

NAVIGABLE WATERS RULES ANNOTATED AND INDEXED

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The navigable waters rules adopted by the Natural Resources Commission are set forth here and are accompanied by annotations and an index to assist with understanding of application and interpretation. The annotations are summaries taken from a variety of sources. In some instances, the annotations are interpretations of a particular rule section, but in other instances they reflect interpretations of navigable waters law with general application. The reader is cautioned that the annotations are *unofficial*, and may suggest directions for additional research, but they cannot be cited as precedent.

ARTICLE 6. NAVIGABLE WATERS

Rule 1. Applicability

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 14-29-1; IC 14-29-3; IC 14-29-4-5; 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 IC 14-19-1-1, IC 14-29-1, IC 14-29-3, IC 14-29-4 (if IC 14-29-4-5(2) applies), or 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.

(c) A separate license is not required under this article and IC 14-29-1 for an activity permitted under IC 14-21-1, IC 14-28-1, IC 14-29-3, IC 14-34, or IC 14-37.

(d) Compliance with this article satisfies the licensing requirements for IC 14-29-1, IC 14-29-3, and IC 14-29-4 (if IC 14-29-4-5(2) applies).

(e) Before issuing a license under IC 14-21-1, IC 14-28-1, IC 14-34, or 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 is exempted from licensing by IC 14-29-1-8(e).

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-1-1 but which had been modified several times. The 1997 language was readopted without changes in 2003 and 2009.

Application of Navigability

State v. Kivett, 228 Ind. 629, 95 N.E.2d 148 (1950) establishes parameters for determining and applying principles of navigability. The test for navigability is whether a waterway "was available and susceptible for navigation according to the general rules of river transportation at the time [1816] Indiana was admitted to the Union. It does not depend on whether it is now navigable. . . . The true test seems to be the capacity of the stream, rather than the manner or extent of use. And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times render the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use."

Once a waterway is found to be navigable it remains so, even if the waterway is no longer used for purposes of commercial navigation. *United States v. United States Steel Corporation*, 482 F.2d 439 (7th Cir. 1973).

For navigable waters, the Department of Natural Resources is not only the regulator but also the proprietor. Title to the bed of a navigable waterway is owned by the State of Indiana. *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950). The state agency assigned "general charge" of navigable waters is the Department of Natural Resources. IC 14-19-1-1(9). The line of demarcation for a navigable waterway is its "ordinary high watermark". 312 IAC 6-1-1(b). The key permitting section of the Navigable Waterways Act is typically IC 14-29-1-8. Section 8(c) anticipates the issuance of a permit for an activity which will not do any of the following: (1) unreasonably impair the navigability of the waterway; (2) cause significant harm to the environment; or (3) pose an unreasonable hazard to life or property. *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 48 (1998).

Exhaustion of Administrative Remedies

A claimant with an available administrative remedy must exhaust the remedy before gaining access to judicial power. Exhaustion can avoid premature litigation, supports the preparation of an adequate remedy for judicial review, and gives the regulatory agency an opportunity and autonomy to correct its own errors. "Even if the ground of complaint is the unconstitutionality of the statute, which may be beyond the agency's power to resolve, exhaustion may still be required because 'administrative action may resolve the case on other grounds without confronting broader legal issues.'" A company was precluded from judicial redress because the company failed to first seek administrative review from the Natural Resources Commission, under IC 4-21.5 and 312 IAC 3-1, with respect to a permit condition requiring public dedication of a channel constructed to the Ohio River. *Carter v. Nugent Sand Company*, 925 N.E.2d 356, 360 (Ind. 2010).

"Navigable" for Laws in DNR and NRC Jurisdiction

The test for navigability under Indiana law is whether a waterway "was available and susceptible for navigation according to the general rules of river transportation at the time [1816] Indiana was admitted to the Union. It does not depend on whether it is now navigable. . . . The true test seems to

be the capacity of the stream, rather than the manner or extent of use. And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times render the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use." *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950).

To assist with regulatory and proprietary functions, "navigable" is defined in 312 IAC 1-1-24 to mean a waterway that has been declared to be navigable or a public highway by one or more of the following: (1) A court. (2) The Indiana General Assembly. (3) The United States Army Corps of Engineers. (4) The Federal Energy Regulatory Commission. (5) A board of county commissioners under IC 14-29-1-2. (6) The Natural Resources Commission under IC 4-21.5.

"Navigable" for Laws outside DNR and NRC Jurisdiction

Navigability for purposes of imposing the navigational servitude is not coterminous with navigability for exercise of the regulatory power or exercise of admiralty jurisdiction. In 1974, the Department of Natural Resources issued a permit to dredge a channel to the Great Miami River, a navigable waterway, without conditioning approval upon dedication to public use of the resulting new waters. In 1977, the Department reaffirmed the permit without new conditions, as well as the permittee's authority to connect the channel to a lagoon. As a result, the Department could not in 1994 interfere with the permittee's private use of the channel and lagoon unless the agency also exercised the power of eminent domain. *I-275 Enterprises, Inc. v. Department of Natural Resources*, Marion Circuit Court, 49 D05-9409-CP-0982 (1996), reversing 6 Caddnar 172 (1994).

For admiralty jurisdiction, "Article III, section 2 of the United States Constitution provides that 'the judicial power shall extend... to all cases of admiralty and maritime jurisdiction.'" *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 226, 227 (7th Cir. 1993). In order to invoke admiralty jurisdiction, a Court must find that (1) the incident occurred on the navigable waters of the United States, (2) the incident posed a potential hazard to maritime commerce, and (3) the activity engaged in was substantially related to traditional maritime activity..." *In Re Strahle*, 250 F. Supp 2d 997, 999 (N.D. Ind. 2003).

The first issue to determine for admiralty jurisdiction is whether a waterway, "which is where the incident occurred, is a navigable waterway of the United States.... In *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 382 (7th Cir. 2001), the Seventh Circuit cited *The Daniel Bell* test for navigability stating the following:

Rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which commerce is conducted by water.

Weaver, quoting *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557, 563, 19 L.Ed. 999 (1870). The key to determining whether a river is navigable is the river's

present navigability where the incident occurred. *Great Lakes* at 229 cited *In re Strahle* at 999 and 1000.

For purposes of the Clean Water Act (33 USC 1311), whether a waterway is navigable is dependent upon whether the watercourse is navigable-in-fact. The reach of the Clean Water Act is based upon the Commerce Clause. The Little Calumet River has been found by the U.S. Army Corps to "support boat traffic" and to "be at least susceptible for use in interstate commerce." As a consequence, wetlands adjacent to the Little Calumet River are subject to regulation under the Clean Water Act. *U.S. v. Fabian*, 522 F. Supp. 2d 1078, 1092 (N.D. Ind. 2007).

Navigational Servitude

"Congress no doubt possesses the power to protect navigable waters of the country, which it can exercise by its own enactments or by the delegation of authority to... the Corps of Army Engineers." *United States v. Republic Steel Corporation*, 264 F.2d 289, 295 (U.S.C.A., 7th Cir. 1959), cert. den. 79 S. Ct. 1150 (1959) cited in *Ogden Dunes v. Army Corps & DNR*, 12 Caddnar 137, 139 (2009).

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states an[d] individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by that Constitution." *Union Bridge Co. v. United States*, 204 U.S. 364, 389-90, 27 S. Ct. 367, 51 L. Ed. 523 (1907)... Further, through the 'power of Congress to regulate commerce' that power is vested in the legislative branch. *Id.*" *Matheny v. Tennessee Valley Authority*, 503 F. Supp. 917, 927 (M.D. Tenn. 2007) cited in *Ogden Dunes* at 139.

The "Great Lakes and the lands beneath them remain subject to the federal navigational servitude. This servitude preserves for the federal government control of all navigable waters 'for the purpose of regulating and improving navigation...'" *Gibson v. United States*, 166 U.S. 269, 271-72, 17 S. Ct. 578, 41 L. Ed. 996 (1897). '[A]lthough the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.' *Id.* at 272, 17 S. Ct. 578." *Glass v. Goeckel*, 709 N.W.2d 58, 64, n. 7 (Mich. 2005) cited in *Ogden Dunes* at 139.

The navigational servitude is a dominant servitude, sometimes described as a "superior navigation easement," which allows the Federal government to exercise its regulatory power over navigable waters in the interests of commerce without compensation for interference with private water rights. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28, 80 S. Ct. 784, 787-88, 5 L. Ed. 2d 838 (1961). The servitude "is a concept of power, not of property." *United States v. Certain Parcels of Land Situated in Valdez*, 666 F.2d 1236, 1238 (9th Cir. 1982). It is a "dominant right over navigable waters for purposes of improving and regulating navigation." *United States v. 119.27 Acres of Land, More or Less, Situated in Plaquemines Parish, La.*, 663 F. 2d 1328, 1330, n. 5 (5th Cir. 1981) cited in *Ogden Dunes* at 139.

Implementation by the U.S. Army Corps of Engineers of the navigational servitude is subject to 33 USC § 1323. The Federal statute must be

interpreted, however, to give effect to the intent of Congress that the Army Corps not be hampered in projects to maintain navigation. *State of Minn, by Spannaus v. Hoffman*, 543 F. 2d 1198, 1207 (8th Cir. 1976) cited in *Ogden Dunes* at 140.

For Indiana's Lake Michigan Coastal Zone, the navigational servitude is also subject to the standards for "federal consistency" under 16 USC 1456. Congress enacted the Coastal Zone Management Act ("CZMA") to encourage coastal States, Commonwealths, and Territories to develop programs to help balance competing uses of and impacts to coastal resources. The CZMA emphasizes the primacy of State decision-making, regarding activities in a coastal zone, with administration at the Federal level by the U.S. Department of Commerce. Section 307 of the CZMA (16 USC 1456) is directed to "federal consistency" cited in *Ogden Dunes* at 140.

Federal consistency is the CZMA requirement by which Federal agency activities, which have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone, must be consistent to the maximum extent practicable with the "enforceable policies" of a State's federally approved coastal management program. "Federal agency activity" refers to a function performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. 15 CFR 930.31(a). The term "enforceable policy" refers to legally binding State constitutions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone. 16 USC 1453(6a). These are incorporated in an approved State management program. 15 CFR 930.11. Cited in *Ogden Dunes* at 140.

The U.S. Department of Commerce has approved the Indiana coastal program for admission to the CZMA. The approval includes a grant of federal consistency to the DNR's Lake Michigan Coastal Program (the "LMCP"). As of August 12, 2002, "direct federal activities occurring within or outside the Indiana coastal zone that are reasonably likely to affect any land or water use or natural resources of the Indiana coastal zone must be consistent to the maximum extent practicable with the enforceable policies of the LMCP." 67 FED. REG. 52,454 and 52,455 (2002). Cited in *Ogden Dunes* at 141.

The "standing" which Congress conferred through CZMA rests exclusively in the State and particularly in the State agency authorized to implement federal consistency. "It is clear that CZMA, which authorizes the Secretary of [the Department of] Commerce to coordinate [F]ederal and State coastal area management plans, is neither a jurisdictional grant, nor a basis for stating a claim upon which relief can be granted." *Town of North Hemstead v. Village of North Hills*, 482 F. Supp 900, 905 (US. Dist. Ct., E.D. New York 1979). Cited in *Ogden Dunes* at 141.

"The zone of interests regulated by the CZMA includes a [S]tate's protection of their coastal zones and not an individual's attempt to seek further protection once the CZMA requirements have been complied with... The only party that could potentially bring its concerns, interest, and potential injuries within the zone of interests of the CZMA for a direct Federal action is the [S]tate agency which implements the CZMA in a particular [S]tate... [N]o provision is made in the CZMA. . .for private or local entities and individuals to substitute their own interests and judgments for that of the reviewing [S]tate agency." *Serrano-Lopez v. Cooper*, 193 F. Supp. 2nd 424, 434 (D. Puerto Rico 2002). Cited in *Ogden Dunes* at 141.

Navigable Waterways Listing

The Natural Resources Commission has adopted, and caused to be published in the Indiana REGISTER, a "Roster of Indiana Waterways Declared Navigable or Nonnavigable". The roster is also available through the Commission's website at www.ai.org/nrc/2390.htm.

Ordinary High Watermark

In 1953, Congress enacted the Submerged Lands Act, whereby the federal government quit-claimed title to all lands beneath navigable waters within state boundaries to the various states, reserving in the federal government authority over such lands and waters for the purposes of navigation. See 43 U.S.C. Section 1301 *et seq.*, especially 43 U.S.C., Section 1311 and 1312. By virtue of 43 U.S.C., Section 1301 (a), the State of Indiana acquired title up to the ordinary high water mark. *Garner v. City of Michigan City*, 453 F. Supp. 33, 35 (N.D. Ind. 1978).

In the absence of a contrary state boundary, the appropriate line of demarcation for a navigable waterway is the ordinary high watermark. The Indiana Water Resource, Governor's Water Resource Study Commission, State of Indiana (Indiana Department of Natural Resources, 1980), page 107. "Ordinary high watermark" is defined in 312 IAC 1-1-26 to mean (1) The line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics. Examples of these physical characteristics include the following: (A) A clear and natural line impressed on the bank. (B) Shelving. (C) Changes in character of the soil. (D) the destruction of terrestrial vegetation. (E) The presence of litter or debris. (2) Notwithstanding subdivision (1), the shore of Lake Michigan at 581.5 feet I.G.L.D., 1985 (582.252 feet N.G.V.D., 1929). The definition of "ordinary high watermark" was originally codified in 1993 at 310 IAC 21 to be "consistent with the U.S. Army Corps definition."

The definition was also made "consistent with one recently enacted by the Indiana General Assembly in 1993 S.E.A. 179. The definition is critical because it delineates the geographic extremity of jurisdiction over navigable waters." In addition, a finite elevation was set as the "ordinary high watermark" for Lake Michigan. Again, the elevation was "consistent with what has been set by the U.S. Army Corps." Report of Public Hearing and Recommendation for Final Adoption of Amendments to the Navigable Waters Article (310 IAC 21), LSA Document #93-106(F) (Sep. 3, 1993).

The state of Indiana has title to the lands located within the boundaries of the state and beneath Lake Michigan, a navigable waterway, up to the ordinary high watermark of Lake Michigan. *Ogden Dunes v. DNR, Beverly Shores and NIPSCO*, 4 Caddnar 31 (1987). The line of demarcation for a navigable waterway is its "ordinary high watermark." Citing 312 IAC 6-1-1(b). *Save Our Rivers v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 26 (1998).

Public Trust

The state holds the bed of Lake Michigan in trust for the people as the common property. All citizens may benefit from this property so long as none attempt to deprive others of the same benefits. The state is authorized to regulate the removal of sand from Lake Michigan because the submerged lands of the lake are held in trust by the state. *LakeSandCo. v. State*, 68 Ind.

App. 439, 120 N.E. 715, 715-16 (1918) cited with approval in *Garner v. Michigan City*, 453 F.Supp. 33, 35 (N.D. Ind. 1978).

"Although the Indiana courts do not expressly use the term 'public trust doctrine', the courts' language imposes a trust obligation on the state to hold the waters and submerged lands of Lake Michigan in trust for the public's use and enjoyment. Indiana case law expressly states that the waters and submerged lands of Lake Michigan are held in trust for the people of the state, and the state is without power to convey or curtail the right of its people in these coastal resources." Note, *Indiana's Lake Michigan Shoreline: Recommended Shoreland Regulations for a Valuable Natural Resource*, 25 VAL. UNIV. LAW REV. 99, 107.

Historically, the public trust doctrine has been closely associated with the state sovereign ownership doctrine. The latter doctrine holds that when states achieve sovereignty, one consequence is immediate state ownership of certain lands and waters. When Indiana achieved statehood in 1816, it obtained title to its navigable waters. At the core of the public trust doctrine is the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public. State sovereign ownership and the public trust doctrine are based on the need to preserve for the public the use of navigable waters free from private interruption and encroachment. *Lauder and Starke Co. Comm. v. DNR*, 7 Caddnar 180 (1997). Placement of the seawall along a shoreline harmonious with adjoining seawalls does not typically infringe upon public trust waters. Although the legal shoreline of a navigable waterway may shift with accretion or erosion due to natural conditions, accretion or erosion attributable in part to man-made structures does not generally result in a change to the legal shoreline. *Id.*

The public trust doctrine is not an absolute. An exception to the restriction on alienation of public trust lands is provided where there is a public purpose or benefit. Examples of valid alienations may include wharves, piers, docks and other structures in aid of commerce. *Id.* The placement of fill within the public trust lands of Lake Michigan requires a permit pursuant to IC 14-18-6 and payment to the treasurer of state of \$100 before a land patent is issued to the private landowner. Another illustration of requiring compensation for the private acquisition of public trust lands is offered by Ohio. That state provides by rule for a schedule of "lease" payments as determined on an individual site and use basis for fills within Lake Erie. Fills placed before 1989 (and not subject to the terms of a site-specific lease) are assessed at \$0.01 per square foot, annually, with an escalator based upon the National Consumers Price Index.

Historically, the public trust doctrine in natural resources law has been closely associated with the state sovereign ownership doctrine. The latter doctrine holds that when states achieve sovereignty, one consequence is immediate state ownership of certain lands and waters. When Indiana achieved statehood in 1816, it obtained title to its navigable waters. *Id.*

At the core of the public trust doctrine is the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public. State sovereign ownership and the public trust doctrine are "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." Citing *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 488 (1988) is *Tungate v. Department of Natural Resources*, 9 Caddnar 28, 30 (2001).

While the DNR's authority under the public trust doctrine is clear, the authority must be exercised in a reasonable manner after a careful examination of the facts peculiar to a particular case. An extension proposed to a boathouse located on a manmade channel off the main body of an inland lake, where the channel is not well-suited to navigation because a nearby seawall already inhibits usage for that purpose, and where the extension would be cantilevered so as not to preclude public fishing, does not violate the public trust doctrine. *Snyder v. Department of Natural Resources*, 8 Caddnar 41 (1998).

Because public freshwater lakes have similar legal stature to navigable waterways, there is a broad public right to the waters of a public freshwater lake. In order to fill a portion of a public freshwater lake, "very special circumstances" must be present. *Maloney v. DNR*, 6 Caddnar 7 (1990).

"The Public Trust Doctrine on Navigable Waters and Public Freshwater Lakes and the Lakes Management Workgroups" describes the development of the public trust in Indiana. This Commission nonrule policy document also chronicles the contributions for the Lakes Management Work Groups between 1997 and 2006, including statutes and rules which were conceptualized by the Work Groups. The document was posted by the Legislative Services Agency on February 2, 2007 and can be linked online through the Commission's website at www.ai.org/nrc/2375.htm.

An addition to the rules governing navigable waters, which was made in 1997, acknowledged application of the "public trust doctrine" to activities within navigable waters. The acknowledgment was balanced in the rule by a reflection upon the property rights of a permit applicant and the neighbors of an applicant. "Minutes of the Natural Resources Commission" (June 26 and June 27, 1997).

Riparian Rights

A property owner whose land abuts a navigable waterway general possesses certain riparian rights associated with ownership of the land. The term "riparian rights" indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property. Riparian rights of the owners of lands fronting navigable waters are derived from common law as modified by statute. Riparian rights do not necessarily constitute an independent estate and are not property rights, *per se*; they are merely licenses or privileges. Stated differently, they constitute property rights of a qualified or restricted nature. Generally, riparian rights are property rights that cannot be constitutionally taken without just compensation.

In Indiana, the rights associated with riparian ownership generally include: (1) the right of access to navigable waters; (2) the right to build a pier out to the line of navigability; (3) the right to accretions; and (4) the right to a reasonable use of the water for general purposes such as boating and domestic use. In Indiana, riparian rights do not include the right to an unobstructed view. *Center Township Corp. v. City of Mishawaka*, 882 N.E.2d 762 (Ind. App. 2008) and *Dyer v. Hall*, 928 N.E.2d 273 (Ind. App. 2010).

"Riparian Zones within Public Freshwater Lakes and Navigable Waters" provides assistance in delineating zones among riparian neighbors and between riparian owners and the State. This nonrule policy document was updated effective

January 1, 2009 for posting by the Legislative Services Agency and can be linked online through the Commission's website at www.ai.org/nrc/2375.htm.

Standing

Access to administrative review is governed by IC 4-21.5 (sometimes referred to as "AOPA") and not the judicial doctrine of standing for most state agencies. To qualify for administrative review of an agency order under AOPA, a person must state facts demonstrating: (A) the petitioner is a person to whom the order is specifically directed; (B) the petitioner is aggrieved or adversely affected by the order; or (C) the petitioner is entitled to review under any law. IC 4-21.5-3-7. "Aggrieved" refers to a substantial grievance, "a denial of some personal or property right or the imposition upon a party of a burden or obligation. . . ." A person must have "a legal interest which will be enlarged or diminished by the result" of the proceeding. An "aggrieved party" is one "whose personal, pecuniary, or property rights have been adversely affected by another person's actions" or by an agency's disposition or order. *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806 (Ind. 2004).

An association has standing under IC 4-21.5 to seek redress for alleged environmental harm when (A) its members would otherwise have standing to seek administrative review in their own right; (B) the interests the association seeks to protect are germane to the association's purpose; and (C) neither the claim asserted nor the relief requested requires the participation of individual members in the administrative proceeding. This form of standing is sometimes referred to as "associational standing". *Save the Valley, Inc. v. Indiana-Kentucky elec. Corp.*, 820 N.E.2d 677 (Ind. App. 2005), *trans. denied*, and *Stuller v. Daniels*, 869 N.E.2d 1199, 1206 (Ind. App. 2007).

Neither an individual nor a local municipality has standing to seek administrative review of a Department of Natural Resources licensure decision if the applicant is the U.S. Army Corps of Engineers and the Army Corps is engaged in its responsibilities pertaining to the navigational servitude. Acting through the Department, the State of Indiana has standing to seek "federal consistency" within geographic areas where the Coastal Zone Management Act applies. The Commission adopted "CZM Federal Consistency", Information Bulletin #43 (First Amendment), Indiana Legislative Services Agency, 20070214-IR-312070085NRA (February 14, 2007) to assist with implementation of federal consistency along a portion of the Lake Michigan watershed in Lake, Porter, and LaPorte Counties. Review of a federal consistency determination is by the Secretary of the U.S. Department of Commerce. As provided in Information Bulletin #43, "A person other than the federal agency or applicant lacks standing to seek administrative review under 15 CFR Part 930. There is no right to state judicial review of an objection to or concurrence with a federal consistency certification." *Ogden Dunes v. Army Corps & DNR*, 12 Caddnar 137, 141 (2009).

Subject-Matter Jurisdiction

The owner of a land upon which there is located a nonnavigable lake owns and has the right to control the surface of the lake. *Berger Farms, Inc. v. Estes*, Ind. App., 662 N.E.2d 654.

Because the DNR failed to demonstrate Millers Lake in Noble County is either a public freshwater lake or a navigable waterway, the Department of Natural

Resources lacked subject-matter jurisdiction to regulate construction activities by a riparian owner. *Waikel v. DNR*, 6 Caddnar 43 (1992).

The Navigable Waterways Act (IC 14-29-1) prescribes construction that would cause "significant harm to the environment." IC 14-29-1-8(c)(2). Water quality is relevant to whether these values are properly protected. Water quality is a consideration that cannot be divorced from the responsibilities of the Department of Natural Resources under the Navigable Waterways Act. On the other hand, the agency has subject-matter jurisdiction to consider water quality solely within the context of the Navigable Waters Act and not within the broader context of the regulatory authority of the Indiana Department of Environmental Management. *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 48 (1998).

The Department of Natural Resources is the state agency that has "general charge of the navigable water of Indiana." The Department is also the state agency primarily responsible for boating safety. As a result, the agency may properly consider the consequences to environmental resources and to public safety for activities within a navigable waterway. The agency may condition or deny a permit for the construction of a permanent facility, a consequence of which could be to enable vessel traffic to cause significant harm to the environment or threaten public safety. The Department of Natural Resources, and the Natural Resources Commission on administrative review, have jurisdiction to make reasonable inquiry into the likely environmental consequences of a riverboat to be operated from facilities authorized by a permit. Testimony of this nature is relevant to determining whether the erection of a permanent structure within the ordinary high watermark of the Ohio River (a navigable waterway) would cause significant harm to the environment in contravention of IC 14-29-1-8. *Id.*

Eminent Domain

A taking of private property may occur even if the government has not actually taken possession of the land. "If regulation goes too far it will be recognized as a taking." The general standard is that a "regulation effects a taking of private property only when it deprives an owner of all or substantially all economic or productive use of the property.

Even if there has not been a total deprivation, a Fifth Amendment violation may occur when the government requires that an owner dedicate an easement allowing public access as a condition to obtaining a development permit. "Such an exaction must be roughly proportional both in nature and extent to the impact of the development for which the permit is required. . . . While this would be a more plausible claim in the present situation, it is difficult to see that extracting public access as a condition to authorizing a major water project connecting to one of the nation's great rivers [the Ohio River] is not proportional and reasonably connected to the enterprise contemplated." The court concluded the takings claim was "doubtful" upon the facts and unnecessary to adjudicate because the claimant had failed to exhaust administrative remedies. *Carter v. Nugent Sand Company*, 925 N.E.2d 356, 359 (Ind. 2010).

312 IAC 6-1-2 Transfer of license

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

Affected: IC 14

Sec. 2. (a) A person cannot transfer or assign a license issued under this article unless prior written approval for the transfer or assignment is obtained from the director.

(b) The director shall not unreasonably deny a request to transfer or assign a permit issued under this article.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-1-3. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-1-3 License application; limitations; revocation; general sanctions

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

Affected: IC 4-21.5; IC 14-9-3; IC 14-10-2-6; IC 14-29

Sec. 3. (a) A license issued under this article is subject to the conditions, terms, or limitations contained on or attached to the license.

(b) A license may be suspended or revoked by the department under IC 4-21.5 for a violation of IC 14-29, this article, or a condition contained on or attached to the license.

(c) Any deputy director referenced in IC 14-9-3 may file a complaint with the commission that seeks the issuance of a notice of violation and the imposition of a charge, where authorized by IC 14-10-2-6, for any of the following:

(1) A violation of IC 14-29.

(2) A violation of this article.

(3) A violation of a condition contained on or attached to a license issued under this article.

(4) Conduct of an activity for which a license is required under this article but for which no license is obtained.

(d) The issuance of a license under this article does not divest the United States, Indiana, the department, or a riparian or littoral owner of a propriety interest in a navigable waterway or adjacent lands.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-1-4. The 1997 language was readopted without changes in 2003 and 2009.

In determining whether to grant a license to place boat slips in a navigable waterway (Trail Creek in LaPorte County), the Department of Natural Resources may consider whether the boat slips would impede navigation or pose a risk to life or property. If navigation would remain unimpeded under the terms of the license, and there is no showing of risk to life or property, no basis is established for denial of the license. *Michigan City Historical Society v. DNR and Francik*, 5 Caddnar 169 (1990).

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).

Annotation: This section was adopted in 2009 and incorporates, as guidance, a Commission nonrule policy document that assists with delineating riparian zones in navigable waters and in public freshwater lakes. The Commission subsequently revised “Riparian Zones within Public Freshwater Lakes and Navigable Waters” and caused the Legislative Services Agency to post a revised version at DIN: 20100331-IR-312100175NRA (March 31, 2010).

“Riparian Zones within Public Freshwater Lakes and Navigable Waters” is a guidance document based primarily on reported decisions by the Court of Appeals of Indiana. The document recognizes four basic principles for the delineation of riparian zones in public waters. *Rademaker v. Wells*, 12 Caddnar 224, 229 (2010).

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 (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.

(iii) 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.

Annotation: This section was adopted in 2009 and is modeled after 312 IAC 11-5-2 which governs the management of lawful nonconforming uses on public freshwater lakes.

Although more commonly considered in an ordinance, nonconforming uses may be considered in a regulatory scheme. A use may be a lawful nonconforming use if it existed before the effective date of a rule. The use may be allowed to continue subsequent to rule adoption despite not conforming to the rule. Providing for nonconforming uses in rules is harmonious with the principle of statutory construction that, absent strong and compelling reasons, rules are given only prospective application. *Brown and Zeller, et al. v. DNR*, 9 Caddnar 135, 142 citing *Mann v. State Dept. of Highways*, 541 N.E.2d 929, 936 (Ind. 1984). On the other hand, the law does not generally favor a nonconforming use because it detracts from the purpose of the rule, which is to confine classes of uses and structures to certain areas. *Kosciusko County Bd. of Zoning Appeals v. Smith*, 724 N.E.2d 279 (Ind. App. 2000); *transfer denied* 741 N.E.2d 1251, cited in *DNR v. Freeman Orchard Assoc., Inc.*, 11 Caddnar 285, 287 (2008).

Rule 2. Definitions

312 IAC 6-2-1 Applicability

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

Affected: IC 14

Sec. 1. (a) The definitions contained in this rule apply throughout this article.

(b) The definitions contained in 312 IAC 1 also apply.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-2-1. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-2-2 “Abandoned shipwreck” defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14

Sec. 2. “Abandoned shipwreck” means a shipwreck to which title has been given up by the owner with the intent of never claiming a right or interest in the future. An intention to give up title may be demonstrated where an owner:

(1) takes steps to collect insurance or pay a salvage award to a person who salvages the vessel’s cargo; or

(2) takes no action after a wreck incident to recovering or removing the vessel and its cargo.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-2-2. The 1997 language was readopted without changes in 2003 and 2009.

“Abandoned shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person. By not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel and its cargo or to provide legal notice of abandonment to the U.S. Coast Guard and the U.S. Army Corps of Engineers, as is required under provisions in the Rivers and Harbors Act (33 U.S.C. 409), an owner shows intent to give up title. Such shipwrecks ordinarily are treated as being abandoned after the expiration of 30 days from sinking.

“(a) When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner.

“(b) Although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party. Any cargo aboard a vessel entitled to sovereign immunity also generally remains the property of the flag nation. In such a situation, title to the cargo remains in the nation from which it had been captured. Shipwrecks entitled to sovereign immunity are wrecks of warships and other vessels (such as privately owned vessels chartered or

otherwise appropriated by a sovereign nation for military purposes) used only on government non-commercial service at the time of sinking. Examples of vessels entitled to sovereign immunity would include, but not be limited to, U.S. battleships and German U-boats from World War II, Confederate gunboats and Union ironclads from the Civil War, and British frigates and Colonial privateers from the Revolutionary War." Abandoned Shipwreck Guidelines, Department of the Interior, 55 FED. REG. 50116, 50120 (Dec. 4, 1990).

312 IAC 6-2-3 "Beach nourishment" defined

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

Affected: IC 14

Sec. 3. "Beach nourishment" means the placement of sand to mitigate beach erosion:

- (1) within the ordinary high watermark of Lake Michigan; or
- (2) within such proximity to the shoreline of Lake Michigan that wind or water erosion is likely to transport sand into the lake.

Annotation: This section was codified in 1997 and readopted without changes in 2003 and 2009.

A general permit or authorization for the placement of "beach nourishment" was implemented by emergency rule on April 15, 1996 and expired on April 14, 1997. The emergency rule contained a definition for "beach nourishment" very similar to the one set forth here. The text of the emergency rule was published at 19 IND. REG. 2316 (June 1, 1996).

"'Beach nourishment' is the placement of sand or other suitable materials to replenish natural processes for beach maintenance along Indiana's Lake Michigan shoreline. Where natural processes have been interrupted, typically by the placement of man-made structures such as seawalls or breakwaters, beach nourishment can mitigate or eliminate erosion." Report of Public Hearing, Analysis and Recommendation for Final Adoption, Recodification of the Rules Governing Navigable Waters, LSA #97-56(F) (June 9, 1997).

Rival lakeside communities, both within proximity to a utility's sand dredging operation, have standing to seek administrative review of a permit authorizing redeposit of the sand for beach nourishment. *Ogden Dunes v. DNR, Beverly Shores and NIPSCO*, 4 Caddnar 31 (1987). Where a Department of Natural Resources permit to a utility for the excavation (and redeposit) of sand from the bed of Lake Michigan has expired, both in terms of its duration and as to the amount of sand authorized to be excavated, issues arising from beneficial use of the sand for beach nourishment are generally mooted. *Id.*

312 IAC 6-2-3.3 “Creek rock” defined

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 3.3. “Creek rock” means each of the following located within a waterway:

- (1) Sand.
- (2) Gravel.
- (3) Rock.
- (4) Slab rock.

Annotation: This section was codified in May 2009 to assist with implementation of 312 IAC 6-5-9 governing the removal of creek rock from navigable waterways. In September 2009, the section was readopted without changes.

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.

Annotation: This section was codified in 2009 and is modeled after 312 IAC 11-2-11.5 which defines “group pier” on a public freshwater lake. 312 IAC 6-4-5(a) (6) disqualifies a group pier from placement through a general license.

312 IAC 6-2-3.8 “Hard mineral resources” defined

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 3.8. “Hard mineral resources” means naturally occurring alluvial deposits of the following:

- (1) Gold.
- (2) Platinum.

- (3) Silver.
- (4) Lead.
- (5) Copper.
- (6) Diamonds and other gemstones.
- (7) Other similar materials.

Annotation: This section was codified in November 2009. The section augments the definition of "prospecting" in 312 IAC 6-2-2.8 and assists with regulation at 312 IAC 6-5-10 of prospecting in a navigable waterway.

312 IAC 6-2-4 "Historic shipwreck" defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14

Sec. 4. "Historic shipwreck" means a shipwreck that is located within a historic site.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-2-6. The 1997 language was readopted without changes in 2003 and 2009.

"Historic shipwreck means a shipwreck that is listed on or eligible for listing in the National Register of Historic Places." Abandoned Shipwreck Guidelines, Department of the Interior, 55 FED. REG. 50116, 50121 (Dec. 4, 1990).

312 IAC 6-2-5 "Historic site" defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14-8-2-125

Sec. 5. "Historic site" has the meaning set forth in IC 14-8-2-125.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-2-7. The 1997 language was readopted without changes in 2003 and 2009.

As defined in IC 14-8-2-125, "historic site" means "a site that is important to the general, archeological, agricultural, economic, social, political, architectural, industrial, or cultural history of Indiana. The term includes adjacent property that is necessary for the preservation or restoration of the site." P.L.1-1995, SEC. 1.

312 IAC 6-2-6 "Marina" defined

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

Affected: IC 14

Sec. 6. "Marina" means a structure that:

- (1) can service simultaneously at least five (5) boats; and
- (2) provides, for a fee, one (1) or more of the following:

- (A) Boat engine fuel.
- (B) Boat repair.
- (C) Boat sales or rental.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-1-1. The 1997 language was readopted without changes in 2003.

In 2008, subdivision (2) was amended to remove the existence of "docks" as a factor qualifying a facility as a "marina". This amendment was a consequence of clarifications originally directed to "public freshwater lakes" and intended to help distinguish definitions in 312 IAC 11 for "marina" and "group pier". As given final adoption, parallel amendments were made to this section, to 312 IAC 8-2-13 (defining a "marina" on a Department of Natural Resources property), and to 312 IAC 11-2-12 (defining a "marina" on a "public freshwater lake"). "Report of Public Hearing and Consideration for Final Adoption" (February 26, 2008), and Natural Resources Commission "Minutes of March 18, 2008" adopting the hearing officer recommendations, LSA Document #07-646.

An errata was filed with the Legislative Services Agency in June 2009 to change the word "watercraft" to "boat" or "boats" (depending upon context) in an initiative directed to language simplification. In September 2009, the language was readopted without additional changes.

312 IAC 6-2-6.8 "Prospecting" defined

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 6.8. "Prospecting" refers to activities conducted in preparation for or to remove hard mineral resources.

Annotation: This section was codified in November 2009. The section references "hard mineral resources", a term defined at 312 IAC 6-2-3.8, and assists with regulation at 312 IAC 6-5-10 of prospecting in a navigable waterway.

312 IAC 6-2-7 "Public or municipal water utility" defined

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

Affected: IC 8-1-2-1; IC 14

Sec. 7. "Public or municipal water utility" means a "public utility" under IC 8-1-2-1(a) or a "municipally owned utility" under IC 8-1-2-1(h), which is operated to furnish water.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-2-10. The 1997 language was readopted without changes in 2003 and 2009.

"Public utility" is defined by IC 8-1-2-1(a) to mean "every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, that

may own, operate, manage, or control any plant or equipment within the state for the:

- (1) conveyance of telegraph or telephone messages;
 - (2) production, transmission, delivery, or furnishing of heat, light, water, or power; or
 - (3) collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste.
- The term does not include a municipality that may acquire, own, or operate any of the foregoing facilities."

"Municipally owned utility" is defined by IC 8-1-2-1(h) to mean "every utility owned or operated by a municipality." As provided in IC 8-1-2-1(c), "municipality" means any city or town of Indiana.

312 IAC 6-2-8 "Shipwreck" defined

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14

Sec. 8. (a) "Shipwreck" means a vessel or wreck, its cargo, and other contents.

(b) As used in subsection (a), a "vessel or wreck" includes each of the following:

- (1) Hull.
- (2) Rigging.
- (3) Armaments.
- (4) Apparel.
- (5) Tackle.
- (6) Cargo.
- (7) Other contents of the vessel or wreck.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-2-11. The 1997 language was readopted without changes in 2003.

In an initiative directed to language clarity, the word "watercraft" in subsection (b) (7) was changed to "vessel or wreck" in an errata filed with the Legislative Services Agency in June 2009. In September 2009, the language was readopted without additional changes.

"Shipwreck . . . means a vessel or wreck, its cargo, and other contents. The vessel or wreck may be intact or broken into pieces scattered on or embedded in the submerged lands or in coralline formations. A vessel or wreck includes, but is not limited to, its hull, apparel, armaments, cargo, and other contents. Isolated artifacts and materials not in association with a wrecked vessel, whether intact or broken and scattered or embedded, do not fit the definition of a shipwreck." Abandoned Shipwreck Guidelines, Department of the Interior, 55 FED. REG. 50116, 50121 (Dec. 4, 1990).

312 IAC 6-2-9 "Waterway" defined (Repealed)

Annotation: This section was repealed in 2000 and relocated to 312 IAC 1-1-29.5.

Rule 3. Shipwrecks and Other Historic Sites

312 IAC 6-3-1 Applicability

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14-21-1

Sec. 1. (a) This rule establishes standards applicable to the issuance of licenses, license conditions, and the conduct of investigations and scientific investigations needed to satisfy IC 14-21-1 and IC 14-29-1-8 for an abandoned shipwreck or historic site located in whole or in part within a navigable waterway.

(b) In addition to the purposes described in subsection (a), this rule is intended to effectuate the Abandoned Shipwreck Act (43 U.S.C. 2101) in Indiana. To the extent not inconsistent with this article, the department may apply guidelines of the National Park Service, Department of Interior, published on December 4, 1990, at 55 FR 50116 through 55 FR 50145 in considering an activity that may affect an abandoned shipwreck.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-3-1. The 1997 language was readopted without changes in 2003 and 2009. Legislative Services Agency has incorporated stylistic changes.

Abandoned Shipwreck Act

Purposes

Congress enacted the Abandoned Shipwreck Act to provide consistent treatment in the adjudication and management of historic shipwrecks. If a shipwreck and its contents are abandoned and embedded in the submerged lands of a state, then title transfers through the United States government to the state where the shipwreck is located. Where the statutory requirements are met, the federal courts are divested of jurisdiction over a claim to the shipwreck and its contents, and the claim must be pursued in the state's judicial system.

Possession

A threshold question is whether the state is in "possession" of the shipwreck. Some courts have held a state need only show a "colorable claim" to establish possession. Included among jurisdictions taking this position are the 7th Circuit, for an Illinois shipwreck, and for a Michigan shipwreck in the neighboring 6th Circuit. In *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F. 2d 665 (7th Cir. 1992), the court held a "colorable claim" is sufficient. Another view is if a state is not in actual possession, a determination may be required by a federal court concerning title to the shipwreck. The distinction arises because states have successfully maintained the sovereign immunity afforded them by the Eleventh Amendment precludes an admiralty action against the property. No Eleventh Amendment preclusion applies if a state does not know the location of a shipwreck before discovery by the salvage company. *Great Lakes Exploration Group, LLC v. Unidentified Wrecked and (For Salvage Purposes) Abandoned Sailing Vessel*, 522 F. 3d 682 (6th Cir. 2008).

Abandonment

Abandonment must be established by clear and convincing evidence before the Abandoned Shipwreck Act applies. A showing of abandonment may be expressed or inferential. Neither a lapse of time nor an owner's failure to return to a shipwreck site necessarily establishes abandonment. An owner's stated intention to abandon is a simple demonstration of abandonment. On the other hand, the action or lack of action by the owner may provide a sufficient inference. Abandonment was found where the owner never attempted salvage, declined salvage assistance by the U.S. Coast Guard, and the shipwreck was located in shallow water making salvage technically feasible. *Fairport Intern Exploration, Inc. v. Shipwrecked Vessel*, 72 F. Supp. 2d 795 (W.D. Mich. 1999).

Embeddedness

As used in the Abandoned Shipwreck Act, "'embedded' means firmly affixed in the submerged Lands. . . such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." 43 USC § 2102(a). In *Diuhos v. Floating and Abandoned Vessel Known as New York*, 979 F. Supp. 138 (S.D.N.Y. 1997), the court held the act did not apply if a ship was neither submerged nor embedded in the lands of a state. The Seventh Circuit found a determination by an Illinois District Court that a shipwreck was "likely embedded" was insufficient and remanded the case for a determination of whether the shipwreck was, in fact, embedded. *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the Seabird*, 941 F.2d 525 (7th Cir. 1991).

Constitutionality

An important principle of admiralty law supporting the salvage of shipwrecks is known as the "law of finds". This principle has been characterized as a "finders-keepers rule". *Abandoned Shipwrecks Act*, 163 ALR Fed. 421 (2000 West Group) § 7(a). The court rejected the argument the Abandoned Shipwrecks Act unconstitutionally interfered with admiralty law by negating the "law of finds" since an exception to the principle was already recognized for embedded shipwrecks. As a matter of law, a state owns shipwrecks that are embedded in its waters. *Sunken Treasure, Inc. v. Unidentified Wrecked and Abandoned Vessel*, 857 F. Supp. 1129 (D.V.I. 1994) approving *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the Seabird* cited previously.

Another admiralty principle known as the "law of salvage" was found not to have been unconstitutionally negated by the Abandoned Shipwrecks Act. Since title to an anchor raised by a salvage company was previously embedded in the coastal waters of the Virgin Island, title to the anchor was vested in the Virgin Islands. The admiralty court did not have jurisdiction over the anchor, and the Virgin Islands could properly invoke the Eleventh Amendment to require disposition by the territory's courts. *Sunken Treasure, Inc. v. Unidentified Wrecked and Abandoned Vessel* and *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the Seabird* cited previously.

312 IAC 6-3-2 Administration of shipwrecks through division of historic preservation

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14

Sec. 2. (a) The division of historic preservation and archeology of the department shall conduct the technical and professional functions of the department under this rule with respect to a determination or regulation of a historic site (including an abandoned shipwreck located within an historic site).

(b) The director of the division of historic preservation and archeology may issue a license under this rule.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-3-2. The 1997 language was readopted without changes in 2003 and 2009. Legislative Services Agency has incorporated stylistic changes.

312 IAC 6-3-3 Licensing

Authority: IC 14-10-2-4; IC 14-21-1-31; IC 14-29-1-8

Affected: IC 14-21-1

Sec. 3. (a) No person may remove, disturb, salvage, or destroy an abandoned shipwreck or a historic site located in whole or in part within a navigable waterway except under a license issued under this rule.

(b) A license application, with respect to a historic site (including a shipwreck located at a historic site), must include a plan (as defined in 310 IAC 20-1-20) that is proposed by the applicant to satisfy 310 IAC 20. The applicant must also satisfy 310 IAC 19. Except as provided in section 4 of this rule, the application shall be filed with the department at least thirty (30) days before a licensed activity is scheduled to begin.

(c) A person who wishes to recover or salvage an abandoned shipwreck that is not believed to be located at a historic site shall file a notification with the department. The notification must:

- (1) provide the location of the abandoned shipwreck; and
- (2) identify how the application determined:
 - (A) the abandoned ship is not located at a historic site; and
 - (B) that the proposed activity:
 - (i) does not otherwise violate IC 14-29-1-8; or
 - (ii) is subject to the exclusive jurisdiction of a federal court or federal agency.

(d) A license issued under this rule may be revoked for a violation of IC 14-21-1, IC 14-29-1-8, this article, or a term of the license.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-3-3. The 1997 language was readopted without changes in 2003. In January and September 2009, errata entries corrected cross-references to other rules. In September 2009, the language was readopted without additional changes.

The scope of license review for navigable waters extends to historic preservation and archeology. As provided in this section, a person may not remove, disturb, salvage, or destroy an historic site which is located in

whole or part within a navigable waterway except unless a permit is issued under the State Historic Preservation and Archeology Act. *Save Our Rivers v. RDI/Caesar's Riverboat Casino, LLC and DNR*, 8 Caddnar 26 (1998).

312 IAC 6-3-4 Emergency licenses

Authority: IC 14-21-1-31; IC 14-29-1-8

Affected: IC 4-21.5-4; IC 14

Sec. 4. (a) The department may, under IC 4-21.5-4, issue a license for a scientific investigation or for salvage of a historic site (including an abandoned shipwreck located at a historic site) if the director determines both of the following:

(1) Imminent and irreparable damage or loss is likely to occur to the historic site due to natural or cultural causes.

(2) Complete review of an application under this rule is impracticable.

(b) To the extent practicable, a license issued under this section shall meet the requirements of this rule.

(c) A permit cannot be issued under this section if its issuance would preclude the recovery of archeological, historical, or architectural information that forms the basis for site significance.

Annotation: This section was recodified in 1997 from language adopted in 1991 as 310 IAC 21-3-4. The 1997 language was readopted without changes in 2003 and 2009.

Rule 4. Marinas and Group Piers

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.

Annotation: This section was recodified in 1997 from language adopted in 1992 as 310 IAC 21-4-1. The 1997 language was readopted without changes in 2003 and in September 2009.

"In 1992, the natural resources commission adopted rules to mandate the placement of a 'wastewater holding tank' on any new marina permitted along navigable waters (with corresponding rules applicable to public freshwater lakes and to reservoirs managed by the department of natural resources). Existing marinas were provided until January 1, 1996 to comply with the mandate. Permitting experience with the rules suggested some flexibility in the way collected sewage may be handled (notably, pumped out and trucked to a sewage collection facility if the trucks are properly licensed for transport of sewage). Also, experience by the Lake Michigan Coastal Coordination Program, as well as the Pumpout Program administered by the Indiana Department of Environmental Management, suggested a few minor changes to make

the regulatory terms more easily understood. For these reasons, the spirit of prior language is maintained by some of the specifics reworked in what will become 312 IAC 6-4." Report of Public Hearing, Analysis and Recommendation for Final Adoption, Recodification of the Rules Governing Navigable Waters, LSA #97-56(F) (June 9, 1997).

In November 2009, subsection (a) was amended to reference both marinas and group piers, as well as to clarify the geographic scope of the rule was along and within the ordinary high watermark of a navigable waterway. "Ordinary high watermark" is considered in the annotation to 312 IAC 6-1-1.

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 obtained from the department by which the person agrees to operate the marina 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.

Annotation: This section was recodified in 1997 from language adopted in 1992 as 310 IAC 21-4-2. The 1997 language was readopted without changes in 2003 and in September 2009.

In November 2009, the section was reworded. Language clarified a person could not be issued a license under this section unless the person agreed to operate a marina in conformance with 312 IAC 6-4-3 governing sewage pumpout facilities. The section was coordinated with licensure of a group pier pursuant to 312 IAC 6-4-4.

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.

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

(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.

Annotation: This section was recodified in 1997 from language adopted in 1992 as 310 IAC 21-4-3. The 1997 language was readopted without changes in 2003.

The section was amended in 2004. A "marina" was required generally to have a working pumpout facility. Under limited circumstances, the Department's Division of Law Enforcement could grant an exemption for a period not to exceed five years. These circumstances were if a marina showed either it did not service and was unlikely prospectively to service boats with marine sanitation devices; or, it entered a written agreement for adequate boat service by a neighboring marina. Natural Resources Commission "Minutes of May 18, 2004" final adopting LSA Document #04-4.

An *errata* was filed with the Legislative Services Agency in June 2009 to change the word "watercraft" to "boats" in an initiative directed to language simplification. The section was readopted without additional changes in September 2009.

In November 2009, the section was reworded. Language clarified a person could not be issued a license to operate a marina under 312 IAC 6-4-2 unless the person agreed to address sewage pumpout facilities under this section.

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.

Annotation: This section was codified in November 2009.

At final adoption, the hearing officer reported this section was similar to existing sections governing 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)." Rule Processing, Report of Public Hearings and Recommendation for Final Adoption, LSA #09-137(F)

(August 26, 2009). Individual licensure of group piers on public freshwater lakes is governed by 312 IAC 11-2-11.5, 312 IAC 11-3-3, and 312 IAC 11-4-8.

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:

(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.

Annotation: This section was codified in November 2009. Prior to final adoption by the Commission, the hearing officer reported the section was similar to existing sections governing 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)." Rule Processing, Report of Public Hearings and Recommendation for Final Adoption, LSA #09-137(F) (August 26, 2009). A general license for qualified piers on public freshwater lakes is provided at 312 IAC 11-3-1.

In meetings held between April and September 2008, the Advisory Council and the Commission considered how the Department of Natural Resources should address lakes identified in subsection (d) and subsection (e). The conclusion by the Department and the Commission was that the DNR's Division of Water would be the licensor under subsection (d), but the Division responsible for managing a listed lake would cause the incorporation of any additional requirement applicable to the property. To implement the apparent legislative intent set forth in IC 14-26-2-15, the lakes described in subsection (e) were exempted. See, for example, the Minutes of the Advisory Council (June 11, 2008).

Rule 5. Mineral Extractions

312 IAC 6-5-1 Applicability

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-34; IC 14-37

Sec. 1. (a) This rule establishes standards applicable to the extraction of sand, gravel, stone, or another mineral from or under the bed of a navigable waterway.

(b) Except as provided in subsections (c) through (d), this rule is administered by the division of water of the department.

(c) The division of reclamation of the department administers an activity under this rule that is also controlled by IC 14-34.

(d) The division of oil and gas of the department administers an activity under this rule that is also controlled by IC 14-37.

Annotation: The process for addressing the extraction of sand, gravel, or stone from the bed of a navigable waterway was originally codified by 310 IAC 21-5 in 1993. The rule sought to harmonize agency administration of IC 13-2-4-9 (recodified as IC 14-29-1-8) and IC 14-3-1-14.5 (recodified as IC 14-29-3-1). Report of Public Hearing and Recommendation for Final Adoption of Amendments to the Navigable Waters Article (310 IAC 21), LSA Document #93-106(F) (September 3, 1993).

The section was codified as 310 IAC 21-5-1 and recodified as 312 IAC 6-5-1 in 1997. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-5-2 Procedures

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

Affected: IC 4-21.5; IC 14-11-4

Sec. 2. (a) Before the department takes an agency action to issue or deny a license under this rule, IC 14-11-4 and 312 IAC 2-3 govern.

(b) After the department takes an agency action, IC 4-21.5 and 312 IAC 3-1 govern.

Annotation: This section was recodified in 1997 from language adopted in 1993 as 310 IAC 21-5-2. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-5-3 License to extract minerals

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1; IC 14-29-3; IC 14-34; IC 14-37

Sec. 3. (a) Except as provided in subsections (b) through (d), a written license is required under this rule before a person can lawfully extract sand, gravel, stone, coal, oil, gas, or another mineral from or under the bed of a navigable waterway.

(b) A separate license is not required under this rule for the extraction of coal from or under the bed of a navigable waterway if a license is issued under IC 14-34 and 312 IAC 25 that also applies the requirements of this rule.

(c) A separate license is not required under this rule for the extraction of oil or gas from or under the bed of a navigable waterway if a license is issued under IC 14-37 and 312 IAC 16-3 that also applies the requirements of this rule.

(d) A license is not required under this rule for the extraction of sand, gravel, or stone from the bed of a navigable waterway that is within a floodway if the extraction activity is exempted or excluded from the licensing requirements of IC 14-28-1.

(e) A license under this section shall conform to IC 14-29-1 and IC 14-29-3.

(f) The standards and requirements of this rule govern a license issued under this rule and any activity for which a license is required under this rule.

Annotation: This section was recodified in 1997 from language adopted in 1993 as 310 IAC 21-5-3. A technical amendment was made to subsection (c) in 2000 to reflect recodification of rules governing the extraction of oil or gas from 310 IAC 7 to 312 IAC 16. In 2003, the section was readopted without additional changes. A technical amendment was made to subsection (b) in January 2009 to reflect recodification of rules governing surface coal mining from 310 IAC 12 to 312 IAC 25. In September 2009, the section was recodified without additional changes.

312 IAC 6-5-4 License fees

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8; IC 14-34-2-1; IC 14-37-3-15

Affected: IC 14-34; IC 14-37

Sec. 4. (a) Except as provided in subsection (b), the fee for a license under this rule is fifty dollars (\$50).

(b) A separate license fee is not required under this rule for an activity for which a permit is issued under IC 14-34 or IC 14-37.

Annotation: This section was recodified in 1997 from language adopted in 1993 as 310 IAC 21-5-1. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-5-5 Bonds

Authority: IC 14-10-2-4; IC 14-29-1-8; IC 14-34-2-1; IC 14-37-3-15

Affected: IC 14-34; IC 14-37

Sec. 5. (a) Except as provided in this section, a bond shall be posted by the license applicant with the department to assure prompt compliance with the terms and conditions of the license. Bond shall be in the form of a surety bond, a cash bond, or a certificate of deposit. No surety bond shall be approved unless issued by a company holding an applicable certificate of authority from the department of insurance, state of Indiana.

(b) The bond for any extraction resulting from surface coal mining operations shall be as determined under IC 14-34 and 312 IAC 25.

(c) The bond for any well for oil and gas purposes shall be as determined under IC 14-37 and 312 IAC 16-4.

Annotation: This section was recodified in 1997 from language adopted in 1993 as 310 IAC 21-5-3. A technical amendment was made to subsection (c) in 2000 to reflect recodification of rules governing the extraction of oil or gas from 310 IAC 7 to 312 IAC 16. In 2003, the section was readopted without additional changes. A technical amendment was made to subsection (b) in January 2009 to reflect recodification of rules governing surface coal mining from 310 IAC 12 to 312 IAC 25. In September 2009, the section was recodified without additional changes.

312 IAC 6-5-6 License duration

Authority: IC 14-10-2-4; IC 14-29-1-8; IC 14-34-2-1; IC 14-37-3-15

Affected: IC 14-37-4-10

Sec. 6. (a) Except as provided in subsection (b), a license issued under this rule, including a license for the extraction of coal, terminates upon the earlier of the following:

(1) The termination date set forth in the license.

(2) Five (5) years after the date on which the department sent notice of the agency action to issue the license.

(b) For the extraction of oil or gas, the duration of the license is as provided in IC 14-37-4-10 unless otherwise specified in the license.

Annotation: This section was codified at 310 IAC 21-5-6 in 1993 to memorialize agency "traditions for addressing the extraction of oil, gas, and coal from beneath navigable waters." Report of Public Hearing and Recommendation for Final Adoption of Amendments to the Navigable Waters Article (310 IAC 21), LSA Document #93-106(F) (September 3, 1993).

The section was recodified in 1997. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-5-7 Conditions for the extraction of minerals

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

Affected: IC 14-28-1; IC 14-34; IC 14-37

Sec. 7. The works, workings, and operations of a license issued under this rule must not do any of the following:

(1) Impede or unreasonably impair the navigation of the navigable waterway.

(2) Damage or endanger a bridge, highway, railroad, public work, or utility.

(3) Damage the property of a riparian owner, an adjoining proprietor, or a person who holds a license under this rule and conducts mineral extraction on adjacent property. The department may waive the requirements of this subdivision if the license applicant obtains written consent from the affected person.

(4) Cause significant harm to the environment.

(5) Violate IC 14-28-1, IC 14-34, or IC 14-37.

Annotation: This section was recodified in 1997 from language adopted in 1993 as 310 IAC 21-5-7. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-5-8 Compensation for extracted minerals

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

Affected: IC 13-11-2-116; IC 14

Sec. 8. (a) Except as provided in subsection (b), a person shall pay to the department a reasonable value for extracted minerals. The value shall be as determined by the department and set forth in the license.

(b) An extraction is exempt from subsection (a) if the mineral is authorized by the department for placement, and is lawfully placed:

- (1) for beach nourishment; or
- (2) in a landfill as defined in IC 13-11-2-116.

Annotation: This section was recodified in 1997 from language adopted in 1993 as 310 IAC 21-5-8. The 1997 language was readopted without changes in 2003 and 2009.

312 IAC 6-5-9 Creek rock removal from a navigable waterway; general license

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-28-1-8

Affected: IC 14-19-1-1; IC 14-28-1; IC 14-29-1; IC 14-29-3

Sec. 9. (a) Except as provided in subsection (d), this section establishes a general license for the removal of creek rock from a navigable waterway that is subject to IC 14-28-1, IC 14-29-1, or IC 14-29-3.

(b) To act under this section, a person must:

(1) if creek rock is to be removed from a parcel located in the riparian zone of an adjacent property owner, either:

- (A) be a riparian owner for the parcel; or
- (B) have written permission from a riparian owner for the parcel; and

(2) receive written permission from the department in the conduct of its responsibilities under IC 14-19-1-1(9). The permission under this subdivision is a proprietary function for the public trust and is not a licensure function.

(c) Without a written license under IC 14-28-1, IC 14-29-1, or IC 14-29-3, and without notice to the department other than as anticipated by subsection (b)(2), a person may remove creek rock from the parcel, if the person satisfies each of the following conditions:

- (1) Not more than ten (10) cubic yards of creek rock is removed within one (1) calendar year from the parcel.
- (2) The creek rock is removed exclusively by the following methods:
 - (A) Hand.
 - (B) Hand tools.
- (3) The creek rock is removed between July 1 and March 31 of the following year.
- (4) The creek rock is removed only from sand bars and gravel bars within the waterway.

The excavation of waterway banks does not qualify under this subdivision.

(d) An individual license is required under IC 14-28-1 and this article for the removal of creek rock from Lake Michigan.

Annotation: This section was codified in May 2009 to address the removal of creek rock from a navigable waterway. "Creek rock" is defined at 312 IAC 6-2-3.3. A general license is provided for qualified activities. Creek rock removal from the floodway of a nonnavigable waterway is governed primarily by 312 IAC 10-5-9 and 312 IAC 10-5-10. The section was readopted without changes in September 2009.

312 IAC 6-5-10 Prospecting in a navigable waterway

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-22-34-12; IC 14-28-1; IC 14-29-1; IC 14-29-3

Sec. 10. (a) This section governs prospecting in a navigable waterway that is subject to IC 14-28-1, IC 14-29-1, or IC 14-29-3.

(b) Unless otherwise provided in this section, a person must not engage in prospecting except as approved by the department in a written license.

(c) Without a written license or notice to the department, and except as provided in subsection (d), a person may engage in prospecting within the ordinary high watermark of a navigable waterway upon compliance with each of the following conditions:

(1) Lawful ingress to and egress from the navigable waterway is obtained.

(2) Written permission is obtained from any affected riparian owner.

(3) Prospecting is performed exclusively by one (1) or a combination of the following processes:

(A) Without the use of equipment.

(B) With the use of nonmotorized equipment, such as a pan, sluice box, or pick and shovel.

(C) With the use of suction equipment, including motorized equipment, having a hand-operated nozzle that has an opening not larger than five (5) inches in diameter.

(4) No mercury or other chemicals are used to assist with the recovery of hard mineral resources.

(5) Activities occur exclusively between sunrise and sunset.

(6) No mussels are taken as prescribed by 312 IAC 9-9-3.

(7) No endangered species are taken as prescribed by IC 14-22-34-12.

(d) The following waterways do not qualify for prospecting under subsection (c) or under 312 IAC 10-5-11(c):

(1) Big Blue River in Harrison County, Crawford County, and Washington County from river mile 57.2 downstream to river mile 11.5.

(2) The East Branch of the Little Calumet River in Porter County.

(3) Lake Michigan.

(4) The Portage Burns Waterway in Porter County.

(5) St. Joseph River in St. Joseph County from the Twin Branch Dam in Mishawaka downstream to the Michigan State Line.

(e) Nothing in this section is intended to modify the rights of riparian owners.

Annotation: This section was codified in November 2009 to govern prospecting, including a general license for qualified activities.

"Prospecting" is defined at 312 IAC 6-2-6.8. Similar standards apply at 312 IAC 10-5-11 to waterways within floodways.

In 2010, the Commission approved a nonrule policy document to assist with implementing this section and related sections. "Prospecting in Indiana", Information Bulletin #62 20100602-IR-312100347NRA, *Indiana Register* (July 1, 2010). The document is also available through the Commission's website at www.ai.org/nrc/2375.htm.

Rule 6. General Authorization for Beach Nourishment to Lake Michigan

312 IAC 6-6-1 Applicability

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

Affected: IC 14-29-1

Sec. 1. (a) This rule establishes terms for a general authorization to place sand for beach nourishment within Indiana Dunes National Lakeshore or Indiana Dunes State Park.

(b) A person who acts under this rule is not required to complete an application or to obtain a written license from the department under IC 14-29-1. A person may, however, elect to seek a written license under IC 14-29-1 rather than apply this rule.

Annotation: The section was codified September 11, 1997. A similar general permit or authorization for beach nourishment was previously implemented by temporary rule on April 15, 1996 and expired on April 14, 1997. The former temporary rule was published at 19 IND. REG. 2316 (June 1, 1996).

"The rule provided "a 'general permit' for the placement of beach nourishment where materials to be placed do not include harmful contaminants and where the direct recipient is either the Indiana Dunes National Lakeshore or the Indiana Dunes State Park. The permitting process is not the primary impediment to placement of beach nourishment; lack of a regular funding source is. Yet access to a 'general permit' should help encourage the placement of beach nourishment when it is economically viable and environmentally sound." Report of Public Hearing, Analysis and Recommendation for Final Adoption, Recodification of the Rules Governing Navigable Waters, LSA #97-56(F) (June 9, 1997).

The section was readopted without changes in 2003 and 2009.

312 IAC 6-6-2 Notice to the department of natural resources

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

Affected: IC 14

Sec. 2. A person who wishes to obtain a general authorization under this rule must provide a written notice to the division of water of the department, including the following:

- (1) The name, address, and telephone number of any person seeking the authorization. Persons for which the information shall be provided include:
 - (A) the owner of the sand before placement for beach nourishment; and
 - (B) if other than the owner, the person who transports the sand.
- (2) The site, and the ownership of the site, from which sand will be removed or extracted.
- (3) The results of any testing or other documentation to establish the sand is unlikely to contain contaminants harmful to humans or aquatic life.
- (4) The method by which the sand is to be transported.
- (5) The site where the sand is to be deposited for the purpose of providing beach nourishment and written acceptance of the riparian owner for its deposit.
- (6) The period for which the general authorization is sought.

Annotation: The section was codified September 11, 1997. A similar provision was implemented by temporary rule on April 15, 1996 and expired on April 14, 1997. The former temporary rule was published at 19 IND. REG. 2316 (June 1, 1996). The section was readopted without changes in 2003 and 2009.

312 IAC 6-6-3 Department project review

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

Affected: IC 14

Sec. 3. (a) Following the receipt of a written notice under section 2 of this rule, the department shall inspect the site from which the sand is to be extracted and the site at which the sand is to be deposited. Within fourteen (14) days after the receipt of the written notice, the department shall inform the person seeking the general authorization whether:

- (1) the person may proceed;
- (2) the person must comply with additional conditions in order to act under this rule, which general conditions may include successful completion of testing criteria; or
- (3) the person cannot act except according to a license issued under IC 14-29-1-8.

(b) In performing its review, the department shall consider whether removal, transport, or placement of the sand is likely to pose a hazard to either of the following:

- (1) Public health or safety.
- (2) The environment.

(c) If the department does not respond within fourteen (14) days of the receipt of a written notice, the request for the general authorization is deemed to have been approved.

Annotation: The section was codified September 11, 1997. A similar provision was implemented by temporary rule on April 15, 1996 and expired on April 14, 1997. The former temporary rule was published at 19 IND. REG. 2316 (June 1, 1996). This section was readopted without changes in 2003 and 2009.

312 IAC 6-6-4 Posting

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

Affected: IC 14

Sec. 4. The department may require a person who acts upon the general authorization to post a copy of the written notice, together with the acceptance and any terms or conditions required by the department, at the site where the sand is deposited.

Annotation: The section was codified September 11, 1997. A similar provision was implemented by temporary rule on April 15, 1996 and expired on April 14, 1997. The temporary rule was published at 19 IND. REG. 2316 (June 1, 1996). This section was readopted without changes in 2003 and 2009.

312 IAC 6-6-5 Compliance with terms and sanctions for violations

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

Affected: IC 14

Sec. 5. (a) A person who acts upon a general authorization must comply with the terms of the written notice provided under section 2 of this rule and any conditions under section 3 of this rule.

(b) A violation of subsection (a) may result in a revocation or suspension of the general authorization or in any other sanction provided by law for the violation of a license issued by the department.

Annotation: The section was codified September 11, 1997. A similar provision was implemented by temporary rule on April 15, 1996 and expired on April 14, 1997. The temporary rule was published at 19 IND. REG. 2316 (June 1, 1996). This section was readopted without changes in 2003 and 2009.

Rule 7. Emergency Construction Activities in Lake Michigan

312 IAC 6-7-1 Application

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 1. (a) This rule establishes standards for determining whether an emergency condition warrants the approval of a construction activity along or within the ordinary high watermark of Lake Michigan where a license application, review, and approval are not completed before conducting the activity. An emergency authorization under this rule applies to IC 14-28-1 and IC 14-29-1.

(b) The presumption is a license application, review, and approval process must be completed before a construction activity can be approved. An emergency action is authorized only if the division director finds the action is supported by extraordinary circumstances as described in this rule.

(c) This rule also sets procedures for seeking approval of an emergency activity and the status of improvements made as a result of the activity.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

This rule addresses the issuance of emergency permits for construction activities along and within the ordinary high watermark of Lake Michigan. The goal was "to make more accessible to the public through the development of a written document, the current licensing practices of the Department of Natural Resources." Opportunities for public participation were clarified. 312 IAC 6-7 was adopted together with 312 IAC 6-8 which identified standards for the permanent placement of hard structures along and within Lake Michigan. "Rules to Standardize Licensing of Lake Michigan Construction", *Shorelines*, p. 6 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

312 IAC 6-7-2 Request for approval of emergency construction

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 2. (a) A person who wishes to perform emergency construction along or within the ordinary high watermark of Lake Michigan, without first obtaining license approval under IC 14-29-1 and this article, must notify the department and the applicable county emergency management agency.

(b) The notice shall describe the nature of the emergency and the construction requested to be performed in response to the emergency. The notice must provide sufficient information for the department to review the request under the terms set forth in this rule.

(c) An authorization issued under this rule also satisfies the need to obtain a license under IC 14-28-1 for the period the authorization is in effect.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

312 IAC 6-7-3 Response to request for emergency construction approval

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 3. Upon the receipt of a request for emergency construction approval, the department shall perform an on-site inspection. To the extent practicable, the department shall consult with other agencies before responding to the request. Included among these agencies are the U.S. Army Corps of Engineers and the appropriate county emergency management agency.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

"In an emergency, new emphasis is placed on department coordination with the appropriate county emergency management agency and the U.S. Army Corps of Engineers." "Rules to Standardize Licensing of Lake Michigan Construction", *Shorelines*, p.p. 6 and 7 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

312 IAC 6-7-4 Determining if an emergency exists

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 4. The department may grant a request to approve emergency construction if, without performing the construction, there is an imminent risk of harm to public safety or major damage to property and at least one (1) of the following conditions exist:

- (1) No erosion protection structure is present at the site.
- (2) A failure or significant structural deterioration of an existing erosion protection structure has occurred. Examples include the following:
 - (A) Erosion of the lake bottom has occurred adjacent to a sheet steel wall.
 - (B) Stones in a rock revetment have shifted.
- (3) Major shoreline erosion has occurred.
- (4) A bluff face is excessively steep and threatens mass slumping.
- (5) Without the construction, there would be a likelihood of significant harm to the environment or to public health and safety.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

This rule supports "a public policy that encourages a thorough evaluation of construction activities before they occur and that discourages the approval of emergency licenses." "Rules to Standardize Licensing of Lake Michigan Construction", *Shorelines*, p. 6 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

312 IAC 6-7-5 Factors tending to support a finding an emergency exists

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 5. Factors tending to support a finding emergency conditions are present under section 3 of this rule include the following:

- (1) The lake level is rising.
- (2) The current lake level is higher than the ordinary high watermark (five hundred eighty-one and five-tenths (581.5) feet) or lower than five hundred seventy-eight (578) feet I.G.L.D., 1985.
- (3) The failed or threatened erosion control structure is in close proximity to the subject property.
- (4) The content, design, or position of an erosion control structure makes its accelerated deterioration or collapse more likely.
- (5) The existing angle of repose of a bluff face or the bluff height make continued slumping probable.
- (6) The risk of harm to public safety or major damage to real property is aggravated by external circumstances.
- (7) If immediate action is not taken, persons other than the person seeking to perform emergency remedial action are also likely to suffer harm.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

312 IAC 6-7-6 Disposition of emergency license

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 6. (a) The department may approve, approve with conditions, or deny a request for an emergency authorization under this rule. This disposition may be made orally if conditions warrant but shall be memorialized in writing as quickly as practicable.

(b) The department may terminate an application for an emergency license if the applicant fails to provide supporting documentation in a timely fashion.

(c) Unless otherwise specified in writing by the department, an approval under this rule is effective for ninety (90) days.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

312 IAC 6-7-7 After-the-fact license

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-18-6; IC 14-28-1; IC 14-29-1

Sec. 7. (a) A person who obtains and acts upon an emergency authorization under this rule must file with the department a completed application, under IC 14-29-1 and this article, for a permanent after-the-fact license within ninety (90) days of commencing the emergency activity.

The department may, for good cause, grant an extension of time for filing an after-the-fact license application.

(b) If the activity for which an emergency authorization is granted also requires a license under IC 14-28-1, a completed application for a permanent after-the-fact license under IC 14-28-1 must also be filed with the department within ninety (90) days of commencing the emergency activity.

(c) Subsections (a) and (b) do not apply if the person granted an emergency authorization conducts no activity over which the department has jurisdiction under IC 14-28-1 or IC 14-29-1.

(d) The receipt of an emergency authorization creates no inference of entitlement to an after-the-fact license or to ownership of the bed of Lake Michigan. The department may require modification or removal of any material or structure placed on or within the ordinary high watermark of Lake Michigan if appropriate to IC 14-29-1 and this article. A person may obtain title to lands within the ordinary high watermark of Lake Michigan only upon compliance with IC 14-18-6.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

"A person who receives and acts upon an emergency license is required to apply for a permanent license" under 312 IAC 6-8 "for the activity, ordinarily within 90 days after beginning the emergency activity." "Rules to Standardize Licensing of Lake Michigan Construction", *Shorelines*, p. 7 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

312 IAC 6-7-8 Administrative review

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 4-21.5; IC 14-28; IC 14-29

Sec. 8. (a) An affected person may obtain administrative review under IC 4-21.5 and 312 IAC 3-1 of a determination under this rule. The division of hearings of the commission shall, as soon as practicable, conduct any appropriate proceeding.

(b) Unless otherwise agreed by the parties, a hearing under this section shall be held in an Indiana county that borders Lake Michigan.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

"If a hearing is requested to consider an emergency license, the Commission would make scheduling the hearing a high priority" and would hold the hearing in Northwest Indiana. "Rules to Standardize Licensing of Lake Michigan Construction", *Shorelines*, p. 7 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

Rule 8. Placement of Permanent Structures in Lake Michigan

312 IAC 6-8-1 Application of rule

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29-1

Sec. 1. (a) This rule establishes standards for determining whether to grant approval for the placement of a permanent structure in Lake Michigan under IC 14-29-1.

(b) If the permanent structure is a marina, approval must be obtained under 312 IAC 6-4 in addition to this rule.

(c) As used in this rule, “permanent structure” means a:

- (1) marina;
- (2) seawall;
- (3) breakwater;
- (4) detached breakwater;
- (5) jetty;
- (6) boat launch;
- (7) “z” wall;
- (8) binwall;
- (9) sinusoidal wall;
- (10) bulkhead;
- (11) groin;
- (12) grout tube;
- (13) cable;
- (14) pipeline;
- (15) wharf;
- (16) pier;
- (17) piling;
- (18) rock revetment; or
- (19) similar structure.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

The primary purpose for the adoption of 312 IAC 6-8 was to address permitting of seawalls, breakwaters, and similar hard structures along and within the ordinary high watermark of Lake Michigan. The goal was “to make more accessible to the public through the development of a written document, the current licensing practices of the Department of Natural Resources.” Opportunities for public participation were clarified for public participation. “Rules to Standardize Licensing of Lake Michigan Construction”, *Shorelines*, p. 6 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

312 IAC 6-8-2 License for the placement of a structure

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 2. (a) A person who wishes to place a permanent structure on or within the ordinary high watermark of Lake Michigan must file a license application with the department that is completed under this article.

(b) The applicant must include plans, drawings, other specifications reasonably required for the department to determine whether placement of the permanent structure would satisfy 312 IAC 6-1-1.

(c) The applicant must demonstrate the permanent structure will not do any of the following:

- (1) Unreasonably impair the navigability of the lake or an adjacent navigable waterway.
- (2) Cause significant harm to the environment.
- (3) Pose an unreasonable hazard to life or property.

(d) The applicant shall evaluate the likely impact of the permanent structure on coastal dynamics, including the following:

- (1) Shoreline erosion and accretion.
- (2) Sand movement within the lake.
- (3) The interaction with existing structures.

(e) The applicant must demonstrate either that it is the fee owner of land immediately adjacent to the site where the construction would take place or that the applicant has written authorization from the fee owner of that land.

(f) The applicant must provide notice to persons adjacent to the affected real property as described in 312 IAC 2-3.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

This section requires the Department of Natural Resources to consider several factors before approving the placement of "hard structures". General factors include the potential for harmful impact to navigation, the environment, public safety, and the property of persons other than the applicant. More specific factors include the likelihood the structure would result in shoreline erosion, harmful sand movement within Lake Michigan, or adverse interaction with existing lake structures. "Rules to Standardize Licensing of Lake Michigan Construction", *Shorelines*, p. 6 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

312 IAC 6-8-3 Action by department

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 4-21.5-3-5; IC 14-28; IC 14-29-1

Sec. 3. (a) The department may determine to approve, approve with conditions, or deny a license sought under this rule and IC 14-29-1. Those conditions may include any action needed to mitigate a negative impact identified under section 2 of this rule. Notice of the determination shall be provided to the applicant and any other person required to be notified under IC 4-21.5-3-5.

(b) The department may terminate a license application where the applicant fails to provide supporting documentation in a timely fashion.

(c) If the department determines the placement of a structure as described in the application would violate the public trust doctrine, the department shall either deny the application or condition approval of the application upon terms that would allow placement of the structure without violation of the public trust doctrine. The license may be conditioned to assure that any public access will not be impeded and to provide for complete removal of the structure and site restoration, at the expense of the riparian landowner, when the structure is no longer required.

(d) As a condition of approval, the department may require monitoring of the structure or of affected lands and waters to determine the impact of the structure upon coastal dynamics or other environmental factors. If monitoring or other documentation identifies a negative impact that was not fully addressed when the license was approved, the department may require removal, modification, or improvement to the structure (or another action needed) to mitigate the negative impact.

Annotation: The section was codified in 2001 and readopted without changes in 2003 and 2009.

Before acting on a license application, the Department of Natural Resources shall consider the public trust. As a condition for license approval, the Department can require monitoring of the structure or affected lands to determine the impact on coastal dynamics. If harmful impacts are identified, the agency can require modification or removal of the structure. "Rules to Standardize Licensing of Lake Michigan Construction", *Shorelines*, p. 6 (DNR Lake Michigan Coastal Coordination Program, Summer-Fall 2000).

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