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## **TITLE 312 NATURAL RESOURCES COMMISSION**

### **Proposed Rule** LSA Document #05-274

#### **DIGEST**

Amends 312 IAC 11-5-2, which governs lawful nonconforming uses for structures subject to licensure under IC 14-26-2 (commonly known as the "Lakes Preservation Act"), to provide greater specificity to the processes used to evaluate lawful nonconforming uses, to specify that the person claiming a lawful nonconforming use has the burden for establishing conformity and provide two years for the submission of documentation, to specify that the Department of Natural Resources has the burden for establishing that a lawful nonconforming use should be terminated if the department contends it poses a nuisance or has been abandoned, and to clarify that a temporary structure can qualify as a lawful nonconforming use and acknowledge that the seasonal removal of a structure does not constitute abandonment. Effective January 1, 2007.

#### **IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses**

The natural resources commission has the authority to adopt the proposed amendments under IC 14-10-2-4, IC 14-15-7-3, and IC 14-26-2-23. The amendments will clarify the treatment of lawful nonconforming uses under IC 14-26-2 and 312 IAC 11 and will not result in an additional requirement or cost under IC 4-22-2-24(d)(3). The amendments will not impose requirements or costs on small businesses under IC 4-22-2.1-5.

#### **312 IAC 11-5-2**

SECTION 1. 312 IAC 11-5-2 IS AMENDED TO READ AS FOLLOWS:

#### **312 IAC 11-5-2 Lawful nonconforming uses**

**Authority:** IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23

**Affected:** IC 4-21.5-3-5; IC 4-21.5-3-8; IC 4-21.5-4; IC 14-26-2

Sec. 2. (a) A structure or facility that was lawfully placed before the effective date of:

(1) **IC 14-26-2; or**

(2) a section of:

(A) 312 IAC 11-3;

(B) 312 IAC 11-4; or

(C) this rule;

including a structure or facility lawfully placed under a section of 310 IAC 6-2 before its repeal, 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 photographs.

(B) Blueprints and engineering drawings.

(C) Pier installation company records.

(D) The department's division of law enforcement pier inventories.

(E) CAD drawings.

(F) Aerial photographs.

(G) Deeds.

(H) Plats.

(I) Easement intent.

(J) GPS units and range finders.

(K) USDA aerial photography for historical documentation.

(L) County GIS programs and aerial photography.

(M) Statements from riparian owners and others familiar with the site may also be considered, but typically they are insufficient, in themselves, to meet the burden.

(4) A person who claims a lawful nonconforming use, that was effective before January 1, 2007, must deliver to the department a written request and supporting documentation by January 1, 2009. For a use that is nonconforming as a result of a rule or statutory amendment that becomes effective after January 1, 2007, a person must deliver a written request and supporting documentation within two (2) years after the effective date of the amendment.

(5) A determination that a structure or facility qualifies or does not qualify as a lawful nonconforming use is a determination of status under IC 4-21.5-3-5(a)(5).

(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 unless a person satisfies the requirements of IC 14-26-2 and this article that are in effect at the time of the modification.

In performing maintenance under this subdivision, the:

(A) location;

(B) size; and

(C) configuration;

of the use must not be modified.

(2) The department may authorize a modification to a lawful nonconforming use if it determines that the resulting change to the:

(A) location;

(B) size; or

(C) configuration;

would better serve the values promoted by IC 14-26-2 than does the existing lawful nonconforming use.

(d) This subsection governs the removal of a lawful nonconforming use as follows:

~~(b)~~ (1) The director or the director's designee may order the removal of a lawful nonconforming use ~~under subsection (a)~~ if the structure or facility is ~~either~~ any of the following:

~~(A)~~ (A) A nuisance that adversely affects any of the following:

~~(i)~~ (i) Public safety.

~~(ii)~~ (ii) Natural resources.

~~(iii)~~ (iii) Natural scenic beauty. ~~or~~

~~(iv)~~ (iv) The water level of a public freshwater lake.

(B) Abandoned.

~~(2)~~ (C) Modified in a manner for which a license is required under IC 14-26-2 or this rule, but 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 temporary structure adversely affects public safety under subdivision (1)(A)(i) if the structure is any of the following:

(A) Extended or located more than one hundred seventy-five (175) feet lakeward from the shoreline or waterline, except as provided for Bass Lake in Starke County at 312 IAC 5-6-3.

(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.**

~~(c)~~ **(e) IC 4-21.5-3-8 controls** an order issued under subsection ~~(b)~~ **is controlled by IC 4-21.5-3-8 (d)** unless an emergency exists, in which event IC 4-21.5-4 ~~may be applied:~~ **applies.**

~~(d)~~ **(f)** Nothing in this rule affects the department's right to seek injunctive or other relief under IC 14-26 or another applicable law. *(Natural Resources Commission; 312 IAC 11-5-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2228; filed May 11, 2004, 9:00 a.m.: 27 IR 3065; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)*

SECTION 2. SECTION 1 of this document takes effect January 1, 2007.

***Notice of Public Hearing***

*Under IC 4-22-2-24, notice is hereby given that on January 24, 2006 at 11:30 a.m., at the District 1 Headquarters, Division of Law Enforcement, 9822 North Turkey Creek Road, Syracuse, Indiana the Natural Resources Commission will hold a public hearing on a proposed amendment to 312 IAC 11-5-2, which governs lawful nonconforming uses for structures subject to licensure under IC 14-26-2 (commonly known as the "Lakes Preservation Act"), to provide greater specificity to the processes used to evaluate lawful nonconforming uses, to specify that the person claiming a lawful nonconforming use has the burden for establishing conformity and provide two years for the submission of documentation, to specify that the Department of Natural Resources has the burden for establishing that a lawful nonconforming use should be terminated if the department contends it poses a nuisance or has been abandoned, and to clarify that a temporary structure can qualify as a lawful nonconforming use and acknowledge that the seasonal removal of a structure does not constitute abandonment.*

*The natural resources commission has the authority to adopt the proposed amendments under IC 14-10-2-4, IC 14-15-7-3, and IC 14-26-2-23. The amendments will clarify the treatment of lawful nonconforming uses under IC 14-26-2 and 312 IAC 11 and will not result in an additional requirement or cost under IC 4-22-2-24(d)(3). The amendments will not impose requirements or costs on small businesses under IC 4-22-2.1-5.*

*Copies of these rules are now on file at the Indiana Government Center-South, 402 West Washington Street, Room W272 and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.*

Michael Kiley  
Chairman  
Natural Resources Commission