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Wetlands, Regulations, and You

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WETLANDS, REGULATIONS, AND YOU

What Every Indiana Farmer Needs to Know



1990 FARM BILL
SECTION 404
STATE PERMITS

INTRODUCTION

The Swampbuster provisions of the 1985 and 1990 Farm Bills can affect your USDA Program Benefits and result in penalties if you are found to be out of compliance. Failure to obtain required Section 404 Permits from the U.S. Army Corps of Engineers and/or State of Indiana Permits can also result in severe penalties. The wetland regulations may apply to you when you perform drainage work, construct levees, install culverts, fill wet areas, or carry out other construction type activities such as building dams or other structures. This brochure is provided to alert you to these various requirements.

WHAT ARE WETLANDS?

For regulatory purposes, three criteria must exist for classification as a wetland: 1. The site must have hydric soil (a list of the hydric soils of Indiana is available at your local Soil Conservation Service (SCS) office. 2. The area must have a predominance of hydrophytic or wetland vegetation (sedges, cattails, reed-canary grass, water tolerant trees), or be capable of supporting this vegetation. 3. The site must have wetland hydrology (ponded water and/or a saturated root zone for a minimum of seven days during the growing season). Although "typical" wetlands may suggest images of a cattail marsh or the shallow portions of lakes, the most common wetland types in Indiana, are forested wetlands and small temporarily flooded wetlands in farmed fields. **Unless you have wetland determinations completed for your land, you should check further when planning work on land that has hydric soil.**

WHY ALL THE FUSS?

Wetlands are a natural resource that have been particularly abused by the activities of people. Nearly 86% of Indiana's wetlands have been drained or filled. So, as wetlands become more rare, they become more valuable. Just as rich topsoil or favorable climate provides us with benefits, so do wetlands.

Wetlands:

- help keep surface water and groundwater clean
- store floodwater
- trap sediment and attached nutrients
- function as greenspace and recreation areas
- contribute to groundwater recharge
- provide habitat for fish and wildlife (including many endangered species)
- may be important to reduce global warming.

Not all wetlands do all things, nor do all wetlands benefit us to the same degree. A healthy environment, however, hinges on a landscape containing various kinds of wetlands functioning together efficiently.

DO I HAVE WETLANDS ON MY PROPERTY?

It is very important for you to know if you have wetlands on your farm. Your treatment of wetlands is the key to

compliance requirements of Swampbuster, Section 404, and Indiana state regulations. If you participate in USDA Farm programs (ASCS benefits, any multi-peril crop insurance, FmHA loans), you should have received a photographic map of your farm which showed areas determined to be Wetlands (W), Farmed Wetlands (FW), Artificial Wetlands (AW) or Converted Wetlands (CW), as well as Prior Converted Cropland (PC) and Nonwetland (NW). This map was prepared by your local Soil Conservation Service Office and should be kept with important farm records. Farmers not participating in USDA programs can receive a wetland determination by completing a 1026 Form at your County ASCS office. It is important for all farmers to know where wetlands are located and how to comply with all regulations to avoid penalties and to insure eligibility for future programs.

WETLANDS AND THE 1990 FARM BILL

The 1985 Farm Bill demonstrated public concern for the environment with a comprehensive conservation title that included the Conservation Reserve Program, conservation compliance, and "Swampbuster." The 1990 Farm Bill renews an environmental commitment and reinforces the conservation provisions of the 1985 Act while adding some flexibility for landowners in terms of mitigation. SCS wetland determination maps provide clear documentation of wetlands under United States Department of Agriculture jurisdiction. Swampbuster criteria apply only to portions of your land classified as Wetland (W), Farmed Wetland (FW), or Converted Wetland (CW).

If you drain, fill, clear trees from, or otherwise alter Wetlands (W) or improve the drainage in a Farmed Wetland (FW) beyond the "scope and effect of the original drainage" you will be subject to loss of USDA program benefits or to penalties ranging from \$750 to \$10,000. Converted Wetlands (CW) are those wetlands manipulated after December 23, 1985 and are subject to special restrictions if you participate in any of the USDA Programs. Prior Converted croplands (PC) are wetlands that were drained, filled, or altered to a condition capable of and producing a commodity crop prior to December 23, 1985; they are exempt from both Section 404 and Swampbuster provisions. However, some PC can revert to wetland if abandoned (not managed and maintained for crop production for the past five years and wetland characteristics have returned). Artificial Wetlands (AW) and Nonwetlands (NW) are also exempt from Swampbuster provisions. Technical assistance and financial incentives to restore Prior Converted Cropland (PC) and Farmed Wetlands (FW) remain available to landowners in the 1990 Farm Bill.

WETLANDS / SECTION 404 OF THE CLEAN WATER ACT

Discharges of dredged or fill material and other fill activities such as clearing, grading, and leveling of materials and side-casting of excavated material in wetland areas are regulated under Section 404 of the Federal Clean Water Act. Simply

stated, 404 Permits are required from the U.S. Army Corps of Engineers (Corps) only when you plan to place fill material in any water of the United States, including areas classified as Wetland, Farmed Wetland, or Converted Wetland, or to spoil material dredged from these areas. The Corps makes the decision whether or not a permit is needed for the planned activity, whether or not a permit will be granted, and the conditions that might be attached. While the Corps has full-decision authority, public involvement in the permit process is required. The public, the U.S. Fish and Wildlife Service, Indiana Department of Natural Resources (IDNR), U.S. Environmental Protection Agency, and the Indiana Department of Environmental Management (IDEM), are often actively involved. In fact, IDEM must grant or waive Section 401 Water Quality Certification stating that the proposed work will not violate the water pollution control laws of the State of Indiana before the Corps can issue a permit. As a rule of thumb, if you plan to do any work outside normal farming practice (cultivation, mowing, and harvest) in a creek, ditch, Wetland, Farmed Wetland, or Converted Wetland you should contact the Corps before you begin work.

THE INDIANA FLOOD CONTROL ACT AND THE INDIANA PRESERVATION OF LAKES STATUTE

In addition to the federal regulations, you must obtain a Construction In A Floodway Permit from the Indiana Department of Natural Resources (IDNR), Division of Water, when you plan to do any construction, excavation, or deposition in the floodway of a stream that has a drainage area of 640 acres or greater. This permit is also required if you plan to construct a dam over 20 feet high or store more than 100 acre feet of water above a dam of any height. Remember that the Soil Conservation Service wetland determinations did not identify these areas. Therefore, the State could require a permit if you plan to carry out projects going beyond normal farming operations even if the activity is not subject to USDA or 404 requirements.

An Indiana Preservation of Lakes Permit is needed from the IDNR, Division of Water if you plan to do work in or adjacent to public freshwater lakes.

FRIENDLY ADVICE

Landowners face numerous regulations as they conduct their business in the 1990's. Although often frustrating, these rules reflect a growing concern for our environment in which wetlands play a crucial role. None of the regulations specifically prohibits work in wetlands. Furthermore, most ongoing agricultural practices do not require state or federal permits and do not affect USDA Program eligibility. If you have Wetlands, Farmed Wetlands, or Converted Wetlands on your property, take time to check with your local SCS office and appropriate Army Corps of Engineers District Office (listed on the back of this brochure) before you begin a project that might affect these wetlands.

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EXAMPLES OF COMMON SITUATIONS:

1) **TILE DITCH MAINTENANCE** *Has the field been determined by SCS to be Prior Converted Cropland?* If so, activity on the ditch does not affect your eligibility for farm programs and does not require a 404 Permit (unless it causes adverse modifications to adjacent wetland areas, or the ditch was constructed to replace a natural drainageway).

Are Farmed Wetlands, or Wetlands present in this field? If so, you may repair, or replace, the tile in Farmed Wetlands only to the "scope and effect" of the original drainage to remain eligible for farm programs. This means that the new drainage may not provide more effective drainage than was originally present. (For example, if the original tile was on 200-foot spacing, new tile may not be any closer than this and may not be larger or more effective tiles.) Your local SCS office can help you in determining the "scope and effect" of your original drainage. Drainage cannot be performed in Wetlands or cause any adverse modifications to Wetlands.

If your activity will fill less than one surface acre of an isolated wetland (has no surface water connection to a stream and is not in the flood plain of a stream), or Farmed Wetland, you are already permitted by the Army Corps of Engineers in the Louisville District under Nationwide Permit 26 (removing the soil, placing a tile, and replacing the soil is considered "fill". The length x width of the ditch must be less than 43,560 square feet). However, if you will place greater than one acre of fill in an isolated wetland, or any fill in a non-isolated wetland, you must notify the Army Corps of Engineers to determine if an individual 404 Permit is required. [In the Detroit District you must notify the Corps of Engineers in all cases.] **Caution:** The list of activities which are permitted by a nationwide permit is complex, varies by district or region, and may not apply in environmentally sensitive areas. **To be safe** contact your local Army Corps of Engineers Office to determine if your project requires a 404 Permit or ASCS and SCS office for assistance. Remember, if you **improve** the drainage in a Farmed Wetland, you are also subject to USDA penalties.

If the tile ditch you are repairing has not functioned for quite some time and you have been unable to farm the area for the last five years, contact your county SCS office to determine if this field is now classified as "abandoned." Fields considered as abandoned revert to Wetlands by law and therefore are subject to all Swampbuster and 404 Regulations.

Is this field within the 100-year floodway of a stream that drains 640 acres or more? If so, a Construction in the Floodway Permit from the Indiana Department of Natural Resources, Division of Water may be required prior to maintaining this tile ditch.

2) **NEW TILE DITCH CONSTRUCTION** *Is Wetland or Farmed Wetland present in this field?* If so, a 404 Permit may be required (see previous section). Contact your local Army Corps of Engineers Office to determine if your tiling project requires a

404 Permit or ASCS and SCS office for assistance. In the 1990 Farm Bill the law has changed: you are now in violation of Swampbuster at the time of drainage whether you plant this area to a commodity crop or not. Therefore, tiling a Wetland or Farmed Wetland will result in penalties or loss of USDA program benefits. If you do not currently participate in any farm programs (including ASCS benefits, any multi-peril crop insurance, and FmHA loans) and have not already received wetland determinations for your property, be sure you contact SCS prior to tiling any wet area to ensure that you will be eligible for farm programs in the future.

Is this field within the 100-year floodway of a stream that drains 640 acres or more? If so, a Construction in the Floodway Permit from the Indiana Department of Natural Resources, Division of Water may be required prior to installing this tile ditch.

3) **OPEN DITCH MAINTENANCE** Your main concern with open ditch maintenance is *what will you do with the spoil material dredged from the ditch?* If run-off or leachate from this material can return back to the ditch, wetland areas, or any other water of the U.S., it is considered a discharge of dredged or fill material. Therefore, **unless this material is immediately deposited in a contained upland site, a 404 Permit may be needed** from the Army Corps of Engineers in your district.

If Wetlands or Farmed Wetlands will be affected, you may repair an open ditch only to the "scope and effect" of the original drainage. This means that the new ditch must not provide more effective drainage than was originally present. Your local SCS office can help you in determining the "scope and effect" of your original drainage. If the open ditch you are repairing has not functioned for quite some time, and you have been unable to farm the surrounding area for the last five years, and the area is designated as Prior Converted Cropland **contact your county SCS office** to determine if this field is now classified as "abandoned." Prior Converted Cropland considered abandoned reverts to Wetland by law and therefore is subject to all Swampbuster and 404 Regulations.

Is this area within the 100-year floodway of a stream that drains 640 acres or more, or is the bottom lower than the established level of an adjacent public freshwater lake? If so, a Construction in the Floodway Permit or a Lakes Preservation Permit from the Indiana Department of Natural Resources, Division of Water may be required prior to maintaining this open ditch. An exception is if the contract is administered by the County Drainage Board and the work is less than 10 miles in length.

4) **CONSTRUCTION OF A NEW OPEN DITCH** *Are Wetlands or Farmed Wetlands present in this field?* If so, a 404 Permit may be required (see Tile Ditch Maintenance section). Contact your local Army Corps of Engineers office to determine if your proposed ditch project requires a 404 Permit or ASCS and SCS office for assistance.

In the 1990 Farm Bill the law has changed: you are now in violation of Swampbuster at the time of drainage. If you have not already received wetland determinations for your property, be sure you contact SCS prior to draining any wet area to prevent future penalties.

Is this field within the 100-year floodway of a stream that drains 640 acres or more? If so, a Construction in the Floodway Permit from the Indiana Department of Natural Resources, Division of Water may be required prior to constructing this ditch.

5) LAND CLEARING *Is the area classified as Wetland?* If the area is a wetland, removing stumps and trees is considered as "swampbusting" and will result in penalties whether a commodity crop is planted on this area or not. In addition, this activity and associated grading may constitute "fill" in the wetland and may require a 404 Permit. Contact the Corps before beginning work.

In addition, a Construction in the Floodway Permit may be needed if the area to be cleared lies within the 100-year floodway of a stream that drains 640 acres or more. Contact the IDNR, Division of Water before proceeding.

Normal timber and logging operations which do not require excavation are exempt in these areas and are not subject to the above permits.

6) POND CONSTRUCTION / AQUACULTURE The construction of a pond or aquaculture facility in a wetland may require a 404 Permit. This activity will not affect eligibility in USDA programs. If construction is in a floodway, the appropriate IDNR permit is required. Due to the site specific nature of this activity, contact the Corps and SCS before beginning work.

7) CHANGE IN LAND USE While certain normal farming practices discussed above may be exempt from 404, Wetlands or Farmed Wetlands (Prior Converted Cropland excluded) are still under Corps jurisdiction. Therefore, changes in land use (e.g., agricultural to residential, agricultural to commercial, or agricultural to recreation), will usually require a 404 Permit. You should request the Army Corps of Engineers or a wetland specialist to determine the boundaries of wetland and non-wetland areas to aid in the planning of your project. (The Corps will require that the wetlands be avoided as much as possible). Then, if conditions warrant it, you must apply for a 404 Permit prior to conducting any activity.

8) EXCAVATION OF ANY KIND OR DEPOSITING OF FILL MATERIAL Before undertaking any excavation or deposition of fill material, ask yourself four simple questions:

1. Are Wetlands or Farmed Wetlands present?
2. Is this area within the 100-year floodway of a stream that drains 640 acres or more?

3. Is this activity in or near a watercourse with greater than 5 cubic feet per second (cfs) average annual flow, or does it affect more than one acre of surface water area?
4. Is the activity adjacent to a public freshwater lake?

If you answer yes to any of these questions, you may need a permit before conducting your planned activity. Consider the discussions above and contact the appropriate agencies before starting any work to ensure that you do not commit a violation.

SO, WHAT CAN I DO WITH MY WETLAND?

A wetland does not have to be "wasted space," but can become a valuable part of your property. Many wetland owners have managed their wetland acreage to provide:

- family recreational opportunities
- income from hunting leases or memberships
- wildlife habitat
- income from camping, fishing, hiking, picnicking or day use
- an area for livestock watering
- an area to filter nutrient and sediment run-off from agricultural fields or livestock waste
- income from aquaculture
- area to treat and filter nutrients from septic tank effluents and sewage treatment plant effluents.

Your county extension agent or SCS District Conservationist can assist you in obtaining information on many of these practices.

If your wetland acreage qualifies, you can be paid for entering it into the new Wetland Reserve Program, or several other programs provided in the 1990 Farm Bill. Contact your county ASCS office for details. In addition, wetland acreage can be entered into Indiana's Classified Wildlife Habitat Act (15-acre minimum) to reduce the property tax assessment on this acreage to one dollar per acre. Contact your IDNR District Wildlife Biologist for details.

The U.S. Fish and Wildlife Service can assist you in restoring a Farmed or Prior Converted wetland to its natural condition at no cost to you. Once restored, this acreage can be entered into the Wetland Reserve Program (from which you would receive an easement payment) or managed to provide some of the advantages listed above.

AGENCY ADDRESSES

UNITED STATES FISH AND WILDLIFE SERVICE - *Responsible for wetland restoration.*

U.S. Fish & Wildlife Service
Bloomington Field Office
718 North Walnut
Bloomington, IN 47401
(812) 334-4261

U.S. ARMY CORPS OF ENGINEERS - *Responsible for Section 404 Permits.*

Detroit District
U.S. Army Corps of Engineers
Regulatory Function Branch
P. O. Box 1027
Detroit, MI 48231
(313) 226-2218

Louisville District
U.S. Army Corps of Engineers
P. O. Box 59, 600 Federal Place
Louisville, KY 40201
(502) 582-5607

U.S. SOIL CONSERVATION SERVICE (SCS) - *Responsible for wetland determinations and helping farmers stay in compliance with farm programs.*

State Office
USDA/SCS
6013 Lakeside Blvd.
Indianapolis, IN 46278
(317) 290-3200

County Office
Listed under Government Offices - US
- Agriculture, Department of
- Soil Conservation Service

AGRICULTURE STABILIZATION AND CONSERVATION SERVICE (ASCS) -
Responsible for payment, enlistment and determinations of compliance with farm programs.

State Office
Indiana State ASCS Office
5981 Lakeside Blvd.
Indianapolis, IN 46278
(317) 290-3030

County Office
Listed under: Government Offices - US
- Agriculture, Department of
- Agriculture Stabilization and Conservation Service

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
- Responsible for Section 401 Water Quality Certification prior to issuance of 404 Permit.

Indiana Department of Environmental Management
5500 W. Bradbury
Indianapolis, IN 46241
(317) 243-5035

INDIANA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER - *Responsible for Construction In A Floodway Permit and Lake Preservation Permits.*

Division of Water
2475 Directors Row
Indianapolis, IN 46204
(317) 232-4160

DIV. OF FISH AND WILDLIFE - *Responsible for Classified Wildlife Habitat Act and Technical Assistance for Wildlife Management.*

Div. of Fish and Wildlife
607 State Office Building
Indianapolis, IN 46204
(317) 232-4080

COOPERATIVE EXTENSION SERVICE - *Provides technical information and guidance.*

State Office
CES AGNR Programs
106 Ag Administration Bldg.
Purdue University
West Lafayette, IN 47907
(317) 494-8494

County Office
Listed under: Government Offices - County
- County Extension or Cooperative Extension

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