



Is IDEM's Takeover Of The 404 Permitting Program A Good Idea Or All Wet?

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The Indiana Department of Environmental Management (IDEM) is actively exploring a takeover of the U.S. Army Corps' Section 404 permitting program, as reported from the [United States Protection Agency/Region 5 \(EPA\) meeting earlier this fall](#). If completed, most of the Clean Water Act Section 404 dredge and fill permits issued in Indiana would be issued by IDEM instead of the Army Corps of Engineers.

This move appears to be consistent with the current federal aspirational goal to release programs to states for administration. IDEM has indicated that it hopes the takeover will lead to greater consistency, predictability and speed for its constituents.

That said, the proposal has considerations to work through. The first is cost. IDEM estimates that the total cost of the program will be \$4,093,150, mostly paying for the personnel costs of 44 staff. This number may be less if they are able to integrate the seven existing employees who work on Section 401 permits. To meet these expenses, IDEM hopes to raise \$4,142,500 in fee revenue.

Another consideration is that IDEM currently regulates isolated wetlands through a separate program that mirrors the federal program in some ways, but is more stringent in some cases. For example, under the federal program, compensatory mitigation is evaluated on a case-by-case basis seeking mitigation for specific aquatic functions (33 CFR 230, subpart J). There are

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no specific ratios imposed in that rule. The state program is less flexible, as specific mitigation ratios are set forth by rule (327 IAC 17-1-5). Therefore, a 404 takeover might cause some projects in Indiana to be subject to more stringent and less flexible mitigation choices.

A third issue is the scope of regulatory authority. Under the federal program, only “jurisdictional” wetlands are regulated. The state currently regulates “isolated” wetlands. However, if the two programs are merged, the isolated wetlands vs. jurisdictional wetlands distinction will not matter. All waters in Indiana would conceivably be regulated at least by IDEM, which would make the state program more stringent than the federal program and more stringent than its neighboring states, save Michigan. Further developments on the so-called “Waters of the US,” or WOTUS, rule would not then apply in Indiana.

Finally, IDEM will not take control of all waters of the state. The Corps will still be responsible for traditional “navigable waters.” EPA will still provide oversight and enforcement for IDEM in its administration of the permitting program, just as they do currently for the U.S. Army Corps of Engineers. Since the EPA is not always predictable itself, it is unclear how much consistency and predictability IDEM’s move to assume the federal program may provide.

It is anticipated that these considerations will be addressed in the upcoming General Assembly session, which will ultimately determine the future and scope of any permitting changes in Indiana.