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**TITLE 327 WATER POLLUTION CONTROL
BOARD**

Proposed Rule
LSA Document #04-228

DIGEST

Adds 327 IAC 17 concerning state regulated wetlands and wetland activity permits. Effective 30 days after filing with the secretary of state.

HISTORY

Second Notice of Comment Period: September 1, 2004, Indiana Register (27 IR 4209).

Notice of First Hearing: September 1, 2004, Indiana Register (27 IR 4209).

Date of First Hearing: November 10, 2004 (continued).

Date of Continued First Hearing: November 23, 2004.

PUBLIC COMMENTS UNDER IC 13-14-9-4.5

IC 13-14-9-4.5 states that a board may not adopt a rule under IC 13-14-9 that is substantively different from the draft rule published under IC 13-14-9-4 until the board has conducted a third comment period that is at least twenty-one (21) days long.

REQUEST FOR PUBLIC COMMENTS

This proposed (preliminarily adopted) rule is substantively different from the draft rule published on September 1, 2004, at 27 IR 4209. The Indiana Department of Environmental Management (IDEM) is requesting comment on the entire proposed (preliminarily adopted) rule.

The proposed rule contains numerous changes from the draft rule that make the proposed rule so substantively different from the draft rule that public comment on the entire proposed rule is advisable. This notice requests the submission of comments on the entire proposed rule, including suggestions for specific amendments. These comments and the department's responses thereto will be presented to the board for its consideration at final adoption under IC 13-14-9-6. Mailed comments should be addressed to:

#04-228 Wetland Activity Permits

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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 also be submitted by facsimile to (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, hand delivered, or faxed by January 21, 2004.

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

IDEM requested public comment from September 1, 2004, through September 30, 2004, on IDEM's draft rule language. IDEM received comments from the following parties:

Indiana Manufacturers Association and Coalition on Wetland Issues (IMA/CWI)

Save the Dunes Conservation Fund (SDC)

United States Fish and Wildlife Service (USFWS)

Following is a summary of the comments received and IDEM's responses thereto:

GENERAL COMMENTS

Comment: The twin purposes of the wetlands legislation [HEA1798 and HEA1277] are (1) to promote a net gain in high quality isolated wetlands; and (2) to assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program. It is apparent, however, that these proposed rules will fail to achieve these purposes. The proposed rule removes "an exempt isolated wetland" from the term "waters" despite no process of verification for meeting the exempt criteria. (SDC)

Response: The workgroup discussed this issue. The acts HEA 1798 and HEA 1277 did not require a notification for all exemptions. However IDEM's existing enforcement authority would be triggered if a landowner filled a wetland that was not, in fact, exempt.

Comment: Developing clear mitigation goals with specific objectives and quantifiable performance standards is critical to both ensuring and determining the success of any mitigation project. Performance standards must identify: 1) the attribute to be achieved; 2) the condition or level that defines success; and 3) the period over which success must be sustained. The performance standards must be specific enough to provide for the assessment of wetland performance over time through the measurement of attributes of wetland habitat and functions. Success in the context of the rules occurs when the performance of the mitigation wetland, as determined by the performance standards for each objective, meets or exceeds the stated goals. We support the following SWS recommendations for performance standards (<http://www.sws.org/wetlandconcerns/Performance.html>, Jan 2003), and encourage their incorporation into the rules and policies developed for state regulated wetlands and wetland activity permits:

1. Stakeholders should carefully consider project objectives and the link between these objectives and performance standards;
2. As a general rule, performance standards should be monitored for a minimum of 5 years or until the standards have been met for at least 3 consecutive years;
3. If wetland assessment techniques have been developed for the wetland type that is to be restored or created, they may provide at least a useful starting point for discussion of performance standards;
4. Because hydrology is a key factor driving wetland function, performance standards based on hydrology may be useful in many circumstances;
5. If project objectives include restoration or creation of a site to a condition similar to that of nearby natural wetlands, performance standards should be based on conditions found in the natural wetlands; and
6. Survival of planted stock or percent cover by vegetation, although often used as performance standards, do not reflect wetland function and should not be relied on as a sole measure of performance in most cases. (SDC)

Response: Mitigation success criteria or performance standards were not required by HEA 1798 and HEA 1277. Mitigation success criteria are technical issues that should be discussed in greater detail by the Wetland Science Advisory Group and others and may be better suited for incorporation into a non-rule policy document or in a revised rule subsequent to this rulemaking.

Comment: All mitigation plans must clearly describe the wetland habitat and functions that will be affected by the proposed development. Since the purpose of compensatory wetland mitigation is to replace lost or adversely impacted wetlands with wetlands having similar functions of equal or greater ecological value, the goals, objectives, and performance standards of a specific mitigation plan should be based on information derived from an ecological assessment of the impacted wetland. Such an assessment must include an evaluation of the entire wetland systems (habitats, functions, biotic and abiotic components). In the case of in-kind mitigation, an ecological assessment should be completed for both the adversely impacted wetland and the proposed mitigation site to assure development of an appropriate mitigation plan. (SDC)

Response: Mitigation success criteria or performance standards were not required by HEA 1798 and HEA 1277. Mitigation success criteria are technical issues that should be discussed in greater detail by the Wetland Science Advisory Group and others and may be better suited for incorporation into a non-rule policy document or a revised rule subsequent to this rulemaking.

Comment: At least some wetland functions may be evaluated by measuring the presence of the physical attributes that provide for that function. For example, if native fish habitat is identified as an objective, then the physical, chemical, and biological attributes that provide the correct conditions for such habitat will have to be evaluated. Assessment of the biological attributes would include identifying the species of fish that occur in the wetland, identifying their life stages, and determining the abundances of those species. Assessment of the chemical attributes would include quantification of the water quality conditions important to the native fishes in the wetland. Assessment of the physical attributes would include characterization of the fish habitat, such as the proportion of open water habitat, the sources, timing, amount of water, and the water depths. If this function is an objective in the mitigation plan, then the information gained from the ecological assessment serves as the basis for one or more performance standards. Other examples of attributes potentially important to assessing wetlands habitats and functions include location, topography, and slope. (SDC)

Response: Mitigation success criteria or performance standards were not required by HEA 1798 and HEA 1277. See responses above.

Comment: In addition to goals, objectives, and performance standards based on an ecological assessment, all mitigation plans must have a remedial action plan and a monitoring program that includes methods for assessing both structural and functional attributes of a wetland. The monitoring program should use an approach similar to that of the ecological assessment so that the resulting data

is directly comparable. (SDC)

Response: 327 IAC 17-1-5(f) has been modified to read:

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:~~ **the department shall take actions as necessary to ensure compliance with 327 IAC 17.**

This language authorizes IDEM to require corrective action should the mitigation prove to be unsuccessful.

Comment: Successful wetland mitigation requires significant expenditures of resources at the initial planning stages of a project. This comprehensive planning and implementation is essential to meeting the goals of the wetlands legislation, particularly given the current lenient requirements for the long-term protection and monitoring of mitigation wetlands. (SDC)

Response: IDEM agrees with the commentor, however, mitigation design is a technical issue that should be addressed subsequent to this rulemaking in a non-rule policy document or subsequent rulemaking.

Comment: A mitigated wetland should become a “state regulated wetland” before its success has been demonstrated. A mitigated wetland must be regulated to evaluate its success, thereby assuring “that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program.” Allowing a mitigated wetland to become another impacted wetland before its success is determined will violate the goals of the rules by contributing to the temporal loss of wetlands. (SDC)

Response: IDEM interprets the HEA 1798 and HEA 1277 to mean that a mitigation site becomes a State Regulated Wetland when the permitted wetland activity begins.

Comment: Class II wetland is defined in the negative. The draft rules explain what it is not, not what it is. (SDC)

Response: The definition of Class II referred to here is identical to the language found in HEA 1277.

Comment: The legislation does not contain nor reference public participation requirements affecting isolated wetland decisions. Public participation requirements must be added to this rulemaking. (SDC)

Response: IDEM agrees. We have added a new section to 327 IAC 17-4. This section will create a public notice mechanism for individual permits comparable to the public process now employed for 401 water quality certifications for federally jurisdictional waters.

Comment: The first stated purpose of the State Regulated Wetlands (SRW) Rule is to “promote a net gain in high quality isolated wetlands”. Since more than 90% of the remaining wetlands in Indiana are on private lands, voluntary restoration by private landowners will be the primary way to achieve that objective. While existing voluntarily created wetlands are considered exempt isolated wetlands, existing degraded wetlands which landowners may want to voluntarily restore are subject to the SRW Rule. This may have a discouraging impact on landowners wishing to voluntarily restore wetlands on their property if the process becomes too burdensome. The primary concern is that there appears to be little stated recognition in the proposed rule language regarding the importance of voluntary restoration in achieving the ultimate goal of net gain, nor are there specific provisions that would differentiate a regulated activity for the purpose of restoring a wetland versus a regulated activity for the purpose of economic gain or convenience. (USFWS)

Response: 327 IAC 17-2-2(b)(9) creates a general permit for the restoration activities suggested by the commentor.

Comment: Most voluntary wetland restoration projects involving private landowners are relatively simple projects designed to restore hydrology to drained wetlands and facilitate the restoration of the wetland plant community. As such, they typically involve removing tile drainage and/or plugging drainage ditches to restore hydrology to the site. One concern we have involves the use of certain language from the Regional General Permit Special Conditions list used for Nationwide Permit 27 under the Section 404/401 Program. Specifically, Special Condition #3 implies that any project involving the plugging of a drainage ditch, no matter how small or isolated from any other water source, would constitute “damming” and thus would remove that project from consideration under the General Permit for the SRW Rule. We feel that this would eliminate many of these small, simple restoration projects from a General Permit process that is specifically designed to facilitate activities such as restoration. We recommend that a provision be added that would allow for projects where ditch plugs are the sole fill activity to be included in the types of projects allowable under the General Permit. (USFWS)

Response: The situation suggested by the commentor would be extremely rare since, (1) wetlands with ditches running through them are unlikely to be considered isolated wetlands and (2) the majority of the properties on which these types of activities have occurred in the past are agricultural and therefore exempted. Should this situation arise, where a large area of a SRW is affected by a small area of fill, IDEM believes it is appropriate under the state wetlands law to provide for a more specific review than that afforded by the general permit.

Comment: A concern that we have, which may discourage landowners from pursuing some of these restoration projects, involves the requirement to conduct wetland delineations on all wetlands on the tract. For some projects, this might involve significant costs if the wetland restoration project is on a tract containing many wetlands. While we understand the desire to get the “big picture” of how the proposed project fits in with the other wetlands in the landscape, the requirement for a formal delineation for every wetland on the tract could eliminate some potential restoration projects simply on funding issues alone. We realize that a differentiation of requirements based on project intent is a difficult line to draw, but our concern goes back to the original stated purpose of rule, which

is to foster a net gain of high quality isolated wetlands. We feel that one of the best ways to achieve this goal is to encourage the voluntary restoration of degraded (i.e. Class I) wetlands. (USFWS)

Response: IC 13-11-2-74.5(c) and IC 13-11-2-74.5(d) require one to know the area of the wetlands on the tract.

SPECIFIC COMMENTS TO RULE 1

Comment: In 327 IAC 17-1-1, we suggest rewording the first sentence of subsection (a) as follows: “This article governs the issuance of ~~wetland activity~~ general and individual permits **for wetland activities** in state regulated wetlands.” (IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: It is suggested that the phrase “consistent with the Clean Water Act” be deleted from subsection (b) of Section 1 since the Clean Water Act technically is not applicable to the subject of isolated wetlands. Such wetlands, not being waters of the United States, are outside the scope of the CWA. (IMA/CWI)

Response: IDEM agrees. This change has been made.

Comment: In 327 IAC 17-1-3, the definitions included in this section are essentially verbatim replicas of those provided in IC 13-11-2. We recommend that Section 3 simply reference the statutory definitions. This would make the rule much shorter and avoids errors creeping into the language as reiterated. This could be done as follows:

Sec. 3. The following terms, as used in this article, have the same meaning as stated in IC 13-11-2:

“Class I wetland”; “Class II wetland”; “Class III wetland”; “Clean Water Act”; “compensatory mitigation”; “dredged material”; “exempt isolated wetland”; “isolated wetland”;... (IMA/CWI)

Response: In an effort to make this rule as user friendly as possible, the draft rule minimizes references to other documents whenever possible.

Comment: If the agency insists on replicating the statutory definitions within the draft rule, then the definition for “exempt isolated wetland” needs correction as follows:

(7) “Exempt isolated wetland” means an isolated wetland that:

(A) is a voluntarily created wetland unless:

(i) the wetland is approved.....

(K) An isolated wetland described in clause (E) and **or** clause (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 clause (E) and **or** clause (F), **as applicable**, consistent with the applicable limitations described in clauses **(I) and (J)** and (K). (IMA/CWI)

Response: IDEM has changed this to be identical to the language used in HEA 1798 and HEA 1277.

Comment: We suggest adding a new definition, “waters of the United States”, to the draft rule to replace the term “federally jurisdictional”, which is not a standard term. “Waters of the United States” can be defined by reference to 33 CFR 328.3. (IMA/CWI)

Response: IDEM agrees. This change has been made.

Comment: There is no definition for “fill” anywhere in the draft rules. There is also no definition of de minimis despite the fact that SDC has provided a definition from Corps of Engineers documents. (SDC)

Response: Both of these terms have commonly understood meanings. Prior to the passage of HEA 1798 and HEA 1277, the wetland regulatory program operated without formal definitions for these terms in rules. Should confusion arise, the details of what constitutes “fill” and what constitutes “de minimis” can be incorporated into a non-rule policy document.

Comment: 327 IAC 17-1-3 (15) which contains a definition of wetlands delineation or delineation for purposes of the rule fails in section (b) to include “boundaries” as part of the technical assessment. (SDC)

Response: This definition is identical to IC 13-11-2-265.8.

Comment: We support the provisions added at 327 IAC 17-1-5 (4). We also support the provisions at subdivision (5) with the change that the department shall [instead of “may”] require corrective action. (SDC)

Response: IDEM agrees with this comment and will change this subdivision as follows:

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 ~~shall may require corrective action:~~ **take actions as necessary to ensure compliance with 327 IAC 17.**

Comment: We recommend the following revisions to this section for clarity and consistency with the underlying statute, IC 13-18-22-6. In the last two subsections of this draft section, we recommend deleting the phrase “consistent with section 1(b)(2) of this rule” since it adds no meaning or content to these subsections.

Sec. 5. (a) Except as otherwise specified in **subsection (b) 6**; compensatory mitigation, **where required under this article**, 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

(b) ~~(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.

(c) ~~(2)~~ The off-site location of compensatory mitigation must be within:

(A) the same eight (8) digit U.S. Geological Service hydrologic unit code; or

(B) the same county;

as the isolated wetlands subject to the authorized wetland activity.

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

(e) ~~(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.~~

(f) ~~(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. (IMA/CWI)

Response: IDEM agrees. Changes have been made.

Comment: 327 IAC 17-1-6, which allows the commissioner to allow exceptions to compensatory mitigation fails to meet the “assurance” goal of the law and the draft rules. If the commissioner exercises this discretion, it must be accompanied by a written statement of reasons included in the permit which qualifies as a “decision” and should be appealable. See also 327 IAC 17-3-3 (7) which requires an applicant seeking to use this exception to make a demonstration that the site or activity meets “specific circumstances.” Where are the specific circumstances in 17-1-6? (SDC)

Response: The authority for the above referenced decision comes from IC 13-18-22-5(c). The wording of IC 13-18-22-5(c) states that IDEM “may” allow exceptions to mitigation. These exceptions are therefore not required and are at IDEM’s discretion. The specific, limited circumstances are a technical issue that may be better suited for incorporation into a non-rule policy document after the rule is adopted.

Comment: In 327 IAC 17-1-7, for the purpose of assuring consistency with the authorizing statutes – IC 13-18-22-1(b) in this case – and clarity, the following revisions are recommended to this section:

Sec. 7. The following **wetland** activities are exempt from permitting **under this article**:

(1) The discharge of:

(A) dirt;

(B)... (IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: We suggest that sections 9 and 10 of Rule 1 should be relocated to Rule 4 [327 IAC 17-4] since the two sections are only applicable to the issuance of individual permits and Rule 4 is the only rule of article 17 dealing with individual permits. (IMA/CWI)

Response: IDEM agrees. These sections have been moved to Rule 4.

Comment: In 327 IAC 17-1-9, “reasonable alternative demonstration” language in subdivisions (1), (2), and (3) are without criteria for a demonstration. A resolution that makes a statement without stating reasons is not reasonable. (SDC)

Response: This language gives IDEM the authority to require these demonstrations. Details of what is a reasonable resolution may be better suited for incorporations into a non-rule policy document.

Comment: In 327 IAC 17-1-10, “Reasonably necessary or appropriate demonstration” language in subdivisions (1), (2), and (3) has no criteria for either demonstrating “reasonably necessary” or “appropriate.” (SDC)

Response: This language gives IDEM the authority to require these demonstrations. Details of what is a reasonable resolution may be better suited for incorporations into a non-rule policy document.

Comment: 327 IAC 17-1-11 requires IDEM to issue a notice of decision. How will the public be notified? (SDC)

Response: A new section, 327 IAC 17-4-10, has been added to create a public noticing mechanism similar to that used in the water quality certification program.

SPECIFIC COMMENTS TO RULE 2

Comment: In 327 IAC 17-2-1, we recommend the following clarification in the first sentence of this proposed section. This proposed revision more accurately describes the nature of a general permit rule.

“This rule ~~governs the issuance of wetland activity~~ **establishes a general permits for permit to authorize wetland activities with**

minimal impact to **Class I and Class II wetlands that are** state regulated wetlands. This rule establishes....” (IMA/CWI)

Response: This language has been changed to read:

This rule **establishes a general permit to authorize wetland activities with minimal impact to Class I and Class II wetlands that are state regulated wetlands. 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.

Comment: In 327 IAC 17-2-2, the following editorial changes are proposed to subsection (a) to better explain the rule and delete extraneous references to the Corps’ nationwide permits. In addition, we suggest that it would be preferable to separate the actual general permit authorizations into a separate section 3 rather than to leave them within section 2, which addresses general applicability of the rule.

“(a) This rule applies to persons proposing to undertake wetland activities in Class I and II state regulated wetlands that will have minimal impacts, **as described in subsequent sections of this rule. including activities applicable to State Regulated Wetlands that would be allowed under the nationwide permit program (as published in 67 Fed. Reg. 2077-2095 (2002)).**

Not only are the references in this subsection(a) to the NWP’s extraneous to the substance of this rule, but the manner in which the reference is made leads to an arguably inaccurate conceptual understanding. The NWP’s are intended for activities proposed to be conducted in waters subject to the Corps’ jurisdiction under the Clean Water Act. Thus, the NWP’s are not germane to activities proposed for SRW’s, which are outside the scope of CWA jurisdiction. We don’t think IDEM intends to convey that NWP’s would be applicable to activities in SRW’s but the language of the draft rule could be reasonably understood as suggesting that conclusion. The best course is not to include a reference to NWP’s. (IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: We recommend that 327 IAC 17-2-2(b)(7)(A) be rewritten to read as follows:

(7) Activities required for the construction, maintenance and repair of utility lines and associated facilities in SRW’s 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 SRW’s, provided there is no **substantial** change in preconstruction contours.

[Comment: to require absolutely no change in preconstruction contours, as the draft rule presently does, appears to be unnecessarily rigid and inflexible.] 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, **electromagnetic, or optical** energy, **including but not limited to transmissions for electrical power or for communications of any nature.** telephone, and telegraph messages, and radio and television communication. ***[Comment: given the increasing prevalence of fiber optic cable and cable for broadband internet connections, it seems prudent to be more general in the description of such utility purposes.]*** Material resulting from trench excavation may be temporarily sidecast (up to three (3) months) into SRW’s, 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 180 days, where appropriate. In **Class II** wetlands, the top 6” to 12” 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 SRW’s (e.g., 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 SRW’s 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. (IMA/CWI)

Response: The language has not been revised in order to maintain consistency between federal and state general permitting programs. IDEM does not believe that the existing language will pose implementation difficulties.

Comment: We recommend that a new 327 IAC 17-2-2(b)(7)(B) be added to read as follows and the rest of the subdivision be renumbered as appropriate:

(B) The construction, maintenance or expansion of a substation facility associated with a power line or utility line, provided that the activity does not result in the loss of greater than ½ acre of SRW’s.

[Comment: This element of NWP 12 was omitted from the draft rule but appears to have potential applicability to activities in SRW’s.] (IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: We recommend that the original 327 IAC 17-2-2(b)(7)(C) be rewritten to read as follows:

(D) ~~(C)~~ The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in SRW’s, provided the discharges do not cause the loss of greater than ½-acre of SRW’s. 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 SRW’s and as near as possible to preconstruction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). ~~Access roads constructed above preconstruction contours and elevations in SRW’s must be properly bridged or culverted to maintain surface flows.~~ ***[Comment: this constraint seems unnecessary in a SRW where currents or surface flows would be***

expected to be minimal if existent at all.] As used in this clause, the term “utility line” does not include activities which drain a SRW, such as drainage tile, or french drains; however, it 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 (1/2) acre loss of SRWs. SRWs temporarily affected by...” **[No further comments offered on this subdivision.]** (IMA/CWI)

Response: The proposed change has not been made. If the SRW in question does not have flow to maintain, then the language in question will not affect the applicability of the general permit. However, situations in which flow, perhaps to or from groundwater, is interrupted or impeded are possible in an SRW.

Comment: We recommend that 327 IAC 17-2-2(b)(9)(A) be rewritten to read as follows:

(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) non-Federal 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;

[Comment: the stricken agencies seem unlikely to be active in Indiana Thus, we suggest that they should be deleted.]

(ii) reclaimed surface coal mine lands **subsequent to reclamation bond release and termination of OSM/IDNR jurisdiction under the Surface Mining Control and Reclamation Act and IC 14-34**, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM or the Indiana Department of Natural Resources **[Comment: any activity conducted on reclaimed surface coal mine land prior to release of a reclamation bond would be subject to and governed by the reclamation provisions of the SMCRA permit for the mine site. Such activities would be exempt from permitting under IC 13-18-22-1 and any reference thereto is superfluous to this proposed rule. Thus, it is proposed to revise this subparagraph (ii) to refer only to activities undertaken after release of the bond.]** (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 or private or tribal lands. **[Comment: there are no tribal lands remaining in Indiana.]**

(IMA/CWI)

Response: IDEM agrees. The changes have been made.

Comment: We recommend that 327 IAC 17-2-2(b)(9)(B) be rewritten to read as follows:

(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 **under IC 13-18-22**, the removal of accumulated sediments; the installation, removal, and maintenance of, dikes, and berms; **the removal of existing drainage structures; [Comment: removal of existing drainage structures is an element of NWP 27 and seems possibly germane here.]** 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 non- native 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 (9)(A)(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 **if not otherwise exempt under this article**. For restoration, enhancement, and creation projects conducted under item (9)(A)(i) and item (9)(A)(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 (i.e., prior to the restoration, enhancement, or creation activities) **if a permit is otherwise required under this article for such reversion activities**. The reversion must occur within five 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 (9)(A)(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 **are applicable** will be at that future date.

[As an overall Comment on this subdivision, it would appear to largely deal with activities relating to voluntarily created wetlands that would be exempt under the authorizing statutes. It is unclear whether and to what extent some activities identified within this subdivision would not be exempt.] (IMA/CWI)

Response: IDEM agrees with the commentor's language and have made these changes with one exception, the addition of the phrase "the removal of existing drainage structures." Drainage structures, in order to be effective, must drain somewhere. If the wetland in question is not isolated then it is not a SRW. Regarding the commentor's general comment at the end, these rules do not exempt wetland activities for the purpose of enhancement of an existing wetland.

Comment: 327 IAC 17- 2-2 (b) (9) (B) should be changed to require planting of native species, instead of making it optional. (SDC)

Response: IDEM agrees. Changes have been made.

Comment: No provision is included in the draft general permit rule comparable to NWP 25 which addresses structural discharges. This activity seems relevant to the SRW context and it is recommended that it be included. (IMA/CWI)

Response: To maintain consistency between federal and state general permitting programs the Regional General Permit, which replaced Nationwide Permit 14, 18, 25, 29, 39, 42, and 44, has been incorporated in this rule as 327 IAC 17- 2-2 (b) (11) in lieu of Nationwide Permit 25.

Comment: We recommend 327 IAC 17-2-2(b)(11)(C) to be rewritten as follows:

(C) Discharges of dredged or fill material authorized by this subdivision are limited to **0.2 acre or less for Class I SRWs and 0.1 acre or less of Class II SRWs State Regulated Wetlands;** **/Comment: wetland activities should be authorized over a greater acreage of Class I wetlands as a minimal impact than for Class II wetlands.**

(IMA/CWI)

Response: There is no rationale provided for this specific acreage level and there is no rationale for providing a different level of exemptions for SRW than for implementation of the NWP for federal jurisdictional waters.

Comment: 327 IAC 17-2-2(b)(11)(D)(i) is superfluous. If authorization is denied by another agency having jurisdiction over the activity, that action governs in any event and there is no need to interrelate this general permit authorization to such actions of other agencies. (IMA/CWI)

Response: This language has been changed to read:

"Authorization of activities under this rule does not substitute for any separate authorizations required by other local, state or federal requirements."

Comment: 327 IAC 17-2-2(b)(11)(D)(ii) is superfluous since the wetland activities described in the various provisions of this general permit are per se deemed to be of minimal impact. Even if it were not superfluous, this condition would be objectionable as quite vague even with respect to unacceptable adverse impacts on aquatic resources. There is no indication of what other public interest factors would be implicated by this provision. Clause (D), as a whole, is unneeded since both items (i) and (ii) are shown to be superfluous. We recommend that Clause (D) is stricken. (IMA/CWI)

Response: IDEM does not agree that fill in some locations does not have the potential to cause adverse impacts and may cause impacts disproportionately large compared to the area of the fill. These impacts are not analogous to the nationwide permits and may not be minimal impacts. These impacts should not be authorized under a general permit. The Regional General Permit, from which this language was derived, included this provision as a safeguard.

Comment: We recommend that 327 IAC 17-2-2(b)(11)(E) be stricken. The only basis for inapplicability of the general permit is that proposed or actual activity is not within the prescribed activities of the general permit.(IMA/CWI)

Response: IDEM does not agree that the language should be stricken. This language merely instructs IDEM upon the course of action to take when the scenario suggested by the commentor arises. That is to say if an applicant sends in a notification of an activity other than those prescribed activities of the general permit, IDEM is to notify the applicant and require the applicable permit.

Comment: 327 IAC 17-2-2 (b) (11) sets a limit for discharges of dredge and fill under a general permit of 0.1 acre or less, which virtually wipe out small wetlands. For example, for a Class I wetland that is slightly over ½ acre would allow fill up to 20% of the wetland, and for Class II wetland slightly over 1/4 acre would allow fill up to 40 or more % of the wetland. A better solution applicable to small wetlands would be use of a percentage. In other words, size matters here. (SDC)

Response: The proposed language is consistent with current implementation in the federal program and is retained in the rule to maintain consistency between federal and state general permitting programs.

Comment: We recommend relocating 327 IAC 17-2-3 to a point immediately following 327 IAC 17-2-4, which states general conditions to the general permit. We believe it is a more logical organization to place the two sections dealing with the substance of the minimal impacts general permit in direct proximity. (IMA/CWI)

Response: IDEM disagrees based on the specific direction of the state wetlands law. IDEM believes that 327 IAC 17-2-3 should

be located before 327 IAC 17-2-4.

Comment: The following revision is proposed to the first sentence of the opening paragraph of 327 IAC 17-2-3:

“As a prerequisite to **the applicability to a specific wetland activity** of the minimal impact general permit **authorization established by this rule to a specific wetland activity**, a person proposing the wetland activity discharge is required to submit to the department a notice of intent...” (IMA/CWI)

Response: To improve clarity, IDEM has revised the rule language to read as follows:

“A person proposing a wetland activity must submit a notice of intent to the department as a prerequisite to applicability of the minimal impact general permit.”

The subsequent language about what a notice of intent must include has been removed from both Rule 2 and Rule 3 and relocated to the definitions section to reduce redundancy.

Comment: 327 IAC 17-2-3(1)(E)(i) appears to be confusing actions prior to January 1, 2004, that have affected the classification of an isolated wetland with wetland activities proposed after January 1, 2004, which would require a permit under IC 13-18-22. Regardless of what past activities occurred, when they occurred (so long as it was prior to January 1, 2004) is not relevant to the present application for a wetland activity permit. (IMA/CWI)

Response: For reasons explained in another response, please be aware that 327 IAC 17-2-3(1)(E)(i) has been relocated to 327 IAC 17-1-3(9)(A)(v)(AA). IC 13-11-2-25.8(b) states, “for the purpose of this section, 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.” The information required by 327 IAC 17-1-3(9)(A)(v)(AA) is therefore necessary to correctly apply the classification.

Comment: In 327 IAC 17-2-3(1)(E)(ii), no permit application is required for the exempt activities referenced by this item. Thus, there is no need to provide the dates of such activities. A person conducting such activities would be prudent to maintain records which corroborate the exempt nature of the activities but this is not a matter for regulation. (IMA/CWI)

Response: For reasons explained in another response, please be aware that 327 IAC 17-2-3(1)(E)(ii) has been relocated to 327 IAC 17-1-3(9)(A)(v)(BB). The exemptions referenced by 327 IAC 17-1-3(9)(A)(v)(BB) are limited by IC 13-11-2-74.5(c), IC 13-11-2-74.5(d), and IC 13-11-2-74.5(e). IDEM, when reviewing an application or notification is likely to discover that past wetland fill has occurred. Without the information required by 327 IAC 17-1-3(9)(A)(v)(BB), the activity will likely be found to be outside of the scope of the general permit and the tract referred for enforcement action since there is little time for an investigation during the review period specified by HEA 1798 and HEA 1277. Providing the information with the application or the notification will reduce the number of unnecessary out of scope findings and enforcement investigations, and will result in a savings of time and money for both the applicant and IDEM.

Comment: In 327 IAC 17-2-3(1)(E)(iii), no permit is needed for the voluntary creation of an isolated wetland. Once created, such a wetland is exempt such that any subsequent wetland activity affecting the wetland does not require a permit under IC 13-18-22. Thus, no need exists for a permit application or for the date information specified in this item. Only if the owner of the voluntarily created wetland transfers the wetland to state regulated wetland status through the process described in IC 13-11-2-74.5(a)(1)(C) would future wetland activity in the wetland require a permit and, thus, a permit application. (IMA/CWI)

Response: For reasons explained in another response, please be aware that 327 IAC 17-2-3(1)(E)(iii) has been relocated to 327 IAC 17-1-3(9)(A)(v)(CC). IDEM needs to know which wetlands on a tract are regulated and which wetlands are exempt. IDEM, when reviewing an application or notification, is likely to discover wetlands, other than those listed in the application or notification, that have been or will be filled by the planned activity. Without the information required by 327 IAC 17-1-3(9)(A)(v)(CC), the activity will likely be found to be outside of the scope of the general permit since there is little time for an investigation during the review period specified by HEA 1798 and HEA 1277. If the voluntary wetland has been filled, the tract could mistakenly be referred for enforcement action. Providing the information with the application or the notification will reduce the number of unnecessary out of scope findings and enforcement investigations, and will result in a savings of time and money for both the applicant and IDEM.

Comment: 327 IAC 17-2-3(1)(E)(iv) involves a potentially more complicated situation, depending on whether the isolated wetlands is an exempt wetland or not under the relevant statutes. If the wetland is exempt, then any restoration activity is outside the regulatory structure. On the other hand, if the wetland is a state regulated wetland, then the restoration activity, even though the resulting upgrade in condition would be a “voluntarily created” wetland feature, a permit may be needed to authorize the activity since it would occur in a regulated wetland. Here again, though, we fail to perceive what dates would be pertinent to an application for a permit. (IMA/CWI)

Response: For reasons explained in another response, please be aware that 327 IAC 17-2-3(1)(E)(iv) has been relocated to 327 IAC 17-1-3(9)(A)(v)(DD). According to IC 13-18-22-2(c), “The classification of an isolated wetland that is based on the level of disturbance of the wetland by human activity or development may be improved to a higher numeric class if an action is taken to restore the isolated wetland, in full or in part, to the conditions that existed on the isolated wetland before the disturbance occurred.” IDEM therefore needs to know if restoration has occurred to properly apply the classification.

Comment: Regarding 327 IAC 17-2-3(1)(E)(v), IC 13-18-22-10 does not address the filling, draining, or elimination of an isolated wetlands after January 1, 2004. This statute only describes certain past activities that are outside IDEM’s scope of authority. No

permit application is applicable to such a circumstance and there is no particular date information that would need to be submitted to IDEM. (IMA/CWI)

Response: For reasons explained in another response, please be aware that 327 IAC 17-2-3(1)(E)(v) has been relocated to 327 IAC 17-1-3(9)(A)(v)(EE). IDEM has revised to clarify as follows:

“filling, draining or elimination by other means isolated wetlands not removed from the department’s authority by IC 13-18-22-10.”

Comment: Regarding 327 IAC 17-2-3(1)(E)(vi), if the land on which an isolated wetland is located is no longer subject to USDA wetland conservation rules so that the wetland is no longer exempt, a permit would be needed for future proposed wetland activity in that wetland unless otherwise exempt for other reasons. A permit application would be needed as for any other proposed wetland activity but no particular dates are pertinent. (IMA/CWI)

Response: For reasons explained in another response, please be aware that 327 IAC 17-2-3(1)(E)(vi) has been relocated to 327 IAC 17-1-3(9)(A)(v)(FF). To improve clarity IDEM has revised this language as follows:

“wetland activities that occurred on land previously exempted by 327 IAC 17-1-3(7)(G) if:

(aa) the land is no longer subject to United States Department of Agriculture wetland conservation rules; and

(bb) the wetland activities were not in compliance with United States Department of Agriculture wetland conservation rules.”

Comment: 327 IAC 17-2-4(2) may require that dredged material in a contained upland disposal area is tested for contamination, but subdivision (10) does not make the same requirement for work, activity, or discharge into an SRW. Why not? (SDC)

Response: Subdivision (10) prohibits the use of “unsuitable” material. The details of how to test a material’s suitability may be more appropriate for inclusion in a non-rule policy document than in a rule given the technical nature of this topic.

Comment: 327 IAC 17-2-4(6) is considerably more restrictive than its counterpart general condition associated with the NWP – General Condition 11, entitled “Endangered Species.” Proposed subdivision (6) would not authorize any activity under the 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.” Thus, regardless of whether there is any basis to conclude that the proposed activity would have an adverse impact on the ETR species, no authorization will be given under the general permit.

In addition, it is believed that a one-half mile radius is greater than necessary for adequate consideration of potential impacts from wetland activity and that a one-quarter mile radius should be more than adequate for this purpose. Consequently, we recommend the following revisions to draft subdivision (6):

“No activity is authorized under this general permit **that: (i) is likely to jeopardize the continued existence of a** where state endangered, threatened or rare species **that is** are documented on a permanent or seasonal basis within a **one-quarter (1/4) one-half (½)** mile radius of the proposed project site by the Indiana Natural Heritage Data Center; **or (ii) will destroy or adversely modify the critical habitat of such species.** (IMA/CWI)

Response: The occurrence of a listed species in close proximity to the location of the wetland activity is sufficient reason to take a closer look at the wetland activity proposed than is afforded under the general permit review deadlines. The fact that the wetland activity would not qualify under the general permit does not mean that the activity will not be permitted. It simply means that IDEM should take a closer look using the individual review procedures under 327 IAC 17-4.

Comment: We suggest that the clarity of 327 IAC 17-2-4(7) would be improved if it were revised to read:

“**Upon completion of the wetland activity and any required mitigation, every the permittee will shall** submit a signed certification ~~regarding the completed work and any required mitigation~~ to the department. The certification will include the following: (IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: We suggest that 327 IAC 17-2-4(8) may be stated in a more positive fashion as follows:

“~~The use of more~~ **More than one (1) general permit provision may be used** for a single and complete project **to the extent applicable is prohibited, provided that except when** the acreage loss of SRWs authorized by ~~the all~~ general permit **provisions utilized** does not exceed the acreage limit of the general permit **provision** with the highest specified acreage limit.” (IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: 327 IAC 17-2-4(9) does not seem likely to have any applicability in the context of SRWs. (IMA/CWI)

Response: The definition of isolated wetlands and therefore SRW hinges on what the federal agencies determine to be Waters of the US. It is difficult to predict how the definition of Waters of the US will be applied in the future. Given this uncertainty IDEM believes it is far safer to include this provision.

Comment: Regarding 327 IAC 17-2-4(11), the relevant statutes, IC 13-18-22-4, IC 13-18-22-5(b)(2), and IC 13-18-22-6, do not expressly provide for review and approval by the Commissioner of the compensatory mitigation plan filed by a permit applicant with the NOI for authorization under the minimal impact general permit. The mitigation plan is to be consistent with the provisions of IC 13-18-22-6, which is rather straightforward. If the mitigation plan is clearly inadequate, the permit applicant is not in compliance with the law and the agency can respond accordingly. (IMA,CWI)

Response: IC 13-18-22-1(c)(2) states that one of the goals of this permitting program is to “assure that compensatory mitigation

will offset the loss of isolated wetlands allowed by the permitting program.” IDEM can make no such assurances without reviewing the mitigation plan. Furthermore IC 13-18-22-4(a) instructed IDEM to adopt general permits analogous to the Nationwide Permits. The Nationwide Permit program includes a provision for the US Army Corps of Engineers’ district engineer to review mitigation plans.

Comment: We recommend deletion of the last sentence of the main portion of 327 IAC 17-2-4(14) immediately preceding the numbered subparagraphs, which reads “The Commissioner may also designate additional critical resource waters after notice and opportunity for comment.” This sentence is superfluous, being redundant with the preceding sentence of the condition.

For the general permit provisions listed in subparagraph (B) of this proposed condition, the activities described in those permit provisions should be stated to be authorized in critical resource waters. The described eligibility determination to be made by the Commissioner under the proposed condition is unnecessary since all activities described by the various provisions of this proposed general permit are categorically deemed *per se* to have minimal impact. (IMA/CWI)

Response: IDEM agrees that the last sentence of the main portion of 327 IAC 17-2-4(14) is superfluous, and has deleted it. IDEM does not agree with the comment concerning clause (14)(B). This language was taken from Nationwide Permit Condition number 25. It provides additional protection to critical resource waters from certain activities otherwise permitted under this rule.

Comment: Under 327 IAC 17-2-4 (14), we suggest adding designated Scenic Streams to the list of critical waters. The last sentence refers to the commissioner designating additional critical resource waters. Is this still possible under Indiana law? (SDC)

Response: These rules deal only with State Regulated Wetlands, not streams.

Comment: 327 IAC 17-2-4(15), which would bar authorization of discharges of dredged or fill material into SRWs within the 100 year floodplain that would result in permanent above-grade fills, is more stringent than NWP 26, which is the apparent source for this proposed condition. Even without this disparity, we would strongly suggest that concerns about adverse effects of such above-grade fill on flood storage capacity should be addressed through state floodplain management regulation and need not be governed by this general permit. (IMS/CWI)

Response: IDEM does not agree that this language is more stringent than US Army Corps of Engineers’ Nationwide Permit general condition number 26.

Comment: No verification process, as referenced by 327 IAC 17-2-4(16), is expressly required by statute or established elsewhere within the proposed rules. In addition, no expiration date is set in the proposed rule nor is one required. These concepts, borrowed verbatim from the Corps’ NWP conditions, are not germane to this rulemaking and, therefore, subdivision (16) should be deleted. (IMA/CWI)

Response: IDEM agrees. This provision has been deleted.

Comment: The intended meaning and effect of 327 IAC 17-2-4(19) is so vague and unclear that it should be deleted. It is potentially overbroad in scope, as well, appearing to deal with any “waters of the state” and not just SRWs. (IMA/CWI)

Response: IDEM does not believe that this language is vague or unclear. If the fill will result in additional impacts, it should not be permitted under the minimal impact general permit. Situations have arisen in the past in which a relatively small area of proposed fill, which would otherwise have qualified for the general permit, would have caused negative impacts disproportionate to the size of the fill itself due to its location. IDEM believes this situation deserves a more careful review than that afforded by the general permit.

Comment: The following revision is recommended to 327 IAC 17-2-4(22):

“Complete all activities necessary to construct the mitigation wetland within **two (2) years one (1) year of after** the effective date of the general permit **authorization for the wetland activity as determined under IC 13-18-22-8(b)**, unless the department grants a written extension upon request. **The two-year time frame applies only to the initial construction and not to any repairs, including replacement of any plantings which do not become successfully established, that may become necessary.** A two-year period is needed for construction of a mitigation wetland in view of the substantial dependence of successful construction on favorable weather conditions, which are random and unpredictable. (IMA/CWI)

Response: IDEM does not agree that all compensatory mitigation requires a two-year construction period. Ideally, compensatory mitigation should be done concurrent to the impact so as to minimize the duration that wetland functions are lost. IDEM has chosen to generalize “concurrently” to one year since this results in a clear deadline. The proposed language clearly allows for an extension of the one-year period upon request and that has worked well when needed in the past.

Comment: We recommend that 327 IAC 17-2-4(24) be deleted from the draft rule. IC 13-18-22 does not in any way imply a need for, much less expressly require, a conservation easement or a deed restriction to protect a mitigation wetland and such provisions cannot be reasonably inferred from the statute. The only circumstance in which the statute mentions such measures is for the protection of a Class III wetland that is designated as an outstanding state protected wetland. Moreover, there is nothing in the authorizing legislation which prohibits the subsequent filling of a wetland created or restored for compensatory mitigation purposes if proper permitting, including satisfaction of compensatory mitigation requirements, were to be procured under IC 13-18-22. (IMA/CWI)

Response: The purpose of the deed restriction is to notify subsequent property owners of the existence of the mitigation site, and

to allow the mitigation site to reach maturity before it can be disturbed. IDEM has revised proposed rule language to eliminate a requirement for a deed restriction for Class I sites in favor of an environmental notice on the deed. A deed restriction is maintained for Class II and Class III mitigation, however the previously required 50 year duration of the deed restriction, which is required under the Nationwide Permitting Program, was replaced by an unspecified duration commensurate with the duration the mitigation attempt is anticipated to need for maturation. IDEM believes that this ‘compromise’ approach retains the needed level of protection to ensure the goals of the state wetland law can be achieved without unnecessarily burdening the applicant. A deed restriction can be altered in the future through a modification to the individual permit. It is also noted that deed restrictions are required under the Nationwide Permitting program; IC 13-18-22-4(a) instructs IDEM to develop a general permit program that is analogous to the NWP.

Comment: We support the language requiring a conservation easement or deed restriction for Class II or Class III mitigation wetlands in 327 IAC 17-2-4(24). We question why this language is in this general permit section but not in the individual permit section. We oppose the added language “for the length of time consistent with the time required for maturation of the wetland type being restored or created” and urge restoration of the deleted language “for a minimum period of fifty (50) years. (SDC)

Response: This duration was changed in an effort to reach a compromise on this issue. As noted in the response above, one of the purposes of the deed restriction is to allow the mitigation site to reach maturity before it can be disturbed. Some mitigation attempts are expected to take longer to reach maturity than others. It therefore makes sense to set the duration of the deed restriction accordingly.

Comment: We suggest that 327 IAC 17-2-4(26) and (27) are unnecessary elements of the rulemaking. They are overly paternalistic and may be more appropriately addressed as part of informal guidance that IDEM might make available to persons contemplating wetland activities. (IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: We recommend the following revision in the second sentence of 327 IAC 17-2-5:

“... 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 notify the person proposing the wetland activity that a permit is required under** 327 IAC 17-3 or 327 IAC 17-4, **as applicable.** (IMA/CWI)

Response: IDEM agrees. These changes have been made.

SPECIFIC COMMENTS TO RULE 3

Comment: The intended purpose of this draft rule is very unclear and appears to be misdirected. Instead of establishing the general permit authorization for wetland activities in Class I SRWs with more than minimal impact, the draft rule’s provisions appear to be intended to implement the streamlined, uniform permits for wetland activities in Class I wetlands that are to be issued by the IDEM prior to the adoption of a rule establishing a general permit for such activities. This conclusion is based on the inclusion in the draft Rule 3 of provisions for a Notice of Registration, as provided for in IC 13-18-22-7(b)(2)(C), and for denial of such permits, as provided in IC 13-18-22-8(d). Both provisions are restricted in applicability to the streamlined individual permits for Class I wetlands. In addition, the only reference to a general permit is in Section 4 when express language of adoption of a general permit would be expected in Sections 1, 3, 5 and perhaps other sections as well. Moreover, if the general permit for Class I wetland activities were intended, Section 3 should reference a Notice of Intent per IC 13-18-22-8(b), rather than a Notice of Registration per IC 13-18-22-7(b). Thus, at best, draft Rule 3 presents a confusing amalgam of provisions pertaining to streamlined individual permits and other provisions possibly pertaining to a general permit. (IMA/CWI)

Response: The rule is not superfluous. IC 13-18-22-4(b) states that “wetland activities in Class I wetlands shall be authorized by a general permit rule.” However IC 13-18-22-7(b), IC 13-18-22-8(c) and IC 13-18-22-8(d) are in effect only until these rules are adopted. Therefore 327 IAC 17-3-3 should reference the notice of intent rather than a notice of registration. For convenience and consistency IDEM has modified this language to reference the notice of intent, which is now in the definition section of Rule 1. 327 IAC 17-3-7, which corresponded to IC 13-18-22-8(d) has also been deleted as the denial authority in IC 13-18-22-8(d) is replaced by the “scope” review in 327 IAC 17-3-5.

Comment: 327 IAC 17-3-3(7), which references the mitigation exception at 327 IAC 17-1-6, requires an applicant to “demonstrate”. How does an applicant “demonstrate”? (SDC)

Response: This language gives IDEM the authority to require these demonstrations. Details of what is an adequate demonstration may be better suited for incorporations into a non-rule policy document.

Comment: In 327 IAC 17-3-4, add “Class I” in front of General Permit. (SDC)

Response: IDEM agrees. This change has been made.

SPECIFIC COMMENTS TO RULE 4

Comment: “Individual” should be added before Permit in title of 327 IAC 17-4. (SDC)

Response: IDEM agrees. This change has been made.

Comment: We see no language in this rule that the General Conditions also apply here. Why not? (SDC)

Response: HEA 1798 and HEA 1277 authorized IDEM to condition individual permits as necessary to meet the goals of the permitting program. Although those may often be identical to the general permit conditions, these acts gave IDEM the flexibility to

tailor the individual permit conditions to account for site specific variations and complexities.

Comment: The specific requirements for deed restrictions or conservation easements for Class III and Class II mitigation wetlands at 327 IAC 17-2-4 (24) should also be restated in 327 IAC 17-4. (SDC)

Response: HEA 1798 and HEA 1277 authorized IDEM to condition individual permits as necessary to meet the goals of the permitting program. Although those may often be identical to the general permit conditions, these acts did give IDEM the flexibility to tailor the individual permit conditions to account for site specific variations and complexities.

Comment: 327 IAC 17-4-1 refers to “certain” Class II wetlands. How would an applicant know if his/her project is affected by reading this section? (SDC)

Response: Please see the applicability section at 327 IAC 17-4-2.

Comment: We propose revising the lead-in language of 327 IAC 17-4-3 by replacing “the discharge” with “a wetland activity.” (IMA/CWI)

Response: IDEM agrees. This change has been made.

Comment: In 327 IAC 17-4-3(5), the unusual term “federally jurisdictional” should be replaced by a term such as “waters of the United States”. (IMA/CWI)

Response: IDEM agrees. This change has been made.

Comment: We do not understand the rationale for the proposed requirement to “disclose dates” for various described actions in 327 IAC 17-4-3(6)(D). While the subdivision indicates that the date information is needed for the purpose of making various referenced determinations, there are no determinations required in most cases and definitely not involving dates. (IMA/CWI)

Response: Please see above responses related to the notice of intent.

Comment: 327 IAC 17-4-3(7) incorrectly assumes that “specific circumstances” for an exception to compensatory mitigation are expressly and particularly listed in 17-1-6 and, furthermore, that one of those “specific circumstances” is met with respect to the isolated wetland at issue. We propose that this subdivision should be revised to read as follows:

(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~~ an exception to mitigation ~~at~~ **has been granted by the department under** 327 IAC 17-1-6.

(IMA/CWI)

Response: IDEM agrees. These changes have been made.

Comment: 327 IAC 17-4-3(8) should be revised in format as follows to be consistent with that of IC 13-18-22-5(a)(1)(A):

(8) The applicant shall demonstrate, as a prerequisite to the issuance of the permit, that the wetland activity is:

(A) if proposed for a Class II wetland, is:

(i) without reasonable alternative per 327 IAC 17-1-9;

(ii) ~~(B)~~ reasonably necessary or appropriate; ~~to achieve a legitimate use...~~

to achieve a legitimate use proposed by the applicant on the property on which the wetland is located per 327 IAC 17-1-10; and

(B) ~~(C)~~ if proposed for a Class III wetland, is:

(i) without practical alternative; and

(ii) will be accompanied by taking steps that are practicable and appropriate to minimize..

(IMA/CWI)

Response: IDEM does not agree that these changes should be made. If, as the commentor suggested in an earlier comment, rule 3 were eliminated, IDEM would agree that this change would be necessary to ensure that these demonstrations were not required on a Class I individual permit. As noted earlier, IC 13-18-22-4(b) requires IDEM to authorize wetland activities in Class I SRWs via a general permit rule, not an individual permit. These changes are therefore not necessary.

Comment: In 327 IAC 17-4-3(9), we are unsure of the intended meaning of a “statement of affirmation.”(IMA/CWI)

Response: IDEM has revised the language as follows:

A statement, signed by the applicant stating, “I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. The information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations.”

Comment: We suggest that 327 IAC 17-4-5 and 327 IAC 17-4-6 be reversed in order and renumbered accordingly. The subject matter of section 6 seems logically to come before that of section 5. (IMA/CWI)

Response: IDEM does not agree and believes that rule requirements should be located before review deadlines.

Comment: 327 IAC 17-4-5 and 327 IAC 17-4-6 contain timelines that are arbitrary and capricious, and will tie the hands of IDEM in administering these regulations to accomplish the stated goals of the legislation. (SDC)

Response: These timelines are statutory requirements from IC 13-18-22-8.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On November 23, 2004, the Water Pollution Control Board conducted the first public hearing concerning the development of a new Article 17. Comments were made by the following parties:

Indiana Wildlife Federation (IWF)

Save the Dunes Conservation Fund (SDC)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: On the first page, the purpose of this regulation states that it is to:

- 1) promote a net gain of high quality wetlands
- 2) assure compensatory mitigation will offset the loss of isolated wetlands.

As land use issues continue to be an issue in Indiana, we must recognize the need of regulation to balance remaining natural resources and the function they serve for the greater good against other use concerns. To some stakeholders, this resource is truly expendable. Our organization is concerned with the loss of habitat for a diverse range of wildlife species. The economic impact of wildlife related activities in Indiana is over \$3 million per year. Also, we can look to the millions of state tax payer dollars that have and will continue to be spent for flood relief for crops and other personal property throughout our state because of wetlands loss, and diminished water quality in many of our lakes and rivers. The vital functions wetlands provide are diminished within this regulation. Scientific assessment processes are not yet complete, but are necessary for implementation of the rule. (Two supporting documents were also submitted to the Water Pollution Control Board concerning the history of Indiana's wetlands and some economic facts) (IWF)

Response: The proposed rules are intended to be consistent with the provisions of the state law passed in 2004 and the Water Pollution Control Board does not have discretion to revise the coverage of the isolated wetland permit requirements in the law. IDEM is working with a group of science advisors to assist in developing procedures for determining wetland classifications, which will help effectively implement the law and these rules.

Comment: Mitigation exemptions should be minimal. Easements for mitigated wetlands should be permanent, as maturation of a restored wetland takes time. The mitigated wetland, in most cases, could be classified as a Class I, and undo the purpose of offsetting the loss of wetlands elsewhere. The exemption for a Class III wetland activity to be allowed because of "lack of practical alternative" can result in an increase loss of high quality wetlands. The Indiana Wildlife Federation is concerned that language in this section creates the potential for diminished standards of protection. (IWF)

Response: These rules neither reduce nor increase the scope of the exemptions as established by HEA 1798 and HEA 1277. "Easements" are not required anywhere within the proposed rules. Deed restrictions are limited to the duration required for the maturation of the type of wetland mitigation attempted, which should adequately ensure that the mitigation wetland accomplishes its purpose. The class of a mitigation wetland is determined at the time of permitting, as necessitated by the mitigation ratio provisions. The exemption provisions in Rule 1 do not reference "lack of practical alternative." The term "practical alternative" appears only in Rule 4, the individual permit. In effect a regulated activity can only occur in a Class III wetland if the activity lacks a practical alternative.

Comment: It is necessary to view this rule package as the first step in the process of crafting wetland regulation. More needs to be addressed to provide wetlands protection that meets the "purpose" of the regulation. (IWF)

Response: The department understands that more clarification for wetland categorization and other issues would be valuable and is working with science and policy advisors to develop non-rule policy documents and/or further rule revisions to help provide greater clarity.

Comment: The draft state regulated wetland rules before you today have been developed in haste and with little scientific basis. We recognize the limitations of the rulemaking per legislative mandate (HEA1798 and HEA1277). Nevertheless, the agency and this Board must strengthen the rules in order to fulfill the twin goals of the statutes: to promote a net gain in high quality isolated wetlands and to assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program. (SDC)

Response: The department has worked with interested parties to craft rules consistent with the schedule in the statute. These proposed rules have not attempted to provide more detail on wetland categorization and some other definitional issues because it was recognized by all that additional time beyond the statutory timeframe would be needed to effectively develop further guidance by rule or policy. The proposed rules however are effective in providing the required clarity in the applicability and content of the required general and individual permits. Through six policy workgroup meetings, the proposed rules have undergone considerable scrutiny in addition to the formal opportunities for public input. The department will continue to work with the public to provide guidance and, if needed, further rule revisions on matters not specifically addressed in this rulemaking.

Comment: The rules should require verification of those wetlands considered exempt by the owner to enable tracking the loss of wetlands. A provision must be added to the rules to clarify that the agency makes the final determination of exemption eligibility of a particular wetland. (SDC)

Response: The department agrees that exemption notification and verification would have benefits in verifying compliance with the permit requirements. However, the legislation does not specifically require such notification or verification. The department's

existing enforcement authority would be triggered if a landowner filled a wetland that was not, in fact, exempt. While the department interprets the law to mean that the department makes the final determination regarding which wetlands and wetland activities are regulated by these rules, the comment illustrates that this issue could benefit from clarification in the rule language. Therefore we have edited 327 IAC 17-1-2 to add the following:

“The department may determine that a wetland or a wetland activity is subject to the provisions of this rule.”

Comment: There should be no exceptions to the mitigation requirements for Class II and III wetlands, and a conservation easement or deed restriction for Class II and III mitigation wetlands should be effective for a minimum period of fifty years. Mitigation wetlands begin to fully replace natural wetlands upon maturation, at which point the current rules allow for their destruction. (SDC)

Response: The department believes that the limited circumstances in which the department would not require mitigation is a fact-based, site-specific issue that would best be handled through non-rule policy development. In regards to the deed restriction duration, the proposed rule represents a “compromise” position between those who advocated deed restrictions and those who adamantly opposed them. The purpose of the deed restriction is to a) notify subsequent property owners, and b) allow mitigation sites to mature before they can be altered. While 50 years was a rough estimate of the maturation time needed, the actual duration could be more finely tuned to the type of mitigation attempted – thus the current language. The actual maturation durations are a technical issue that would be best addressed through non-rule policy.

Comment: We also encourage the Board to add a requirement that public information will be available on applications to fill wetlands under the general permit and Class I general permit. (SDC)

Response: General permitting is different than individual permitting. The agency’s decision is made at the time of the general permit effective date, not on a case-by-case basis. This is evidenced by the fact that a landowner does not apply for a general permit, but notifies the department (i.e. the notice of intent) that she is planning on acting on the already issued general permit. The public involvement component for this decision is therefore this very rulemaking. Public input is not required on a case-by-case basis on each individual activity so long as the activity falls within the scope of the general permits, which have already been thoroughly reviewed and commented on by the public. Regarding availability of the information, the department will work to identify an administrative mechanism to make it convenient for the public to obtain information on notices of intent.

Comment: IDEM requested input on how to determine the “success” of mitigation efforts, but then responded that the performance standards we suggested are not required under the statute. Nor are they prohibited. Such standards enable objective determinations of “successful” mitigation, which is essential to meeting the goals of the wetlands legislation, particularly given the current lenient requirements for the long-term protection of mitigation wetlands. (SDC)

Response: As noted by the commentor, mitigation success criteria or performance standards were not required by HEA 1798 and HEA 1277. We agree that this does not prohibit their inclusion. However, mitigation success criteria are technical issues that should be discussed in greater detail by the Wetland Science Advisory Group and others and may be better suited for incorporation into a non-rule policy document or subsequent rulemaking. IDEM currently implements the Section 401 Water Quality Certification program for federal jurisdictional wetlands without detailed mitigation success criteria or performance standards in rule and can continue to do so for the isolated wetlands prior to further work with the public to craft written guidelines.

Comment: IDEM is pursuing development of a nonrule policy through a scientific advisory group to address the several key terms in the rules that are vaguely defined or lack definition altogether. Given the extent to which the definitions will determine implementation of the rules, we believe a nonrule policy is insufficient. Definitions for terms such as “fringe wetland” and “de minimis” as well as the wetland classifications should be incorporated into the rules prior to final adoption. Consistency with Section 404 U.S. Army Corps of Engineers definitions, while not required, would save time during the rulemaking as well as facilitate implementation of the permitting process. (SDC)

Response: Both “fringe” and “de minimis” have commonly understood meanings. Prior to the passage of HEA 1798 and HEA 1277, the wetland regulatory program operated without a formal “de minimis” definition in rules. Should confusion arise, the definitions for these terms can be incorporated into a non-rule policy document or in a subsequent rulemaking.

327 IAC 17

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 general and individual permits for wetland activities in SRWs.

(b) The purpose of this article 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

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 the following:

(A) An isolated wetland that is a voluntarily created wetland unless:

(i) the wetland is:

- (AA) 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; or
- (BB) reclassified as an SRW under IC 13-18-22-6(c); or

(ii) 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) An isolated wetland that exists as an incidental feature in or on any of the following:

- (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.
- (vi) A manmade drainage control structure.

(C) An isolated wetland that is a fringe wetland associated with a private pond.

(D) An isolated wetland that 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) An isolated wetland that is a Class I wetland with an area, as delineated, of one-half (½) acre or less.

(F) An isolated wetland that is a Class II wetland with an area, as delineated, of one-fourth (¼) acre or less.

(G) An isolated wetland that 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.

(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 the following:

(i) The acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in clause (E).

(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 the following:

(i) The acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in clause (F).

(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 clause (E) or (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 clause (E) or (F) consistent with the applicable limitations described in clauses (I) and (J).

(8) "Isolated wetland" means a wetland that is not subject to regulation under Section 404(a) of the Clean Water Act.

(9) "Notice of intent" means a notice submitted by a person proposing the wetland activity as a prerequisite to applicability of a general permit under either 327 IAC 17-2 or 327 IAC 17-3. This notice must contain the following information:

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

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

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

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

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

(v) For the purpose of making the determinations at subdivisions (7)(A) and (7)(K), section 4 of this rule, 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:

(AA) Actions that disturb or affect isolated wetlands under subdivision (1)(A) that occurred after January 1, 2004.

(BB) Wetland activities exempted by subdivision (7)(E) or (7)(F) that occurred after January 1, 2004.

(CC) Voluntary creation of isolated wetlands under subdivisions (7)(A) and (12).

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

(EE) Filling, draining, or elimination by other means isolated wetlands not removed from the department's authority by IC 13-18-22-10.

(FF) Wetland activities that occurred on land previously exempted by subdivision (7)(G) if:

(aa) the land is no longer subject to; and

(bb) the wetland activities were not in compliance with;

the United States Department of Agriculture wetland conservation rules.

(B) A compensatory mitigation plan to reasonably offset the loss of wetlands allowed, unless an exception to mitigation has been granted by the department under section 6 of this rule.

(C) A statement signed by the applicant stating, "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. The information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

(D) Correspondence from the United States Army Corps of Engineers (USACOE) that states that the wetland is not waters of the United States.

(10) "State regulated wetland" or "SRW" means an isolated wetland located in Indiana that is not an exempt isolated wetland.

(11) "Tract" means any area of land that is:

(A) under common ownership; and

(B) contained within a continuous border.

(12) "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.

(13) “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 any of the following:

- (A) An exempt isolated wetland.
- (B) A private pond.
- (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.

(14) “Waters of the United States” means waters described by 33 CFR 328.3(a)(3).

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

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

material into an isolated wetland.

(16) “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. The term generally includes the following:

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

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

- (A) whether a wetland exists on an area of land; and
- (B) if so, 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. (a) Except as otherwise specified in subsection (b), compensatory mitigation, where required under this article, 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

(b) 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.

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

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

as the isolated wetlands subject to the authorized wetland activity.

(d) 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.

(e) Mitigation plans required under section 3(9)(B) of this rule 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.

(f) 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 shall take actions as necessary to ensure compliance with this article. (*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 wetland activities are exempt from permitting under this article:

(1) The discharge of any of the following in a de minimis amount:

- (A) Dirt.
- (B) Sand.
- (C) Rock.
- (D) Stone.
- (E) Concrete.
- (F) Other inert fill materials.

(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 any of the following:
 - (i) Plowing.
 - (ii) Seeding.
 - (iii) Cultivating.
 - (iv) Minor drainage.
 - (v) Harvesting for the production of food, fiber, and forest products.
 - (vi) Upland soil and water conservation practices.
- (B) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures, such as the following:

- (i) Dikes.
- (ii) Dams.
- (iii) Levees.
- (iv) Groins.
- (v) Riprap.

(vi) Breakwaters.

(vii) Causeways and bridge abutments or approaches.

(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 the following:

(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.

(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 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. 9. The department shall issue notices of decision in accordance with IC 4-21.5-3-5(b). *(Water Pollution Control Board; 327 IAC 17-1-9)*

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 establishes the following:

(1) A general permit to authorize wetland activities with minimal impact to Class I and Class II wetlands that are SRWs.

(2) 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; IC 14-34

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, as described in this rule.

(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 that are necessary to make repair, rehabilitation, or replacement are permitted, provided the adverse environmental effects resulting from the repair, rehabilitation, or replacement are minimal. As used in this subdivision, "currently serviceable" means usable 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 riprap 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:

(A) fifty (50) cubic yards below the plane of the ordinary high water mark; and

(B) 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 the following:

(A) Staff gauges.

(B) Water recording devices.

(C) Water quality testing and improvement devices.

(D) Similar structures.

(6) Survey activities including core sampling, seismic exploratory operations, plugging of seismic shotholes and other exploratory-type boreholes, 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" means any:

(i) pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose; and

(ii) 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, maintenance, or expansion of a substation facility associated with a power line or utility line, provided that the activity does not result in the loss of greater than one-half (½) acre of SRWs.

(C) 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.

(D) 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 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, are 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 an 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 any of the following:

(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).

(ii) Reclaimed surface coal mine lands subsequent to reclamation bond release and termination of OSM/IDNR jurisdiction under the Surface Mining Control and Reclamation Act and IC 14-34. The future reversion does not apply to streams or wetlands created, restored, or enhanced as mitigation for the mining impacts, naturally due to hydrologic or topographic features, or for a mitigation bank.

(iii) Other public or private lands.

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

Activities authorized by this subdivision include, to the extent that a permit is required under IC 13-18-22-1, 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 if not otherwise exempt under this article. 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 if a permit is otherwise required under this article for such reversion 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 regulatory requirements are applicable 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 the following:

(A) The repair or maintenance of dikes.

(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 following:

(i) Buildings or work pads.

(ii) Stockpiling of material.

(iii) Staging, loading, and unloading areas.

(iv) Roads.

(v) Land leveling.

(vi) Berms, dikes, dams, and ditch construction.

(vii) Drainage facilities.

(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) Authorization of activities under this rule does not substitute for any separate authorizations required by other local, state, or federal requirements.

(E) Activities that the department determines to have the potential to cause unacceptable adverse impacts on aquatic resources or other public interest factors are not authorized by this subdivision.

(F) 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:

(i) after-the-fact applications; or

(ii) 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. A person proposing a wetland activity must submit a notice of intent to the department as a prerequisite to applicability of the minimal impact general permit. (*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) Upon completion of the wetland activity and any required mitigation, the permittee shall submit a signed certification to the department. The certification will include the following:

(A) A statement that:

(i) the authorized work was done in accordance with the department authorization, including any conditions; and

(ii) any required mitigation was completed in accordance with the permit conditions.

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

(8) More than one (1) general permit provision may be used for a single and complete project to the extent applicable, provided that the acreage loss of SRWs authorized by all general permit provisions utilized does not exceed the acreage limit of the general permit provision 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.

(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), 2(b)(9), 2(b)(10), and 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) The permittee shall clearly mark the construction limits shown in the plans at the tract during construction.

(17) 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.

(18) 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.

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

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

(21) 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.

(22) 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.

(23) 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.

(24) 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.

(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 notify the person proposing the wetland activity that a permit is required under 327 IAC 17-3 or 327 IAC 17-4, as applicable. *(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. A permit to undertake a wetland activity under this rule is considered to have been issued to any applicant on the thirty-first day after the department receives a notice of intent submitted under section 3 of this rule if the department has not:

(1) previously authorized the wetland activity; or

(2) notified the applicant per the review requirements in section 5 of this rule.

(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 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. A person proposing a wetland activity must submit a notice of intent to the department as a prerequisite to applicability of the Class I general permit. *(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 Class I 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 intent and notify the applicant if the proposed activity is outside the scope of the applicability of the Class I general 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. 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 intent submitted under section 3 of this rule if the department has not:

- (1) previously authorized the wetland activity; or
- (2) notified the applicant per the review requirements in section 5 of this rule.

(Water Pollution Control Board; 327 IAC 17-3-6)

Rule 4. Individual 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 a wetland activity 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 waters of the United States.
- (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)(A), 327 IAC 17-1-3(7)(K), 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(12).
- (iv) Restoration of isolated wetlands under IC 13-18-22-2(c).
- (v) Filling, draining, or elimination by other means isolated wetlands not removed from the department's authority by 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 an exception to mitigation has been granted by the department under 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 a reasonable alternative under section 8 of this rule.

(B) Reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located under section 9 of this rule.

(C) For a Class III wetland, as follows:

(i) Without a 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.

(D) For a Class III wetland, an applicant's demonstration in clause (C)(i) and (C)(ii) is not satisfied by the demonstrations in section 8 or 9 of this rule.

(9) A statement signed by the applicant stating, "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. The information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

(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)

327 IAC 17-4-8 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. 8. 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 17-4-8)

327 IAC 17-4-9 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. 9. 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 17-4-9)

327 IAC 17-4-10 Public notice of applications for individual permits for wetland activities in Class II and Class III state regulated wetlands

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

Affected: IC 4-21.5-3-5

Sec. 10. (a) Except as provided in subsection (f) [sic.], the commissioner shall provide public notice of and an opportunity to comment on complete applications submitted to the department under this rule.

(b) The public notice must contain the following information:

- (1) The applicable statutory and regulatory authority.**

- (2) The name and address of the applicant and, if any, the applicant's agent.
- (3) The name, address, and telephone number of the department's employee who may be contacted concerning the application.
- (4) The location of the tract.
- (5) A brief description of the proposed project, including the following:
 - (A) The purpose and a description of the wetland activity.
 - (B) The current and proposed use of the tract.
 - (C) A summary of the number, size, and class of the SRW on the tract.
 - (D) A description of the compensatory mitigation proposed by the applicant.
- (6) A statement telling where the public may view or obtain a copy of the application.
- (7) A statement that the comment period deadline is thirty (30) calendar days from the date of mailing of the public notice unless otherwise specified.
- (8) A statement that any person may request in writing that a public hearing or meeting be held to consider the application.

(c) The department shall provide notice of a complete application to the following:

- (1) The applicant.
- (2) Adjacent property owners and other potentially affected persons, as provided by the applicant.
- (3) The following agencies:
 - (A) The department of natural resources.
 - (B) The United States Fish and Wildlife Service.
 - (C) Affected county and local plan commissions.
- (4) Any person who requests copies of public notices of applications.

(d) The department shall consider comments received during any public comment period under this section in making a determination under this rule. The department may hold a public hearing in response to a request for a public hearing under subsection (b). (*Water Pollution Control Board; 327 IAC 17-4-10*)

Notice of Public Hearing

Under IC 4-22-2-24, IC 13-14-8-6, and IC 13-14-9, notice is hereby given that on February 9, 2005 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 final 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 rule. 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 (317) 232-6565 (TDD). 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, Twelfth Floor and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.

Tim Method
Deputy Commissioner
Office of Water Quality