

 **Indiana Farm Bureau**
Supporting Agriculture for


Years

Understanding Drainage Options—What's Feasible and Legal

February 2019



Outline for the Presentation

- Do you need a permit?
- Does common law apply?
- Does local government approve it?
- Will my neighbor allow it?



WOTUS

- Clean Water Act
 - US Army Corps of Engineers in conjunction with EPA
 - IDEM plays a role
- Stay of the 2015 rule
- Current rulemakings
 - Repeal 2015 rule
 - New definitions
- Placement of dredged or fill material into waters of the US



What is Fill?

- Dirt, rock, sand, gravel, riprap, etc.
- Pipes and culvert structures (new and replacement structures)
- Dirt or rock placed into an old stream channel if the stream is relocated
- Mechanized land clearing (bulldozing) in wetlands involving removal of stumps
- Side casting of dredged material into wetlands
- Damming up streams/pump arounds
- Bank stabilization (streams and lakeshores)



Exempt Activities

Clean Water Act, Section 404(f)(1)

- Established (ongoing) farming, ranching, and silviculture activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices
- Maintenance (but not construction) of drainage ditches
- Construction and maintenance of irrigation ditches
- Construction and maintenance of farm or stock ponds
- Construction and maintenance of farm and forest roads, in accordance with best management practices
- Maintenance of structures such as dams, dikes, and levees



Not Exempt

- Discharge of dredged or fill material associated with an activity that converts a wetland to upland



CWA Permit Types

- Individual
- Nationwide
- Regional General Permit



Indiana Regional General Permit

- Categories:
 - Bank Stabilization
 - New construction (Residential, Commercial, Industrial)
 - Minor Discharges
 - Agriculture Activities: clearing, tiling, ditching, fills for buildings or access roads
- Maximum limitations:
 - 1.0 acre and/or 1,500 linear feet
- Mitigation:
 - Loss of greater than 0.10 acre and/or 300 linear feet.
 - More than minimal individual or cumulative impact.



WOTUS in a Nutshell

- It is still in effect and you may have to get a permit to work in ditches and streams
- Call the Army Corps of Engineers or IDEM for advice



NRCS

- Swampbuster/Food Security Act
- Can't convert wetland for ag production after Dec 23, 1985
- Abandonment concerns
- Eligibility for farm programs
- NRCS decision does not apply to Corps



IDEM-Isolated Wetland

- No federal jurisdiction
- Exempt wetlands
 - Incidental feature in ag land or roadside ditch
 - Isolated wetland on land subject to swampbuster and used for ag
- Exempt activity
 - Section 404(f) activity
- Regulated activity
 - Filling
 - Excavating
 - Mechanical clearing using heavy equipment
 - Constructing a pond
 - Dredging



DNR-Floodway Permit

- Regulated activity in the floodway
 - Bank protection, bridges, buildings, channel work, dams, excavations, fills, flood control projects, levees, outfalls, residential construction, and utility line activity



DNR-No Permit

- Drain Tile, Outfall Structure or Grassed Waterway General License
- 312 IAC 10-5-8
- No notice to agency



DNR– Criteria for No Permit

- Limit to 1 acre of trees removed in floodway
- No more than 2 days construction within the waterway between April 1 and June 30
- Best Management Practices used
- Mulched and seeded with native species, if not practicable, plant mixture of red clover, orchard grass, timothy, perennial rye grass or another species approved by DNR



DNR– Criteria for No Permit

- Stabilized with an erosion control blanket or suitable structural armament
 - Slopes of 3:1 or steeper
 - Runoff conveyed through a channel or swale
- Concentrated discharge points be protected with structural armament to the normal water level. Riprap must have an average minimum diameter of 6 inches and extend below the normal water level



Outfall Technical Criteria

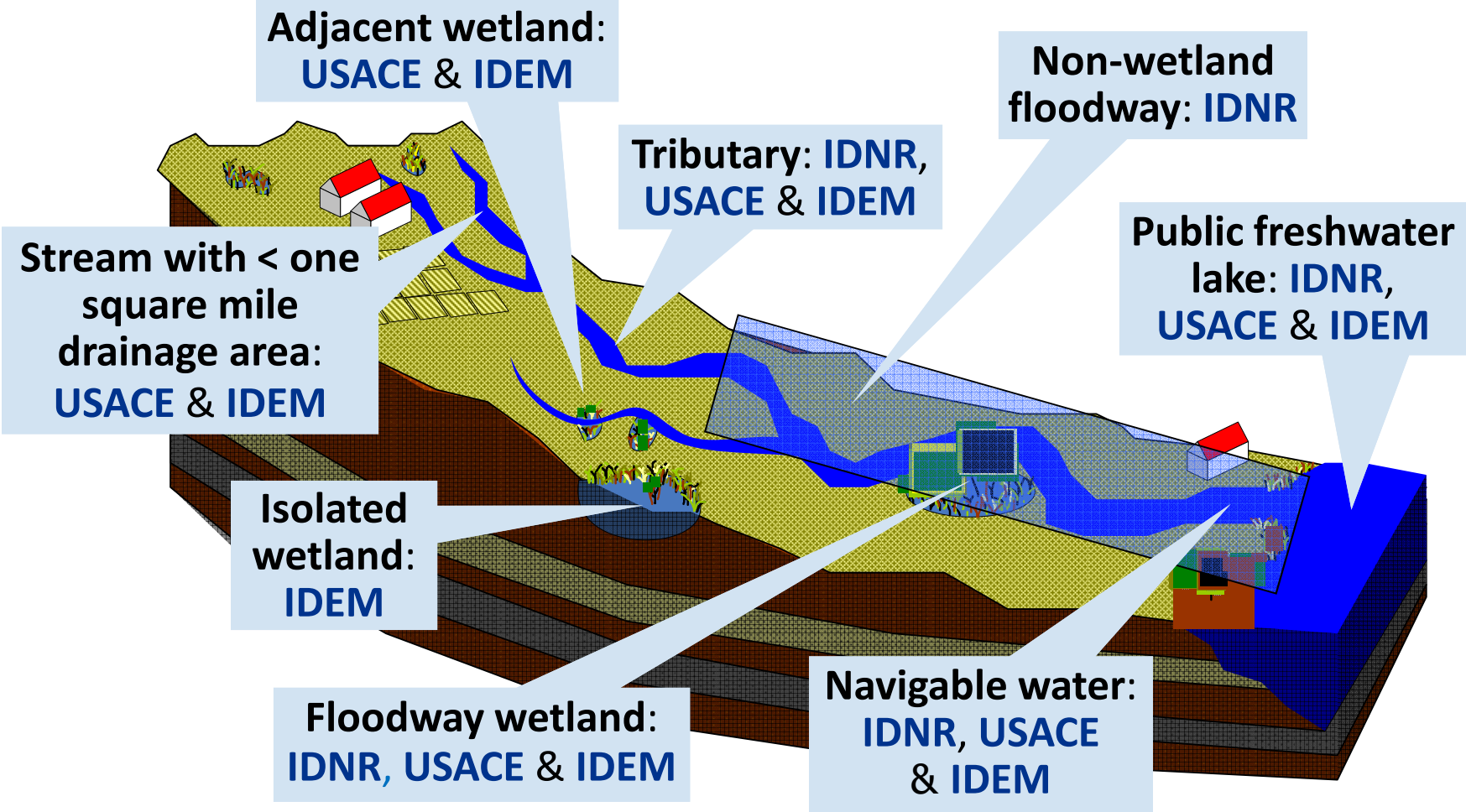
- Not exceed ten (10) square feet in cross-sectional flow area as determined by the summation of cross-sectional area of conduits within the project area
- The structure shall be supported by headwall, slope wall, or anchored end section and conform to the bank.
- If flow passing through the outfall in a reverse direction would induce flood damages during a regulatory flood, the outfall shall be equipped with a closure mechanism.



Grassed Waterway Technical Criteria

- If the outfall is a grassed waterway, the depth of the swale shall not exceed 5 feet as measured from the lowest bank elevation to the bottom of the swale
- Not exceed an area of disturbance 30 feet wide

Who Regulates What?





Common Enemy

- Diffuse surface water
 - No defined channel or banks
- Wall it in, wall it out
- Accelerate it
- Limitations
 - Cannot concentrate and cast it on a neighbor



INDOT—Roads

Under the roadway

- Complete permit application
- Landowner responsible for cost and construction
- EXCEPT, INDOT complete construction under the roadway

In right-of-way

- Complete permit application
- Reviewed for impact to road and right-of-way
- Landowner responsible for cost and construction



Regulated Drains

- Established by court or drainage board
- Pay assessment—county maintains
- Permission needed to access for drainage
 - Petition surveyor
 - Submit plans and specs unless outlet of 12” or less
 - Permission if adequate to handle flow



Removal of Obstructions

- Mutual drain
 - On two properties
 - *Frazeee v Skees*—assume was mutual drain created by consent
 - Private drain on subdivided property
- Natural surface water course
- Petition drainage board for removal
 - Surveyor inspects
 - Drainage board hearing
 - Apportion costs-natural occurrence, or
 - Responsible party pays



Easements

- Written easement or covenant
 - Check recorder's office
- Implied easement
 - Established by common owner
 - In use when land severed
 - Necessary, not convenient
- Prescriptive easement
 - Actual, open, notorious, continuous, uninterrupted, adverse use for twenty years, or
 - Continuous adverse use with knowledge and consent of servient owner



Can You Enter Neighbor's Land?

- Consent
- Easement that allows it
- No right to self help