

SECTION 2.3

PERMITS/CODES ADMINISTERED BY IDNR

2.31 Introduction and Definitions

This Section addresses the various laws and rules administered by the Indiana Department of Natural Resources (IDNR). The Indiana General Assembly empowered the IDNR with the responsibility to oversee various construction activities within, over, and/or under the State's waterways through the creation of a number of regulatory programs. For many of these programs, IDNR has subsequently promulgated administrative rules to further define and clarify its authority.

The laws passed by the legislature and subsequent rules promulgated by IDNR have sought to protect the lives and property of individuals and the public and also the existing resources along and within Indiana's waters. The safety of the public at large and impacts to adjoining land owners are taken into account during the technical or engineering review of a proposed project. The integrity of fish, wildlife and botanical resources are also safe-guarded through an environmental review of a proposed project.

In general, the IDNR reviews and approves plans for any work within the floodway of a stream or along the shoreline of a public freshwater lake **before** work on the project may begin. However, many Regulated Drain projects are exempt from the IDNR permit requirements through certain sections of the Flood Control Act (IC 14-28-1) and the Flood Hazard Areas Rule (310 IAC 6-1). If not exempt, more than one regulatory statute may apply to a certain drainage improvement project which could include; Flood Control Act (IC 14-28-1), Lake Preservation Act (IC 14-26-2), Lowering of the Ten Acre Lake Act (IC 14-26-5) (formerly referred to as the "Ditch" Act), Navigable Waterways Act (IC 14-29-1), Sand and Gravel Permits Act (IC 14-29-3), and the Construction of Channels Act (IC 14-29-4). A permit issued under the Flood Control Act will also cover authorization under the Navigable Waterways Act; however, occasionally, more than one permit may be required for the same project. For example, if a project is designed to dredge a waterway that drains more than a square mile and is within one-half (½) mile of a freshwater lake, then two(2) permits will be required, one under the Flood Control Act and one under the Lowering of the Ten Acre Lake Act. The application review process will have included all applicable statutes and rules.

Definitions

The following is a partial listing of terms that have been defined through various statutes and administrative rules specifically for administering the IDNR-related statutes. It should not be assumed that these definitions will always agree with other agency definitions or definitions found in other laws or ordinances. More common terms contained in the IDNR-related statutes are contained in Appendix "A": Glossary of Terms.

Adversely affect the efficiency of, or unduly restrict the capacity of, the floodway: an increase in the elevation of the regulatory flood of at least fifteen-hundredths (0.15) of a foot as determined by comparing the regulatory flood elevation under the project condition to that under the base condition. This definition does not apply to a dam regulated under IC 14-27-7 and IC 14-28-1, a flood control project authorized under IC 14-28-1-29 or an area for which a flood easement is secured and recorded with the county recorder.

Base Condition: the condition of the flood plain on January 1, 1973 but without any unauthorized dam or levee. If an activity after December 31, 1972, lowered the regulatory flood profile, the flood plain under the lower profile is the base condition.

Channel: an artificial channel; or the improved channel of a natural watercourse; connecting to any river or stream in Indiana for the purpose of providing access by boat or otherwise to public or private industrial, commercial, housing, recreational, or other facilities.

Cumulative Effects: the impact which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what person undertakes the other actions. Cumulative effects can result from individually minor but cumulatively significant actions taking place over a period of time. Each of the following elements is considered when assessing the impact of cumulative effects within the floodway:

- (1) Adverse impacts on the efficiency of or undue restrictions upon the capacity of the floodway.
- (2) Unreasonable hazards to the safety of life or property.
- (3) Unreasonable detrimental effects upon fish, wildlife or botanical resources.

Floodway: the channel of a river or stream and those portions of the flood plains adjoining the channel which are reasonably required to efficiently carry and discharge the peak flow of the regulatory flood of any river or stream.

Flood Easement: a right of use over the property of another person acquired to convey or impound floodwater.

Navigable Waterway is defined by rule in 2 parts:

navigable - a waterway which has been declared to be "navigable" or a "public highway" by one or more of the following:

- (1) A court.
- (2) The Indiana General Assembly.
- (3) The United States Army Corps of Engineers.
- (4) The Federal Energy Regulatory Commission.
- (5) A board of county commissioners under IC 14-29-1-1.
- (6) The commission following a completed proceeding under IC 4-21.5.

waterway - a river, stream, creek, run, canal, channel, ditch, lake, reservoir, or embayment

Ordinary High Water Mark: the line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics. Examples of these physical characteristics include the following:

- (1) A clear and natural line impressed on the bank.
- (2) Shelving.
- (3) Changes in the character of the soil.
- (4) The destruction of terrestrial vegetation.
- (5) The presence of litter or debris.

Also, the shore of Lake Michigan at five hundred eighty-one and five-tenths (581.5) feet, IGLD, 1985 (five hundred eighty-two and two hundred fifty-two thousandths (582.252) feet, NGVD, 1929).

One-sided Construction: a project involves construction on only one (1) side of a regulated drain if the work is limited to the entire area below the top of the banks and within the drainage easement on one (1) side of the stream or open drain.

Project Condition: the condition of the flood plain with existing structures, obstructions, deposits, excavations, and the project.

Regulatory Flood: the flood having a peak discharge which can be expected to be equaled or exceeded on the average of once in a one hundred (100) year period, as calculated by a method and procedure which is acceptable to and approved by the commission. This flood is equivalent to a flood having a probability of occurrence of one percent (1%) in any given year. The term is also sometimes referred to as the one hundred (100) year frequency flood. "Commission" as used in the definition means the Natural Resources Commission, however, in practice the determination of acceptability is made by IDNR.

Rural Area: an area where the flood protection grade of each residential, commercial, or industrial building impacted by the project is higher than the regulatory flood elevation under the project condition, and where the area lies outside the corporate boundaries of a consolidated city or an incorporated town and outside the territorial authority for comprehensive planning established under IC 36-7-4-205 (b).

Significant Environmental Harm: damage to natural or cultural resources, the individual or cumulative effect of which is found by the Director of IDNR to be obvious and measurable (based upon the opinion of a professional qualified to assess the damage) and which:

- (1) creates a condition where recovery of affected resources is not likely to occur within an acceptable period; and
- (2) cannot be adequately mitigated through the implementation of a mitigation plan approved by the Director of IDNR.

Total Length: the length of a stream, expressed in miles, from the confluence of the stream with the receiving stream to the upstream extremity of the stream, as indicated by the solid or dashed, blue or purple line depicting the stream on the most current edition of the seven and one-half (7½) minute topographic quadrangle map published by the United States Geological Survey, measured along the meanders of the stream as depicted on the map.

Unreasonable detrimental effects upon fish, wildlife, or botanical resources: damage to fish, wildlife, or botanical resources which is found likely to occur by the Director of IDNR based upon the opinion of a professional qualified to assess the damage and which creates a condition where recovery of the affected resources is not likely to occur within an acceptable period; and cannot be mitigated through the implementation of a mitigation plan approved by the Director of IDNR.

Unreasonable hazard to the safety of life or property: a condition which is likely to be caused by the design or construction of a project and which is likely to result during the regulatory flood in either of the following: the loss of human life or damage to public or private property to which the permit applicant has neither ownership nor flood easement.

2.32 Description

Indiana "Flood Control Act" (IC 14-28-1) and Flood Hazard Areas Rule (310 IAC 6-1)

The Indiana Flood Control Act was passed by the state legislature in 1945. In the Flood Control Act's preamble, the General Assembly declared that "... the loss of lives and property caused by floods and the damage resulting from floods is a matter of deep concern to Indiana affecting the life, health, and convenience of the people and the protection of property." Furthermore, "... the channels and that part of the flood plains of rivers and streams that are the floodways should not be inhabited and should be kept free and clear of interference or obstructions that will cause any undue restriction of the capacity of the floodways."

Within the Flood Control Act, the General Assembly created a permitting program to ensure that "... all flood control works and structures and the alteration of natural or present watercourses of all rivers and streams in Indiana ... be regulated ... according to sound and accepted engineering practices so as to best control and minimize the extent ... and reduce the height and violence of floods" Simply stated, the two (2) fundamental provisions of the Act's regulatory program are:

- (1) An abode or place of residence may not be constructed or placed within a floodway.
- (2) Any structure, obstruction, deposit, or excavation within a floodway must receive written approval from the Director of the Department of Natural Resources for the work before beginning construction.

The Department's regulatory authority under the Flood Control Act is **limited to the floodway** area produced by the regulatory flood. Many of these floodways throughout the state have been delineated through studies performed for the National Flood Insurance Program (NFIP). These floodway maps are generally available for public inspection in the local plan commission's or building commissioner's office. They are also available in the IDNR Division of Water's office.

Floodways exist for all waterways **even if they have not been mapped**. It should not be assumed that because the floodway of a watercourse is unmapped that the Department does not have any regulatory authority under the Flood Control Act. If a project is proposed in an unmapped area, consultation with the Division of Water staff is advised.

The Flood Hazard Areas rule was promulgated not only for the Flood Control Act but the Floodplain Management Act as well. It contains jurisdictional information, key definitions, project performance standards, and design criteria for specific regulatory exemptions. Several of the rule's sections have not been updated and conflict with the provisions of the Flood Control Act. In these instances the wording in the Act takes precedence over that of the rule.

Indiana "Lowering of Ten Acre Lakes Act" or "Ditch Act" (IC 14-26-5)

The Lowering of Ten Acre Lakes Act states that a person may not "... locate, make, dig, dredge, construct, reconstruct, repair, or reclean ... a ditch or drain having a bottom depth lower than the normal water level of a lake within one-half (½) mile of the lake without a permit from the Department." Additionally, it restricts a person's ability to "... order or recommend the location, establishment, construction, reconstruction, repair, or recleaning" of a ditch and/or drain under the same conditions. The requirements of the "Ditch Act" do not apply to lakes that are less than ten (10) acres in size.

The Act's regulatory program was established to provide safeguards against the lowering of a freshwater lake's water level as the result of a ditch and/or drain activity. Since many of the lakes in northern Indiana are underlain by, and connected to, sand and/or gravel layers, the area of regulatory control extends up to ½ mile landward of the lake shoreline. The penetration of a sand or gravel layer while performing work on a ditch and/or drain could result in a lowering of the lake's level and related environmental damage. The location of the ditch and/or drain with respect to the lake (entering, exiting, under or alongside) has no bearing on the regulatory requirement (see Exhibit 2.3a). Regulated activities typically include: ditch construction and/or reconstruction; tile drain installation and/or repair; and the installation of pipelines having non-watertight joints.

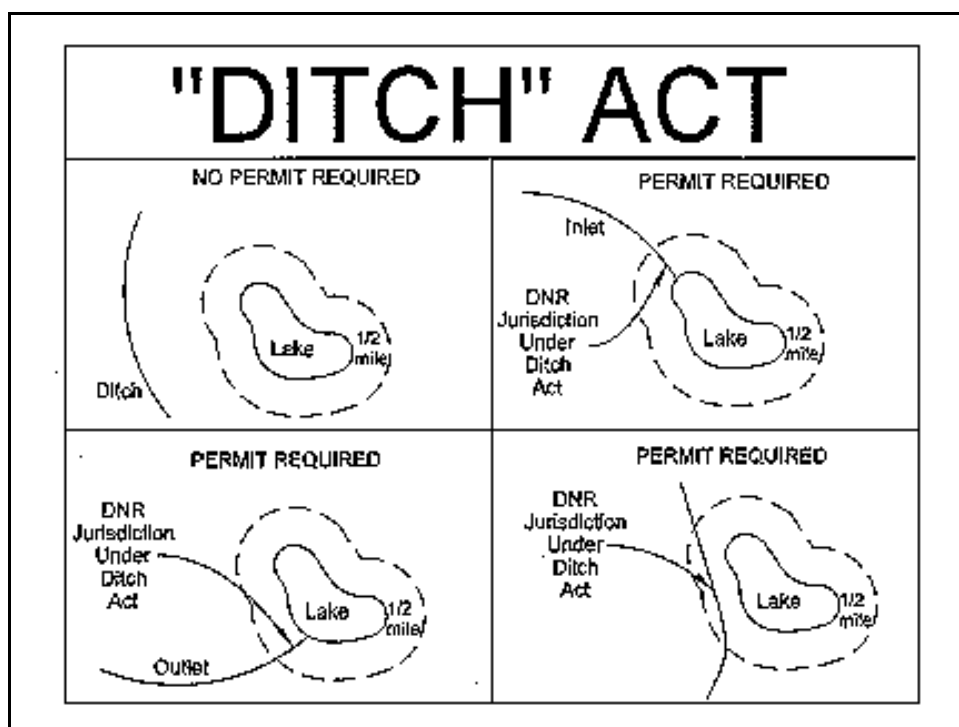


Exhibit 2.3a: IDNR Jurisdiction Limit under the Ditch Act (Source: IDNR)

Other IDNR-Administered Statutes and Rules

There are several other laws and administrative rules that IDNR administers. The most well known of these additional statutes and rules include the Lakes Preservation Act (IC 14-26-2) and the associated Public Freshwater Lakes Rule (312 IAC 11), and the Navigable Waterways Act (IC 14-29-1) and associated Navigable Waterways Rule (312 IAC 6). The IDNR also regulates mineral extraction from navigable streams through the Sand and Gravel Permits Act (IC 14-29-3) and the construction of channels connected to navigable streams through the Construction of Channels Act (IC 14-29-4). However, the vast majority of drainage improvement projects undertaken in Indiana will only involve the Flood Control Act and/or the Lowering of Ten Acre Lakes Act.

In association with the Public Freshwater Lakes Act, IDNR has developed reviews of many lakes which identify wetland areas along the shores of the lakes. Copies of the "Public Freshwater Lake Wetland Review Maps" are available from the IDNR-Division of Fish and Wildlife. A listing of available review maps is provided in Appendix "E.2". IDNR has also published a roster of declared Navigable Waterways in association with the Navigable Waterways Act. The roster is provided in Appendix "E.3" and can also be obtained at the IDNR Internet address provided in Appendix "E.7."

2.33 Exempt Projects

The Flood Control Act and the Flood Hazard Areas Rule exempt a number projects either as a function of the watershed's physical parameters, by the project type, or through the establishment of jurisdictional limits.

Exemptions Through Jurisdictional Limits

- (1) Portions of a project outside of the floodway are not subject to IDNR regulation.
- (2) Projects where a waterway's drainage area at the downstream end of the project site is less than 1 square mile (640 acres) are not subject to IDNR regulation.

Primary Exemptions

- (1) A reconstruction or maintenance project (as defined in the "County Drainage Code", IC 36-9-27) on an open stream or an open regulated drain, if the total length of the stream or drain is less than or equal to 10 miles (see Exhibit 2.3b).

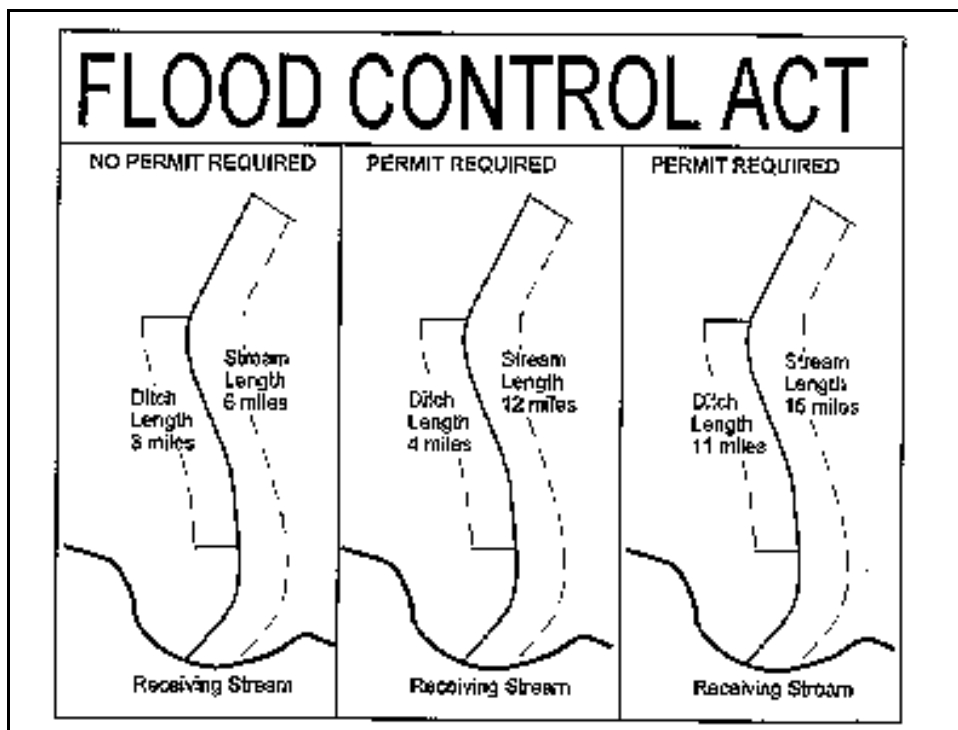


Exhibit 2.3b: Definition of Stream Length with regards to IDNR Permit (Source: IDNR)

- (2) State or county road bridge projects where the drainage area at the bridge structure is less than 50 square miles and the project site is in a rural area.

Other Exemptions

To qualify for any of the following project exemptions, IDNR should be contacted to ensure that the exemption criteria are met.

- (1) Utility line crossings and relocation projects.
- (2) Obstruction Removal for River and Stream Maintenance (See text of Flood Hazard Areas Rule for additional determinations and specific exemption criteria).
- (3) Residential additions and reconstructions (See text of Flood Control Act and Flood Hazard Areas Rule for specific exemption criteria).
- (4) Wetland restoration projects (See text of Flood Hazard Areas Rule for additional determinations and specific exemption criteria).

The form to apply for the Obstruction Removal for River and Stream Maintenance exemption is provided in Appendix "E.5" and can also be obtained at the IDNR Internet address provided in Appendix "E.7."

There are currently no exemptions for ditch and/or drain work subject to regulation under the Lowering of Ten Acre Lakes Act.

2.34 Pre-Application Consultation/Early Coordination Process

Before beginning any drainage improvement project, early coordination with IDNR is strongly encouraged by the agency. Pre-application consultation with IDNR can be used to clarify permit requirements, processing procedures, and verify the need for a permit application submittal.

Written comments concerning a project from the IDNR-Division of Fish and Wildlife can be obtained prior to submittal of the official application to IDNR. These comments would be used on the subsequent permit application as long as the project has not been revised. To invoke this Early Coordination process, the applicant must submit a written request to the Division of Fish and Wildlife that includes the following:

- (1) Brief project proposal.
- (2) Project location on a U.S.G.S. Quadrangle Map.
- (3) Drawing of the disturbed area due to the project.

Once a request has been received, the Division will schedule a field meeting with the applicant. The address and phone number of the Division of Fish and Wildlife are included in Appendix "E.7".

SEA 368 Review Process

In addition to the above process, a formal early coordination procedure for Drainage Board projects was established by the creation of Section 53.5 of the Indiana Drainage Code (IC 36-9-

27) in 1995. The IDNR Division of Water refers to this early coordination as the "SEA 368 Review Process." Section 53.5 states that if a reconstruction or maintenance project is subject to regulation under the Flood Control Act, the Lowering of Ten-Acre Lakes Act or requires an Individual Permit under Section 404 of the federal Clean Water Act, the county surveyor or drainage board shall request an on-site field review of the project. The following process is detailed in the law:

- (1) The county surveyor or drainage board, through written notification to the IDNR Division of Water, requests an on-site field review meeting. The information that may be included, but not necessarily required, in the written notification is found in Appendix "E.6" (IDNR Sample SEA 368 Request Submittal).
- (2) Within 14 days, the Division contacts the surveyor or the surveyor's designee, and the Indiana Department of Environmental Management (IDEM) to determine the date, time and location of the meeting.
- (3) The on-site field review is conducted by one or more staff representatives of:
 - (a) The county.
 - (b) IDNR, including one engineer from the Division of Water.
 - (c) IDEM.
 - (d) The local Soil and Water Conservation District (SWCD), if applicable.
- (4) Within 30 days of the on-site field review, the Division of Water will provide the county with a summary of the review. The summary will include:
 - (a) A narrative and map defining the project location.
 - (b) A description of the proposed work.
 - (c) A list of conditions that IDNR would place on a permit to mitigate any unreasonable or detrimental effects that may occur as a result of the proposed work.
 - (d) A list of conditions that IDEM would place on a certification to comply with Section 401 of the federal Clean Water Act, if it is possible to ensure compliance with Section 401 by placing conditions on the certification.
 - (e) A list of any other conditions that IDNR and/or IDEM would place on a permit or certification for the proposed project.
- (5) The Department of Natural Resources may not require or recommend the following as conditions on a permit for a regulated drain reconstruction or maintenance project:
 - (a) Deed restrictions.
 - (b) Conservation easements.
 - (c) Tree planting or tree retention within the easement of the regulated drain if:

- (A) the project involves construction on only one (1) side of the drain;
 - (B) vegetation on the opposite overbank will not be disturbed; and
 - (C) the county agrees to establish a suitably sized vegetated filter strip consisting of grasses and legumes along the side of the drain on which the construction will occur.
- (6) If the county surveyor or drainage board are aggrieved by the permit conditions provided in the summary from the Division of Water, the surveyor or board may enter into further negotiations with IDNR and/or IDEM in order to obtain mutually agreeable permit conditions.
- (7) If the permit conditions provided in the summary from the Division of Water are acceptable to the county, the conditions are binding upon IDNR and may not be changed by IDNR as long as the permit application(s) for the project are submitted within 2 years of the on-site filed review.

It must be noted that Section 53.5 only affects Regulated Drain maintenance or reconstruction projects.

2.35 Application Requirements

For any application submittal to IDNR, four (4) primary pieces of information must be provided. These items are:

- (1) Completed and signed application form with the correct application fee;
- (2) Verification of Public Notice;
- (3) Site location that includes the parameters of the project; and
- (4) Complete project plans.

An application checklist, blank application forms, and application instructions can be found in Appendix "E.1" or on the at the IDNR Internet address provided in Appendix "E.7." The application fee for Construction In A Floodway Applications is \$50.00. If a project is also reviewed under the Lowering of Ten Acre Lakes Act, an additional \$25.00 fee must be included. There are no additional fees for review under the Navigable Waterways Act.

Also included in Appendix "E.1" is information concerning the public notice requirements. In general, all adjacent property owners to a project site must be notified of their rights to review project plans and be notified of IDNR decisions regarding the project. Proof of notice to the adjacent property owners must be provided before IDNR can finalize its review of the proposed project.

A complete set of plans must also be submitted with every permit application. For most drainage improvement projects, the submitted plans should include a general project boundary map, scaled plan and profile sheets and channel cross-section drawings. Typical cross-sections for specified reaches of the project may be submitted in lieu of detailed cross-sectional information throughout the project length. Details, specifications and information concerning revegetation of disturbed

areas, riprap placement, etc., should also be included in the submittal package. Although not required, a detailed project narrative and/or description will also aid in the processing of the application. Applications to IDNR are made through the IDNR Division of Water.

2.36 Overview of the Agency Application Review Process

Review Criteria

As noted earlier, each separate statute contains certain criteria by which a project is judged to be acceptable or not. Conditions may also be added to an authorization in order to bring a project design up to the standards of the criteria noted in the statute.

Flood Control Act: The Flood Control Act places the burden of proving the project's approvability on the applicant. Using the applicant's submitted information, IDNR determines a project's approvability by evaluating both its singular and cumulative impacts against the criteria stipulated in the Act:

- (1) whether or not the project will adversely affect the efficiency of, or unduly restrict the capacity of, the floodway;
- (2) whether or not the project will constitute an unreasonable hazard to the safety of life or property; and
- (3) whether or not the project will result in unreasonably detrimental effects upon fish, wildlife, or botanical resources.

Lowering of Ten Acre Lakes Act: In assessing a project under the Lowering of Ten Acre Lakes Act, IDNR evaluates its impact on "... land, water, lakes, fish, wildlife, and botanical resources that may be affected by the proposed work". This is accomplished through the following criteria:

- (1) whether or not the project will endanger the lake level; and
- (2) whether or not the project will result in unreasonably detrimental effects upon fish, wildlife, or botanical resources.

Navigable Waterways Act: If a project subject to permit under the Flood Control Act is also located within a navigable waterway, it does not require a separate permit under the Navigable Waterways Act since the Navigable Waterways Act evaluation criteria are applied during the project review as well. In these cases, the following criteria must also be assessed:

- (1) whether or not the project will unreasonably impair the navigability of the waterway;
- (2) whether or not the project will cause significant harm to the environment; and
- (3) whether or not the project will pose an unreasonable hazard to life or property.

General Public Notice

All permit applications submitted to IDNR, although already noticed to the adjoining property owners to the project site by the applicant, must be placed on a general public notice upon receipt by the agency. This latter general public notice is conducted by IDNR staff, not the applicant. Unless an emergency has been declared by the Director of IDNR, an application cannot be acted

upon until 30 days (from the date of the general public notice) has elapsed. At any time during the review process by the agency, a public hearing may be requested by the public if the provisions under 312 IAC 2-3 have been satisfied.

Inter-Department Consultation

For drainage improvement projects reviewed under the auspices of the Flood Control Act and/or the Lowering of Ten Acres Lakes Act, a two-part, simultaneous review takes place. One aspect of the review involves the project's impact upon the efficiency of, or the capacity of the floodway. This hydraulic assessment of possible impacts on the floodway also takes into consideration the project's potential to create an unreasonable hazard to the safety of life or property upstream or downstream of the project site. This portion of the project review is performed by staff of the Division of Water. By their nature, drainage improvement projects do not normally adversely impact the efficiency or capacity of the floodway, as long as any excavated material is disposed of properly. If a proposed project includes building "spoil banks" along the top-of-banks of a channel, or includes channel relocation, bridge/culvert crossings, or other types of control structures, the review time will be increased and hydraulic modelling may be required by the applicant or IDNR.

The second aspect of the project review by IDNR involves the proposed project's environmental impacts. This portion of the project review is undertaken by staff of several IDNR Divisions and coordinated by a staff member of the Division of Fish and Wildlife. The Divisions involved in the project review and their areas of expertise are given below:

- (1) ***Division of Soil Conservation*** - reviews project plans to determine if proper soil conservation practices are being incorporated into the design to reduce sedimentation of waterways or adjoining properties.
- (2) ***Division of Outdoor Recreation*** - reviews project sites to determine if recreational sites developed with Land and Water Conservation Fund grants will be impacted. The Outdoor Recreation Division also informs Division of Fish and Wildlife if project will occur along one of Indiana's listed Scenic Waterways (see Appendix "E.4").
- (3) ***Division of Nature Preserves*** - reviews project sites against the Natural Heritage Database for reports of endangered, threatened or specially listed plant or animal species. This information is forwarded to the Division of Fish and Wildlife.
- (4) ***Division of Forestry*** - reviews project plans for impacts to Indiana's hardwood resources.
- (5) ***Division of Fish and Wildlife*** - receives information noted above from other IDNR Divisions and conducts field inspections to make determination of whether or not the project will result in unreasonably detrimental effects upon fish, wildlife, or botanical resources. The Fish and Wildlife Division also utilizes "National Wetland Inventory (NWI) Maps" and the "Public Freshwater Lake Wetland Review Maps" for those lakes listed in Appendix "E.2" as tools in their evaluation.

If the project will occur along a Navigable Waterway, two additional Divisions of the IDNR become involved in the project review. These Divisions and their responsibilities are:

- (1) ***Division of Law Enforcement*** - reviews project plans to determine impacts upon navigability and boater safety.

- (2) ***Division of Historic Preservation and Archaeology*** - reviews project plans and site to determine if any known historical, architectural, or archaeological sites listed in or eligible for inclusion in the National Register of Historic Places will be impacted by the proposed project.

Under current procedures, it is the joint responsibility of the Divisions of Water and Fish & Wildlife to ensure that a project will not cumulatively impact the efficiency of or unduly restrict the capacity of the floodway; cause unreasonably detrimental effects upon fish, wildlife or botanical resources; or constitute an unreasonable hazard to the safety of life or property.

Final Processing

Once the environmental review has been completed, final comments are then combined with the hydraulic review results and the final authorization documents are presented to the Director of the Division of Water for approval. If a public hearing through the IDNR has been held, the transcript of this proceeding is included in the final documents presented to the Division of Water Director. Final approval documents will include specific and general permit conditions and information concerning appeal procedures.

2.37 Procedures for Timely Access to IDNR Regulatory Personnel

All initial calls to the IDNR Division of Water are answered by the Customer Service Center. An in-state toll free number to the Division is provided in Appendix "E.7." Once an application has been submitted, a distinct number is assigned to that application for tracking and identification. Within the Division of Water, public notice, tracking of status, and other administrative duties relating to the final processing of an application is the responsibility of the Technical Service Center. An application is assigned to a particular technical staff person, and all administrative and technical questions related to that application may be addressed by that individual. Callers should refer to the application by number when calling the Division. A listing of IDNR personnel, addresses, phone numbers, fax number and IDNR-Division of Water Internet address is included in Appendix "E.7".