

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NONRULE POLICY DOCUMENT

Title: Determining when Compensatory Mitigation is Complete

Identification Number: Water-009-NPD

Date Originally Effective: September 8, 2006

Dates Revised: None

Other Policies Repealed or Amended: None

Brief Description of Subject Matter: A compensatory mitigation site is “complete” under IC 13-18-22-6(b) when construction activities have occurred and the compensatory mitigation site has met the success criteria. Attaining the success criteria demonstrates the statutory requirement to offset the loss of wetlands authorized by the permit.

Citations Affected: 327 IAC 17-1-5, IC 13-18-22-6(b)

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Background

Goals of the state regulated wetland program are to promote the net gain in higher quality isolated wetlands (IC 13-18-22-1(c)(1)) and to assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program (IC 13-18-22-1(c)(2)). However, it is accepted that some wetland loss is unavoidable.

When applicants must impact a wetland, state law generally requires that they replace it with a compensatory mitigation wetland (IC 13-18-22-6). However, studies have found that compensatory wetland mitigation required by state and federal agencies often fails to fully compensate for the wetland loss authorized by the permit, even when compensatory mitigation wetlands are constructed per accepted scientific/engineering parameters.

In addition, a temporal loss of wetland function can occur because it takes many years from the time a wetland is constructed until it fully functions as a wetland or in the manner of the wetland it replaced. To overcome the risk of failure and the temporal loss of function, many state and federal agencies require the area of replacement wetland to be greater than the area of wetland lost. This is known as the mitigation ratio (for example, 2:1 means two acres of compensatory mitigation for each acre of wetland loss). IC 13-18-22-6 sets these ratios ranging

from 1:1 to 3:1 for state regulated wetlands, depending on the class of the impacted wetland, whether the impacted wetland was forested or not, and if the replacement wetland is on-site or off-site relative to the permitted wetland loss. IC 13-18-22-6(b) provides an incentive to complete mitigation in advance of creating the impact to a wetland by lowering the required replacement/compensatory wetland mitigation to 1:1.

Discussion

Since the passage of the isolated wetland statutes in 2004, many have questioned what IC 13-18-22-6(b) meant by “complete”. One view has been that “complete” means when construction of the compensatory mitigation site has been finished. Another view has been that “complete” means when the mitigation site reaches a state equivalent to mature examples of the wetland ecosystem being replaced. IDEM has indicated that a wetland compensatory mitigation site is “complete” when it is demonstrated to successfully offset the loss of wetlands authorized by the permit. IDEM determined that the demonstration of “success” occurred through monitoring the site and comparing its performance against a set of success criteria included in an IDEM approved mitigation plan. Thus, IDEM has considered compensatory mitigation sites to be “complete” when the sites have met the success criteria for two (2) consecutive years and a site was then released from additional monitoring.

Defining “complete” as “construction being finished” entails the risk of failure, as identified above. This is in conflict with the stated legislative goals. IDEM acknowledges that failure could still occur after the determination that the success criteria have been met for two (2) consecutive years. However, accepting “complete” as achieving equivalency with examples of mature ecosystems of the type being replaced may require decades of monitoring by the applicant and oversight by IDEM. While this interpretation would pose the least risk of failure, resource constraints make it unworkable. Furthermore, reliance on a set of pre-specified success criteria provides the property owner with certainty of a definite end to responsibility within a shorter time period.

Policy Resolution

Therefore, for the purposes of determining “complete” with respect to compensatory mitigation, “complete” is defined to mean that compensatory wetland mitigation site construction is finished and that the success criteria in the IDEM approved mitigation plan have been achieved for a period of two (2) consecutive years.

Explanation

The statutory goals of the state regulated wetland program support this definition over the competing interpretation of defining “complete” to mean simply “construction being finished,” which would not assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program.