

Title: January 1, 2004, Effective Date for Isolated Wetland Determinations

Identification Number: Water-008-NPD

Date Originally Effective: September 8, 2006

Dates Revised: None

Other Policies Repealed or Amended: None

Brief Description of Subject Matter: January 1, 2004, is the effective date of the Indiana state law governing the regulation of isolated wetlands. When considering the condition of an isolated wetland, we must compare its current condition to its condition on January 1, 2004.

Citations Affected: [IC 13-11-2-265](#), [IC 13-18-22-10](#), [327 IAC 17-1-3\(1\)\(A\)](#), [327 IAC 17-1-3\(1\)\(B\)](#), [327 IAC 17-1-3\(7\)\(A\)](#), [327 IAC 17-1-3\(7\)\(B\)](#), [327 IAC 17-1-3\(7\)\(C\)](#), [327 IAC 17-1-3\(7\)\(D\)](#), [327 IAC 17-1-3\(7\)\(H\)\(i\)\(CC\)](#), [327 IAC 17-1-3\(9\)\(A\)\(v\)](#), [327 IAC 17-1-3\(12\)\(A\)](#), [327 IAC 17-1-3\(12\)\(B\)](#), and [327 IAC 17-4-3\(6\)\(D\)](#).

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Background

Many determinations concerning isolated wetlands require knowledge of when in the past certain activities occurred. For example, under [IC 13-18-22-10](#), IDEM does not have authority over unpermitted activities in isolated wetlands that occurred prior to January 1, 2004. Modification of the natural hydrology and removal or replacement of the natural vegetation at some point in the past results in a lower class of wetland under [327 IAC 17-1-3\(1\)\(A\)](#). Unfortunately, unlike with unpermitted activities, the rule is silent on how far back one should or must look when making this determination. Taken to the extreme, one could interpret this to mean that one would need to compare a wetland's current hydrology and vegetative condition to that of its presettlement 'natural' condition. Under this extreme view, proving or disproving disturbance would become an unreasonable hardship. The results would be subjective, inconsistent, unpredictable, and heavily influenced by the amount of resources the applicant and IDEM would be willing or able to spend on researching the history of disturbance on the tract. This concern was raised by stakeholders during the rulemaking process for [327 IAC 17](#) leading to the use of the January 1, 2004, limit on the tract history information required by the Notice of Intent and the Application under [327 IAC 17-1-3\(9\)\(A\)\(v\)](#) and [327 IAC 17-4-3\(6\)\(D\)](#).

Policy Resolution

January 1, 2004, is the effective date of the Indiana state law governing the regulation of isolated wetlands. Accordingly, January 1, 2004, is the date used to determine the status of the wetland per the following:

- 1) In accordance with [IC 13-18-22-10](#), IDEM cannot take enforcement action against any unpermitted activity that occurred in an isolated wetland prior to this date.
- 2) In accordance with [IC 13-18-22-10](#), mitigation required under a Water Quality Certification for isolated wetland impacts prior to this date are released from monitoring regardless of its performance.
- 3) The natural vegetative condition of a wetland, for the purpose of calculating the percent disturbed by removal or replacement of the natural vegetation under [327 IAC 17-1-3\(1\)\(A\)\(i\)](#), is the vegetative condition as of January 1, 2004. Similarly, the natural hydrologic condition of a wetland, for the purpose of calculating the percent disturbed by modification of the natural hydrology, is the hydrologic condition as of January 1, 2004.

Explanation

In order to make many of the determinations required under [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](#), tract history information is necessary. However, IDEM did not wish to create an unreasonable burden for itself or its applicants and agreed with stakeholders that a cut-off date be established. Establishing January 1, 2004, as a cutoff date has other implications beyond tract history. This policy outlines those implications.

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