

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

During the October 2007 meeting, Richard Cockrum asked about the regulation of stone and gravel extractions from rivers and streams. He suggested the activity could have an adverse impact on fisheries and other wildlife, as well as botanical resources. Cockrum asked whether the Flood Control Act could be applied to regulate the activity.

Ron McAhron responded there have been discussions within DNR concerning gravel extractions from creek beds. His understanding was there was once an informal DNR committee looking into the feasibility and legality of developing rules to address this issue. A decision from the Switzerland Circuit Court dismissing an action by the local prosecutor, which was later affirmed by the Court of Appeals of Indiana, has discouraged the agency from moving forward with rule adoption. The DNR was not a party to the prosecution or appeal, however, and the dismissal was entered in the absence of any standards. McAhron reflected that the agency would take another look at rule adoption, and prepare a draft for discussion by the Advisory Council.

As a consequence, a working draft was presented to the Advisory Council during the February 2008 meeting. The draft was prepared by the Division of Water and the Division of Fish and Wildlife and addressed non-navigable waterways. The draft was structured so the Advisory Council could recommend preliminary adoption to the Natural Resources Commission. During the Advisory Council meeting, modifications were recommended to the draft. The Department was instructed to prepare a revised draft incorporating these modifications and to return the topic for review at the April meeting. Jon Eggen was made the contact person for any additional thoughts by individual members of the Advisory Council.

The Department has incorporated several changes into the draft. In addition, the Division of Hearings was requested and has added comparable provisions that would address navigable waters. The revised draft is set forth below.

Recommendation: The recommendation is that the Advisory Council recommend the Natural Resources Commission give preliminary adoption to amendments to 312 IAC 6 and 312 IAC 10 to address the extraction of “creek rock” from navigable waterways and non-navigable waterways, respectively, as set forth in the revised draft.

TITLE 312 NATURAL RESOURCES COMMISSION

Proposed Rule
LSA Document #08-

DIGEST

Amends 312 IAC 6 for navigable waters and 312 IAC 10 for non-navigable waters to address general licenses and individual licenses for the extraction of creek rock. Effective 30 days after filing with the Publisher.

312 IAC 6-2-3.3

312 IAC 6-2-3.8

312 IAC 6-2-7.5

312 IAC 6-2-7.6

312 IAC 6-5-9

312 IAC 6-5-10

312 IAC 10-2-16.5

312 IAC 10-2-24.5

312 IAC 10-2-33.6

312 IAC 10-2-33.7

312 IAC 10-5-9

312 IAC 10-5-10

SECTION 1. 312 IAC 6-2-3.3 IS ADDED TO READ AS FOLLOWS:

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.

(5) Hard mineral resources. *(Natural Resources Commission; 312 IAC 6-2-3.3)*

SECTION 2. 312 IAC 6-2-3.8 IS ADDED TO READ AS FOLLOWS:

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

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

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 minerals. (*Natural Resources Commission; 312 IAC 6-2-3.8*)

SECTION 3. 312 IAC 6-2-7.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-2-7.5 “Recreational dredging” 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. 7.5. “Recreational dredging” means an activity which complies with both of the following:

(1) Occurs exclusively within an active channel and either:

(A) beneath the water surface; or

(B) upon non-vegetated sand or gravel bars.

(2) Uses either:

(A) A suction dredge with a nozzle opening not larger than two and a half

(2.5) inches and with a rating of not more than four (4) horsepower; or

(B) Powered sluice equipment of two and a half (2.5) horsepower or less and related tools. (*Natural Resources Commission; 312 IAC 6-2-7.5*)

SECTION 4. 312 IAC 6-2-7.6 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-2-7.6 “Recreational panning” defined

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

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

Sec. 7.6. “Recreational panning” means the use of non-motorized equipment such as a pan, sluice box, or a pick and shovel. (*Natural Resources Commission; 312 IAC 6-2-7.6*)

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

312 IAC 6-5-9 Creek rock removal and recreational panning in navigable waterway; general license without notice

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

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

Sec. 9. (a) Except as provided in subsection (d), this section establishes a general license without notice for the removal of creek rock from a navigable waterway which is subject to IC 14-28-1, IC 14-29-1, or IC 14-29-3. To act under this section, a person must be a riparian owner (or have written permission from a person who is a riparian owner) of the parcel of the navigable waterway where creek rock is removed.

(b) Without a written license under IC 14-28-1, IC 14-29-1 or IC 14-29-3 and without notice to the department, 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.

(C) Scoop-type excavating equipment. The use of a bulldozer or rock crusher does not qualify under this clause.

(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.

(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, a person may conduct recreational panning from the parcel.

(d) An individual license is required for the removal of creek rock from Lake Michigan. (*Natural Resources Commission; 312 IAC 6-5-9*)

SECTION 6. 312 IAC 6-5-10 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-5-10 Creek rock removal and recreational dredging in navigable waterway; general license with notice

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

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

Sec. 10. (a) Except as provided in subsection (d), this section establishes a general license with notice for the removal of creek rock and for recreational dredging from a navigable waterway which is subject to IC 14-28-1, IC 14-29-1, and IC 14-29-3. To act under this section, a person must be a riparian owner (or have written permission from a person who is the riparian owner) of the parcel of the navigable waterway where creek rock is removed.

(b) Without a written license under IC 14-28-1, IC 14-29-1 or IC 14-29-3 but with notice to the department, a person may remove creek rock or conduct recreational dredging from the parcel, if the person complies with this section.

(c) A person who wishes to remove creek rock or conduct recreational dredging under this section must file a written notice, on a department form, with the division of fish and wildlife. The notice must include the following information:

(1) Identification of the navigable waterway and a description of the parcel where the removal would occur, including the following:

(A) Terminal points of the project.

(B) Access routes to the project referenced to readily a discernable landmark, such as a bridge or a dam.

(C) The project and access routes must be illustrated on at least one (1) of the following:

(i) United States Geological Survey topographic map; or

(iii) Another map determined by the department to satisfy the purposes of this clause.

(2) The name, address, and telephone number of the person who is seeking the general license. If any of the activities would be performed on behalf of the person by an independent contractor, the name, address, and telephone number of the independent contractor must also be provided.

- (3) Documentation to demonstrate the person seeking the general license is a riparian owner of the parcel (or has written permission from the person who is a riparian owner of the parcel).**
- (4) A statement in which the person agrees to comply with the following conditions:**
- (A) Creek rock would be removed exclusively through the use of hand-operated equipment or mechanical means, such as an excavator with a bucket with minimal fallback, and would not be pushed and stockpiled. Examples of equipment that qualify for use under this clause include a small tractor, backhoe, or front-end loader. Examples of equipment that do not qualify under this clause include a bulldozer or a rock crusher.**
 - (B) No access road would be constructed to do any of the following:**
 - (i) Destroy more than one-half (1/2) of an acre of trees within a floodway;**
 - (ii) Traverse a wetland indicated on the national wetlands inventory map unless pads are used;**
 - (iii) Raise the elevation of the flood plain governed by IC 14-28; or**
 - (iv) Cross a waterway.**
 - (C) Access to the project would be exclusively from one (1) side of the waterway.**
 - (D) Not more than fifty (50) total cubic yards of creek rock would be removed from the waterway within one (1) calendar year.**
 - (E) Recreational dredging would be limited to the following:**
 - (i) July 1 through March 31 of the following year; and**
 - (ii) a maximum of thirty (30) days.**
- (d) The following areas do not qualify for a general license under this section:**
- (1) Within one-half (1/2) mile of any of the following:**
 - (A) A species listed in the “Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern)”, Information Bulletin #2-Fourth Amendment (August 1, 2007), published in the Indiana Register at 20070815-IR-312070469NRA.**
 - (B) A known mussel resource.**
 - (C) An outstanding natural area, as contained on the registry of natural areas maintained in the natural heritage data center of the department.**
 - (2) Within a river or stream listed in the Outstanding Rivers List for Indiana, Information Bulletin #4-Second Amendment (May 23, 2007), published in the Indiana Register at 20070530-IR-312070287NRA.**
 - (3) Within a river or stream listed for limited use or as an outstanding state resource, under 327 IAC 2-1-11 or 327 IAC 1.5-19, unless a written authorization is provided by the Indiana department of environmental management.**
 - (4) Within a river or stream listed pursuant to IC 13-18-2-3 as an impaired water where the cause of impairment is Impaired Biotic Communities.**
 - (5) Within Lake Michigan.**
- (e) Within ten (10) days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a written notice under subsection (c), the division of fish and wildlife shall provide a written response that does one (1) of the following:**
- (1) Approves the terms of the notice.**
 - (2) Provides additional conditions to the approval.**
 - (3) Requires additional information.**

(4) Requires the person to obtain a permit for the activity under IC 14-28-1 or IC 14-29-1.

If the department does not respond under this subsection in a timely fashion, the written notice is approved.

(f) A copy of the written notice provided under subsection (c) and any additional conditions provided by the department under subsection (d) must be posted by the person in a conspicuous location at the site of the project.

(g) The authorization for activities conducted under this section expires two (2) years after the date of issuance by the department.

(h) The authorization for activities conducted under this section does not waive permit requirements of other state, federal, or local government.

(i) A person who elects to act under this general license with notice must comply with the terms of the written notice provided under subsection (c) and with any additional conditions provided by the department under subsection (e). Failure to comply with these terms and conditions may result in the revocation of the general license, a civil penalty, a commission charge, and any other sanction provided by law for the violation of a license issued under IC 14-28-1, IC 14-29-1, IC 14-29-3, 312 IAC 6, or 312 IAC 10. (*Natural Resources Commission; 312 IAC 6-5-10*)

SECTION 7. 312 IAC 10-2-16.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 10-2-16.5 “Creek rock” defined

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

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

Sec. 16.5. “Creek rock” means each of the following located within a waterway:

- (1) Sand.**
- (2) Gravel.**
- (3) Rock.**
- (4) Slab rock.**
- (5) Hard mineral resources.** (*Natural Resources Commission; 312 IAC 10-2-16.5*)

SECTION 8. 312 IAC 10-2-24.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 10-2-24.5 “Hard mineral resources” defined

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

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

Sec. 24.5. “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 minerals. *(Natural Resources Commission; 312 IAC 10-2-24.5)*

SECTION 9. 312 IAC 10-2-33.6 IS ADDED TO READ AS FOLLOWS:

312 IAC 10-2-33.6 “Recreational dredging” defined

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

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

Sec. 33.6. “Recreational dredging” means an activity which complies with both of the following:

(1) Occurs exclusively within an active channel and either:

(A) beneath the water surface; or

(B) upon non-vegetated sand or gravel bars.

(2) Uses either:

(A) A suction dredge with a nozzle opening not larger than two and a half

(2.5) inches and with a rating of not more than four (4) horsepower; or

(B) Powered sluice equipment of two and a half (2.5) horsepower or less and related tools. *(Natural Resources Commission; 312 IAC 10-2-33.6)*

SECTION 10. 312 IAC 10-2-33.7 IS ADDED TO READ AS FOLLOWS:

312 IAC 10-2-33.7 “Recreational panning” defined

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

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

Sec. 33.7. “Recreational panning” means the use of non-motorized equipment such as a pan, sluice box, or a pick and shovel. *(Natural Resources Commission; 312 IAC 10-2-33.6)*

SECTION 11. 312 IAC 10-5-9 IS ADDED TO READ AS FOLLOWS:

312 IAC 10-5-9 Creek rock removal and recreational panning in non-navigable waterway; general license without notice

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

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

Sec. 9. (a) Except as provided in subsection (d), this section establishes a general license without notice for the removal of creek rock from a waterway which is subject to IC 14-28-1. To act under this section, a person must own (or have written permission from a person who owns) the parcel of a waterway where creek rock is removed.

(b) Without a written license under IC 14-28-1 and without notice to the department, 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.

(C) Scoop-type excavating equipment. The use of a bulldozer or rock crusher does not qualify under this clause.

- (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.

(c) Without a written license under IC 14-28-1 and without notice to the department, a person may conduct recreational panning from the parcel.

(d) A navigable waterway is governed by 312 IAC 6. (*Natural Resources Commission; 312 IAC 10-5-9*)

SECTION 12. 312 IAC 10-5-10 IS ADDED TO READ AS FOLLOWS:

312 IAC 10-5-10 Creek rock removal and recreational dredging from a non-navigable waterway; general license with notice
Authority: IC 14-10-2-4; IC 14-28-1-5
Affected: IC 14-28-1; IC 14-29-1

Sec. 10. (a) Except as provided in subsection (j), this section establishes a general license with notice for the removal of creek rock and for recreational dredging from a waterway which is subject to IC 14-28-1. To act under this section, a person must own (or have written permission from the person who owns) the parcel of a waterway where creek rock is removed.

(b) Without a written license under IC 14-28-1 but with notice to the department, a person may remove creek rock or conduct recreational dredging from the parcel, if the person complies with this section.

(c) A person who wishes to remove creek rock or conduct recreational dredging under this section must file a written notice, on a department form, with the division of fish and wildlife. The notice must include the following information:

(1) Identification of the waterway and a description of the parcel where the removal would occur, including the following:

- (A) Terminal points of the project.
- (B) Access routes to the project referenced to readily a discernable landmark, such as a bridge or a dam.
- (C) The project and access routes must be illustrated on at least one (1) of the following:
 - (i) United States Geological Survey topographic map; or
 - (iii) Another map determined by the department to satisfy the purposes of this clause.

(2) The name, address, and telephone number of the person who is seeking the general license. If any of the activities would be performed on behalf of the person by an independent contractor, the name, address, and telephone number of the independent contractor must also be provided.

(3) Documentation to demonstrate the person seeking the general license is the owner of the parcel (or has written permission from the person who is the owner of the parcel).

(4) A statement in which the person agrees to comply with the following conditions:

- (A) Creek rock would be removed exclusively through the use of hand-operated equipment or mechanical means, such as an excavator with a

bucket with minimal fallback, and would not be pushed and stockpiled. Examples of equipment that qualify for use under this clause include a small tractor, backhoe, or front-end loader. Examples of equipment that do not qualify under this clause include a bulldozer or a rock crusher.

(B) No access road would be constructed to do any of the following:

(i) Destroy more than one-half (1/2) of an acre of trees within a floodway;

(ii) Traverse a wetland indicated on the national wetlands inventory map unless pads are used;

(iii) Raise the elevation of the flood plain; or

(iv) Cross a waterway.

(C) Access to the project would exclusively from one (1) side of the waterway.

(D) Not more than fifty (50) total cubic yards of creek rock would be removed from the waterway within one (1) calendar year.

(E) Recreational dredging would be limited to the following:

(i) July 1 through March 31 of the following year; and

(ii) a maximum of thirty (30) days.

(d) The following areas do not qualify for a general license under this section:

(1) Within one-half (1/2) mile of any of the following:

(A) A species listed in the “Roster of Indiana Animals, Insects, and Plants that are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern)”, Information Bulletin #2-Fourth Amendment (August 1, 2007), published in the Indiana REGISTER at 20070815-IR-312070469NRA.

(B) A known mussel resource.

(C) An outstanding natural area, as contained on the registry of natural areas maintained in the natural heritage data center of the department.

(2) Within a river or stream listed in the Outstanding Rivers List for Indiana, Information Bulletin #4-Second Amendment (May 23, 2007), published in the Indiana Register at 20070530-IR-312070287NRA.

(3) Within a river or stream listed for limited use or as an outstanding state resource, under 327 IAC 2-1-11 or 327 IAC 1.5-19, unless a written authorization is provided by the Indiana department of environmental management.

(4) Within a river or stream listed pursuant to IC 13-18-2-3 as an impaired water where the cause of impairment is Impaired Biotic Communities.

(e) Within ten (10) days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a written notice under subsection (c), the division of fish and wildlife shall provide a written response that does one (1) of the following:

(1) Approves the terms of the notice.

(2) Provides additional conditions to the approval.

(3) Requires additional information.

(4) Requires the person to obtain a permit for the activity under IC 14-28-1 or IC 14-29-1.

If the department does not respond under this subsection in a timely fashion, the written notice is approved.

(f) A copy of the written notice provided under subsection (c) and any additional conditions provided by the department under subsection (d) must be posted by the person in a conspicuous location at the site of the project.

(g) The authorization for activities conducted under this section expires two (2) years after the date of issuance by the department.

(h) The authorization for activities conducted under this section does not waive permit requirements of other state, federal, or local government.

(i) A person who elects to act under this general license with notice must comply with the terms of the written notice provided under subsection (c) and with any additional conditions provided by the department under subsection (e). Failure to comply with these terms and conditions may result in the revocation of the general license, a civil penalty, a commission charge, and any other sanction provided by law for the violation of a license issued under IC 14-28-1 or 312 IAC 10.

(j) A navigable waterway is governed by 312 IAC 6. (*Natural Resources Commission; 312 IAC 10-5-10*)