

# An Overview of the Basic Environmental Rulemaking Process

Step 1	Publication of Notice of Proposed RM First Public Comment Period	Opportunity for Public Comment
Step 2	Publication of Draft Rule Second Public Comment Period	Opportunity for Public Comment
Step 3	Board's 1st Public Hearing and Preliminary Consideration of Draft Rule	Opportunity for Public Comment
Step 4	Publication of Preliminary Adopted (Proposed) Rule	
Step 5	Third Public Comment Period (when necessary)	Opportunity for Public Comment
Step 6	Board's 2nd Public Hearing and Consideration of Proposed Rule for Final Adoption	Opportunity for Public Comment
Step 7	Review of Final Adopted Rule by Attorney General	
Step 8	Review of Final Adopted Rule by Governor	
Step 9	Filing of Rule with Secretary of State	
Step 10	Publication of Final Rule in IR	

THIS CHART has been revised to show (in green) the changes to the IDEM rulemaking process made by the 2003 GA.

Other rule-related changes adopted in 2003 include:

- SEA 417, SEC. 3. Limits SWMB power to adopt rules re coal waste. (IC 13-19-3-3)
- HEA 1221, SEC. 4 & 5. WPCB to amend rules to comply, rules voided. SEC. 6. Endangered industries - no rules until 7/1/05.
- HEA 1671, SEC. 3. IDEM shall post NPD 45 days before presentation to Board. Shall collect comments, present to Board. NPD effective 30 days after presentation. (IC 13-14-1-11.5)
- HEA 1671, SEC. 12. EQSC to consider Board rulemaking.

Listed below are additional rulemaking changes which the GA enacted, but which were included in bills vetoed by the Governor.

- SEA 440, SEC. 2. APCB to adopt federal NSR rules.
- HEA 1798, SEC. 35. 1st Comment Period does not apply to rules under new wetlands chapter. (IC 13-11-9-3)
- HEA 1798, SEC. 37. APCB may not adopt emission-testing rules for certain counties. (IC 13-17-5-9)
- HEA 1798, SEC. 38. Includes directives for WPCB re wetlands rule (IC 13-18-22)
- HEA 1798, SEC. 41. EQSC responsibilities re wetlands.

## STEP #1

### Publication of Notice of Proposed Rulemaking (First Notice)

**First Public Comment Period:** Notice to be published in the *Indiana Register*, describing subject matter and basic purpose of proposed rule, requesting submission of comments, and setting a deadline for comment submissions (comment period must be at least 30 days in length).

#### Summary of Info Required in Notice:

- Authority under which the proposed rule is to be adopted.
- Subject matter and basic purpose of the proposed rule, including all alternatives being considered by IDEM and the basis for each alternative.
- Existing statutes and rules relevant to the subject of the proposed rule.
- Request submission of alternative ways to achieve purpose.
- Request submission of comments, including suggestions for specific language.
- Include detailed statement of issues to be addressed by adoption of the proposed rule.

**Exceptions:** IC 13-14-9-7(a) exempts certain rulemakings from these IC 13-14-9-3 first notice requirements where the commissioner finds that limited policy options necessitate only one comment period; IC 13-14-9-7(b) requires that these findings be published with the draft rule.

IC 13-14-9-8(a) exempts certain rulemakings from both the IC 13-14-9-3 first and IC 13-14-9-4 second notice requirements when the commissioner finds no anticipated benefit from either comment period; IC 13-14-9-8(b) requires that these findings be published with the draft rule and included in written materials to be considered at the board meeting (the board packet).

Source: IC 13-14-9-2, 3, 7 and 8

## STEP #2

### Publication of Draft Rule (Second Notice)

**Second Public Comment Period:** Full text of draft rule is to be published in the *Indiana Register*, along with a second notice requesting submission of comments and setting a deadline for comment submissions (comment period must be at least 30 days in length).

#### Summary of Information Required in Notice:

- The full text of the draft rule.
- A summary of the response by IDEM to written comments submitted during the first public comment period.
- Request for comments (including suggested specific amendments to the language contained in the draft rule), along with deadline for submissions.
- Where IC 13-14-9-7 is applicable, the full text of the commissioner's findings.

Notice of time, date, and place of board public hearing and meeting to consider the draft rule are customarily published as part of the second notice, although the law only requires that notice be published prior to the hearing.

Source: IC 13-14-9-2, 4

IC 13-14-9-4 (HEA 1671, SEC.5) lists additional information to be included in 2nd Notice.

IC 13-14-9-3 (HEA 1671, SEC.4) lists additional information to be included in 1st Notice.

**Board packet** (written materials to be considered at the board public hearing and meeting scheduled in the *Indiana Register* to consider the draft rule) is to include:

- The full text of the draft rule, as most recently prepared by IDEM; and
  - IDEM's written response to all comments received during the immediately preceding comment period (i.e., the responses to comments submitted during the second public comment period).
  - Where IC 13-14-9-8 is applicable, the full text of the commissioner's findings under Sec. 8(a).
  - The full text of the LSA fiscal analysis if one was required under IC 4-22-2-28.\*
- Note:** IDEM normally provides a "fact sheet" as well.

Source: IC 13-14-9-6, 8

IC 4-22-2-28(c) (HEA 1671, SEC.2) requires that IDEM notify LSA of proposed Preliminary Adoption (PA) at least 66 days in advance. LSA shall prepare Fiscal Analysis (FA) at least 21 days in advance of the PA.

IC 13-14-9-4.2 (HEA 1671, SEC.6) requires IDEM to make FA available to Board at least 14 days before PA.

\*There is some confusion in the statutes about the timing of this requirement; see note on following page re Step 4.

## STEP #3

### Board Consideration of Draft Rule (1st Public Hearing and Preliminary Adoption)

**Board's First Public Hearing on Draft Rule**  
To be conducted under IC 4-22-2-26(b) through (d). Also see IC 13-14-8-6 and procedures in Appendix B.

**Board Meeting on the Draft Rule**  
Options available to board on preliminary adoption:

- Preliminarily adopt *draft* rule, with or without amendments, and proceed to publication as a *proposed* rule.
- Send draft rule back for republication and additional comments under IC 13-14-9-3 or 4 (considering any written finding by the commissioner under IC 13-14-9-7 or 8).
- Recess and reconsider at later meeting (the time, date and place of which has been announced before the recess, per IC 4-22-2-26(d)).

Source: IC 13-14-9-5(a)(1), and (c)

**Note:** The law uses the term "proposed" rule to cover both the draft and the preliminarily adopted versions. In this publication, the term "draft" is applied until the proposal has been preliminarily adopted; thereafter it is referred to as the "proposed" or "preliminarily adopted rule."

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STEP #4

Publication of Proposed (Preliminarily Adopted) Rule

Publication of Proposed (Preliminarily Adopted) Rule in the Indiana Register is to include:

- Full text of proposed rule, including any amendments arising from the comments received before or during the first board meeting.
• Summary of IDEM's responses to all comments received at the first board meeting.
• For a proposed rule with an estimated economic impact on regulated entities greater than \$500,000, a copy of the LSA fiscal analysis required by IC 4-22-2-28.\*

Note: Notice of time, date, and place of the board public hearing and meeting to consider the proposed rule are customarily published as part of the publication of the proposed (preliminarily adopted) rule, although the law only requires that notice be published prior to the hearing.

Source: IC 13-14-9-5(a)(2)

\*IC 4-22-2-28(b) states that an agency shall submit preliminarily adopted rules with an estimated economic impact of more than \$500,000 on regulated entities to the LSA, which shall have 45 days to perform a fiscal analysis. IC 13-14-9-5(a)(2)(C) requires that this fiscal analysis be published in Indiana Register along with the preliminarily adopted rule. Also see the note on the following page re the board packet.

Now IC 4-22-2-28(c) and 66 days per HEA 1671, SEC.2.

Board packet (written materials to be considered at the board public hearing and meeting scheduled in the Indiana Register to consider the proposed rule) is to include:

- The full text of the proposed rule "as most recently prepared by IDEM";
• IDEM's written response to all comments received during the immediately preceding board meeting and, if there was a third public comment period, the comments submitted during that period;
• The full text of the LSA fiscal analysis if one was required under IC 4-22-2-28.\*

Note: IDEM normally also provides:

- a list of any IDEM suggested changes to the preliminarily adopted version, and
• the text of the proposed rule with the proposed changes incorporated.

Source: IC 13-14-9-6

\*IC 13-14-9-6 requires that the LSA fiscal analysis be included in the board packet for both preliminary and final adoption, but the requirement that it be included prior to preliminary adoption is unworkable, as the statutes also provide that the request not be submitted to LSA until after preliminary adoption.

After the board has adopted the proposed rule (final adoption), it is to be submitted to the attorney general (AG), who is to review it for legality. Under IC 4-22-2-31(b), the AG determines the number of copies of the rule and other documents to be submitted.

The rule is submitted to the AG as part of a "promulgation packet" prepared by IDEM, that also includes:

- all notices
• all comments and responses thereto
• LSA fiscal approval
• Budget Agency fiscal approval\*
• transcripts of all public hearings
• list of changes to rules
• copies of all materials incorporated by reference (see also IC 4-22-2-21).

\*Per 1989 Ex. Order of Governor Bayh (see App. C). Note that LSA is to review for impact on regulated entities, while Budget is to review for fiscal impact on state and local government.

STEP #8

Consideration by Governor

The governor has 15 days from the date of submission by IDEM to approve or disapprove the rule, with or without cause (the governor may take 30 days if he files an intent to take an additional 15 days with the sec. of state within the first 15 day period).

If neither approved nor disapproved by the governor within the allowed period, the rule is deemed approved.

Source: IC 4-22-2-33 and 34

STEP #5

Third Public Comment Period

A board may not final adopt a rule until after a third public comment period at least 21 days long. IDEM shall publish a notice of the third public comment period as part of the requisite publication under IC 13-14-9-5(a)(2). Comments shall be solicited only on the portion of the preliminarily adopted rule that is substantively different from the language contained in the proposed rule published at second notice under IC 13-14-9-4.

Exceptions: The third public comment period shall not be required:

- where the preliminarily adopted rule is identical to the proposed rule, or
• does not substantively differ from the proposed rule.

The third public comment period also shall not be required where the commissioner has made a determination and published written findings under IC 13-14-9-7 or 8 that there is no "reasonably anticipated benefit" to affording public comment on the proposed rule.\*

Source: IC 13-14-9-4,5

\*This exception in the 3rd comment period requirements may not be well-advised, as the proposed rule may at this point differ substantively from the version the commissioner determined to be exempt from 1st, or both 1st and 2nd, notice.

STEP #6

Board Consideration of Proposed Rule (2nd Hearing and Final Adoption)

Board's Second Public Hearing on the Proposed Rule

To be conducted under IC 4-22-2-26(b) through (d). Also see IC 13-14-8-6 and procedures in Appendix B.

Board Meeting on the Proposed Rule

Options available to board on final adoption:

- Adopt a rule identical to the proposed rule published under IC 13-14-9-5(a)(2).
• Adopt the proposed rule with amendments that meet the logical outgrowth criteria of IC 13-14-9-10 (see discussion at page 20).
• Recommend amendments that do not meet the logical outgrowth criteria. [Under IC 13-14-9-11 the amended proposed rule then will have to be republished under IC 13-14-9-5(a)(2) (i.e., Step 4) before the board may consider it for final adoption.]
• Reject the proposed rule.\*
• Recess and reconsider at a later meeting (the time, date and place of which has been announced before the recess, per IC 4-22-2-26(d)).

Source: IC 13-14-9-9, 10 and 11

\* If the board rejects the proposed rule on the basis that there was not adequate opportunity for public comment under IC 13-14-9-3 or 4, then the rejected proposed rule is subject to the IC 13-14-9-4 (i.e., Step 2) comment requirements. See IC 13-14-9-12 and 13.

STEP #7

Consideration by Attorney General

The AG has 45 days to approve or disapprove a rule and may disapprove it only under certain circumstances:

- (1) it has been adopted without statutory authority;
(2) it has been adopted without compliance with statutory procedural requirements;
(3) the version adopted is not a logical outgrowth of the proposed rule as published under IC 13-14-9-5(a)(2) and the testimony presented at the board meeting on final adoption under IC 13-14-9-5(a)(3); or
(4) it violates another law.

If the AG fails to either timely approve or disapprove the rule, after 45 days the rule is "deemed approved" and is to be submitted to the governor.

Rather than disapproving a rule that fails to comply with the formatting requirements established by a legislative agency, the AG pursuant to IC 4-22-2-32(d)(2) may return the rule to IDEM, which in this limited case may bring it into technical compliance with IC 4-22-2-20(2) and 42 and resubmit it to the AG without readopting the rule.

Source: IC 4-22-2-31 and 32

Note: See discussion at page 20 re logical outgrowth.

Note: See discussion at page 21 re withdrawal of a rule on IDEM's own initiative.

STEP #9

Filing with Secretary of State

When a rule has been approved or deemed approved by the governor, IDEM shall immediately submit the rule to the sec. of state for filing.

Subject to review under IC 4-22-2-39, the sec. of state shall accept the rule for filing. The sec. of state shall take no more than 3 days to complete this review.

A rule that has been accepted for filing takes effect upon the latest of:

- the date that is 30 days after the date and time the rule was accepted for filing, or
• the effective date stated in the rule itself.

Source: IC 4-22-2-35, 36 and 39

STEP #10

Publication of Final Rule

The full text of the final rule is to be published in the Indiana Register.

Source: A Guide to Indiana Environmental Rulemaking © 1993, 1999, 2003 Marcia J. Oddi

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