

# PROPOSED AMENDMENT

## SB 389 # 12

### DIGEST

State regulated wetlands. Provides that a Class I wetland with an area of not more than three-fourths acre (instead of not more than one-half acre) and a Class II wetland with an area of not more than three-eighths acre (instead of not more than one-fourth acre) are "exempt isolated wetlands" that are not state regulated wetlands. Provides that a permit is not needed for: (1) the discharge of dredged or fill material into an ephemeral stream; (2) development within the boundaries of a municipality on a property that contains a Class I or Class II wetland that is not more than three-fourths acre in area; or (3) the development of cropland that has been used for agricultural purposes: (A) in the five years immediately preceding the development; or (B) in the 10 years immediately preceding the development if the United States Army Corps of Engineers has issued a jurisdictional determination confirming that the cropland does not contain wetlands subject to federal jurisdiction. Provides that a permit is not needed for: (1) development within the boundaries of a municipality on a property that contains a Class I or Class II wetland that is more than three-fourths acre in area; or (2) the maintenance of a field tile within a Class III wetland; if the person seeking to perform the development or maintenance obtains a site-specific approval from the department of environmental management (department). Specifies the information that a person seeking a site-specific approval must provide to the department. Provides that: (1) wetland activities within a Class I wetland; (2) the maintenance of a field tile within a Class I or Class II wetland that is necessary to restore drainage of land adjacent to the wetland and does not have the effect of draining the wetland; and (3) the maintenance of a field tile within a Class III wetland that is necessary to restore drainage of land adjacent to the wetland and does not have the effect of draining the wetland and for which a site-specific approval is obtained; shall be authorized by a general permit instead of by an individual permit. Reduces the number of days after the filing of an amended application within which the department must make a decision to issue or deny an individual permit. Provides that the department's failure to make a final determination on an application for a certification under Section 401 of the federal Clean Water Act not more than 120 days after receiving a complete application does not constitute a waiver of the certification unless the applicant, at least 30 days before submitting the application, contacts the department to request a pre-coordination meeting.

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- 1 Delete everything after the enacting clause and insert the following:  
2 SECTION 1. IC 13-11-2-48.5 IS ADDED TO THE INDIANA  
3 CODE AS A NEW SECTION TO READ AS FOLLOWS  
4 [EFFECTIVE JULY 1, 2021]: **Sec. 48.5. (a) "Cropland", for**  
5 **purposes of IC 13-18-22, means farmland:**  
6 (1) that is cultivated for agricultural purposes; and  
7 (2) from which crops are harvested.  
8 (b) The term includes:  
9 (1) orchards;  
10 (2) farmland used to produce row crops, close-grown crops,

1           **or cultivated hay; and**  
 2           **(3) farmland intentionally kept out of production during a**  
 3           **regular growing season (summer fallow).**

4           **(c) The term does not include pasture land unless the pasture**  
 5           **land is in active rotation with cultivated crops for purposes of soil**  
 6           **maintenance or improvement.**

7           SECTION 2. IC 13-11-2-74.5, AS AMENDED BY P.L.113-2014,  
 8           SECTION 47, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
 9           JULY 1, 2021]: Sec. 74.5. (a) "Exempt isolated wetland", for purposes  
 10          of IC 13-18 and environmental management laws, means an isolated  
 11          wetland that:

- 12           (1) is a voluntarily created wetland unless:
- 13           (A) the wetland is approved by the department for
  - 14           compensatory mitigation purposes in accordance with a permit
  - 15           issued under Section 404 of the Clean Water Act or
  - 16           IC 13-18-22;
  - 17           (B) the wetland is reclassified as a state regulated wetland
  - 18           under IC 13-18-22-6(e); or
  - 19           (C) the owner of the wetland declares, by a written instrument:
  - 20           (i) recorded in the office of the recorder of the county or
  - 21           counties in which the wetland is located; and
  - 22           (ii) filed with the department;
  - 23           that the wetland is to be considered in all respects to be a state
  - 24           regulated wetland;
- 25           (2) exists as an incidental feature in or on:
- 26           (A) a residential lawn;
  - 27           (B) a lawn or landscaped area of a commercial or
  - 28           governmental complex;
  - 29           (C) agricultural land;
  - 30           (D) a roadside ditch;
  - 31           (E) an irrigation ditch; or
  - 32           (F) a manmade drainage control structure;
- 33           (3) is a fringe wetland associated with a private pond;
- 34           (4) is, or is associated with, a manmade body of surface water of
- 35           any size created by:
- 36           (A) excavating;
  - 37           (B) diking; or
  - 38           (C) excavating and diking;
- 39           dry land to collect and retain water for or incidental to
- 40           agricultural, commercial, industrial, or aesthetic purposes;

- 1 (5) subject to subsection (c), is a Class I wetland with an area, as  
 2 delineated, of ~~one-half (1/2)~~ **three-fourths (3/4)** acre or less;
- 3 (6) subject to subsection (d), is a Class II wetland with an area, as  
 4 delineated, of ~~one-fourth (1/4)~~ **three-eighths (3/8)** acre or less;
- 5 (7) is located on land:
- 6 (A) subject to regulation under United States Department of  
 7 Agriculture wetland conservation programs, including  
 8 Swampbuster and the Wetlands Reserve Program, because of  
 9 voluntary enrollment in a federal farm program; and
- 10 (B) used for agricultural or other purposes allowed under the  
 11 programs referred to in clause (A); or
- 12 (8) is constructed for reduction or control of pollution.
- 13 (b) For purposes of subsection (a)(2), an isolated wetland exists as  
 14 an incidental feature:
- 15 (1) if:
- 16 (A) the owner or operator of the property or facility described  
 17 in subsection (a)(2) does not intend the isolated wetland to be  
 18 a wetland;
- 19 (B) the isolated wetland is not essential to the function or use  
 20 of the property or facility; and
- 21 (C) the isolated wetland arises spontaneously as a result of  
 22 damp soil conditions incidental to the function or use of the  
 23 property or facility; and
- 24 (2) if the isolated wetland satisfies any other factors or criteria  
 25 established in rules that are:
- 26 (A) adopted by the board; and
- 27 (B) not inconsistent with the factors and criteria described in  
 28 subdivision (1).
- 29 (c) The total acreage of Class I wetlands on a tract to which the  
 30 exemption described in subsection (a)(5) may apply is limited to the  
 31 larger of:
- 32 (1) the acreage of the largest individual isolated wetland on the  
 33 tract that qualifies for the exemption described in subsection  
 34 (a)(5); and
- 35 (2) fifty percent (50%) of the cumulative acreage of all individual  
 36 isolated wetlands on the tract that would qualify for the exemption  
 37 described in subsection (a)(5) but for the limitation of this  
 38 subsection.
- 39 (d) The total acreage of Class II wetlands on a tract to which the  
 40 exemption described in subsection (a)(6) may apply is limited to the

1 larger of:

2 (1) the acreage of the largest individual isolated wetland on the  
3 tract that qualifies for the exemption described in subsection  
4 (a)(6); and

5 (2) thirty-three and one-third percent (33 1/3%) of the cumulative  
6 acreage of all individual isolated wetlands on the tract that would  
7 qualify for the exemption described in subsection (a)(6) but for  
8 the limitation of this subsection.

9 (e) An isolated wetland described in subsection (a)(5) or (a)(6) does  
10 not include an isolated wetland on a tract that contains more than one  
11 (1) of the same class of wetland until the owner of the tract notifies the  
12 department that the owner has selected the isolated wetland to be an  
13 exempt isolated wetland under subsection (a)(5) or (a)(6) consistent  
14 with the applicable limitations described in subsections (c) and (d).

15 SECTION 3. IC 13-11-2-104.8 IS ADDED TO THE INDIANA  
16 CODE AS A NEW SECTION TO READ AS FOLLOWS  
17 [EFFECTIVE JULY 1, 2021]: **Sec. 104.8. "In lieu fee", for purposes  
18 of IC 13-18-22-6, means a fee that:**

19 **(1) is paid pursuant to:**

20 **(A) the department of natural resources stream and  
21 wetland mitigation program; or**

22 **(B) another in lieu fee mitigation program;**

23 **(2) is paid to:**

24 **(A) the state government; or**

25 **(B) the Indiana natural resources foundation created by  
26 IC 14-12-1-4; and**

27 **(3) is applied toward the cost of:**

28 **(A) restoring, establishing, enhancing, or preserving  
29 aquatic resources in compensation for the alteration of  
30 other aquatic resources; and**

31 **(B) monitoring and providing long term management of  
32 the site where aquatic resources are restored, established,  
33 enhanced, or preserved with money provided by the fee.**

34 SECTION 4. IC 13-18-22-1, AS AMENDED BY P.L.166-2020,  
35 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
36 JULY 1, 2021]: Sec. 1. (a) Except as provided in subsection (b), a  
37 person proposing a wetland activity in a state regulated wetland must  
38 obtain a permit under this chapter to authorize the wetland activity.

39 (b) A permit is not required for the following wetland activities:

40 (1) The discharge of dirt, sand, rock, stone, concrete, or other

- 1 inert fill materials in a de minimis amount.
- 2 **(2) The discharge of dredged or fill material into an**
- 3 **ephemeral stream.**
- 4 ~~(2)~~ **(3)** A wetland activity at a surface coal mine for which the
- 5 department of natural resources has approved a plan to:
- 6 (A) minimize, to the extent practical using best technology
- 7 currently available, disturbances and adverse effects on fish
- 8 and wildlife;
- 9 (B) otherwise effectuate environmental values; and
- 10 (C) enhance those values where practicable.
- 11 ~~(3)~~ **(4)** Any activity listed under Section 404(f) of the Clean Water
- 12 Act, including:
- 13 (A) normal farming, silviculture, and ranching activities, such
- 14 as plowing, seeding, cultivating, minor drainage, harvesting
- 15 for the production of food, fiber, and forest products, or upland
- 16 soil and water conservation practices;
- 17 (B) maintenance, including emergency reconstruction of
- 18 recently damaged parts, of currently serviceable structures
- 19 such as dikes, dams, levees, groins, riprap, breakwaters,
- 20 causeways, and bridge abutments or approaches, and
- 21 transportation structures;
- 22 (C) construction or maintenance of farm or stock ponds or
- 23 irrigation ditches, or the maintenance of drainage ditches;
- 24 (D) construction of temporary sedimentation basins on a
- 25 construction site that does not include placement of fill
- 26 material into the navigable waters; and
- 27 (E) construction or maintenance of farm roads or forest roads,
- 28 or temporary roads for moving mining equipment, where the
- 29 roads are constructed and maintained, in accordance with best
- 30 management practices, to assure that:
- 31 (i) flow and circulation patterns and chemical and biological
- 32 characteristics of the navigable waters are not impaired;
- 33 (ii) the reach of the navigable waters is not reduced; and
- 34 (iii) any adverse effect on the aquatic environment will be
- 35 otherwise minimized.
- 36 ~~(4)~~ **(5)** The maintenance or reconstruction (as defined in
- 37 IC 36-9-27-2) of a regulated drain in accordance with
- 38 IC 36-9-27-29(2) as long as the work takes place within the
- 39 current easement, and the reconstruction does not substantially
- 40 change the characteristics of the drain to perform the function for

1 which it was designed and constructed.

2 **(6) Development within the boundaries of a municipality on**  
 3 **a property that contains a Class I or Class II wetland that is**  
 4 **not more than three-fourths (3/4) acre in area.**

5 **(7) Development within the boundaries of a municipality on**  
 6 **a property that contains a Class I or Class II wetland that is**  
 7 **more than three-fourths (3/4) acre in area if a site-specific**  
 8 **approval is obtained for the development under section 12 of**  
 9 **this chapter.**

10 **(c) The development of cropland, as defined in IC 13-11-2-48.5,**  
 11 **does not require a permit under this chapter if the cropland has**  
 12 **been used for agricultural purposes:**

13 **(1) in the five (5) years immediately preceding the**  
 14 **development; or**

15 **(2) in the ten (10) years immediately preceding the**  
 16 **development, if the United States Army Corps of Engineers**  
 17 **has issued a jurisdictional determination confirming that the**  
 18 **cropland does not contain wetlands subject to federal**  
 19 **jurisdiction under Section 404 of the Clean Water Act.**

20 **After receiving a jurisdictional determination described in**  
 21 **subdivision (2) from the United States Army Corps of Engineers,**  
 22 **the department shall notify the person proposing the wetland**  
 23 **activity that the development of the cropland used for agricultural**  
 24 **purposes in the immediately preceding ten (10) years is exempt**  
 25 **from the permit requirement of subsection (a) under subdivision**  
 26 **(2).**

27 **(e) (d) The goal of the permitting program for wetland activities in**  
 28 **state regulated wetlands is to:**

29 **(1) promote a net gain in high quality isolated wetlands; and**

30 **(2) assure that compensatory mitigation will offset the loss of**  
 31 **isolated wetlands allowed by the permitting program.**

32 **SECTION 5. IC 13-18-22-3 IS AMENDED TO READ AS**  
 33 **FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. (a) Except as**  
 34 **provided in section 4 of this chapter, an individual permit is required**  
 35 **to authorize a wetland activity in a Class III wetland.**

36 **(b) Except as provided in ~~section~~ sections 1 and 4(a) 4 of this**  
 37 **chapter, an individual permit is required to authorize a wetland activity**  
 38 **in a Class II wetland.**

39 **(c) ~~The board shall adopt rules under IC 4-22-2 and IC 13-14 not~~**  
 40 **later than June 1, 2005, to govern the issuance of individual permits by**

1 the department under subsections (a) and (b):

2 SECTION 6. IC 13-18-22-4 IS AMENDED TO READ AS  
3 FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 4. ~~(a)~~ **The following**  
4 **wetland activities shall be authorized by a general permit:**

5 **(1) Wetland activities within a Class I wetland.**

6 **(2) Wetland activities with minimal impact in Class I wetlands**  
7 **and within a Class II wetlands; including the activities wetland**  
8 **that are** analogous to those allowed under the nationwide permit  
9 program (as published in 67 Fed. Reg. 2077-2089 (2002)). ~~shall~~  
10 ~~be authorized by a general permit rule:~~

11 **(3) The maintenance of a field tile within a Class I or Class II**  
12 **wetland if the maintenance of the field tile:**

13 **(A) is necessary to restore drainage of land adjacent to the**  
14 **wetland; and**

15 **(B) does not have the effect of draining the wetland.**

16 **(4) The maintenance of a field tile within a Class III wetland**  
17 **if:**

18 **(A) the maintenance of the field tile:**

19 **(i) is necessary to restore drainage of land adjacent to**  
20 **the wetland; and**

21 **(ii) does not have the effect of draining the wetland; and**

22 **(B) the applicant obtains a site-specific approval for the**  
23 **maintenance of the field tile under section 12 of this**  
24 **chapter.**

25 ~~(b) Wetland activities in Class I wetlands shall be authorized by a~~  
26 ~~general permit rule:~~

27 ~~(c) The board shall adopt rules under IC 4-22-2 and IC 13-14 not~~  
28 ~~later than February 1, 2005; to establish and implement the general~~  
29 ~~permits described in subsections (a) and (b):~~

30 SECTION 7. IC 13-18-22-5 IS AMENDED TO READ AS  
31 FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 5. (a) ~~The board shall~~  
32 ~~adopt rules adopted under section 3 of IC 4-22-2 and IC 13-14-9 to~~  
33 **implement this chapter. The rules adopted under this section:**

34 (1) must require that the applicant demonstrate, as a prerequisite  
35 to the issuance of the permit, that wetland activity:

36 (A) is:

37 (i) without reasonable alternative; and

38 (ii) reasonably necessary or appropriate;

39 to achieve a legitimate use proposed by the applicant on the  
40 property on which the wetland is located; and

- 1 (B) for a Class III wetland, is without practical alternative and  
 2 will be accompanied by taking steps that are practicable and  
 3 appropriate to minimize potential adverse impacts of the  
 4 discharge on the aquatic ecosystem of the wetland;  
 5 (2) except as provided in subsection (c), must establish that  
 6 compensatory mitigation will be provided as set forth in section  
 7 6 of this chapter to reasonably offset the loss of wetlands allowed  
 8 by the permits; and  
 9 (3) may prescribe additional conditions that are reasonable and  
 10 necessary to carry out the purposes of this chapter.

11 (b) The rules adopted under **this section to implement section 4** of  
 12 this chapter must **provide for the authorization of the wetland**  
 13 **activities described in section 4 of this chapter by a general permit**  
 14 **and** require, as a prerequisite to the applicability of the general permit  
 15 **by rule** to a specific wetland activity, that the person proposing the  
 16 ~~discharge~~ **wetland activity** submit to the department a notice of intent  
 17 to be covered by the general permit **by rule** that:

- 18 (1) identifies the wetlands to be affected by the wetland activity;  
 19 and  
 20 (2) except as provided in subsection (c), provides a compensatory  
 21 mitigation plan as set forth in section 6 of this chapter to  
 22 reasonably offset the loss of wetlands allowed by the general  
 23 permit.

24 (c) ~~Under subsections (a) and (b);~~ The rules adopted under **sections**  
 25 **3 and 4 of this chapter section** may provide for exceptions to  
 26 compensatory mitigation in specific, limited circumstances.

27 (d) For purposes of subsection (a)(1)(A):

- 28 (1) a resolution of the executive of the county or municipality in  
 29 which the wetland is located; or  
 30 (2) a permit or other approval from a local government entity  
 31 having authority over the proposed use of the property on which  
 32 the wetland is located;

33 that includes a specific finding that the wetland activity is as described  
 34 in subsection (a)(1)(A) is considered conclusive evidence of that fact.

35 SECTION 8. IC 13-18-22-6, AS AMENDED BY P.L.147-2015,  
 36 SECTION 12, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
 37 JULY 1, 2021]: Sec. 6. (a) Except as otherwise specified in subsections  
 38 (b) and (c), compensatory mitigation shall be provided in accordance  
 39 with the following table:

40 Wetland Replacement On-site **and** Off-site

1	Class	Class	<b>In-lieu Fee</b>	Ratio
2			Ratio	
3	Class I	Class II or III	1 to 1	1 to 1
4	Class I	Class I	1.5 to 1	1.5 to 1
5	Class II	Class II or III	1.5 to 1	2 to 1
6			Nonforested	Nonforested
7			2 to 1	2.5 to 1
8			Forested	Forested
9	Class III	Class III	2 to 1	2.5 to 1
10			Nonforested	Nonforested
11			2.5 to 1	3 to 1
12			Forested	Forested

13 (b) The compensatory mitigation ratio shall be lowered to one to one  
 14 (1:1) if the compensatory mitigation is completed before the initiation  
 15 of the wetland activity.

16 (c) A wetland that is created or restored as a water of the United  
 17 States may be used, as an alternative to the creation or restoration of an  
 18 isolated wetland, as compensatory mitigation for purposes of this  
 19 section. The replacement class of a wetland that is a water of the  
 20 United States shall be determined by applying the characteristics of a  
 21 Class I, Class II, or Class III wetland, as appropriate, to the replacement  
 22 wetland as if it were an isolated wetland.

23 (d) The off-site location of compensatory mitigation must be:

24 (1) within:

25 (A) the same eight (8) digit U.S. Geological Service hydrologic  
 26 unit code; or

27 (B) the same county;

28 as the isolated wetlands subject to the authorized wetland activity;

29 or

30 (2) within a designated service area established in an in lieu fee  
 31 mitigation program approved by the United States Army Corps of  
 32 Engineers.

33 (e) Exempt isolated wetlands may be used to provide compensatory  
 34 mitigation for wetlands activities in state regulated wetlands. An  
 35 exempt isolated wetland that is used to provide compensatory  
 36 mitigation becomes a state regulated wetland.

37 SECTION 9. IC 13-18-22-8 IS AMENDED TO READ AS  
 38 FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 8. (a) Subject to  
 39 subsection (f), the department shall make a decision to issue or deny an  
 40 individual permit under section 3 or 7(b)(1) of this chapter not later

1 than one hundred twenty (120) days after receipt of the completed  
 2 application. If the department fails to make a decision on a permit  
 3 application by the deadline under this subsection or subsection (f), a  
 4 permit is considered to have been issued by the department in  
 5 accordance with the application.

6 (b) A general permit under section 4 of this chapter becomes  
 7 effective with respect to a proposed wetland activity that is within the  
 8 scope of the general permit on the thirty-first day after the department  
 9 receives a notice of intent from the person proposing the wetland  
 10 activity that the wetland activity be authorized under the general  
 11 permit.

12 (c) Except as provided in subsection (d), a permit to undertake a  
 13 wetland activity in a Class I wetland under section 7(b)(2) of this  
 14 chapter is considered to have been issued to an applicant on the  
 15 thirty-first day after the department receives a notice of registration  
 16 submitted under section 7(b)(2) of this chapter if the department has  
 17 not previously authorized the wetland activity.

18 (d) The department may deny a registration for a permit for cause  
 19 under subsection (c) before the period specified in subsection (c)  
 20 expires.

21 (e) The department must support a denial under subsection (a) or (d)  
 22 by a written statement of reasons.

23 (f) The department may notify the applicant that the completed  
 24 application referred to in subsection (a) is deficient. If the department  
 25 fails to give notice to the applicant under this subsection not later than  
 26 fifteen (15) days after the department's receipt of the completed  
 27 application, the application is considered not to have been deficient.  
 28 After receipt of a notice under this subsection, the applicant may  
 29 submit an amended application that corrects the deficiency. The  
 30 department shall make a decision to issue or deny an individual permit  
 31 under the amended application within a period that ends a number of  
 32 days after the date the department receives the amended application  
 33 equal to the remainder of:

34 (1) ~~one hundred twenty (120)~~ **ninety (90)** days; minus

35 (2) the number of days the department held the initial application  
 36 before giving a notice of deficiency under this subsection.

37 SECTION 10. IC 13-18-22-12 IS ADDED TO THE INDIANA  
 38 CODE AS A NEW SECTION TO READ AS FOLLOWS  
 39 [EFFECTIVE JULY 1, 2021]: **Sec. 12. (a) A person seeking to engage**  
 40 **in:**

1           **(1) development under section 1(b)(7) of this chapter within**  
 2           **the boundaries of a municipality on a property that contains**  
 3           **a Class I or Class II wetland that is more than three-fourths**  
 4           **(3/4) acre in area; or**

5           **(2) the maintenance under section 4(4) of this chapter of a**  
 6           **field tile within a Class III wetland;**

7           **may apply to the department for a site-specific approval for the**  
 8           **activity in accordance with this section and the rules adopted**  
 9           **under section 5 of this chapter.**

10           **(b) An applicant for a site-specific approval under this section**  
 11           **must provide information to the department on the need to**  
 12           **perform the activity described in subsection (a), including the**  
 13           **following:**

14           **(1) For an activity described in subsection (a)(1), the**  
 15           **important economic and social needs for development of the**  
 16           **land.**

17           **(2) For an activity described in subsection (a)(2), information**  
 18           **showing the location and area needed to be disturbed within**  
 19           **the Class III wetland.**

20           **(3) Lack of reasonable alternatives to the disturbance of the**  
 21           **wetland referred to in subsection (a)(1) or (a)(2).**

22           **SECTION 11. IC 13-18-23-1 IS AMENDED TO READ AS**  
 23           **FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. (a) The department**  
 24           **shall do the following:**

25           **(1) Make a final determination on an application for a**  
 26           **certification under Section 401 of the Clean Water Act not later**  
 27           **than ~~one hundred twenty (120)~~ ninety (90) days after its receipt**  
 28           **of a complete application and if the applicant meets the**  
 29           **condition set forth in subsection (b).**

30           **(2) Include in its notice of the final determination to the applicant**  
 31           **a statement of reasons for the final determination.**

32           **(b) At least thirty (30) days before submitting an application**  
 33           **under this section, an applicant must contact the department to**  
 34           **request a pre-coordination meeting.**

35           ~~(b)~~ **(c) A failure by the department to act within the period specified**  
 36           ~~in~~ **make a final determination not later than ninety (90) days after**  
 37           **receiving a complete application, if required under subsection**  
 38           **(a)(1), constitutes a waiver of the certification.**

(Reference is to SB 389 as printed January 27, 2021.)