

IC 13-14-9

Chapter 9. Rulemaking Procedures

IC 13-14-9-0.1

Application of certain amendments to chapter

Sec. 0.1. The amendments made to sections 3 and 4 of this chapter by P.L.100-2006 apply only to proposed rules for which the department of environmental management provides notice under section 3 of this chapter, as amended by P.L.100-2006, after June 30, 2006.

As added by P.L.220-2011, SEC.280.

IC 13-14-9-1

Applicability of chapter

Sec. 1. (a) Except as provided in sections 8 and 14 of this chapter, this chapter applies to the following:

- (1) The board.
- (2) The underground storage tank financial assurance board established by IC 13-23-11-1.

(b) In addition to the requirements of IC 4-22-2 and IC 13-14-8, a board may not adopt a rule except in accordance with this chapter.

As added by P.L.1-1996, SEC.4. Amended by P.L.100-2006, SEC.7; P.L.204-2007, SEC.11; P.L.133-2012, SEC.89.

IC 13-14-9-2

Public comment periods

Sec. 2. Except as provided in sections 4.5, 7, 8, and 14 of this chapter, a board may not adopt a rule under this chapter until the board has conducted at least two (2) public comment periods, each of which must be at least thirty (30) days in length.

As added by P.L.1-1996, SEC.4. Amended by P.L.130-1997, SEC.1; P.L.159-2011, SEC.14.

IC 13-14-9-3

First public comment period; notice

Revisor's Note: P.L.240-2003, SEC.4 (which was effective 7-1-2003 until 4-25-2005) was printed in the 2003 Supplement but was incorrectly omitted from the printing of the 2004 Edition of the Indiana Code.

Sec. 3. (a) Except as provided in subsection (b), the department shall provide notice in the Indiana Register of the first public comment period required by section 2 of this chapter. A notice provided under this section must do the following:

- (1) Identify the authority under which the proposed rule is to be adopted.
- (2) Describe the subject matter and the basic purpose of the proposed rule. The description required by this subdivision must:

- (A) list all alternatives being considered by the department

at the time of the notice;

(B) state whether each alternative listed under clause (A) creates:

(i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or

(ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements;

(C) state the extent to which each alternative listed under clause (A) differs from federal law;

(D) include any information known to the department about the potential fiscal impact of each alternative under clause (A) that creates:

(i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or

(ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements;

and

(E) set forth the basis for each alternative listed under clause (A).

(3) Describe the relevant statutory or regulatory requirements or restrictions relating to the subject matter of the proposed rule that exist before the adoption of the proposed rule.

(4) Request the submission of alternative ways to achieve the purpose of the proposed rule.

(5) Request the submission of comments, including suggestions of specific language for the proposed rule.

(6) Include a detailed statement of the issue to be addressed by adoption of the proposed rule.

(b) This section does not apply to rules adopted under IC 13-18-22-2, IC 13-18-22-3, or IC 13-18-22-4.

(c) The notice required under subsection (a) shall be published electronically in the Indiana Register under procedures established by the publisher.

As added by P.L.1-1996, SEC.4. Amended by P.L.130-1997, SEC.2; P.L.240-2003, SEC.4; P.L.282-2003, SEC.35; P.L.2-2005, SEC.54; P.L.215-2005, SEC.16; P.L.1-2006, SEC.200; P.L.100-2006, SEC.8.

IC 13-14-9-4

Second public comment period; notice

Sec. 4. (a) The department shall provide notice in the Indiana Register of the second public comment period required by section 2 of this chapter. A notice provided under this section must do the following:

(1) Contain the full text of the proposed rule, to the extent required under IC 4-22-2-24(c).

(2) Contain a summary of the response of the department to written comments submitted under section 3 of this chapter during the first public comment period.

(3) Request the submission of comments, including suggestions

of specific amendments to the language contained in the proposed rule.

(4) Contain the full text of the commissioner's written findings under section 7 of this chapter, if applicable.

(5) Identify each element of the proposed rule that imposes a restriction or requirement on persons to whom the proposed rule applies that:

(A) is more stringent than a restriction or requirement imposed under federal law; or

(B) applies in a subject area in which federal law does not impose a restriction or requirement.

(6) With respect to each element identified under subdivision (5), identify:

(A) the environmental circumstance or hazard that dictates the imposition of the proposed restriction or requirement to protect human health and the environment;

(B) examples in which federal law is inadequate to provide the protection referred to in clause (A); and

(C) the:

(i) estimated fiscal impact; and

(ii) expected benefits;

based on the extent to which the proposed rule is more stringent than the restrictions or requirements of federal law, or on the creation of restrictions or requirements in a subject area in which federal law does not impose restrictions or requirements.

(7) For any element of the proposed rule that imposes a restriction or requirement that is more stringent than a restriction or requirement imposed under federal law or that applies in a subject area in which federal law does not impose restrictions or requirements, describe the availability for public inspection of all materials relied upon by the department in the development of the proposed rule, including, if applicable:

(A) health criteria;

(B) analytical methods;

(C) treatment technology;

(D) economic impact data;

(E) environmental assessment data;

(F) analyses of methods to effectively implement the proposed rule; and

(G) other background data.

(b) The notice required under subsection (a) shall be published electronically in the Indiana Register under procedures established by the publisher.

As added by P.L.1-1996, SEC.4. Amended by P.L.240-2003, SEC.5; P.L.215-2005, SEC.17; P.L.100-2006, SEC.9.

IC 13-14-9-4.2

Department required to provide the office of management and

budget fiscal impact statement to board

Sec. 4.2. Not less than fourteen (14) days before the date of preliminary adoption of a proposed rule by a board, the department shall make available to the board the fiscal impact statement prepared by the office of management and budget with respect to the proposed rule under IC 4-22-2-28(e).

As added by P.L.240-2003, SEC.6. Amended by P.L.226-2005, SEC.2; P.L.123-2006, SEC.28.

IC 13-14-9-4.5**Third public comment period; notice**

Sec. 4.5. (a) Except for a rule:

(1) that has been preliminarily adopted by a board in a form that is:

(A) identical to; or

(B) not substantively different from;

the proposed rule published in a second notice under section 4 of this chapter; or

(2) for which the commissioner has made a determination and prepared written findings under section 7 or 8 of this chapter;

a board may not adopt a rule under this chapter until the board has conducted a third public comment period that is at least twenty-one (21) days in length.

(b) The department shall publish notice of a third public comment period with the:

(1) text;

(2) summary; and

(3) fiscal analysis;

that are required to be published in the Indiana Register under section 5(a)(2) of this chapter.

(c) The notice of a third public comment period that must be published in the Indiana Register under subsection (b) must request the submission of comments, including suggestions of specific amendments, that concern only the portion of the preliminarily adopted rule that is substantively different from the language contained in the proposed rule published in a second notice under section 4 of this chapter.

As added by P.L.130-1997, SEC.3. Amended by P.L.240-2003, SEC.7.

IC 13-14-9-5**Adoption; prerequisites**

Sec. 5. (a) A board may not adopt a rule until all of the following occur:

(1) The board holds a board meeting on the proposed rule.

(2) The department, after approval of the proposed rule by the board under subsection (c), publishes the following in the Indiana Register as provided in IC 4-22-2-24(c):

(A) The full text of the proposed rule, including any

amendments arising from the comments received before or during the meeting held under subdivision (1).

(B) A summary of the response of the department to all comments received at the meeting held under subdivision (1).

(C) For a proposed rule with an estimated economic impact on regulated entities that is greater than five hundred thousand dollars (\$500,000), a copy of the office of management and budget fiscal analysis required under IC 4-22-2-28.

(3) The board, after publication of the notice under subdivision (2), holds another board meeting on the proposed rule.

(4) If a third public comment period is required under section 4.5 of this chapter, the department publishes notice of the third public comment period in the Indiana Register.

(b) Board meetings held under subsection (a)(1) and (a)(3) shall be conducted in accordance with IC 4-22-2-26(b) through IC 4-22-2-26(d).

(c) At a board meeting held under subsection (a)(1), the board shall determine whether the proposed rule will:

(1) proceed to publication under subsection (a)(2);

(2) be subject to additional comments under section 3 or 4 of this chapter, considering any written finding made by the commissioner under section 7 or 8 of this chapter; or

(3) be reconsidered at a subsequent board meeting in accordance with IC 4-22-2-26(d).

As added by P.L.1-1996, SEC.4. Amended by P.L.130-1997, SEC.4; P.L.2-1998, SEC.48; P.L.224-1999, SEC.2; P.L.123-2006, SEC.29.

IC 13-14-9-6

Board meetings; written materials

Sec. 6. In addition to the requirements of section 8 of this chapter, the department shall include the following in the written materials to be considered at the board meetings held under section 5(a)(1) and 5(a)(3) of this chapter:

(1) The full text of the proposed rule, as most recently prepared by the department.

(2) The written responses of the department to all comments received:

(A) during the immediately preceding comment period for a board meeting held under section 5(a)(1) of this chapter;

(B) during the immediately preceding board meeting under section 5(a)(1) of this chapter for a board meeting held under section 5(a)(3) of this chapter if a third public comment period is not required under section 4.5 of this chapter; or

(C) during:

(i) a third public comment period that address the portion of the preliminarily adopted rule that is substantively different from the language contained in the proposed rule

published in a second notice under section 4 of this chapter; and

(ii) the immediately preceding board meeting held under section 5(a)(1) of this chapter;

for a board meeting held under section 5(a)(3) of this chapter if a third public comment period is required under section 4.5 of this chapter.

(3) The full text of the office of management and budget fiscal analysis if a fiscal analysis is required under IC 4-22-2-28.

As added by P.L.1-1996, SEC.4. Amended by P.L.130-1997, SEC.5; P.L.224-1999, SEC.3; P.L.123-2006, SEC.30.

IC 13-14-9-7

Waiver of first public comment period

Sec. 7. (a) Unless a board determines under section 5(c)(2) of this chapter that a proposed rule should be subject to additional comments, section 3 of this chapter does not apply to a rulemaking action if the commissioner determines that the rulemaking policy alternatives available to the department are so limited that the public notice and comment period under section 3 of this chapter would provide no substantial benefit to:

(1) the environment; or

(2) persons to be regulated or otherwise affected by the proposed rule.

(b) If the commissioner makes a determination under subsection (a), the commissioner shall prepare written findings under this section. The full text of the commissioner's written findings shall be included in the public notice provided under section 4 of this chapter.

As added by P.L.1-1996, SEC.4.

IC 13-14-9-8

Special rulemaking process for certain rules; findings; notice; hearing; rule based on nullified federal law or regulation

Sec. 8. (a) Except as provided in subsection (g), unless a board determines that a proposed rule should be subject to additional comments or makes a determination described in subsection (f), sections 2 through 7 and sections 9 through 14 of this chapter do not apply to a rulemaking action if the commissioner determines that:

(1) the proposed rule constitutes:

(A) an adoption or incorporation by reference of a federal law, regulation, or rule that:

(i) is or will be applicable to Indiana; and

(ii) contains no amendments that have a substantive effect on the scope or intended application of the federal law or rule;

(B) a technical amendment with no substantive effect on an existing Indiana rule; or

(C) an amendment to an existing Indiana rule, the primary and intended purpose of which is to clarify the existing rule;

- and
- (2) the proposed rule is of such nature and scope that there is no reasonably anticipated benefit to the environment or the persons referred to in section 7(a)(2) of this chapter from the following:
- (A) Exposing the proposed rule to diverse public comment under section 3 or 4 of this chapter.
 - (B) Affording interested or affected parties the opportunity to be heard under section 3 or 4 of this chapter.
 - (C) Affording interested or affected parties the opportunity to develop evidence in the record collected under sections 3 and 4 of this chapter.
- (b) If the commissioner makes a determination under subsection (a), the commissioner shall prepare written findings under this section. The full text of the commissioner's written findings shall be included in:
- (1) the notice of adoption of the proposed rule; and
 - (2) the written materials to be considered by the board at the public hearing held under this section.
- (c) The notice of adoption of a proposed rule under this section must:
- (1) be published in the Indiana Register; and
 - (2) include the following:
 - (A) Draft rule language that includes the language described in subsection (a)(1).
 - (B) A written comment period of at least thirty (30) days.
 - (C) A notice of public hearing before the appropriate board.
- (d) The department shall include the following in the written materials to be considered by the board at the public hearing referred to in subsection (c):
- (1) The full text of the proposed rule as most recently prepared by the department.
 - (2) Written responses of the department to written comments received during the comment period referred to in subsection (c).
 - (3) The commissioner's findings under subsection (b).
- (e) At the public hearing referred to in subsection (c), the board may:
- (1) adopt the proposed rule;
 - (2) adopt the proposed rule with amendments;
 - (3) reject the proposed rule;
 - (4) determine that additional public comment is necessary; or
 - (5) determine to reconsider the proposed rule at a subsequent board meeting.
- (f) If the board determines under subsection (e) that additional public comment is necessary, the department shall publish a second notice in accordance with section 4 of this chapter and complete the rulemaking in accordance with this chapter.
- (g) If the board adopts the proposed rule with amendments under subsection (e)(2), the amendments must meet the logical outgrowth

requirements of section 10 of this chapter, except that the board, in determining whether the amendments are a logical outgrowth of comments provided to the board, and in considering whether the language of comments provided to the board fairly apprised interested persons of the specific subjects and issues contained in the amendments, shall consider the comments provided to the board at the public hearing referred to in subsection (c)(2)(C).

(h) This subsection applies to that part of a rule adopted under this section that directly corresponds to and is based on a federal law, rule, or regulation that is stayed or repealed, invalidated, vacated, or otherwise nullified by a legislative, an administrative, or a judicial action described in subdivision (1), (2), or (3). If:

(1) a proposed rule is adopted by a board under subsection (e)(1) based on a determination by the commissioner under subsection (a)(1)(A) and the federal law, rule, or regulation on which the adopted rule is based is later repealed or otherwise nullified by legislative or administrative action, then that part of the adopted rule that corresponds to the repealed or nullified federal law, rule, or regulation is void as of the effective date of the legislative or administrative action repealing or otherwise nullifying the federal law, rule, or regulation;

(2) a board adopts a proposed rule under subsection (e)(1) that is based on a determination by the commissioner under subsection (a)(1)(A) and the federal law, rule, or regulation on which the adopted rule is based is later invalidated, vacated, or otherwise nullified by a judicial decree, order, or judgment of a state or federal court whose decisions concerning such matters have force and effect in Indiana:

(A) then that part of the rule that corresponds to the invalidated, vacated, or otherwise nullified federal law, rule, or regulation shall not be enforced by the commissioner or any other person during the time in which an appeal of the judicial decree, order, or judgment can be commenced or is pending; and

(B) either:

(i) that part of the adopted rule that corresponds to the invalidated, vacated, or otherwise nullified federal law, rule, or regulation is void as of the date that the judicial decree, order, or judgment becomes final and unappealable; or

(ii) enforcement of the adopted rule is restored if the judicial decree, order, or judgment is reversed, vacated, or otherwise nullified on appeal; and

(3) the federal law, regulation, or rule that is the basis of a rule that is adopted under subsection (e)(1) and based on a determination by the commissioner under subsection (a)(1)(A) is stayed by an administrative or a judicial order pending an administrative or a judicial action regarding the validity of the federal law, rule, or regulation, the commissioner may suspend

the enforcement of that part of the adopted rule that corresponds to the stayed federal law, rule, or regulation while the stay is in force.

As added by P.L.1-1996, SEC.4. Amended by P.L.204-2007, SEC.12; P.L.79-2011, SEC.1; P.L.159-2011, SEC.15; P.L.6-2012, SEC.103.

IC 13-14-9-9

Action upon proposed rules

Sec. 9. After complying with sections 2 through 8 of this chapter, the board may, at the board meeting held under section 5(a)(3) of this chapter:

- (1) adopt a rule that is identical to the proposed rule published under section 5(a)(2) of this chapter;
- (2) adopt the proposed rule with amendments that meet the criteria set forth in section 10 of this chapter;
- (3) recommend amendments to the proposed rule that do not meet the criteria set forth in section 10 of this chapter;
- (4) reject the proposed rule; or
- (5) reconsider the proposed rule at a subsequent board meeting in accordance with IC 4-22-2-26(d).

As added by P.L.1-1996, SEC.4.

IC 13-14-9-10

Amended proposals; logical outgrowth

Sec. 10. (a) A board may amend a proposed rule at a board meeting held under section 5(a)(3) of this chapter and adopt the amended rule under section 9(2) of this chapter if the amendments are a logical outgrowth of:

- (1) the proposed rule as published under section 5(a)(2) of this chapter; and
- (2) any comments provided to the board at the meeting held under section 5(a)(3) of this chapter.

(b) In determining, for the purposes of this section, whether an amendment is a logical outgrowth of the proposed rule and any comments, the board shall consider:

- (1) whether the language of:
 - (A) the proposed rule as published under section 5(a)(2) of this chapter; and
 - (B) any comments provided to the board at the meeting held under section 5(a)(3) of this chapter;fairly apprised interested persons of the specific subjects and issues contained in the amendment; and
- (2) whether the interested parties were allowed an adequate opportunity to be heard by the board.

As added by P.L.1-1996, SEC.4.

IC 13-14-9-11

Amended proposals; notice

Sec. 11. If the board recommends amendments to a proposed rule

under section 9(3) of this chapter, the full text of the proposed rule and accompanying amendments shall be published in accordance with section 5(a)(2) of this chapter. After that publication, the board shall hold another board meeting on the proposed rule under section 5(a)(3) of this chapter.

As added by P.L.1-1996, SEC.4.

IC 13-14-9-12

Rejection; grounds

Sec. 12. The board may reject a proposed rule under section 9(4) of this chapter if one (1) of the following conditions exists:

- (1) The following occurs or has occurred:
 - (A) under section 8 of this chapter, sections 3 and 4 of this chapter did not apply to the proposed rule; and
 - (B) either:
 - (i) the board determines that necessary amendments to the proposed rule will affect persons that reasonably require an opportunity to comment under section 4 of this chapter, considering the criteria set forth in section 8(a)(2) of this chapter; or
 - (ii) the board determines that due to the fundamental or inherent structure or content of the proposed rule, the only reasonably anticipated method of developing a rule acceptable to the board is to require the department to redraft the rule and to obtain the public comments under section 4 of this chapter.
- (2) The following occurs or has occurred:
 - (A) the proposed rule was subject to sections 3 and 4 of this chapter; and
 - (B) either:
 - (i) the board makes a determination set forth in subdivision (1)(B)(i) or (1)(B)(ii); or
 - (ii) the board determines that, due to a procedural or other defect in the implementation of the requirements under sections 3 and 4 of this chapter, an interested or affected party will be unfairly and substantially prejudiced if the public comment period under section 4 of this chapter is not again afforded and that no reasonable alternative method to obtain public comments is available to the interested or affected party other than the public comment period under section 4 of this chapter.

As added by P.L.1-1996, SEC.4. Amended by P.L.204-2007, SEC.13.

IC 13-14-9-13

Rejection; public comment

Sec. 13. If a board rejects a proposed rule under section 12 of this chapter, the proposed rule is subject to section 4 of this chapter whether or not the proposed rule has previously been the subject of the comment period required by section 4 of this chapter.

As added by P.L.1-1996, SEC.4.

IC 13-14-9-14

Procedures for board to establish water quality standards for combined sewer community; notice of rulemaking; hearing; EPA approval

Sec. 14. (a) Except as provided in subsection (g), sections 1 through 13 of this chapter do not apply to a rule adopted under this section.

(b) The board may use the procedures in this section to adopt a rule to establish new water quality standards for a community served by a combined sewer that has:

- (1) an approved long term control plan; and
- (2) an approved use attainability analysis that supports the use of a CSO wet weather limited use subcategory established under IC 13-18-3-2.5.

(c) After the department approves the long term control plan and use attainability analysis, the department shall publish in the Indiana Register a notice of adoption of a proposed rule to establish a CSO wet weather limited use subcategory for the area defined by the approved use attainability analysis.

(d) The notice under subsection (c) must include the following:

- (1) Suggested rule language that amends the designated use to allow for a CSO wet weather limited use subcategory in accordance with IC 13-18-3-2.5.
- (2) A written comment period of at least thirty (30) days.
- (3) A notice of public hearing before the board.

(e) The department shall include the following in the written materials to be considered by the board at the public hearing referred to in subsection (d)(3):

- (1) The full text of the proposed rule as most recently prepared by the department.
- (2) Written responses of the department to written comments received during the comment period referred to in subsection (d)(2).
- (3) The letter prepared by the department approving the long term control plan and use attainability analysis.

(f) At the public hearing referred to in subsection (d)(3), the board may:

- (1) adopt the proposed rule to establish a new water quality standard amending the designated use to allow for a CSO wet weather limited use subcategory;
- (2) adopt the proposed rule with amendments;
- (3) reject the proposed rule; or
- (4) determine to reconsider the proposed rule at a subsequent board meeting.

(g) If the board adopts the proposed rule with amendments under subsection (f)(2), the amendments must meet the logical outgrowth requirements of section 10 of this chapter, except that the board, in

determining whether the amendments are a logical outgrowth of comments provided to the board, and in considering whether the language of comments provided to the board fairly apprised interested persons of the specific subjects and issues contained in the amendments, shall consider the comments provided to the board at the public hearing referred to in subsection (d)(3).

(h) The department shall submit a new water quality standard established in a rule adopted under subsection (f) to the United States Environmental Protection Agency for approval.

As added by P.L.100-2006, SEC.10. Amended by P.L.159-2011, SEC.16; P.L.133-2012, SEC.90.