

March 30, 2021

Dear Member of the Indiana General Assembly,

SB 389 has called into question Indiana's wetland policy. As an elected leader, you are in a position to decide the future policy regarding this critical natural resource.

To date, the debate has focused on how many wetlands to de-regulate. Other options need to be explored, or Indiana will lose these critical water resources and their water management functions—losses that cannot be undone and will result in significant financial impacts for Hoosiers in increased flooding, lost groundwater recharge, lost water purification, and lost wildlife habitat.

**In response to the March 22 hearing on SB 389, we feel there are a number of key facts that need to be brought into the discussion.**

### Key Facts

- 'Small wet spots in agricultural fields' are already exempt under current regulations (exemption for incidental wet spots in farm fields: IC 13-11-2-74.5. Likewise, there are existing exemptions for wetlands under ¼ acre (327 IAC 17-1-3(7)(E & F)) and normal farming activities which include tile drain repair (IC 13-18-22-1(b)).
- All wetlands, regardless of Class, provide critical water storage, water supply (drinking water) management, habitat, and water quality functions (pollution treatment) as attested to by academic researchers from several Indiana universities in a recent symposium. (Learn more [here](#).)
- The majority of the permitted isolated wetland impacts are to Class 1 and 2 wetlands. In the past 5 years, 51% of permits have been for Class 1, 41% for Class 2, and less than 2% for Class 3. Adding exemptions for Class 1 and Class 2 wetlands will substantially reduce the number of Indiana wetlands remaining.
- Some isolated wetlands have standing water (in some cases even enough for boating activity), however, many do not have standing water. In those cases, the water is often held just below the surface for long periods of time. Wetlands are very diverse in regard to how they appear on the landscape. Therefore, no one photo is indicative of a particular Class of wetlands.
- IDEM uses the same wetland definition as federal agencies. To identify an area as a wetland, agency personnel have to follow a common set of procedures involving soil science, hydrology indicators, and vegetation data. The process of determining wetlands was not established by IDEM or the IDNR, but rather by the US Army Corps of Engineers (USACE).
- Indiana's remaining wetland resources are not comparable to the other 49 states. We have important water assets that require state-level protection. Our economy and resiliency depend on them. That being said, many other states have a variety of policies in place to protect their wetlands. The Environmental Law Institute states, "23 states have permitting programs for some or all freshwater wetlands within the state."<sup>1</sup> Regarding neighboring states, Kentucky is currently pursuing protections and Ohio just completed theirs. Wisconsin created a multi-stakeholder Wetland Study Council to explore the issue and determine the best path forward. Some other states have taken the significant step of assuming Clean Water Act Section 404 authority in order to broaden state-specific wetland protections (Michigan, New Jersey, Florida).
- Mitigation ratios that determine how many acres of wetland must be built to replace a wetland that is destroyed are set higher than the impacted acreage not only to defend against the potential failure of the constructed wetland, but more importantly, to also offset the functional loss of older, more established wetlands. Young trees don't store as much water. Newly inundated soils don't have the same composition or chemical processes. These ratios also help ensure no net loss of wetlands, since there are fully exempted impacts already allowed for wetlands under a certain size. The federal government has long had a 'No-Net-Loss' of wetlands policy stemming back to the George H.W. Bush administration.

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<sup>1</sup> <https://www.eli.org/vibrant-environment-blog/water-act-rule-poses-challenges-states>

- The state in-lieu fee mitigation option was extended to state-regulated wetlands in 2015 by the Indiana General Assembly in HEA 1350<sup>2</sup> to offer permittees an easier, more reliable means of meeting mitigation requirements. It removes the burden of years of monitoring for the permittee and ensures fewer mitigation failures which can cost the permittee unexpected expenses. Important additional information about the in-lieu fee program is included as an Addendum to this letter to clear up widespread misinformation about the program.

## Policy Alternatives

There are a number of policy solutions that have not been considered, yet, in the discussion of SB 389. Wetland permit holders have complained about the complexity of the wetland permit process. They often find themselves with both federal- and state-protected wetlands in the same project and struggle with the differences. There are policy solutions that would streamline state wetland permitting, ensure scientifically based assessments, align with federal regulatory processes, and provide clear, simple exemptions for common land use challenges. These efficiencies have not been considered during this process because agency response was reactively trying to salvage this important program. These common-sense and practical suggestions include concepts such as:

- Remove reference to isolated wetland Classes, and instead define isolated wetlands by their type, using the same classification and nomenclature as the US Army Corp of Engineers (USACE) uses, i.e. Emergent, Scrub-Shrub, and Forested (PEM, PSS, PFO). This classification system acknowledges the functional value of any given wetland (e.g. its water storage capacity and its habitat) and is common across the country.
  - Further define a small subset of these to a category known as ‘Critical Wetland and/or Critical Special Aquatic Site’. These would include rare or unique state-regulated wetlands and would use the same definition as the federal permitting process does for acknowledging these special wetland resources (e.g. fens, bogs, dune/swale, etc.). Most of these are currently classified as Class 3 wetlands and make up a very small percentage of permits. Decide how to best protect this subset (e.g. required avoidance, unique mitigation ratios, etc.).
- Align mitigation ratios for wetland types to USACE’s ratios for those of the same types.
- Align permit process thresholds to USACE (e.g. when to apply via general vs. individual permits). General permits are an easier permit pathway, and the USACE already has criteria for this pathway. Such alignment would provide process clarity and consistency for permittees.
- Exempt areas cropped within the last 5-yrs (same as USACE)

To date, Indiana’s policy for wetlands has centered on replacing (“mitigating”) wetlands that are filled or disturbed. However, preservation of existing wetlands is more cost effective than mitigation, so it would be advantageous to also look at protecting these valuable natural resources through incentives programs. For instance,

- Create tax incentives for protection and preservation of existing wetlands, so landowners would be compensated for any opportunity cost. Lost tax revenue would be a fraction of the cost of having to manage the resulting flood waters and pollution from lost wetlands.

Additional policy options to consider:

- Rename the program to State-Regulated Wetlands Program to lessen confusion and maintain consistency if/when the federal definition of Waters of the United States (WOTUS) undergoes different interpretations at the federal level.
- Create an Indiana Wetland Council charged with tracking the benefits wetlands provide to the state, examining the efficiency and efficacy of the wetland permitting process, and making recommendations about state wetland policy.
- Simplify, provide clarity, and/or expand/align other exemptions such as:
  - Exempt ‘incidental wetlands’ and utilize similar 5-yr timeframe for activities. These are wetlands that may have developed due to construction earthwork that has sat idle for a few years, etc. (e.g. runoff from a large gravel pile that collects at a low spot and wetland conditions develop)
  - Clarify temporary impacts; allow for simple on-site restoration of temporary/construction impacts (per guidance); don’t require mitigation if restored on site

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<sup>2</sup> also known as P.L.147-2015

## Policy Pitfalls to Consider

The negotiation process over SB 389 and its subsequent amendments do not have the benefit of factual input from practitioners with expertise to understand how wetlands function and who work with them daily. If implemented based on anecdotal evidence, the proposed changes will have widespread and immediate negative impacts statewide.

We respectfully urge you to consider that evidence-based policy should:

- Rely on diverse perspectives and input when crafting regulation that affects every Hoosier. In the case of SB 389, narrow perspectives were at the negotiation table (the regulated and the regulator). No other affected interests were invited to the table, thus limiting the creativity and appropriateness of the solution set.
- Trigger pause for assessment when intense and widespread public opposition from diverse constituents arises, especially when that public opposition outnumbers the proponents by manyfold.
- Be based on verifiable facts, not on anecdotal evidence and conjecture.
- Not allow widespread deregulation to occur based on claims against agency personnel. This is a dangerous precedent, and process issues should be handled within departmental policy, not with legislative policy changes.
- Avoid the inclusion of undefined, social valuations like “important economic and social needs” into regulatory processes (Section 10 of Amendment 12). This creates regulatory confusion.
- Not deflect state-appropriate regulatory responsibility to local municipalities to regulate resources that have regional and statewide impacts and implications. This not only undermines the argument against deregulation, it will also lead to even more inconsistencies and overall inefficiency for the regulated community. Significant wetland losses would be realized before local policies and protection can be enacted.
- Provide a delay of the implementation of any changes to at least July 1, 2022. Such a significant change to the regulatory regime requires additional time to implement.
- Provide a consistent and reliable regulatory response. Having consistent state wetlands policy protects Hoosiers from the swinging pendulum of federal regulation as various administrations apply different interpretations of Waters of the US.

We appreciate your thoughtful consideration of the above facts, policy alternatives, and those pitfalls when making widespread policy decisions that affect millions of Hoosiers citizens. Other policy solutions exist to help reduce grievances and enact policy that is based in science, consistency, and shared Hoosier interests. We welcome the opportunity to share our collective expertise to help guide such a policy solution.

Sincerely,

(See the growing list of organizations of over 80 organizations)

## Addendum: In-Lieu Fee Program Facts

- IDEM does not contract with anyone to build wetlands and receives no money from the in-lieu fee program. Rather, IDEM simply authorizes permittees to purchase in-lieu fee credits as part of the isolated wetland program. The program's lead agency is the US Army Corp of Engineers (USACE). The Indiana Department of Natural Resources (IDNR) is the program sponsor and was asked to sponsor the program by Federal Highways and the Indiana Department of Transportation (INDOT). While former IDEM wetland program employees currently work at IDNR in the in-lieu fee program, they do so as state employees and do not personally profit from the program.
- The in-lieu fee program provides mitigation for both federal and state-regulated wetland impacts AND stream impacts. One (1) stream credit equates to one (1) linear foot of impact. One (1) wetland credit equates to one (1) acre of impact. Credit prices vary by Service Area and type of mitigation.
- There has been notable growth in the In-Lieu Fee Fund as shown below.

Year	Total Advanced Wetland Credit Sales	Total Advanced Stream Credit Sales	Total Credit Revenue
2018	15.69	1,159	\$1,818,060
2019	51.44	7,131	\$7,299,830
2020	77.03	38,943.65	\$23,426,421
Total	144.16	47,233.65	\$32,544,311

Details of this growth include:

- 2015: The state in lieu fee program was created by the Indiana General Assembly via HEA 1350.
- 2018: The first credit sale occurred in September; 2018 numbers represent only a quarter year of credit sales.
- 2019: This was the first full year of credit sales, and more permittees utilized the program, as expected.
- 2020: This credit year was heavily impacted by mitigation needs associated with INDOT's work on I-69 and I-465 expansion projects. These large projects created an anomaly in typical or expected annual growth for the in-lieu fee program, specifically \$9,636,412.50 (41.13% of total 2020 in-lieu fee revenue).

### Revenue Breakdown:

2020 Stream Credits Revenue: \$17,003,272.51

2020 Total Wetland Credits Revenue: \$6,423,148.86

- 2020 Federal Jurisdictional (impacts) Credits: 51.93 (\$4,416,018.16)
- 2020 State Isolated (impacts) Credits: 25.10 (\$2,007,130.70)

This means that wetland credits purchased for State Isolated Wetland impacts account for 8.57% of total 2020 revenue.

Stream credits account for 72.58% of total 2020 revenue.

- There have been no in-lieu fee mitigation credits required from the USACE or IDEM for Agricultural Land Use impacts to aquatic resources since the start of the program. The vast majority have been in the categories of Growth and Development and Transportation and Service Corridors.
- The in-lieu fee program's 15% administrative fee provided to IDNR is used for program staff salaries, equipment, project management, project expenses, etc. The funds cannot be spent outside of the program. The in-lieu fee program is a fee-based program; tax dollars (general fund) are not used to fund the program.