

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

**NAVIGABLE WATERS GROUP PIERS,) Administrative Cause
MARINAS, OTHER STRUCTURES, AND) Number: 08-009L
LAWFUL NONCONFORMING USES) (LSA Document #09-137(F))**

**RULE PROCESSING, REPORT OF PUBLIC HEARINGS AND
RECOMMENDATION FOR FINAL ADOPTION**

1. RULE PROCESSING

For consideration are amendments proposed to 312 IAC 6 for navigable waterways to add new standards regarding group piers and amended standards regarding marinas. New provisions are included to specify how lawful nonconforming uses are addressed. The rules would also recognize a nonrule policy document as guidance for determining riparian boundaries in implementation of the agency responsibilities.

This subject originated conceptually during the February 13, 2008 meeting of the Advisory Council when an array of waterway issues received an overview. During its April 9, 2008 meeting, the Advisory Council provided substantive direction for the subject rule adoption. As reported in the pertinent portions of the April 2008 minutes:

Chairman Early reflected that this proposal was given conceptual consideration during the February meeting. The concept was brought to the Advisory Council as a result of a recommendation by Rick Cockrum.

Steve Lucas indicated a draft rule to provide substantive standards was presented in two parts. The first is mostly new and would address navigable waters within 312 IAC 6. The second would amend 312 IAC 11 for public freshwater lakes. Lucas said there were some standards for piers on public freshwater lakes, but these mostly dealt with structures qualifying for general licenses and notably did not provide specific standards for “group piers”. He said the substantive provisions included major new regulatory requirements. Some of the requirements are quantifiable, but others are still largely conceptual and included a measure of subjectivity.

Lucas said that if the Advisory Council determined all or a portion of this proposal was ready to move forward, he would prefer to address the provisions

for navigable waters separately from those for public freshwater lakes. The geography of regulation is different, with most of what have been traditionally considered to be a “public freshwater lake” located in the northern fifth of Indiana. With the notable exception of Lake Michigan, most navigable waters which are likely to have group piers or marinas are located in the southern two-thirds of Indiana. Public hearings for public freshwater lakes would be held in northern Indiana and those for navigable waters would likely be held in central Indiana.

Lucas also reflected that there was one subject area where he did not recommend preliminary adoption as set forth in the Advisory Council packet. In proposed 312 IAC 6-4-5(d), nine lakes are proposed for exemption from licensure as navigable waters. He said he recommends only the retention of Lake Freeman and Lake Shafer within the exemption. Doing so would mirror legislation that exempts these two lakes from licensure for piers under the Lakes Preservation Act. The other seven lakes are leased by the DNR from the U.S. Army Corps of Engineers, and administered through the Division of State Parks [and Reservoirs]. As such, they enjoy unique protections, but their exemption here would negate watercraft safety reviews from the Division of Law Enforcement, water dynamic reviews from the Division of Water, and environmental reviews from the Division of Fish and Wildlife that would ordinarily result from the Navigable Waters Act.

Bill Freeman questioned why Lake Freeman and Lake Shafer should be exempted. He expressed concerns that allowing for their exemption might have negative ramifications and would be subject to future criticism.

Chairman Early asked if the exemptions of Lake Freeman and Lake Shafer were required because they are exempted by statute. Lucas responded that it was a less direct relationship. The two lakes are statutorily exempted from the Lakes Preservation Act, not from the Navigable Waters Act which was adopted subsequent to the Lakes Preservation Act exemption. If the DNR now adopts rules for piers and seeks to apply them to the lakes, the rules would effectively but not literally negate the statutory exemption. John Davis said the rules might appear to evade legislative intent, an appearance which could be even more damaging to the agency than a direct challenge.

Davis also reflected that the process for addressing construction activities on the seven lakes leased from the U.S. Army Corps might already provide sufficient environmental and safety protections. He wished to be assured that the regulatory proposal would not violate the DNR’s relationship with the Army Corps. Evans suggested Indiana was generally best served by developing strategies where environmental and safety concerns were within programs administered by state agencies and not dependent upon federal agencies. James Hebenstreit recommended the exemptions be removed for the seven Army Corps lakes so that piers on these lakes would be subject to DNR technical reviews. He said the lakes varied markedly in how they were managed by the Army Corps and under individual leases with DNR, so retaining regulatory authority would support better overall uniformity.

Rick Cockrum recommended removing the word “boating” so any club placing a pier would be subject to licensure as a “group pier”. He envisioned a fishing club would have similar consequences for impact to the waters as would a “boating club”.

Cockrum asked whether the standard in 312 IAC 6-4-4(b)(1) by which the DNR is to evaluate whether a group pier unreasonably impairs “the navigability of the waterway” would include a consideration of excessive boat traffic on the entirety of the waterway or only at the site of the pier. Lucas responded that his understanding was the Division of Law Enforcement performed an evaluation in the immediate vicinity of the pier and did not [apply] a general standard for carrying capacity of the waterway. In the absence of a baseline determination of carrying capacity, he believed a serious analysis would be difficult.

Jon Eggen observed excessive boat density was an argument sometimes made by local residents to oppose the placement of public access sites on public freshwater lakes and navigable waters. The DNR policy has supported the placement of public access sites.

Ron McAhron reported the Lake Management Work Group has worked tirelessly to reform how public freshwater lakes are managed. He said the Lake Management Work Group includes two State Senators and two State Representatives and has developed several items of legislation directed to the Lakes Preservation Act. Included is SEA 41 discussed earlier. In addition, the Lake Management Work Group is interested in developing rules directed to pier placement. McAhron asked that the Advisory Council forward the portion of this proposal, which pertains to “public freshwater lakes”, to the Work Group for its input and possible return to the Advisory Council for consideration during the June meeting.

John Davis asked that, if the navigable waters portion of the proposal is forwarded to the Commission, the Advisory Council do so with the expectation the DNR would review potential consequences with the Army Corps. He said the DNR would not necessarily recommend changes but should fully evaluate the possibilities.

Richard Cockrum moved to amend the rule proposal by: (1) striking the word “boating” from the description of a “group pier” for navigable waters under 312 6-2-3.7(9) and the word “yacht” for the description of a “group pier” for public freshwater lakes under 312 IAC 11-2-1.5(9); (2) adding a reference in 312 IAC 6-4-4 to specify the DNR may consider an excessive increase of boating traffic to a navigable waterway from “group pier” and by adding a reference in 312 IAC 11-4-8 to specify the DNR may consider an excessive increase of boating traffic to a public freshwater lake from a “group pier”; and, (3) striking the exemptions for the seven Army Corps lakes in 312 IAC 6-4-5(d). Don Van Meter seconded the motion. The motion carried with Bill Freeman abstaining.

Richard Cockrum moved to bifurcate the rule proposal into elements pertaining to navigable waters (312 IAC 6) and those pertaining to public freshwater lakes (312 IAC 11). With respect to navigable waters, he moved to recommend the rule proposal to the Natural Resources Commission for preliminary adoption, as

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amended, but on condition the DNR shall review and may determine to reinstate the exemption of the seven Army Corps lakes, if the exemption is reasonably required by Indiana's lease with the Army Corps. With respect to public freshwater lakes, he moved to recommend action on the rule proposal be deferred for review by the Lake Management Work Group and returned to the agenda of the Advisory Council during its June meeting. Bill Freeman seconded the motion. On a voice vote, the motion carried.

Subsequent to the April 2008 meeting of the Advisory Council, the provisions pertaining to public freshwater lakes, which offered amendments to 312 IAC 11, have been considered separately from those pertaining to navigable waters and offering amendments to 312 IAC 6. Amendments pertaining to public freshwater lakes are currently the subject of a temporary rule posted in the Indiana REGISTER on December 15, 2008 and published on the website of the Legislative Services Agency at: <http://www.in.gov/legislative/iac/20081231-IR-312080933ERA.xml.pdf>. The temporary rule amendments for public freshwater lakes can also be accessed on the website of the Natural Resources Commission at: <http://www.ai.org/nrc/2398.htm>. The proposal for amending 312 IAC 11 is not further considered here except as it bears on an effort to maintain consistency with 312 IAC 6. The subject of this report is the proposal to amend 312 IAC 6 pertaining to navigable waterways.

The navigable waters proposal was considered briefly during the May 21, 2008 meeting of the Natural Resources Commission and remanded to the DNR for additional refinement. As reported in the pertinent portions of the May 2008 minutes:

John Davis presented this item and said the proposed rule amendment was forwarded to the Commission through the Advisory Council. He was "unsure" of the affect the rule would have on the state-managed federally-owned and some state-owned reservoirs "where [the Department] owns the entirety or almost the entirety of the shoreline." Davis said that further discussions within the Department indicate the "situation is even a little more complex than I had understood." He asked the Commission to send the rule proposal back for further Department review "so that our reservoir specialist may take part in a discussion to perfect" the proposal.

Larry Klein moved to remand the proposed amendments to address piers, marinas and related matters in navigable waters for further review. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

The proposed rules were considered briefly during the June 11, 2008 meeting of the Advisory Council. As stated in part, the minutes reported:

John Davis introduced this item. He noted that the Advisory Council discussed the pier issue previously. Davis explained that the seven reservoirs listed in the rule proposal are “a little more complex”, and Department owned or managed shorelines present “unique” situations. He met with staff from the Division of States Parks and Reservoirs to discuss how the reservoirs “could fit into the rule”. Davis said an amended rule proposal would be presented to the Advisory Council in August. “There are compelling reasons why [the reservoirs] need to be included. There is more than just our management at stake.”

Bill Freeman asked, “So you are only talking about DNR reservoirs?” Davis answered in the affirmative and noted that Brookville Lake, Cagles Mill Lake, Cecil M. Harden Lake, Mississinewa Lake, Lake Monroe, Patoka Lake, and J. Edward Roush Lake are included in the proposed rule at 312 IAC 6-4-5. “We have a set of rules that the Corps leaves us with. The lease itself says we are in charge. So we want to know how that affects the rest of the rule.”

During the August 13, 2008 meeting, the Advisory Council endorsed modifications to address these reservoirs. As reflected in the minutes, “John Davis said with the new language..., 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 management on those reservoirs would apply ‘above and beyond’ the regulatory standards of the 312 IAC 6-4.”

The Commission gave preliminary adoption to the proposed amendments during its meeting of September 16, 2008. As reported in the pertinent portion of the minutes:

James Hebenstreit...presented this item and explained that the proposed rules would govern structures on navigable waterways. He said the proposal addresses concerns that the Division of State Parks and Reservoirs had with the original draft “about how the [proposal] might affect the authority of both State Parks and the Corps to regulate piers. I think now we have worked that out.” Hebenstreit said the proposal is the first attempt at drafting rules for piers on navigable waterways. He said the Advisory Council had requested that rules be drafted to “mirror” the public freshwater lakes rules addressing the same subject matter “as much as possible”.

Hebenstreit said that 312 IAC 6-1-5 creates a mechanism to establish a lawful nonconforming use to address existing piers that would not conform to the proposed rules. The proposal would allow persons to modify or maintain lawful nonconforming structures and would give the Department authority to “order the

removal of a lawful nonconforming use if [the structure] is determined to be a nuisance”. A similar provision already exists for public freshwater lakes.

Hebenstreit said the other amendments would mirror “to some extent” the existing rules addressing structures in public freshwater lakes, and they would incorporate concepts though not the exact language of licensure for “group piers” at 312 IAC 6-2-3.7. 312 IAC 6-4-5 would establish a general permit for a pier which is neither more than 100 feet long nor more than one-quarter the width of the navigable waterway. “That’s probably an item that will get a lot of testimony, because it was kind of a starting point. We are not sure what kind of piers we might really have out there on all the navigable waterways.”

Hebenstreit explained that 312 IAC 6-4-5(d) addresses piers placed along or within the ordinary high water mark of listed reservoirs and “makes clear” that the rule proposal applies as well as any other regulations of the Corps or other Department divisions might have on the reservoir.

Stautz said, “I think the same suggestions would apply for this rule as well, as far as a ‘legal interest’ amendment with regard to DNR’s discretion or authority” as approved in the previous agenda item. Ahearn asked for clarification regarding lawful nonconforming uses. “Do we understand that the rule is saying that the structure is (a) a nuisance, and then (b) pose a significant adverse affect to navigability enjoyment, enjoyment of life and property, and public trust? Is it a two-part test before the Director may remove a lawful nonconforming use?” Hebenstreit said, “As I read that, I think that it meant any one of those.” Stautz said, “Yes.”

Ahearn asked, “Can this be read to say that every structure that extends 100 feet is a nuisance?” Hebenstreit answered, “I think it’s safe to say that there are a lot of navigable streams that aren’t 100 feet wide. So, if somebody has a pier that extends across three-quarters of the stream we probably have a hazard of some sort. I think that is what we are trying to catch.” Ahearn said, “I guess I read it as a two-part test. If it is a nuisance, that accomplishes one of the other things. We are saying if it’s 100 feet, by rule, we are declaring that it has a significant adverse affect on navigability.” Lucas noted that this same issue came up regarding structures on public freshwater lakes before the AOPA Committee and gave an example. “If a structure was 110 feet long, then it would be incumbent upon the Department to order removal...and demonstrate that being more than 100 feet long posed, in fact, some nuisance.” Ahearn asked, “So, it is two-prong test?” Lucas answered that was how the AOPA Committee had previously applied the concept.

Mark Ahearn moved to approve for preliminary adoption amendments to address piers, marinas, lawful nonconforming uses and related matters in navigable waters. The motion was with amendments to 312 IAC 6-4-4(b)(6) to reflect the “legal” interests of a neighboring landowner and with amendment to 312 IAC 6-4-4(c)(1)(B) similar to those required by the Commission for public freshwater lakes. Jane Stautz seconded the motion. Upon a voice vote, the motion carried.

A “notice of intent” to adopt the proposed rule amendments was published in the Indiana REGISTER on February 11, 2009 as LSA Document #09-137. The notice identified James Hebenstreit, P.E., Assistant Director of the DNR’s Division of Water, as the “small business regulatory coordinator”.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted to the Office of Management and Budget on March 4. In a letter dated May 22 and received July 7, 2009, OMB approved the proposed fiscal analyses.

On July 8, 2009, the Division of Hearings submitted a copy of the proposed rule and corresponding “Economic Impact Statement” to the Legislative Services Agency. On July 9, LSA provided an intended date of posting of July 22, 2009. On July 14, the Division of Hearings provided LSA with a “Notice of Public Hearing”. On July 15, 2009, the LSA issued to the Commission an “authorization to proceed” with the rule proposal.

In accordance with IC 4-22-2.1-5(c)(2), a copy of the proposed rule and the statement concerning rules affecting small business were submitted to the Indiana Economic Development Corporation on July 15, 2009. On August 17, 2009, IEDC submitted written comments to the Commission dated August 12, 2009 which concluded: “The IEDC does not object to the economic impact associated with this proposed rule.” The Commission responded to the IEDC’s comments on August 17, 2009. IEDC’s full comments were made available for inspection and copying in the Commission’s Division of Hearings office and on the Commission’s website on August 17, 2009. Copies of IEDC’s comments were also available at the public hearings scheduled for August 24 and August 25, 2009.

A public hearing on the rule proposal was scheduled for August 24, 2009 in the Indiana Government Center North, 100 North Senate Avenue, Room N501, Indianapolis, Indiana and a second public hearing was scheduled for August 25, 2009 in the Offices of Angel Mounds State Historic Site, 8215 Pollack Avenue, Evansville. Notice of the public hearings and the text of the proposed amendments were published in the Indiana

REGISTER on July 22, 2009. This notice included the statement under IC 4-22-2.1-5 concerning rules affecting small businesses. The notice also included information required under IC 4-22-2-24. Notice of the public hearings with similar information was published on July 24, 2009 in the Indianapolis DAILY STAR, a newspaper of general circulation published in Marion County, Indiana and on the same day in the Evansville COURIER, a newspaper of general circulation published in Vanderburgh County, Indiana. In addition, notice of the public hearings and a summary of the proposed rule changes were published on the calendar of the Commission's website.

2. REPORT OF PUBLIC HEARINGS

A. Report of Public Hearings and Comments

Two public hearings were convened as scheduled. The first was on August 24, 2009 at 10:30 a.m., EDT, in Room N501, Indiana Government Center North, 100 North Senate Avenue, Indianapolis. James Hebenstreit, P.E., Assistant Director of the DNR's Division of Water appeared. No member of the public appeared. The second was on August 25, 2009 at 3:00 p.m., CDT, at the Offices of Angel Mounds State Historic Site, 8215 Pollack Avenue, Evansville. Conservation Officer Gordon Wood and Conservation Officer Michael Lamar of District 7 of the Division of Law Enforcement appeared. No member of the public appeared. No comments were otherwise received from the public concerning the rule proposal.

3. RECOMMENDATION FOR FINAL ADOPTION

The propose rules as published for preliminary adoption appear to be lawful and reasonably structured for their intended purposes. The proposals largely parallel those already in effect, either as permanent rules or temporary rules, for public freshwater lakes. The statutes governing navigable waterways and those governing public freshwater lakes are similar, and the similarity is reflected in treatment of these public waters by the courts. Illustrative are *Parkison v. McCue*, 831 N.E.2d 118 (Ind. App. 2005) and *Bath v. Courts*, 459 N.E.2d 72 (Ind. App. 1984). The procedural requirements for rule adoption have seemingly been satisfied. The proposed rules include important

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policy decisions, and these are within the province of the Natural Resources Commission. Within this context, the proposed amendments published in the INDIANA REGISTER, and attached as Exhibit “A”, are recommended for final adoption.

Dated: August 26, 2009

Stephen L. Lucas
Hearing Officer

Exhibit "A"

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule

LSA Document #09-137(F)

DIGEST

Amends 312 IAC 6-1-1, 312 IAC 6-4-1, 312 IAC 6-4-2, and 312 IAC 6-4-3 and adds 312 IAC 6-1-4, 312 IAC 6-1-5, 312 IAC 6-2-3.7, 312 IAC 6-4-4, and 312 IAC 6-4-5, governing the placement of structures in navigable waters, to provide new standards pertaining to the placement of piers, to incorporate by reference a nonrule policy document, which assists with the identification of riparian zones, for use as guidance in performing regulatory functions anticipated by IC 14-29-1 (sometimes called the "Navigable Waters Act"), and to provide standards for determining lawful nonconforming uses. Makes technical changes. Effective 30 days after filing with the Publisher.

312 IAC 6-1-1; 312 IAC 6-1-4; 312 IAC 6-1-5; 312 IAC 6-2-3.7; 312 IAC 6-4-1; 312 IAC 6-4-2; 312 IAC 6-4-3; 312 IAC 6-4-4; 312 IAC 6-4-5

SECTION 1. 312 IAC 6-1-1 IS AMENDED TO READ AS FOLLOWS:

312 IAC 6-1-1 Application of article

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14-19-1-1; IC 14-21-1; IC 14-28-1; IC 14-29; IC 14-34; IC 14-37

Sec. 1. (a) This article governs an activity relative to a license, and an activity for which a license is required whether or not a permit is sought or held, under:

- (1) IC 14-19-1-1;
- (2) IC 14-29-1;
- (3) IC 14-29-3;
- (4) IC 14-29-4 (if IC 14-29-4-5(2) applies); or
- (5) another statute administered by the department as a result of a waterway being navigable.

(b) In the absence of a contrary state boundary, the line of demarcation for a navigable waterway is the ordinary high watermark. **If the water level on a navigable waterway is modified by a lawful control structure, the line of demarcation for purposes of licensure and enforcement is determined based upon the ordinary high watermark with the control structure in place.**

(c) A separate license is not required under this article and IC 14-29-1 for an activity permitted under:

- (1) IC 14-21-1;
- (2) IC 14-28-1;
- (3) IC 14-29-3;
- (4) IC 14-34; or
- (5) IC 14-37.

(d) Compliance with this article satisfies the licensing requirements for **the following**:

- (1) IC 14-29-1.
- (2) IC 14-29-3. ~~and~~
- (3) IC 14-29-4 (if IC 14-29-4-5(2) applies).

(e) Before issuing a license under:

- (1) IC 14-21-1;
- (2) IC 14-28-1;
- (3) IC 14-34; or
- (4) IC 14-37;

the department shall apply the requirements of IC 14-29-1-8 and this article with respect to an activity within a navigable waterway.

(f) Before issuing a license under this rule, the department shall consider the following:

- (1) The public trust ~~doctrine~~.
- (2) The likely impact upon the applicant and other affected persons, including the accretion or erosion of sand or sediments.

(g) A separate license is not required under IC 14-29-1-8 for an activity ~~which~~ **that** is exempted from licensing by IC 14-29-1-8(e).

(Natural Resources Commission; 312 IAC 6-1-1; filed Sep 11, 1997, 8:50 a.m.: 21 IR 366; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286)

SECTION 2. 312 IAC 6-1-4 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-1-4 Determination of riparian zones

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-1-8

Affected: IC 14-15; IC 14-29-1

Sec. 4. If a determination of riparian boundaries is reasonably required for the performance of functions under IC 14-29-1 and this article, the department (or the commission on administrative review) shall consider as guidance "Riparian Zones within Public Freshwater Lakes and Navigable Waters", as published by the Legislative Services Agency at DIN: 20080116-IR-312080013NRA (January 16, 2008).

(Natural Resources Commission; 312 IAC 6-1-4)

SECTION 3. 312 IAC 6-1-5 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-1-5 Lawful nonconforming uses

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-1-8

Affected: IC 4-21.5; IC 14-15; IC 14-29-1-8

Sec. 5. (a) A structure or facility that was lawfully placed before the effective date of a provision of:

- (1) IC 14-29-1-8; or
- (2) a section of this article;

which would be unlawful if placed after that date, is eligible for qualification under this section as a lawful nonconforming use.

(b) This subsection governs the establishment of a lawful nonconforming use as follows:

- (1) A person who claims a lawful nonconforming use has the burden of proof for establishing:
 - (A) the existence of the use; and
 - (B) that the use was lawful;

when the new or amended statutory or rule section became effective. Except as provided in subdivision (2), a use must have been in existence when the new or amended section became effective and not merely at some time before it became effective.

(2) If a rule section that governs the placement of a temporary structure becomes effective outside the boating season, but a temporary structure was used during the previous boating season, the use is

considered to have been in existence when the section became effective. As used in this subdivision, the boating season is from April 1 through October 31.

(3) The department may consider the following documentation in determining the existence of a lawful nonconforming use:

- (A) Ground level or aerial photographs.
- (B) Blueprints or engineering drawings.
- (C) Pier installation company records.
- (D) Inventories of piers that are nonconforming uses. These inventories shall be maintained by the department's division of law enforcement at the district headquarters for the district in which the structure is located.
- (E) CAD drawings.
- (F) Deeds, plats, and similar recorded documents.
- (G) Adjudications by the commission or by a court, including those determining the intent or consequence of an easement.
- (H) GPS units or range finders.
- (I) USDA documentation.
- (J) County GIS programs and documentation.
- (K) Statements from riparian owners and others familiar with the site may also be

considered, but a determination may not be based solely on those statements.

(4) A person may deliver a written request and supporting documentation in support of a claim to any lawful nonconforming use that arises under IC 14-29-1-8 or this article. A person who does not deliver a request under this subdivision is not prohibited from asserting the benefits of a lawful nonconforming use as an affirmative defense or otherwise in a proceeding under IC 4-21.5.

(5) The department shall provide notice under IC 4-21.5-3-5 of a determination that a structure qualifies or does not qualify as a lawful nonconforming use under subdivision (4).

(6) The department shall maintain a public file or files to memorialize any determinations under this subsection. The department may include in the file a determination that a structure qualified or did not qualify as a lawful nonconforming use even if the determination was made before the effective date of this subsection.

(c) This subsection governs the maintenance of or modification to a lawful nonconforming use as follows:

(1) Except as provided in subdivision (2), a lawful nonconforming use may be maintained, but the use cannot be modified or repaired unless a person satisfies the requirements of IC 14-29-1 and this article that are in effect at the time of the modification or repair. In performing modification or repair under this subdivision, the:

- (A) location;
- (B) size; and
- (C) configuration;

of the use must be maintained.

(2) The department may authorize a modification or repair to a lawful nonconforming use if it determines that the resulting change to the:

- (A) location;
- (B) size; or
- (C) configuration;

would better serve a public right or a vested right, as protected by IC 14-29-1 or this article, than does the existing lawful nonconforming use.

(d) This subsection governs the removal of a lawful nonconforming use as follows:

(1) The director or the director's designee may order the removal of a lawful nonconforming use if the structure or facility is either of the following:

- (A) A nuisance that is likely to pose a significant adverse effect to any of the following:
 - (i) Navigability.
 - (ii) The environment.
 - (ii) The enjoyment of life or property.
 - (iv) The public trust.

(B) Abandoned.

(C) Modified in a manner for which a license is required under IC 14-29-1 or this article, but for which no license has been obtained.

(2) The department has the burden of proof to establish a lawful nonconforming use should be removed under this subsection.

(3) A structure adversely affects navigability under subdivision (1)(A)(i) if the structure is any of the following:

(A) Extended or located more than one hundred (100) feet from the ordinary high watermark of the waterway.

(B) Submerged or otherwise obscured from the view of a boater or other person using a lake.

(C) In a derelict condition. A structure is in a derelict condition if:

(i) so neglected by the owner that it has become ineffective for the intended purposes; or

(ii) following a reasonable inquiry, the owner of the structure cannot be identified.

(4) Generally, a use is abandoned if not exercised for a period in excess of one (1) year. A person may, however, present evidence of special factors that would reasonably excuse a failure to maintain the use. These factors include the following:

(A) Pending litigation relating to the lawful nonconforming use.

(B) Unusual environmental conditions.

(e) IC 4-21.5-3-8 controls an order issued under subsection (d) unless an emergency exists, in which event IC 4-21.5-4 applies.

(f) Nothing in this rule affects the department's right to seek injunctive or other relief under IC 14-29-1 or another applicable law.

(Natural Resources Commission; 312 IAC 6-1-5)

SECTION 4. 312 IAC 6-2-3.7 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-2-3.7 "Group pier" defined

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-29-1

Sec. 3.7. "Group pier" means a pier that is subject to IC 14-29-1 and provides docking space for any of the following:

(1) At least five (5) separate property owners.

(2) At least five (5) rental units.

(3) An association.

(4) A condominium, cooperative, or other form of horizontal property.

(5) A subdivision or an addition.

(6) A conservancy district.

(7) A campground.

(8) A mobile home park.

(9) A club that has, as a purpose, the use of public waters for any of the following:

(A) Boating.

(B) Fishing.

(C) Hunting.

(D) Trapping.

(E) Similar activities.

(Natural Resources Commission; 312 IAC 6-2-3.7)

SECTION 5. 312 IAC 6-4-1 IS AMENDED TO READ AS FOLLOWS:

312 IAC 6-4-1 Applicability

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8
Affected: IC 14-29-1

Sec. 1. (a) This rule establishes standards for the placement or maintenance of a **pier, including a marina or a group pier, along or within the ordinary high watermark of** a navigable waterway.

(b) This rule is administered by the division of water and the division of law enforcement of the department.

(Natural Resources Commission; 312 IAC 6-4-1; filed Sep 11, 1997, 8:50 a.m.: 21 IR 369; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286)

SECTION 6. 312 IAC 6-4-2 IS AMENDED TO READ AS FOLLOWS:

312 IAC 6-4-2 Individual licensure of marinas

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8
Affected: IC 14-29-1-8

Sec. 2. (a) **Except as provided in subsection (c), a person must not place a marina that is a permanent structure along or within the ordinary high watermark of a navigable waterway unless a written license is required obtained from the department to place a new by which the person agrees to operate the marina along a navigable waterway. under section 3 of this rule.**

(b) A license issued under subsection (a) satisfies IC 14-29-1-8 and IC 14-15-7-3.

(c) A separate license is not required under this section if:

(1) a license is issued for a group pier under section 4 of this rule; and

(2) the person who seeks the license for the group pier agrees to satisfy the requirements for pumpout facilities in section 3 of this rule.

(Natural Resources Commission; 312 IAC 6-4-2; filed Sep 11, 1997, 8:50 a.m.: 21 IR 369; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286)

SECTION 7. 312 IAC 6-4-3 IS AMENDED TO READ AS FOLLOWS:

312 IAC 6-4-3 Sewage pumpout facilities for boats at a marina

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8
Affected: IC 14-29-1-8

Sec. 3. (a) Except as provided in subsection (c), a person must not operate a marina unless the person **does the following:**

(1) Provides a pumpout that is:

(A) in good working order; and

(B) readily accessible to patrons of the marina. and

(2) Secures and maintains one (1) of the following:

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(A) A license under 327 IAC 3-2 for the construction and operation of a wastewater treatment facility or sanitary sewer.

(B) A license under 410 IAC 6-10 for the construction of a commercial on-site wastewater disposal facility.

(C) An alternative written approval for wastewater disposal from an authorized governmental agency.

(b) The department shall require compliance with subsection (a) as a condition for the issuance of a license under section 2 of this rule.

(c) A person may apply to the division of law enforcement for an exemption from this section. The exemption shall be granted, for a period not to exceed five (5) years, where the person demonstrates either of the following:

(1) The marina is designed to serve exclusively boats that are neither required nor likely to be equipped with a marine sanitation device.

(2) The operator of the marina has entered a binding agreement with another marina or similar facility along the waterway to provide pumpout services where the other marina or similar facility:

(A) maintains a lawful pumpout as described in subsection (a);

(B) is in proximity to the marina seeking the exemption so patrons to be served at a pumpout, which would otherwise be required at the exempted marina, would not be significantly inconvenienced; and

(C) has sufficient pumpout capacity and accessibility to effectively serve the patrons of both parties to the agreement.

(Natural Resources Commission; 312 IAC 6-4-3; filed Sep 11, 1997, 8:50 a.m.: 21 IR 369; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286; filed Jul 22, 2004, 10:05 a.m.: 27 IR 3885; errata filed Jun 2, 2009, 10:29 a.m.: 20090624-IR-312090386ACA)

SECTION 8. 312 IAC 6-4-4 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-4-4 Individual licensure of group piers

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-15; IC 14-26-2

Sec. 4. (a) A person must not place a group pier along or within the ordinary high watermark of a navigable waterway unless the person obtains a written license from the department under this section.

(b) The applicant must demonstrate exercise of the license would not do any of the following:

(1) Unreasonably impair the navigability of the waterway.

(2) Cause significant harm to the environment.

(3) Pose an unreasonable hazard to life or property.

(4) Violate the public trust.

(5) Interfere with the reasonable exercise of boating operations by the public.

(6) Interfere with the legal interests of a landowner having property rights abutting the lake or rights to access the lake.

(c) The department shall condition a license for a group pier so the placement, configuration, and maintenance of the pier, as follows:

(1) Provide a reasonable buffer zone between the pier and the following:

(A) The channel where boats are commonly operated in excess of ten (10) miles per hour.

(B) The riparian zone of adjacent property owners to provide for reasonable navigation by the adjacent property owner and by the public. Except as otherwise provided in this clause, the department shall require at least (5) feet of clearance on both sides of a riparian line (for

a total of ten (10) feet). The department may require as much as ten (10) feet of clearance on both sides of a riparian line (for a total of twenty (20) feet) if, based upon the opinion of a qualified professional, that additional clearance is required for reasonable navigation. The department may approve an exception to this clause where:

- (i) adjacent riparian owners use a common pier along their mutual property line; and
- (ii) the purposes of this clause are satisfied by waters elsewhere within their riparian zones.

(2) Do not result in unreasonable traffic congestion either:

- (A) in the immediate vicinity of the pier; or
- (B) to impair the carrying capacity of the navigable waterway where the department has determined the carrying capacity in an analysis that is published before the license application is filed.

(3) Do not authorize structures that are likely to be hidden or obscured so as to pose a hazard to the public.

(4) Minimize disturbances to vegetation and sediments between the ordinary high watermark and adjacent shallow waters.

(5) Are unlikely to trap debris or redirect sediments or currents to cause erosion or sedimentation that is detrimental to navigation or to the property rights of other riparian owners.

(6) Avoid causing or appearing to cause appropriations of public water unnecessary to the reasonable exercise of riparian rights. A pier must not extend more than one-half (1/2) the width of the applicant's shoreline. As used in this subdivision, "width" is determined by the straight line formed between the points located at intersections of the applicant's property lines with the shoreline.

(Natural Resources Commission; 312 IAC 6-4-4)

SECTION 9. 312 IAC 6-4-5 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-4-5 General licenses for qualified piers

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-15; IC 14-26-2; IC 14-29-1

Sec. 5. (a) The placement and maintenance of a pier is authorized without a written license issued by the department under IC 14-29-1 and this rule if the pier qualifies under this section.

(b) In order for a pier to qualify, the structure must satisfy each of the following:

(1) Not infringe on the access of an adjacent landowner to the navigable waterway.

(2) Not unduly restrict navigation.

(3) Not exceed the lesser of the following:

(A) One hundred (100) feet long.

(B) One-quarter (1/4) of the width of the waterway.

(4) Not be unusually wide or long relative to similar structures within the vicinity on the same navigable waterway.

(5) Not be a marina.

(6) Not be a group pier.

(7) Be placed by a riparian owner or with the written approval of a riparian owner.

(c) A pier placed along or within the ordinary high watermark of Lake Michigan must also comply with 312 IAC 11-7 or 312 IAC 11-8.

(d) A pier placed along or within the ordinary high watermark of any of the following lakes must, in addition to this article, satisfy any requirement otherwise applicable to a property that is owned or leased by the state and managed by a division of the department:

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- (1) Brookville Lake in Franklin County and Union County.
- (2) Cagles Mill Lake in Putnam County and Owen County.
- (3) Cecil M. Harden Lake in Parke County.
- (4) Mississinewa Lake in Miami County, Wabash County, and Grant County.
- (5) Lake Monroe in Monroe County, Brown County, and Lawrence County.
- (6) Patoka Lake in Dubois County, Orange County, and Crawford County.
- (7) J. Edward Roush Lake in Huntington County.

(e) A pier is exempted from licensure under this rule and IC 14-29-1 if placed along or within the ordinary high watermark of either of the following:

- (1) Lake Freeman in Carroll County and White County.
- (2) Lake Shafer in White County.

(Natural Resources Commission; 312 IAC 6-4-5)