

## **ADVISORY COUNCIL**

Minutes of April 9, 2008

### **MEMBERS PRESENT**

Patrick Early, Chair  
Donald Van Meter  
Richard Cockrum  
Charles Hasbrook  
James Snyder  
Kari Evans  
William Wert  
Bill Freeman

### **NATURAL RESOURCES COMMISSION STAFF PRESENT**

Stephen Lucas

### **DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT**

Ronald McAhron	Executive Office
John Davis	Executive Office
Ryan Hoff	Executive Office
James Hebenstreit	Division of Water
Jon Eggen	Division of Water
James Ray	Division of Fish and Wildlife
Linnea Petercheff	Division of Fish and Wildlife

### **GUESTS PRESENT**

John Goss  
Chuck Brinkman

Patrick Early, Chair, called the meeting to order at 10:35 a.m., EDT in the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of eight members, the Chair observed a quorum.

Chairman Early asked for a motion with respect to the draft minutes for the meeting held on February 13, 2008. Bill Freeman moved to approve the minutes but with the correction of the name “Brandt” for “Grant” in the last word of the first page. Don Van Meter seconded the motion. On a voice vote, the motion carried.

The Chair announced that Kari A. Evans was recently appointed to fill the vacancy created when Phil French was appointed to the Natural Resources Commission. He welcomed Evans and asked her to provide a brief biography.

Evans said she recently completed a six-month sabbatical after service as a Policy Director for Governor Mitch Daniels. Prominent among agencies within her responsibilities were the Indiana Department of Environmental Management and the DNR. She was previously an attorney with Barnes and Thornburg, practicing primarily

environmental and natural resources law in the firm's Indianapolis and Chicago offices. Before that she was an attorney with IDEM. Evans said she was returning next week to her private law practice with Barnes and Thornburg. She said she looked forward to continuing to serve Indiana on the Advisory Council.

### **Reconsideration of Recommendation for Preliminary Adoption of Proposed New Rules for Creek Gravel from Waterways; Administrative Cause No. 07-203W**

Chairman Early observed this item was being returned for further consideration from the February meeting. "We had a pretty extensive discussion last meeting," and the Council considered the challenges. He said providing more clarity would help the public understand the agency's expectations and the agency obtain successful enforcement. He asked Ron McAhrn, Deputy Director for the Bureau of Water and Resource Regulation, to begin the day's discussion of the item.

Ron McAhrn also reflected that the Advisory Council thoroughly reviewed the proposal during its February meeting. The Council made several changes to a prior draft and returned the proposal to the DNR for the refinement of regulatory standards in a few other instances. McAhrn said Jon Eggen, Head of the Division of Water's Enforcement Section, was the point person for the refinement effort. He asked Eggen to give the Council an overview of suggested changes.

Jon Eggen reviewed the suggested changes. Included among them were a reduction to 2.5 horsepower for sluice equipment that would qualify for "recreational dredging" under 312 IAC 10-2-33.6. The maximum opening on a suction dredge was reduced to 2.5 inches rather than the problematical term "small". Eggen said these changes were developed within the agency following a review of the literature. In 312 IAC 10-5-10(c)(4)(D), the maximum cubic yards which could be removed according to a general license, with notice, was modified from 100 cubic yards in a two-year period to 50 cubic yards annually. In section 10(d)(1) and 10(d)(2), cross references were clarified to nonrule policy documents for endangered species and for outstanding rivers. A revised section 10(d)(4) was added to help coordinate with efforts by IDEM to "address Impaired Biotic Communities".

Steve Lucas added that the draft considered in February included only non-navigable rivers and streams. The current draft would also address navigable waterways. For the most part, general licenses for navigable waters would be similar to those already proposed for non-navigable waters. Lake Michigan would be disqualified from general licensure. Because sand within the lake is a critical to beach nourishment and to help minimize shoreline erosion on Lake Michigan, any extraction from Lake Michigan would require an individual license.

Rick Cockrum said he brought the issue to the Advisory Council because Conservation Officers had "expressed frustration" with persons extracting aggregate from non-navigable rivers and streams, often without landowner permission. This result followed a

decision by the Court of Appeals of Indiana affirming the dismissal of an infraction, sought for violation of the Flood Control Act, by a local court. The dismissal was entered in the absence of regulatory standards. In addition, he has received complaints from citizens regarding the devastating effects unregulated creek-rock extraction can have on fishing and other aquatic species. “I think you’ve come a long way with this draft in addressing the problem.”

Kari Evans inquired how the proposed rule would fit with “jurisdictional waters” of the U.S. Army Corps of Engineers and IDEM. McAhrn responded the DNR met recently with the Army Corps seeking clarification of its authority and whether the Army Corps was prepared to take an active role with respect to the excavation of creek rock. His understanding of the response is that the Army Corps believes streams are “too sparsely impacted” to warrant its intervention. Following similar discussions with IDEM, McAhrn believes the DNR is better positioned to address enforcement. Adoption of the rule would not, however, limit the authority of either the Army Corps or IDEM concerning jurisdictional waters.

Evans reflected the proposed rules would appear to “give a clear enforcement mechanism” to the DNR and help focus site restorations. In addition, the rules would give better direction to future licensing activities.

Cockrum expressed concerns with applying these standards to navigable waters as well as non-navigable waters. He said navigable waters were a public trust, and the agency should not condone giving away the value of the trust.

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, said he agreed with Cockrum. Although non-navigable waters are owned by private individuals, navigable waters are administered by the DNR for all citizens.

The Chair said he supported the concept of general licensure for low-impact extractions on non-navigable waters. He did not have the same comfort level for allowing these activities on navigable waters.

Chuck Brinkman of the Indiana Wildlife Federation addressed the Advisory Council. He said controlling sedimentation was essential to protecting the integrity of Indiana’s rivers and streams. He said creek rock extractions directly from waterways were significant contributors to sedimentation. Brinkman applauded the concepts included in the rule proposal and urged they be forwarded to the Natural Resources Commission with clear standards that would help advance water quality protection.

William Wert reflected that property ownership along navigable waters was often characterized by small adjacent lots. If extractions were allowed for each lot owner, the cumulative effects to the waterway could be detrimental to the environment and to property values.

Evans suggested the same low-impact activity that would qualify for a general license on a non-navigable waterway might be too great an impact for navigable waters. The standards did not have to be the same, but the integrity of a regulatory system could be supported by allowing small uses on navigable waters without requiring an individual license.

Chairman Early suggested the standards for navigable waters might be amended to allow extractions, by the riparian owner or with the permission of the riparian owner, using only non-motorized equipment. Don Van Meter agreed this approach could effectively address both aggregate extractions and activities such as gold mining.

Richard Cockrum moved to recommend the Commission give preliminary adoption to proposed new rules for the extraction of creek rock from non-navigable rivers and streams, as set forth in the amendments proposed to 312 IAC 10, and for new rules for the extraction of creek rock from navigable waters, as amendments to 312 IAC 6, which would include general licensing for extractions using only non-motorized equipment. Van Meter seconded the motion. Upon a voice vote, the motion carried.

#### **Consideration of Recommendation of Approval of a Nonrule Policy Document to Address Cumulative Effects under the Flood Control Act; Administrative Cause No. 08-052W**

Ron McAhron introduced this item. He said recent litigation underlined the need to identify the standards by which the Department of Natural Resources considers potential cumulative effects for permits issued pursuant to the Flood Control Act. A nonrule policy document was recommended to articulate the process used. He explained, “Staff has basically done this but has not documented its process.” McAhron introduced Linnea Petercheff from the Division of Fish and Wildlife who he said coordinated efforts within the agency to draft the document.

Linnea Petercheff reflected that biologists within the Division of Fish and Wildlife already consider cumulative effects when reviewing license applications under the IC 14-28-1 and rules at 312 IAC 10. The proposed document would help coordinate efforts among her division, the Division of Water, the Division of Law Enforcement and the Division of Nature Preserves. Other divisions, such as the Division of Outdoor Recreation or the Division of State Parks and Reservoirs, would also have an opportunity for input. She reviewed the proposed nonrule policy document with the Advisory Council and observed that DNR professionals would use “a version of the check list on the last page of the policy” for each license application.

The Chair asked Steve Lucas to briefly review for the Advisory Council the difference between a rule and a nonrule policy document. Lucas responded that a rule had “the force and effect of law”, and a nonrule policy document helped explain how an agency implemented a statute or rule. A nonrule policy document could not directly impose

requirements upon persons regulated, but the agency would be expected to comply with its terms.

William Wert moved to recommend the Commission adopt a new nonrule policy document to address cumulative effects, pursuant to the Flood Control Act, as set forth in the Advisory Council materials. Donald Van Meter seconded the motion. Upon a voice vote, the motion carried.

### **Consideration of Recommendation for Preliminary Adoption of Amendments to Definition of “Lake”; Administrative Cause No. 08-047A**

Steve Lucas, Director of the Division of Hearings, Natural Resources Commission, presented this item. He said for consideration was a proposed amendment to the definition of “lake” among the several definitions having general application to programs of the Department of Natural Resources. The amendments would serve several purposes for clarity and coordination. In addition, they would assist with establishing a listing of each “public freshwater lake” as required by new SEA 41. The amendments would clarify that the five-acre minimum size applies only to the Lakes Preservation Act. Bays and coves would be included in describing the shoreline of any lake; their inclusion has already been clarified for public freshwater lakes by SEA 41. Bays and coves would not necessarily be included for the definition of a “small lake” for purposes of determining suitability for high-speed boating. Man-made channels into public freshwater lakes would be included for determining the shoreline or size of a lake.

Ron McAhron reported a related aspect of SEA 41 is that, following recommendations by the DNR and the Advisory Council, the Commission is to establish a nonrule policy document listing “the public freshwater lakes in Indiana.” Clarifications to the definition of “lake”, and amendments within SEA 41, would assist in establishing the list. McAhron said Director Rob Carter has assigned him to lead an informal DNR committee and begin the listing process. Included on the committee are Maj. Felix Hensley, State Boating Law Administrator; Jim Hebenstreit, Assistant Director of the Division of Water; and, Jim Ray, Chief of the Lake and River Enhancement (“LARE”) Program within the Division of Fish and Wildlife. After the committee develops a draft list, the proposal would be presented to the Advisory Council for its review.

Kari Evans moved to recommend the Commission give preliminary adoption to amendments to the definition of “lake” as set forth in the Advisory Council packet. Bill Freeman seconded the motion. Upon a voice vote, the motion carried.

### **Consideration of Recommendation for Preliminary Adoption of Amendments to Address Piers, Marinas and Related Matters in Navigable Waterways and in Public Freshwater Lakes; Administrative Cause No. 08-009L**

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. 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 perform 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 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.

### **Adjournment**

The meeting adjourned at approximately 12:45 p.m.