ADVISORY COUNCIL
Minutes of August 13, 2008

MEMBERS PRESENT
Patrick Early, Chair
AmyMarie Travis, Vice Chair
John Bassemier
Donald Van Meter
Kari Evans
Bill Freeman
Richard Cockrum
James Trachtman
William Wert

NATURAL RESOURCES COMMISSION STAFF PRESENT
Stephen Lucas

DEPARMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Ron McAhron	Executive Office
Ryan Hoff	Executive Office
James Hebenstreit	Division of Water
Kenneth Smith	Division of Water
Jon Eggen	Division of Water
Linnea Petercheff	Division of Fish and Wildlife
Col. Michael Crider	Division of Law Enforcement

GUEST PRESENT

Dick Mercier	Chuck Lassiter
Mike Phelps	Carl Kelle

Patrick Early, Chair of the Advisory Council, called the meeting to order at 10:33 a.m., EDT (9:33 a.m., CDT) at The Garrison, Fort Harrison State Park, 6001 North Post Road, Indianapolis, Indiana. With the presence of nine members, the Chair observed a quorum.

Chairman Early asked for a motion with respect to the draft minutes for the meeting held on June 11, 2008. John Bassemier moved to approve the minutes of June 11, 2008. Don Van Meter seconded the motion. Upon a voice vote, the motion carried.

Consideration of Recommendation for Preliminary Adoption of Prospecting Rules for Waterways; Administrative Cause No. 08-105W

Ron McAhron, Deputy Director for the Bureau of Water and Resource Regulation, introduced this item. He said following comments by prospectors, for gold and other hard minerals in Indiana waterways, which were made to the Natural Resources Commission at the May meeting in Spencer, the Commission remanded this rule proposal

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for further review. He said the Chairman Early, himself, and a delegation from the DNR accepted an invitation from Mike Phelps and other prospectors to view activities onsite in Spring Creek, White County.

McAhron thanked the prospectors for providing the opportunity to meet. As a result, he said the agency and the Advisory Council were better informed on the nature of prospectors' activities and the likely impacts to the environment. He said the DNR has concluded "minimal limitations" on prospecting activities were probably in order. A general license was provided in the proposed rule that would place limitations on "nozzle size" and cause activities to stay clear of environmentally sensitive areas. He said a definitive answer had not yet been found as to whether "motorized" language should be included relative to pumps. As a whole, he said the agency determined there were "not as many environmental concerns" from prospecting activities as originally thought.

Chairman Patrick Early reflected upon the field trip to Spring Creek. He said a "full contingent from the DNR made the trip" to White County to view the prospecting activities. He said he now believes these activities are "minimal impact operations as long as they were limited to hand-held equipment." He said it was a "good trip for all of us" and that it was probably a "good idea to support this recreational activity" within appropriate environmental limitations.

Kari Evans inquired about the requirement, for qualification under a general license, that a prospector obtain permission from "any" riparian owner. Steve Lucas answered that riparian owners on a navigable waterway have "a bundle of property rights" within near-shore areas, and a person engaged in prospecting might move along the shorelines of several riparian owners. As a result, the term "any" was used. But since the issue is inherently site-specific, "the" might be a viable substitute for "any".

The Chair asked about prospecting near the middle of a substantial river. "Would permission from a riparian owner be required in this situation?" Lucas responded that, assuming a prospector obtains lawful river access, permission ordinarily would not be required. Riparian rights do not extend endlessly into a river. The potential problem can be illustrated with an extreme example. If a prospector were to dig a deep hole in close proximity to the "ordinary high watermark" of a navigable waterway, particularly where a residence is located onshore, a landowner might complain "and would probably have a legal basis for complaining".

Lucas added the NRC and DNR have considerable recent experience with "public freshwater lakes", where navigable waters principles are often applied. In this context, the Court of Appeals of Indiana uses what it calls a "reasonableness" test to determine how far into a lake a riparian owner's interests go. Lucas said the Advisory Council might recommend this concept also be applied to navigable waters, but the "subjectivity of a 'reasonableness' test" can make consistency difficult to achieve.

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Chairman Early asked if the Advisory Council could recommend a specific distance from the shore, such as ten or 15 feet. Lucas responded this approach might be workable. It could at least offer guidance, although the NRC's rule could not change riparian rights.

Evans expressed concern with the agency becoming involved in determining private property rights. A suggestion was made that the need to obtain the permission of the riparian owner might be removed from the rule. Lucas responded that a problem with this approach is, for non-navigable waters, the general license requires approval of the landowner. The juxtaposition of requiring landowner permission for non-navigable waters but not requiring permission from the riparian owner for navigable waters could create regulatory problems.

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, reflected that he viewed the issue from two DNR perspectives, as a regulator and as land holder. He said property managers along waterways, where prospecting might occur, are concerned with their ability to protect the natural resources if the owner's permission is not required.

The Vice Chair, AmyMarie Travis, said it was important to have clear directives in the rule so, with enforcement activities, a Conservation Officer had and could give the public clear guidance. She said misdirection could result if private property interests, including riparian rights, were not considered in the equation. She added the language might appropriately be limited to any "affected" riparian owner to reflect that permission was needed only from a riparian owner with legal standing to complain at a particular location, as opposed to any riparian owner on the river.

Evans asked if the rules would limit a riparian owner's rights. She expressed the perspective that a riparian owner could pursue an action, against a person interfering with those rights, independently from the rules. Lucas said he agreed with this perspective.

The Chair said he believed the rules as proposed were a step in the right direction. He suggested, however, that there be four substantive amendments to the general license:

(1) The ability to use suction equipment should be described to specifically include "motorized" equipment.
(2) The ability to use suction equipment should be limited to "hand-operated" equipment so that an automatic suction set-up could not be used over several hours without the direct supervision and participation of the operator.
(3) The applicability of the license should be limited to "daylight hours".
(4) The listing of disqualified waterways contained in proposed 312 IAC 6-5-10(d) might not prove to be exclusive. As a result, language should be included to allow the DNR to subsequently list other waterways which were disqualified.

Lucas asked to review these principles so he had a clear understanding for drafting potential amendments. The term "motorized" would be stated as an inclusion not a limitation. In other words, suction equipment could be motorized or non-motorized.

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Chairman Early said that was correct. Lucas said he thought he understood the concept of hand operation. He added that NRC rules limiting activities to daylight hours are often described in terms of "from sunrise to sunset". The Chair said he was supportive of this clarification. With respect to the list of disqualified waters, Lucas suggested he believed both DNR enforcement and fairness to the prospectors required a definitive published listing. The list could be modified on a short-term basis by a "temporary rule" and on an indefinite basis through the rule-adoption process. Chairman Early expressed understanding with this need and agreed to address future changes to the listing through temporary rules or permanent rules.

Mike Phelps of Brookston, Indiana spoke to the rule proposals. He thanked the DNR and the Advisory Council for meeting with other prospectors and him onsite in White County. He said he believed this kind of communication was essential to a fair regulatory system and emphasized an understanding of the need for reasonable environmental protection. Phelps said the Advisory Council should not be concerned with prospecting within natural lakes because these areas are not viable for the location of gold or other hard mineral resources. He said he believed the concept of having a minimum distance from the shoreline, such as ten or 15 feet, might be helpful to effective administration of the rule. Phelps said he and other prospectors looked forward to continuing to work with the agency as the rule adoption process moves forward. Chuck Lassiter and Carl Kelle accompanied him.

Richard Cockrum said he intended to vote in favor of a motion to recommend preliminary adoption, with modifications based upon Advisory Council discussions, of the proposed rules. Recreational prospecting appeared unlikely to him to have major adverse environmental consequences, if properly regulated. At the same time, he urged the Advisory Council, the agency, and the prospectors to keep in mind that, at least for navigable waters, this action was authorizing the private use of natural resources which belong to the public. He said a continued sensitivity to this precept was essential.

Ron McAhron suggested another clarification that might be helpful was a statement the rule was not intended to supersede the rights of riparian owners. He also asked the Advisory Council to balance the level of scrutiny, for what seemed to be the low-impact activity of prospecting, with other activities more likely to have some impact to proprietary interests.

AmyMarie Travis suggested specifying that nothing in the rule was intended to replace the rights of riparian owners. She recommended an amendment to this effect.

Richard Cochrum moved to modify the proposed amendments to 312 IAC 6 and 312 IAC 10, as set forth in the packet of the Advisory Council to govern the prospecting of minerals from Indiana waterways, with the inclusion of the following concepts:

(1) To qualify for a general license, a prospector must:
(A) Obtain permission from any "affected" riparian owner.
(B) Limit activities to "hand-held" suction equipment.

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(C) Limit activities to the period between sunrise and sunset.

(2) The use of "motorized" equipment should be identified as a form of qualified suction equipment.

(3) The rules should clarify they are not intended to change the rights of riparian owners.

William Wert seconded the motion. The Chair called for the question. On a voice vote, the motion carried.

Richard Cochrum moved to recommend the amendments, as modified, to the Natural Resources Commission for preliminary adoption. James Trachtman seconded the motion. The Chair called for the question. On a voice vote, the motion carried.

Consideration of Recommendation for Preliminary Adoption of Amendments to 312 IAC 11 Governing the Placement of Structures on Public Freshwater Lakes to Provide New Standards Pertaining to the Placement of Group Piers and Related Matters; Administrative Cause No. 08-065W

Ron McAhron, Deputy Director for the Bureau of Water and Resource Regulation, also introduced this item. He recited a brief history concerning rule proposals to address "group piers" and related matters, including the Advisory Council's previous consideration which resulted in a remand for input from the Lake Management Work Group (the "LMWG"). McAhron said some aspects of the LMWG's recommendations were incorporated with the current draft, but additional substantive language might come from the body. He reflected growing urgency for progress toward rule adoption in this high-profile area was underlined by comments from Commission members during the July meeting in Portage. McAhron then deferred to James Hebenstreit, Assistant Director for the DNR's Division of Water.

Jim Hebenstreit outlined the rule proposal and said the most important new language was included within 312 IAC 11-4-8. The new section would establish substantive requirements for "group piers". Currently, "group piers" are disqualified from a general license so they receive the additional scrutiny of pre-construction approval, within the context of the Lakes Preservation Act and existing rules, but there are no standards having exclusive application to them. These amendments would assist with presenting a transparent regulatory process.

Hebenstreit directed the Advisory Council's attention to green sheets, distributed just prior to the meeting, which included two clarifications. The first would include the specification that a club qualified as a group pier, under 312 IAC 11-2-11.5(9), if it had as a purpose "the use of public waters for boating, fishing, hunting, trapping, or similar activities". The second was that the agency would consider the "carrying capacity" of a lake only if there were an agency determination of carrying capacity before a license was applied for. This modification was in proposed 312 IAC 11-4-8(d)(2)(B).

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McAhron reflected that the DNR did not currently have standards for determining the "carrying capacity" of a lake. He expected, however, the LMWG would address this issue in its deliberations. He identified one instance where a carrying capacity had been determined, for the mouth of Burns Portage Waterway into Lake Michigan, and where carrying capacity had thus been a consideration for an application for a "marina" or "group pier". Without establishing standards in advance of individual licensure, McAhron said an indefinite and potentially very difficult licensure review could result.

Rick Cochram said the provision for the amendment to 312 IAC 11-2-11.5(9) was offered because of his previously-stated concern to the Advisory Council that the current language of "yacht club" was too restrictive. The first approach was to modify the language from "yacht club" to "boat club", but upon further consideration, this language was also seen as being too restrictive. The example of a "hunt club" was presented where the potential adverse impact would properly require the additional scrutiny of a "group pier" license, as much as would a "boat club", since the impacts to natural resources would be similar and potentially just as serious. The next concept, and the one contained in the rule in the Advisory Council packet, would have expanded the term to any "club". This concept was viewed as being too broad since a "club", without context, is a very inclusive term and could mean such things as a "chess club" or a "bridge club"—entities which would not inherently have a significant impact on a lake's natural resources. He said the proposed modified language would encompass activities directed to usage of the public waters, and he now believed the modification would describe an appropriate regulatory structure.

Cochram said he was also the Advisory Council member that caused the reference to "carrying capacity" in proposed 312 IAC 11-4-8(d)(2)(B). At the same time, he reflected an understanding that discernable standards were needed if the use of the concept was to be workable. He said he welcomed this proposed amendment as well and looked forward to the possibility the DNR or the LMWG would develop standards for determining numbers or processes for determining carrying capacity.

As additional information, Steve Lucas directed the Advisory Council's attention to an orange sheet distributed, prior to the meeting, which addressed the proposed treatment of seven listed reservoirs. He said this subject was part of rules pertaining to navigable waters, and not the immediate lakes rule proposal, but it was an undetermined point when the then-combined subject of "group piers" on lakes and navigable waters was presented to the Advisory Council on April 9. At that time, the Advisory Council recommended preliminary adoption of rules for "group piers" and other subjects for preliminary adoption by the Commission, contingent upon a consensus being developed for the regulation of these seven reservoirs.

John Davis said with the new language shown on the orange sheet, the regulatory principles generally applicable to navigable waters would also be applied to the seven reservoirs. In addition, the modification would clarify that standards for property

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management on those reservoirs would apply "above and beyond" the regulatory standards of the 312 IAC 6-4.

Cochram recalled that the navigable waters rules for "group piers" were also to be modified to reflect modifications made by the Advisory Council regarding "group piers" on public freshwater lakes. Lucas agreed and said that these modifications would be incorporated in the navigable waters rules to the extent of similarities with physical characteristics and statutory authorities.

Richard Cochram moved to modify the proposed amendments to 312 IAC 11, as set forth in the packet of the Advisory Council to govern new standards for "group piers" and related matters on public freshwater lakes, with the inclusion of the following language:

(1) In 312 IAC 11-2-11.5(9), the phrase "that has, as a purpose, the use of public waters for boating, fishing, hunting, trapping, or similar activities" would be added following the word "club".

(2) In 312 IAC 11-4-8(d)(2)(B), the phrase "where the department has determined the carrying capacity in an analysis which is published before the license application is filed" would be added following the word "lake".

Bill Freeman seconded the motion. On a voice vote, the motion carried.

Richard Cochram moved to recommend the amendments, as modified, for preliminary adoption by the Natural Resources Commission. Bill Freeman seconded the motion. The Chair called for the question. On a voice vote, the motion carried.

Consideration of Recommendation for Preliminary Adoption of New Article, 312 IAC 27, governing the Flood Control Revolving Fund; Administrative Cause No. 08-064A

Kenneth Smith, Assistant Director for the Division of Water, presented this item. He explained that the Department of Natural Resources and the Natural Resources Commission have for many years assisted the Department of Administration with the implementation of the Flood Control Revolving Fund. He said the "law has been in place since the 1950s to provide low-interest loans." With amendments made by the most recent session of the Indiana General Assembly in SB 104, the authority has been focused in the DNR and the NRC. This new responsibility carries with it the need to adopt rules, particularly in anticipation a more expansive interpretation may be in the offing as to the purposes to which funding may be placed.

Smith said the proposed rules were in three parts. The first applied to administration and delegated many functions from the NRC to the DNR in order support efficiency. The second provided definitions. The third described "how the fund would be executed" and included provisions to identify priorities.

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Smith said the Division of Water requested the Advisory Council to recommend that the Natural Resources Commission give preliminary adoption to proposed 312 IAC 27, but with a modification. In several locations within the proposed rule, a reference was made to a loan application being "substantially" complete. He said the term "substantially" was not defined, and the term might result in uncertainty as loan applications were being reviewed. The Division of Water asked that the term be deleted wherever it occurred.

There was a brief discussion by the DNR and the members of the Advisory Council concerning the Flood Control Revolving Fund and the status of the resulting program. The discussion included a review of available funding and active loans.

Richard Cochram noted proposed 312 IAC 27-3-5 anticipated an annual report to the Commission. He asked if a similar report could be provided to the Advisory Council. Ron McAhron responded the agency could do that.

Kari Evans moved to recommend proposed 312 IAC 27 to the Natural Resources Commission for preliminary adoption, but with the deletion of the word "substantially" wherever it appeared. In addition, 312 IAC 27-3-5 would be modified to include an annual report to the Advisory Council. Don Van Meter seconded the motion. The Chair called for the question. On a voice vote, the motion carried.

Consideration of Recommendation for Preliminary Adoption of Amendments to 312 IAC 9-2-3 that Governs the Sale of Parts of Wild Turkeys and Amendments to 312 IAC 9-4-11 that Governs the Taking of Wild Turkeys; Administrative Cause No. 08-122D

Linnea Petercheff, Operations Staff Specialist with the Division of Fish and Wildlife, presented this item. She said for consideration was proposed amendments to rules under the Fish and Wildlife Code to govern the sale of wild turkey parts and the taking of wild turkeys. She said the changes regarding the use of parts were initiated by a citizens' petition for rule change. With these changes, the heads, feet, and skin of wild turkeys could be purchased and sold. Allowing these changes would support taxidermy and not harm the resource. In addition, all counties were opened to turkey hunting. She said DNR biologists determined efforts to reintroduce turkeys have reached a level of success to allow this occurrence.

The Chair inquired whether the rules should be clarified to allow the purchase and sale of turkey beards. Col. Michael Crider responded that beards were feathers, attached to skin, and the Division of Law Enforcement was comfortable beards were already included within the coverage of the proposed amendments.

AmyMarie Travis moved to recommend the Natural Resources Commission give preliminary adoption to rules in 312 IAC 9, concerning wild turkeys and related subjects,

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as set forth in the Advisory Council packet. John Bassemier seconded the motion. On a voice vote, the motion carried.

Adjournment

The meeting adjourned at 11:54 a.m., EDT (12:54 p.m., CDT).

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