

IDNR Public Notice Guidance

The Procedures Governing Certain Licenses Act (IC 14-11-4) was enacted to ensure that the general public is afforded the opportunity to participate in certain regulatory programs administered by the IDNR. The Act prohibits IDNR from acting on a permit application until 30 days after the public notice requirement has been met. The following five programs administered by the Division of Water are subject to the Act's public notice requirements:

Lakes Preservation Act (IC 14-26-2),
Lowering of Ten Acre Lakes Act,
Flood Control Act (IC 14-28-1),
Sand and Gravel Permits Act (IC 14-29-3), and
Construction of Channels Act (IC 14-29-4).

The IDNR guidance for providing public notice can be found at:
http://www.in.gov/dnr/water/permits/application_manual/generalpublicnotice.html
http://www.in.gov/dnr/water/permits/application_manual/publicnotice.html

An IDNR administrative law judge ruled that the practice of providing public notice to adjacent landowners prior to submitting a permit application to the IDNR is in conflict with 312 IAC 2-3-3. Therefore, public notice as required under the following statutes must be provided to the adjacent landowners after the application is submitted to the Division of Water, IDNR.

A basic principle of the Procedures Governing Certain Licenses Act is the public's right to notification of pending application(s). The Act stipulates that both the applicant and the IDNR must provide public notice.

Section 5 of the Act states "... the applicant [or authorized agent] must notify at least one (1) of the owners of each parcel of real property reasonably known to be adjacent to the affected real property". This citation contains 2 terms that are fundamental to fulfilling the notification mandate; "owner" and "adjacent to the affected real property". The Act defines "owner" as:

"owner" means "... the person:

(1) Listed on the tax assessment rolls as being responsible for the payment of real property taxes imposed on the property; and

(2) In whose name title to real property is shown in the records of the recorder of the county in which the real property is located".

The phrase "adjacent to the affected real property" is defined by the Public Hearings Rule, 312 IAC 2-3:

"adjacent to the affected real property" means "real property owned by a person, other than the applicant, which is both of the following:

(1) Located within one-fourth (1/4) mile of the site where the licensed activity would take place.

(2) Has a border or point in common with the exterior boundary of the property where the licensed activity would take place. Included is property which would share a common border or point if not for the separation caused by a right-of-way, easement, or railroad."

Note: The IDNR includes roadways and waterways within the context of a right-of-way.

If the project site is owned by someone other than the applicant, the property owner is considered to be an affected landowner and must be given notice by the applicant.

The Act states that the IDNR must provide notice to:

"... persons who have requested notification of a license [permit] application that:

(A) Affects specific real property to which the application relates; or

(B) Is of the same type as the application".

To satisfy this requirement IDNR prepares and mails a list of recently filed applications on a weekly basis. The list is provided without charge to individuals, groups, organizations, etc. who wish to be informed of the applications received. To be placed on the mailing list, submit a written request, including the complete mailing address:

Technical Services Section
Division of Water
Room W264
402 West Washington Street
Indianapolis, Indiana 46204

To ensure that the applicant's and INDR's notice contain sufficient material to adequately inform the recipient(s) of the project scope and hearing options, the Public Hearings Rule specifies what material must be included in the notice.

"A notice ... shall do the following:

(1) Provide the name and address of the applicant.

(2) Identify the statute and rule under which a permit is sought.

(3) Identify the specific real property to which the application relates ...

(4) Set forth any other information required by statute or rule relative to the particular type of permit sought.

(5) Include an explanation of the options available to the person served. These options shall be as follows:

- (A) File a petition with the director requesting an informal hearing
- (B) Request the IDNR to notify the person in writing when an initial determination is made to issue or deny the permit ..."

Using the statutory requirements as a base, the IDNR developed an example public notice form: <http://www.in.gov/icpr/webfile/formsdiv/50354.pdf>

It requires that the notice minimally include:

1. applicant's name, address and telephone number;
2. agent's name, address and telephone number (if applicable);
3. stream or lake name;
4. project description;
5. project location;
6. relevant statute or rule; and
7. name, address and telephone number of the person to contact if questions arise in regard to the project.

The statute bars the IDNR from acting on an application until 30 days after the public notice requirement has been met: "... the director may not issue a license [permit] until thirty (30) days after the notice required by this chapter has been given". Therefore, it is to the applicant's advantage to provide the notice as early in the application process as possible. The 30-day waiting period applies not only to the applicant's notice but to IDNR as well. Both notice periods must expire prior to action by IDNR.

If an incomplete application is filed with IDNR and is not made complete within a reasonable period of time, the Public Hearings Rule allows IDNR to deny the application without satisfying the public notice provision.

The Public Hearings Rule offers the applicant several methods of notice:

1. Personal Service:

Under this option, the applicant must hand deliver the public notice form to the adjacent property owner(s). Proof that notice has been provided is accomplished by completing and returning a form N-4 provided by the Department. The form requires the applicant to list the name(s) and address(es) of the individual(s) served as well as the date(s) on which service was performed. If you are using a mode of personal delivery, the effective date of the public notice is considered the date the public notice was delivered to the adjacent landowner. The applicant is required to attest to the accuracy of the information stated on the form by signing and dating it under the penalties for perjury.

2. 1st Class Mail:

Through this option, 1st class mail is used to provide notice to the adjacent property owner(s). For each notice sent, the applicant must obtain a "Certificate of Mailing", Postal Form PS 3817, stamped with the date of mailing. Additionally, the applicant must complete a Department supplied Form N-4. The form requires the applicant to list the name(s) and address(es) of the individual(s) served as well as the service date(s). The applicant must also avow on the form that 21 days have elapsed without the notice(s) being returned as undelivered or undeliverable. If you use first class mail to provide public notice, the effective date of the public notice will be based on the actual postmark date. That 21 day period will be reflected on Form N-4 between the date mailed and the date that the form is signed. The applicant attests to the accuracy of the information stated on the form by signing and dating it under the penalties for perjury. The completed form and all "Certificates of Mailing" must be returned to the Department as proof of public notice.

3. Certified Mail:

The third option allows the applicant to provide public notice to the adjacent property owner(s) via "Certified Mail". A "Domestic Return Receipt", Postal Form PS 3811 (commonly known as the "green card"), signed by the recipient must be obtained for each notice. The applicant must complete a form provided by the Department. The form requires the applicant to list the name(s) and address(es) of the individual(s) served as well as the service date(s). Please be aware that, if the public notice notification is mailed via certified mail, the Department will recognize the "Date of Delivery" as the effective date for the 30-day public notice period - not the postmarked date. The applicant attests to the accuracy of the information stated on the form by signing and dating it under the penalties for perjury. The completed form and all "green cards" must be returned to the Department as proof of that public notice has been performed.

4. Legal Publication:

Note: The Public Hearings Rule states that public notice by legal publication may only be used in specific circumstances:

"(A) The current address of a person entitled to notice under this rule is not ascertainable.

(B) The identity or existence of a person entitled to notice is not ascertainable.

(C) The Department [IDNR] directs the applicant to cause notice by publication because the license [permit] application is likely to evoke general public interest". If you are using a publication for public notice, the date of the publication must occur **after the application is submitted** to the [IDNR] Division of Water and will be considered the effective date.

Prior to performing notice by legal publication the applicant should contact the Division of Water's Technical Services Branch at (317) 232-4160 to discuss its suitability. If deemed appropriate, proof of notice is accomplished by submitting a copy of the notice and the publisher's affidavit to the Department [IDNR].

The IDNR public notice, state form 50354 (see Appendix M-4) should be published in a local newspaper (use the current media guide to determine the appropriate local newspaper with the largest circulation) within the project area if more than eight property owners are adjacent to the project.

The Public Hearings Rule clearly states that any expense incurred as a result of the public notice process must be borne by the applicant: "... service of notice must be provided by the applicant at its expense".

The public notice document must advise the notified party(s) of their right to an informal public hearing. To request a hearing, a petition that satisfies the criteria established by the Public Hearings Rule must be filed with the IDNR:

(b). The petition shall include the signatures of at least twenty-five (25) individuals who are at least eighteen (18) years of age and who reside in the county where the licensed activity would take place or who own real property within one (1) mile of the site of the proposed or existing licensed activity.

(c) The complete mailing addresses of the petitioners shall be typed or printed legibly on the petition.

(d) Each individual who signs the petition shall affirm that the individual qualifies under subsection (b).

(e) The petition shall identify the application for which a public hearing is sought, either by division docket [application] number or by the name of the applicant and the location of the permit.

Petitions that do not meet the criteria will be deemed invalid and will not be honored. If IDNR denies an application because it was incomplete, the application does not qualify for an informal public hearing under the Public Hearings Rule.

In addition to the filing of a petition, an informal public hearing may also be held at the request of the applicant or the motion of the director. The public notice must also advise the notified party(s) of their right to notice of the initial determination following action by IDNR. To obtain this notice, a written request, specifying notice of initial determination, must be submitted to:

Technical Services Section
IDNR - Division of Water
Room W264
402 West Washington Street

Indianapolis, Indiana 46204

To facilitate the determination of who is an "adjacent landowner", the IDNR has developed the following technique for identifying "adjacent landowners":

1. Obtain a plat of the area in the vicinity of the project site (generally a plat may be obtained from the auditor's office).
2. Sketch the project boundaries on the plat.
3. Draw the IDNR's jurisdictional boundary on the plat.
4. Determine the project area that lies within the Department's jurisdiction.
5. Outline the property(s) containing the project area determined in step 4.
6. Draw a $\frac{1}{4}$ mile perimeter around the project area developed in step 4.
7. Within the $\frac{1}{4}$ mile perimeter, identify each property that would share a common border or point (exclusive of all rights-of-way, roadways, waterways, easements, or railroads) with the property(s) outlined in step 5.

The owner of each property identified in step 7 is an "adjacent landowner" who must be given notice by the applicant under the provisions of the Act.