

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

IN THE MATTER OF:) **Administrative Cause**
) **Number: 23-WA-001**
READOPTION OF 312 IAC 11)
GOVERNING PUBLIC)
FRESHWATER LAKES)
) **(LSA Document #23-66 (F))**

RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULES

A. INTRODUCTION

For consideration is the readoption of 312 IAC 11 in its entirety, and without amendment. This article provides standards for the regulation of construction activities along and within lakes. 312 IAC 11 can be accessed through the Indiana General Assembly’s website at: <http://www.in.gov/legislative/iac/T03120/A00110.PDF>.

If rules are readopted in their current form without amendments, 312 IAC 2-2-4(b) authorizes the Director of the Division of Hearings to approve preliminary adoption. The Commission retains authority to take final action on readoptions. The Director of the Division of Hearings approved preliminary adoption on January 3, 2023. The standard practice is to readopt rules by article, and 312 IAC 11 is now submitted for consideration as to final action.

B. READOPTION ANALYSIS REQUIRED UNDER IC 4-22-2.5-3.1 AND IC 4-22-2.1-5

Executive Order 13-03 requires agencies to “suspend rulemaking action on any proposed rules”. The Director of the Office of Management and Budget (OMB) has determined the moratorium set forth in Executive Order 13-03 was not applicable to readoptions.¹

¹ Indiana State Budget Agency email dated May 2, 2013, to heads of state agencies. OMB’s determination caused Financial Management Circular 2015-1 to be equally inapplicable to readoptions.

The OMB determined that the fiscal analyses, as specified in Financial Management Circulars 2010-4, are not required to be submitted to the OMB for State Budget Agency's approval if those analyses have been submitted to the OMB in a previous rule adoption or amendment.²

Jennifer Ware, Assistant Director (*Ware*) with the Department of Natural Resources, Division of Water, was appointed Small Business Regulatory Coordinator for this rule readoption. Ware provided the Hearing Officer with the analyses as required for the proposed readoption of 312 IAC 11.

1. Review under IC 4-22-2.5-3.1(c)
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 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 limiting development of the shoreline and out into the public trust by riparian owners that would affect the public's right to recreational value and scenic beauty of Indiana's lakes.

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 approximately eight (8) times. Included 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.

² OMB emails dated March 16 and March 24, 2017. OMB's determination effectively renders Executive Order 2-89 inapplicable to readoptions.

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 first obtaining a permit from the Department. A \$100 fee must be submitted with each application and most 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 and temporary structures are authorized by a general license. The owner of a qualified temporary pier or temporary structure 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 or temporary structure would be subject to individual licensure at an additional cost to landowners and at a great fiscal and human burden to the agency. Thousands of temporary piers and temporary structures are placed in public freshwater lakes each boating season under the general license provisions contained in 312 IAC 11. As a result of the general licenses, 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 additional money and time 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 rules that number would increase dramatically every year which would be completely beyond the staffing capabilities and resources 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 of public and private rights.

A small fraction of users of public freshwater lakes are small businesses. Most of the regulated community consists of individuals. It is estimated that a nominal portion of 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.

In reviewing license applications, the DNR is required under IC 14-26-2-23(c) to consider the effects (including cumulative effects) of a proposed activity upon:

- (1) The shoreline, water line, or bed of the public freshwater lake.
- (2) The fish, wildlife, or botanical resources.
- (3) The public rights described in section 5 of this chapter.
- (4) The management of watercraft operations under IC 14-15.
- (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 no objective standards for reviewing applications or citing violations. 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 regulatory standards. 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 for citizens of Indiana. IC 14-26-2-5.

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 (IDEM). 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 IDEM 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 IDEM 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.

Rule 312 IAC 11 was re-adopted in 2017 (LSA #17-133). No significant changes in technology, economic conditions or other factors in the area affected by the rule have occurred since that time.

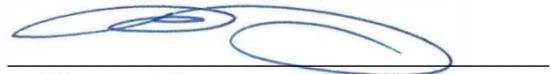
On February 9, 2023, the analyses required under IC 4-22-2.5-3.1 were forwarded to the Legislative Council as required by IC 4-22-2-28(i).

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

On February 8, 2023, the Notice of Intent to Readopt 312 IAC 11 was posted to the *Indiana Register* at 20230208-IR-312230066RNA as anticipated by 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 Commission, through the Small Business Regulatory Coordinator, seeking to have a particular section of the rule readopted separately. If 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. No request was made.

The hearing officer recommends the Commission approve the readoption of 312 IAC 11, in its entirety and without amendment, for subsequent filing with the Publisher under IC 4-22-2-35 as authorized at IC 4-22-2.5-4(c)(1).

Dated: March 11, 2023



Billie Franklin
Hearing Officer