

NATURAL RESOURCES ADVISORY COUNCIL
Minutes of the April 10, 2007 Meeting

Members Present

AmyMarie Travis, Vice Chair
William Wert
Bill Pippenger
Donald Van Meter
David Lupke

Department of Natural Resources Staff

Ron McAhron Executive Office
John Davis Executive Office
Cheryl Hampton Human Resources
Lt. Col. Sam Purvis Law Enforcement
Ann Knotek Legal

Natural Resources Commission Staff

Stephen Lucas
Jennifer Kane

AmyMarie Travis, Vice-Chair, opened the discussions at 10:34 a.m., EDT in the Board Room at the Indiana State Museum, 650 West Washington Street, Indianapolis, Indiana. In the absence of a quorum, she observed that official action could not be taken, but there could be informal discussions of agenda items.

Scheduling of 2007 Meeting Dates and Locations

Bill Pippenger observed that the members had previously expressed a preference for holding meetings on Wednesdays, but the proposed dates were Tuesdays. He said he had scheduling conflicts on Tuesdays and wondered whether the dates could be reset for Wednesdays. Donald Van Meter also indicated the Wednesday date would be preferable for him for the June meeting. Those in attendance asked John Davis to discuss with Chairman Early the possibility of resetting each of the proposed dates on Tuesdays for one day later on Wednesdays.

Don Van Meter said he conceptually liked the idea of holding the August meeting in conjunction with the Indiana State Fair but wondered whether there was a suitable facility on the Fair Grounds. The Vice Chair observed that the Open Door Law would prohibit requiring an entrance fee, so, if the meeting were to be held on the grounds, a provision would need to be implemented to allow public attendance without paying an entry fee. The Advisory Council members asked John Davis to determine whether a suitable location could be obtained that would conveniently allow for a tour within the Fair Grounds but that was itself outside the gates.

Report from Bureau of Water and Mineral Resources

Ron McAhron reported that, if enacted as currently drafted, Indiana House Bill 1738 would establish new responsibilities for the Advisory Council. He suggested consideration of the legislation might become an appropriate topic for the June meeting.

Consideration of Tendered Project Regarding Riparian Zones in Public Waters (Administrative Cause No. 07-045A)

Steve Lucas, Director of the NRC's Division of Hearings, opened an informal discussion of this subject. Included were discussions of what constitute a "navigable" waterway and a "public freshwater lake". He said for consideration was a project to help identify how riparian zones would be delineated within a navigable waterway or a public freshwater lake. This delineation was distinguished from how the delineation would be performed on a private waterway. Lucas said the Advisory Council was being asked to choose among five options:

- (1) Continue exclusively with the current approach of developing precedents through the Indiana Appeals Court and Supreme Court and the NRC's administrative law judges and its AOPA Committee (published in "Caddnar").
- (2) Develop a "nonrule policy document" to synthesize and conceptualize the precedents developed under option (1), with the possible inclusion of principles used by licensed surveyors.
- (3) Develop rules to direct the application of principles pertaining to the delineation of riparian zones.
- (4) Recommend legislation to direct the application of principles pertaining to the delineation of riparian zones.
- (5) Some combination of options (1) through (4).

David Lupke asked what would be the legal effect of a "nonrule policy document". Lucas responded that it would be advisory and would not have the force and effect of law. A "nonrule policy document" could, however, synthesize the precedents and offer them in a manner that was better organized than individual precedents. A new rule or a new statute would have the force and effect of law. AmyMarie Travis said a "nonrule policy document" would be similar to a learned treatise. It could provide support for the agency decision makers and the public in determining riparian boundaries.

Ann Knotek of the DNR's Office of Legal Counsel directed the attention of the Advisory Council to IC 14-26-2-23, a copy of which is attached to these Minutes as an Appendix. She said this statutory section was at the core of DNR's regulatory responsibilities for the placement of piers and similar structures. These structures are often what are at issue in a delineation of riparian zones. She said this section received major amendments in 2006

to clarify and augment the agency's authority. In particular, Knotek identified subsection (e)(2):

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

.....

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

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

(B) shall exempt any class of activities from licensing, including temporary structures, if the commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in [IC 14-26-2-5].

Knotek wondered if the Advisory Council should recommend action to the Natural Resources Commission to implement this expanded statutory responsibility.

Don Van Meter indicated he was comfortable with moving forward to develop a nonrule policy document or a rule to address the delineation of riparian zones. The members asked Lt. Col. Samuel Purvis whether the Division of Law Enforcement would prefer a rule or a nonrule policy document. Purvis responded that having experience with a nonrule policy document was a good approach because it would allow the agency to better understand how a process would work. After gaining the experience, a determination could be made to adopt a rule for all or portions of the document. Bill Pippenger said he supported Purvis's view.

David Lupke observed that riparian rights disputes, particularly as to pier placements, were a growing issue in northeastern Indiana. He suggested that the obvious places for development along major public freshwater lakes, such as Lake James in Steuben County, had been largely filled. Developers were now in the position of seeking to develop wetlands or to use creative approaches, such as developing condominiums landward of the shoreline with access to a lake through some funneling mechanism.

William Wert asked whether there have been determinations about the capacity of a lake to handle increasing boating pressure. Can the number of boats become so large that enjoyment is impeded, and a lake suffers environmental damage?

John Davis said Wert's question pointed to another public waters issue that the DNR expects to bring to the Advisory Council. Carrying capacity for a navigable waterway, Sugar Creek in western Indiana, is a challenge that needs to be addressed.

Lt. Col. Purvis said the agency was examining carrying capacity within lakes. He said other Great Lakes states have sought to address the issue, but responses have typically been site specific and subjective. Also, the challenge is not just boats. He said the Division of Fish and Wildlife is concerned with the adverse environmental impact that can result from shadows thrown by an excessive number of piers.

John Davis asked Lucas whether he and DNR staff could develop a draft nonrule policy document to address riparian zones and tender the draft for review by the Advisory Council. Lucas responded that he could or would welcome a more active participation by the Advisory Council in developing the document if those were the wishes of the members.

Van Meter said this topic presented a lot of interesting issues. He observed that the backup materials showed there were decisions that could form the basis for a meaningful document.

Lupke said the subject provided for a fascinating discussion and a topic of great importance to his portion of the state. Pippenger noted there were also many related issues pertaining to the growing challenges posed for the protection of Indiana's public freshwater lakes.

Vice Chair Travis emphasized the commitment made to keep meetings on schedule. She said the five members of the Advisory Council had participated in an excellent discussion of this issue and in an appropriate consideration of the options. The hour had arrived for the meeting to close, but she suggested that a good foundation was achieved for seeking input by a quorum as to how best to proceed.

Adjournment

At approximately 12:02 p.m., the meeting adjourned.

Next Meeting of the Natural Resources Advisory Council

The next meeting of the Natural Resources Advisory Council will likely be in Indianapolis on June 12 or June 13, 2007.

Appendix IC 14-26-2-23

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

- (1) Over, along, or lakeward of the shoreline or waterline of a public freshwater lake:
 - (A) excavate;
 - (B) place fill; or
 - (C) place, modify, or repair a temporary or permanent structure.
 - (2) Construct a wall whose lowest point would be:
 - (A) below the elevation of the shoreline or waterline; and
 - (B) within ten (10) feet landward of the shoreline or waterline, as measured perpendicularly from the shoreline or waterline;
of a public freshwater lake.
 - (3) Change the water level, area, or depth of a public freshwater lake or the location of the shoreline or waterline.
- (b) An application for a permit for an activity described in subsection (a) must be accompanied by the

following:

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

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

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

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

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

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

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

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

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

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

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

(1) Assist in the administration of this chapter.

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

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

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

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

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

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