

**Hoosier Environmental Council Policy (“HEC”) Bill Analysis**  
**“Environmental Nuisance Actions” (HB 1380 / SB 411)**  
**2021 Legislative Session**

**Introduction:**

House Bill 1380 authored by Representative Alan Morrison (R-42), and Senate Bill 411 authored by Senators Scott Baldwin (R-20) and Jon Ford (R-38) are companion bills entitled “*Environmental Nuisance Actions*” (collectively, the “Bill”) that would:

- (1) prohibit *any cause of action* for damages and injury<sup>1</sup> against a permitted agricultural, forestry or industrial operation that is compliant with environmental regulations (hereinafter “a permitted industry”) *except* a nuisance action under Indiana’s Nuisance Statute at Ind. Code § 32-30-6, *et. seq.*;
- (2) elevate the plaintiff’s burden of proof in a nuisance action to clear and convincing evidence;<sup>2</sup> and
- (3) prohibit any recovery of stigma damages in a nuisance action.

Of particular concern is that Indiana’s Nuisance Statute also contains the state’s Right to Farm Act (“RTFA”), which bars nuisance actions against agricultural and industrial operations (Ind. Code § 32-30-6-9) and the Forestry/Logging Rights Act (“FLRA”), which bars nuisance actions against forestry operations (Ind. Code § 32-30-6-11). In other words, the Bill, in combination with the RTFA and FLRA, would eliminate all available court remedies for Hoosiers whose health, quality of life, and/or property rights are adversely impacted by just about any type of polluting and extracting industry such as a landfill, waste processing facility, factory farm, sand/gravel mine, logging operation, refinery, smelter, or other heavy industry that is permitted and compliant with environmental regulations. As presented below, this is problematic in several respects.

**1. The Bill Would Unconstitutionally Strip Citizens of Their Property Rights**

The causes of action (i.e., court remedies) that the Bill would eliminate include those that vindicate constitutionally protected, private property rights. Specifically, a nuisance action protects the property right to reasonably use and enjoy one’s land without interference. *See* Ind. Code § 32-30-6-6 (defining nuisance as “whatever is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property”); *see also* Ind. Code § 32-30-6-7 (allowing “[a]n action to abate or enjoin a nuisance . . . by a person whose property is injuriously affected or personal enjoyment is lessened by the nuisance”); *see also Indiana Motorcycle Ass’n v. Hudson*, 399 N.E.2d 775, 778 (Ind. Ct. App. 1980). In turn, Indiana’s trespass law provides a cause of action for violations of the property right to exclusively possess one’s land. *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999). Both nuisance and trespass claims are typically brought at the same time

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<sup>1</sup> Such private causes of action for damages and injury include long-established common law actions for negligence, trespass, nuisance, intentional infliction of emotional distress, gross negligence, and others.

<sup>2</sup> The burden of proof ordinarily applicable to civil actions is the “preponderance of the evidence” standard.

when the interference is caused by an industry’s discharge of noxious substances. *See e.g., Lever Bros. Co. v. Langdoc*, 655 N.E.2d 577, 583 (Ind. Ct. App. 1995).

It is an “elementary maxim” that “there is no right without a remedy.” *McIntire v. Franklin Twp. Cmty. Sch. Corp.*, 15 N.E.3d 131, 137 (Ind. Ct. App. 2014). In other words, a right without a remedy is nothing but an illusory right. *Id.*; *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, *if the laws furnish no remedy for the violation of a vested legal right.*”) (emphasis added). Yet, that is precisely what the Bill would do by barring the very court actions that would allow neighbors impacted by permitted industries to enforce their private property rights in court. *George v. State*, 211 Ind. 429, 434, 6 N.E.2d 336, 338 (1937) (explaining that the courts “must have some power to grant relief” for the violation of a constitutionally protected right, and “some remedy by which [the relief] can be secured”). Thus, the Bill is unconstitutional for this reason alone.<sup>3</sup>

## **2. Environmental Regulations Are Not Intended to Protect Private Property Rights**

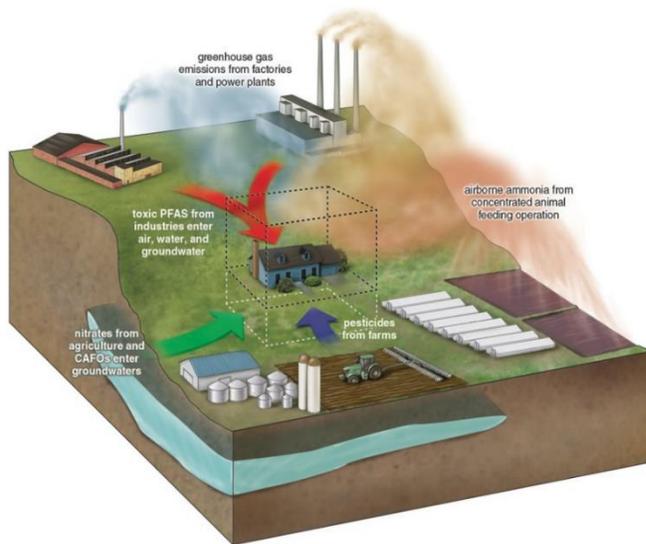
Environmental regulations are *prospective* in nature and aimed at protecting *public* health and the environment. On the other hand, the causes of action that the Bill would eliminate—most notably actions for negligence, trespass, and nuisance—are *retrospective* and intended to provide a remedy for personal injury, property damage, and the infringement of *private* property rights. As *Figure 1* below demonstrates, there are many instances where environmental regulations do not go far enough to protect public health and the environment from an industry’s otherwise “authorized discharges,”<sup>4</sup> much less prevent those discharges from invading the property rights of citizens.

Indeed, Indiana courts have long recognized that a lawful business can still be held liable for invading the private rights of neighbors. *See e.g., Bonewitz v. Parker*, 912 N.E.2d 378, 382 (Ind. App. 2009) (finding a legally permitted and operated mycelium furnace liable in nuisance for creating noxious conditions for its neighbor). Put another way, simply because an industry has a permit and complies with environmental regulation does not mean that neighbors are being protected from harm by the industry’s pollution discharges. Thus, eliminating all private causes of action that would remedy such harm would leave impacted Hoosiers without any protection or recourse.

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<sup>3</sup> The Bill has other constitutional infirmities under the Takings Clauses of both the U.S. and Indiana Constitutions, which prohibit the government from taking private property without just compensation. Authorizing private industries to impose unlawful nuisances and trespasses on Indiana citizens with impunity would be an unconstitutional taking. *See e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Richards v. Washington Terminal*, 233 U.S. 546 (1914) (“while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.”)

<sup>4</sup> An “authorized discharge” under the Bill is defined as “a discharge made in material compliance with a permit issued by” the US EPA or IDEM. *See Bill* at p. 2, lines 20-23. In turn, a “discharge” is defined as the “emission, dispersal, escape or release, disposition, or migration of a substance upon discharge, emission, injunction, disposition or escape or release of any substance to air, land, or water (including subsurface land or water)” by an agricultural, industrial, or forestry operation. *Bill* at p. 2, lines 27-37.



*Figure 1:* Property rights are three-dimensional. They include airspace, surface, and subsurface rights that are conveyed with the property deed and title of ownership including the right of use and enjoyment (an infringement of which is a nuisance), the right of exclusive possession (the invasion of which is a trespass), and the right of transfer (the violation of which is an illegal restraint on alienation). Notably, landowners also have a duty not to use their land in such a way as to cause harm to neighbors and a breach of that duty gives rise to liability in negligence. The Bill would dangerously eliminate that duty for Indiana industries.

### **3. The Bill Would Allow Harm From an Industry’s Negligent Conduct to Go Unchecked**

Barring any cause of action for damages and injury against a permitted industry would include barring actions in negligence. This is very dangerous. A negligence action may arise from an industry’s failure to follow regulatory requirements or from a failure to use reasonable care not to harm others. *See e.g., S. E. Ind. Nat. Gas Co. v. Ingram*, 617 N.E.2d 943, 951 (Ind. Ct. App. 1993). As applied to landowners, this duty of reasonable care prohibits a person from “us[ing] his land in such a way as to unreasonably injure the interests of persons not on his land—including owners of adjacent lands, other landowners, and users of public ways.” *Lever Bros. Co. Langdoc*, 655 N.E.2d 577, 581 (Ind. Ct. App. 1995). And for more than a century, that landowner duty has been described this way:

[T]he person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. . . . whether the things so brought be beasts, or water, or filth, or stench.

*B&B, LLC v. Lake Erie Land Co.*, 943 N.E.2d 917, 926 (Ind. Ct. App. 2011).

Indiana courts have long recognized that this duty to use reasonable care is entirely distinct from the statutory duty to comply with regulations. *S. E. Ind. Nat. Gas Co.*, 617 N.E.2d at 950 (“the test of reasonable care aris[es] from the common law” and is “a wholly distinct standard dependent largely upon the circumstances of the case and upon what a jury may decide a reasonably prudent person would have done under the circumstances.”) Put another way, a landowner’s compliance with regulation does not preclude his liability in negligence. *See e.g., Bonewitz*, 912 N.E.2d at 382 (whether a land use “is in accord with various rules and regulations does not require a finding [that] the use is reasonable”). And there is good reason for this distinction.

## *DuPont's Teflon Chemicals - a Cautionary Tale*

The recent documentary, *Dark Waters*,<sup>5</sup> tells the true story of a lawyer who took on DuPont for contaminating the drinking water supply of a town in West Virginia that surrounds one of its chemical plants. There, over decades, Dupont dumped thousands of tons of toxic sludge containing perfluorooctanoic acid (PFOA), a chemical used to make Teflon, even after discovering that the chemical had made its way into the town's water supply. What's worse, DuPont knew, based on years of study, that PFOA is a persistent, bio-accumulative chemical that causes cancer, birth defects, distemper, rotting teeth, and other illnesses in humans and animals. Nevertheless, DuPont kept dumping the chemical at its plant while keeping the public and U.S. EPA in the dark.

Notably, since the EPA was not even aware that this chemical existed, there were no regulations in place to protect people from exposure. Consequently, the only reason DuPont was ever held to account was because a nearby cattle farmer became suspicious that something from the DuPont plant was causing his cows to dye at an alarming rate from unusual medical conditions such as bloated organs, blackened teeth, and tumors. He sued for damages and ultimately exposed DuPont's egregious conduct, which led to a class-action and settlement requiring the company to compensate the thousands of people in the town who had been sickened or lost loved ones.<sup>6</sup>

The cautionary tale here is that had the Bill (HB 1380/SB 411) been the law in West Virginia, that farmer would not have been able to sue DuPont in negligence for his damages because DuPont had not violated any environmental regulations or permits. Those who were killed or made seriously ill by DuPont's clearly unreasonable conduct would be unjustly left without any recourse or remedy, and DuPont would be free to continue its lethal dumping with impunity.

Such an outcome cannot be what we want for Indiana. Permitted industries, like everyone else, must be held to a basic standard of conduct to use reasonable and ordinary care in all aspects of their operations. Regulatory compliance alone is not enough.

Please urge your Indiana lawmakers to oppose HB1380 and SB411.

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<sup>5</sup> Alejandro De La Garza, *Dark Waters Tells the True Story of the Lawyer Who Took DuPont to Court and Won. But Rob Bilott's Fight is Far From over*, *TIME Magazine* (Nov. 25, 2019) at <https://time.com/5737451/dark-waters-true-story-rob-bilott/>.

<sup>6</sup> This litigation also led to Congressional hearings and public outrage that forced PFOAs off the market, only to be substituted by the chemical industry with PFAs that are just as harmful. And, although we now know that the wide use of PFOAs and PFAs in carpet, furniture, cookware, food packaging, fire-fighting foams, and other industrial uses has resulted in the almost ubiquitous poisoning of our air, water, soil, and food, PFAs have not been banned. As a result, the blood of virtually all Americans is contaminated with these toxic chemicals that are linked to kidney and testicular cancer, immune system dysfunction, developmental reproductive harm, thyroid disease, and liver damage.