

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:)
) **Administrative Cause**
READOPTION OF 312 IAC 11) **Number: 11-001W**
GOVERNING PUBLIC)
FRESHWATER LAKES) **(LSA Document #11-42(F))**

RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULE

A. INTRODUCTION

For consideration is the readoption of 312 IAC 11 governing public freshwater lakes. Article 11 currently includes rule 1—administration; rule 2—definitions; rule 3—temporary structures and permanent structures; rule 4—licensing of particular types of structures; and, rule 5—innovative practices and nonconforming uses. Rule 1 through rule 5 assist with administration of IC 14-26-2 (sometimes referred to as the “Lakes Preservation Act”). The text of article 11 can be accessed through the Legislative Services Agency website at: www.in.gov/legislative/iac/T03120/A00110.PDF.

Formerly, article 11 addressed “lake construction activities” and also included rule 6—surface water rights; emergency regulation. Rule 6 assisted with administration of IC 14-25-5. The purpose and scope of IC 14-25-5 differs significantly from that of IC 14-26-2. Inclusion of rule 6 in Article 11 caused unnecessary confusion. Effective January 1, 2011, rule 6 was repealed and relocated into new article 11.5 governing surface water emergencies on lakes. Earlier this year, article 11 was renamed to reflect that its scope is exclusively “public freshwater lakes” regulated by the Lakes Preservation Act and does not include all construction activities for lakes.

In April 2002, the Natural Resources Commission approved delegations of authority with respect to readoptions. If rules are being readopted in their current form without amendments, the Director of the Division of Hearings may approve preliminary action. The Commission retained authority to take final action on readoptions.

The rules codified under 312 IAC 11 are proposed for readoption without amendment. The Director of the Division of Hearings approved preliminary action on January 3, 2011. The standard practice is to readopt rules by article. 312 IAC 11 is now submitted for consideration as to final action.

B. READOPTION ANALYSIS REQUIRED UNDER IND. CODE 4-22-2.5-3.1

James Hebenstreit, Assistant Director of the Division of Water of the Department of Natural Resources was appointed as the Small Business Regulatory Coordinator for this rule readoption. Hebenstreit provided the following analyses of potential impacts to small business for the proposed readoption of 312 IAC 11:

IC 4-22-2.1-5 Statement concerning rules affecting small businesses

Estimated number of small businesses subject to this rule:

The Department of Natural Resources currently regulates construction activities in public freshwater lakes under IC 14-26-2 and 312 IAC 11. IC 14-26-2-23 provides that: (a) Unless a person obtains a permit from the department under this section and conducts the activities according to the terms of the permit, a person may not conduct the following activities:

- (1) Over, along, or lakeward of the shoreline or water line of a publiclake:
 - (A) excavate;
 - (B) place fill; or
 - (C) place, modify, or repair a temporary or permanent structure.
- (2) Construct a wall whose lowest point would be:
 - (A) below the elevation of the shoreline or water line; and
 - (B) within ten (10) feet landward of the shoreline or water line, as measured perpendicularly from the shoreline or water line;
of a public freshwater lake.
- (3) Change the water level, area, or depth of a public freshwater lake or the location of the shoreline or water line.

Based on a review of the permits issued in the last 5 years, it is believed that 20 to 25 permits have been issued to small businesses each year.

Estimated average annual reporting, record keeping, and other administrative costs small Businesses Will Incur For Compliance:

There is a \$100 application fee associated with any permit for construction activities on the State's public freshwater lakes. There is a potential additional cost to small businesses as well as all applicants to demonstrate that the application would comply with the statute and rules but there is no requirement that the applicant or owner retain professional assistance to prepare that information. In most cases the information could be prepared for between \$25 to \$200. There is no annual reporting or record keeping requirement.

Estimated total annual economic impact on small businesses to comply:

- (A) Based on the review of the permits issued in the last 5 years, the rules would be applicable to 20 to 25 small businesses annually. The permit fee (required by statute) for each application is \$100 and the cost of preparing the information to demonstrate that the project meets the requirements of the rule and statute may range from \$25 to \$200. The total economic impact on small businesses for compliance is estimated to be a maximum of \$7500 [25 businesses X \$100 application fee X \$200 (maximum preparation fee)] annually.
- (B) Economic impact of this rule is based upon estimates made by the staff of the Division of Water, Department of Natural Resources who process and review permit applications and are in regular contact with applicants and/or their agents regarding the preparation and review of application materials and plans.

Justification statement of requirement or cost:

The State of Indiana holds the waters of public freshwater lakes in trust for the citizens of Indiana. Under IC 14-26-2 the Department of Natural Resources (DNR) is the agency with the regulatory authority for the trust. As such, the DNR must seek to strike a balance between the rights of riparian landowners to use their lake frontage and the rights of the public to use the lake. In recent years, with the increase of the value of lakefront property, the increasing size and number of boats on our lakes and the shift from "weekend cottages" to full time residences, the number of disputes over riparian rights, safety and public trust issues has greatly increased. The public freshwater lake rules (312 IAC 11) provide a road map to bring order to what could otherwise be chaos on our public freshwater lakes. Without the rules and standards set forth therein, the public, small businesses and governmental entities would be faced with the prospect of initiating legal action to resolve these disputes. Based on previous experience, most notably with pier disputes, this approach will lead to the expenditure of thousands of dollars in legal fees. Lacking statewide standards, the likelihood is that different courts will issue inconsistent decisions. The problem can be aggravated if the Department is not made a party to the litigation because in its absence, navigational safety, riparian rights and public trust issues may not ever be considered. The re-adoption of 312 IAC 11 would provide predictability for regulated entities as to what the "rules of the game" are and should lessen the frequency of litigation. They would also provide guidance in how the agency will respond to development proposals on lakefront properties which would assist the public, small business and government agencies in making decisions on whether to proceed with acquisition of those

properties. In summary, the rules are needed to promote public safety, protect the public trust and allow reasonable enjoyment of the rights of riparian owners.

Regulatory flexibility analysis of alternative methods:

The rule does not impose onerous burdens on small businesses and provides the advantage of articulating understandable agency expectations. A range of more stringent regulatory requirements could be envisioned, including requiring individual licenses for every pier placed in a public freshwater lake. The resulting burden of universal individual licenses seems unwarranted and unnecessary in light of current usage and it would be impossible for the Department to administer within current budgetary constraints. Another alternative would be the prohibition of any structures within or along the shoreline of public freshwater lakes. Such an alternative would seem to be in conflict with the department's charge to preserve and protect the state's public freshwater lakes for all of its citizens. A final alternative would be to allow the rule to expire.

The alternative methods of universal licensure or outright prohibition have been considered and rejected. These alternatives are unwarranted by current usage and agency budgetary constraints. The alternative of allowing the rule to expire has also been rejected because in the absence of 312 IAC 11, there would be almost no objective standards for the review and issuance for licenses pursuant to IC 14-26-2. In addition, the rule creates a general license which allows the placement of an estimated 12,000 to 15,000 individual piers annually without the owners having to apply for an individual license as required by IC 14-26-2. Compliance with IC 14-26-2 would require the DNR and Commission to continue to seek a balance among interests, but there would additionally be an absence of predictability. Implementing the Lakes Preservation Act in its varied applications and among competing users can be complex. The complexity is derived primarily from the purposes of the Lakes Preservation Act, however, and not from the provisions of 312 IAC 11. The re-adoption of 312 IAC 11 takes what appears to be the unmanageable challenge of administering the Lakes Preservation Act to become one that is manageable.

Review Under IC 4-22-2.5-3.1

The continued need for the rule.

There is a critical need for 312 IAC 11 to assist in the administration of IC 14-26-2 (sometimes referred to as the "Lakes Preservation Act"). The antecedents to today's Lakes Preservation Act are found in bills enacted in 1947. Under the Lakes Preservation Act, the agency is assigned bundled responsibilities which include the application of police powers and regulatory powers. At the core is protection of the public trust, including environmental protection and public safety. The Lakes Preservation Act is "[p]ublic trust legislation" intended to recognize "the public's right to preserve the natural scenic beauty of our lakes and to recreational values

upon the lakes.” *Lake of the Woods v. Ralston*, 748 N.E.2d 396 (Ind. App. 2001). Public and private interests must be balanced. An important element is identifying which persons may lawfully exercise riparian rights.

Over the years, the Indiana General Assembly has amended the Lakes Preservation Act several times, and beginning with 2000 amendments, directed the DNR to take a more aggressive role in implementation. Since 2000, the General Assembly has amended the Lakes Preservation Act at least five times. Included in these recent amendments is a mandate at IC 14-26-2-23 that the Natural Resources Commission adopt rules to do the following:

- (1) Assist in the administration of the Lakes Preservation Act.
- (2) Provide objective standards for issuing permits under the Lakes Preservation Act, including standards for the configuration of piers, boat stations, platforms, and similar structures. The standards:
 - (A) may provide for a common use if the standard is needed to accommodate the interests of landowners having property rights abutting the public freshwater lake or rights to access the public freshwater lake; and
 - (B) **shall exempt any class of activities from licensing, including temporary structures, if the Commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in section 5 of the Lakes Preservation Act.**
- (3) Establish a process for mediation under IC 4-21.5-3.5.

[Emphasis supplied by Hebenstreit.]

In addition, the Indiana General Assembly created the Lakes Management Work Group through a series of noncode statutes, the most recent of which was set forth in P.L. 59-2010. Although the language of individual noncode statutes differs somewhat, the General Assembly has typically directed the Work Group to do the following:

- (1) Conduct public meetings to hear testimony and receive written comments concerning problems affecting the lakes of Indiana.
 - (2) Develop proposed solutions to problems affecting the lakes which are subject to the Lakes Preservation Act.
 - (3) Issue reports to the Natural Resources Study Committee of the Indiana General Assembly on its work.
- The Lake Management Work Group has suggested both legislation and rules. Many of its suggestions for legislation have been enacted, and many of its suggestions for rules have been adopted within 312 IAC 11.

The strategy of the Indiana General Assembly with respect to implementation of the Lakes Preservation Act has been to employ the expertise and experience of the DNR through rule adoption by the Commission. The Lakes Preservation Act does not contain detailed regulatory requirements. These are set forth primarily in 312

IAC 11. In the absence of 312 IAC 11, the already challenging management of public freshwater lakes would become chaotic.

Indeed, the structure of the Lakes Preservation Act is to require permitting for the activities under its comprehensive umbrella. Specifically, IC 14-26-2-23 requires that a person may not excavate, place fill or place a temporary or permanent structure in a public freshwater lake without obtaining a permit from the Department. A \$100 fee must be submitted with each application and permits are valid for 2 years. A major thrust of 312 IAC 11 is to provide general licensure for qualified activities which are deemed unlikely to have more than a de minimus impact. An important example is that the great majority of temporary piers are authorized by a general license. The owner of a qualified temporary pier is not required to complete the application and notification process otherwise imposed by the Lakes Preservation Act. In the absence of 312 IAC 11, each temporary pier would be subject to individual licensure at an additional cost to landowners and at a great fiscal and human burden to the agency. It is estimated that there are 12,000 to 15,000 temporary piers placed in public freshwater lakes each boating season under the general license provisions contained in 312 IAC 11. As a result, thousands of lakefront property owners are able to install their piers without filing an application for an individual permit and paying the application fee of \$100. Failure to re-adopt the general license provisions would cost these landowners a minimum of 1.2 to 1.5 million dollars every other year. In addition, with the general license provisions in place, the Department processes an average of 275 permit applications annually (based on the last 5 years of records) pursuant to IC 14-26-2. Without the rule, that number would increase by 12,000 to 15,000 every other year which would be completely beyond the staffing capabilities of the Department.

The nature of any complaints or comments received from the public, including small businesses, concerning the rule or the rule's implementation by the agency.

The core purpose of the Lakes Preservation Act is set forth in IC 14-26-2-5:

Sec. 5. (a) As used in this section, "natural scenic beauty" means the natural condition as left by nature without manmade additions or alterations.

(b) As used in this section, "recreational purpose" means the following:

- (1) Fishing.
- (2) Boating.
- (3) Swimming.
- (4) The storage of water to maintain water levels.
- (5) Any other purpose for which lakes are ordinarily used and adapted.

(c) The:

(1) natural resources and the natural scenic beauty of Indiana are a public right;

and

(2) public of Indiana has a vested right in the following:

(A) The preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state.

(B) The use of the public freshwater lakes for recreational purposes.

(d) The state:

(1) has full power and control of all of the public freshwater lakes in Indiana both meandered and unmeandered; and

(2) holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes.

(e) A person owning land bordering a public freshwater lake does not have the exclusive right to the use of the waters of the lake or any part of the lake.

With varied interests and uses among citizens, conflicts are inevitable. Citizen complaints are common, and a frequent complaint alleges that a neighbor or another user may be impairing enjoyment of public waters by another. Complaints are more commonly directed to other persons than directed to the statute or the rule. If directed to the rule, complaints are as likely to urge greater regulatory control as they are to urge lesser regulatory control. In large measure, the Lakes Preservation Act and 312 IAC 11 are both directed to achieving fair balance in dispute resolution.

A small fraction of users of public freshwater lakes are small businesses. Most of the regulated community consists of individuals. Based on a review of permits issued during the last five years, it is estimated that 20 to 25 small businesses may be affected annually. As applied to small businesses, very few comments or complaints have been received. Complaints generally concern processing time or complaints similar to those received from individuals. The greatest impact to small businesses by not readopting 312 IAC 11 would be similar to the impact to individuals – elimination of the general license opportunities and instead requiring full licensure and fees for all structures.

The complexity of the rule, including any difficulties encountered by:

(A) the agency in administering the rule; or

(B) small businesses in complying with the rule.

The Lakes Preservation Act is a comprehensive effort by the Indiana General Assembly, which addresses primarily structures and construction, to manage “public freshwater lakes”. Unless a person obtains a permit from the DNR, a person must not conduct the following activities:

(1) over, along, or lakeward of the shoreline of a public freshwater lake:

(A) excavate;

(B) place fill; or

(C) place, modify, or repair a temporary or permanent structure.

(2) construct a wall within ten feet landward of the shoreline of the lake.

(3) change the water level, area, or depth of a public freshwater lake or the location of the shoreline.

IC 14-26-2-23(a). Additional licensing requirements apply to sand mining (IC 14-26-2-11) and channel construction (IC 14-26-2-12).

In reviewing license applications, the DNR is required to consider the effects (including cumulative effects) of a proposed activity upon:

- (1) the shoreline, water line, or bed of the lake;
- (2) fish, wildlife, and botanical resources;
- (3) the public rights described in IC 14-26-2-5 (quoted above);
- (4) management of boating; and
- (5) “The interests of a landowner having property rights abutting the public freshwater lake or rights to access the public freshwater lake.”

As directed by the Indiana General Assembly, 312 IAC 11 provides “objective standards” for performing these reviews. In the absence of 312 IAC 11, there would be almost no objective standards. Compliance with the Lakes Preservation Act would require the DNR and Commission to continue to seek a balance among interests, but there would additionally be an absence of predictability. Implementing the Lakes Preservation Act in its varied applications and among competing users can be complex. The complexity is derived primarily from the purposes of the Lakes Preservation Act, however, and not from the provisions of 312 IAC 11.

The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, or local laws, rules, regulations, or ordinances.

Whether by legislative design or merely by consequence, the Lakes Preservation Act causes public freshwater lakes to be regulated similarly to navigable waters (such as Lake Michigan or the Tippecanoe River). For public freshwater lakes and for navigable waters, the DNR is directed by the General Assembly to serve as the state agency which protects the public trust. The DNR is effectively the trustee.

With the exception of the regulation of walls, where the General Assembly has extended authority ten feet landward of the shoreline, DNR authority is exclusively lakeward of and does not extend landward of the shoreline of a public freshwater lake. 312 IAC 11 does not augment the statutory directive regarding walls, so the geographic scope of 312 IAC 11 is exclusively lakeward of the shoreline. Local laws or ordinances apply landward of the shoreline. These authorities do not overlap, duplicate, or conflict.

Similarly to navigable waterways, the DNR authority for public freshwater lakes can overlap with exercise of authority by the US Army Corps of Engineers and the Indiana Department of Environmental Management. These authorities do not conflict but can occasionally overlap. The agencies cooperate to provide consistency. In recent years, the Department has worked with the Corps of Engineers and the Indiana Department of Environmental Management to develop a Programmatic General Permit. By virtue of this effort, over 50% of the permits issued by the Department pursuant to IC 14-26-2 also serve as the approval of the project by both the Corps of Engineers and the Department of Environmental

Management thereby negating the need for the permittee to file separate applications with those agencies. In any event, overlap or duplication is a consequence of the Lakes Preservation Act and not 312 IAC 11.

The length of time since the rule was last reviewed under this section or otherwise evaluated by the agency, and the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule since that time.

With the continuing presence and participation of the Lake Management Work Group, 312 IAC 11 is in almost constant review. In addition, the frequency of legislative amendments to the Lakes Preservation Act makes the statute one of the most dynamic that the agency is charged with administering. An example of where the agency has been called upon to address changes in technology pertains to the use of “aerators”. With new technologies and the growing usage of aerators on public freshwater lakes, and partly as a result of interest by the Lake Management Work Group, “aerators” have been assigned specific licensure requirements effective January 1, 2010.

Aerators are often installed to inject oxygen into the waters of a lake to prevent the formation of ice around a riparian owner’s pier. An aerator with a large impact zone can pose a safety hazard to members of the public using a lake during the winter months and unaware of thin or absent ice caused by the aerator. The placement of an aerator in a public freshwater lake is subject to individual licensure pursuant to IC 14-26-2. As such a small business who wishes to place an aerator would be subject to paying the application fee of \$100 plus costs of \$25 to \$200 for the preparation of supporting materials to accompany the application. Based on meetings with the public, it appears that the use of an aerator in March can reduce the likelihood of damages to piers caused by the movement of ice in late winter. As a result, rules were developed that would authorize a general license for the placement of an aerator with a limited geographic impact if accompanied by a warning sign in March as well as in warmer months when snowmobiling, ice skating, ice fishing and other recreational activities are unlikely. The fiscal impact to small businesses is neutral to positive. For a small business that elects to place an aerator in a public freshwater lake during the month of March, the savings of applying for an individual permit would be somewhat offset by the cost of providing warning signs. The cost of signage is estimated at \$20 to \$40.

In addition to statutory requirements, Executive Order 2-89 requires that comprehensive analyses for readoptions be submitted to the Indiana Office of Management and Budget (the “OMB”). OMB also requires the submission of copies of fiscal analyses for recent amendments to the rule scheduled for readoption. These were prepared by Hebenstreit and forwarded to OMB through the Commission’s Division of Hearings. OMB Director, Adam M. Horst, wrote on June 11, 2011 to state in part: “After reviewing the proposed

rule, the recommendation of the State Budget Agency is that the rule changes be approved.”

C. NOTICE OF INTENT TO READOPT AND RECOMMENDATION FOR FINAL ACTION

On January 19, 2011, a “Notice of Intent to Readopt” 312 IAC 11 was posted to the *Indiana Register* at 20110119-IR-312110042RNA as anticipated by IC 4-22-2.5-2 and IC 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 11 without changes. The notice also provided that a person had 30 days to submit a written request to the Natural Resources Commission, through the Small Business Regulatory Coordinator, seeking to have a particular section of the rule readopted separately. If such a request had been made, the Commission would have been required to complete the full rule adoption process for the section requested to be readopted separately.

In this instance, no written request was received. The Commission may either submit the rule for filing with the Publisher under IC 4-22-2-35 or elect the procedure for readoption under IC 4-22-2. The hearing officer recommends the Commission approve 312 IAC 11 for readoption and for subsequent filing with the Publisher, without amendment, as attached in Exhibit “A”.

Dated: June 27, 2011

Stephen L. Lucas
Hearing Officer

ARTICLE 11. PUBLIC FRESHWATER LAKES

Rule 1. Administration

312 IAC 11-1-1 Purpose

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

Sec. 1. (a) This article provides standards for the regulation of construction activities along and within lakes.

(b) This rule and 312 IAC 11-2 through 312 IAC 11-5 provide standards, with respect to activities along and within public freshwater lakes, that are subject to IC 14-26-2.

(c) This rule and 312 IAC 11-2 through 312 IAC 11-5 are also coordinated with the responsibilities in IC 14-26-2. (*Natural Resources Commission; 312 IAC 11-1-1; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2219; filed Feb 7, 2000, 3:31 p.m.: 23 IR 1366; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-1-2 Authority to grant, condition, or deny a license

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 4-21.5; IC 14-15; IC 14-26-2

Sec. 2. (a) The authority to grant, condition, or deny a license under IC 14-26 rests with the director or a delegate.

(b) An action taken under subsection (a) is subject to administrative review by the commission under IC 4-21.5 and 312 IAC 3-1.

(c) 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.

(*Natural Resources Commission; 312 IAC 11-1-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2219; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-1-3 Mediation of disputes among riparian owners or between riparian owners and the department

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 4-21.5; IC 14-15; IC 14-26-2

Sec. 3. (a) A riparian owner or the department may initiate a proceeding under IC 4-21.5 and 312 IAC 3-1 to seek resolution by the commission of a dispute among riparian owners, or between a riparian owner and the department, concerning the usage of an area over, along, or within a shoreline or waterline of a public freshwater lake.

(b) A party to a proceeding initiated under subsection (a) may seek mediation of the dispute under IC 4-21.5. The administrative law judge shall approve the use of mediation if the request is made by:

(1) a party within thirty (30) days of the initiation of the proceeding;

(2) a party within thirty (30) days after a party is joined as determined necessary for just adjudication or by agreement of the parties; or

(3) agreement of the parties.

(c) The administrative law judge may at any time approve the use of mediation.

(d) If a good faith effort by the parties to the mediation fails to achieve a settlement, the department shall make an initial determination of the dispute, file the determination with the administrative law judge, and serve it upon the parties. Within twenty (20) days after filing the initial determination, a party may request that the administrative law judge perform administrative review of the initial determination.

(e) If a request for administrative review is received under subsection (d), the administrative law judge shall seek a final disposition of the proceeding as soon as is practicable. (*Natural Resources Commission; 312 IAC 11-1-3; filed Jun 21, 2001, 3:03 p.m.: 24 IR 3374; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-1-4 Determination of riparian zones

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

Affected: IC 14-8; IC 14-15; IC 14-26-2

Sec. 4. If a determination of riparian boundaries is reasonably required for the performance of functions under IC 14-26-2, this rule, and 312 IAC 11-2 through 312 IAC 11-5, the department (or the commission on administrative review) shall consider as guidance "Riparian Zones within Public Freshwater Lakes and Navigable Waters", Information Bulletin #56 (Second Amendment) as published by the Legislative Services Agency at 20100331-IR-312100175NRA (March 31, 2010). (*Natural Resources Commission; 312 IAC 11-1-4; filed Aug 27, 2010, 11:11 a.m.: 20100922-IR-312090806FRA, eff Jan 1, 2011*)

Rule 2. Definitions

312 IAC 11-2-1 Definitions applicable to the regulation of public freshwater lakes

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

Affected: IC 14-8; IC 14-15; IC 14-26-2

Sec. 1. This rule provides definitions that apply to this article and are in addition to those set forth in IC 14-8, IC 14-26, and 312 IAC 1. (*Natural Resources Commission; 312 IAC 11-2-1; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-1.5 "Aerator" defined

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

Affected: IC 14-8; IC 14-15; IC 14-26-2

Sec. 1.5. "Aerator" means a mechanical device placed within a public freshwater lake that is used to accomplish any of the following:

- (1) Increase the amount of dissolved oxygen in the water.
- (2) Increase the decomposition of organic materials.
- (3) Alter water flow or circulation.
- (4) Reduce icing.
- (5) Enhance audio or visual enjoyment by bubbling or spraying water.

(*Natural Resources Commission; 312 IAC 11-2-1.5; filed Aug 27, 2010, 11:11 a.m.: 20100922-IR-312090806FRA, eff Jan 1, 2011*)

312 IAC 11-2-2 "Area of special concern" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 2. "Area of special concern" means an area that contains at least one (1) of the following characteristics:

- (1) An altered shoreline where bulkhead seawalls are at least two hundred fifty (250) feet apart.
- (2) Bogs, fens, muck flats, sand flats, or marl beaches identified by the division of nature preserves in the Natural Community Classification System.
- (3) More than six hundred twenty-five (625) square feet of contiguous emergent vegetation or rooted vegetation with floating leaves.

(*Natural Resources Commission; 312 IAC 11-2-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1614; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 464*)

312 IAC 11-2-3 "Bioengineered" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 3. "Bioengineered" means the use of a combination of biological elements (plant materials) and structural or mechanical reinforcements for stabilization, revetment, or erosion control. Biological and mechanical elements must function

together in an integrated and complementary manner. (*Natural Resources Commission; 312 IAC 11-2-3; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-4 "Boatwell" defined

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

Affected: IC 14-26-2

Sec. 4. "Boatwell" means a manmade excavation along the shoreline or water line of a public freshwater lake that:

- (1) is used for the mooring of a boat; and
- (2) has been stabilized to prevent erosion.

(*Natural Resources Commission; 312 IAC 11-2-4; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA*)

312 IAC 11-2-5 "Bulkhead seawall" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 5. (a) "Bulkhead seawall" means a vertical, or near vertical, solid concrete, steel sheet piling, or vinyl piling structure, which has the purpose of shoreline protection.

(b) A timber wall may be deemed to be a bulkhead wall if the property owner proves to the satisfaction of the division of water that the wall functions as a bulkhead wall by providing evidence in the form of a written assessment from a registered professional engineer, licensed professional geologist, or soil scientist with expertise in shoreline protection or wave dynamics. The written assessment must address and evaluate each of the following items:

- (1) The structural integrity of the wall.
- (2) The height of the top of the wall above normal lake level.
- (3) Success of the wall in protecting the shoreline from erosion in the past.
- (4) The ability of the wall to retain land or prevent land from sliding as evidenced by the lack of sinkholes or depressions behind the wall.
- (5) Adequacy of existing connections to adjacent shore protection structures or tiebacks at each end of the wall.
- (6) The timber wall was constructed before January 1, 1991.

(*Natural Resources Commission; 312 IAC 11-2-5; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; filed May 2, 2005, 2:15 p.m.: 28 IR 2660; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-6 "Cumulative effect" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 6. "Cumulative effect" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what person undertakes the other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time. (*Natural Resources Commission; 312 IAC 11-2-6; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-7 "Developed area" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 7. "Developed area" means the upland side or sides of a manmade channel or an area that does not contain any of the following characteristics:

- (1) An area of special concern.
- (2) A significant wetland.
- (3) A natural shoreline.

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(Natural Resources Commission; 312 IAC 11-2-7; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1614; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 464)

312 IAC 11-2-8 "Director or a delegate" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 8. "Director or a delegate" means the director, the deputy director for the bureau of water and resource regulation, or an employee of the department to whom the director has delegated authority to perform a function under IC 14-26. *(Natural Resources Commission; 312 IAC 11-2-8; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)*

312 IAC 11-2-9 "Dry hydrant" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 9. "Dry hydrant" means a structure that does both of the following:
(1) Extends lakeward of the legally established or average normal waterline or shoreline.
(2) Provides a means of suction water supply without direct drafting for fire protection.

(Natural Resources Commission; 312 IAC 11-2-9; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)

312 IAC 11-2-10 "Fish attractor" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 10. "Fish attractor" means a structure or structures placed within a public freshwater lake that establishes an artificial reef or similar habitat and which is beneficial to fish populations. *(Natural Resources Commission; 312 IAC 11-2-10; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2220; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)*

312 IAC 11-2-11 "Glacial stone" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-26-2

Sec. 11. "Glacial stone" means a rounded stone that satisfies each of the following:
(1) Was produced by glacial activity.
(2) No individual stone weighs more than one hundred twenty (120) pounds.
(3) At least ninety percent (90%) of the material passes through a twelve (12) inch sieve.
(4) Not more than ten percent (10%) of the material passes through a six (6) inch sieve.

(Natural Resources Commission; 312 IAC 11-2-11; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 464; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA)

312 IAC 11-2-11.5 "Group pier" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 11.5. "Group pier" means a pier that 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:
 - (A) boating;
 - (B) fishing;
 - (C) hunting;
 - (D) trapping; or
 - (E) similar activities.

(Natural Resources Commission; 312 IAC 11-2-11.5; filed Jan 7, 2005, 2:10 p.m.: 28 IR 1681; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Oct 1, 2010, 3:50 p.m.: 20101027-IR-312090856FRA, eff Jan 1, 2011)

312 IAC 11-2-11.8 "Manmade channel" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 11.8. "Manmade channel" means a watercourse created by mechanical means that connects to the lake at one (1) or more points and by its construction increases the total length of shoreline around the lake. The term does not include any areas within the lake cleared by either chemical or mechanical means that do not result in an increase in the total length of shoreline around the lake. *(Natural Resources Commission; 312 IAC 11-2-11.8; filed Sep 14, 2005, 2:45 p.m.: 29 IR 464)*

312 IAC 11-2-12 "Marina" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

- Sec. 12. "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.

(Natural Resources Commission; 312 IAC 11-2-12; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Apr 24, 2008, 1:44 p.m.: 20080521-IR-312070646FRA; errata filed Jun 2, 2009, 10:29 a.m.: 20090624-IR-312090386ACA)

312 IAC 11-2-13 "Natural resources" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 13. "Natural resources" means the water, fish, plant life, and minerals in a public freshwater lake. *(Natural Resources Commission; 312 IAC 11-2-13; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)*

312 IAC 11-2-14 "Natural scenic beauty" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 14. "Natural scenic beauty" means the natural condition as left by nature without manmade additions or alterations. *(Natural Resources Commission; 312 IAC 11-2-14; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)*

312 IAC 11-2-14.5 "Natural shoreline" defined
Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-26-2

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Sec. 14.5. "Natural shoreline" means a continuous section of unaltered shoreline or water line where the distance between lawful permanent structures is at least two hundred fifty (250) feet. (*Natural Resources Commission; 312 IAC 11-2-14.5; filed Sep 14, 2005, 2:45 p.m.: 29 IR 464; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA*)

312 IAC 11-2-15 "Pea gravel" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 15. "Pea gravel" means rounded stone that satisfies each of the following conditions:

- (1) Each stone passes through a one-half ($\frac{1}{2}$) inch or a twelve and one-half ($12\frac{1}{2}$) millimeter sieve.
- (2) At least ninety-five percent (95%) of the stones pass through a three-eighths ($\frac{3}{8}$) inch sieve.
- (3) Not more than eighty percent (80%) of the stones pass through a three-sixteenths ($\frac{3}{16}$) inch (or a four and seventy-five hundredths (4.75) millimeter) sieve.
- (4) Not more than thirty-five percent (35%) of the stones pass through a three thirty-seconds ($\frac{3}{32}$) inch (or a two and thirty-six hundredths (2.36) millimeter) sieve.
- (5) Not more than four percent (4%) of the stones pass through a one-fiftieth ($\frac{1}{50}$) inch (or a six hundred (600) micrometer) sieve.

(*Natural Resources Commission; 312 IAC 11-2-15; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-16 "Permanent structure" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 16. "Permanent structure" means a structure that does not qualify as a temporary structure. (*Natural Resources Commission; 312 IAC 11-2-16; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-17 "Public freshwater lake" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 17. "Public freshwater lake" means a lake that has been used by the public with the acquiescence of a riparian owner. The term does not include any of the following:

- (1) Lake Michigan.
- (2) A lake lying wholly or in part within the city of East Chicago, Gary, or Hammond.
- (3) A privately owned body of water used for the purpose of, or created as a result of, surface coal mining.

(*Natural Resources Commission; 312 IAC 11-2-17; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; filed Dec 26, 2001, 2:42 p.m.: 25 IR 1547; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-18 "Recreational purpose" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 18. "Recreational purpose" means fishing, boating, swimming, the storage of water to maintain water levels, and any other purpose for which lakes are ordinarily used and adapted. (*Natural Resources Commission; 312 IAC 11-2-18; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-19 "Riparian owner" defined

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

Affected: IC 14-15; IC 14-26-2

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Sec. 19. "Riparian owner" means the owner of land, or the owner of an interest in land sufficient to establish the same legal standing as the owner of land, bound by a lake. The term includes a littoral owner. (*Natural Resources Commission; 312 IAC 11-2-19; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2221; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-20 "Riprap" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 20. "Riprap" means angular, limestone rock that satisfies each of the following conditions:

(1) No individual piece weighs more than one hundred twenty (120) pounds.

(2) At least ninety percent (90%) of the material passes through a twelve (12) inch sieve.

(3) Not more than ten percent (10%) of the material passes through a six (6) inch sieve.

(*Natural Resources Commission; 312 IAC 11-2-20; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2222; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 465*)

312 IAC 11-2-21 "Seawall" defined

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

Affected: IC 14-26-2

Sec. 21. "Seawall" means a manmade structure placed along the shoreline or water line of a public freshwater lake for the purpose of shoreline stabilization. (*Natural Resources Commission; 312 IAC 11-2-21; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2222; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA*)

312 IAC 11-2-22 "Seawall reface" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 22. "Seawall reface" means the reinforcing of an existing seawall along the lakeward face. (*Natural Resources Commission; 312 IAC 11-2-22; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2222; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-23 "Significant environmental harm" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 23. "Significant environmental harm" means damage to natural or cultural resources, the individual or cumulative effect of which is found by the director or a delegate to be obvious and measurable (based upon the opinion of a professional qualified to assess the damage) and that:

(1) creates a condition where recovery of affected resources is not likely to occur within an acceptable period; and

(2) cannot be adequately mitigated through the implementation of a mitigation plan approved by the director.

(*Natural Resources Commission; 312 IAC 11-2-23; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2222; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-2-24 "Significant wetland" defined

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

Affected: IC 14-26-2

Sec. 24. "Significant wetland" means a transitional area between terrestrial and deep-water habitats containing at least one (1) of the following:

(1) At least two thousand five hundred (2,500) square feet of contiguous, emergent vegetation or rooted vegetation with floating leaves landward or lakeward of the shoreline or water line. The areal extent of the vegetation is independent of ownership.

(2) Adjacent wetland areas designated by a federal or state agency under one (1) of the following:

(A) National Wetlands Inventory.

(B) U.S. Army Corps of Engineers Wetlands Delineation Manual (1987).

(C) National Food Security Act Manual (1994).

(3) The existence of a species listed at 15 IR 1312 in the Roster of Indiana Animals and Plants that are Extirpated, Endangered, Threatened, or Rare.

(Natural Resources Commission; 312 IAC 11-2-24; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2222; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 465; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA; errata filed Aug 9, 2006, 12:00 p.m.: 20060906-IR-312060009ACA)

312 IAC 11-2-25 "Temporary structure" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 25. (a) "Temporary structure" means a structure that can be installed and removed from the waters of a public freshwater lake without using a crane, bulldozer, backhoe, or similar heavy or large machinery.

(b) Examples of a temporary structure include the following:

(1) A pier that:

(A) is supported by auger poles or other poles that do not exceed three and one-half (3½) inches in diameter and rest on the lake bed; and

(B) is not mounted in or comprised of concrete or cement.

(2) A boat shelter, boat lift, or boat hoist that:

(A) has a canvas top and sides;

(B) is supported by auger poles or other poles that do not exceed three and one-half (3½) inches in diameter;

(C) is not mounted in or comprised of concrete or cement;

(D) is designed to float or to rest upon the bed of the lake under its own weight if any structure to which it is attached complies with this section; and

(E) is not wider than ten (10) feet nor longer than twenty (20) feet.

(Natural Resources Commission; 312 IAC 11-2-25; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2222; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)

312 IAC 11-2-25.2 "Toe protection" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 25.2. "Toe protection" means the glacial stone or angular, limestone rock that is placed along the lakeward face of a bulkhead seawall to minimize lake bed erosion and undercutting at the base of the seawall and satisfies each of the following:

(1) No individual piece weighs more than one hundred twenty (120) pounds.

(2) At least ninety percent (90%) of the material passes through a twelve (12) inch sieve.

(3) Not more than ten percent (10%) of the material passes through a six (6) inch sieve.

(4) No individual piece is placed more than one (1) foot lakeward of the lakeward face of a bulkhead seawall.

(Natural Resources Commission; 312 IAC 11-2-25.2; filed Sep 14, 2005, 2:45 p.m.: 29 IR 465)

312 IAC 11-2-26 "Unaltered shoreline" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 26. "Unaltered shoreline" means a shoreline that does not include lawful permanent structures. *(Natural Resources Commission; 312 IAC 11-2-26; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2222; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)*

312 IAC 11-2-27 "Underwater beach" defined

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

Affected: IC 14-26-2

Sec. 27. "Underwater beach" means an area of a lakebed that is both of the following:

(1) Lakeward of the shoreline or water line of a public freshwater lake.

(2) Used for a recreational purpose, such as wading or swimming.

(Natural Resources Commission; 312 IAC 11-2-27; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2223; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA)

312 IAC 11-2-27.5 "Upland side of a manmade channel" defined

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

Affected: IC 14-15; IC 14-26-2

Sec. 27.5. "Upland side of a manmade channel" means those sections of the shoreline along a manmade channel where less than six hundred twenty-five (625) square feet of contiguous emergent vegetation or rooted vegetation with floating leaves are present. (Natural Resources Commission; 312 IAC 11-2-27.5; filed Sep 14, 2005, 2:45 p.m.: 29 IR 465)

312 IAC 11-2-28 "Waterline or shoreline" defined (Repealed)

Sec. 28. (Repealed by Natural Resources Commission; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA)

Rule 3. Temporary Structures and Permanent Structures

312 IAC 11-3-1 General licenses for qualified temporary piers and similar temporary structures; dry hydrants; and glacial stone refaces

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

Affected: IC 14-15; IC 14-26-2

Sec. 1. (a) The placement and maintenance of a:

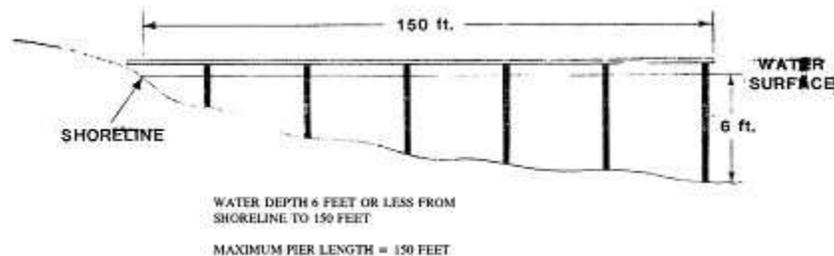
- (1) temporary structure;
- (2) dry hydrant; or
- (3) glacial stone reface;

is authorized without a written license issued by the department under IC 14-26-2 and this rule if the temporary structure, dry hydrant, or glacial stone reface qualifies under this section.

(b) In order for a temporary structure to qualify, the structure must satisfy each of the following:

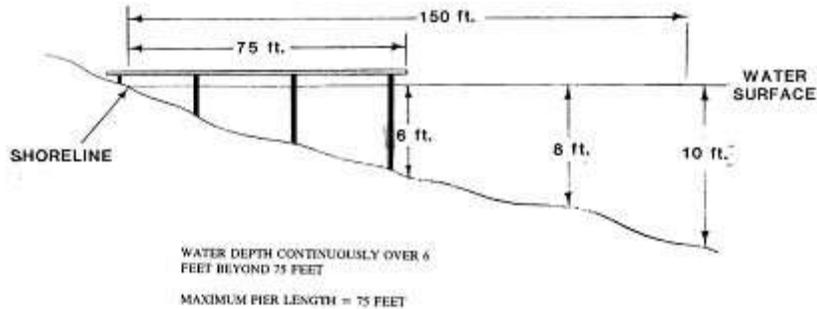
- (1) Be easily removable.
- (2) Not infringe on the access of an adjacent landowner to the public freshwater lake.
- (3) Not unduly restrict navigation.
- (4) Not be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake.
- (5) Not extend more than one hundred fifty (150) feet from the shoreline or water line.
- (6) If a pier, not extend over water that is continuously more than six (6) feet deep to a distance of one hundred fifty (150) feet from the shoreline or water line.
- (7) Not be a marina.
- (8) Not be a group pier.
- (9) Be placed by a riparian owner or with the written approval of a riparian owner.

(c) Illustrations of maximum lengths for a pier or similar structure that may qualify under subsection (b) are as follows:

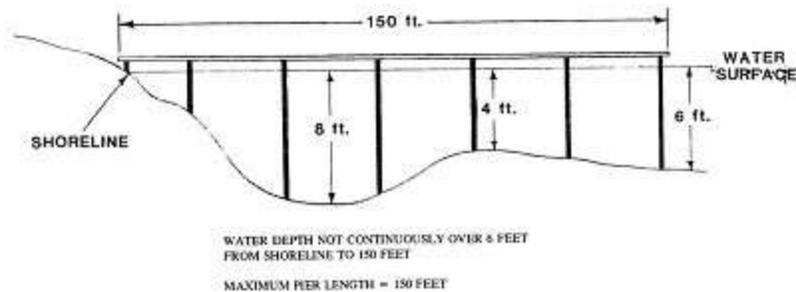


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Where the water depth is six (6) feet or less from the shoreline to one hundred fifty (150) feet from the shoreline, the maximum pier length is one hundred fifty (150) feet.



Where the maximum water depth is continuously more than six (6) feet beyond seventy-five (75) feet from the shoreline, the maximum pier length is seventy-five (75) feet.



Where the maximum water depth is not continuously over six (6) feet from the shoreline, the maximum pier length is one hundred fifty (150) feet.

(d) In order for the placement, maintenance, and operation of a dry hydrant to qualify, the hydrant must satisfy each of the following:

- (1) Be sponsored or owned by a volunteer or full-time fire department recognized by the public safety training institute.
- (2) Be readily accessible from an all-weather road, public access site, or similar area.
- (3) Have a diameter of at least six (6) inches.
- (4) Be constructed of PVC pipe or a similar nontoxic material.
- (5) Extend no more than one hundred fifty (150) feet from the waterline or shoreline.
- (6) Have all portions of the hydrant and its in-lake accessories be at least five (5) feet below the legally established or average normal water level.
- (7) Be marked with a danger buoy, which conforms to 312 IAC 5-4-6(a)(1), at the lakeward end of the hydrant.
- (8) Be equipped with a screen or straining device on the lakeward end.
- (9) Glacial stone or riprap only may be placed in or on the lakebed for either of the following:
 - (A) Bedding the intake pipe.
 - (B) Straining the intake water.
- (10) Be approved by the riparian landowner.

(e) In order for the placement of glacial stone on the lakeward side of a seawall to qualify, the glacial stone reface must satisfy each of the following:

- (1) The seawall reface must be comprised exclusively of glacial stone.
- (2) The reface must not extend more than four (4) feet lakeward of the shoreline or water line at the base of a lawful seawall.
- (3) A walk or structural tie must not be constructed on the existing seawall in combination with the glacial stone reface.
- (4) An impermeable material must not be placed behind or beneath the glacial stone reface.
- (5) Filter cloth placed behind or beneath the glacial stone reface must be properly anchored to prevent displacement or flotation.

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(6) Erosion from disturbed areas landward of the shoreline or water line must be controlled to prevent its transport into the lake.

(Natural Resources Commission; 312 IAC 11-3-1; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2223; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1614; filed May 25, 2004, 8:45 a.m.: 27 IR 3062; filed Jan 7, 2005, 2:10 p.m.: 28 IR 1681; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Oct 1, 2010, 3:50 p.m.: 20101027-IR-312090856FRA, eff Jan 1, 2011)

312 IAC 11-3-1.2 General licenses for aerators

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

Affected: IC 14-15; IC 14-26-2

Sec. 1.2. (a) This section establishes terms for a general license to place and maintain an aerator.

(b) A person who acts under this section is not required to complete an application or to obtain a written license from the department under IC 14-26-2 and this rule. A person who wishes to place or maintain an aerator, which does not qualify under this section, must obtain a written license in advance of placement.

(c) To qualify for the general license, a person must satisfy each of the following requirements:

(1) Limit operation of the aerator to March through October.

(2) For March, post and maintain a sign at the site of the aerator that does each of the following:

(A) States "beware thin ice" in black lettering clearly visible to an approaching person.

(B) Includes a standard illustration in black for thin ice, upon a reflective yellow background, within a black triangle.

(C) Substantially conforms to the following illustration:



(3) Limit the effects of the aerator to a distance that does not:

(A) exceed one hundred fifty (150) feet from the shoreline or water line of the public freshwater lake; or

(B) extend beyond the boundaries of the person's riparian zone.

(4) Operate the aerator to accomplish both of the following:

(A) Minimize the disturbance of bottom sediments.

(B) Not diminish water clarity.

(5) Operate the aerator so it does not unduly infringe on the recreational usage of the lake by adjacent landowners or the public.

(6) Operate the aerator so that it does not remove more than six hundred twenty-five (625) square feet of aquatic vegetation.

(7) Cause the aerator to be the following:

(A) Readily inoperable or removable.

(B) Secure from movement caused by water currents, wind, or similar factors.

(Natural Resources Commission; 312 IAC 11-3-1.2; filed Aug 27, 2010, 11:11 a.m.: 20100922-IR-312090806FRA, eff Jan 1, 2011)

312 IAC 11-3-2 Disputes regarding a structure placed under authority of a general license

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

Affected: IC 4-21.5; IC 14-15; IC 14-26-2

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Sec. 2. (a) A person may seek administrative review of the placement or maintenance of a structure under section 1 or 1.2 of this rule.

(b) Administrative review under this section is subject to IC 4-21.5 and 312 IAC 3-1. If a dispute involves the placement of a pier, another temporary structure, or a glacial stone reface, where the review of another structure authorized by a general license appears appropriate to a full and fair determination of the dispute, the administrative law judge may order additional parties joined.

(c) The administrative law judge shall commit the matter to mediation under 312 IAC 11-1-3 as soon as practicable. Except as otherwise provided in this subsection, no administrative review brought under this section shall proceed to formal discovery or to a hearing without the completion of at least two (2) mediation sessions. A mediation session is not required to be scheduled where either:

(1) all parties agree during a prehearing conference, during a status conference, or in writing not to participate in mediation; or

(2) a party is dismissed or defaulted under 312 IAC 3-1-9(a), 312 IAC 3-1-9(b)(1), or 312 IAC 3-1-9(b)(2).

(d) Unless otherwise ordered by the administrative law judge or agreed in writing by all the parties, any structure placed by a party under section 1 of this rule must be removed from along or lakeward of the shoreline or water line upon the later of the following:

(1) Ninety (90) days after filing of the request for administrative review.

(2) January 1 of the year following the filing of the request for administrative review.

(e) In exercising discretion under subsection (d), an administrative law judge shall consider whether the structure poses a substantial intrusion or merely a de minimis intrusion to the interests protected by IC 14-26-2, IC 14-15-7-3, and this rule. (*Natural Resources Commission; 312 IAC 11-3-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2224; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1615; filed Jun 21, 2001, 3:03 p.m.: 24 IR 3374; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Aug 27, 2010, 11:11 a.m.: 20100922-IR-312090806FRA, eff Jan 1, 2011*)

312 IAC 11-3-3 Individual licenses for structures that do not qualify for a general license

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

Affected: IC 14-11-4; IC 14-15; IC 14-26-2

Sec. 3. (a) Except as provided in section 1 of this rule and in subsection (c), a structure placed within the shoreline or water line of a public freshwater lake requires a written license issued by the department under IC 14-26-2 and this rule.

(b) Except as provided in 312 IAC 11-4-7, a structure that is located on a public freshwater lake:

(1) more than one hundred fifty (150) feet; and

(2) less than two hundred (200) feet;

from the shoreline or water line requires a written license under IC 14-26-2, this rule, IC 14-15-7-3, and 312 IAC 5-4. The department may provide that the multiple licensing requirements of this subsection be satisfied with a single written license.

(c) Except as provided in 312 IAC 11-4-7, a structure that is located:

(1) on a public freshwater lake; and

(2) not less than two hundred (200) feet from the shoreline or water line;

does not require a license under IC 14-26-2 and this rule, but the structure does require a license under IC 14-15-7-3 and 312 IAC 5-4. Only a navigation aid or water recreation structure can be licensed under 312 IAC 5-4.

(d) The director or a delegate shall not issue a license under this rule except upon a written determination that shows the following:

(1) The license, including conditions attached to the license, conforms to IC 14-26-2 and this rule. In making the determination, there shall be a determination that issuance of the permit would not result in significant environmental harm to the public freshwater lake.

(2) The applicant has demonstrated that an owner of each parcel of real estate, reasonably known to be adjacent to the real estate described in subsection (e)(2), has been notified under IC 14-11-4 and 312 IAC 2-3.

(e) An application for a license under this section must include a description of the following:

(1) The permanent structure, including plans and specifications of sufficient detail for the department to evaluate the project under IC 14-26-2 and this rule.

(2) The real estate:

(A) on which the structure would be located; or

(B) that the structure would benefit.

(f) Examples of a structure that requires a written license under this section include the following:

- (1) A marina.
- (2) A group pier.
- (3) A new seawall or a seawall refacing.
- (4) An underwater beach.
- (5) A boat well excavation, construction, or fill.
- (6) A fish attractor.
- (7) A pier that is supported by a structure permanently mounted in, or affixed to, the bed of the lake.
- (8) A boathouse that is totally or partially enclosed on the sides. This structure ordinarily should be:
 - (A) placed over a boat well constructed landward of the shoreline or water line; and
 - (B) constructed only after a permit is obtained to alter the shoreline or water line.

(Natural Resources Commission; 312 IAC 11-3-3; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2224; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 465; filed Oct 1, 2010, 3:50 p.m.: 20101027-IR-312090856FRA, eff Jan 1, 2011)

312 IAC 11-3-4 Common usage where needed to accommodate landowner property rights

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

Affected: IC 14-11-4; IC 14-15; IC 14-26-2

Sec. 4. (a) This section applies where common usage is needed to accommodate the interests of landowners that have either:

- (1) property rights abutting a lake; or
- (2) rights to access the lake.

(b) If the placement of multiple structures is found to result in interference to the property rights of a landowner, the department (or, on administrative review, the commission) may require licensure to be conditioned upon common use and maintenance of a structure.

(c) Common use and maintenance may be implemented through any of the following persons:

- (1) A corporation.
- (2) A limited liability company.
- (3) A partnership.
- (4) An association.
- (5) A county, city, town, or township.
- (6) Another person providing for common ownership and determined by the department (or, on administrative review, by the commission) to be capable of serving the purposes of this section.

(d) A person who refuses to participate in a process for common usage, established under this section, may be denied:

- (1) a license by the department; and
- (2) access to the common structure by the person identified under subsection (c).

(Natural Resources Commission; 312 IAC 11-3-4; filed Mar 4, 2008, 12:22 p.m.: 20080402-IR-312070467FRA)

Rule 4. Licensing of Particular Types of Structures

312 IAC 11-4-1 Marinas

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

Affected: IC 14-15; IC 14-26-2

Sec. 1. (a) A written license under IC 14-26-2 and this rule is required to place a marina within a public freshwater lake.

(b) Except as provided in subsection (d), a person must not operate a marina unless the person provides a pumpout that is in good working order and readily accessible to patrons of the marina and secures and maintains one (1) of the following:

- (1) A license under 327 IAC 3-2 for the construction and operation of a wastewater treatment facility or a sanitary sewer.
- (2) A license under 410 IAC 6-10 for the construction of a commercial on-site wastewater disposal facility.
- (3) An alternative written approval for wastewater disposal from an authorized governmental agency.

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(c) The requirements of subsection (b) shall be made a condition for a license issued by the department to construct a new marina or to modify an existing marina.

(d) A person may apply to the division of law enforcement for an exemption from subsection (b). 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 lake to provide pumpout services where the other marina or similar facility:

(A) maintains a lawful pumpout as described in subsection (b);

(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.

(Natural Resources Commission; 312 IAC 11-4-1; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2225; filed Jul 22, 2004, 10:05 a.m.: 27 IR 3886; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; errata filed Jun 2, 2009, 10:29 a.m.: 20090624-IR-312090386ACA)

312 IAC 11-4-2 New seawalls

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

Affected: IC 14-26-2

Sec. 2. (a) A written license under IC 14-26-2 and this rule is required for the construction or placement of a seawall within or along the shoreline or water line of a public freshwater lake.

(b) If a new seawall is to be placed:

(1) in a significant wetland; or

(2) along a natural shoreline;

the seawall must be comprised of bioengineered materials.

(c) If a new seawall is to be placed in an area of special concern, the seawall must be comprised of either or both of the following:

(1) Bioengineered materials.

(2) Glacial stone.

(d) If a new seawall is to be placed in a developed area, the seawall must be comprised of one (1) or any combination of the following:

(1) Bioengineered material.

(2) Glacial stone.

(3) Riprap.

(4) Concrete.

(5) Steel sheet piling.

(e) For a new seawall comprised of glacial stone or riprap, the base of the wall must not extend more than four (4) feet lakeward of the shoreline or water line.

(f) The lakeward face of the new seawall must be located along the public freshwater lake's shoreline or water line as determined by the department.

(g) The lakeward extent of bioengineered material must be coordinated with the department before filing the license application.

(h) The director or a delegate may not issue a license for the placement of an impermeable material behind or beneath a new seawall.

(i) Filter cloth placed behind or beneath a new seawall must be properly anchored to prevent displacement or flotation.

(j) Erosion from disturbed areas landward of the shoreline or water line must be controlled to prevent its transport into the lake.

(k) Toe protection placed along the lakeward face of a new bulkhead seawall must not extend more than one (1) foot lakeward of the new seawall. *(Natural Resources Commission; 312 IAC 11-4-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2225; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 466; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA; errata filed Aug 9, 2006, 12:00 p.m.: 20060906-IR-312060009ACA)*

312 IAC 11-4-3 Seawall refacing

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

Affected: IC 14-26-2

Sec. 3. (a) A written license under IC 14-26-2 and this rule is required to reface on the lakeward side of a seawall that is located within or along the shoreline or water line of a public freshwater lake.

(b) Except as provided in 312 IAC 11-3-1(e), the director or a delegate shall not issue a license to reface a seawall if the wall has been previously refaced.

(c) To qualify for a license if a seawall is to be refaced in a significant wetland or an area of special concern, the seawall reface must be comprised of like materials in accordance with the following seawall types:

(1) For an existing concrete seawall, the seawall reface may be comprised of one (1) or any combination of the following:

- (A) Concrete.
- (B) Glacial stone.
- (C) Bioengineered materials.

(2) For an existing steel sheet piling seawall, the seawall reface may be comprised of one (1) or any combination of the following:

- (A) Steel sheet piling.
- (B) Glacial stone.
- (C) Bioengineered materials.

(3) For an existing riprap seawall, the seawall reface may be comprised of one (1) or any combination of the following:

- (A) Riprap.
- (B) Glacial stone.
- (C) Bioengineered materials.

(4) For an existing glacial stone seawall, the seawall reface may be comprised of one (1) or any combination of the following:

- (A) Glacial stone.
- (B) Bioengineered materials.

(5) For an existing bioengineered seawall, the seawall reface may be comprised of bioengineered materials only.

(6) For all other seawall types, the seawall reface may be comprised of one (1) or any combination of the following:

- (A) Glacial stone.
- (B) Bioengineered materials.

(d) To qualify for a license if a seawall is to be refaced in a developed area, the seawall reface must be comprised of one (1) or any combination of the following:

- (1) Bioengineered material.
- (2) Glacial stone.
- (3) Riprap.
- (4) Concrete.
- (5) Steel sheet piling.

(e) For a seawall reface comprised of:

(1) glacial stone or riprap, the reface must not extend more than four (4) feet lakeward of the shoreline or water line at the base of the existing wall;

(2) concrete, the reface must:

- (A) not extend more than twelve (12) inches lakeward of the existing seawall; and
- (B) be keyed to the lakeward face of the existing seawall;

(3) steel sheet piling, the reface must not extend more than six (6) inches lakeward of the existing seawall; and

(4) bioengineered material, the lakeward extent of the reface must be coordinated with the department before filing the permit application.

(f) Any walk or structural tie constructed on top of the existing seawall must be located landward of the seawall face.

(g) The director or a delegate shall not issue a license for the placement of an impermeable material behind or beneath a seawall reface.

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(h) Filter cloth placed behind or beneath the seawall reface must be properly anchored to prevent displacement or flotation.

(i) Erosion from disturbed areas landward of the shoreline or water line must be controlled to prevent its transport into the lake.

(j) Toe protection placed along the lakeward face of a refaced bulkhead seawall must not extend more than one (1) foot lakeward of the refaced seawall. (*Natural Resources Commission; 312 IAC 11-4-3; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2225; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1616; filed May 25, 2004, 8:45 a.m.: 27 IR 3063; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 467; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA*)

312 IAC 11-4-4 Underwater beaches

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

Affected: IC 14-26-2

Sec. 4. (a) A written license under IC 14-26-2 and this rule is required to place material for an underwater beach within a public freshwater lake.

(b) The director or a delegate shall not issue a license for the placement of:

- (1) filter cloth; or
- (2) an impermeable material;

beneath or in an underwater beach.

(c) The director or a delegate shall not issue a license for the placement of an underwater beach:

- (1) in a significant wetland; or
- (2) along a natural shoreline.

(d) To qualify for a license to place an underwater beach in an area of special concern, the underwater beach must:

- (1) not exceed six hundred twenty-five (625) square feet;
- (2) not extend:

(A) more than thirty (30) feet lakeward of the shoreline or water line; or

(B) to a depth of six (6) feet;

whichever occurs earlier;

(3) be placed on not more than one-half (½) the length of the shoreline or water line of the riparian owner;

(4) be comprised of clean, nontoxic pea gravel;

(5) not exceed six (6) inches in thickness; and

(6) be thin enough or tapered so the shoreline or water line will not be extended lakeward.

(e) To qualify for a license to place an underwater beach in a developed area, the underwater beach must:

(1) be comprised of clean, nontoxic pea gravel;

(2) not exceed six (6) inches in thickness;

(3) be placed on not more than one-half (½) the length of the shoreline or water line of the riparian owner;

(4) extend not:

(A) more than fifty (50) feet lakeward from the shoreline or water line; or

(B) beyond a depth of six (6) feet;

whichever occurs earlier; and

(5) be thin enough or tapered so the shoreline or water line will not be extended lakeward.

(f) If beach material has been placed previously under this section, the additional material must not:

(1) extend beyond the limits of the previous beach material; and

(2) exceed the size restrictions specified in subsections (d) and (e).

(g) Erosion from disturbed areas landward of the shoreline or water line must be controlled to prevent its transport into the lake. (*Natural Resources Commission; 312 IAC 11-4-4; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2226; filed Dec 26, 2001, 2:42 p.m.: 25 IR 1547; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 14, 2005, 2:45 p.m.: 29 IR 467; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA; errata filed Aug 9, 2006, 12:00 p.m.: 20060906-IR-312060009ACA*)

312 IAC 11-4-5 Boatwell excavations or constructions

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

Affected: IC 14-26-2

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Sec. 5. (a) A written license under IC 14-26-2 and this rule is required to excavate or construct a boatwell that is within or adjacent to the shoreline or water line of a public freshwater lake.

(b) The department may not issue a license for the excavation or construction of a boatwell in:

- (1) a significant wetland; or
- (2) an area of special concern.

(c) To qualify for a license to place a boatwell in a developed area, the excavation or construction of the boatwell must not:

(1) adversely affect the:

- (A) water level;
- (B) significant wetlands; or
- (C) natural resources;

of the public freshwater lake;

(2) exceed twenty (20) feet wide;

(3) extend more than thirty (30) feet landward from the shoreline or water line; and

(4) be connected to the public freshwater lake until the landward sides of the boatwell have been stabilized to prevent erosion.

(d) Erosion from disturbed areas landward of the shoreline or water line must be controlled to prevent its transport into the lake. (*Natural Resources Commission; 312 IAC 11-4-5; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2226; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA*)

312 IAC 11-4-6 Boatwell fills

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

Affected: IC 14-26-2

Sec. 6. (a) A written license under IC 14-26-2 and this rule is required to fill an existing boatwell along a public freshwater lake.

(b) To qualify for a license, the existing boatwell must:

(1) not exceed twenty (20) feet wide;

(2) not extend more than thirty (30) feet landward from the shoreline or water line;

(3) not be filled until a seawall or other permanent barrier has been constructed across the lakeward end of the boatwell to prevent the fill material from entering the public freshwater lake; and

(4) be filled with only clean, nontoxic material.

(c) Erosion from disturbed areas landward of the shoreline or water line must be controlled to prevent its transport into the lake. (*Natural Resources Commission; 312 IAC 11-4-6; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2227; errata filed Apr 27, 1999, 4:45 p.m.: 22 IR 2883; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Jul 11, 2006, 9:04 a.m.: 20060802-IR-312060009FRA*)

312 IAC 11-4-7 Fish attractors

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

Affected: IC 14-15; IC 14-26-2

Sec. 7. (a) A written license is required under IC 14-26-2 and this rule to construct or place a fish attractor within a public freshwater lake.

(b) To qualify for a license, the construction or placement of a fish attractor must:

(1) be anchored to ensure proper settling;

(2) not be placed:

(A) in a channel;

(B) in a beach area;

(C) near the lake surface nor in an area that would adversely affect public safety and navigation as determined by the division of law enforcement; and

(D) to affect natural resources or natural scenic beauty of the lake in a detrimental manner otherwise prohibited by IC 14-26-2;

(3) use materials and methods to ensure safe placement; and

(4) be supervised by the division of fish and wildlife.

(c) The licensee must promptly remove from the waters of the public freshwater lake any portion or portions of the fish attractor that become unattached from the permitted fish attractor. The responsibility is a condition of a license issued under this section. (*Natural Resources Commission; 312 IAC 11-4-7; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2227; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661*)

312 IAC 11-4-8 Group piers

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

Affected: IC 14-15; IC 14-26-2-5

Sec. 8. (a) A person must not place a group pier along or within the shoreline or water line of a public freshwater lake 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 public freshwater lake.
- (2) Pose an unreasonable hazard to life or property.
- (3) Violate the public rights described in IC 14-26-2-5.
- (4) Interfere with the reasonable exercise of boating operations by the public.
- (5) Interfere with the property 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:
 - (A) portion of the lake two hundred (200) feet from the shoreline or water line; and
 - (B) 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 five (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, additional clearance is required for reasonable navigation. The department may approve an exception to this clause where adjacent riparian owners use a common pier along their mutual property line, and 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 public freshwater lake where the department has determined the carrying capacity in an analysis which 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 in close proximity to the shoreline or water line.
- (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 appropriation 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 or water line. 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 or water line.

(*Natural Resources Commission; 312 IAC 11-4-8; filed Oct 1, 2010, 3:50 p.m.: 20101027-IR-312090856FRA, eff Jan 1, 2011*)

Rule 5. Innovative Practices and Nonconforming Uses

312 IAC 11-5-1 Alternative licenses

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

Affected: IC 14-15; IC 14-26-2

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Sec. 1. (a) The director or a delegate may issue a license that uses materials, techniques, or standards other than those approved in this article, under either of the following circumstances, if the applicant demonstrates to the satisfaction of the department:

- (1) That activities under the permit satisfy both of the following:
 - (A) Include new technology or material not previously or commonly used for the purpose sought.
 - (B) Do not affect the public safety, natural resources, natural scenic beauty, or water level of the lake in a detrimental manner otherwise prohibited by IC 14-26-2.
- (2) That the applicant is a government entity that demonstrates the licensed activity would provide public access to the water if both of the following apply:
 - (A) The resulting use would comply with 43 CFR 17.203, 43 CFR 17.217, and 43 CFR 17.218 that are designed to eliminate discrimination on the basis of disability for any program or activity receiving federal financial assistance, including the construction of public access facilities by public entities.
 - (B) A design that conforms to 312 IAC 11-4 would not provide equivalent accessibility.

(b) A person who wishes to secure a license under this section must confer and consult with the department before filing an application.

(c) Use of the following materials cannot qualify for a license under this section:

- (1) Railroad ties.
- (2) Treated timber.
- (3) Broken concrete.
- (4) Tires.
- (5) Scrap metal, appliances, or vehicle bodies.
- (6) Asphalt.

(7) For a license sought under subsection (a)(1), another material not considered by the department to be innovative.

(Natural Resources Commission; 312 IAC 11-5-1; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2227; filed Sep 9, 2003, 9:32 a.m.: 27 IR 61; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)

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 14-25.5-2; IC 14-26-2-5

Sec. 2. (a) A structure or facility that was lawfully placed before the effective date of a provision 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 or aerial photographs.
- (B) Blueprints or engineering drawings.
- (C) Pier installation company records.

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- (D) Inventories of piers that are nonconforming uses. These inventories shall be maintained by the department's division of law enforcement at the district headquarters for the district in which the structure is located.
 - (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) Except as provided in subdivision (5), a person may deliver a written request and supporting documentation in support of a claim to any lawful nonconforming use that arises under IC 14-26-2 or this article. Except as provided in subdivision (5), 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) A person must satisfy this subdivision in order to retain the status of a lawful nonconforming use for a pier that is longer than one hundred fifty (150) feet (or, for a pier on Bass Lake in Starke County, longer than three hundred (300) feet). By January 1, 2010, the person must deliver, to the department's division of law enforcement at the district headquarters for the district in which the lawful nonconforming use is located, a written request and supporting documentation sufficient to demonstrate the existence of the lawful nonconforming use.
- (6) 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) or (5).
- (7) 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 14-26-2 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 referenced in IC 14-26-2-5, 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 adversely affects any of the following:
 - (i) Public safety.
 - (ii) Natural resources.
 - (iii) Natural scenic beauty.
 - (iv) The water level of a public freshwater lake.
 - (B) Abandoned.
 - (C) Modified in a manner for which a license is required under IC 14-26-2 or this rule, but for which no license has been obtained.

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(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 public safety under subdivision (1)(A)(i) if the structure is any of the following:

(A) Except as provided in clause (B), extended or located more than one hundred fifty (150) feet lakeward from the shoreline or water line.

(B) For Bass Lake in Starke County, would violate 312 IAC 5-6-3(a).

(C) Submerged or otherwise obscured from the view of a boater or other person using a lake.

(D) 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) Notwithstanding subsection (e), the department's division of law enforcement or the department's division of water may issue a notice of violation under IC 14-25.5-2 for either of the following:

(1) The placement or maintenance of an unlawful nonconforming use.

(2) The unauthorized modification or repair of a lawful nonconforming use.

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(g) 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; filed Sep 6, 2007, 12:09 p.m.: 20071003-IR-312060605FRA, eff Jan 1, 2008*)

312 IAC 11-5-3 Licenses to enhance the public trust or to help control erosion

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

Affected: IC 14-15; IC 14-26-2

Sec. 3. (a) If an applicant demonstrates to the satisfaction of the department that modifications to conditions required under this article would promote a purpose described in subsection (b) or (c), the director or a delegate may issue a license under this section that incorporates those modifications. A person who wishes to secure a license under this section must confer with the department before filing an application.

(b) If a purpose of the license is to enhance public access to or use of the lake, the department may issue a license to any of the following:

- (1) A government entity.
- (2) A nonprofit organization.
- (3) A lake association.
- (4) An educational institution.

(c) If a purpose of the license is to control erosion and stabilize the shoreline or waterline, the department may issue a license where supported by a written assessment from a registered engineer, geologist, or soil scientist (with expertise in bank stabilization and erosion control practices) that the proposal is the only viable method for controlling erosion and stabilizing the shoreline or waterline. The written assessment must evaluate the following:

- (1) The composition of existing shoreline terrain.
- (2) Impacts due to wind and wave action.
- (3) The severity of erosion and need for bank stabilization.
- (4) The suitability of materials to armor and provide bank stabilization.

(d) The applicant for a license under this section must also demonstrate the proposal would not affect the:

- (1) public safety;
- (2) natural resources;
- (3) natural scenic beauty; or
- (4) water level;

of the lake in a manner otherwise prohibited by IC 14-26-2.

(e) The following materials do not qualify for a license under this section:

- (1) Railroad ties.
- (2) Treated timber.
- (3) Broken concrete.
- (4) Tires.
- (5) Scrap metal, appliances, or vehicle bodies.
- (6) Asphalt.

(7) Another material determined by the department to be unsuitable for satisfying the requirements of this section.

(*Natural Resources Commission; 312 IAC 11-5-3; filed Sep 14, 2005, 2:45 p.m.: 29 IR 468*)

Rule 6. Surface Water Rights; Emergency Regulation (*Repealed*)

(*Repealed by Natural Resources Commission; filed Oct 1, 2010, 3:52 p.m.: 20101027-IR-312090876FRA, eff Jan 1, 2011*)

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