. (a) Unless a person obtains a permit from the department under this section and conducts the activities according to the terms of the permit, a person may not conduct the following activities:

(1) Over, along, or lakeward of the shoreline or waterline of a public freshwater lake:

(A) excavate;

(B) place fill; or

(C) place, modify, or repair a temporary or permanent structure.

(2) Construct a wall whose lowest point would be:

(A) below the elevation of the shoreline or waterline; and

(B) within ten (10) feet landward of the shoreline or waterline, as measured perpendicularly from the shoreline or waterline; of a public freshwater lake.

(3) Change the water level, area, or depth of a public freshwater lake or the location of the shoreline or waterline.

(b) An application for a permit for an activity described in subsection (a) must be accompanied by the following:

(1) A nonrefundable fee of one hundred dollars ($100).

(2) A project plan that provides the department with sufficient information concerning the proposed excavation, fill, temporary structure, or permanent structure.

(3) A written acknowledgment from the landowner that any additional water area created under the project plan is part of the lake and is dedicated to the general public use with the public rights described in section 5 of this chapter.

(c) The department may issue a permit after investigating the merits of the application. In determining the merits of the application, the department may consider any factor, including cumulative effects of the proposed activity upon the following:

(1) The shoreline, waterline, or bed of the lake.

(2) The fish, wildlife, or botanical resources.

(3) The public rights described in section 5 of this chapter.

(4) The management of watercraft operations under IC 14-15.

(5) The interests of a landowner having property rights abutting the lake or rights to access the lake.

(d) A contractor or agent of the landowner who engages in an activity described in subsection (a)(1), (a)(2), or (a)(3) must comply with the terms of a permit issued under this section.

(e) The commission shall adopt rules under IC 4-22-2 to do the following:

(1) Assist in the administration of this chapter.

(2) Provide objective standards for issuing permits under this section, including standards for the configuration of piers, boat stations, platforms, and similar structures. The standards:

(A) may provide for a common use if the standard is needed to accommodate the interests of landowners having property rights abutting the lake or rights to access the lake; and

(B) shall exempt any class of activities from licensing, including temporary structures, if the commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in section 5 of this chapter.

(3) Establish a process under IC 4-21.5 for the mediation of disputes among persons with competing interests or between a person and the department. A rule adopted under this subsection must provide that:

(A) if good faith mediation under the process fails to achieve a settlement, the department shall make a determination of the dispute; and

(B) a person affected by the determination of the department may seek administrative review by the commission.

5. Reauthorizations of Lake Management Work Group

In 2006, the Indiana General Assembly enacted legislation to form a new Indiana "Lake Management Work Group", again, with 26 members chosen from a broad base of lakes organizations, users, researchers, and bipartisan representation from the Indiana State Senate and House of Representatives.[41]

The work group has met annually after 2006 and was reauthorized in 2011 through P.L.181-2011. Included for 2011 are State Representative Dick Dodge (R Pleasant Lake), Chair; State Representative Nancy Dembowski (D Knox); State Senator Jim Buck (R-Kokomo); and, State Senator Jim Arnold (D-LaPorte).

The work group is directed to do the following:

(1) Monitor, review, and coordinate the implementation of the work group's recommendations issued under P.L.239-1997 and P.L.65-2000.
(2) Facilitate collaborative efforts among commonly affected state, county, and local governmental entities in cooperation with lake residents and related organizations.
(3) Conduct public meetings to hear testimony and receive written comments concerning lake resource concerns and the implementation of the work group's recommendations.
(4) Develop proposed solutions to problems concerning the implementation of the work group's recommendations.
(5) Review, update, and coordinate the implementation of new and existing recommendations by communicating with the public, the general assembly, and other governmental entities concerning lake resources.
(6) Review and coordinate the development and maintenance of an Internet web site that includes information on the management of lake and watershed resources.
(7) Issue reports to the natural resources study committee when directed to do so.
(8) Review all funding that is used for Indiana's waterways, including potential funding sources that could be used by the general assembly to correct funding problems.
(9) Issue a final report before July 1, 2012.

At the time of the Second Amendment to Information Bulletin #41, the new work group was in an organizational stage.

6. Post-2006 Laws and Role of the Lake Management Work Groups

Since 2006, the work group has been a significant participant in the development of additional legislation and rules to refine and foster the Lakes Preservation Act and related laws pertaining to the public trust. Several examples are outlined.

A key element for a "public freshwater lake", the type of watercourse that is subject to the Lakes Preservation Act, is that the lake has been "used by the public with the acquiescence of a riparian owner". "Acquiesce" is sometimes applied as "one's mere silence, or without express assent" so as that it is exclusive of intentional approval.[42] The Lake Management Work Group urged a broader definition, one that included silence but also included active approval.[43] P.L.6-2008 implemented an inclusive definition for "acquiescence" under the Lakes Preservation Act to mean "consent without conditions, tacit, or passive compliance, or acceptance".

The Lake Management Work Group sought clarification for what would constitute a "lake" for purposes of the Lakes Preservation Act.[44] In 1993, the Commission had determined Mt. Zion Millpond in Fulton County was a "public freshwater lake". Mt. Zion Millpond was formed in the 19th Century by a dam on Rain Creek, the same creek which feeds Lake Manitou. In reaching the determination, the Commission cited the Restatement (Second) of Torts, Sec. 842, Comment 12. Based on the Restatement, the Commission concluded a "lake" is a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both the depression and the body of water are of natural origin or part of a watercourse. Lakes normally come into existence as a result of the forces of nature. A lake may also be formed by damming a stream; and this body of water, even though artificially created, is a segment of watercourse and within the term "lake".[45] P.L.6-2008 codified the Restatement and set five acres as a size minimum. Antecedents to the Lakes Preservation Act were enacted in 1947. This year was identified as determinative of whether a lake could qualify as a "public freshwater lake". As a result, a reservoir created after 1947 does not satisfy the definition.[46]

The Work Group repeatedly identified regulatory deficiencies caused by the absence of an agency listing of public freshwater lakes.[47] Following statutory refinement as to what constitutes a "public freshwater lake", the Indiana General Assembly authorized the agency to develop a listing as a nonrule policy document.[48] Effective January 1, 2010, the Commission adopted its initial "Listing of Public Freshwater Lakes" and caused posting in the Indiana Register. The document was shared with the work group,[49] and it has been twice since amended based largely on public comments.[50]

The Lake Management Work Group identified phosphorous as a central element to excessive nutrient loads within many public freshwater lakes. Reference was made to pioneering efforts by the Indiana General Assembly in 1971 to restrict the use of phosphorous in detergents.[51] Public Law 25-2008 removed an exemption from the restriction which previously applied to "dish washing machine equipment", including household dishwashers.

The Lakes Preservation Act historically limited the duration of any permit to a maximum period of two years. Although the period was adequate for most construction projects, individual permits for structures removed during

winter months (most notably group piers) became problematic. Was a permit for a group pier ineffective after the second year? Also, the LARE program allowed better financial access to dredging projects to remove excessive sediments. The complexity of dredging and financial constraints sometimes meant projects required more than two years for completion. The Lake Management Work Group supported P.L.25-2009 which authorized the agency, by rule, to identify types of permits that would not expire after two years. A temporary rule currently implements the authorization. Included among the types of permits covered are temporary structures and projects contingent upon LARE funding.[52]

Development of the LARE Fund was discussed previously in Category 34 of resolutions. In 2011, the fund was made available for the removal of logjams or obstructions from rivers.[53] In addition to a county sheriff, a county's fiscal body was made eligible to apply for a grant for special needs boat patrols on a lake.[54]

The Lake Management Work Group participated in rule adoptions directed to implementation of the Lakes Preservation Act. Perhaps most notable were modifications to 312 IAC 11-2-11.5, 312 IAC 11-3-1, and 312 IAC 4-8 pertaining to "group piers", with some of the modifications derived from concepts developed by the work group.[55] The amendments required buffer zones between structures, generally limited the breadth of a structure to half the length of an applicant's shoreline, required written approval (and not merely acquiescence) to use the riparian zone of another person, and made explicit the requirement that a structure not interfere with the public rights established by IC 14-26-2-5.[56] The work group also offered written comments to the Commission on the terms for a general license to govern qualified aerators.[57]

7. Epilogue: The Public Trust Doctrine

The 2000 statutory reforms were the result of consensus resolutions from citizens with diverse interests in the use of our lakes. These resolutions were developed through legislation applying flexible management approaches that consider diverse interests. The Department of Natural Resources is implementing new programs, and the Natural Resources Commission has adopted complete sets of rules, to help implement the legislation. The resolutions, legislation, and rules provide direction and a legal foundation, but they do not make the public trust doctrine work.

Other regulatory mechanisms must assist. For example, in 2001 the Commission adopted rules to help assure construction activities on Lake Michigan are supportive of the public trust doctrine:

> If the department determines the placement of a structure as described in the application would violate the public trust doctrine, the department shall either deny the application or condition approval of the application upon terms that would allow placement of the structure without violation of the public trust doctrine. The license may be conditioned to assure that any public access will not be impeded and to provide for complete removal of the structure and site restoration, at the expense of the riparian landowner, when the structure is no longer required.[58]

Adequate service to the public trust is dependent upon more than new regulatory structures and new state funding sources. Category 24 of resolutions from the Indiana Lakes Management Work Group addressed the need for increased public access to our public waters:

> Many people have expressed concerns about the impacts of heavy lake use, including damage to lakes' natural resources, property damage, safety concerns, and overcrowding. These concerns are legitimate and are being addressed in many ways by the Lakes Management Work Group. Restricting public access to lakes would be one way to address these impacts. In general, the Work Group feels that access to public freshwater lakes should not be restricted, because all public freshwater lakes belong to all the citizens of Indiana.
>
> The Indiana Lakes Management Work Group encourages the Indiana Department of Natural Resources and other entities to acquire, develop, and maintain public access to these waters.

Since 1953, the Department of Natural Resources (or an antecedent agency, the Department of Conservation) has provided access to public waters through the statewide Public Access Program. This program focused initially on inland lakes, but it has since expanded to Lake Michigan, navigable rivers and streams, and publicly-funded reservoirs. State funding is provided primarily through the purchase of noncommercial fishing and hunting licenses for which fees are deposited in the Fish and Wildlife Fund.[59] Under the Sport Fish Restoration Act of 1950, up to 75% of State funding is eligible for reimbursement by through the U.S. Fish and Wildlife Service. Following the Wallop-Breaux amendments to the SFRA, States are required to spend at least 15% of SFRA funding on boating access to public waters.

By 2003, the Department's Division of Fish and Wildlife managed 238 public access sites and 21 public fishing areas. In the previous year, Indiana joined states participating in the national Coastal Zone Management Program. This program provides new opportunities for improving public access to waters in the Indiana Coastal

Zone, an area including roughly the northern halves of Lake County and Porter County and the northwestern third of LaPorte County. Improved public awareness of competing public uses, and how to accommodate them, is also critical to effective management of the public trust.

Much depends upon mutual respect for the interests of competing users. A gratifying product of public participation in rules for Lake Wawasee and Syracuse Lake was a new sense of understanding and cooperation among a variety of interests. Homeowners, sailboat racers, fishing tournament sponsors and competitors, and fishing enthusiasts opened dialogues that only a few months ago seemed impossible. During the final stage of rule adoption for fishing tournaments and other organized boating activities, there was a genuine consensus.

The rights of citizens to fully enjoy our public waters will continue to present new challenges as the population grows and improved financial circumstances support more travel and more varied uses of those waters. Solutions must consider a social and environmental equation that is dynamic. Mutual interests can be properly served only by wisely managing the public trust to ensure the enjoyment of those waters for the present and for the future.

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[1] The original information bulletin was adapted, in part, from "Competition for Lakes and Rivers: Recent Indiana Legal Reforms and the Public Trust", J. Goss, as presented by S. Lucas to the Advanced Environmental Law Seminar, Indiana Continuing Legal Education Foundation (Nov. 13, 2003).
[2] Putting the Public Trust Doctrine to Work, Coastal States Organization (2nd Edition, 1997), p. 1.
[3] Id.
[4] Lake Sand Co. v. State, 68 Ind. App. 439, 120 N.E. 715 (1918).
[5] State v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950).
[6] Acts 1947, c. 181 and Acts 1947, c. 301.
[7] IC 14-26-2-3.
[8] IC 14-26-2-5.
[9] Lake of the Woods v. Ralston, 748 N.E.2d 396 (Ind. App. 2001).
[10] Parkinson v. McCue, 831 N.E.2d 118 (Ind. App. 2005).
[11] IC 14-19-1-1(9).
[12] Notably, IC 14-29-1-8 and 312 IAC 6.
[13] IC 14-26-2 and 312 IAC 11.
[14] IC 14-15 and 312 IAC 5.
[15] P.L.152-2006, SEC. 3 as codified at IC 14-26-2-23(c)(4).
[16] Ind. P.L.239-1997.
[17] Final Report of the Indiana Lakes Management Work Group, (Indiana Department of Environmental Management, Dec. 1999), p. 6.
[18] P.L.38-2000 and P.L.64-2000.
[19] P.L.233-2003.
[20] P.L.152-2006.
[21] P.L.6-2008.
[22] P.L.25-2009.
[23] Final Report of the Indiana Lakes Management Work Group, pp. 14 and 15.
[24] IC 14-15-3-17. This speed limit is not limited to "public freshwater lakes" and includes, for example, Lake Michigan. Exempted from the restriction are Lake Shafer and Lake Freeman in White County.
[25] IC 14-8-2-129.
[26] Final Report of the Indiana Lakes Management Work Group, p. 39.
[27] Fiscal Impact Statement for H.B. 1336, Office of Fiscal and Management Analysis, Legislative Services Agency (May 1, 2003).
[28] IC 14-9-8-21.5. The "special boat patrol needs fund" is described at IC 14-9-9-5.
[29] IC 14-9-9-6.
[30] Department of Natural Resources v. Town of Syracuse, 686 N.E.2d 410 (Ind. App. 1997).
[31] Final Report of the Indiana Lakes Management Work Group, pp. 40 and 41.
[32] 312 IAC 11-3-1.
[33] 312 IAC 11-1-3 was added and 312 IAC 11-3-2 was amended effective July 21, 2001.
[34] The authority was incorporated into the rules for public freshwater lakes at 312 IAC 5-6-1; for navigable waters other than Lake Michigan; at 312 IAC 5-7-1; for Lake Michigan and its navigable tributaries in Northwest Indiana at 312 IAC 5-8-1; and, for waters owned by public utilities at 312 IAC 5-9-1. The recodification was effective January 1, 2002.
[35] 312 IAC 2-4 became effective January 1, 2002. These rules retained fishing tournament requirements that predated the 2000 statutory reforms for lakes managed through the Department's Division of State Parks and Reservoirs. These are Monroe Lake, Salamonie Lake, Mississinewa Lake, Roush Lake, Brookville Lake, Hardy

Lake, Patoka Lake, Cagles Mill Lake, and Raccoon Lake.
[36] The amendments were effective February 15, 2003.
[37] Exempted are boat races, fishing tournaments, and water ski events that were already subject to special licensing requirements.
[38] The Indiana State Boating Law Administrator testified that the concept of a "major organized boating activity" was developed in concert with the U.S. Coast Guard and consistent with Indiana's. Memorandum of Understanding with the U.S. Coast Guard for Lake Michigan, Ohio River, and Other Navigable Waters. Minutes of Natural Resources Commission (Aug. 20, 2002), p. 6.
[39] Amendments to 312 IAC 2-4 and 312 IAC 5-3 became effective October 1, 2003. Applying the same legal authorities, the licensure of fishing tournaments was also required for Sylvan Lake in Noble County beginning on October 1, 2005. 312 IAC 2-4-14.
[40] Report of Public Hearing, Analysis, and Presentation for Final Adoption, Legislative Services Agency Document 02-236 (February 19, 2003).
[41] Generally, IC 2-5.5-3. This chapter has since been amended regularly to extend the expiration date of the Work Group.
[42] Black's Law Dictionary, 6th Edition (West Publishing Co. 1990).
[43] Lake Management Work Group Meeting Notes (March 16, 2007 and June 22, 2007).
[44] Lake Management Work Group Meeting Notes (June 22, 2007).
[45] Department of Natural Resources v. Fulton County, et al., 6 Caddnar 123 (1993). In 1995, the Commission adopted the essence of the Restatement "lake" definition by rule. See 312 IAC 1-1-21.
[46] P.L.6-2008 codified at IC 14-26-2-1.5.
[47] See, for example, Lake Management Work Group Notes (June 22, 2007).
[48] IC 14-26-2-24.
[49] Indiana Lakes Management Notes (June 9, 2010).
[50] The current version is posted in the Indiana Register (June 1, 2011) at www.in.gov/legislative/iac/20110601-IR-312110313NRA.xml.pdf.
[51] Lake Management Work Group Meeting Notes (June 22, 2007).
[52] LSA Document #11-376(E). posted in the Indiana Register (June 29, 2011) at www.in.gov/legislative/iac/20110629-IR-312110376ERA.xml.pdf. On July 19, 2011, the Commission gave preliminary adoption to a permanent rule to implement this statutory authority.
[53] P.L. 207-2011.
[54] P.L. 217-2011.
[55] "Rule Processing, Report of Public Hearing and Recommendation for Final Adoption", Administrative Cause No. 08-065W, LSA Document #09-856(F) (June 29, 2010), p. 8.
[56] For approval, see "Minutes of July 20, 2010 Meeting", Natural Resources Commission.
[57] The resulting rules are at 312 IAC 11-2-1.5 and 312 IAC 11-3-12.
[58] 312 IAC 6-8-3(c).
[59] IC 14-22-3.

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