

# Indiana Law Review

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Volume 58

2024

Number 1

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## NOTES

### MARSH MADNESS: HOW INDIANA COULD BE A NATIONAL MODEL FOR WETLAND REGULATIONS POST-SACKETT V. EPA

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## INTRODUCTION

Up until the early 20th century, Indiana was home to the largest inland wetland in the United States.<sup>1</sup> The Grand Kankakee Marsh comprised around one million acres of marshland in northern Indiana.<sup>2</sup> Fed by the Kankakee River, the marsh stretched from South Bend to Momence, Illinois.<sup>3</sup> According to contemporaneous accounts, the marsh was a natural wonder. Lew Wallace, the Civil War general and author of *Ben-Hur*, once remarked, “[N]ever in all my world travels have I seen a more perfect spot nor a more tantalizing river.”<sup>4</sup> Presidents Benjamin Harrison, Grover Cleveland, and Theodore Roosevelt, hunted in the marsh.<sup>5</sup> Before them, Native Americans, such as the Potawatomi, and French fur traders heavily utilized the marsh’s resources.<sup>6</sup> During the latter part of the 19th century, the area was given the moniker “Chicago’s Pantry” because wildlife hunted in the marsh in a given morning could be processed and transported to Chicago in time to be served for dinner in the city’s restaurants that same evening.<sup>7</sup>

Nevertheless, the State of Indiana sought to drain the Grand Kankakee Marsh and develop the area into farmland.<sup>8</sup> A plan to drain the marsh was developed in 1883 by the state’s Chief Engineer, John Campbell, who estimated that the resulting farmland could result in \$8–10 million in revenue for the state.<sup>9</sup> “Certainly this is a problem worthy of the best efforts of the State[,]” Campbell declared.<sup>10</sup> In the following decades, the Kankakee River, which was known for its extreme crookedness, was straightened.<sup>11</sup> Two thousand of the river’s oxbows were eliminated, transforming the 250-mile winding river into a 90-mile canal.<sup>12</sup> The once “Grand” Kankakee Marsh was reduced in size by more than 90%.<sup>13</sup>

The destruction of the Grand Kankakee Marsh was not without consequence. The marsh’s demise resulted in an estimated 20% decline in the

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1. *Everglades of the North: The Story of the Grand Kankakee Marsh* (PBS television broadcast Nov. 5, 2012) [hereinafter *Everglades of the North*].

2. Jack Klasey, *Looking Back: The Grand Kankakee Marsh*, DAILY J. (Feb. 2, 2019), [https://www.daily-journal.com/news/local/looking-back-the-grand-kankakee-marsh/article\\_783b1842-262c-11e9-98fa-b393c163324f.html](https://www.daily-journal.com/news/local/looking-back-the-grand-kankakee-marsh/article_783b1842-262c-11e9-98fa-b393c163324f.html) [https://perma.cc/UYH3-2XQG].

3. *Everglades of the North*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See generally JOHN CAMPBELL, REP. UPON THE IMPROVEMENT OF THE KANKAKEE RIVER AND THE DRAINAGE OF THE MARSHLANDS IN IND. (Indianapolis, WM. B. Burford, State Printer 1883).

10. *Id.* at 15.

11. *Everglades of the North*, *supra* note 1.

12. Klasey, *supra* note 2.

13. *Everglades of the North*, *supra* note 1.

North American migratory bird population.<sup>14</sup> Communities around the Kankakee River now experience regular flooding.<sup>15</sup> Further, the Indiana Department of Environmental Management's (IDEM) 2022 Section 303(d) list, which identifies the state's most severely impaired waters in accordance with the Clean Water Act (CWA), identifies the Kankakee River as having both biotic and chemical impairments that are hazardous to human health.<sup>16</sup> Given the filtration qualities of wetlands, such pollutants may have been filtered or prevented from entering the waterway had the marsh remained intact.

In Indiana, the Grand Kankakee Marsh was not the only wetland that was devastated since the state's founding. While wetland decline has been a national trend in the United States,<sup>17</sup> in Indiana, an estimated 85% of wetlands have been destroyed since the 1780s.<sup>18</sup> This makes Indiana one of seven states that have lost over 80% of their wetlands.<sup>19</sup> Today, around 4% of lands in Indiana, or 800,000 acres, are wetlands.<sup>20</sup>

Recently, the decline of wetlands in Indiana has been hastened by deregulation at both the state and federal levels. Since the U.S. Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (SWANCC), wetlands have been separated into two categories: jurisdictional and isolated.<sup>21</sup> In short, jurisdictional wetlands are regulated by the federal government under the CWA, while certain isolated wetlands do not qualify for federal protection but may be regulated by the states in which they reside.<sup>22</sup> Indiana was one of a handful of states that recognized the value of isolated wetlands and passed a law in 2003 that created the Indiana State Isolated Wetlands Program.<sup>23</sup> However, in 2021, this program's ability to protect wetlands was severely hampered by Senate Enrolled Act (SEA) 389, which

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14. *Id.*

15. See Scott Buckner & Tom Sparks, *The Big One . . . Again*, KANKAKEE VALLEY POST NEWS (Feb. 27, 2018), [https://www.newsbug.info/kankakee\\_valley\\_post\\_news/the-big-one-again/article\\_d3689321-6a1b-5856-bb40-22df92a57a9c.html](https://www.newsbug.info/kankakee_valley_post_news/the-big-one-again/article_d3689321-6a1b-5856-bb40-22df92a57a9c.html) [<https://perma.cc/FFF2-F3GN>].

16. *Section 303(d) List of Impaired Waters*, IDEM, [www.in.gov/idem/nps/files/ir\\_2022\\_apndx\\_1\\_listing\\_tables.xlsx](http://www.in.gov/idem/nps/files/ir_2022_apndx_1_listing_tables.xlsx) [<https://perma.cc/K77L-ZWLD>] (last visited Nov. 26, 2023, 2:02 PM).

17. Roughly half of the United States' wetland acreage has been lost since the country's founding. See generally Thomas Dahl, *Wetlands Loss Since the Revolution*, U.S. FISH & WILDLIFE SERV. (Dec. 1990), <https://www.fws.gov/wetlands/Documents%5CWetlands-Loss-Since-the-Revolution.pdf> [<https://perma.cc/VBB7-EREC>].

18. IND. WETLANDS TASK FORCE, SENATE ENROLLED ACT 389: WETLANDS TASK FORCE FINAL REPORT, at 9 (2022).

19. Dahl, *supra* note 17, at 17.

20. IND. WETLANDS TASK FORCE, *supra* note 18, at 22.

21. See generally LAURA GATZ & MEGAN STUBBS, CONG. RSCH. SERV., RL33483, WETLANDS: AN OVERVIEW OF ISSUES 19 (2017); *Solid Waste Agency of N. Cook Cnty v. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

22. Gatz & Stubbs, *supra* note 21, at 13.

23. Beverly Gard, *Wetlands Threat: A bill in the legislature would strip protections from sensitive habitat—and that would be disastrous*, DAILY REP., (Feb. 27, 2021), [www.greenfieldreporter.com/2021/02/27/wetlands\\_threat\\_a\\_bill\\_in\\_the\\_legislature\\_would\\_strip\\_protections\\_from\\_sensitive\\_habitat\\_and\\_that\\_would\\_be\\_disastrous/](http://www.greenfieldreporter.com/2021/02/27/wetlands_threat_a_bill_in_the_legislature_would_strip_protections_from_sensitive_habitat_and_that_would_be_disastrous/) [<https://perma.cc/4EUQ-L9FV>].

removed protections for an entire class of wetlands and included several new exemptions for wetland permits.<sup>24</sup> This situation was made worse by the U.S. Supreme Court's 2023 decision in *Sackett v. EPA*, which requires wetlands to have a "continuous surface connection" and be practically "indistinguishable" from a traditional navigable body of water to be protected by the CWA.<sup>25</sup> This contrasts with the Court's 2006 decision in *Rapanos v. United States*, which was interpreted to only require a wetland to have a "significant nexus" with a traditional navigable body of water to be protected by the CWA.<sup>26</sup> Due to the Court's decision in *Sackett*, it has been estimated that over half of the country's jurisdictional wetlands will lose federal protection.<sup>27</sup> In Indiana, it has been estimated that the decision will result in 300,000 acres of wetlands losing federal protection.<sup>28</sup> Given the repeated, significant changes to federal jurisdiction over wetlands under the CWA, state-level wetland programs are all the more important.

This Note argues that, instead of being an unfortunate example of extreme wetland decline, Indiana should strive to be a national model of wetland preservation. To do this, the Indiana General Assembly (IGA) should repeal SEA 389 and institute changes to shore up and incentivize wetland protection. Much like how the *SWANCC* decision pushed the IGA to protect the state's newly unregulated isolated wetlands, the *Sackett* decision should motivate the legislature to ensure wetlands that lose federal protections in Indiana remain protected under the state's Isolated Wetlands Law. Part I of this Note explains what a wetland is, why they have declined, and why remaining wetlands should be protected. Part II explains how the federal government has protected wetlands under the CWA and how federal wetland regulation has evolved. Part III explains how Indiana has protected wetlands under the state's Isolated Wetlands Law and the adverse impacts of SEA 389. Part IV argues that the IGA should repeal SEA 389 and pass legislation that (1) creates a better, proactive, and more user-friendly isolated wetlands program, and (2) invests in certain initiatives to protect and restore isolated wetlands.

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24. S.E.A. 389, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021).

25. *Sackett v. EPA*, 598 U.S. 651, 684 (2023).

26. *See Rapanos v. United States*, 547 U.S. 715, 759 (2006).

27. Brief of Scientific Societies as Amici Curiae in Support of Respondents at 2, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

28. Casey Smith, *Indiana lawmakers could further dilute state wetlands protections following SCOTUS decision*, IND. CAP. CHRON. (July 26, 2023, 7:00 AM), <https://indianacapitalchronicle.com/2023/07/26/indiana-lawmakers-could-further-dilute-state-wetlands-protections-following-scotus-decision/> [https://perma.cc/ZQM4-PHMX].

## I. A WETLANDS PRIMER

A. *What Are Wetlands, and Why Should They Be Protected?*

The Code of Federal Regulations defines wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”<sup>29</sup> Indiana statutory and regulatory definitions of wetlands are identical to the federal definition.<sup>30</sup> The definition of a wetland can be broken down into three key attributes that have been used by the U.S. Army Corps of Engineers (USACE) to identify and delineate wetlands: water, hydric soils, and plants that have adapted to grow in hydric soils.<sup>31</sup> When an area becomes saturated with water, microscopic organisms consume the oxygen in the soil and create hydric soils.<sup>32</sup> Once hydric soils are established, plants that are adapted to grow in hydric soils, such as cattails and bulrushes, may take root.<sup>33</sup> Thus, a wetland is formed.

Wetlands provide numerous environmental benefits, including flood mitigation. Wetlands act as natural sponges that absorb and slowly release stormwater.<sup>34</sup> One acre of wetlands can store up to one million gallons of excess water.<sup>35</sup> Scientists have proposed using coastal wetlands’ flood mitigating properties to lessen the impact of rising sea levels due to climate change.<sup>36</sup> A study that examined Hurricane Sandy, which hit New York and New Jersey in 2012, concluded that wetlands prevented \$625 million in flood damage.<sup>37</sup> Similarly, the USACE “found that protecting wetlands along the Charles River in Boston, Massachusetts, saved \$17 million in potential flood damage

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29. 33 C.F.R. § 328.3(c)(1) (2023).

30. *See* IND. CODE § 13-11-2-265.8 (2023); *see also* 327 IND. ADMIN. CODE 17-1-3(16) (2023).

31. U.S. ARMY CORPS OF ENG’RS ENV’T LAB’Y, CORPS OF ENG’RS WETLANDS DELINEATION MANUAL 3 (1987) <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4530> [<https://perma.cc/CLK5-S5UD>] [hereinafter Delineation Manual].

32. *Hydric Soils*, USDA: NAT’L RES. CONSERVATION SERV. (Feb. 28, 2012), <https://www.nrcs.usda.gov/conservation-basics/natural-resource-concerns/soil/hydric-soils> [<https://perma.cc/U98W-FM2S>].

33. Delineation Manual, *supra* note 31, at C3.

34. *Functions and Values of Wetlands*, EPA (Sept. 2001), <https://www.epa.gov/sites/default/files/2016-02/documents/functionsvaluesofwetlands.pdf> [<https://perma.cc/DEF9-27U5>] [hereinafter *Functions and Values*].

35. *Id.*

36. *Use Nature as Infrastructure*, SCI. AM. MAG., Apr. 2023, at 8.

37. Rowan Jacobsen, *Rebuilt Wetlands Can Protect Shorelines Better Than Walls*, SCI. AM. MAG. (Apr. 1, 2019), <https://www.scientificamerican.com/article/rebuilt-wetlands-can-protect-shorelines-better-than-walls/> [<https://perma.cc/2LCW-UEYV>].

annually.<sup>38</sup> In Indiana, wetlands provide an estimated \$2,270 per acre in water storage services and \$1,055 per acre in erosion prevention.<sup>39</sup>

Wetlands also act as natural kidneys by filtering and preventing pollutants, excess nutrients, and sediments from entering waterways and aquifers.<sup>40</sup> The filtering qualities of wetlands are so well established that municipalities around the world have utilized constructed wetlands for stormwater and sewage treatment for over sixty years.<sup>41</sup> A wetland filters water by slowing water flows and allowing sediments, which may contain material harmful to human health, to sink and become locked in the wetland's floor.<sup>42</sup> In Indiana, wetlands filter water that replenishes underground aquifers, which 70% of Indiana residents rely on for drinking water.<sup>43</sup> Such filtration could be further utilized to address impairments in Indiana's waterways. Of all states, Indiana ranks first in mileage of rivers and streams that are impaired.<sup>44</sup> Nearly three-quarters of Indiana's waterways are so polluted that they may not be used for fishing, swimming, or recreation without exposure to serious contaminants or diseases.<sup>45</sup> The primary source of this pollution is farm runoff.<sup>46</sup> Waste from livestock and excess fertilizer flows into rivers and streams during rain events or snowmelts.<sup>47</sup> These pollutants cause waterways to harbor harmful bacteria, such as *E. coli*, and excess nutrients contribute to the development of harmful algal blooms, which in turn produce toxic byproducts.<sup>48</sup> Utilization of wetlands to combat the flow of such nutrients and waste has been initiated in the neighboring state of Ohio.<sup>49</sup> One study found that restoring 10% of historic wetlands in northwestern Ohio

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38. *Fact Sheet: Wetlands*, IND. DEP'T ENV'T MGMT., [https://www.in.gov/idem/files/factsheets\\_water\\_quality\\_wetlands.pdf](https://www.in.gov/idem/files/factsheets_water_quality_wetlands.pdf) [<https://perma.cc/R29L-FEL3>] (last visited Aug. 22, 2024).

39. John Ketzenberger, *Wetlands Take Care of Us, If We Take Care of Them*, THE NATURE CONSERVANCY (Mar. 9, 2023), <https://www.nature.org/en-us/newsroom/indiana-needs-wetlands-protection/> [<https://perma.cc/T4G4-WVRN>].

40. *Functions and Values*, *supra* note 34.

41. *See generally* Jan Vyzmazal, *Constructed Wetlands for Wastewater Treatment: Five Decades of Experience*, 45 ENV'T SCI. AND TECH. 61 (Aug. 26, 2010), <https://pubmed.ncbi.nlm.nih.gov/20795704> [<https://perma.cc/8FDV-TFYF>].

42. *Functions and Values*, *supra* note 34.

43. *Importance of Wetlands*, IND. DEP'T ENV'T MGMT., <https://www.in.gov/idem/wetlands/importance-of-wetlands/> [<https://perma.cc/B3WK-F8ED>] (last visited Sept. 9, 2023).

44. ENV'T INTEGRITY PROJECT, *THE CLEAN WATER ACT AT 50: PROMISES HALF KEPT AT THE HALF-CENTURY MARK 7* (2022), <https://environmentalintegrity.org/wp-content/uploads/2022/03/CWA-report-3.23.22-FINAL.pdf> [<https://perma.cc/LTN7-DK4G>].

45. *Id.* at 18.

46. *Id.* at 34.

47. *Id.*

48. *Id.*

49. *Governor DeWine Announces Plans for New H2Ohio Wetlands in 22 Counties*, STATE OF OHIO (July 28, 2022), <https://h2.ohio.gov/governor-dewine-announces-plans-for-new-h2ohio-wetlands-in-22-counties/> [<https://perma.cc/FKW5-PXMY>].

around the Maumee River could reduce the amount of excess nutrients, specifically phosphorous, from entering the river by over a third.<sup>50</sup>

Wetlands also trap and store carbon. Of all terrestrial ecosystems, wetlands have the highest carbon density.<sup>51</sup> Wetlands are estimated to store 11.5 billion tons of carbon in the lower forty-eight states.<sup>52</sup> Wetlands store carbon by accumulating dead plant material in a water-saturated, low-oxygen environment.<sup>53</sup> The lack of oxygen in wetlands prevents carbon in organic material from degrading into carbon dioxide and being released into the atmosphere.<sup>54</sup> Accordingly, wetlands have been described as “carbon sinks.”<sup>55</sup>

Animals, including endangered species, also depend on wetlands. Indeed, according to the U.S. Fish and Wildlife Service, 40% of all plant and animal species either live in or utilize wetlands at some point in their lifecycles despite wetlands comprising only 6% of the Earth’s terrestrial surface.<sup>56</sup> Around half of the federally listed endangered species depend on wetlands.<sup>57</sup> Similarly, half of the species on the Indiana Department of Natural Resources’ (IDNR’s) “greatest conservation need” list use wetlands at some point in their lifecycles.<sup>58</sup>

Finally, wetlands support recreational activities and provide economic benefits. In addition to providing hiking and boating opportunities, wetlands provide habitat for species that are hunted and fished, as well as bird species sought after by bird watchers. Bird watching in the United States generates over \$40 billion in economic activity annually.<sup>59</sup> One study that focused on Michigan’s coastal wetlands concluded that each wetland acre generated nearly \$500 in recreational value annually.<sup>60</sup>

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50. William J. Mitsch, *Solving Lake Erie’s harmful algal blooms by restoring the Great Black Swamp in Ohio*, 108 *ECOLOGICAL ENG’G* 406, 411 (2017).

51. Amirreza Sharifi et. al., *Carbon dynamics and export from flooded wetlands: A modeling approach*, 206 *ECOLOGICAL MODELLING* 196, 196 (2013), <https://digitalcommons.unl.edu/usepapapers/193/> [<https://perma.cc/XR4T-ST99>].

52. IND. WETLANDS TASK FORCE, *supra* note 18, at 12.

53. *Coastal Blue Carbon*, NAT’L OCEAN SERV., (Aug. 16, 2023) <https://oceanservice.noaa.gov/ecosystems/coastal-blue-carbon/> [<https://perma.cc/BAZ6-D2SL>].

54. *Id.*

55. Amirreza Sharifi et. al., *supra* note 51, at 209.

56. *Why Healthy Wetlands are Vital to Protecting Endangered Species*, U.S. FISH & WILDLIFE SERV. (Apr. 26, 2023), <https://www.fws.gov/story/2023-04/why-healthy-wetlands-are-vital-protecting-endangered-species> [<https://perma.cc/9EHK-UME2>].

57. *Id.*

58. *Hearing on S.B. 389 Before the Senate Committee on Environmental Affairs*, 122nd General Assembly (2021) (statement of David Bausman, IDNR), available at [https://iga.in.gov/session/2021/video/committee\\_environmental\\_affairs\\_4800/](https://iga.in.gov/session/2021/video/committee_environmental_affairs_4800/) [<https://perma.cc/YF2S-5T5D>] (choose “Environmental Affairs”; then under “Meetings” choose “Monday, Jan. 25 -10:00am” from dropdown).

59. *National Bird Day*, NAT’L OCEAN SERV., (Feb. 1, 2022) <https://oceanservice.noaa.gov/ecosystems/estuaries/bird-watching.html> [<https://perma.cc/M4WH-B2ZC>].

60. C. Nicholas Raphael & Eugene Jaworski, *Economic value of fish, wildlife, and creations in Michigan’s coastal wetlands*, 5 *COASTAL ZONE MGMT. J.* 181 (1979).

*B. Historic Wetland Decline*

Historically, wetlands in the United States were seen as nuisance lands that ought to be converted to something more useful, like farmland.<sup>61</sup> During the middle of the 19th century, Congress passed a series of laws that allowed selected states to “reclaim . . . swamp and overflowed lands, made unfit thereby for cultivation[.]”<sup>62</sup> These acts, collectively referred to as the Swamp Land Acts, allowed specific states to obtain uncontested swampland within their borders with the hope of converting these areas into farmland.<sup>63</sup> Indiana was permitted to take part in this policy via the Swamp Land Act of 1850, and nearly 1.3 million acres of swampland, including large swaths of the Grand Kankakee Marsh, were granted to the state under the Act’s authority.<sup>64</sup>

In 1900, the U.S. Supreme Court declared that “[i]f there is any fact which may be supposed to be known by everybody, . . . it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.”<sup>65</sup> This negative attitude towards wetlands was pervasive through the 19th century and resulted in the filling of over half of the wetland acreage in the United States.<sup>66</sup> While conversion of wetlands to farmland is, and continues to be, the major driver of wetland loss in the United States, other drivers of wetland loss include urbanization, aquaculture, and industry.<sup>67</sup>

Attitudes and policies towards wetlands began to shift in the mid-to-late 20th century. For example, Congress passed the Migratory Bird Conservation Act in 1929 and the Migratory Bird Hunting Stamp Act of 1934, which provided authorization and funding mechanisms for the U.S. Fish and Wildlife Service to acquire wetlands as a method of preserving and protecting waterfowl habitat.<sup>68</sup> Most notably, certain wetlands gained a level of federal protection in 1975 when the USACE included “adjacent” wetlands in its definition of “waters of the United States.”<sup>69</sup> Congress appeared to acquiesce to the USACE’s definition and

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61. Erik G. Davis, Note, *Interstate Compacts That Are for the Birds: A Proposal for Reconciling Federal Wetlands Protection with State Water Rights Through Federal-Interstate Compacts*, 10 BYU J. PUB. L. 325, 325 (1996).

62. 43 U.S.C. § 982.

63. Davis, *supra* note 61 at 325. See also Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENV’T L. REV. 307, 311 n. 20. (1991).

64. Stephen F. Strausberg, *Indiana and the Swamp Lands Act: A Study in State Administration*, IND. MAG. OF HISTORY, Sept. 1977, at 202.

65. *Leovy v. United States*, 177 U.S. 621, 636 (1900).

66. Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENV’T L. L. 277, 287 (2016).

67. Gaston Antonio Ballut-Dajud et. al., *Factors Affecting Wetland Loss: A Review*, 11 LAND 434, 468 (2022).

68. See Sherry A. Enzler & Jean Coleman, *Wetlands and Drainage After Rapanos: A “Series of Unfortunate Events”*, 40 WM. MITCHELL L. REV. 78, 92 (2013); WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404 3-4 (Kim D. Connolloy et al. eds., 2005).

69. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320, 31324 (July 25, 1975).



included adjacent wetlands as jurisdictional waters in the 1977 CWA Amendments under § 404(g).<sup>70</sup> The current rate of wetland loss varies by region, but it has been estimated that, despite federal and state protection efforts, the United States loses 60,000 acres of wetlands per year.<sup>71</sup> The current rate of wetland loss in Indiana is difficult to assess because there has never been a comprehensive state-specific wetland inventory.

## II. FEDERAL APPROACHES TO WETLAND REGULATION

### A. *The Clean Water Act and the 404 Permit Program*

The CWA is the primary federal law that provides regulatory protection to wetlands in the United States.<sup>72</sup> Congress enacted the CWA in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>73</sup> Like nearly every federal environmental law, the basis of the CWA’s authority is rooted in the Commerce Clause of the U.S. Constitution.<sup>74</sup> Prior to the Act’s passage, federally regulated waters were limited to “navigable waters,” which had to be capable of use by vessels in interstate commerce.<sup>75</sup> The CWA redefined “navigable waters” to mean “the waters of the United States.”<sup>76</sup> Up until the *SWANCC* decision in 2001, the CWA was interpreted to provide federal protection for most bodies of water throughout the United States because the Act regulated a channel of commerce, even if the body of water was wholly intrastate.<sup>77</sup> The Act’s conference report states that the “conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation . . . .”<sup>78</sup>

Section 404 of the CWA prohibits the discharge of dredge or fill material into waters of the United States without a permit from the USACE.<sup>79</sup> In 1975, the USACE interpreted “waters of the United States” to include wetlands adjacent to other navigable waters.<sup>80</sup> Initially, the USACE interpreted the CWA to exclude much of the wetland acreage in the United States, but this

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70. 33 U.S.C. § 1344(g) (2022).

71. *Threats to Wetlands*, EPA (Sept. 2001), [https://www.epa.gov/sites/default/files/2021-01/documents/threats\\_to\\_wetlands.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/threats_to_wetlands.pdf) [<https://perma.cc/RC2Z-Y3RE>].

72. Gatz & Stubbs, *supra* note 21, at 7.

73. 33 U.S.C. § 1251 (2023).

74. JAY AUSTIN & BRUCE MYERS, *ANCHORING THE CLEAN WATER ACT 2* (2007); *See* U.S. CONST. art.1, § 8, cl. 3.

75. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44585, *EVOLUTION OF THE MEANING OF “WATERS OF THE UNITED STATES” IN THE CLEAN WATER ACT 1* (2019).

76. 33 U.S.C. § 1362(7) (2023).

77. AUSTIN & MYERS, *supra* note 74, at 5.

78. S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.).

79. 33 U.S.C. § 1344 (2023).

80. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320, 31324 (July 25, 1975).

interpretation was rejected in *Natural Resources Defense Council v. Callaway*.<sup>81</sup> The court held that Congress “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”<sup>82</sup> Congress amended the CWA in 1977 so that wetlands “adjacent” to waters of the United States were protected under section 404(g).<sup>83</sup> In general, Section 404(g) allows states and tribes to take over the administration of the Section 404 permit program so long as certain conditions are met.<sup>84</sup> By including “adjacent wetlands” in 404(g), Congress not only recognized that wetlands are vital to “maintaining the chemical, physical, and biological integrity” of waters of the United States, but explicitly recognized that adjacent wetlands *are* waters of the United States.<sup>85</sup>

*B. Drain the Swamp: The Executive and Judicial Branches  
Wade into Wetlands*

The Judicial and Executive branches’ approach towards wetland regulation has shifted from supporting the CWA’s authority over wetlands toward eroding that authority. Since the passage of the 1977 CWA Amendments, nearly every Presidential administration has sought to preserve wetlands in the United States. In 1977, President Carter issued Executive Order 11,990, which directed federal agencies to “take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands . . . .”<sup>86</sup> Vice President George H.W. Bush first articulated the idea of “no net loss” of wetlands while campaigning for the Presidency.<sup>87</sup> Essentially, the “no net loss” policy seeks compensation for wetland destruction by requiring the construction of new wetlands or enhancing existing wetland values.<sup>88</sup> After his election, President Bush’s Administration put forth new guidelines for the Section 404 permit program that permitted development in wetland habitats but attempted “no net loss” of wetlands by requiring compensatory mitigation.<sup>89</sup> President Bill Clinton expanded on this policy with his “Clean Water Action” plan, which, among other water quality goals, aimed for a net gain of 100,000 acres of wetlands by 2005.<sup>90</sup> While the plan created an interagency task force to

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81. *Nat. Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

82. *Id.*

83. 33 U.S.C. § 1344(g) (2022).

84. *See generally* 33 U.S.C § 1344(g) (2023).

85. *Sackett v. EPA*, 598 U.S. 651, 711 (2023) (Kagan, J., concurring).

86. Exec. Order 11,990, Protection of Wetlands, 42 Fed. Reg. 26961, 26961 (May 24, 1977).

87. Remarks to Members of Ducks Unlimited, 1 PUB. PAPERS 691 (June 8, 1989).

88. *No Net Loss of Wetlands*, TEX. A&M UNIV. <https://coastalresilience.tamu.edu/home/wetland-protection/policy-framework/federal-framework/no-net-loss-of-wetlands/> [https://perma.cc/2XSK-F2ZF] (accessed March 8, 2024).

89. J.B. Ruhl & James Salzman, *No Net Loss? The Past, Present, and Future of Wetlands Mitigation Banking*, 73 CASE W. RES. L. REV. 411, 418 (2022).

90. CLAUDIA COPELAND, CONG. RSCH. SERV., 98-150ENR, THE CLEAN WATER ACTION PLAN: BACKGROUND AND EARLY IMPLEMENTATION 3 (1998).

address wetland issues, there has never been a net increase of 100,000 wetland acres since the announcement of the Clean Water Action plan.<sup>91</sup> President George W. Bush also endorsed the “no net loss” wetlands policy when his administration released its “National Wetlands Mitigation Action Plan” in 2002.<sup>92</sup> This culminated in a final rule in 2008 entitled “Compensatory Mitigation for Losses of Aquatic Resources” that set standards for compensatory mitigation and related programs and incorporated existing non-rule policies on mitigation sequencing.<sup>93</sup> President Barack Obama endorsed the “no net loss” policy and expanded it to also include other natural resources “that are important, scarce, or sensitive.”<sup>94</sup> President Obama’s administration also issued the Clean Water Rule (CWR).<sup>95</sup> To properly understand and contextualize this rule, it is important to first review three essential Supreme Court cases concerning the USACE’s authority over wetlands.

1. *The Court’s Shifting Views on USACE Authority.*—

“You ever notice they use the word ‘nexus’ a lot in law school? It makes you sound—I don’t know—adult.” Professor R. George Wright<sup>96</sup>

The Supreme Court first weighed in on USACE’s authority over wetlands in *United States v. Riverside Bayview Homes*.<sup>97</sup> In *Riverside*, the Court upheld USACE’s inclusion of wetlands without a direct connection to a navigable body of water in its definition of “waters of the United States.”<sup>98</sup> The Court in *Riverside* held that USACE’s interpretation of the CWA was reasonable and acknowledged the logic of USACE’s determination that wetlands play a vital role in accomplishing the goals of the CWA.<sup>99</sup> Thus, it was not unreasonable to

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91. Julie M. Sibling, *Nowhere Near No-Net-Loss*, NAT’L WILDLIFE FED’N, [https://www.nwf.org/~media/PDFs/Wildlife/Nowhere\\_Near\\_No-Net-Loss.pdf](https://www.nwf.org/~media/PDFs/Wildlife/Nowhere_Near_No-Net-Loss.pdf) [https://perma.cc/53T4-LH8V] (last accessed August 25, 2024).

92. *National Wetlands Mitigation Action Plan*, EPA (Dec. 24, 2022) [https://www.epa.gov/sites/default/files/2015-08/documents/national\\_wetlands\\_mitigation\\_action\\_plan\\_0.pdf](https://www.epa.gov/sites/default/files/2015-08/documents/national_wetlands_mitigation_action_plan_0.pdf) [https://perma.cc/3JZD-SG5H].

93. *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19594 (Apr. 10, 2008). This rule prohibited discharges “if there is a practicable alternative to the proposed discharge.” See 40 C.F.R. § 230.10 (2023). If the discharge could not be avoided, steps must be taken to minimize the impact of the discharge. See *id.* Finally, USACE would determine appropriate compensatory mitigation for the unavoidable adverse impacts of the discharge. See 40 C.F.R. § 230.93 (2023).

94. President Barack Obama, *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*, THE WHITE HOUSE (Nov. 5, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related> [https://perma.cc/U7WV-DH33].

95. *Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37054 (June 29, 2015).

96. R. George Wright, Michael McCormick II Prof. of L., Ind. Univ. Robert H. McKinney Sch. of L., *Constitutional Law Lecture* (Sept. 18, 2023) (lecture notes on file with the author).

97. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

98. *Id.* at 134.

99. *Id.*

conclude that adjacent wetlands are “inseparably bound up with ‘waters’ of the United States,” regardless of their physical connection to navigable waters.<sup>100</sup>

However, the Court came to a different conclusion in *SWANCC*. The Solid Waste Agency of Northern Cook County purchased a 533-acre parcel to dispose of solid waste.<sup>101</sup> The site was formerly used for mining and had developed a series of permanent ponds and trenches.<sup>102</sup> USACE determined that the waters were used by migratory birds and asserted jurisdiction under the Migratory Bird Rule.<sup>103</sup> The Migratory Bird Rule was not so much a rule as it was a clarification made in the preamble to regulations where the USACE adopted the view that “waters of the United States,” as defined by 33 C.F.R. § 328.3(a), included waters used as habitat by (1) birds protected by Migratory Bird Treaties, (2) birds that cross state lines, (3) endangered species, or (4) waters used to irrigate crops sold in interstate commerce.<sup>104</sup> The Court held in *SWANCC* that USACE’s application and clarification of its jurisdiction under 33 CFR § 328.3(a) exceeded USACE’s authority under the CWA.<sup>105</sup>

The Court differentiated between its ruling in *SWANCC* and *Riverside* by reasoning that there was a “significant nexus” between the wetlands in *Riverside* and navigable waters.<sup>106</sup> While the Court’s majority mentioned the goal of the CWA at the outset of its opinion, it did not ruminate on the impact this decision would have on the Act’s achievement of that goal.<sup>107</sup> Justice Stevens dissented and pointed out that CWA’s ambitious goals to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” necessitated a broad interpretation of “waters of the United States.”<sup>108</sup>

Overall, the *SWANCC* decision called into question the scope of USACE’s authority over isolated, intrastate wetlands.<sup>109</sup> Using the “significant nexus” phrase from *SWANCC*, the USACE and EPA issued a memorandum clarifying that the federal government still had jurisdiction under the CWA over isolated, intrastate bodies of water in certain circumstances, so long as “their use, degradation, or destruction could affect other ‘waters of the United States,’ thus establishing a significant nexus between the water in question and other ‘waters of the United States.’”<sup>110</sup>

The Supreme Court once again evaluated the scope of USACE’s jurisdiction under the CWA in *Rapanos v. United States*. John Rapanos filled wetlands on a

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100. *Id.*

101. *Solid Waste Agency of N. Cook Cnty v. Army Corps of Eng’rs*, 531 U.S. 159, 163 (2001).

102. *Id.*

103. *Id.* at 164.

104. Definition of Waters of the United States, 51 Fed. Reg. 41216, 41217 (Nov. 13, 1986).

105. *Solid Waste Agency of N. Cook Cnty*, 531 U.S. at 174.

106. *Id.* at 167.

107. *See generally id.*

108. *Id.* at 180. (Stevens, J., dissenting).

109. MULLIGAN, *supra* note 75, at 20.

110. Memorandum from Gary Guzy, General Counsel, EPA & Robert Andersen, Chief Counsel, USACE to Assistant Administrator for Water et al. (Jan. 19, 2001).

parcel of land that he owned in Michigan, and USACE brought an enforcement action, which was upheld by the lower courts.<sup>111</sup> The Supreme Court held in a five-to-four decision that the wrong standard in determining whether Rapanos's land was jurisdictional had been applied, but the Court's majority could not agree on which standard to actually apply.<sup>112</sup> The court's plurality, which comprised Justices Scalia, Alito, Roberts, and Thomas, concluded that only wetlands with a continuous surface connection to navigable waters are "waters of the United States."<sup>113</sup> Justice Kennedy, however, concluded that a "significant nexus" with a navigable body of water was sufficient to impose USACE's jurisdiction under the CWA.<sup>114</sup> In response to *Rapanos*, USACE and EPA put forth guidance that used either Justice Kennedy's "significant nexus" test or the plurality's "continuous surface connection" test to determine whether a wetland was jurisdictional.<sup>115</sup> The significant nexus analysis assessed the "flow characteristics and functions" of a wetland to "determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters."<sup>116</sup>

2. *Trump, Biden, and Sackett*.—Subsequent to *Rapanos*, President Obama's administration promulgated the CWR.<sup>117</sup> The CWR sought to further clarify which waters are jurisdictional given the ambiguous nature of the "significant nexus" test put forth in *Rapanos*.<sup>118</sup> The CWR was widely seen as expanding the scope of the CWA by broadly defining which waters are adjacent and including bodies of water, such as certain tributaries, as jurisdictional.<sup>119</sup> Indiana was one of several states and organizations that challenged the CWR in court.<sup>120</sup> This litigation resulted in the rule being stayed in Indiana.<sup>121</sup> Two courts remanded the CWR and held that it exceeded USACE and EPA's authority under CWA.<sup>122</sup>

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111. *Rapanos v. United States*, 547 U.S. 715, 719-21, 729-30 (2006).

112. *See generally id.*

113. *Id.* at 742.

114. *Id.* at 779 (Kennedy, J., concurring).

115. ENV'T. PROT. AGENCY & DEP'T ARMY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (2007).

116. ENV'T. PROT. AGENCY & DEP'T ARMY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (2008).

117. Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054 (June 29, 2015).

118. MULLIGAN, *supra* note 75, at 24.

119. *Id.* at 25.

120. *Indiana to sue over new EPA water rule*, J. & COURIER (July 7, 2015, 2:33 PM), <https://www.jconline.com/story/news/local/indiana/2015/07/07/indiana-sue-new-epa-water-rule/29823403/> [<https://perma.cc/7G2M-G64K>].

121. *Ohio v. United States Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804, 809 (6th Cir. 2015).

122. MULLIGAN, *supra* note 75, at 28.

Not long after taking office, President Trump issued Executive Order 13,778, which required his administration to review the CWR.<sup>123</sup> In response, USACE and EPA initiated a two-step process to repeal the CWR and issue a new rule that more closely aligned the jurisdictional test with the plurality in *Rapanos*.<sup>124</sup> This rule, which would become known as the “Navigable Waters Protection Rule” (NWPR), narrowed the scope of the CWA to only bodies of water with a continuous surface connection with a traditional navigable body of water.<sup>125</sup> The NWPR was also the subject of much litigation.

Under the Biden Administration, USACE and EPA requested that courts overseeing legal challenges to the NWPR remand the rule while a new regulation was developed.<sup>126</sup> The U.S. District Court for the District of Arizona remanded and vacated the rule, saying that,

The concerns identified by Plaintiffs and the Agency . . . are not mere procedural errors or problems that could be remedied through further explanation . . . . Rather, they involve fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition of “waters of the United States.”<sup>127</sup>

In response to this ruling, USACE and EPA halted the implementation of the NWPR and defined “waters of the United States” as was done prior to the CWR.<sup>128</sup>

On December 30, 2022, the Biden Administration announced the “Revised Definition of ‘Waters of the United States’” rule.<sup>129</sup> The rule became effective on March 20, 2023, and was based on the pre-2015 definition of “waters of the United States.”<sup>130</sup> Wetlands were jurisdictional under the rule if they met the relatively permanent, continuous connection standard as provided by the plurality in *Rapanos*, or if they met Justice Kennedy’s significant nexus

123. Exec. Order No. 13,778, 82 Fed. Reg. 12497 (Mar. 3, 2017).

124. Mulligan, *supra* note 75, at 28-30.

125. The Navigable Waters Protection Rule: Definition of “Waters of the United States”, 85 Fed. Reg. 22250, 22279 (Apr. 21, 2020).

126. EPA Press Office, *EPA, Army Announce Intent to Revise Definition of WOTUS*, EPA (June 9, 2021), <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus> [<https://perma.cc/J4KQ-64WL>].

127. *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 955 (D. Ariz. 2021).

128. KATE R. BOWERS & LAURA GATZ, CONG. RSCH. SERV., R47408, WATERS OF THE UNITED STATES (WOTUS): FREQUENTLY ASKED QUESTIONS ABOUT THE SCOPE OF THE CLEAN WATER ACT 3, 5 (2023).

129. *Revising the Definition of the “Waters of the United States”*, EPA (last updated Sept. 8, 2023), <https://www.epa.gov/wotus/revising-definition-waters-united-states> [<https://perma.cc/QL9W-PF2F>].

130. Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004, 3004 (Jan. 18, 2023).

standard.<sup>131</sup> Keeping with tradition, multiple district courts enjoined the rule, preventing it from going into effect in twenty-seven states.<sup>132</sup>

Less than three months after the Biden Administration's rule went into effect, the U.S. Supreme Court handed down its decision in *Sackett v. EPA*. The Court held that to assert jurisdiction over adjacent wetlands under the CWA, EPA or USACE must establish “first, that the adjacent body of water constitutes ‘waters of the United States’ . . . and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the [jurisdictional] ‘water’ ends and the ‘wetland’ begins.”<sup>133</sup> The Court seemed reluctant to define wetlands as “waters of the United States” because of the CWA’s use of the word “waters.” The Court reasoned that the plural use of the word “waters” meant that the act referred to traditional navigable waters because this is how the word was used elsewhere in the statute.<sup>134</sup> Almost reluctantly, the Court acknowledged that some wetlands were indeed “waters of the United States” because the CWA explicitly mentions navigable waters and “wetlands adjacent thereto” in section 404.<sup>135</sup> Like the majority in *SWANCC*, the majority in *Sackett* did not evaluate their new standard in the context of the overarching goal of the CWA, nor did it take into consideration the legislative history of the act, which indicated that “navigable waters” was to “be given the broadest possible constitutional interpretation. . . .”<sup>136</sup>

Justice Kavanaugh aptly criticized the majority’s new test with a rudimentary vocabulary lesson. “In short,” Justice Kavanaugh said, “the term ‘adjacent’ is broader than ‘adjoining’ and does not require that two objects actually touch. We must presume that Congress used the term ‘adjacent’ wetlands in 1977 to convey a different meaning than ‘adjoining’ wetlands.”<sup>137</sup> Unlike the majority, Justice Kavanaugh did consider the environmental consequences of its holding: “[T]he Court’s new and overly narrow test may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies’ regulatory authority, with negative consequences for waters of the United States.”<sup>138</sup>

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131. *Final Rule: Revised Definition of “Waters of the United States” Fact Sheet*, EPA (Dec. 2022) <https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf> [<https://perma.cc/J828-92TP>].

132. *Definition of “Waters of the United States”: Rule Status and Litigation Update*, EPA (last updated Sept. 8, 2023), <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> [<https://perma.cc/F5EV-L7GR>] [hereinafter *Litigation Update*]; see *Texas v. EPA*, 662 F. Supp. 3d 739 (S.D. Tex. 2023); *W. Virginia v. EPA*, 669 F. Supp. 3d 781 (D.N.D. 2023); Order Granting an Injunction Pending Appeal, *Kentucky, et. al. v. EPA, et. al.*, No. 23-5345, 3:23-CV-00007 (2023).

133. *Sackett v. EPA*, 598 U.S. 651, 678-79 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)).

134. *Id.* at 671.

135. *Id.* at 675.

136. S. REPT. NO. 92-1236, at 144 (1972) (Conf. Rep.).

137. *Sackett*, 598 U.S. at 719-20 (Kavanaugh, J., concurring).

138. *Id.* at 726 (Kavanaugh, J., concurring).

In response to the Court's holding in *Sackett*, EPA and USACE amended their earlier Revised Definition of the "waters of the United States" rule.<sup>139</sup> The revised rule, effective September 8, 2023, "removes the significant nexus test from consideration when identifying tributaries or other waters as federally protected."<sup>140</sup> Because this rule amended the prior rule, it will not go into effect in the states where the prior rule was enjoined.<sup>141</sup> Further, USACE and EPA have not issued guidance on interpreting the *Sackett* holding. Accordingly, it is unclear how the agencies define or evaluate a "continuous surface connection" or "practically indistinguishable." Until guidance appears, states with isolated wetland programs, like Indiana, are uncertain how exactly *Sackett* will ultimately impact wetlands within their borders.

### III. ISOLATED WETLAND REGULATION IN INDIANA

#### *A. The Good: IDEM's Undiminished Authority post-SWANCC and the Isolated Wetlands Law*

The *SWANCC* decision reverberated in Indiana and caused all three branches of the state's government to respond. Within the executive branch, Indiana's environmental regulatory agency, IDEM, sought to use its existing authority to protect the state's isolated wetlands post-*SWANCC*. Specifically, the agency indicated that it intended to apply its state National Pollutant Discharge Elimination System (NPDES) permitting process to regulate discharges into wetlands.<sup>142</sup> NPDES permits are essential components to the success of the CWA because they limit or prevent discharges into waters of the United States.<sup>143</sup> EPA has delegated IDEM authority to issue NPDES permits in most circumstances.<sup>144</sup>

The judicial branch responded in *Indiana Department of Environmental Management v. Twin Eagle, LLC*. *Twin Eagle* challenged IDEM's authority to protect isolated wetlands and private ponds.<sup>145</sup> *Twin Eagle* sought to construct residential buildings near Fort Wayne, which would have impacted nearly twenty-two acres of wetlands and ponds.<sup>146</sup> The USACE determined that, post-

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139. Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023).

140. *To Conform with Recent Supreme Court Decision, EPA and Army Amend "Waters of the United States" Rule*, EPA (August 29, 2023), <https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule> [<https://perma.cc/TNSA-C4PY>].

141. *Litigation Update*, *supra* note 134.

142. *Indiana Dept. of Env't Mgmt v. Twin Eagle, LLC*, 798 N.E.2d 839, 842 (Ind. 2003).

143. *NPDES Permit Basics*, EPA (Dec. 11, 2023) <https://www.epa.gov/npdes/npdes-permit-basics> [<https://perma.cc/EF3G-JQBN>].

144. *NPDES Program Authorizations*, EPA (July 2019) [https://www.epa.gov/sites/default/files/2021-02/documents/authorized\\_states\\_2021.pdf](https://www.epa.gov/sites/default/files/2021-02/documents/authorized_states_2021.pdf) [<https://perma.cc/M9KT-64DH>].

145. *Twin Eagle, LLC*, 798 N.E.2d at 842.

146. *Id.*



*SWANCC*, around two-thirds of these ponds and wetlands, were not subject to the CWA.<sup>147</sup> Nevertheless, IDEM sought to apply its state NPDES permitting process to the newly non-jurisdictional wetlands.<sup>148</sup> *Twin Eagle* argued that, because there was no federal jurisdiction over most of the wetlands in question, IDEM had no authority to issue a federally authorized NPDES permit.<sup>149</sup> Further, the developer argued that no state law gave IDEM authority to issue an NPDES permit in this instance, nor did any state law grant IDEM the authority to regulate isolated wetlands and private ponds.<sup>150</sup>

The Indiana Supreme Court held that IDEM could regulate private ponds and isolated wetlands if discharges from those sources threaten to pollute other waters.<sup>151</sup> The court noted that federal law does not prevent a state from having a more stringent regulatory regime than what is imposed by the CWA.<sup>152</sup> Further, the court indicated that there were multiple authorizing statutes that gave IDEM the authority to regulate discharges into “waters of the state.”<sup>153</sup> The court went on to explain that:

Among the rules adopted pursuant to these [authorizing statutes] is the requirement that “[a]ny discharge of pollutants into waters of the state” requires an NPDES permit unless it is specifically excluded. The reach of the rule is unaffected by the choice of Congress to limit federal legislation or by any constitutional constraints on federal jurisdiction. Thus, when *SWANCC* curbed previously expansive views of the reach of the CWA, IDEM’s scope of authority did not shrink. To the contrary, as the Supreme Court expressly noted, *SWANCC* had no effect whatsoever on the scope of waters subject to state regulation . . . The contraction of federal authority did nothing to limit state power.<sup>154</sup>

Indeed, as the CWA is constrained by the limits of the Commerce Clause, a state may use its general police power to exercise a more general authority over its water resources. The court also acknowledged the regulatory difficulties often presented by wetlands, noting their season-dependent boundaries.<sup>155</sup> However, the court stated that this challenge does not remove wetlands from IDEM’s jurisdiction or classify them as something other than “waters of the state.”<sup>156</sup>

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147. *Id.*

148. *Id.*

149. *Id.* at 842-43.

150. *Id.*

151. *Id.* at 845.

152. *Id.* at 842.

153. *Id.* at 846.

154. *Id.* (citations omitted).

155. *Id.* at 847.

156. *Id.*

Therefore, the court concluded, “at least some wetlands can be waters of the state” and subject to regulation.<sup>157</sup>

While *Twin Eagle* was being litigated, the legislative branch had its say on the matter. The IGA passed Indiana’s Isolated Wetlands law in response to the *SWANCC* decision, which had left around one-third of Indiana’s wetlands without any federal regulatory protection.<sup>158</sup> While the court’s holding in *Twin Eagle* gave IDEM jurisdiction over at least some isolated wetlands in Indiana, the Isolated Wetlands Law gave IDEM explicit statutory jurisdiction over such wetlands and created a corresponding permitting program.<sup>159</sup>

The original Isolated Wetlands Law created three classes of wetlands.<sup>160</sup> Class III wetlands encompassed rare and ecologically important wetlands, such as certain bogs, seeps, swamps, ponds, and flats.<sup>161</sup> Before 2021, a Class II wetland was an isolated wetland that was not a Class I or Class III, and a Class I wetland was a wetland where at least 50% of the wetland had been disturbed or affected by human activity or the wetland only supported minimal wildlife, aquatic habitat, or hydrological function.<sup>162</sup> Finally, the law provided a wide array of exemptions, including wetlands that existed as an “incidental feature” on certain varieties of land, including agricultural land, and wetlands that were below certain acreage limitations.<sup>163</sup>

Aside from the unique Class system, permits issued under the Isolated Wetlands Law differ from federal Section 404 permits primarily in the amount of compensatory mitigation required.<sup>164</sup> Mitigation ratios put forth in the Isolated Wetlands law generally exceeded 1:1 so that the state will not suffer a net loss of wetlands.<sup>165</sup> In other words, if one acre of wetland is destroyed, the permittee is required to restore or create a wetland elsewhere in the same watershed that is one acre or larger, depending on the qualities of the original wetland that was destroyed.<sup>166</sup> This is in contrast with the federal mitigation ratios put forth by the USACE where ratios are based on the lost “aquatic resource functions.”<sup>167</sup> Isolated wetland activity is usually brought to the attention of IDEM by USACE when they do a jurisdictional analysis,

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157. *Id.*

158. Gard, *supra* note 23.

159. *See* IND. CODE § 13-11-2-112.5 (2020); IND. CODE § 13-18-22 (2020).

160. IND. CODE § 13-11-2-25.8 (2020).

161. *Id.*

162. *Id.*

163. IND. CODE § 13-11-2-74.5 (2020).

164. *See infra* text accompanying notes 163-66.

165. *See State Regulated Wetlands Program: Frequently Asked Questions*, IND. DEP’T OF ENV’T MGMT., <https://www.in.gov/idem/wetlands/information-about/state-regulated-wetlands-program/frequently-asked-questions/> [https://perma.cc/MB3C-8N58] (last visited Oct. 6, 2023, 12:30 PM).

166. *See id.* An exception to this was for Class I wetlands where the mitigation ratio was 1:1 if the replacement wetland was a higher class. *See* 327 IND. ADMIN. CODE 17-1-5 (2023).

167. 33 C.F.R. § 332.3(f) (2024).

voluntarily by permit applicants, or by whistleblowers who identify unpermitted wetland activity.<sup>168</sup>

*B. The Bad: Senate Enrolled Act 389*

This first version of the bill that would become SEA 389 would have completely repealed Indiana's Isolated Wetlands Law.<sup>169</sup> A version repealing Indiana's Isolated Wetlands passed the Indiana Senate on February 1, 2021.<sup>170</sup> The bill was introduced by Senator Garten, who is on the board of directors of the Indiana Builders Association (IBA), an organization that supported the measure.<sup>171</sup>

Arguments for the measure centered on problems individuals had with IDEM's implementation of the program, the cost of mitigation, and the impact the Isolated Wetlands program has on property rights.<sup>172</sup> It is worth noting that many of the supporters of the legislation indicated their general support of wetlands, water quality, and opposition to environmental degradation.<sup>173</sup> Two farmers who supported the measure told the Senate Committee on Environmental Affairs that they didn't know a wetland existed on their property.<sup>174</sup> The farmers were brothers and when they installed drainage tile on their property, the USACE was contacted anonymously by a whistleblower.<sup>175</sup> Their farm was visited by USACE, EPA, and IDEM, and the farmers were told to mitigate around thirty-six acres.<sup>176</sup> The farmers anticipated that this mitigation would cost them over \$1 million.<sup>177</sup> Another farmer, who was being represented by his attorney, told the Committee that he checked the National Wetlands Inventory (NWI) before clearing an area of his farm.<sup>178</sup> Unbeknownst to the farmer, the area was a wetland despite not being listed on the NWI, and he, too, faced mitigation costs.<sup>179</sup> Subsequent to their testimony, IDEM's enforcement

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168. *Hearing on S.B. 389, supra* note 58 (testimony of Brian Wolff, IDEM).

169. S.B. 389, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (as introduced Jan. 14, 2021) <https://iga.in.gov/pdf-documents/122/2021/senate/bills/SB0389/SB0389.01.INTR.pdf> [<https://perma.cc/9DHH-XB5T>].

170. *Actions for Senate Bill 389*, Ind. Gen. Assemb., <https://iga.in.gov/legislative/2021/bills/senate/389/actions> [<https://perma.cc/4PQH-J7F8>] (last accessed Mar. 8, 2024).

171. Sade Ajishegiri et. al., *Lax ethics rules allow Indiana lawmakers to ignore potential conflicts of interest*, INDIANAPOLIS STAR (July 10, 2023, 5:17 AM), <https://www.indystar.com/story/news/environment/2023/07/10/indiana-lawmakers-vote-bills-tied-business-interests/70393666007/> [<https://perma.cc/T5L8-22BG>].

172. *Hearing on S.B. 389, supra* note 58 (testimony of those in support of the bill).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

actions against these farmers were upheld by the Office of Environmental Adjudication.<sup>180</sup>

The bill was opposed by IDEM, IDNR, environmental groups, as well as sportsmen and conservation groups.<sup>181</sup> In general, IDEM and IDNR opposed the measure due to the positive impact isolated wetlands have on water quality and flood mitigation, as well as the recreational opportunities and wildlife habitat provided by isolated wetlands.<sup>182</sup>

SEA 389 was heavily amended by the House Committee on Environmental Affairs.<sup>183</sup> Two representatives remarked that the Senate version of the bill was like a “meat cleaver.”<sup>184</sup> The House version restored the Isolated Wetlands program but granted an exception for wetlands on “cropland,” removed permit requirements for maintenance of drainage tile, excluded ephemeral streams, included a legislative study committee, and slightly lowered mitigation ratios for some classes of wetlands.<sup>185</sup>

The final version of SEA 389 made several consequential changes to Indiana’s Isolated Wetlands Law.<sup>186</sup> The measure removed Class I wetlands from IDEM’s regulatory purview so that Class I wetland activity no longer requires a permit or mitigation.<sup>187</sup> The measure also defined a Class II wetland as one that supports “moderate habitat or hydrological functions” but does not provide habitat for rare, threatened, or endangered species.<sup>188</sup> In that same vein, the measure nearly doubled the size of Class II wetlands that are exempt from permitting requirements from one-fourth of an acre to three-eighths of an acre.<sup>189</sup> SEA 389 also provided new exemptions for all “cropland,” removed permitting requirements for ephemeral streams, and exempted dredge and fill activities in wetlands within municipalities that are less than three-quarters of an acre.<sup>190</sup> The measure also removed the state statutory goals of no net loss of wetlands and net gains of high-quality wetlands.<sup>191</sup> Finally, the measure established a fourteen-member Indiana Wetlands Task Force tasked with

180. *See* Bankview Farm, II, Inc, 2023 O.E.A. 113 (2023); Yeley Family Ltd. P’ship, 2023 O.E.A. 129 (2023).

181. *Hearing on S.B. 389, supra* note 58 (testimony of those in opposition the bill).

182. *Id.*

183. *Actions for Senate Bill 389, supra* note 173.

184. *Hearing on S.B. 389 Before the House Committee on Environmental Affairs*, 122nd Gen. Assembly (2021) (comment by Rep. Aylesworth and Rep. Slager) available at [https://iga.in.gov/session/2021/video/committee\\_environmental\\_affairs\\_0700/](https://iga.in.gov/session/2021/video/committee_environmental_affairs_0700/) [<https://perma.cc/KZD8-RUNG>] (choose “Environmental Affairs”; then under “Meetings” choose “Wednesday, Apr. 7 – 8:30am” from dropdown).

185. S.B. 389, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (as amended by the House Committee on Environmental Affairs) <https://iga.in.gov/pdf-documents/122/2021/senate/bills/SB0389/SB0389.03.COMH.pdf> [<https://perma.cc/WJW3-SBWZ>].

186. *See infra* text accompanying notes 185-91.

187. IND. CODE § 13-11-2-74.5(a)(5) (2023).

188. IND. CODE § 13-11-2-25.8(a)(2) (2023).

189. IND. CODE § 13-11-2-74.5 (2023); *compare* IND. CODE § 13-11-2-74.5 (2020).

190. S. Enrolled Act 389, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021).

191. *Id.*

providing recommendations on wetland utilization and reviewing certain aspects of IDEM's and IDNR's wetlands programs.<sup>192</sup> Despite the opposition of his executive agencies, Governor Eric Holcomb signed SEA 389 on April 29, 2021.<sup>193</sup>

As anticipated, SEA 389 had a negative impact on Indiana's wetlands. An evaluation of permitting activity by IDEM showed that, in the first two years of the law being effective, the agency approved or determined that a permit wasn't needed for draining, filling, and destroying 350 acres of wetlands.<sup>194</sup> For those 350 acres of activity, only 85.7 acres of mitigation was required.<sup>195</sup> Therefore, the state suffered a net loss of around 260 acres of wetlands within two years of the law's passage.<sup>196</sup> The actual loss is probably higher because the provided figure does not include wetlands that may have been filled without the input of IDEM, which is no longer needed in the areas newly exempted by SEA 389. The Indiana Wetlands Task Force concluded that exemptions for cropland "provided short-term economic benefit to farmers and developers at the cost of long-term flooding issues."<sup>197</sup>

The Indiana Wetlands Task Force, as established by SEA 389, met five times in 2022.<sup>198</sup> Some of the Task Force's membership represented organizations that supported the bill, like the IBA and the Indiana Farm Bureau,<sup>199</sup> and those that opposed the bill, like the White River Alliance.<sup>200</sup> The IBA's representative did not participate in any of the meetings.<sup>201</sup> In general, the Task Force prioritized four broad areas that they felt encapsulated the directives given to them by the IGA: (1) a review of existing wetland permitting processes, (2) strategies to incentivize the avoidance of wetlands during development, (3) strategies to incentivize the preservation and restoration of wetlands, and (4) a review of the in-lieu fee program.<sup>202</sup> The in-lieu fee program is an existing program through IDNR that allows permittees to satisfy mitigation requirements by paying a set amount to a government or non-profit natural resources management entity.<sup>203</sup>

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192. *Id.*

193. *Actions for Senate Bill 389*, *supra* note 168.

194. Casey Smith, *More than 260 acres of Indiana wetlands lost since 2021 law took effect*, *advocates say*, IND. CAP. CHRON. (Sept. 6, 2023, 7:00 AM), <https://indianacapitalchronicle.com/2023/09/06/more-than-260-acres-of-indiana-wetlands-lost-since-2021-law-took-effect-advocates-say/> [<https://perma.cc/2LA8-33FQ>].

195. *Id.*

196. *Id.*

197. IND. WETLANDS TASK FORCE, *supra* note 18, at 4 (2022).

198. *Id.* at 3.

199. *Hearing on S.B. 389*, *supra* note 58 (testimony of those in support of the bill).

200. *The Anti-Wetlands Law, SEA 389*, HOOSIER ENV'T COUNCIL, <https://www.hecweb.org/oppose-sb-389/> [<https://perma.cc/H9PT-DRPB>] (last visited Aug. 23, 2024).

201. IND. WETLANDS TASK FORCE, *supra* note 18, at 3.

202. *Id.*

203. *In-Lieu Fee Mitigation Program*, IDNR, accessed Jan. 23, 2024, <https://www.in.gov/dnr/land-acquisition/stream-and-wetland-mitigation-program/in-lieu-fee-mitigation-program-how-it-works/> [<https://perma.cc/3NPR-8BA9>]

The Task Force made several recommendations and conclusions. They found that flooding frequency and associated costs are increasing due to wetland loss in Indiana.<sup>204</sup> The Task Force concluded that, given the average annual increase in rainfall, Indiana must stop wetland loss within the state and proactively work to restore wetlands, particularly upstream in watersheds.<sup>205</sup> The Task Force also concluded that the in-lieu fee program was popular and beneficial but understaffed and under-resourced.<sup>206</sup> Additionally, they found that Indiana wetlands programs generally were understaffed and under-resourced, with negative consequences for both developers and wetlands.<sup>207</sup> The Task Force concluded by stating:

In summary, despite the diversity of views and perspectives on the task force there is a consensus that isolated wetlands do need prioritization at the state level. The functions and values that wetlands provide are clear and significant, and Indiana is at a point where the cumulative loss of wetlands is having a measurable negative impact on residents, particularly from a water quality and flooding standpoint.<sup>208</sup>

### *C. The Ugly: Doubling Down on Senate Enrolled Act 389*

The Indiana Wetlands Task Force released its report in the fall of 2022.<sup>209</sup> During the following legislative session in 2023, however, lawmakers seemed to ignore the report's conclusions and instead attempted to further reduce state protection for isolated wetlands. Rep. Doug Miller—who sits on the board of the IBA—filed an amendment to a bill wholly unrelated to wetlands.<sup>210</sup> The amendment would have made a small change to the state's Isolated Wetlands Law, changing a series of “or’s” to “and’s.”<sup>211</sup> The impact of this change, however, would have dramatically altered how wetlands are classified.<sup>212</sup> For example, the existing law classifies a Class II wetland as one that supports moderate wildlife *or* hydrological function.<sup>213</sup> Under Rep. Miller's amendment, a Class II wetland would need both characteristics to qualify for protection.<sup>214</sup> The amendment would have made similar changes to the classification of Class

204. IND. WETLANDS TASK FORCE, *supra* note 18, at 3.

205. *Id.*

206. IND. WETLANDS TASK FORCE, *supra* note 18, at 3.

207. *Id.* at 4.

208. *Id.*

209. *See id.* at 5 (“No later than November 1, 2022, the task force shall issue . . .”).

210. Cate Charron, *Legislation Cutting Wetland Protections in Indiana Dies, Democrats Celebrate Victory*, INDYSTAR, Apr. 20, 2023, <https://www.indystar.com/story/news/environment/2023/04/20/indiana-wetlands-lawmakers-drop-environmental-protections-cut/70103158007/> [https://perma.cc/5TWZ-G4MP].

211. S.B. 414, Comm. Amend. 2, 123rd Gen. Assemb., 1st Reg. Sess. (Ind. 2023).

212. Charron, *supra* note 213.

213. IND. CODE § 13-11-2-25.8 (2023).

214. Ind. S.B. 414, Comm. Amend. 2.

I and III wetlands as well, but the amendment was eventually removed from the underlying legislation prior to passage.<sup>215</sup>

During the 2024 IGA, Chairman Alan Morrison of the House Committee on Environmental Affairs introduced House Enrolled Act (HEA) 1383.<sup>216</sup> This measure, which was signed into law on February 12, 2024, narrowed the definition of Class III wetlands while broadening the definition of Class II wetlands.<sup>217</sup> Specifically, a wetland that was formerly classified as a Class III would be classified as a Class II wetland if it is located “in a setting more than minimally disturbed by human activity or development” or “supports less than minimal wildlife or aquatic habitat or hydrologic function.”<sup>218</sup> Permitted activity in a Class II wetland requires less mitigation, and a Class II wetland is ineligible for certain statutory protections as an “outstanding state protected wetland.”<sup>219</sup> HEA 1383 also eliminates IDEM’s rulemaking authority under the Isolated Wetlands Law, which limits the agency’s ability to adapt wetland regulations to extenuating circumstances.<sup>220</sup> Finally, the law includes a preservation component that allows developers to receive mitigation credits for preserving wetlands with a deed or conservation easement.<sup>221</sup> This last provision comports with one of the findings included in the Indiana Wetlands Task Force Report.<sup>222</sup>

During the House Committee on Environmental Affairs’ consideration of HEA 1383, Chairman Morrison and IDEM indicated that the measure resulted from negotiations between the agency, the IBA, and a consortium of environmental consultants.<sup>223</sup> These negotiations took place even though the IBA’s representative neglected to attend any meetings of the Indiana Wetlands Task Force.<sup>224</sup> Indeed, the representative for the IBA indicated that he has a “sore backside” from having to work with IDEM and compromise on certain aspects of HEA 1383.<sup>225</sup> During the Senate Committee on Environmental Affairs’ hearing on the measure, the IBA’s representative acknowledged that HEA 1383 partially resulted from issues they had with the classification criteria established in SEA 389.<sup>226</sup> Specifically, wetlands believed to be Class II wetlands were classified as Class III wetlands under SEA 389, thus imposing a higher regulatory burden for developers on those parcels.<sup>227</sup> IDEM characterized

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215. Charron, *supra* note 213.

216. H.B. 1383, 123rd Gen. Assemb., 2nd Reg. Sess. (Ind. 2024).

217. *Id.*

218. *Id.*

219. *See* IND. CODE § 13-18-22-6 (2023); *see also* IND. CODE § 13-18-22-9 (2023).

220. H.E.A. 1383.

221. *Id.*

222. IND. WETLANDS TASK FORCE, *supra* note 18, at 3.

223. *Hearing on H.B. 1383 Before the House Committee on Environmental Affairs*, 123rd Gen. Assemb. (2024) (statement of Rep. Alan Morrison).

224. IND. WETLANDS TASK FORCE, *supra* note 18, at 3.

225. *Hearing on H.B. 1383 Before the House Committee on Environmental Affairs*, 123rd Gen. Assemb. (2024) (statement of Rick Wajda, IBA).

226. *Hearing on H.B. 1383*, *supra* note 225 (statement of Rick Wajda).

227. *Id.*

HEA 1383 as an “off-ramp” for developers in those situations<sup>228</sup> and, when asked directly, remarkably declined to admit their earlier opposition to SEA 389.<sup>229</sup> The IBA’s representative acknowledged that other states, such as North Carolina, have completely repealed their isolated wetlands laws.<sup>230</sup> However, the IBA was not supporting such a measure at this time,<sup>231</sup> despite supporting exactly such a measure three years prior.<sup>232</sup>

While HEA 1383’s authors and supporters touted IDEM’s support of the measure, the *Indianapolis Star* reported that members of IDEM’s wetlands program staff were opposed to it.<sup>233</sup> One senior wetlands program manager told the paper that HEA 1383 is “not good for wetlands and it’s not good for water quality.”<sup>234</sup> This same employee denied being consulted on this legislation or participating in the aforementioned negotiations with the IBA, saying, “[w]e do the field work, we see these wetlands and know their value. But none of us were really consulted on this bill, this was done without input from our team.”<sup>235</sup>

#### IV. FILLING THE VOID LEFT BY SACKETT AND SENATE ENROLLED ACT 389 IN INDIANA

*“Of course, it is likely enough, my friends,” [Treebeard] said slowly, ‘likely enough that we are going to our doom . . . . But if we stayed at home and did nothing, doom would find us anyway, sooner or later. That thought has long been growing in our hearts; and that is why we are marching now.’”*<sup>236</sup>

Since the late 1970s, the United States has had a policy interest in protecting wetlands. Congress has never passed legislation that would limit the authority of USACE or EPA to regulate wetlands. With the exceptions of Presidents Reagan and Trump, every Presidential Administration since the passage of the CWA—Republican and Democrat—has either called for no net loss of wetlands or a net increase of wetland acreage. The only unanimous Supreme Court decision concerning USACE’s authority over wetlands was *Riverside*, which upheld USACE’s jurisdiction over adjacent wetlands.<sup>237</sup> All other Court decisions that limited the scope of the CWA and USACE’s authority were 5-4

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228. *Id.* (statement of Drake Abramson, IDEM).

229. *Hearing on H.B. 1383, supra* note 226 (statement of Drake Abramson, IDEM).

230. *Hearing on H.B. 1383, supra* note 226 (statement of Rick Wajda, IBA).

231. *Hearing on H.B. 1383, supra* note 215 (statement of Rick Wajda, IBA).

232. *See Hearing on S.B. 389, supra* note 58.

233. Sarah Bowman, ‘*IDEM Saying it’s a Good Bill is a Lie’: State Water Regulators Denounce Wetlands Bill*, INDYSTAR, Jan. 30, 2024, <https://www.indystar.com/story/news/environment/2024/01/30/state-water-regulators-speak-against-wetlands-bill-pushed-by-builders/72394209007/> [<https://perma.cc/MVW5-YFV3>].

234. *Id.*

235. *Id.*

236. J.R.R. TOLKIEN, *THE TWO TOWERS* 90 (Houghton Mifflin Co. hardcover ed. 1988).

237. *See U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).



or 4-1-4 decisions.<sup>238</sup> Further, a poll conducted by the U.S. Geological Survey in 2017 found that 59% of Americans visited a wetland in the past year to recreate, and nearly 80% were concerned with the impacts on water quality should wetlands be degraded or destroyed.<sup>239</sup>

Indiana has also demonstrated a policy interest in protecting isolated wetlands. In the years following the *SWANCC* decision, Indiana recognized the value of its isolated wetlands and was part of a minority of states that passed an isolated wetlands law to protect them.<sup>240</sup> This law was passed in a bipartisan fashion, and attempts to modify or repeal this law have been met with bipartisan opposition.<sup>241</sup> Further, a poll commissioned by the Audubon Society in 2022 found that 94% of voters in Indiana believed that wetland protections should either be maintained or strengthened.<sup>242</sup>

After the Court handed down its decision in *Sackett*, both regulators and environmentalists in Wisconsin collectively shrugged.<sup>243</sup> The reason was simple: Wisconsin's wetland laws are robust enough to protect any wetland that may lose federal jurisdiction.<sup>244</sup> That is an enviable position, and it is one Indiana should strive for. The IGA and the state's Executive Branch should acknowledge the benefits and policy interests in protecting the state's isolated wetlands. To do this, it should pass legislation and change how the state's isolated wetlands program works. These changes fall into two categories: (1) running the state's isolated program better for the benefit of both landowners and wetlands and (2) investments by the state. If implemented, these changes would make Indiana a model for wetland regulation instead of a model of dramatic wetland decline.

#### A. A Better Program

The state programs in place to protect Indiana's isolated wetlands must be changed to better engage with landowners and protect wetland acreage. These changes will likely require the IGA to pass legislation that alters the parameters

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238. See *Rapanos v. U.S.*, 547 U.S. 715 (2006); *Sackett v. EPA*, 598 U.S. 651 (2023).

239. Emily Wilkins and Holly Miller, *Public Views of Wetlands and Waterfowl Conservation in the United States—Results of a Survey to Inform the 2018 Update of the North American Waterfowl Management Plan*, U.S. GEOLOGICAL SURV. <https://pubs.usgs.gov/of/2017/1148/ofr20171148.pdf> [<https://perma.cc/L3G8-RGA3>] (last visited Nov. 23, 2023).

240. Gard, *supra* note 23.

241. *Id.*

242. Timberly Ferree, *Indiana Poll Shows Hoosiers Support Protection of Wetlands Across Party Lines*, IND. ENV'T REP. May 25, 2022, <https://www.indianaenvironmentalreporter.org/posts/indiana-poll-shows-hoosiers-support-protection-of-wetlands-across-party-lines> [<https://perma.cc/8J8C-AF62>].

243. Henry Redman, *State Law Keeps Wisconsin's Wetlands Protected Despite U.S. Supreme Court Decision*, WIS. EXAM'R. June 5, 2023, <https://wisconsinexaminer.com/2023/06/05/state-law-keeps-wisconsins-wetlands-protected-despite-u-s-supreme-court-decision/> [<https://perma.cc/3HT8-XPZ2>].

244. *Id.*

of the isolated wetlands program, provides outreach and educational resources to landowners, and makes the program easier to navigate. With appropriate changes, landowners will be less likely to violate wetland regulations because proper analysis and permitting will take place *before* wetland acreage is destroyed. Consequently, landowners will avoid the risk of enforcement actions that often carry civil penalties and require costly mitigation.

Indiana's isolated wetlands program should be more proactive in preventing the degradation of wetlands. The state's isolated program, as run by IDEM, currently relies on USACE, self-reporting, and whistleblowers to determine the location of isolated wetlands in Indiana.<sup>245</sup> By the time IDEM and USACE get involved, the wetland in question is usually already damaged or destroyed. Thus, in many instances, the program is reactively regulating isolated wetlands rather than proactively preventing wetland degradation. In these scenarios, landowners who filled in or damaged a wetland without a permit are required to mitigate. However, the wetlands that result from mitigation are usually lower quality and are not guaranteed to be sustained.<sup>246</sup> Further, it is generally more economical to prevent wetland degradation rather than mitigate, litigate, or appeal an agency determination. Thus, preventing wetland loss is more economically advantageous to landowners than reacting to wetland loss.

Indiana should focus on educating landowners and empowering agents to identify and prevent wetland destruction. For example, in Wisconsin, the state has tasked Conservation Wardens with ensuring compliance with the state's wetlands laws.<sup>247</sup> These wardens may receive whistleblower complaints, but they are also trained to look out for wetland violations while working in the field.<sup>248</sup> IDEM and IDNR should work collaboratively so that conservation officers are trained to identify wetlands within their jurisdiction and recognize violative wetland activity. Further, given that these officers often have relationships with the communities they serve, they would be well-suited to educate local landowners about the presence and benefits of wetlands. In that same vein, Indiana should better engage with local municipalities to identify local wetlands and account for their benefits. As the Wetlands Task Force rightly recommended, Indiana should provide training and assistance to local communities so that they are able to identify local wetlands and direct mitigation activities to best suit the community.<sup>249</sup> For example, a community with an impaired waterway could work with IDEM to figure out where pollutants may be entering the waterway and plan mitigation efforts accordingly. These levels of outreach would probably require additional appropriations and direction from the IGA to maintain consistency and sustainability.

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245. See generally *Hearing on S.B. 389*, *supra* note 58 (statement of Brian Wolff, IDEM).

246. *Id.*

247. John Schreiber and Emily Pedersen, *Wetland Laws: How They Work and How Wardens Enforce Them*, WIS. WATERFOWL ASSOC. June 2020, <https://www.wisducks.org/wetland-laws-how-they-work-and-how-wardens-enforce-them/> [<https://perma.cc/KCR8-FU6V>].

248. *Id.*

249. IND. WETLANDS TASK FORCE, *supra* note 18, at 14.

Indiana should also eliminate its unique class system for regulating wetlands and the list of exemptions. The class system fails to take into consideration that wetlands often cannot fit into neat categories. Reasonable minds, and indeed judges, could disagree on the classification of wetlands based on the criteria put forth in the statute. Further, ranking wetlands in this way implies that some wetlands are arbitrarily more important than others. Yet there may be instances where Class II wetlands may be critically important to a community for flood control, while Class III may have fewer flood mitigation benefits but offer habitat to rare or endangered species. Therefore, Indiana should evaluate each wetland on a case-by-case basis. In addition to the species present and the level of human disturbance, consideration should also be given to the wetland's location in a watershed relative to impaired waterways, aquifers, and municipalities so that a wetland's role in flood mitigation and water filtration is reflected in how it is regulated. This will certainly require the IGA to change Indiana's isolated wetlands law and will likely require additional staffing, resulting in more appropriations.

The Wetlands Task Force recommended that IDEM develop better online tools for entities seeking a permit and the public,<sup>250</sup> and IDEM should adhere to this recommendation. As the Task Force pointed out, IDEM currently uses paper applications for permitting isolated wetland activities.<sup>251</sup> Switching to an online system would benefit the agency because applications could be more easily sorted and evaluated. It would benefit applicants because an online portal would save them time and postage and provide a more user-friendly experience. Finally, the online portal could, and should, allow the public to access information on local projects. This way, proposed wetland projects could receive a degree of public oversight and input. Making this change would require some investment by the agency, but such an investment would probably not require an additional appropriation by the IGA, given that the Indiana Office of Technology offers such services.<sup>252</sup>

Finally, given the current tumultuous nature of wetland regulation at the federal level, IDEM should also adopt the Wetlands Task Force recommendation of having annual meetings to discuss the wetlands permitting process, update landowners on any changes at the state and federal levels, and hear any concerns or recommendations.<sup>253</sup> These meetings would benefit the state because relevant agencies could receive feedback on their permitting and outreach efforts. At the same time, the meetings would serve the public and interested landowners by updating them on relevant changes and allowing entities to voice support or concerns. Such dialogue would inform future administrative rulemakings or legislation to improve the overall program. These

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250. *Id.* at 15.

251. *Id.*

252. See *IOT Service Catalog*, IND. OFF. TECH., [https://www.in.gov/iot/files/IOT-Services-Catalog\\_final-19Aug2024.pdf](https://www.in.gov/iot/files/IOT-Services-Catalog_final-19Aug2024.pdf) [<https://perma.cc/M2MB-Y2JZ>] (last visited Aug. 24, 2024).

253. IND. WETLANDS TASK FORCE, *supra* note 18, at 15.

meetings would have a negligible cost and would not require any additional appropriations from the IGA.

*B. Investments by the State*

There are several areas where Indiana should make investments to prevent wetland loss and encourage wetland preservation. Such investments should include (1) an updated wetlands inventory and map, (2) tax abatements and incentives to landowners and municipalities in exchange for preserving wetlands, (3) land and easement acquisition, and (4) additional staffing for the isolated wetlands programs. Taken together, these investments will push Indiana towards proactively protecting wetlands instead of the current “break-it-you-buy-it” reactive method of regulating wetlands. Further, some of these investments will assist the state Isolated Wetlands Program in becoming more responsive, user-friendly, and effective.

Indiana should create a holistic statewide wetlands inventory and a corresponding user-friendly map. The state has never conducted a wetlands inventory. This has led landowners to rely on the National Wetlands Inventory (NWI), which is problematic for two reasons: (1) the data used by the NWI is old, and (2) the data does not conclusively indicate the presence of a wetland.<sup>254</sup> The NWI was created using satellite data to determine the likely presence of wetlands, whereas actual wetland delineation is based on field observations of soil, water, and plants.<sup>255</sup> The NWI has been relied upon to the detriment of landowners, as indicated anecdotally by testimonials provided during consideration of SEA 389.<sup>256</sup> The NWI is available to navigate on IDEM’s website, which could mislead landowners into believing that the NWI is authoritative on where wetlands are in the state.<sup>257</sup> The agency has released a factsheet that characterizes the NWI as “a great starting point” but “not comprehensive.”<sup>258</sup> The Indiana Wetlands Task Force recommended that the state comprehensively update Indiana’s statewide wetland map because it “would advise and inform both development and resource conservation decisions . . . .”<sup>259</sup> The Task Force only recommended a one-time investment by the state.<sup>260</sup> In contrast, Wisconsin updates its wetlands inventory every ten years and provides an online map tool for property owners to utilize in

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254. *Wetlands Data Limitations, Exclusions and Precautions*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/node/264582> [<https://perma.cc/K7FZ-HXEU>] (last visited Nov. 23, 2023).

255. *See generally* Delineation Manual, *supra* note 31.

256. *See Hearing on S.B. 389*, *supra* note 58 (statements of those in support of the bill).

257. *Mapping*, IND. DEP’T ENV’T MGMT., <https://www.in.gov/idem/wetlands/information-about/mapping/> [<https://perma.cc/3KH4-T7J3>] (last visited Nov. 23, 2023).

258. *Understanding the National Wetland Inventory*, IND. DEP’T ENV’T MGMT., [https://www.in.gov/idem/files/factsheet\\_owq\\_stormwater\\_understanding\\_nwi.pdf](https://www.in.gov/idem/files/factsheet_owq_stormwater_understanding_nwi.pdf) [<https://perma.cc/JX4Z-BVRV>] (last visited Nov. 23, 2023).

259. IND. WETLANDS TASK FORCE, *supra* note 18, at 13.

260. *Id.*

determining if they should seek a wetland permit or exemption.<sup>261</sup> While either approach towards a new map would benefit Indiana's wetlands and landowners more than the NWI, a regularly updated map is a better approach because it would sustain future wetland conservation.

Indiana should also offer tax abatements or incentives to encourage landowners to preserve wetlands. These types of incentives to landowners would provide a monetary benefit to wetland preservation in addition to the natural benefits. Further, a successful incentive could encourage voluntary wetland restoration. In 2022, legislation was introduced in the IGA by Rep. Pat Boy to allow for a property tax deduction of 100% of the assessed value of a delineated wetland on a real property.<sup>262</sup> The fiscal note accompanying the legislation found that landowners with wetlands on their property could potentially save a combined \$11 million annually from this deduction.<sup>263</sup> Regrettably, this legislation failed to become law. The Indiana Wetlands Task Force also recommended providing tax abatements and incentives to developers but went further to include a recommendation that wetland protections continue to be enforced through protective covenants passed on through respective homeowners' associations.<sup>264</sup> As the Task Force pointed out, the IDNR currently runs the Classified Forest Program, which has covenant-like characteristics that require landowners to continue land management requirements even if the land is transferred.<sup>265</sup> Generally, this program allows certain forested areas and wetlands to be assessed at a set price of \$13.29 starting in 2017 and subsequently adjusted by the Consumer Price Index for All Urban Consumers.<sup>266</sup> In exchange for this benefit, the IDNR puts in place a management program for the parcel of land.<sup>267</sup> Unfortunately, this program is only available to parcels of land that are ten acres or more.<sup>268</sup> Per the Task Force's recommendation, the program should be expanded to include smaller wetlands.<sup>269</sup> While any tax abatement or incentive to preserve wetlands is positive, post-*Sackett*, such incentives should include wetlands of all sizes and be robust enough to encourage wetland preservation and restoration.

Indiana should also invest in the outright purchase of wetland property and easements. The IDNR currently operates the President Benjamin Harrison

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261. Christopher L. Noll & Calvin Lawrence, *WDNR Wisconsin Wetland Inventory (WWI) Map Production SOP*, WIS. DEP'T NAT. RES. May 24, 2021, [https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/WWI\\_SOP.pdf](https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/WWI_SOP.pdf) [<https://perma.cc/L5Y5-A3HA>].

262. H.B. 1334, 122nd Gen. Assemb., 2nd Reg. Sess. (Ind. 2022).

263. LEGIS. SERV. AGENCY, FISCAL IMPACT STATEMENT H.B. 1334, H. 122-6960, 2nd Reg. Sess., at 2 (2022).

264. IND. WETLANDS TASK FORCE, *supra* note 18, at 12.

265. *Id.* at 13.

266. IND. CODE § 6-1.1-6-14 (2023).

267. *The Classified Forest and Wildlands Program*, IND. DEP'T NAT. RES., <https://www.in.gov/dnr/forestry/files/fo-ClassifiedForestBrochure.pdf> [<https://perma.cc/BJ8K-HF8S>] (last visited Nov. 23, 2023).

268. *Id.*

269. IND. WETLANDS TASK FORCE, *supra* note 18, at 11.

Conservation Trust Fund, which provides funding to “protect land that represents outstanding natural resources and habitats, or have recreational, historical or archaeological significance.”<sup>270</sup> The trust fund received a biennial appropriation of \$10 million in 2023.<sup>271</sup> The trust fund also receives funding from private donations and environmental license plate sales.<sup>272</sup> To further protect wetlands post-*Sackett*, the state should increase appropriations to this fund and provide a sub-fund to be used specifically for wetland acquisition. This would guarantee that state funding is used to acquire wetlands and prevent competition between wetland conservation projects and other worthwhile land conservation acquisitions. The Indiana Wetlands Task Force reported on programs run through the U.S. Fish and Wildlife Service that provide easement payments along with technical assistance to landowners seeking to voluntarily restore wetlands. In one instance, these programs were leveraged along with private and non-profit conservation organization investments to restore 6,000 acres of wetlands in Southern Indiana.<sup>273</sup> The Task Force stated that the project resulted in thousands of hunters and birdwatchers traveling to the area annually.<sup>274</sup> Projects like these should be a model for future investments by the state.

To accomplish any of these goals, Indiana needs to invest in additional personnel. The Wetlands Task Force found multiple staffing issues at both IDNR and IDEM.<sup>275</sup> The Task Force found that IDNR specifically does not have enough staff to meet the needs of the in-lieu compensatory mitigation program.<sup>276</sup> The program has sold \$60 million in mitigation credits and only has two projects in development.<sup>277</sup> Further, as a result of staffing shortages and expertise, IDNR was required to obligate \$8 million in consultant contracts to assist staff in “finding potential sites, planning, designing, and permitting projects through the project review and approval process.”<sup>278</sup> As the Task Force pointed out, due to these staffing shortages, wetlands, and streams are currently being filled without timely replacements to the detriment of local watersheds.<sup>279</sup> In general, the Task Force found that both IDEM and IDNR are significantly understaffed, and such staffing shortages result in a lower-quality program and increased costs.<sup>280</sup> While the state recently underwent a compensation study that resulted in an increase in salaries for state employees, no new positions were

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270. *About the President Benjamin Harrison Conservation Trust Fund*, IND. DEP’T NAT. RES., <https://www.in.gov/dnr/land-acquisition/about-the-trust/> [https://perma.cc/MTP6-9T66] (last visited Nov. 23, 2023).

271. H.B. 1001, 123rd Gen. Assemb., 1st Reg. Session (Ind. 2023).

272. IND. DEP’T NAT. RES., *supra* note 259.

273. IND. WETLANDS TASK FORCE, *supra* note 18, at 14.

274. *Id.*

275. *Id.* at 10.

276. *Id.* at 3.

277. *Id.*

278. *Id.*

279. *Id.* at 18-21.

280. *Id.* at 4.

created.<sup>281</sup> The state must evaluate what is required of IDEM and IDNR to successfully meet the demand of their respective wetland programs and increase staffing levels accordingly.

Finally, Indiana should invest in incentives for municipalities to encourage altering zoning and housing density requirements to prevent homes from being built on wetlands. Increasing housing density prevents housing developments from encroaching on wetland acreage by allowing more homes to be built in a smaller area. As the Wetlands Task Force pointed out, providing tax incentives to encourage higher-density housing development is a non-regulatory approach that may prevent wetland destruction.<sup>282</sup> The Task Force found wide support from organizations that supported SEA 389 for increased housing density, including the IBA.<sup>283</sup> Changes to housing density policies would also benefit consumers because, as the IBA pointed out, it allows for more cost-effective housing as well.<sup>284</sup> Given that increasing housing density is supported by groups who have historically opposed the state's Isolated Wetlands Law and that this policy could benefit consumers, it should be an easier policy to implement by IGA.

C. *“But That’s My Wetland! I’ll Do What I Want with It!”*

Criticism of wetland regulations generally falls into three broad categories. The first and most prominent is focused on property rights. Put simply, this argument says that if a wetland is privately owned, the owner should be able to do whatever they want to it, and any restrictions on that property amount to a government taking.<sup>285</sup> Second, opponents of wetland regulation argue that wetland regulations are complex, cumbersome, and unpredictable. This argument will often cite examples of small family farms or landowners who unknowingly waded into a complex regulatory nightmare involving a wetland on their property.<sup>286</sup> And third, wetland regulation is expensive. This argument focuses not only on the cost of permits, delineation, and mitigation but also on how these costs get transferred to consumers.<sup>287</sup> While all these arguments have elements that should be considered when developing wetland regulation, they ultimately fail at accounting for the long-term implications of wetland destruction as compared to the short-term costs imposed by wetland regulation.

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281. *October 2022 Compensation Study Final Report*, IND. STATE PERSONNEL DEP'T. (accessed Nov. 23, 2023 at 3:32 PM), <https://www.in.gov/spd/files/comp-study-report.pdf> [<https://perma.cc/5ZL2-ZQC6>].

282. IND. WETLANDS TASK FORCE, *supra* note 18, at 8.

283. *Id.* at 7-9.

284. *Id.*

285. CRAIG N. JOHNSTON ET. AL., *LEGAL PROTECTION OF THE ENVIRONMENT* 55 (4th ed. 2018).

286. *See generally* *Hearing on S.B. 389*, *supra* note 58 (testimony of those in support of the bill); *see also* Brief of Americans for Prosperity Foundation as Amici Curiae in Support of Petitioners at 23-25, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454).

287. *Id.*

It should also be noted that criticism of wetland regulation is never focused on the wetlands themselves. Since the 1977 CWA Amendments, opponents to wetland regulation almost never argue with the scientific findings regarding the benefits of wetlands or the negative consequences that result from their destruction. Indeed, during consideration of the first iteration of SEA 389, many proponents of the legislation indicated their general support and acknowledgment of wetland benefits.<sup>288</sup>

The property rights argument has found sympathetic ears in many public officials. Indiana's Attorney General, Todd Rokita, said that the ruling in *Sackett* was good news for property owners because it would protect "jobs, property, and freedom."<sup>289</sup> Indeed, the Court seemed sympathetic to this argument in *Sackett* when they held that Congress must enact "exceedingly clear language if it wishes to significantly alter . . . the power of the Government over private property."<sup>290</sup> However, the idea that wetland regulations violate property rights and are tantamount to a government taking fails to take into consideration (1) a general principle underlying nuisance law that restricts the use of property in ways that harm others, and (2) wetland regulations do not entirely inhibit the use of property or rob property of its value.

There is a Latin phrase that is often found in casebooks describing nuisance law as it relates to property: *sic utere tuo ut alienum non laedas*. This translates to "the rightful use of one's own property cannot be a legal wrong to another."<sup>291</sup> The Court described the concept in 1876:

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain . . . This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.<sup>292</sup>

This principle is applicable to landowners with wetlands because damaging or destroying a wetland causes injury to others. To be sure, filling in or draining a small, isolated wetland may not have a direct, noticeable impact on another. But in the aggregate, wetland destruction causes flooding, as well as increased pollution in waterways.<sup>293</sup>

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288. *Hearing on S.B. 389, supra* note 58 (testimony of those in support of the bill) (e.g., the IBA testified that they support the protection of high-quality wetlands and appreciate the functions they provide Indiana).

289. Smith, *supra* note 28.

290. *Sackett v. EPA*, 598 U.S. 651, 679 (2023) (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Assoc.*, 140 S. Ct. 1837, 1849-1850 (2020)).

291. G.A.I., *Sic Utere Tuo ut Alienum Non Laedas*, 5 MICH. L. REV. 673, 673-75 (1907).

292. *Munn v. Illinois*, 94 U.S. 113, 124 (1876) (citation omitted).

293. *See* text accompanying *supra* notes 36-52.



Those making the property rights argument also tend to invoke the Takings Clause of the Fifth Amendment to the U.S. Constitution.<sup>294</sup> Generally, they argue that when the government imposes a regulation that diminishes a parcel's economic value, the property owner is owed compensation under the takings clause.<sup>295</sup> However, the U.S. Supreme Court has weighed in on the Takings Clause and similar regulations. In *Lucas v. South Carolina Coastal Council*, the Court held that if State regulations rob a parcel of “all economically beneficial uses in the name of the common good,” then the owner “has suffered a taking.”<sup>296</sup> But the Court also held that “no compensation is owed” if a State’s regulation is consistent with “restrictions that background principles of the State’s law of property and nuisance already place upon ownership.”<sup>297</sup> The Court gave an example of a person who was “denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land” as someone who would *not* be entitled to compensation.<sup>298</sup> Furthermore, while wetland regulations may impede certain activities, they certainly do not rob a parcel of *all* economic value. For example, the presence of a wetland may prevent flooding on that same property or provide the owner with recreational opportunities. Also, wetland regulations are not an outright abolition on all activity on a parcel of property, rather they generally require permitting and mitigation if a wetland is adversely impacted. Indeed, USACE approves roughly 95% of wetland permits, and “many [wetland] activities are either not regulated at all, explicitly exempted from regulation, or authorized under general permits.”<sup>299</sup> Therefore, under the Court’s analysis in *Lucas*, wetland regulations generally do not require compensation under the Takings Clause.

The argument that wetland regulation is too complex and unpredictable fails to acknowledge the complexity of wetlands and nature in general. The astrophysicist Neil deGrasse Tyson once said, “[t]he Universe is under no obligation to make sense to you.”<sup>300</sup> In that same vein, nature is under no obligation to be easily regulated. Wetlands are a vital component of a vast web of systems that impact water quality. This complexity is one of the reasons why wetlands should be evaluated on a case-by-case basis rather than attempting to place them neatly in a class system. It is also a reason why courts and Congress should give agency experts deference when making decisions on how to regulate wetlands to meet the goals of the CWA and other water pollution legislation. A

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294. U.S. CONST. amend. V.

295. *E.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 303 (2002).

296. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis original).

297. *Id.* at 1029.

298. *Id.*

299. *What About Taking of Private Property relating to Wetland Regulations?*, EPA (Jan. 29, 2024), <https://www.epa.gov/cwa-404/what-about-taking-private-property-relating-wetland-regulations> [<https://perma.cc/A3QC-HFHY>].

300. @neiltyson, TWITTER (Apr. 3, 2021, 12:42 PM), <https://twitter.com/neiltyson/status/1378387351806820357?lang=en> [<https://perma.cc/BX8Q-RB7W>].

wetland in northwest Indiana along Lake Michigan may have completely different functions and characteristics than a wooded wetland in southern Indiana. Further, the wetland classification methods and delineation manuals have largely remained consistent since 1987.<sup>301</sup> While these tools may seem complex to a layman, private consultants and agency personnel should be well-adept at interpreting these tools for the average property owner. The Wetlands Task Force recommended that IDEM evaluate a certification program for wetlands professionals.<sup>302</sup> Such a certification program could alleviate concerns of inconsistency by ensuring that wetland delineators, and their projects, are held to the same standards. Therefore, if Indiana makes proper investments and changes to the Isolated Wetlands program to enhance its accessibility, the complexity of wetland regulations need not be a concern for the average landowner.

Regarding cost, as the Wetlands Task Force pointed out, it is in the state's overall economic interest to preserve isolated wetlands.<sup>303</sup> The cost to the state by not making changes to the program and the isolated wetlands law would be greater than the costs imposed by changing the program. For example, in the analysis of the impact of SEA 389 found that 260 acres of wetlands had been destroyed in Indiana in the two years since the law's passage.<sup>304</sup> Each acre of wetlands provides an estimated \$2,270 in water storage and \$1,055 in erosion prevention.<sup>305</sup> Therefore, Indiana has lost nearly \$900,000 in just water storage and erosion prevention in only two years due to SEA 389. This does not include any flooding costs incurred by private parties, lost water filtration costs, or the impact on wildlife. Nor does it include wetlands that were filled and went unreported due to exemptions in SEA 389. In contrast, the line items for wetlands programs in Wisconsin's 2023–2025 biennial budget totaled \$1,347,300.<sup>306</sup> Indiana's costs would probably be much less because Indiana has around 800,000 acres of wetlands<sup>307</sup> whereas Wisconsin has over 5 million acres of wetlands.<sup>308</sup> Wisconsin does not have a class system for wetlands; they evaluate each wetland project on a case-by-case basis with an assessment of the “net positive or net negative” environmental impact of each project, and the state created a wetlands study council that has met regularly to discuss wetlands issues.<sup>309</sup> The Indiana Wetlands Task Force found that the costs incurred due to

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301. *See generally* Delineation Manual, *supra* note 31.

302. IND. WETLANDS TASK FORCE, *supra* note 18, at 15.

303. *Id.* at 8.

304. Smith, *supra* note 197.

305. Ketzenberger, *supra* note 39.

306. 2023 WIS. SESS. LAWS. 19.

307. IND. WETLANDS TASK FORCE, *supra* note 18, at 22.

308. *Wetland Ecology and Science*, WIS. DEP'T NAT. RES, <https://dnr.wisconsin.gov/topic/wetlands/ecology> [<https://perma.cc/PF4P-TQ9W>] (last visited Aug. 25, 2024).

309. *Wisconsin Wetland Study Council*, WIS. DEP'T NAT. RES, <https://dnr.wisconsin.gov/topic/Wetlands/studyCouncil.html> [<https://perma.cc/986G-SWXC>] (last visited Jan. 23, 2024).

wetland degradation are “significant.”<sup>310</sup> A study found that 3% to 7% of wetland cover is necessary for adequate flood control, and possibly 15% is necessary to maintain adequate water quality treatment.<sup>311</sup> Without such wetland cover, flood control infrastructure, and water purification costs are thrust upon the public.<sup>312</sup> As the Task Force acknowledged, a small wetland may seem insignificant and particularly burdensome when considering the economic benefits of any given development.<sup>313</sup> But in the aggregate, and considering the magnitude of wetlands already lost in the state and the associated stormwater management and water quality costs, it is in the state’s economic interest to preserve its remaining wetlands. Finally, Indiana had \$2.9 billion in reserves and reported a \$3.6 million surplus in fiscal year 2023.<sup>314</sup> Indiana can afford to protect its wetlands.

#### CONCLUSION

If Indiana had not drained the Grand Kankakee Marsh, it would rival the Florida Everglades in its scale and diversity. The Florida Everglades has an annual cumulative economic benefit of over \$150 million and supports over 1,500 jobs.<sup>315</sup> Instead of a natural wonder and economic engine, the area of Indiana that once housed the marsh now regularly floods, and recreation on the Kankakee River cannot be undertaken without exposure to serious contaminants and diseases. Arguably, the marsh’s destruction played a role in the extinction of at least one species that resided there: the Passenger Pigeon.<sup>316</sup>

While the Grand Kankakee Marsh can never be restored, Indiana should stop the madness of destroying existing wetlands for short-term economic gain and make necessary changes to its own laws to prepare for the influx of wetlands that will soon rely on the state to protect them post-*Sackett*. This Note argued that the IGA should repeal SEA 389 and pass laws that (1) create a better, proactive, and more user-friendly isolated wetlands program and (2) invest in certain initiatives to protect and restore isolated wetlands. If Indiana moves forward with these changes, it could become a model for wetland regulation and preservation in a post-*Sackett* country.

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310. IND. WETLANDS TASK FORCE, *supra* note 18, at 8.

311. *Id.* at 9.

312. *Id.*

313. *Id.* at 11.

314. *General Fund Surplus Statement*, IND. STATE BUDGET AGENCY (July 13, 2023), <https://www.in.gov/sba/files/FY23-Close-Out-Surplus-Statement.pdf> [<https://perma.cc/6X8P-JKTX>].

315. *Tourism to Everglades National Park creates \$104.5 Million in Economic Benefits*, NAT’L PARK SERV. (Apr. 23, 2015), <https://www.nps.gov/ever/learn/news/tourism-to-everglades-national-park-creates-104-million-in-economic-benefits.htm> [<https://perma.cc/NG7V-PFVW>].

316. *Everglades of the North*, *supra* note 1.