

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

**IN THE MATTER OF:** )  
 )  
**READOPTION OF 312 IAC 10.5** ) **Administrative Cause**  
**GOVERNING DAM REGULATIONS** ) **Number: 13-003W**  
 ) **(LSA Document #13-162(F))**

**RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULE**

**A. INTRODUCTION**

For consideration is the readoption of 312 IAC 10.5 governing dam regulations. This article includes Rule 1—application and administration; Rule 2—definitions; Rule 3—hazard classifications. The text of 312 IAC 10.5 can be accessed through the Legislative Services Agency Internet site at:

<http://www.in.gov/legislative/iac/T03120/A00105.PDF?>

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

The rules codified under 312 IAC 10.5 are proposed for readoption without amendment. The Director of the Division of Hearings approved preliminary action on January 8, 2013. It is the standard practice to readopt rules by article, and 312 IAC 10.5 is now submitted for consideration as to final action.

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

Kenneth E. Smith, Assistant Director of the Department of Natural Resources, Division of Water was appointed as the Small Business Regulatory Coordinator for this rule

readoption. Smith provided the following analyses of potential impacts to small business for the proposed readoption of 312 IAC 10.5:

**Economic Impact Statement**  
LSA Document #13-162

**IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses**  
**Estimated Number of Small Businesses Subject to this Rule:**

The rule currently used by the DNR's dam safety program, 312 IAC 10.5 Regulation of Dams, will expire at the end of 2013 unless it is reauthorized. This rule is used to assist in the implementation of the statute, IC 14-27-7.5 Regulation of Dams. The State's dam safety program is a critical public safety topic. This initiative seeks dam safety rule reauthorization and corrections to a misquoting of the dam safety statute IC 14-27-7.5, found in 312 IAC 10-1-2(d). It further seeks a correction to 312 IAC 10-2-2(d) where the reference is to subsection (b) instead of (c).

Approximately 1,100 existing dams are subject to I.C.14-27-7.5 (Regulation of Dams).

In the regulation of dams for downstream public safety, the Indiana Department of Natural Resources (IDNR) is often challenged to determine what legal entity has ownership, or responsibility for maintenance of the dam. The individuals or neighborhoods that benefit from a lake formed by a dam may not have the legal responsibility or opportunity for maintenance. Profiling of dam owners regarding the IC 4-22-2.1-4 definition of a small business or their industry sector is not conducted or tracked in the dam safety program process or database. The only ownership information that IDNR attempts to obtain is the owner or owners' name, address, and telephone number.

Most of the 1,100 regulated dams are non-state owned. Estimates of government ownership show 144 State of Indiana owned dams, 19 federally owned dams, 106 dams owned by local government, and 126 dams owned by conservancy districts.

Since the disclosure of dams used for business operations is not required by I.C. 14-27-7.5, for this analysis, the approximate number of small businesses subject to the statute was roughly estimated by considering any business reference in the owner's name. An example would be B&B Brake Sales, Inc. The IDNR estimates that approximately 50 small businesses may be subject to this rule. No classification by industry sector is possible.

No differentiation could be made between owners whose business operations might or might not be dependent upon on the existence of the dam. Given the limited available data, no differentiation could be made between small or large businesses.

A variety of non-business owner types control the remaining non - governmentally owned regulated dams. Other non-business types of owners

include, individuals, families, homeowner associations, lake resident associations, housing developments, and not-for-profit corporations. Typically, most non-governmental owners, own only one dam. It is possible, however, that a few non-governmental owners, or small business owners, own more than one dam.

The disclosure of industry sector information for dams also is not required by I.C. 14-27-7.5. Dams, however, are typically used for one or more of the following purposes, recreation, flood control, water supply, sediment control, fish and wildlife.

**Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:**

The DNR estimates the average annual reporting, record keeping, and other administrative costs that small businesses will incur to comply with the proposed rule is zero.

The IDNR has already seen with the existing rules, and further anticipates that if readopted the proposed initiative, will have no additional annual administrative costs incurred by small business in order to comply with the proposed rule. The proposed readopted rule does not impose any additional requirements on the business owner beyond those already statutorily established.

The proposed rule mirrors the ongoing practice prior to the initial rule adoption, clarifies definitions and the existing requirements set forth in I.C. 14-27-7.5, and utilizes practices and definitions already recognized in agency guidances. The primary purpose of this rule readoption is to implement the legislative mandate of IC 14-27-7.5 which directed these guidances be formalized by rule.

The proposed rule readoption includes the statutorily required classifications of high hazard, significant hazard, and low hazard, and mirrors practice of terms used in the statute and nationwide by the engineering profession.

**Estimated Total Annual Economic Impact on Small Businesses to Comply:**

The DNR estimates that the total annual economic impact that compliance with the proposed rule will have on all small businesses subject to the rule is zero. This estimate is based on the fact that the proposed readoption initiative imposes no additional annual requirements on the business owner beyond those already statutorily established.

No assumptions were made and no data was used to determine the total annual economic impact of the proposed rule, as the proposed readoption initiative imposes no additional annual requirements on the business owner beyond those already statutorily established.

**Justification Statement of Requirement or Cost:**

No requirement or cost is imposed on small business by the rule beyond those already statutorily established. Nothing is imposed which was not expressly required by the authorizing statute.

No data, studies, or analyses were relied upon by the agency in determining that the imposition of the requirement or cost is necessary, as there is no imposition being proposed.

**Regulatory Flexibility Analysis of Alternative Methods:**

As there is no economic impact on small businesses from the proposed rule readoption initiative, a regulatory flexibility analysis found no less expensive alternative. The compliance or reporting requirements are set by statute. The statute does not allow less stringent schedules or deadlines for compliance or reporting requirements for small businesses. Simplification of compliance or reporting requirements has already been done by statute by setting different requirements for low, significant and high hazard dams. The statute already utilizes performance standards (not design standards) for all regulated entities. The exemption of small businesses from part or all of the rule would be contrary to the purpose of the statute, reducing the catastrophic flood risk from a dam failure faced by life, property and business situated downstream in the dam failure inundation area of these dams. The type of group or individual owning a dam has nothing to do with the potential risk a dam may pose to downstream individuals.

**MOST RECENT SMALL BUSINESS IMPACT ANALYSIS  
REVIEW UNDER IC 4-22-2.5-3.1**

**LSA Document # 13-162**

(Administrative Cause Number 13-003W)

Dam Safety Rule Reauthorization (312 IAC 10.5 Regulation of Dams)

The rule currently used by the DNR's dam safety program, 312 IAC 10.5 Regulation of Dams, will expire at the end of 2013 unless it is reauthorized. This rule is used to assist in the implementation of the statute, IC 14-27-7.5 Regulation of Dams. The State's dam safety program is a critical public safety topic. This initiative seeks dam safety rule reauthorization.

**The degree to which the factors analyzed in a previous economic impact statement have changed since the statement was prepared**

The factors analyzed in previous economic impact statements have not changed since the rule was first adopted.

The proposed rule mirrors the ongoing practice prior to the initial rule adoption, clarifies definitions and the existing requirements set forth in I.C. 14-27-7.5, and utilizes practices and definitions already recognized in agency guidances. The primary purpose of this rule readoption is to implement the legislative mandate of IC 14-27-7.5 which directed these guidances be formalized by rule. The proposed rule readoption includes the statutorily required classifications of high hazard, significant hazard, and low hazard, and mirrors practice of terms used in the statute and nationwide by the engineering profession.

The proposed readoption initiative imposes no additional annual requirements on the business owner beyond those already statutorily established. Neither the

existing rule nor the proposed readopted rule initiative imposes compliance actions, or administrative actions for regulated entities, and they will not create an unfunded mandate on any entity.

**Any regulatory alternatives included in the statement under IC 4-22-2.1-5(a)(5)**

No regulatory alternatives were identified in current or previous statements as neither the existing rule nor the proposed readopted rule initiative impose compliance actions, or administrative actions for regulated entities.

**Any regulatory alternatives not considered by the agency at the time the statement was prepared could be implemented to replace one (1) or more of the rule's existing requirements**

There were not and are no regulatory alternatives not considered by the agency at the time statements were prepared (that could be implemented to replace one (1) or more of the rule's requirements). Previous and current statements have, however, explained that long term stakeholder input (from individuals, property owners, and businesses situated at risk in the dam failure flood inundation areas below the dams, and from individuals situated on impoundments) on the larger topic of dam safety, have expressed many areas of concern that to address would require a substantial increase in regulatory mandates.

Executive Order 13-03 requires agencies to “suspend rulemaking action on any proposed rules for which a notice of intent to adopt a rule... was not submitted to the office of the *Indiana Register* on or before January 14, 2013.” The requirements of Executive Order 13-03 were restated, along with additional compliance information in Financial Management Circular 2013-01. On April 12, 2013 the Director of the Department of Natural Resources, Robert E. Carter, submitted correspondence to the Office of Management and Budget seeking an exception from the moratorium. On May 2, 2013 Christopher D. Atkins, Director, Office of Management and Budget, provided written correspondence to all agency heads stating that the moratorium set forth in Executive Order 13-03 was not applicable to re-adoptions and that an exception did not need to be sought or received.

As specified by Executive Order 2-89 and Financial Management Circular 2010-4, fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to the Office of Management and Budget on May 31, 2013. In a letter dated July 9, 2013, Christopher D. Atkins, Director, Office of Management and Budget, recommended that the proposed rule readoption be approved.

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

On April 24, 2013, the “Notice of Intent to Readopt” 312 IAC 10.5 was posted to the *Indiana Register* at 20130424-IR-312130162RNA as anticipated by Ind. Code § 4-22-2.5-2 and Ind. Code § 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 10.5 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 has been received. The Commission may either submit the rule for filing with the Publisher under Ind. Code § 4-22-2-35 or elect the procedure for readoption under Ind. Code § 4-22-2. It is recommended that the Commission approve for readoption 312 IAC 10.5, without amendment for subsequent filing with the Publisher.

Dated: July 24, 2013

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Sandra L. Jensen  
Hearing Officer