

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NONRULE POLICY DOCUMENT

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Other Policies Repealed or Amended: None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).

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM 30 days after presentation to the appropriate board. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate board. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

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.