Hoosier Environmental COUNCIL

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May 28, 2021

Via Email: elish@idem.IN.gov
Erin Lish, Project Manager
IDEM, Office of Water Quality/Permits Branch

RE: Public Comments of the Hoosier Environmental Council on IDEM Formal Notice of Receipt of an Application for a State Isolated Wetland Individual Permit; Public Notice No: 2021-293-06-ERL-A (April 28, 2021)

Dear Erin,

Please accept these brief public comments on behalf of the Hoosier Environmental Council (HEC) regarding the State Isolated Wetland Individual Permit application submitted by Scannell Properties ("Scannell") as part of its proposal to impact 3.59 acres of Class II forested and non-forested wetlands to expand an existing Fed Ex building and associated infrastructure on property located at 10190 Bennett Parkway Zionsville, IN 46077 (the Site). As detailed below, HEC respectfully requests that the permit for additional parking space not be approved because endangered species use the site as refuge, a reasonable alternative was not considered as required by Ind. Code § 13-18-22-5(a), the proposed project does not align with Indiana's water quality standards at 327 IAC 2-1-1 *et. seq.*, and wetlands were improperly classified and therefore subject to additional regulatory and mitigation requirements.

Site significance and endangered, threatened, and rare species habitat suitability:

The Site at issue consists of 28 acres of woodlands, 11.28 acres of wetlands, and is directly adjacent to the Browning Marsh Nature Preserve (Browning Marsh). Browning Marsh is owned and managed by the Central Indiana Land Trust (CILTI), is a 41-acre wetland that provides several habitats including emergent marsh, forested wetland and wet prairie, and protects more state-rare and endangered species than any other similarly sized property in central Indiana.[1]

The Site itself harbors a diverse assortment of native, hardwood tree species, including American Sycamore, Green Ash, Bur Oak, Sugar Maple, Silver Maple, Eastern Cottonwood, and American Ash, which are associated with the delineated state regulated wetlands.[2] Herbaceous and shrub/scrub native plant species that were identified within the forested (wetland) understory include six unique species of sedge (*Carex spp.*), Virginia creeper (*Parthenocissus quinquefolia*), dogwoods (*Cornus spp.*), Canadian goldenrod (*Solidago canadensis*), ragweed (*Ambrosia spp.*),

[1] https://conservingindiana.org/preserves/browning-marsh/
[2] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (6-14).

and poison ivy (*Toxicodendron radicans*).[3] Clearly, the Site is comprised of an extremely diverse, established, and native plant community.

According to the United States Department of Agriculture (USDA) Forest Service, the federally endangered Indiana bat (*Myotis sodalist*) is found in hardwood forests throughout most of their range, and plant communities that are most suitable in supporting the Indiana bat are as follows:

> Common dominant trees utilized by Indiana bat throughout its range include oaks (*Quercus spp.*), hickories (*Carya spp.*), ashes (*Fraxinus spp.*), elms (*Ulmus spp.*), eastern cottonwoods (*Populus deltoides*), locusts (*Robinia spp.*), and maples (*Acer spp.*). The understory may include hawthorns (*Crataegus spp.*), dogwoods (*Cornus spp.*), fragrant sumac (*Rhus aromatica*), giant ragweed (*Ambrosia trifida*), sedges (*Carex spp.*), Virginia creeper (*Parthenocissus quinquefolia*), wood nettle (*Laportea canadensis*), goldenrod (*Solidago spp.)*, poison-ivy (*Toxicodendron radicans*), and wild grape (*Vitis spp.*)[4]

The plant communities found on Site and the habitat requirements for the federally endangered Indiana bat (*Myotis sodalist*) are nearly identical, indicating its suitability to provide refuge for this species. The USDA Forest Service recommends that live oaks, elms, ashes, cottonwoods, and maples be retained when possible since they are the types of trees primarily used as summer roosts for these endangered bats.[5] This is even more critical given that Indiana bats were listed in 1967 as "in danger of extinction" under the Endangered Species Preservation Act of 1966 and have not yet recovered, even after a period of 55 years. One of the main causes is the loss or fragmentation of forested habitat (summer roosts),[6] which is, unfortunately, what this proposed development will do.

Our collective failure to protect this species for over half a century indicates that our current efforts need to be more aggressive in order to comply with the policy set forth in the Endangered Species Act that "all Federal departments and agencies [shall] *seek to conserve* endangered species and threatened species and shall *utilize their authorities* in furtherance of the purposes of this act", 16 U.S. Code § 1531 (c)(1), which are to "provide a means whereby *the ecosystems upon which endangered species and threatened species depend may be conserved* and to provide a program for the conservation of such endangered species and threatened species. 16 U.S.C. § 1531 (b).

In that regard, in the Fed Ex Building Expansion Isolated Wetland Individual Permit Support Documentation ("Fed Ex Supporting Documentation"), the US Fish and Wildlife Service (USFWS) indicated that *the Fed Ex expansion site is within the range of the federally endangered Indiana bat* (*Myotis sodalist*) and the federally threatened northern long-eared bat (*Myotis septentrionalis*). The USFWS informed V3 Companies ("consultants") that the Fed Ex Building Expansion ("the Action") may cause a prohibited "take" of the Indiana bat (*Myotis sodalist*). 50

[3] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (12-21).
[4] https://www.fs.fed.us/database/feis/animals/mammal/myso/all.html#23
[5] https://www.fs.fed.us/database/feis/animals/mammal/myso/all.html#23
[6] https://www.fws.gov/midwest/endangered/mammals/inba/inbafctsht.html

CFR § 17.21 (c)(1). Such a "take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA Section 3(19). By destroying 20 acres of the bat's habitat, the Action could certainly cause *harm* to the federally endangered Indiana bat.

The USFWS also noted seven other endangered, threatened, and rare/special concern species within a half-mile of the project area and *hypothesized that all of these species could potentially be documented within the project site*,[7] but were not found during the field reconnaissance (see table below).

Table 6: State ETR Species

Type	Scientific Name	Common Name	State Listing	Date	Site Observed
Amphibian	*Acris blanchardi*	Blanchard's Cricket Frog	Special Concern	2009	Browning Wetland
Bird	*Cistothorus platensis*	Sedge Wren	Endangered	2000	
Bird	*Ixobrychus exilis*	Least Bittern	Endangered	2003	Browning Wetland
Bird	*Rallus elegans*	King Rail	Endangered	2003	Browning Wetland
Bird	*Rallus limicola*	Virginia Rail	Endangered	2003	Browning Wetland
Mammal	*Lasiurus borealis*	Eastern Red Bat	Special Concern	2013	Browning Family Marsh Nature Preserve
Mammal	*Taxidea taxus*	American Badger	Special Concern	1988	

However, according to iNaturalist, a trusted citizen science project that allows individuals to observe and document wildlife, the Eastern Red Bat (*Lasiurus borealis*), Least Bittern (*Ixobrychus exilis*), American Bittern (*Botaurus lentiginosus*), and the Worm-Eating Warbler (*Helmitheros vermivorum*) have been observed *on or directly adjacent to* the property limits.[8] The American Bittern, not listed in the Fed Ex Supporting Documentation, is a state endangered species, while the Worm-Eating Warbler, also not listed, is a state special concern species.[9] The Indiana Department of Natural Resources (DNR) Natural Heritage Data Center acknowledges that the Site is in such close proximity to Browning Marsh -- a protected natural area -- that "it is expected that all precautions [will be] taken to not impact the systems and features protected therein."[10] Given these concerns and "expectation that all precautions will be taken," IDEM must require further investigation before allowing Scannell to destroy wetlands relied on by these endangered and threatened species to survive.

Moreover, given the overall outstanding environmental quality of the Site, its capability to support federal and state endangered, threatened, or rare species, and recommendations from federal and state agencies, considerable care and forethought must be demonstrated when deciding

[7] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (4-5).
[8] https://www.inaturalist.org; HEC Supporting Document.
[9] https://www.in.gov/dnr/nature-preserves/files/fw-Endangered_Species_List.pdf
[10] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (74).

on a "reasonable alternative" to the chosen path of proceeding ahead with impacting this sensitive, forested wetland ecosystem. However, as discussed below, that has not occurred in this case.

A reasonable alternative was not considered:

Scannell has not demonstrated that it considered a reasonable alternative to filling state regulated isolated wetlands that have the potential to support federal and state endangered, threated, or rare species, as required by Ind. Code § 13-18-22-5(a), 327 IAC 17-4-3(8)(A). The reasonable alternatives analysis requires "that the applicant demonstrate, as a prerequisite to the issuance of this permit, that wetland activity is without reasonable alternative, and reasonably and necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located." Ind. Code § 13-18-22-5(a)(1).

The Fed Ex Supporting Documentation mentioned alternatives such as "No Build", "Avoidance", and "Minimization,"[11] but did not in any way *demonstrate* that these reasonable alternatives were actually considered in any meaningful way or that destroying wetlands is necessary and appropriate to achieving a legitimate use. Instead, Scannell insists that if it pursues a "No Build" alternative, all economic benefits would be lost in the form of short-term job creation, potential return on property investment, such that the no build alternative is not practical *only* from an economic development perspective.[12] Similarly, Scannell concluded that an "Avoidance" alternative is not feasible because "the impacted wetland is situated within the area necessary for the proposed industrial lots, utilities, roadways, and grading."[13]

But this is not sufficient for purposes of the alternatives analysis under Ind. Code § 13-18-22-5(a), which requires the applicant to demonstrate "wetland activity is without reasonable alternative and is reasonably and necessary appropriate." Considering the Site's outstanding environmental quality, the "No Build" and "Avoidance" alternatives should have also included an assessment from an environmental perspective, *i.e.,* consideration of the environmental benefits realized from avoiding impact to critical habitat. That clearly did not happen here.

The analysis is also flawed because the stated legitimate use of the tract (and the reason given for destroying wetlands), Ind. Code § 13-18-22-5 (a)(1)(ii), is to increase parking lot space for a fleet of delivery vehicles, not to provide for short-term jobs or to increase Scannell's return on property investment. Put another way, Scannell did not demonstrate that the current parking lot capacity is insufficient for current demand as required by Ind. Code § 13-18-22-5 (a)(1)(ii). Rather, it stated that because of economic incentives it must proceed with the project. But if that were the case -- if economic incentives or increasing property value return *were* in fact the stated legitimate use of the tract -- then Scannell should have provided documentation to support those claims. It did not.

[11] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (15-16).
[12] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (15).
[13] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (15).

Moreover, there is no question that land and water conservation can provide economic benefits by boosting the economy through tourism and jobs, increasing water quality, and providing developers with necessary property value returns.[14] Thus, if economic incentives are, in fact, the legitimate use of the tract, then these public economic benefits must be considered in the alternatives analysis as well. In addition, if Scannell needs to see a property value return while demonstrating a reasonable alternative (protecting wetlands rather than impacting them), these wetlands are subject to the outstanding state water resource improvement fund that grants capital to projects that will lead to the overall improvement to the water quality of the affected waterbody (IC 13-18-3-14 *et. seq.*). Accordingly, IDEM should deny the permit until/unless Scannell conducts a reasonable alternatives analysis that is compliant with Ind. Code § 13-18-22-5 (a), 327 IAC 17-4-3(8)(A),

The proposed project does not align with Indiana's water quality standards:

Isolated wetlands are considered waters of the state, Ind. Code § 13-18-22, and subject to Indiana's water quality standards. 327 IAC 2-1-1 *et seq.* The goal of the state is to "restore and maintain the chemical, physical, and biological integrity of the waters of the state." 327 IAC 2-1-1.5. Considering the documented occurrence and extremely high probably of finding state and federally endangered, threatened, or special/rare species on the property, a total of 11.28 acres of wetlands on site, 28 acres of mature, hardwood forest, adjacency to a 41-acre protected wetland habitat, and the significant role isolated wetlands play in the hydrological cycle, the approval of this State Isolated Wetland Permit does not align with Indiana's water quality goals. Instead, it ignores Indiana's water quality goals to further a limited, short-term economic agenda.

The isolated wetlands exhibit factors to be classified as an outstanding state resource waters (OSRW), 327 IAC 2-1-10 (e). According to the definition outlined in 327 IAC 2-1-9 (40), waters that "may be considered outstanding state resource water include waterbodies that have unique or special ecological, recreational, or aesthetic significance." State regulated isolated wetlands are not exempt from receiving this designation.

As a prerequisite to receiving this classification, waters of the state that exhibit *any* of the following characteristics: a unique or exceptional habitat in the waterbody, *a rare or endangered species in the waterbody*, or *exceptional esthetic quality in the immediate environs of the waterbody*, 327 IAC 2-1-10 (e)(1); the waterbody: *is within boundaries or flows through a designated* natural area, *nature preserve*, or state or national park or forest, 327 IAC 2-1-10 (e)(2)(A); or *intensive recreational use is made* of the waterbody, 327 IAC 2-1-10 (e)(3). Outstanding state resource water classifications may include, but are *not limited to,* these factors. 327 IAC 2-1-10 (e).

Specifically, Wetland A and Wetland H both continue off-site, into the boundaries of a nature preserve and protected wetland habitat[15]. It can be concluded, then, that Wetlands A and H presumably are *within boundaries of a designated nature preserve*. Additionally, Browning Marsh

[14] http://s3.amazonaws.com/landtrustalliance.org/USFWS-LandTrustAlliance-Economic-Benefits-Brochure.pdf
[15] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (30-32).

is open to the public for *recreational use*. Therefore, these particular isolated wetlands, having met the qualification as OSRW's, would be subject to antidegradation implementation procedures, as required by Ind. Code § 13-18-3-2 (m), 327 IAC 2-1.3-1(a).

Antidegradation implementation procedures also apply to all surface waters of the state. 327 IAC 2-1.3-1 (a). Surface waters of the state, as defined in 327 IAC 2-1-9 (51), has the meaning set forth in Ind. Code § 13-11-2-265 (a), where "Waters" are additionally defined as "the accumulations of water, surface and underground, natural and artificial, public and private; a part of the accumulations of water; that are wholly or partially within, flow through, or border upon Indiana." Given that they qualify as surface waters of the state and OSRW's, they are subject to Tier 1 and Tier 2.9 antidegradation standards, 327 IAC 2-1.3-3 (a)(c), which require that the "level of water quality necessary to protect existing uses is maintained, and any new or increased loading of a regulated pollutant that results in a significant lowering of water quality shall be prohibited."

Stormwater ("urban runoff") that flows over parking lots and other urbanized environments can carry a number of regulated pollutants, including heavy metals, synthetic organics, and petroleum hydrocarbons[16], which would significantly lower the water quality and threaten the existing uses of the wetlands on Site, and would also impair the water quality of the Browning Marsh. Additionally, "when land is altered from a natural forested ecosystem to an urbanized land use consisting of [parking lots, roads, and other associated infrastructure], the hydrology of the system is significantly altered," which reduces the amount of water infiltrated into the soil and instead directly converts it to urban runoff.[17] In contrast, wetlands have the ability to filter pollutants and drastically improve water quality. Considering the Site is a forested wetland, IDEM should deny this permit on the basis that it does not align with Indiana's water quality standards.

Improper wetland classification with regards to endangered, threatened, and rare species

Eight state regulated wetlands (A, B, D-H) delineated on the property have been classified as "Class II" Wetlands. According to the Fed Ex Supporting Documentation, Class II Wetlands are *unlikely to support endangered, threatened, or rare species,* whereas Class III Wetlands are *likely to support endangered, threatened, or rare species*[18]. The consultants concluded "*there is a chance these species will occur on site,* however, no endangered, threatened, or rare species were observed on site."[19] A chance that a species will occur and the likelihood that a species will occur are synonymous. This indicates that the language used in the Fed Ex Supporting Documentation to classify wetlands is more consistent with the Class III description. Furthermore, under the "Aquatic Wildlife Habitat" section within the "Classification and Characterization of Wetlands" portion of the supporting documentation, the consultant acknowledges that "*wetlands are anticipated to provide wildlife benefits* due to [their] size and hydrology" for every wetland that was delineated.[20]

[16] https://www.epa.gov/sites/production/files/2015-10/documents/usw_b.pdf (4-1).
[17] https://www.epa.gov/sites/production/files/2015-10/documents/usw_b.pdf (4-3).
[18] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (5).
[19] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (10-11).
[20] FedEx Building Expansion, Isolated Wetland Individual Permit Supporting Documentation (5-14).

Considering the consultant's own acknowledgement of these wetlands being able to provide wildlife benefits to endangered, rare, or threatened species; documented scientific-grade observations of endangered and special concern species on the site by citizen scientists (referenced in site description above); and the site being adjacent to a protected wetland habitat that is *known* to host these species, there is no question that the isolated wetlands here have been improperly classified as Class II Wetlands. The language that is used in consultant's report to define these wetlands as Class III is also consistent with the requirements set forth in 327 IAC 17-1-3 (3). Accordingly, IDEM should deny this State Isolated Wetland Permit until a proper wetland delineation report is done and all the appropriate factors regarding these isolated wetlands are considered.

Class III Wetlands are subject to additional regulatory and mitigation requirements:

Class III Wetlands are subject to different regulations than Class II wetlands. Scannell must demonstrate that wetland activity is without reasonable and *practical* alternative, pursuant to Ind. Code § 13-18-22-5(a)(1)(B). A practical alternative includes the consideration of the ability of these wetlands to support endangered, rare, and threatened species and the outstanding environmental quality of the site, which was not demonstrated by Scannell. Developing on ecologically sensitive sites, adjacent to protected aquatic wildlife habitat, warrants the consideration of *not developing at all.* Even if the project were to continue at this stage, considerations must *then* be accompanied by taking steps that are *practicable and appropriate* to minimize potential, adverse impacts of the discharge on the aquatic ecosystem of the wetland (Ind. Code § 13-18-22-5(a)(1)(B)). We must ask if it is *appropriate* to develop on such a site.

Scannell did not demonstrate that they considered whether it was practical or appropriate to develop on such a site and jumped straight to purchasing mitigation credits through IDEM's In-Lieu Fee Program. Scannell's current "Minimization" alternative includes the purchase of 8.7 acres of mitigation credits, according to the Class II Wetland mitigation ratios. However, Class III Wetlands are subject to different mitigation ratios set forth in IC 13-18-22-6 (a), which would increase the total amount of wetland acres to be restored and place more demand on a wetland mitigation program that has not completed any projects to date. Also, the In-Lieu Fee Program is just *one* option for mitigating *unavoidable* impacts to wetlands.[21] But the impacts to these wetlands are completely avoidable, and as discussed above, Scannell failed to consider this as a reasonable alternative.

Instead of purchasing mitigation credits (which is only *one* option, as noted by the DNR) and assuming wetland impacts were unavoidable at this stage, that decision would still warrant another thoughtful reevaluation pursuant to 327 IAC 17-1-3 (5), in which wetlands enlargement, enhancement, and *preservation may be considered compensatory mitigation* on a case-by-case basis, *particularly for Class III wetlands*. Thus, Scannell must demonstrate that the preservation of on-site, Class III forested wetlands that exhibit diverse, established, and native plant communities; support federal and state endangered, rare, and threatened species; and share

[21] https://www.in.gov/dnr/land-acquisition/files/la-INSWMP-annualreport2019.pdf (1).

boundaries with protected wetlands, is not *practical or reasonable.* It has not done so and therefore IDEM should deny the permit for this reason as well.

Conclusion:

Isolated wetlands are a significant contributor to the hydrological cycle, having the capability to filter pollutants and improve water quality[22] and allowing the proposed wetland impacts does not align with the overarching goal of Indiana's water quality standards. Acceptance of this State Isolated Wetland Permit would result in not only the "filling" of Class III wetlands, but also the clearing of forested wetland habitat that shares a boundary with a 41-acre, protected marsh preserve. The site hosts an extremely diverse, established, and native plant community, and any activity on the site would displace federal and state endangered, threatened, and rare species. Such an outcome is potentially a violation of the Endangered Species Act, by causing a take of the federally endangered Indiana bat. Scannell has not demonstrated that it considered a *reasonable, practical, or appropriate alternative* to destroying these wetlands. Therefore, we respectfully request that IDEM deny the State Isolated Wetland Permit.

Thank you for considering HEC's concerns. We look forward to your response.

Sincerely,

Susie McGovern
Legal Assistant and Policy Associate
Hoosier Environmental Council

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