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TITLE 312 NATURAL RESOURCES COMMISSION

LSA Document #00-123(F)

DIGEST

Adds 312 IAC 6-7 to establish standards for determining whether to approve emergency construction, along or within the ordinary high watermark of Lake Michigan, without the prior completion of the ordinary licensing processes for IC 14-29-1. Included are areas below the ordinary high watermark of Lake Michigan and within a tributary where a license is also required under IC 14-28-1. The procedures for seeking approval of an emergency activity, and the status of improvements made as a result of the activity, are outlined. Adds 312 IAC 6-8 to establish standards for determining whether to approve construction of a structure, along or within the ordinary high watermark of Lake Michigan. Effective 30 days after filing with the secretary of state.

312 IAC 6-7

312 IAC 6-8

SECTION 1. 312 IAC 6-7 IS ADDED TO READ AS FOLLOWS:

Rule 7. Emergency Construction Activities in Lake Michigan

312 IAC 6-7-1 Application

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 1. (a) This rule establishes standards for determining whether an emergency condition warrants the approval of a construction activity along or within the ordinary high watermark of Lake Michigan where a license application, review, and approval are not completed before conducting the activity. An emergency authorization under this rule applies to IC 14-28-1 and IC 14-29-1.

(b) The presumption is a license application, review, and approval process must be completed before a construction activity can be approved. An emergency action is authorized only if the division director finds the action is supported by extraordinary circumstances as described in this rule.

(c) This rule also sets procedures for seeking approval of an emergency activity and the status of improvements made as a result of the activity. (Natural Resources Commission; 312 IAC 6-7-1; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1610)

312 IAC 6-7-2 Request for approval of emergency construction

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 2. (a) A person who wishes to perform emergency construction along or within the ordinary high watermark of Lake Michigan, without first obtaining license approval under IC 14-29-1 and this article, must notify the department and the applicable county emergency management agency.

(b) The notice shall describe the nature of the emergency and the construction requested to be performed in response to the emergency. The notice must provide sufficient information for the department to review the request under the terms set forth in this rule.

(c) An authorization issued under this rule also satisfies the need to obtain a license under IC 14-28-1 for the period the authorization is in effect. (Natural Resources Commission; 312 IAC 6-7-2; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1610)

312 IAC 6-7-3 Response to request for emergency construction approval

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 3. Upon the receipt of a request for emergency construction approval, the department shall perform an on-site inspection. To the extent practicable, the department shall consult with other agencies before responding to the request. Included among these agencies are the U.S. Army Corps of Engineers and the appropriate county emergency management agency. *(Natural Resources Commission; 312 IAC 6-7-3; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1611)*

312 IAC 6-7-4 Determining if an emergency exists

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 4. The department may grant a request to approve emergency construction if, without performing the construction, there is an imminent risk of harm to public safety or major damage to property and at least one (1) of the following conditions exist:

- (1) No erosion protection structure is present at the site.
- (2) A failure or significant structural deterioration of an existing erosion protection structure has occurred. Examples include the following:
 - (A) Erosion of the lake bottom has occurred adjacent to a sheet steel wall.
 - (B) Stones in a rock revetment have shifted.
- (3) Major shoreline erosion has occurred.
- (4) A bluff face is excessively steep and threatens mass slumping.
- (5) Without the construction, there would be a likelihood of significant harm to the environment or to public health and safety.

(Natural Resources Commission; 312 IAC 6-7-4; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1611)

312 IAC 6-7-5 Factors tending to support a finding an emergency exists

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 5. Factors tending to support a finding emergency conditions are present under section 3 of this rule include the following:

- (1) The lake level is rising.
- (2) The current lake level is higher than the ordinary high watermark (five hundred eighty-one and five-tenths (581.5) feet) or lower than five hundred seventy-eight (578) feet I.G.L.D., 1985.
- (3) The failed or threatened erosion control structure is in close proximity to the subject property.
- (4) The content, design, or position of an erosion control structure makes its accelerated deterioration or collapse more likely.
- (5) The existing angle of repose of a bluff face or the bluff height make continued slumping probable.
- (6) The risk of harm to public safety or major damage to real property is aggravated by external circumstances.
- (7) If immediate action is not taken, persons other than the person seeking to perform emergency remedial action are also likely to suffer harm.

(Natural Resources Commission; 312 IAC 6-7-5; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1611)

312 IAC 6-7-6 Disposition of emergency license

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 6. (a) The department may approve, approve with conditions, or deny a request for an emergency authorization under this rule. This disposition may be made orally if conditions warrant but shall be memorialized in writing as quickly as practicable.

(b) The department may terminate an application for an emergency license if the applicant fails to provide supporting documentation in a timely fashion.

(c) Unless otherwise specified in writing by the department, an approval under this rule is effective for ninety (90) days. *(Natural Resources Commission; 312 IAC 6-7-6; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1611)*

312 IAC 6-7-7 After-the-fact license

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-18-6; IC 14-28-1; IC 14-29-1

Sec. 7. (a) A person who obtains and acts upon an emergency authorization under this rule must file with the department a completed application, under IC 14-29-1 and this article, for a permanent after-the-fact license within ninety (90) days of commencing the emergency activity. The department may, for good cause, grant an extension of time for filing an after-the-fact license application.

(b) If the activity for which an emergency authorization is granted also requires a license under IC 14-28-1, a completed application for a permanent after-the-fact license under IC 14-28-1 must also be filed with the department within ninety (90) days of commencing the emergency activity.

(c) Subsections (a) and (b) do not apply if the person granted an emergency authorization conducts no activity over which the department has jurisdiction under IC 14-28-1 or IC 14-29-1.

(d) The receipt of an emergency authorization creates no inference of entitlement to an after-the-fact license or to ownership of the bed of Lake Michigan. The department may require modification or removal of any material or structure placed on or within the ordinary high watermark of Lake Michigan if appropriate to IC 14-29-1 and this article. A person may obtain title to lands within the ordinary high watermark of Lake Michigan only upon compliance with IC 14-18-6. *(Natural Resources Commission; 312 IAC 6-7-7; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1611)*

312 IAC 6-7-8 Administrative review

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 4-21.5; IC 14-28; IC 14-29

Sec. 8. (a) An affected person may obtain administrative review under IC 4-21.5 and 312 IAC 3-1 of a determination under this rule. The division of hearings of the commission shall, as soon as practicable, conduct any appropriate proceeding.

(b) Unless otherwise agreed by the parties, a hearing under this section shall be held in an Indiana county that borders Lake Michigan. *(Natural Resources Commission; 312 IAC 6-7-8; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1612)*

SECTION 2. 312 IAC 6-8 IS ADDED TO READ AS FOLLOWS:

Rule 8. Placement of Permanent Structures in Lake Michigan

312 IAC 6-8-1 Application of rule

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29-1

Sec. 1. (a) This rule establishes standards for determining whether to grant approval for the placement of a permanent structure in Lake Michigan under IC 14-29-1.

(b) If the permanent structure is a marina, approval must be obtained under 312 IAC 6-4 in addition to this rule.

(c) As used in this rule, "permanent structure" means a:

- (1) marina;
- (2) seawall;
- (3) breakwater;
- (4) detached breakwater;
- (5) jetty;
- (6) boat launch;

- (7) “z” wall;
- (8) binwall;
- (9) sinusoidal wall;
- (10) bulkhead;
- (11) groin;
- (12) grout tube;
- (13) cable;
- (14) pipeline;
- (15) wharf;
- (16) pier;
- (17) piling;
- (18) rock revetment; or
- (19) similar structure.

(Natural Resources Commission; 312 IAC 6-8-1; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1612)

312 IAC 6-8-2 License for the placement of a structure

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29

Sec. 2. (a) A person who wishes to place a permanent structure on or within the ordinary high watermark of Lake Michigan must file a license application with the department that is completed under this article.

(b) The applicant must include plans, drawings, other specifications reasonably required for the department to determine whether placement of the permanent structure would satisfy 312 IAC 6-1-1.

(c) The applicant must demonstrate the permanent structure will not do any of the following:

- (1)** Unreasonably impair the navigability of the lake or an adjacent navigable waterway.
- (2)** Cause significant harm to the environment.
- (3)** Pose an unreasonable hazard to life or property.

(d) The applicant shall evaluate the likely impact of the permanent structure on coastal dynamics, including the following:

- (1)** Shoreline erosion and accretion.
- (2)** Sand movement within the lake.
- (3)** The interaction with existing structures.

(e) The applicant must demonstrate either that it is the fee owner of land immediately adjacent to the site where the construction would take place or that the applicant has written authorization from the fee owner of that land.

(f) The applicant must provide notice to persons adjacent to the affected real property as described in 312 IAC 2-3. *(Natural Resources Commission; 312 IAC 6-8-2; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1612)*

312 IAC 6-8-3 Action by department

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 4-21.5-3-5; IC 14-28; IC 14-29-1

Sec. 3. (a) The department may determine to approve, approve with conditions, or deny a license sought under this rule and IC 14-29-1. Those conditions may include any action needed to mitigate a negative impact identified under section 2 of this rule. Notice of the determination shall be provided to the applicant and any other person required to be notified under IC 4-21.5-3-5.

(b) The department may terminate a license application where the applicant fails to provide supporting documentation in a timely fashion.

(c) If the department determines the placement of a structure as described in the application would violate the public trust doctrine, the department shall either deny the application or condition approval of the application upon terms that would

allow placement of the structure without violation of the public trust doctrine. The license may be conditioned to assure that any public access will not be impeded and to provide for complete removal of the structure and site restoration, at the expense of the riparian landowner, when the structure is no longer required.

(d) As a condition of approval, the department may require monitoring of the structure or of affected lands and waters to determine the impact of the structure upon coastal dynamics or other environmental factors. If monitoring or other documentation identifies a negative impact that was not fully addressed when the license was approved, the department may require removal, modification, or improvement to the structure (or another action needed) to mitigate the negative impact.
(Natural Resources Commission; 312 IAC 6-8-3; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1613)

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