

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

**IN THE MATTER OF:** ) **Administrative Cause**  
 ) **Number: 20-FW-006**  
**READOPTION OF 312 IAC 9.5** )  
**GOVERNING IN-LIEU FEE MITIGATION** ) **(LSA Document #20-410(F))**

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

**A. INTRODUCTION**

For consideration is the readoption of 312 IAC 9.5 in its entirety, and without amendment. This article provides standards for article establishes an option to request an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized in permits issued by the DNR under the Lakes Preservation Act (IC 14-26-2), Flood Control Act (IC 14-28-1), and the Navigable Waterways Act (IC 14-29-1). 312 IAC 9.5 can be accessed through the Indiana General Assembly’s website at: <http://iac.iga.in.gov/iac/T03120/A00095.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 2, 2020. The standard practice is to readopt rules by article, and 312 IAC 9.5 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) determined the moratorium set forth in Executive Order 13-03 was not applicable to readoptions.<sup>1</sup>

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.<sup>2</sup>

Matt Buffington, Environmental Supervisor, of the Department of Natural Resources, Division of Fish & Wildlife, was appointed Small Business Regulatory Coordinator for this rule readoption. Buffington provided to the Hearing Officer the following analyses as required for the proposed readoption of 312 IAC 9.5:

Review under IC 4-22-2.5-3.1(c)

**The continued need for the rule.**

The public continues to submit permit applications to the Department of Natural Resources, Division of Water, for construction in and around waterways. Construction plans often result in impacts to fish, wildlife, and botanical resources that need to be mitigated. In-lieu fee is one of three mitigation options and no other rule addresses in-lieu fee. In-lieu fee has been a mitigation option since May 2019 for Indiana Department of Environmental Management (IDEM) 401 Water Quality Certifications and US Army Corps of Engineers (USACE) 404 permits. Customers using in-lieu fee for those approvals continue to ask when an in-lieu option for DNR permits will be available. The public wants the in-lieu fee mitigation option, which necessitates the rule.

**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.**

While the rule has been in place for a couple years, there has been no program enacted to implement the rule. Comments from the public show a very strong interest in allowing the in-lieu fee program to be active and the rule to be fully implemented. There are no known complaints about a similar in-lieu fee program that is currently active for IDEM and USACE.

**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.**

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<sup>1</sup> 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.

<sup>2</sup> OMB emails dated March 16 and March 24, 2017. OMB’s determination effectively renders Executive Order 2-89 inapplicable to readoptions.

To date, the actual rule has not been fully administered due to the lack of a program to implement the rule. Implementation and administration of the rule is expected in 2020 now that the nonrule policy Information Bulletin #79, In-lieu Fee Mitigation (<http://iac.iga.in.gov/iac/20200603-IR-312200289NRA.xml.pdf>), has been approved by the Natural Resources Commission. Some additional coordination is required between DNR and the Indiana Natural Resources Foundation before the program goes live but those issues are not expected to be significant. Since an in-lieu fee program for DNR permits has not been implemented, there are no issues with compliance by small businesses.

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

The rule does not overlap, duplicate, or conflict with other federal, state, or local laws, rules, regulations, or ordinances. The floristic quality assessment that is part of the rule may also be used by the USACE as a part of their permitting process. Federal regulations in 33 CFR 325.1, 33 CFR 332, and 40 CFR 230 provide for the payment of an in-lieu fee for permits required by the USACE. Some applicants for the in-lieu fee may need both a permit from the DNR and the USACE. The federal requirements include an assessment of impacts to aquatic resources that will be impacted by the project (40 CFR 230.93), and an applicant may use the floristic quality assessment as part of that requirement. However, the federal requirements are much more detailed and the only additional requirements for the DNR will be the completion of the application form, the requirement of the floristic quality assessment (if not already done for the federal permit), and the payment of the fee.

**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.**

Since there is no active in-lieu fee program associated with this rule, there has been only minor review of the rule. During the development of the recently approved Information Bulletin #17, it became evident that two items in the rule need to be reviewed that may ease the process for customers and the State. First, changes regarding the requirement for a Floristic Quality Assessment would reduce the time and money spent in order to evaluate and approve in-lieu fee decisions. Second, allowing in-lieu fee funds to be used for preservation would better align with the existing Information Bulletin #17 Floodway Mitigation Guidelines (<http://iac.iga.in.gov/iac//20190130-IR-312190041NRA.xml.pdf>) and the in-lieu fee option being used by IDEM and USACE. No changes in technology, economic conditions, or other factors have changed in the area affected by the rule.

On August 5, 2020, the analyses required under IC 4-22-2.5-3.1, was 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 August 5, 2020, the “Notice of Intent to Readopt” 312 IAC 9.5 was posted to the *Indiana Register* at 20200805-IR-312200410RNA as anticipated by IC 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 9.5 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 for readoption 312 IAC 9.5, 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: September 8, 2020



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Billie J. Davis  
Hearing Officer