

Mythbusting on SB 389

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Hoosier Environmental Council
White River Alliance

SB 389 would repeal Indiana's Isolated Wetlands Law eliminating protection for the state regulated wetlands. These are some of the points that have arisen during discussion of this bill and answers to those points.

1. EPA protects enough of Indiana's wetlands. False.

While it is true that some of Indiana's wetlands are federally protected, the majority are ONLY protected by state regulation. The Indiana Department of Environmental Management (IDEM) testified that 85% of Indiana's original wetlands are gone and of those remaining only 10 – 20% are federally protected¹. For the other 80 – 90% of Indiana's wetlands, it is up to the state to determine whether to protect them. SB 389 would eliminate that protection and they could be destroyed at will.

2. The Biden Administration will increase protection of wetlands. Maybe, but limited.

This could happen, but it could take as long as 3 years. That's how long it took the Trump Administration to change federal protection of wetlands². Even if the Biden Administration changed those protections back to what they were under Obama, that would only protect about 40% of Indiana's wetlands, according to IDEM's testimony.

3. Loss of state regulated wetlands won't affect flooding because they don't have a surface water connection. False.

Wetlands are like sponges. The EPA estimates that one acre of wetland can absorb 1 to 1.5 million gallons of water³. That is true regardless of whether the wetland is under state or federal jurisdiction⁴. In fact, many isolated (i.e. state) wetlands are surrounded by upland areas and therefore provide important localized water storage. This storage prevents stormwater from accumulating into larger volumes that then flood rivers and streams. Leaving wetlands intact within and around development can lessen the

¹ IDEM testimony for the Indiana Senate Environmental Affairs Committee January 25, 2021

² <https://www.epa.gov/nwpr/wotus-step-one-repeal> The change was introduced in 2017 and not finalized until 2020.

³ EPA *Functions and Values of Wetlands*. <https://www.epa.gov/sites/production/files/2016-02/documents/functionsvaluesofwetlands.pdf>

⁴ US Fish and Wildlife Service. *Geographically Isolated Wetlands*.

<https://www.fws.gov/wetlands/Documents/Geographically-Isolated-Wetlands-A-Preliminary-Assessment-of-Their-Characteristics-and-Status-in-Selected-Areas-of-the-United-States-Fact-Sheet.pdf>

damage caused by intense and uncontrolled storm water runoff. Uncontrolled runoff and its associated flooding put public services and infrastructure at risk and drives up homeowner insurance costs.

4. Isolated wetlands do not have any impact on water quality. False.

Wetlands do not need to have a direct connection to Waters of the U.S. in order to protect water quality for our drinking water or other water uses (recreation, wildlife, etc.). Isolated wetlands, just like federally jurisdictional wetlands, filter pollutants as water makes its way to underground aquifers or to surface waters. Both groundwater and surface water are used to provide drinking water supplies in Indiana. In fact, the majority of public water supplies utilize groundwater as their primary water source, thus making wetlands' direct connection to groundwater an important part of the overall water cycle and water quality discussion. Likewise, isolated wetlands also play a unique and important role in protecting surface water quality. According to scientists with the American Institute of Biological Sciences, "GIWs [geographically isolated wetlands] significantly protect navigable waters by retaining and removing nutrients and pollutants within the watershed above the downstream water; often, its retention service relies on limited hydrological connectivity between GIWs and traditional navigable waters⁵

5. The 'In-lieu fee program' is skyrocketing. True and to be expected.

A permit to fill a wetland requires that the wetland be replaced by a constructed wetland in the same watershed. This is called "mitigation", and it has been a permitting requirement for both state and federal wetlands prior to establishment of the in-lieu fee program. The purpose is to make sure there is no net loss of wetland acres as well as to maintain the water storage and water quality functions that would otherwise be lost within that same watershed. In 2018 a program was created in which the permittees could pay a fee to the state in lieu of having to construct the replacement wetland themselves. The Department of Natural Resources (DNR) then uses that money to do the mitigation⁶. This is called the "In-lieu fee program" and it was done to make life easier for developers and to help address some of the challenges linked to the lack of long-term monitoring and maintenance of independent mitigation projects. The in-lieu fee program only just started in 2018, and it has been ramping up in 2019 and 2020 as

⁵ Geographically Isolated Wetlands are Important Biogeochemical Reactors on the Landscape, <https://academic.oup.com/bioscience/article/65/4/408/254933?login=true>

⁶ <https://www.in.gov/dnr/heritage/8340.htm>

permittees are getting used to it and using it more, so for each of these first years the amount going into it has increased⁷.

SB 389 would stop the in-lieu fee program for isolated wetlands only. In-lieu fee would continue for federally protected wetlands, as well as streams.

6. Hoosier taxpayers are paying excessive amounts into the 'In-lieu fee program'. False.

It may be true that the biggest contributor so far to the in-lieu fee program is the Indiana Department of Transportation (INDOT). That is because, while it is building roads, INDOT sometimes damages or destroys wetlands. However, INDOT has been paying for wetland mitigation since well before the in-lieu fee program. The cost to taxpayers hasn't changed. If INDOT hadn't paid into the in-lieu fee program, they would have paid contractors to build the wetland mitigation and consultants to perform regular maintenance, monitoring and remediation.

Overall, investments made into wetland mitigation benefit taxpayers because they ensure that the functions provided by wetlands (e.g. purifying water, reducing flood risk, and hosting wildlife) aren't lost when they are destroyed but rather replaced. Prior to the in-lieu fee program wetland mitigation was mostly done on a project-by-project basis, resulting in a patchwork of mitigation sites, managed by a wide variety of mitigation site owners with a wide variety of required monitoring and management timeframes. Management of invasive species, for example, may only need to occur for the first few years after the mitigation was constructed, depending on permit requirements. Independent mitigation projects may experience failures over time (lost acreage). This may occur after the required monitoring has ceased. For these reasons, many see the in-lieu fee program as a more reliable investment.

7. IDEM mitigation ratios are actually making more wetlands than those impacted by development. False.

Mitigation ratio means the acres of replacement wetland that must be constructed for each acre of natural wetland destroyed. Mitigation ratios are designed to help offset the functional loss of a given wetland. This functional loss is not simply a factor of the wetland's size. A wetland's function in the landscape depends a lot upon the type of vegetation present in the wetlands. Wetlands with diverse plant species provide diverse food supplies, and these food supplies are a factor of how robust (dense and old) the individual plants or trees are in that wetland. This diverse and abundant food supply cannot be recreated overnight; hence, a young constructed wetland mitigation site is

⁷ Data for the In-lieu Fee Program for 2018 and 2019 are available in the *Indiana Stream and Wetland Mitigation Program Calendar Year 2019 Annual Report*. <https://www.in.gov/dnr/heritage/files/la-INSWMP-annualreport2019.pdf>

not the equivalent of a well-established, healthy existing wetland lost to development. Likewise, the volume of water able to be stored, treated, or evapotranspired from an established forested wetland cannot be provided by a newly constructed wetland. Finally, constructed mitigation wetlands can have high failure rates. Ratios greater than 1:1 acres are put in place to guard against the inevitable net loss that occurs when trying to recreate natural systems in artificial or restored conditions. To ensure full functional value is retained, mitigation ratios must often be higher than 1:1 acres.

8. SB 389 will save money for the state. False.

SB 389 will reduce some work for IDEM, but it will leave 80 – 90% of Indiana’s wetlands unprotected which will cost the state in other ways. SB 389 will allow developers and others to destroy wetlands at will. Loss of wetlands means loss of groundwater recharge, reducing water available for wells in areas where wetlands have been destroyed. Loss of wetlands also means loss of water storage. An acre of wetland can store 1 – 1.5 million gallons of water (see footnote #3). If wetlands are destroyed, the risk of flooding goes up, and floods are enormously expensive. Floods are expensive in regard to property loss and damage. The loss of functioning wetlands dramatically increases property damage during storm events for people in vulnerable areas. Floods are also expensive in regard to the necessary infrastructure investments and reinvestments required to manage the greater volumes of runoff no longer captured by wetlands (e.g. additional detention ponds, underground storage tanks, larger pipes, etc.). If more of the original wetlands were still present around Indianapolis, Ft. Wayne and other cities struggling with combined sewers, they would have less stormwater going into the combined sewers. That would mean less need for the expensive projects to reduce combined sewer overflows (CSO). These CSO and other stormwater infrastructure costs then get quickly passed on to utility customers (citizens). Finally, wetlands provide habitat for many plant and animal species that play an important part in Indiana’s economy. For instance, up to 90% of recreationally caught fish rely on wetlands at some point in their life cycle⁸. All in all, loss of wetlands will cost the state in lost groundwater recharge, increased flooding, and loss of wildlife.

9. Wetland regulation stands in the way of economic development and is contributing to the housing shortage. Misleading.

Indiana state wetlands regulation has been around during both economic and housing booms and busts. Current regulation does not prohibit wetland destruction for

⁸ EPA. *Economic Benefits of Wetlands*. <https://www.epa.gov/sites/production/files/2016-02/documents/economicbenefits.pdf>

development, but rather facilitates a process for mitigating any impacts from such development.

There are many, many factors tied to economic swings and housing shortages, most tied to the intricacies of the economy e.g. local job markets, land use ordinances, lending policies, interest rates, tax rates and policies (federal, state, and local), wealth distribution, material costs and markets, the capacities of local infrastructure, etc. Deregulation of wetlands via SB 389 will not address these.

While environmental deregulation may provide short-term savings to a particular developer on a particular site, it could also create more widespread negative impacts to economic development. The overall economic development potential of a given state or region is dependent on its water supplies.

Wetlands help ensure a clean and plentiful water supply, which are necessary for Indiana to keep growing and luring businesses. Indiana's water supply is a competitive advantage over some western and sunbelt states. The trend across the country is that companies are making investment decisions based on ESG (environmental, social and governance) factors, like healthy and sustainable water supplies^{9, 10}.

10. Wetlands located on a site slated for development can be an asset. True.

Developments that remove their capacity to store water on the landscape in wetlands must still deal with the water that would have benefited from that storage. This translates into expensive infrastructure to pipe the water quickly away and maintenance costs of said infrastructure. Funneling so much water into a pipe system and subsequently into nearby streams and rivers is one way floods are produced. Likewise, removing flood storage from the development itself also leaves it more vulnerable to flooding.

Many developers are able to turn existing wetlands into neighborhood amenities while maintaining the valuable flood-prevention capacity they provide. Natural areas like wetlands help host desirable wildlife and passive recreation opportunities that are highly valued and sought after in urban and suburban areas. This can lead to higher property values and stable communities.

⁹ Urbanland (Jan 21, 2021). *ESG in Focus: Looking Ahead at a More Sustainable Industry in 2021*. https://urbanland.uli.org/sustainability/esg-in-focus-looking-ahead-at-a-more-sustainable-industry-in-2021/?utm_source=realmagnet&utm_medium=email&utm_campaign=HQ%20Urban%20Land%201%2F25%2F21%20ENL%20%28copy%29

¹⁰ Urban Land Institute (Sept 19, 2019). *Emerging Trends in Real Estate*. <https://americas.uli.org/190919et20release/>

11. IDEM has been regulating ‘puddles’. False.

The size thresholds in the regulation and the Army Corps definition of wetland that IDEM uses do not include puddles. The existing Indiana regulation says that a Class I wetland may be exempt if they are no more than half an acre in size and Class II may be exempt under a quarter acre¹¹. Multiple wetlands may qualify as exempt on a site as well. If they have to be larger than a quarter or half acre, they are not puddles. The highest quality wetlands, Class III, are the previously untouched wetlands. According to the definition in the regulation, Class III wetlands “support more than minimal wildlife or aquatic habitat or hydrologic function”¹². Again, a puddle could not fit the definition.

Further, Indiana’s wetlands law has a long list of exemptions that includes exempting a wet area that “exists as an incidental feature” in a lawn, landscaping, or agricultural field¹³. Since incidental wet spots are exempt from the law, puddles are not regulated. (see the entire list of exemptions in the appendix below)

12. IDEM is regulating fields that have been farmed for generations until one spring when they get a wet spot.

Farming is exempt from the wetland regulation including plowing, seeding, cultivating, and harvesting¹⁴. (see attached Appendix for the entire list of exemptions)

13. IDEM has no criteria for identifying a wetland. False.

If one does an internet search on the words “IDEM” and “wetland”, this page is the first result <https://www.in.gov/idem/wetlands/2336.htm> . It has this definition:

“A wetland is an area of land that is either permanently, seasonally, or intermittently flooded by water. These biological ecosystems are typically defined by three main characteristics:

The presence of soil saturated by water

The presence of water-tolerant plants

The presence of water itself.

There are many different types of wetland ecosystems in Indiana, such as bogs, fens, swamps, marshes, and forested wetlands. Wetlands can be either forested or non-forested. One common myth about wetlands is that they always have

¹¹ 327 IAC 17-1-3(7)(E & F)

¹² 327 IAC 17-1-3(3)(A)

¹³ IC 13-11-2-74.5

¹⁴ 327 IAC 17-1-7(3)

surface water present. However, many wetlands have annual periods in which they are dry.”

Further, in the wetland rule at 327 IAC 17-1-3(16), ‘wetlands’ are defined and the next subsection (17) defines a ‘wetland delineation’ as “a technical assessment of whether a wetland exists on an area of land” basing this on “the presence or absence of wetlands characteristics, as determined consistently with the Wetlands Delineation Manual, Technical Report Y-87-1 of the United States Army Corps of Engineers”. So IDEM is using the US Army Corps definition.

14. **IDEM doesn’t provide clear instructions on what to do about wetlands. False.**

A simple internet search on the words “IDEM” and “wetlands” brings up

<https://www.in.gov/idem/wetlands/>



On that page, clicking on the large box labelled “Isolated Wetlands Program” brings up a page with an introduction followed by this list of links to all the instructions one could need:

Isolated Wetlands Permitting Program

- [Frequently Asked Questions \(FAQs\)](#)
- [Project Planning Tips](#)
- [Early Coordination – NOTE: this phase provides an important opportunity to get project guidance and answers to questions](#)
- [Application Materials](#)

- [Overview of IDEM Isolated Wetland Permit Types](#)
- [Understanding Isolated Wetland Exemptions](#)
- [Terms and Conditions of the Isolated Wetland General Permit](#)
- [Working Without IDEM Authorization](#)
- [How to Report a Complaint or Violation to IDEM](#)

Also, the Waterways Inquiry Button at the top of the page opens a portal where landowners can enter information on their project and receive information from IDEM and DNR simultaneously.

APPENDIX – ACTIVITY EXCEPTIONS & EXEMPTIONS

Exceptions for wetland activities in Indiana’s current law, language verbatim from IC 13-18-22:

IC 13-18-22-1(b)

- (b) A permit is not required for the following wetland activities:
- (1) The discharge of dirt, sand, rock, stone, concrete, or other inert fill materials in a de minimis amount.
 - (2) A wetland activity at a surface coal mine for which the department of natural resources has approved a plan to:
 - (A) minimize, to the extent practical using best technology currently available, disturbances and adverse effects on fish and wildlife;
 - (B) otherwise effectuate environmental values; and
 - (C) enhance those values where practicable.
 - (3) Any activity listed under Section 404(f) of the Clean Water Act, including:
 - (A) normal farming, silviculture, and ranching 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;
 - (B) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
 - (C) construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
 - (D) construction of temporary sedimentation basins on a construction site that does not include placement of fill material into the navigable waters; and
 - (E) construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where the roads are constructed and maintained, in accordance with best management practices, to assure that:
 - (i) flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired;
 - (ii) the reach of the navigable waters is not reduced; and

- (iii) any adverse effect on the aquatic environment will be otherwise minimized.
- (4) The maintenance or reconstruction (as defined in [IC 36-9-27-2](#)) of a regulated drain in accordance with [IC 36-9-27-29\(2\)](#) as long as the work takes place within the current easement, and the reconstruction does not substantially change the characteristics of the drain to perform the function for which it was designed and constructed.

Wetlands that are exempt from Indiana's current law, language verbatim from IC 13-11-2

IC 13-11-2-221.5 "State regulated wetland"

Sec. 221.5. "State regulated wetland", for purposes of [IC 13-18](#), means an isolated wetland located in Indiana that is **not an exempt isolated wetland**.

IC 13-11-2-74.5 "Exempt isolated wetland"

Sec. 74.5. (a) "Exempt isolated wetland", for purposes of [IC 13-18](#) and environmental management laws, means an isolated wetland that:

- (1) is a voluntarily created wetland unless:
 - (A) the wetland is approved by the department for compensatory mitigation purposes in accordance with a permit issued under Section 404 of the Clean Water Act or [IC 13-18-22](#);
 - (B) the wetland is reclassified as a state regulated wetland under [IC 13-18-22-6\(e\)](#); or
 - (C) the owner of the wetland declares, by a written instrument:
 - (i) recorded in the office of the recorder of the county or counties in which the wetland is located; and
 - (ii) filed with the department;that the wetland is to be considered in all respects to be a state regulated wetland;
- (2) exists as an incidental feature in or on:
 - (A) a residential lawn;
 - (B) a lawn or landscaped area of a commercial or governmental complex;
 - (C) agricultural land;
 - (D) a roadside ditch;
 - (E) an irrigation ditch; or
 - (F) a manmade drainage control structure;
- (3) is a fringe wetland associated with a private pond;
- (4) is, or is associated with, a manmade body of surface water of any size created by:
 - (A) excavating;
 - (B) diking; or
 - (C) excavating and diking;dry land to collect and retain water for or incidental to agricultural, commercial, industrial, or aesthetic purposes;
- (5) subject to subsection (c), is a Class I wetland with an area, as delineated, of one-half (1/2) acre or less;
- (6) subject to subsection (d), is a Class II wetland with an area, as delineated, of one-fourth (1/4) acre or less;
- (7) is located on land:
 - (A) subject to regulation under United States Department of Agriculture wetland conservation programs, including Swampbuster and the Wetlands Reserve Program, because of voluntary enrollment in a federal farm program; and
 - (B) used for agricultural or other purposes allowed under the programs referred to in clause (A); or

- (8) is constructed for reduction or control of pollution.
- (b) For purposes of subsection (a)(2), an isolated wetland exists as an incidental feature:
- (1) if:
 - (A) the owner or operator of the property or facility described in subsection (a)(2) does not intend the isolated wetland to be a wetland;
 - (B) the isolated wetland is not essential to the function or use of the property or facility; and
 - (C) the isolated wetland arises spontaneously as a result of damp soil conditions incidental to the function or use of the property or facility; and
 - (2) if the isolated wetland satisfies any other factors or criteria established in rules that are:
 - (A) adopted by the board; and
 - (B) not inconsistent with the factors and criteria described in subdivision (1).
- (c) The total acreage of Class I wetlands on a tract to which the exemption described in subsection (a)(5) may apply is limited to the larger of:
- (1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(5); and
 - (2) fifty percent (50%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(5) but for the limitation of this subsection.
- (d) The total acreage of Class II wetlands on a tract to which the exemption described in subsection (a)(6) may apply is limited to the larger of:
- (1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(6); and
 - (2) thirty-three and one-third percent (33 1/3%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(6) but for the limitation of this subsection.
- (e) An isolated wetland described in subsection (a)(5) or (a)(6) does not include an isolated wetland on a tract that contains more than one (1) of the same class of wetland until the owner of the tract notifies the department that the owner has selected the isolated wetland to be an exempt isolated wetland under subsection (a)(5) or (a)(6) consistent with the applicable limitations described in subsections (c) and (d).