

HOUSE BILL No. 1436

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-21.5-3-27.5; IC 14-8-2; IC 14-28-1.

Synopsis: Administrative proceedings and state agencies. Provides that, in an adjudicative administrative proceeding concerning an agency action, the administrative law judge shall order the agency to pay the reasonable attorney's fees incurred by the party challenging the agency action if the administrative law judge makes a finding that the agency action was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) not supported by substantial evidence. Requires the director of the department of natural resources (director) to issue a permit for the construction of a structure in a floodway if the director determines that the structure will not: (1) adversely affect the efficiency of or unduly restrict the capacity of the floodway; (2) constitute an unreasonable hazard to the safety of life or property; or (3) result in unreasonably detrimental effects upon fish, wildlife, or botanical resources. Eliminates the provision of current law under which the director may not issue the permit unless the applicant clearly proves that the structure will not do any of those three things. Prohibits the director from determining that the construction of a structure in a floodway will adversely affect the efficiency of the floodway or unduly restrict the capacity of the floodway if the construction of the structure would increase the regulatory flood elevation of the floodway by less than fifteen-hundredths of a foot.

Effective: July 1, 2021.

Thompson

January 14, 2021, read first time and referred to Committee on Judiciary.



First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

HOUSE BILL No. 1436

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 4-21.5-3-27.5 IS ADDED TO THE INDIANA
2 CODE AS A **NEW** SECTION TO READ AS FOLLOWS
3 [EFFECTIVE JULY 1, 2021]: **Sec. 27.5. In a proceeding under this**
4 **chapter concerning an agency action, the administrative law judge**
5 **shall order the agency to pay the reasonable attorney's fees**
6 **incurred in the proceeding by the party challenging the agency**
7 **action if the administrative law judge makes a finding that the**
8 **agency action was:**
9 (1) **arbitrary, capricious, an abuse of discretion, or otherwise**
10 **not in accordance with law;**
11 (2) **contrary to constitutional right, power, privilege, or**
12 **immunity;**
13 (3) **in excess of statutory jurisdiction, authority, or limitations,**
14 **or short of statutory right;**
15 (4) **without observance of procedure required by law; or**
16 (5) **not supported by substantial evidence.**
17 SECTION 2. IC 14-8-2-19.3 IS ADDED TO THE INDIANA CODE



1 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
2 1, 2021]: **Sec. 19.3. "Base condition", for purposes of IC 14-28-1-22,**
3 **means:**

4 **(1) the condition of a floodway:**

5 **(A) as it was on January 1, 1973; or**

6 **(B) if an unauthorized dam or levee was present in the**
7 **floodway on January 1, 1973, as it would have been on**
8 **January 1, 1973, without the presence of the unauthorized**
9 **dam or levee; or**

10 **(2) if the regulatory flood profile of the floodway was lowered**
11 **by an activity conducted after December 31, 1972, the**
12 **regulatory flood profile of the floodway as lowered by the**
13 **activity.**

14 SECTION 3. IC 14-8-2-237.5 IS ADDED TO THE INDIANA
15 CODE AS A NEW SECTION TO READ AS FOLLOWS
16 [EFFECTIVE JULY 1, 2021]: **Sec. 237.5. "Regulatory flood**
17 **elevation" means the elevation of a flood having a one percent**
18 **(1%) probability of being equaled or exceeded in a year, as**
19 **calculated by a method and procedure approved by the natural**
20 **resources commission.**

21 SECTION 4. IC 14-28-1-22, AS AMENDED BY P.L.156-2020,
22 SECTION 61, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
23 JULY 1, 2021]: **Sec. 22. (a) As used in subsection (b)(1) with respect**
24 **to a stream, "total length" means the length of the stream, expressed in**
25 **miles, from the confluence of the stream with the receiving stream to**
26 **the upstream or headward extremity of the stream, as indicated by the**
27 **solid or dashed, blue or purple line depicting the stream on the most**
28 **current edition of the seven and one-half (7 1/2) minute topographic**
29 **quadrangle map published by the United States Geological Survey,**
30 **measured along the meanders of the stream as depicted on the map.**

31 **(b) This section does not apply to the following:**

32 **(1) A reconstruction or maintenance project (as defined in**
33 **IC 36-9-27) on a stream or an open regulated drain if the total**
34 **length of the stream or open drain is not more than ten (10) miles.**

35 **(2) A construction or reconstruction project on a state or county**
36 **highway bridge in a rural area that crosses a stream having a**
37 **upstream drainage area of not more than fifty (50) square miles**
38 **and the relocation of utility lines associated with the construction**
39 **or reconstruction project if confined to an area not more than one**
40 **hundred (100) feet from the limits of the highway construction**
41 **right-of-way.**

42 **(3) The performance of an activity described in subsection (c)(1)**



- 1 or (c)(2) by a surface coal mining operation that is operated under
2 a permit issued under IC 14-34.
- 3 (4) Any other activity that is determined by the commission,
4 according to rules adopted under IC 4-22-2, to pose not more than
5 a minimal threat to floodway areas.
- 6 (5) An activity in a boundary river floodway to which section 26.5
7 of this chapter applies.
- 8 (6) The removal of a logjam or mass of wood debris that has
9 accumulated in a river or stream, subject to the following
10 conditions:
- 11 (A) Work must not be within a salmonid stream designated
12 under 327 IAC 2-1.5-5 without the prior written approval of
13 the department's division of fish and wildlife.
- 14 (B) Work must not be within a natural, scenic, or recreational
15 river or stream designated under 312 IAC 7-2.
- 16 (C) Except as otherwise provided in Indiana law, free logs or
17 affixed logs that are crossways in the channel must be cut,
18 relocated, and removed from the floodplain. Logs may be
19 maintained in the floodplain if properly anchored or otherwise
20 secured so as to resist flotation or dislodging by the flow of
21 water and placement in an area that is not a wetland. Logs
22 must be removed and secured with a minimum of damage to
23 vegetation.
- 24 (D) Isolated or single logs that are embedded, lodged, or
25 rooted in the channel, and that do not span the channel or
26 cause flow problems, must not be removed unless the logs are
27 either of the following:
- 28 (i) Associated with or in close proximity to larger
29 obstructions.
- 30 (ii) Posing a hazard to navigation.
- 31 (E) A leaning or severely damaged tree that is in immediate
32 danger of falling into the waterway may be cut and removed if
33 the tree is associated with or in close proximity to an
34 obstruction. The root system and stump of the tree must be left
35 in place.
- 36 (F) To the extent practicable, the construction of access roads
37 must be minimized, and should not result in the elevation of
38 the floodplain.
- 39 (G) To the extent practicable, work should be performed
40 exclusively from one (1) side of a waterway. Crossing the bed
41 of a waterway is prohibited.
- 42 (H) To prevent the flow of sediment laden water back into the



- 1 waterway, appropriate sediment control measures must be
 2 installed.
- 3 (I) Within fifteen (15) days, all bare and disturbed areas must
 4 be revegetated with a mixture of grasses and legumes. Tall
 5 fescue must not be used under this subdivision, except that low
 6 endophyte tall fescue may be used in the bottom of the
 7 waterway and on side slopes.
- 8 (c) A person who desires to:
- 9 (1) erect, make, use, or maintain a structure, an obstruction, a
 10 deposit, or an excavation; or
- 11 (2) suffer or permit a structure, an obstruction, a deposit, or an
 12 excavation to be erected, made, used, or maintained;
- 13 in or on a floodway must file with the director a verified written
 14 application for a permit accompanied by a nonrefundable minimum fee
 15 of two hundred dollars (\$200).
- 16 (d) The application for a permit must set forth the material facts
 17 together with plans and specifications for the structure, obstruction,
 18 deposit, or excavation.
- 19 (e) An applicant must receive a permit from the director for the
 20 work before beginning construction. The director shall issue a permit
 21 **for an obstruction, deposit, or excavation in a floodway** only if, in
 22 the opinion of the director, the applicant has clearly proven that the
 23 ~~structure~~, obstruction, deposit, or excavation will not do any of the
 24 following:
- 25 (1) Adversely affect the efficiency of or unduly restrict the
 26 capacity of the floodway.
- 27 (2) Constitute an unreasonable hazard to the safety of life or
 28 property.
- 29 (3) Result in unreasonably detrimental effects upon fish, wildlife,
 30 or botanical resources.
- 31 **(f) The director shall issue a permit for the construction of a**
 32 **structure in a floodway if the director determines that the**
 33 **structure will not:**
- 34 **(1) adversely affect the efficiency of or unduly restrict the**
 35 **capacity of the floodway;**
- 36 **(2) constitute an unreasonable hazard to the safety of life or**
 37 **property; or**
- 38 **(3) result in unreasonably detrimental effects upon fish,**
 39 **wildlife, or botanical resources.**
- 40 **For the purposes of this subsection, the director may not determine**
 41 **that the construction of a structure in a floodway will adversely**
 42 **affect the efficiency of the floodway or unduly restrict the capacity**



1 **of the floodway if the construction of the structure would increase**
 2 **the regulatory flood elevation of the floodway by less than**
 3 **fifteen-hundredths (0.15) of a foot, as determined by comparing the**
 4 **regulatory flood elevation of the floodway as it would be if the**
 5 **structure were constructed to the regulatory flood elevation of the**
 6 **floodway under the floodway's base condition.**

7 ~~(f)~~ **(g)** In deciding whether to issue a permit under this section, the
 8 director shall consider the cumulative effects of the structure,
 9 obstruction, deposit, or excavation. The director may incorporate in and
 10 make a part of an order of authorization conditions and restrictions that
 11 the director considers necessary for the purposes of this chapter.

12 ~~(g)~~ **(h)** A permit issued under this section:

13 (1) is valid for two (2) years after the issuance of the permit; and

14 (2) to:

15 (A) the Indiana department of transportation or a county
 16 highway department if there is any federal funding for the
 17 project; or

18 (B) an electric utility for the construction of a power
 19 generating facility;

20 is valid for five (5) years from the date of issuance.

21 A permit that is active and was issued under subdivision (1) before July
 22 1, 2014, is valid for two (2) years beginning July 2014, and a permit
 23 that is active and was issued under subdivision (2) before July 1, 2014,
 24 is valid for five (5) years beginning July 2014.

25 ~~(h)~~ **(i)** A permit issued under:

26 (1) subsection ~~(g)~~~~(1)~~ **(h)****(1)** may be renewed one (1) time for a
 27 period not to exceed two (2) additional years; and

28 (2) subsection ~~(g)~~~~(2)~~ **(h)****(2)** may be renewed one (1) time for a
 29 period not to exceed five (5) additional years.

30 ~~(i)~~ **(j)** The director shall send a copy of each permit issued under this
 31 section to each river basin commission organized under:

32 (1) IC 14-29-7 or IC 13-2-27 (before its repeal); or

33 (2) IC 14-13-9, IC 14-30-1 (before its repeal), or IC 36-7-6
 34 (before its repeal);

35 that is affected.

36 ~~(j)~~ **(k)** The permit holder shall post and maintain a permit issued
 37 under this section at the authorized site.

38 ~~(k)~~ **(l)** For the purposes of this chapter, the lowest floor of a
 39 building, including a residence or abode, that is to be constructed or
 40 reconstructed in the one hundred (100) year floodplain of an area
 41 protected by a levee that is:

42 (1) inspected; and



1 (2) found to be in good or excellent condition;
2 by the United States Army Corps of Engineers shall not be lower than
3 the one hundred (100) year frequency flood elevation plus one (1) foot.
4 SECTION 5. IC 14-28-1-34, AS AMENDED BY P.L.219-2014,
5 SECTION 34, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
6 JULY 1, 2021]: Sec. 34. A person who knowingly fails to comply with
7 section ~~22(j)~~ **22(k)** of this chapter commits a Class B infraction. Each
8 day a person violates section ~~22(j)~~ **22(k)** of this chapter constitutes a
9 separate infraction.

