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TITLE 327 WATER POLLUTION CONTROL BOARD

FINDINGS AND DETERMINATION OF THE COMMISSIONER PURSUANT TO IC 13-14-9-7 AND SECOND NOTICE OF COMMENT PERIOD #04-228(WPCB)

DEVELOPMENT OF NEW RULES CONCERNING WETLAND ACTIVITY PERMITS

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) has developed draft rule language for new rules 327 IAC 17-1, 327 IAC 17-2, 327 IAC 17-3, and 327 IAC 17-4 concerning wetland activity permits. The purpose of this notice is to seek public comment on the draft rule, including suggestions for specific language to be included in the rule. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

CITATIONS AFFECTED: 327 IAC 17.

AUTHORITY: IC 13-18-3-1; IC 13-18-22.

STATUTORY REQUIREMENTS

House Enrolled Act 1798 (P.L.282-2003) directed that this rulemaking be conducted in accordance with IC 13-14-9-7. IC 13-14-9-7 recognizes that under certain circumstances it may be appropriate to reduce the number of public comment periods routinely provided. In cases where the commissioner determines that the rulemaking policy alternatives available to IDEM are so limited that the notice of first public comment period would provide no substantial benefit, IDEM may forgo this comment period and proceed directly to the notice of second public comment period.

If the commissioner makes the determination of limited rulemaking policy alternatives required by IC 13-14-9-7, the commissioner shall prepare written findings and include them in the second notice of public comment period published in the Indiana Register. This document constitutes the commissioner's written findings pursuant to IC 13-14-9-7.

The statute provides for this shortened rulemaking process if the commissioner determines that "the rulemaking policy alternatives available to the department are so limited that the public notice and comment period under [IC 13-14-9-3]... would provide no substantial benefit to:

- (1) the environment; or
- (2) persons to be regulated or otherwise affected by the proposed rule."

Background and Issues

This rulemaking is mandated under House Enrolled Act (HEA) 1798, passed in the 2003 Indiana General Assembly, and HEA 1277, passed in the 2004 Indiana General Assembly. The Acts require Indiana to develop a state regulated wetlands permitting program for those wetlands not under federal jurisdiction. Following the U.S. Supreme Court Decision in *Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers*, many of Indiana's wetlands were removed from federal jurisdiction. This rulemaking provides the framework for Indiana's nonfederally jurisdictional wetlands.

The Acts mandate that the Water Pollution Control Board (Board) adopt rules for general permits for minimal impacts to Class I and II state regulated wetlands, as well as permits for more significant impacts to Class I state regulated wetlands by February, 2005. The Acts also mandate that the Board adopt rules for individual permits for impacts to Class II and III state regulated wetlands by June 2005. Rather than conduct two (2) separate rulemakings, it was determined that the issues to be discussed were sufficiently connected that one (1) rulemaking containing all types of permits would be the most efficient method of meeting the statutory mandates. Because of the relatively short time frame for adoption of the rules, a workgroup of interested parties was formed this spring to obtain input on how best to implement the new law.

The department has convened a group of wetland scientists (Wetlands Science Advisory Group) to discuss approaches

for classifying wetlands per HEA 1798/1277. Consequently, this rulemaking is not intended to provide further definitions or clarification on wetland classification. Please contact James Robb, (317) 233-8802, at IDEM to obtain additional information related to the wetland classification discussions.

IDEM specifically solicits comments on the draft rules on a few key issues relating to ensuring that a mitigation wetland is successful at achieving its intent under the state law. The draft rule requires that a general and individual permit contain a wetland mitigation plan. Draft rule language requires inclusion of monitoring requirements to gauge progress in creating the compensatory mitigation and includes language requiring an environmental notice on deeds for compensatory wetlands for Class I and environmental deed restrictions for compensatory wetlands for Class II and Class III wetlands. The latter requirement is intended to obviate the need for burdensome long term monitoring and reporting requirements for difficult to recreate wetlands as represented in Class II and Class III.

Other key issues are:

- How to determine a “successful” mitigation wetland.
- Should a mitigated wetland become a “state regulated wetland” before its success has been demonstrated?
- What length of time should a mitigated wetland be allowed to develop, undisturbed, before it can again be impacted as a state regulated wetland?
- Are there additional requirements from the U.S. Army Corps’ Nationwide permits that should be included within this rule?
- What are the criteria to determine what is a minimal vs. significant impact to a wetland?
- What is the most efficient way to regulate tracts of land with wetlands of different classes?

The workgroup and the Wetland Science Advisory Group will continue to meet throughout this rulemaking process to assist in refining the rule and address these and other issues. Information regarding the workgroup is contained below. The department seeks comments on the issues outlined above as well as the draft rule language contained in this notice.

Identification of Restrictions and Requirements Not Imposed Under Federal Law

The Indiana legislature crafted HEA 1798 and HEA 1277 in such away as to be applicable only to those wetlands that are not federally jurisdictional. Therefore, all elements of these draft rules impose either a restriction or a requirement on persons to whom the draft rules apply that is “not imposed under federal law” (NIFL elements). These rules are required under IC 13-14-9-3, IC 13-18-22-2, IC 13-18-22-3, and IC 13-18-22-4.

Fiscal Impact Statements Accompanying the Enacted Wetlands Statutes

These rules are designed to implement the wetland provisions in HEA 1277 and HEA 1798 and, therefore, are not anticipated to have a fiscal impact beyond those created by the statutes. A fiscal impact statement for HEA 1277 was prepared on March 4, 2004. A fiscal impact statement for HEA 1798 was prepared on April 28, 2003. The fiscal impact statement for HEA 1277 addresses the fiscal impact of the rulemaking and the Environmental Quality Service Council (EQSC) review. It does not specifically address the fiscal impact of ongoing regulation. The fiscal impact statement for HEA 1798 stated that because IDEM has historically operated a certification program for wetlands, and since fewer wetlands would require an individual permit or “certification,” significantly fewer state resources would be needed to review applications. However, the statement goes on to say that the categorization of wetlands required by the Act is new to IDEM and that significant additional effort would be required to implement this provision. The resources necessary was indeterminable. As IDEM has just begun to work with interested persons to outline approaches for determining wetland classification under the new state law, the resources needed are still indeterminable at this time.

Potential Fiscal Impact of the Rules

There are a number of provisions of the rules that will have a fiscal impact upon regulated entities. Because the actual cost associated with implementation depends largely on the type of wetland being impacted and the mitigation plan, attaching specific dollar figures to the provisions at this time is not possible. The following are activities under the rule for which the regulated entities would incur costs. This list is not exhaustive but it represents those major issues within the rules for which fiscal impacts have been identified.

1. Classification of wetland—the applicant must determine what class of wetland is proposed to be impacted to determine whether the exemptions within the rule apply as well as what type of permit would be required. Classification of wetland is required for permit applications.
2. Delineation of a wetland—the cost of wetlands delineation depends on a number of factors, including the size of the wetland. A wetlands delineation is required for permit applications.
3. Preparation of permit applications—the cost of preparation of applications depends on the type of permit being sought.
4. Mitigation costs—the cost to mitigate an impacted wetland depends on the type of wetland being impacted as well as whether mitigation is occurring on-site or off-site. Mitigation costs may be reduced by using an exempt isolated

wetland as a mitigated wetland, thereby eliminating the cost of developing another wetland for mitigation purposes.

5. Preparation of a compensatory mitigation plan—costs will vary depending on the size of the mitigated wetlands, as well as type of wetland. A compensatory mitigation plan is required for all permit applications unless the applicant can demonstrate that the site or activity meets the requirements for an exception to mitigation.

6. Mitigation banking—an applicant may propose the use of mitigation banks instead of the actual mitigation.

As the rule is refined and more specific information is obtained regarding the fiscal impacts of these rules, the information will be provided to the Water Pollution Control Board, workgroup members, and all interested parties.

Public Participation and Workgroup Information

An external workgroup has been established to discuss issues involved in this rulemaking. The workgroup is made up of IDEM staff and a cross section of stakeholders. As there are many technical issues involved in this rulemaking a Wetland Science Advisory Group has also been established. Workgroup information is available at <http://www.in.gov/idem/rules/progress/water/wpcb04xx/index.html>. If you wish to provide comments to the workgroup on the rulemaking, attend meetings, or have suggestions related to the workgroup process, please contact Megan Wallace, Rules Section, Office of Water Quality at (317) 233-8669 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the workgroup who represent their particular interests in the rulemaking.

FINDINGS

The commissioner of IDEM has prepared written findings regarding rulemaking on wetland activity permits. These findings are prepared under IC 13-14-9-7 and are as follows:

(1) In accordance with House Enrolled Act 1798 (P.L.282-2003) and House Enrolled Act 1277 (P.L.52-2004), IDEM is required to submit this notice under IC 13-14-9-7.

(2) The draft rule is hereby incorporated into these findings.

Lori Kaplan

Commissioner

Indiana Department of Environmental Management

REQUEST FOR PUBLIC COMMENTS

This notice requests the submission of comments on the draft rule language, including suggestions for specific revisions to language to be contained in the rule. Mailed comments should be addressed to:

#04-228(WPCB) Wetland Activity Permits

Larry Wu, Chief

Rules Section

Office of Water Quality

Indiana Department of Environmental Management

P.O. Box 6015

Indianapolis, Indiana 46206-6015

Hand delivered comments will be accepted by the receptionist on duty at the 12th floor reception desk, Office of Water Quality, 100 North Senate Avenue, 12th Floor West, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 232-8406, Monday through Friday, between 8:15 a.m and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules Section at (317) 233-8903.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by September 30, 2004.

Additional information regarding this action may be obtained from Megan Wallace, Rules Section, Office of Water Quality, (317) 233-8669 or (800) 451-6027 (in Indiana).

DRAFT RULE

SECTION 1. 327 IAC 17 IS ADDED TO READ AS FOLLOWS:

ARTICLE 17. WETLAND ACTIVITY PERMITS

Rule 1. State Regulated Wetlands

327 IAC 17-1-1 Purpose

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. (a) This article governs the issuance of wetland activity general and individual permits in state regulated wetlands (SRWs) and establishes procedures and criteria for the review of applications for wetland activity general and individual permits.

(b) The purpose of this article, consistent with the Clean Water Act, is to:

(1) promote a net gain in high quality isolated wetlands; and

(2) assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program.

(Water Pollution Control Board; 327 IAC 17-1-1)

327 IAC 17-1-2 Applicability

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. This article applies to persons proposing to undertake wetland activities in SRWs. *(Water Pollution Control Board; 327 IAC 17-1-2)*

327 IAC 17-1-3 Definitions

Authority: IC 13-11-2; IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4; IC 13-18-22-6

Sec. 3. The following definitions apply throughout this article:

(1) “Class I wetland” means an isolated wetland described by one (1) or both of the following:

(A) At least fifty percent (50%) of the wetland has been disturbed or affected by human activity or development by one (1) or more of the following:

(i) Removal or replacement of the natural vegetation.

(ii) Modification of the natural hydrology.

(B) The wetland supports only minimal wildlife or aquatic habitat or hydrologic function because the wetland does not provide critical habitat for threatened or endangered species listed in accordance with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and the wetland is characterized by at least one (1) of the following:

(i) The wetland is typified by low species diversity.

(ii) The wetland contains greater than fifty percent (50%) areal coverage of nonnative invasive species of vegetation.

(iii) The wetland does not support significant wildlife or aquatic habitat.

(iv) The wetland does not possess significant hydrologic function.

(2) “Class II wetland” means either of the following:

(A) An isolated wetland that is not a Class I or Class III wetland.

(B) A type of wetland listed in subdivision (3)(B) that would meet the definition of Class I wetland if the wetland were not a rare or ecologically important type.

(3) “Class III wetland” means an isolated wetland:

(A) that:

(i) is located in a setting undisturbed or minimally disturbed by human activity or development; and

(ii) supports more than minimal wildlife or aquatic habitat or hydrologic function; or

(B) unless classified as a Class II wetland under subdivision (2)(B), that is of one (1) of the following rare and ecologically important types:

(i) Acid bog.

(ii) Acid seep.

- (iii) Circumneutral bog.
 - (iv) Circumneutral seep.
 - (v) Cypress swamp.
 - (vi) Dune and swale.
 - (vii) Fen.
 - (viii) Forested fen.
 - (ix) Forested swamp.
 - (x) Marl beach.
 - (xi) Muck flat.
 - (xii) Panne.
 - (xiii) Sand flat.
 - (xiv) Sedge meadow.
 - (xv) Shrub swamp.
 - (xvi) Sinkhole pond.
 - (xvii) Sinkhole swamp.
 - (xviii) Wet floodplain forest.
 - (xix) Wet prairie.
 - (xx) Wet sand prairie.
- (4) “Clean Water Act” refers to:
- (A) 33 U.S.C. 1251 et seq.; and
 - (B) regulations adopted under 33 U.S.C. 1251 et seq.
- (5) “Compensatory mitigation” means the:
- (A) restoration; or
 - (B) creation;
- of wetlands to offset or compensate for a loss of wetlands resulting from an authorized wetland activity. Wetlands enlargement, enhancement, and preservation may be considered compensatory mitigation on a case-by-case basis, particularly for Class III wetlands.
- (6) “Dredged material” means material that is dredged or excavated from an isolated wetland.
- (7) “Exempt isolated wetland” means an isolated wetland that:
- (A) is a voluntarily created wetland unless:
 - (i) the wetland is approved by the department for compensatory mitigation purposes in accordance with a permit issued under Section 404 of the Clean Water Act or IC 13-18-22;
 - (ii) the wetland is reclassified as an SRW under IC 13-18-22-6(c); or
 - (iii) the owner of the wetland declares, by a written instrument:
 - (AA) recorded in the office of the recorder of the county or counties in which the wetland is located; and
 - (BB) filed with the department;
 that the wetland is to be considered in all respects to be an SRW;
 - (B) exists as an incidental feature in or on:
 - (i) a residential lawn;
 - (ii) a lawn or landscaped area of a commercial or governmental complex;
 - (iii) agricultural land;
 - (iv) a roadside ditch;
 - (v) an irrigation ditch; or
 - (vi) a manmade drainage control structure;
 - (C) is a fringe wetland associated with a private pond;
 - (D) is, or is associated with, a manmade body of surface water of any size created by:
 - (i) excavating;
 - (ii) diking; or
 - (iii) excavating and diking;
 dry land to collect and retain water for or incidental to agricultural, commercial, industrial, or aesthetic purposes;
 - (E) is a Class I wetland with an area, as delineated, of one-half (½) acre or less;
 - (F) is a Class II wetland with an area, as delineated, of one-fourth (¼) acre or less;
 - (G) is located on land:

- (i) subject to regulation under the United States Department of Agriculture wetland conservation rules, also known as Swampbuster (16 U.S.C. §§ 3801-3862), because of voluntary enrollment in a federal farm program; and
 - (ii) used for agricultural or associated purposes allowed under the rules referred to in this clause; or
- (H) for purposes of clause (B), an isolated wetland exists as an incidental feature:**
- (i) if:
 - (AA) the owner or operator of the property or facility described in clause (B) does not intend the isolated wetland to be a wetland;
 - (BB) the isolated wetland is not essential to the function or use of the property or facility; and
 - (CC) the isolated wetland arises spontaneously as a result of damp soil conditions incidental to the function or use of the property or facility; and
 - (ii) if the isolated wetland satisfies any other factors or criteria established in rules that are:
 - (AA) adopted by the water pollution control board; and
 - (BB) not inconsistent with the factors and criteria described in this clause.
- (I) The total acreage of Class I wetlands on a tract to which the exemption described in clause (E) may apply is limited to the larger of:**
- (i) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in clause (E); and
 - (ii) fifty percent (50%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in clause (E) but for the limitation of this subdivision.
- (J) The total acreage of Class II wetlands on a tract to which the exemption described in clause (F) may apply is limited to the larger of:**
- (i) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in clause (F); and
 - (ii) thirty-three and one-third percent (33⅓%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in clause (F) but for the limitation of this subdivision.
- (K) An isolated wetland described in clauses (E) and (F) does not include an isolated wetland on a tract that contains more than one (1) of the same class of wetland until the owner of the tract notifies the department that the owner has selected the isolated wetland to be an exempt isolated wetland under clauses (E) and (F) consistent with the applicable limitations described in clauses (J) and (K).**
- (8) “Isolated wetland” means a wetland that is not subject to regulation under Section 404(a) of the Clean Water Act.**
- (9) “State regulated wetland” or “SRW” means an isolated wetland located in Indiana that is not an exempt isolated wetland.**
- (10) “Tract” means any area of land that is:**
- (A) under common ownership; and
 - (B) contained within a continuous border.
- (11) “Voluntarily created wetland”, for purposes of this article, means an isolated wetland that:**
- (A) was restored or created in the absence of a governmental order, directive, or regulatory requirement concerning the restoration or creation of the wetland; and
 - (B) has not been applied for or used as compensatory mitigation or another regulatory purpose that would have the effect of subjecting the wetland to regulation as waters by:
 - (i) the department; or
 - (ii) another governmental entity.
- (12) “Waters” means the accumulations of water, surface and underground, natural and artificial, public and private, or a part of the accumulations of water that are wholly or partially within, flow through, or border upon Indiana. The term does not include:**
- (A) an exempt isolated wetland;
 - (B) a private pond; or
 - (C) an off-stream pond, reservoir, wetland, or other facility built for reduction or control of pollution or cooling of water before discharge.
- The term includes all waters of the United States, as defined in Section 502(7) of the federal Clean Water Act (33 U.S.C. 1362(7)), that are located in Indiana.**

(13) “Wetland activity” means the discharge of:

- (A) dredged; or
- (B) fill;

material into an isolated wetland.

(14) “Wetlands” means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that, under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include the following:

- (A) Swamps.
- (B) Marshes.
- (C) Bogs.
- (D) Similar areas.

(15) “Wetlands delineation” or “delineation”, for purposes of this rule, means a technical assessment:

- (A) of whether a wetland exists on an area of land; and
- (B) if so, of the type and quality of the wetland based on the presence or absence of wetlands characteristics, as determined consistently with the Wetlands Delineation Manual, Technical Report Y-87-1 of the United States Army Corps of Engineers.

(Water Pollution Control Board; 327 IAC 17-1-3)

327 IAC 17-1-4 Wetlands not considered disturbed or affected

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-22

Sec. 4. For purposes of the definitions of Class I wetland, Class II wetland, and Class III wetland, a wetland or setting is not considered disturbed or affected as a result of an action taken after January 1, 2004, for which a permit is required under IC 13-18-22 but has not been obtained. *(Water Pollution Control Board; 327 IAC 17-1-4)*

327 IAC 17-1-5 Compensatory mitigation for state regulated wetlands

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-6; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 5. Except as otherwise specified in section 6 of this rule, compensatory mitigation shall be provided in accordance with the following table:

Wetland Class	Replacement Class	On-Site Ratio	Off-Site Ratio
Class I	Class II or III	1 to 1	1 to 1
Class I	Class I	1.5 to 1	1.5 to 1
Class II	Class II or III	1.5 to 1 Nonforested 2 to 1 Forested	2 to 1 Nonforested 2.5 to 1 Forested
Class III	Class III	2 to 1 Nonforested 2.5 to 1 Forested	2.5 to 1 Nonforested 3 to 1 Forested

(1) The compensatory mitigation ratio shall be lowered to one to one (1:1) if the compensatory mitigation is completed before the initiation of the wetland activity.

(2) The off-site location of compensatory mitigation must be within the same:

- (A) eight (8) digit U.S. Geological Service hydrologic unit code; or
- (B) county;

as the isolated wetlands subject to the authorized wetland activity.

(3) Exempt isolated wetlands may be used to provide compensatory mitigation for wetlands activities in SRWs. An exempt isolated wetland that is used to provide compensatory mitigation becomes a SRW.

(4) Mitigation plans required under 327 IAC 17-2-3(2)(A), 327 IAC 17-3-3(7), and 327 IAC 17-4-3(7) shall contain monitoring provisions that are sufficient to monitor the performance of the compensatory mitigation wetland until it is demonstrated to successfully offset the loss of wetlands authorized by the permit consistent with section 1(b)(2) of this rule.

(5) If, after a reasonable monitoring period, the department finds that the compensatory mitigation does not

successfully offset the loss of wetlands authorized by the permit consistent with section 1(b)(2) of this rule, the department may require corrective action.

(Water Pollution Control Board; 327 IAC 17-1-5)

327 IAC 17-1-6 Exceptions to mitigation

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 6. At the discretion of the commissioner, the department may allow exceptions to compensatory mitigation in specific, limited circumstances. *(Water Pollution Control Board; 327 IAC 17-1-6)*

327 IAC 17-1-7 Exempt activities

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 7. The following activities are exempt from permitting:

(1) The discharge of:

- (A) dirt;**
- (B) sand;**
- (C) rock;**
- (D) stone;**
- (E) concrete; or**
- (F) other inert fill materials;**

in a de minimis amount.

(2) A wetland activity at a surface coal mine for which the department of natural resources has approved a plan to:

- (A) minimize, to the extent practical using best technology currently available, disturbances and adverse effects on fish and wildlife;**
- (B) otherwise effectuate environmental values; and**
- (C) enhance those values where practicable.**

(3) Any activity listed under Section 404(f) of the Clean Water Act, including the following:

(A) Normal farming, silviculture, and ranching activities, such as:

- (i) plowing;**
- (ii) seeding;**
- (iii) cultivating;**
- (iv) minor drainage;**
- (v) harvesting for the production of food, fiber, and forest products; or**
- (vi) upland soil and water conservation practices.**

(B) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as:

- (i) dikes;**
- (ii) dams;**
- (iii) levees;**
- (iv) groins;**
- (v) riprap;**
- (vi) breakwaters;**
- (vii) causeways and bridge abutments or approaches; and**
- (viii) transportation structures.**

(C) Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance of drainage ditches.

(D) Construction of temporary sedimentation basins on a construction site that does not include placement of fill material into the navigable waters.

(E) Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where the roads are constructed and maintained, in accordance with best management practices,

to assure that:

- (i) flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired;
- (ii) the reach of the navigable waters is not reduced; and
- (iii) any adverse effect on the aquatic environment will be otherwise minimized.

(Water Pollution Control Board; 327 IAC 17-1-7)

327 IAC 17-1-8 Denial of a permit

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 8. The department may deny a permit for cause. The department must support a denial by a written statement of reasons. *(Water Pollution Control Board; 327 IAC 17-1-8)*

327 IAC 17-1-9 Reasonable alternative demonstration

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 9. A wetland activity is considered to be without reasonable alternative if:

- (1) an executive of the county or municipality in which the wetland is located issues a resolution stating that the wetland activity is without reasonable alternative to achieve a legitimate use proposed by the applicant on the property on which the wetland is located;
- (2) a local government entity that has authority over the proposed use of the property on which the wetland is located issues a permit or other approval stating that the wetland activity is without reasonable alternative to achieve a legitimate use proposed by the applicant on the property on which the wetland is located; or
- (3) the department, in the absence of a local determination under this section, determines the wetland activity is without reasonable alternative to achieve a legitimate use proposed by the applicant on the property on which the wetland is located.

(Water Pollution Control Board; 327 IAC 17-1-9)

327 IAC 17-1-10 Reasonably necessary or appropriate demonstration

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 10. A wetland activity is considered to be reasonably necessary or appropriate if:

- (1) an executive of the county or municipality in which the wetland is located issues a resolution stating that the wetland activity is reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located;
- (2) a local government entity, having authority over the proposed use of the property on which the wetland is located, issues a permit or other approval stating that the wetland activity is reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located; or
- (3) the department, in the absence of a local determination under this section, makes a determination that the wetland activity is reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located.

(Water Pollution Control Board; 327 IAC 17-1-10)

327 IAC 17-1-11 Notice of decision

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7; IC 13-18-22-8

Affected: IC 4-21.5-3-5; IC 13-18-3; IC 13-18-4

Sec. 11. The department shall issue notices of decision in accordance with IC 4-21.5-3-5(b). *(Water Pollution Control Board; 327 IAC 17-1-11)*

Rule 2. General Permit for Minimal Impacts to State Regulated Wetlands

327 IAC 17-2-1 Purpose

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-4; IC 13-18-22-5; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. This rule:

(1) governs the issuance of; and

(2) establishes procedures and criteria for the review of applications for;

wetland activity general permits for minimal impacts to SRWs. (*Water Pollution Control Board; 327 IAC 17-2-1*)

327 IAC 17-2-2 Applicability

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. (a) This rule applies to persons proposing to undertake wetland activities in Class I and Class II SRWs that will have minimal impacts, including activities applicable to SRWs that would be allowed under the nationwide permit program (as published in 67 FR 2077-2095 (2002)).

(b) Wetland activities covered by this rule include the following:

(1) Activities related to the repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by this rule, 327 IAC 17-3, or 327 IAC 17-4, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement, are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. As used in this subdivision, "Currently serviceable" means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. A permit issued under this subdivision authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire, or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two (2) years of the date of their destruction or damage. In cases of catastrophic events, such as tornadoes, this two-year limit may be waived by the commissioner, provided the permittee can demonstrate funding, contract, or other similar delays.

(2) Discharges of dredged or fill material, including excavation, into SRWs to remove accumulated sediments and debris in the vicinity of, and within, existing structures, for example, bridges, culverted road crossings, water intake structures, and the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the wetland in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than two hundred (200) feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the commissioner under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the commissioner.

(3) Discharges of dredged or fill material, including excavation, into SRWs, for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in a SRW. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without permit provided the uplands are restored to their original pre-event location. A permit issued under this subdivision is for the activities in SRWs associated with the replacement of the uplands.) The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed before the damage. The department retains the right to determine the extent of the preexisting conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from

the adjacent wetland is limited to fifty (50) cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the preexisting bottom contours of the wetland. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with subdivision (11) to restore damaged upland areas. This permit cannot be used to reclaim historic lands lost, over an extended period, to normal erosion processes. Any work authorized by this permit must not cause more than minimal degradation of water quality or increase flooding. A permit issued under this subdivision authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the 327 IAC 17-1-7(3)(B) exemption for maintenance.

(4) Fish and wildlife harvesting devices and activities, such as duck blinds. A permit issued under this subdivision does not authorize impoundments and semi-impoundments of waters of the state for the culture or holding of motile species.

(5) The use of devices designed to measure and record scientific data, such as:

- (A) staff gauges;
- (B) water recording devices;
- (C) water quality testing and improvement devices; and
- (D) similar structures.

(6) Survey activities including core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, soil survey, sampling, and historic resources. The following are not authorized under this subdivision:

- (A) Discharges and structures associated with the recovery of historic resources.
- (B) Drilling and the discharge of excavated material from test wells for oil and gas exploration. However, the plugging of such wells is authorized.
- (C) Fill placed for roads, pads, and other similar activities
- (D) Permanent structures.

The discharge of drilling mud and cuttings may require a permit under 327 IAC 5.

(7) Activities required for the construction, maintenance, and repair of utility lines and associated facilities in SRWs as follows:

(A) The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all SRWs, provided there is no change in preconstruction contours. As used in this clause, a "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. Material resulting from trench excavation may be temporarily side cast (up to three (3) months) into SRWs, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The commissioner may extend the period of temporary side casting not to exceed a total of one hundred eighty (180) days, where appropriate. In wetlands, the top six (6) inches to twelve (12) inches of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain SRWs, for example, backfilling with extensive gravel layers, creating a french drain effect. For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the SRWs through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each SRW.

(B) The construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all SRWs, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(C) The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in SRWs, provided the discharges do not cause the loss of greater than one-half (½) acre of SRWs. Access roads shall be the minimum width necessary. Access roads must be constructed so that the length of the road minimizes the adverse effects on SRWs and as near as possible to preconstruction contours and elevations, for example, at grade corduroy roads or geotextile/gravel roads. Access roads constructed above preconstruction contours and elevations in SRWs must be properly bridged or culverted to maintain surface flows. As used in this clause, "utility line" does not include activities that drain a SRW, such as drainage tile or french drains; however, the term does

include pipes conveying drainage from another area. For the purposes of this clause, the loss of SRWs includes the filled area plus SRWs that are adversely affected by flooding, excavation, or drainage as a result of the project.

Activities authorized by clauses (A) through (C) may not exceed a total of one-half (½) acre loss of SRWs. SRWs temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevation, is not included in the calculation of permanent loss of SRWs. This includes temporary construction mats, for example, timber, steel, and geotextile, used during construction and removed upon completion of the work. Where certain functions and values of SRWs are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level. Mechanized land clearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance, and expansion of utility line substations, foundations for overhead utility lines, and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of SRWs that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this rule. Access roads used solely for construction of the utility line must be removed upon completion of the work and the area restored to preconstruction contours, elevations, and wetland conditions.

(8) Return water from upland, contained dredged material disposal area. The dredging itself may require a permit under IC 13-18-22-1. The return water from a contained disposal area is administratively defined as a discharge of dredged material, even though the disposal itself occurs on the upland and does not require a IC 13-18-22-1 permit.

(9) Activities in SRWs associated with the restoration of former wetlands, the enhancement of degraded wetlands and riparian areas, the creation of wetlands and riparian areas, and the restoration and enhancement of streams and open water areas as follows:

(A) The activity is conducted on:

- (i) nonfederal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service (FWS) or the Natural Resources Conservation Service (NRCS), the National Marine Fisheries Service, the National Ocean Service, or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations;
- (ii) reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM or the Indiana department of natural resources (the future reversion does not apply to streams or wetlands created, restored, or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or
- (iii) any other public, private, or tribal lands.

(B) Planting of only native species should occur on the site.

Activities authorized by this subdivision include, to the extent that a IC 13-18-22-1 permit is required, the removal of accumulated sediments; the installation, removal, and maintenance of dikes, and berms; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove nonnative invasive, exotic, or nuisance vegetation; and other related activities. This subdivision does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this subdivision authorizes the relocation of wetlands on the project site provided there are net gains in aquatic resource functions and values. For example, this subdivision may authorize the creation of an open water impoundment in an emergent wetland provided the emergent wetland is replaced by creating that wetland type on the project site. For enhancement, restoration, and creation projects conducted under item (iii), this subdivision does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases, a separate permit would be required for any reversion. For restoration, enhancement, and creation projects conducted under items (i) and (ii), this subdivision also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use, that is, prior to the restoration, enhancement, or creation activities. The

reversion must occur within five (5) years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after a permit issued under this subdivision expires. This subdivision also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require an IC 13-18-22-1 permit). The five-year reversion limit does not apply to agreements without time limits reached under item (i). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the federal agency or appropriate state agency executing the agreement or permit. Before any reversion activity, the permittee or the appropriate federal or state agency must notify the commissioner and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the department's regulatory requirements will be at that future date.

(10) Discharges of dredged or fill material and maintenance activities that are associated with moist soil management for wildlife performed on federally-owned or managed property, state-owned or managed property, and local government agency-owned or managed property, for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include:

(A) the repair or maintenance of dikes; and

(B) plowing or discing to impede succession, prepare seed beds, or establish fire breaks.

Sufficient vegetated buffers must be maintained adjacent to all open waterbodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This subdivision does not authorize the construction of new dikes, roads, water control structures, etc., associated with the management areas. This subdivision does not authorize converting wetlands to uplands, impoundments, or other open waterbodies.

(11) New construction, agriculture, and mining activities. The following activities are authorized:

(A) New construction activities associated with the construction or installation of new facilities or structures. Typically, these include residential, commercial, industrial, institutional, and recreational activities. These activities include:

(i) filling and grading;

(ii) dredging;

(iii) stormwater, sediment, and erosion control activities; and

(iv) roads, infrastructures, and utilities;

provided the individual and cumulative impacts are minimal.

(B) Agriculture and mining activities. These include work or discharges of dredged or fill material associated with the:

(i) buildings or work pads;

(ii) stock piling of material;

(iii) staging, loading, and unloading areas;

(iv) roads;

(v) land leveling;

(vi) berms, dikes, dams, and ditch construction;

(vii) drainage facilities; and

(viii) erosion and water control activities.

This subdivision does not affect those agricultural and mining activities that are exempt in accordance with 327 IAC 17-1-7.

(C) Discharges of dredged or fill material authorized by this subdivision are limited to one-tenth (0.1) acre or less of SRWs.

(D) The following activities are not authorized by this subdivision:

(i) Activities that are denied any required local, state, or federal authorization.

(ii) Activities that the department determines to have the potential to cause unacceptable adverse impacts on aquatic resources or other public interest factors.

(E) The department may on a case-by-case basis require a 327 IAC 17-3 or 327 IAC 17-4 permit. The department will notify the applicant that the project does not qualify for a general permit under this rule and instruct the applicant on the procedures to seek authorization under the 327 IAC 17-3 or 327 IAC 17-4 permit. The department may also require a 327 IAC 17-3 or 327 IAC 17-4 permit for any after-the-fact

applications or any unauthorized activity, or both, regardless of whether or not the discharge meets the area limitation specified in clause (C).

(c) Wetland activities that would have more than minimal impacts to water quality, either viewed individually or collectively with other projects that may affect the same waterbody affected by the proposed project, are excluded. (*Water Pollution Control Board; 327 IAC 17-2-2*)

327 IAC 17-2-3 Notice of intent requirements

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-22

Sec. 3. As a prerequisite to applicability of the minimal impact general permit to a specific wetland activity, a person proposing the discharge is required to submit to the department a notice of intent with the following information to be covered by the general permit:

(1) An identification of the wetlands to be affected by the wetland activity including the following:

(A) The location of the tract and location of the wetlands on the tract.

(B) A delineation of all wetlands on the tract.

(C) A classification of all SRWs on the tract.

(D) A description of the proposed wetland activities and project at the site.

(E) For the purpose of making the determinations at 327 IAC 17-1-4, 327 IAC 17-1-3(7)(L), 327 IAC 17-1-3(7)(A), IC 13-18-22-2(c), IC 13-18-22-10, and IC 13-18-22-11, the person proposing the activity shall disclose dates for the following:

(i) Actions that disturb or affect isolated wetlands under 327 IAC 17-1-3(1)(A) that occurred after January 1, 2004.

(ii) Wetland activities exempted by 327 IAC 17-1-3(7)(E) or 327 IAC 17-1-3(7)(F) that occurred after January 1, 2004.

(iii) Voluntary creation of isolated wetlands under 327 IAC 17-1-3(7)(A) and 327 IAC 17-1-3(11).

(iv) Restoration of isolated wetlands under IC 13-18-22-2(c).

(v) Filling, draining, or elimination by other means isolated wetlands after January 1, 2004, under IC 13-18-22-10.

(vi) Wetland activities that occurred after January 1, 2004, on land previously exempted by 327 IAC 17-1-3(7)(G) if the land is no longer subject to United States Department of Agriculture wetland conservation rules under IC 13-18-22-11.

(2) The provision of:

(A) a compensatory mitigation plan to reasonably offset the loss of wetlands allowed by the general permit; or

(B) a demonstration that the site or activity meets the specific circumstances for the exception to mitigation according to 327 IAC 17-1-6.

(3) A signed statement of affirmation from the responsible party.

(4) Correspondence from the United States Army Corps of Engineers (USACOE) that states that the wetland is not federally jurisdictional.

(*Water Pollution Control Board; 327 IAC 17-2-3*)

327 IAC 17-2-4 General conditions

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 4. The recipient of the general permit shall comply with the following general conditions:

(1) Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

(2) Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills must be permanently stabilized at the earliest practicable date. The permittee shall deposit any dredged material in a contained upland disposal area to prevent sediment run-off to any waterbody. Sampling may be required to determine if the dredged sediment

is contaminated.

(3) No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the wetland, including those species that normally migrate through the area.

(4) Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

(5) The permittee must provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality.

(6) No activity is authorized under this general permit where state endangered, threatened, or rare species are documented on a permanent or seasonal basis within a one-half (½) mile radius of the proposed project site by the Indiana Natural Heritage Data Center.

(7) Every permittee will submit a signed certification regarding the completed work and any required mitigation to the department. The certification will include the following:

(A) A statement that the authorized work was done in accordance with the department authorization, including any conditions.

(B) A statement that any required mitigation was completed in accordance with the permit conditions.

(C) The signature of the permittee certifying the completion of the work and mitigation.

(8) The use of more than one (1) general permit for a single and complete project is prohibited, except when the acreage loss of SRWs authorized by the general permits does not exceed the acreage limit of the general permit with the highest specified acreage limit.

(9) No activity may occur in the proximity of a public water supply intake, except where the activity is for repair of the public water supply intake structures.

(10) No activity, including structures and work in SRWs or discharges of dredged or fill material, may consist of unsuitable material, for example:

(A) trash;

(B) debris;

(C) car bodies; and

(D) asphalt;

and material used for construction or discharged must be free from toxic pollutants in toxic amounts.

(11) When determining compensatory mitigation to reasonably offset the loss of wetlands allowed by the general permit, the commissioner will consider the following factors:

(A) The commissioner will establish a preference for restoration of wetlands as compensatory mitigation, with preservation used only in exceptional circumstances.

(B) Permittees may propose the use of mitigation banks to meet the wetland mitigation requirements.

(C) In all cases that require compensatory mitigation, the mitigation provisions will specify the party responsible for accomplishing or complying, or both, with the mitigation plan.

(12) Activities in breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

(13) Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

(14) Critical resource waters include critical habitat for federally listed threatened and endangered species, state natural heritage sites, outstanding national resource waters, water pollution control board designated waters, for example, outstanding state or national resource waters, or both, exceptional use waters, outstanding state protected wetland, or other waters officially designated by the state as having particular environmental or ecological significance and identified by the commissioner after notice and opportunity for public comment. The commissioner may also designate additional critical resource waters after notice and opportunity for comment.

(A) Except as noted below, discharges of dredged or fill material into SRWs are not authorized by section 2(b)(7), 2(b)(8), or 2(b)(11) of this rule for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(B) For section 2(b)(1) and 2(b)(9) through 2(b)(11) of this rule, the commissioner may authorize activities under these general permits only after it is determined that the impacts to the critical resource waters will be no more than minimal.

(15) For purposes of this general condition, 100-year floodplains will be identified through the existing Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps. Discharges of dredged or fill material into SRWs within the mapped 100-year floodplain, resulting in

permanent abovegrade fills, are not authorized by general permit.

(16) For activities that have not been verified by the department and the project was commenced or under contract to commence by the expiration date of the general permit (or modification or revocation date), the work must be completed within twelve (12) months after such date (including any modification that affects the project). For activities that have been verified and the project was commenced or under contract to commence within the verification period, the work must be completed by the date determined by the department. For projects that have been verified by the department, an extension of a department approved completion date may be requested. This request must be submitted at least one (1) month before the previously approved completion date.

(17) The permittee shall clearly mark the construction limits shown in the plans at the tract during construction.

(18) The permittee shall allow the commissioner or an authorized representative of the commissioner (including an authorized contractor), upon the presentation of credentials to:

(A) enter upon the tract;

(B) have access to and copy at reasonable times any records that must be kept under the conditions of the permit;

(C) inspect, at reasonable times, any:

(i) monitoring or operational equipment or method;

(ii) collection, treatment, pollution management, or discharge facility or device;

(iii) practices required by the permit; and

(iv) wetland mitigation site; and

(D) sample or monitor any discharge of pollutants or any mitigation site.

(19) Any activity involving fill that is associated with additional impacts to waters of the state, such as dredging, excavation, or damming, is not authorized by a general permit unless the total area of wetland affected is less than or equal to the area allowed by the general permit.

(20) Execute the project as proposed in the notice of intent.

(21) Implement the mitigation plan submitted with the notice of intent.

(22) Complete all activities necessary to construct the mitigation wetland within one (1) year of the effective date of this general permit, unless the department grants a written extension upon request.

(23) Clearly identify, on the tract, all mitigation wetlands after construction of the mitigation wetlands. Install survey markers to identify the boundaries of the wetlands. If the mitigation wetlands being constructed are adjacent to or near existing wetlands, then the survey markers must distinguish the constructed wetland from the existing wetland.

(24) Protect all areas upon which a Class II or Class III mitigation wetland is to be created with a conservation easement or deed restriction. These areas shall be protected as wetlands for the length of time consistent with the time required for maturation of the wetland type being restored or created. The discharge of pollutants, including fill material, in them or their excavation shall be prohibited. A copy of the signed and recorded modification to the deed shall be filed with the department within sixty (60) days of the applicant's release from monitoring requirements.

(25) An applicant establishing a Class I mitigation wetland must file a signed and recorded environmental notice, which describes the compensatory mitigation contained in the mitigation plan, with the department within sixty (60) days of the applicant's release from monitoring requirements.

(26) If the project will disturb more than one (1) acre of soil during construction, contact the department's stormwater permits section to determine need for 327 IAC 15-5 (Rule 5) permit.

(27) If the project is located within a floodway, contact the Indiana department of natural resources to determine the need for possible construction in the floodway permit.

(Water Pollution Control Board; 327 IAC 17-2-4)

327 IAC 17-2-5 Review requirements

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 5. The department shall review the notice of intent to determine whether the proposed activity is within the scope of the minimal impact general permit. If the department finds that the proposed activity is not within

the scope of the minimal impact general permit, the department shall require the activity to be permitted by the applicable permit at 327 IAC 17-3 or 327 IAC 17-4, as appropriate. (*Water Pollution Control Board; 327 IAC 17-2-5*)

327 IAC 17-2-6 Review deadlines

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7; IC 13-18-22-8

Affected: IC 13-18-3; IC 13-18-4

Sec. 6. The general permit becomes effective with respect to a proposed wetland activity that is within the scope of the general permit on the thirty-first day after the department receives a notice of intent from the person proposing the wetland activity that the wetland activity be authorized under the general permit. (*Water Pollution Control Board; 327 IAC 17-2-6*)

Rule 3. Permit for Impacts in Class I State Regulated Wetlands

327 IAC 17-3-1 Purpose

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. This rule establishes procedures and criteria for the review of applications for wetland activity permits for significant impacts to Class I SRWs. (*Water Pollution Control Board; 327 IAC 17-3-1*)

327 IAC 17-3-2 Applicability

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. This rule applies to persons proposing to undertake wetland activities in Class I SRWs that will have significant impacts. (*Water Pollution Control Board; 327 IAC 17-3-2*)

327 IAC 17-3-3 Notice of registration requirements

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-22

Sec. 3. As a prerequisite to applicability of the Class I permit to a specific wetland activity, a person proposing the discharge is required to submit to the department a notice of registration to be covered by the permit that includes the following:

- (1) Applicant information.
- (2) Agent information if applicable.
- (3) Purpose and description of activity.
- (4) Current and proposed use of the tract.
- (5) Correspondence from the USACOE that states that the wetland is not federally jurisdictional.
- (6) Identification of the wetlands to be affected by the wetland activity including the following:
 - (A) The location of the tract and location of the wetlands on the tract.
 - (B) A delineation of all wetlands on the tract.
 - (C) A classification of all SRWs on the tract.
 - (D) For the purpose of making the determinations at 327 IAC 17-1-4, 327 IAC 17-1-3(7)(L), 327 IAC 17-1-3(7)(A), IC 13-18-22-2(c), IC 13-18-22-10, and IC 13-18-22-11, the person proposing the activity shall disclose dates for the following:
 - (i) Actions that disturb or affect isolated wetlands under 327 IAC 17-1-3(1)(A) that occurred after January 1, 2004.
 - (ii) Wetland activities exempted by 327 IAC 17-1-3(7)(E) or 327 IAC 17-1-3(7)(F) that occurred after January 1, 2004.
 - (iii) Voluntary creation of isolated wetlands under 327 IAC 17-1-3(7)(A) and 327 IAC 17-1-3(11).
 - (iv) Restoration of isolated wetlands under IC 13-18-22-2(c).

(v) Filling, draining, or elimination by other means isolated wetlands after January 1, 2004, under IC 13-18-22-10.

(vi) Wetland activities that occurred after January 1, 2004, on land previously exempted by 327 IAC 17-1-3(7)(G) if the land is no longer subject to United States Department of Agriculture wetland conservation rules under IC 13-18-22-11.

(7) A compensatory mitigation plan to reasonably offset the loss of wetlands allowed, unless the applicant can demonstrate that the site or activity meets the specific circumstances for the exception to mitigation at 327 IAC 17-1-6.

(8) A signed statement of affirmation from the applicant.

(Water Pollution Control Board; 327 IAC 17-3-3)

327 IAC 17-3-4 General conditions

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 4. The recipient of this general permit shall comply with the general conditions at 327 IAC 17-2-4. *(Water Pollution Control Board; 327 IAC 17-3-4)*

327 IAC 17-3-5 Review requirements

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 5. The department shall review the notice of registration and notify the applicant if the proposed activity is outside the scope of the applicability of the Class I permit. *(Water Pollution Control Board; 327 IAC 17-3-5)*

327 IAC 17-3-6 Review deadlines

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7; IC 13-18-22-8

Affected: IC 13-18-3; IC 13-18-4

Sec. 6. Except as provided by section 7 of this rule, a permit to undertake a wetland activity in a Class I wetland under this rule is considered to have been issued to any applicant on the thirty-first day after the department receives a notice of registration submitted under section 3 of this rule if the department has not previously authorized the wetland activity. *(Water Pollution Control Board; 327 IAC 17-3-6)*

327 IAC 17-3-7 Denial of a permit

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7; IC 13-18-22-8

Affected: IC 13-18-3; IC 13-18-4

Sec. 7. The department may deny a registration for a permit for cause before the period in section 6 of this rule expires. The department must support a denial by a written statement of reasons. *(Water Pollution Control Board; 327 IAC 17-3-7)*

Rule 4. Permit for Wetland Activities in Class II and Class III State Regulated Wetlands

327 IAC 17-4-1 Purpose

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-3; IC 13-18-22-5; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. This rule governs the issuance of wetland activity individual permits and establishes procedures and criteria for the review of applications for wetland activity individual permits in Class III and certain Class II wetlands. *(Water Pollution Control Board; 327 IAC 17-4-1)*

327 IAC 17-4-2 Applicability

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-3; IC 13-18-22-5; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. This rule applies to persons who propose to undertake wetland activities in a:

- (1) Class III wetland; and**
- (2) Class II wetland, except wetland activities that are regulated by a minimal impact general permit under 327 IAC 17-2.**

(Water Pollution Control Board; 327 IAC 17-4-2)

327 IAC 17-4-3 Permit application requirements

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-3; IC 13-18-22-5; IC 13-18-22-7

Affected: IC 13-18-22

Sec. 3. A person proposing the discharge is required to submit to the department an application that includes the following:

- (1) Applicant information.**
- (2) Agent information if applicable.**
- (3) Purpose and description of activity.**
- (4) Current and proposed use of the tract.**
- (5) Correspondence from the USACOE that states that the wetland is not federally jurisdictional.**
- (6) Identification of the wetlands to be affected by the wetland activity including the following:**
 - (A) The location of the tract and location of the wetlands on the tract.**
 - (B) A delineation of all wetlands on the tract.**
 - (C) A classification of all SRWs on the tract.**
 - (D) For the purpose of making the determinations at 327 IAC 17-1-4, 327 IAC 17-1-3(7)(L), 327 IAC 17-1-3(7)(A), IC 13-18-22-2(c), IC 13-18-22-10, and IC 13-18-22-11, the person proposing the activity shall disclose dates for the following:**
 - (i) Actions that disturb or affect isolated wetlands under 327 IAC 17-1-3(1)(A) that occurred after January 1, 2004.**
 - (ii) Wetland activities exempted by 327 IAC 17-1-3(7)(E) or 327 IAC 17-1-3(7)(F) that occurred after January 1, 2004.**
 - (iii) Voluntary creation of isolated wetlands under 327 IAC 17-1-3(7)(A) and 327 IAC 17-1-3(11).**
 - (iv) Restoration of isolated wetlands under IC 13-18-22-2(c).**
 - (v) Filling, draining, or elimination by other means isolated wetlands after January 1, 2004, under IC 13-18-22-10.**
 - (vi) Wetland activities that occurred after January 1, 2004, on land previously exempted by 327 IAC 17-1-3(7)(G) if the land is no longer subject to United States Department of Agriculture wetland conservation rules under IC 13-18-22-11.**
- (7) A compensatory mitigation plan to reasonably offset the loss of wetlands allowed, unless the applicant demonstrates that the site or activity meets the specific circumstances for the exception to mitigation at 327 IAC 17-1-6.**
- (8) The applicant shall demonstrate, as a prerequisite to the issuance of the permit, that the wetland activity is as follows:**
 - (A) Without reasonable alternative under 327 IAC 17-1-9.**
 - (B) Reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located under 327 IAC 17-1-10.**
 - (C) For a Class III wetland, as follows:**
 - (i) Without practical alternative.**
 - (ii) Will be accompanied by taking steps that are practicable and appropriate to minimize potential adverse impacts of the discharge on the aquatic ecosystem of the wetland.**
- (9) A signed statement of affirmation from the applicant.**

(Water Pollution Control Board; 327 IAC 17-4-3)

327 IAC 17-4-4 Conditions

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-3; IC 13-18-22-7

Affected: IC 13-18-3; IC 13-18-4

Sec. 4. The department shall condition an approval as necessary to do the following:

(1) Achieve the goals of the permitting program under 327 IAC 17-1-1.

(2) Provide compensatory mitigation to reasonably offset the loss of wetlands allowed by the permits except as provided in 327 IAC 17-1-6.

(Water Pollution Control Board; 327 IAC 17-4-4)

327 IAC 17-4-5 Review requirements

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7; IC 13-18-22-8

Affected: IC 13-18-3; IC 13-18-4

Sec. 5. The department may notify the applicant that the completed application is deficient. If the department fails to give notice to the applicant under this section not later than fifteen (15) days after the department's receipt of the completed application, the application is considered not to have been deficient. After receipt of a notice under this section, the applicant may submit an amended application that corrects the deficiency. The department shall make a decision to issue or deny an individual permit under the amended application within a period that ends a number of days after the date the department receives the amended application equal to the remainder of:

(1) one hundred twenty (120) days; minus

(2) the number of days the department held the initial application before giving a notice of deficiency under this section.

(Water Pollution Control Board; 327 IAC 17-4-5)

327 IAC 17-4-6 Review deadlines

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7; IC 13-18-22-8

Affected: IC 13-18-3; IC 13-18-4

Sec. 6. Subject to section 5 of this rule, the department shall make a decision to issue or deny an individual permit not later than one hundred twenty (120) days after receipt of the completed application. If the department fails to make a decision on a permit application by the deadline under this section or section 5 of this rule, a permit is considered to have been issued by the department in accordance with the application. *(Water Pollution Control Board; 327 IAC 17-4-6)*

327 IAC 17-4-7 Denial of a permit

Authority: IC 13-18-3-1; IC 13-18-22-1; IC 13-18-22-7; IC 13-18-22-8

Affected: IC 13-18-3; IC 13-18-4

Sec. 7. The department may deny an application for a permit for cause before the period in section 5 or 6 of this rule expires. The department must support a denial by a written statement of reasons. *(Water Pollution Control Board; 327 IAC 17-4-7)*

Notice of First Meeting/Hearing

Under IC 4-22-2-24, IC 13-14-8-1, IC 13-14-8-2, and IC 13-14-9, notice is hereby given that on November 10, 2004, at 1:30 p.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Room A, Indianapolis, Indiana, the Water Pollution Control Board will hold a public hearing on a proposed new rule concerning wetland activity permits.

The purpose of this hearing is to receive comments from the public prior to preliminary adoption of these rules by the board. All interested persons are invited and will be given reasonable opportunity to express their views concerning the proposed new rules. Oral statements will be heard, but, for the accuracy of the record, all comments should be submitted in writing.

Additional information regarding this action may be obtained from Megan Wallace, Rules Section, Office of Water Quality, (317) 233-8669 or (800) 451-6027 (in Indiana).

Individuals requiring reasonable accommodations for participation in this event should contact the Indiana Department of Environmental Management, Americans with Disabilities Act coordinator at:

Attn: ADA Coordinator

Indiana Department of Environmental Management

100 North Senate Avenue

P.O. Box 6015

Indianapolis, Indiana 46206-6015

or call (317) 233-0855 or (TDD): (317) 233-6565. Speech and hearing impaired callers may contact IDEM via the Indiana Relay Service at 1-800-743-3333. Please provide a minimum of 72 hours' notification.

Copies of these rules are now on file at the Office of Water Quality, Indiana Department of Environmental Management, Indiana Government Center-North, 100 North Senate Avenue, 12th Floor, Indianapolis, Indiana and are open for public inspection.