

# Indiana Wetlands

## - Do I Need a Permit for That?

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Since the Supreme Court of the United States decided the Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers ("SWANCC") decision in 2001, developers, property owners, and governmental entities have been struggling with the question of whether a permit is required for dredge and fill, or other activities that may impact a wetland. The Indiana General Assembly has attempted to answer that question with the passage of recent legislation.

Before a person or entity can determine whether it is impacted by wetlands legislation, a person or entity must determine whether or not the waterbody in question is a wetland or an isolated wetland. Generally, to be a wetland an area has to be wet at least part of the year (either at or above the ground level), support the growth of wetland

plants (plants that thrive in or near water) and have a certain type of soil. Certain activities may require one or more permits from regulatory agencies. Such activities include: filling (placement of dredged or fill material into a waterbody), dredging (removal of silt or sediment from a waterbody), excavating (activities on shore that impact waterbodies, for example stream widening, channel relocation, or sand and gravel mining) and other construction that involve building or maintenance activities within the floodway of a river, stream, or adjacent wetland. The new legislation, described below, adds definitions for consideration in determining whether a waterbody is an isolated wetland in Indiana.

In SWANCC, the Supreme Court of the United States decided that the federal government did not have jurisdiction over waterbodies known as isolated wetlands. In response to that decision, the State of Indiana began implementation of a new state wetland permit program. After legal challenges, the enforceability of the permit program remained in flux. In an attempt to provide structure to Indiana's response to SWANCC the General Assembly overrode a veto from the Governor of the State of Indiana and House Enrolled Act 1798 ("HEA 1798") became law on January 27, 2004. The General Assembly then passed House Enrolled Act 1277 ("HEA 1277"), which amends certain provisions of

HEA 1798. The Indiana Department of Environmental Management ("IDEM") has pledged to begin working with the general public in implementing the new state wetland law.

The original bill, HEA 1798 noted a goal of "no net loss of wetlands" and a "net gain of high quality wetlands" but according to the governor's office at the time of the veto the bill's "resolution of wetlands issues in unsatisfactory even as a starting place for state regulation." According to the late governor's office, the problem was that HEA 1798 would address only about one-third of Indiana's approximately 800,000 acres of wetland-type areas. After the veto-override of HEA 1798 by the General Assembly, HEA 1277 was introduced as a "trailer" bill to address these types of concerns that certain legislators raised in reaction to the veto-overridden bill. HEA 1277 amends, deletes and adds definitions, addresses a wetlands classification system, provides for a general permit rule and gives authority to IDEM over certain isolated wetlands.

### Regulated Activities

Important points for the implementation of HEA 1798 include that the Act requires a person to apply for a permit to place dredged or fill material in non-exempt or "state regulated wetlands."

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The Act does not require a permit for "wetland activity" in "exempt isolated wetlands."

### Wetlands Classification

The permitting requirements of HEA 1798 are based on the class of isolated wetland under consideration. HEA 1798 defines, and HEA 1277 amends the definitions, for three classes of wetlands. The classes are based on factors such as the extent to which the wetland has been disturbed or affected by human activity, the removal or replacement of natural vegetation, the modification of the natural hydrology and the wetland's support of wildlife or aquatic habitat. Class II wetlands also include certain

rare and ecologically important types of wetlands.

### Applying for a Permit

IDEM's current non-rule guidance provides that to apply for a permit for a wetland activity, the person or entity desiring to perform the wetland activity may use IDEM's existing permit application form. To expedite the processing of permitting decisions, IDEM requests that the applicant supply IDEM with information supporting the classification of the wetland in question using HEA 1798 and HEA 1277 for the classification definitions.

### Compensatory Mitigation

HEA 1798 also provides for compensatory mitigation ratios and requirements. Compensatory mitigation is designed

to reasonably offset the loss of wetlands allowed by permits. Both on-site and off-site ratios are listed, and the ratios increase from wetland Class I through wetland Class III.

### Statutory Timeframes

HEA 1798 provided a number of timeframes within which the Water Pollution Control Board and IDEM must act in order to implement the provisions of a wetland program. HEA 1277 amended these dates. The board may adopt rules to implement the definition of Class I Wetlands by February 1, 2005; the board shall adopt rules to govern the issuance of individual permits for Class II and Class III Wetlands no later than June 1, 2005, the board shall adopt rules for the issuance of general permits for Class I and minimally impacted Class II Wet-

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lands by February 1, 2005. IDEM shall make available permit applications and registration forms for Class I Wetland Activities by June 1, 2004.

HEA 1277 contains a safe-harbor provision for certain activities that impacted a wetland that would have been an isolated wetland if they occurred before January 1, 2004. However, there are restrictions on the safe harbor that provides that IDEM has authority over wetland activity in an isolated wetland, including an exempt isolated wetland, that are subject to the provisions of (1) a National Pollutant Discharge Elimination System ("NPDES") permit issued by IDEM under 33 U.S.C. 1342, (2) an agreed under IC 13-30-3-3, consent order or consent decree executed by the department and the regulated party, (3) an order issued under IC 13-30-3-4 or a judgment of a court enforcing or upholding an enforcement order or decree; that became effective before January 1, 2004.


IDEM recommends that a person or entity who plans on performing a Wetland Activity that may affect a state regulated

isolated wetland observe the following procedure:

- Become familiar with the terms and conditions of HEA 1798 and HEA 1277;
- Contact the US Army Corps of Engineers ("USACOE") and IDEM to determine if the wetland is isolated and/or a state regulated wetland;
- Prior to consulting with USACOE or IDEM:
  - Have any areas that may be wetlands delineated by a person qualified to conduct such delineations and verified by the USACOE;
  - Obtain documentation from the USACOE that the wetland or wetlands in question are considered isolated and not water of the United States;
  - Perform an initial assessment of the class of wetland proposed to be impacted according to the provisions of HEA 1798 and provide all supporting materials to IDEM; and
  - Use the currently available Section 401 Water Quality Certification application until IDEM provides new forms for public use.

At this time, if a person or entity is proposing to impact both isolated and non-isolated wetlands, they may submit one application that will be reviewed for compliance under both Section 401 of the Clean Water Act and HEA 1798 and HEA 1277. As this is an area of developing regulation, an applicant should consider contacting both counsel and a qualified wetland consultant to determine the application requirements and forms applicable to them at the time of application. Additional information on the regulation of isolated wetlands is available on IDEM's update website, <http://www.in.gov/idem/water/planbr/401/currentev.html> and its new state wetlands permit program website, <http://www.in.gov/idem/water/planbr/401/isowetlands.html>. 

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