AGENDA ITEM #18

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

ADDING 312 IAC 5-6-5.6 TO	**)**	**Administrative Cause**
ESTABLISH A BOAT PROTECTED	**)**	
ZONE, THE "PRAIRIE", IN LAKE		**) Number: 08-135D**
MANITOU, IN FULTON COUNTY	**)**	**(LSA Document 08-756(F))**

RULE PROCESSING, REPORT OF PUBLIC HEARING AND COMMENTS, AND RECOMMENDATION FOR FINAL ADOPTION

1. RULE PROCESSING

For consideration as to final adoption is proposed 312 IAC 5-6-6.5 to establish a watercraft protected zone in an area known as the "prairie" in Lake Manitou, Fulton County. Also proposed is repeal of 312 IAC 5-6-5.5. 312 IAC 5-6-5.5 became effective October 1, 2005, which established a watercraft protected zone, as is currently proposed but without a "sunset" clause. As written, 312 IAC 5-6-5.5 contained a "sunset" or section expiration date of April 30, 2008. Prior to the section expiration, a previous rule (LSA Document #07-822) was initiated to remove the expiration clause; however, the rule adoption failed due to the tolling of the one-year statutory time limit to adopt a rule (Ind. Code § 4-22-2-25).

Effective July 1, 2008, an emergency rule, LSA Document #08-520(E), posted at 20080625-IR-312080520ERA, established a temporary boat protected zone in the area known as the "Prairie". This instant rule proposal, LSA Document 08-765(F), would make this temporary boat zone permanent.

On September 16, 2008, the Natural Resources Commission gave preliminary adoption to the proposed rule amendment. Inserted below is the pertinent portion of the minutes for the September 16, 2008 meeting. The minutes indicate the preliminary adoption of "312 IAC 5-6-5.5"; however, an expired section cannot be amended. Instead,

the Legislative Services Agency amended the proposed rule for publication to read "312 IAC 5-6-5.6", and to include the repeal of 312 IAC 5-6-5.5.

Tom Flatt from the Division of Fish and Wildlife presented this item. He explained that Lake Manitou is located south of Rochester in Fulton County. Flatt said an ecozone was established in this same area known as the "prairie" in 2005, but the rule contained a sunset provision of April 30, 2008. He said an attempt to amend the rule in 2007 prior to expiration was not successful due to statutory time constraints.

Flatt said a public meeting was held on May 29, 2008 to address concerns voiced during the 2007 rule adoption process. He said, "The meeting participants were satisfied and their concerns were addressed and they strongly supported" the proposed ecozone. Flatt said that in June 2008 the Director signed a temporary rule re-establishing the ecozone. He recommended preliminary adoption of the rule amendment to establish an ecozone in the area known as the "prairie".

Stautz asked whether the public concerns voiced in 2007 regarding the placement of buoys marking the ecozone were addressed in this instant rule proposal. Flatt said one concern was that a buoy was placed in "unnecessarily" deep water. "The buoys pretty much circumvent the ecozone, and there is not a lot of leeway to position them any differently unless you get right up into the shallow water." He said, however, the concern seems to have been satisfied.

Mark Ahearn moved to give preliminary adoption of amendments to 312 IAC 6-6-5.5 governing special watercraft zone on Lake Manitou in Fulton County in an area commonly known as "the Prairie". Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

A "notice of intent" to adopt the proposed rule amendment was posted to the Indiana REGISTER on October 1, 2008. The notice listed Tom Flatt, with the Department of Natural Resources, Division of Fish and Wildlife, as the "small business regulatory coordinator" for the proposal. No comments were received in response to this notice.

As required by Executive Order, a proposed fiscal analysis of the rule proposal was submitted to the Office of Management and Budget on October 3, 2008. The analysis provided in substantive part:

FISCAL IMPACT ANALYSIS TO STATE AND LOCAL GOVERNMENTS
LSA Document #08-756

A calculation of the estimated fiscal impact on state and local government, including the effective date of the rule

The proposed rule adds 312 IAC 5-6-5.6, governing special watercraft standards on Lake Manitou, Fulton County, by creating an ecozone in the area known as the "Prairie". The effective date of the proposed rule is 30 days after filing with the Publisher. No fiscal impact is anticipated.

Identification of any sources of revenue affected by the rule

No sources of revenue will be affected by this rule.

Identification of any appropriation, distribution or other expenditures of revenue affected by the rule

No special appropriations, distributions or other expenditures are expected because of this rule. The buoys purchased when the rule was originally enacted will continue to be used. The lake association will remove and place the buoys at their expense each year. No restoration of emergent vegetation in the restricted zone is planned by the Department because of the on going hydrilla eradication effort at the lake.

The estimated increase or decrease in revenues or expenditures of state and local government that would result from the implementation of the rule

None expected.

The assumptions used in making the fiscal impact calculation

Oversight of the ecozone by staff of the Divisions of Fish and Wildlife and Law Enforcement would be carried out as part of their normal duties at the lake and are not figured into the fiscal impact calculations.

The Office of Management and Budget reviewed the fiscal analyses, and recommended in its letter dated January 6, 2009, "that the rule changes be approved."

On January 16, 2009, the NRC, Division of Hearings submitted a copy of the proposed rule to the Legislative Services Agency (the "LSA") along with the associated Economic Impact Statement (EIS). The EIS indicated:

ECONOMIC IMPACT STATEMENT (EIS)
LSA Document #08-756

IC 4-22-2.1-5 Statement concerning Rules Affecting Small Business

Estimated Number of Small Businesses Subject to This Rule:

The Indiana Department of Natural Resources estimates that, except for one possibility, no small businesses will be directly or indirectly affected by this rule amendment. The one exception is that a small business is likely to be contracted to annually remove and replace the buoys marking the restricted zone. The Department has the authority to promulgate rules governing special watercraft zones in accordance with IC 14-15-7-3.

Estimated Average Annual Administrative Costs That Small Businesses Will Incur:

The DNR estimates that there will be no administrative costs to small businesses as a result of compliance with these rules.

Estimated Total Annual Economic Impact on Small Businesses:

The DNR estimates that, except for one possible small business, there will be no impact on small businesses as a result of compliance with this rule. The one exception is that a business opportunity may be created for placing and removing the buoys marking the ecozone.

Justification of Requirements of Costs on Small Businesses Where Rule Is Not Expressly Required by Law:

There are no negative economic impacts on small businesses as a result of compliance with this rule.

Supporting Data, Studies or Analyses:

None.

Regulatory Flexibility Analysis of Alternative Methods:

There are no alternatives proposed by the Department given that there are no negative impacts on small businesses. The Department did not rely on any studies in its decision not to employ alternatives to this rule.

On January 22, 2009, a copy of the notice of public hearing was forwarded to LSA for posting. The justification statement required under IC 4-22-2-24(d)(3) stated:

IC 4-22-2-24 (d)(3) Justification Statement
LSA Document #08-756

The Lake Manitou special watercraft zone is locally known as the "prairie." The area is approximately forty (40) acres of shallow water that, historically, was covered with emergent vegetation dominated by rushes. Power boating through the area was a leading cause of the loss of emergent vegetation.

The rule is proposed under authority IC 14-15-7-3 (a)(4) to establish zones where restrictions for public safety can be placed on watercraft operations, and IC 14-15-7-3 (a)(6) where zones are authorized where the use of watercraft may be limited or prohibited for fish, wildlife or botanical resource management. The rule prohibits motorized boating, but allows boats to drift or to be manually propelled through the zone.

A previous rule at 312 IAC 5-6-5.5 established an ecozone in the same subject area expired in 2008. The Department concludes the Lake Manitou ecozone to have been effective for the following reasons.
1) Boating safety issues have been addressed as no incidents due to motorboating within the shallow waters of the zone were reported to the Division of Law Enforcement.
2) The small stand of rush was preserved and the opportunity was there for the bed to expand naturally or for restoration efforts to take place.
3) Prior to the treatment for hydrilla, nearly the entire 40 acres was covered with underwater aquatic vegetation that provided fish habitat, acted to reduce wave action and bank erosion, and tied up nutrients and sediments that helped to reduce water turbidity and the production of algae.
4) An area was provided to anglers where they would not be disturbed by motorboats, personal watercraft and the waves generated by those craft.

The Department is pursuing a watercraft protection zone for Lake Manitou, because the above four reasons are likely to continue in perpetuity. Because the shallow nature of the area within the watercraft zone would normally preclude high speed boating, the proposed rule is not an additional restriction on recreational boating.

Asplund, Timothy R. 2000. The Effects of Motorized Watercraft on Aquatic Ecosystems. Wisconsin Department of Natural Resources, Bureau of Integrated Science Services and University of Wisconsin – Madison, Water Chemistry Program. Publication SS – 948 – 00.

DNR Staff Observations. Fisheries District-1; Robert Robertson and Jeremy Price; Kankakee Fish and Wildlife Area, Indiana.

On January 22, 2009, the LSA issued by email an "authorization to proceed" with rule adoption.

A public hearing was scheduled for March 5, 2009. Notice of the public hearing and the text of the proposed amendments were posted to Indiana REGISTER on February 4, 2009. This notice included the statement under Ind. Code § 4-22-2.1-5, concerning rules affecting small businesses. The notice also included information required under Ind. Code § 4-22-2-24. Notice of the public hearing with similar information was published on January 30, 2009 in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County, Indiana, and on the same day in *The Rochester Sentinel*, a newspaper of general circulation in Fulton County. In addition, notice of the public hearing and a summary of the proposed rule changes were published on the Commission's Web-based calendar. A link to the proposed rule was also added to the Commission's Internet site in order to simplify receipt of public comment on the proposal at http://www.in.gov/nrc/2377.htm.

2. REPORT OF PUBLIC HEARING

The public hearing was convened as scheduled in the Rochester Public Library, 320 West 7th Street, Rochester, on March 5, 2009 to consider proposed 312 IAC 5-6-5.6. Stephen Lucas served as the Hearing Officer for the Natural Resources Commission, welcomed those in attendance, and outlined the rule adoption process. He introduced Tom Flatt, Aquatic Habitat Coordinator for the Division of Fish and Wildlife, Department of Natural Resources. Flatt provided a history of the rules (both permanent and temporary) for special boating restrictions within "the Prairie" in Lake Manitou and the justifications for them. He reflected that the DNR had originally hoped to perform site restoration, but funding limitations and the size of the Prairie made doing so unlikely.

Flatt said the hope was that natural recovery would occur as a consequence of the boating restrictions provided in the rule. Eel grass and even non-emergent species helped stabilize the sediments in the lake bed and were supportive of aquatic animal species. An opportunity was provided to ask procedural questions and questions concerning the substance of the rule proposal. The following comments were received from the public:

Orv Huffman, former President of the Lake Manitou Association said he was "glad to see we're to the point we can make permanent the law" to protect the Prairie. He said arrangements had been made for the Association to place and to remove the marker buoys which would identify the border of the boating zone.

Hon. Mark Smiley, Mayor of Rochester, said the protection for the rule proposal was "a good thing to keep the Prairie for wildlife and fish habitat and for the enjoyment of the people." He said he believed there were enough active members of the Lake Manitou Association to accomplish placement and removal of the buoys that would mark the zone. Mayor Smiley said the waters within the Prairie were "too shallow" for high-speed boating, and this limitation was well-understood within the community. Referring to the rule, he stated "I'm all in favor of it."

Ray Dausman of Rochester stated regarding the rule proposal, "I'm all for it. I think it should be continued." Dausman then asked Tom Flatt to provide additional perspectives regarding the expenses which would be associated with restoration of the Prairie vegetation. Flatt responded the reintroduction of bull rush would cost $25 per plant, and plantings needed to be made two-to-three feet apart. Plantings needed to be stabilized, and doing so required additional labor and additional cost. For a site that includes 43 acres, "it becomes expensive real quick." Dausman asked that, if the Lake Manitou Association would work out a plan to perform plantings, "would the DNR help out?" Flatt responded the agency would assist.

Karen Ewen of Rochester said, "I have the same thoughts as those who have spoken." The proposed rule for the protection of the Prairie is a "very positive thing for the lake, and I want to see it happen."

Hon. Jason Grube, Member of the Rochester City Council, said he "would be disheartened if the Prairie just came back to eel grass." Lake Manitou would be better served by a diversification of aquatic plant life. He said there was already a great quantity of eel grass in the lake. Grube urged the DNR to work with local citizens to reintroduce "bull rush and other species" to selected sites within the Prairie.

Phyllis Dausmann of Rochester added her support for the rule proposal. "I'm in favor of it becoming a permanent law."

Walt Talbott of Rochester observed that with sedimentation, all of the Prairie would be dry land within 250 years. He said he also had several questions for Tom Flatt. Talbott

said he had been told the DNR used an excessive dosage of herbicide to kill Hydrilla within Lake Manitou. Flatt responded that the dosage was within appropriate parameters, although he acknowledged the herbicide was more damaging to native plant species than anticipated. Given the very serious consequences for an uncontrolled infestation of Hydrilla, the primary goal was its eradication. "We errored on the side of too much not on the side of too little, but we were still within parameters." In response to a question as to the potential adverse effects to the Tippecanoe River, Flatt said there should be none. He reflected that some herbicide might enter the outlet from Lake Manitou, and with the possibility of Hydrilla in the outlet, that was probably a good thing. But the herbicide becomes dilute and breaks down quickly so no harm should come to the Tippecanoe River.

3. OTHER COMMENTS

On February 4, 2009, a person by the name of "Shane" submitted a comment on the proposed rule by email to nrcrules@nrc.in.gov. The Commission's nonrule policy document, Information Bulletin #55, clarifies that citizens must identify themselves when filing comments in order for those comments to be included in a report or to be considered by a hearing officer in an analysis. A request for the commenter's full name, pursuant to the nonrule policy document, could not be made since the commenter did not provide any contact information. Shane's comment is not included or considered in this report.

4. CONSIDERATION FOR FINAL ADOPTION

There appears to be public support for the rule proposal and the amendments seem appropriate. The proposed rule, as published in the Indiana *Register* is proposed to be amended, and is attached as "Exhibit A". The references to "watercraft" are suggested to be replaced with "boat" or its derivative. The language that is ~~stricken~~ is to be deleted with the language <u>underlined</u> to be inserted.

For decades, agency rules have used both the term "watercraft" and the term "boat", sometimes even in the same section, although the terms have generally been understood to have the same meaning. Use of two terms has occasionally generated

controversy in adjudicatory proceedings where a litigant has urged that a vessel might qualify as a boat but not as a watercraft, or the reverse.

In 2007 rule amendments, the Natural Resources Commission affirmed the terms "watercraft" and “boat” were synonymous. As now provided in 312 IAC 1-1-4.5, “boat” means a watercraft. The term “watercraft” is defined at 312 IAC 1-1-29.4.

“Watercraft” means any instrumentality or device in or by means of which a person may be transported upon the public water of Indiana. The term includes a motorboat, sailboat, rowboat, skiff, dinghy, or canoe:

(1) of any length or size; and

(2) whether or not used to carry passengers for hire.

The term “boat” is being substituted for "watercraft" in Commission rules to remove the false dichotomy. “Boat” is being chosen over “watercraft” because the term is the simpler and more commonly used. One additional minor advantage is that the term "watercraft" is sometimes used to describe the plural, although the plural is alternatively shown as "watercrafts". The potential for confusion between plural and singular does not exist with the terms "boat" and "boats".

Substitution of the term "boat" for "watercraft" in this rule section is a technical modification consistent with this process. The substitution has no substantative consequence. It is recommended that “Exhibit A” be given final adoption as attached.

Date: April 13, 2009

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Jennifer M. Kane
Hearing Officer

EXHIBIT A

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule
LSA Document #08-756(F)

DIGEST

Adds 312 IAC 5-6-5.6 to establish a ~~watercraft~~ **boating** protected zone in an area known as the "prairie" in Lake Manitou, Fulton County. Repeals 312 IAC 5-6-5.5. Effective 30 days after filing with the Publisher.

312 IAC 5-6-5.5
312 IAC 5-6-5.6

SECTION 1. 312 IAC 5-6-5.6 IS ADDED TO READ AS FOLLOWS:

312 IAC 5-6-5.6 Lake Manitou; special ~~watercraft~~ boating zones
Authority: IC 14-10-2-4; IC 14-15-7-3
Affected: IC 14; IC 32-19-1-1

Sec. 5.6. (a) This section establishes restrictions on the operation of ~~watercraft~~ boats on Lake Manitou in Fulton County.

(b) Except as provided in subsection (c), a person must not operate a ~~watercraft~~ boat in an area commonly known as the Prairie, which is enclosed by a line of buoys placed as follows:
(1) SPC 2114199 (UTM 4544799) north and SPC 185587 (UTM 568631) east.
(2) SPC 2114362 (UTM 4544844) north and SPC 184604 (UTM 568331) east.
(3) SPC 2114620 (UTM 4544921) north and SPC 184241 (UTM 568219) east.
(4) SPC 2115391 (UTM 4545156) north and SPC 184259 (UTM 568221) east.
(5) SPC 2115871 (UTM 4545305) north and SPC 184900 (UTM 568414) east.
(6) SPC 2115720 (UTM 4545262) north and SPC 185534 (UTM 568608) east.
(7) SPC 2114303 (UTM 4544831) north and SPC 185670 (UTM 568656) east.

(c) A person is exempted from subsection (b) if each of the following requirements is satisfied:
(1) The ~~watercraft~~ boat is not a motorboat or is a motorboat that has the motor turned off.
(2) The ~~watercraft~~ boat is not operated in excess of idle speed.
(3) The ~~watercraft~~ boat is not anchored.
(Natural Resources Commission, 312 IAC 5-6-5.6)