Hoosier Environmental COUNCIL

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Via Email: lrl.regulatorypubliccomment@usace.army.mil
Sarah Keller, CELRL-RDN
United States Army Corps of Engineers

RE: Public Comments of the Hoosier Environmental Council on Public Notice Number No. LRL-2022-00935

Dear Ms. Keller,

Please accept these brief public comments on behalf of the Hoosier Environmental Council (HEC) regarding the application for a Section 404 Dredge and Fill Permit (Application) submitted by Gershman Partners (Applicant) as part of its proposal to impact 8.078 acres of jurisdictional wetlands.

HEC is a non-profit in Indiana that advocates for equitable and ecologically beneficial development and policies. One of HEC's core initiatives is to track permits in the Upper White River watershed to promote the responsible development of wetlands and streams and protect Indiana's water quality.[1] This Permit will permanently impact wetlands that are within proximity to Pleasant Run Creek, which flows into the White River. Therefore, the Permit is of interest to HEC.

Significance of the impacted wetland ecosystem

The Application proposes to impact a 19.38-acre jurisdictional wetland that is associated with a 45-acre wetland ecosystem. This wetland ecosystem is a combination of ponds, ephemeral wetlands, near-permanent wetlands, some forested and some not.[2] Within and near the wetland ecosystem, much wildlife has been observed, including osprey, great egrets, sandhill cranes, solitary sandpipers, and American bitterns, all of which are either Indiana state special concern or state endangered species.[3] These species are in danger of disappearing from the state or have a

[1] This program work is funded by the Nina Mason Pulliam Charitable Grant, and it is part of a regional initiative to reduce pollution, improve wildlife habitat, and increase awareness of the White River. Accessible at https://www.ninapulliamtrust.org/programs/environmental-initiatives/.
[2] The Applicant has applied for two Isolated Wetland Permits, one Water Quality Certificate, and one Dredge & Fill Permit, with a total amount of 45.542 wetland acres delineated on the development site.
[3] I-65 and County Line Road wildlife observations, Exhibit 1.

known or suspected limited abundance in Indiana.[4] In addition, some of the wetlands are considered historic.[5]

The Applicant has applied for a Section 401 Water Quality Certificate (WQC) from the Indiana Department of Environment Management (IDEM). The application for the WQC includes an Early Coordination/Environmental Assessment Report (report), which was prepared by the Indiana Department of Natural Resources (DNR). In this report, the DNR makes the following observations:

- There are a number of forested and wetland areas within the project limits that are *likely important habitat sites* in a rapidly developing urban area.

- Submitted maps and aerial photos appear to show a pond in the northwest corner of the project area. *Ponds can be important habitat features in urban areas. Avoiding impacts to the pond is recommended* if possible.

- Several of the areas identified as wetlands often maintain surface water for extended periods. *The forested areas around these wetlands provide an important refuge to wetland species in an otherwise urban landscape.* Avoiding wetlands and nearby forested areas will significantly reduce impacts to wildlife.[6]

This means that the approval of this Application will impact potentially historic wetlands that are likely important habitat sites, support species in need of conservation, and can provide an important refuge to wetland species in an urban landscape.

HEC is concerned that the approval of this Application will impact high quality, historical wetlands. According to the public notice, "if [The National Register of Historic Places is] made aware, as a result of comments received in response to this notice or by other means, of specific archaeological, *scientific,* prehistorical, or *historical sites or structures which might be affected by the proposed work,* the District Engineer will immediately take the appropriate action necessary pursuant to the National Historic Preservation Act of 1966 – Public Law 89-665 as amended (including Public Law 96-515)."[7]

In addition, the Application will impact both jurisdictional and non-jurisdictional wetlands that provide important habitat and breeding areas for species in need of conservation in the state of Indiana, and HEC believes that further investigation is warranted into the quality of the 45-acre wetland ecosystem, which includes the 19.38-acre jurisdictional wetland, and its ability to support federally listed endangered species.

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[4] Indiana Species of Greatest Conservation Need, Indiana DNR. Accessible at https://www.in.gov/dnr/fish-and-wildlife/nongame-and-endangered-wildlife/species-of-greatest-conservation-need/.
[5] NWI Historic Wetlands Map, Exhibit 2.
[6] Page 27-28, Full IDEM Joint Application (401 Water Quality Certificate and Isolated Wetland Permit).
[7] Public Notice LRL-2022-00935, USACE. Accessible at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll15/id/2959.

Jurisdictional status and significant nexus concerns of the wetland ecosystem

As previously mentioned, the 19.38-acre jurisdictional wetland is similarly situated within a wetland complex that consists of nearly 45 acres of wetlands and is 1,500 feet away from Pleasant Run Creek. HEC believes that these wetlands, when considered in total as a "wetland ecosystem," have the potential to significantly affect the chemical, physical, and biological integrity of Pleasant Run Creek and could be considered jurisdictional.

The United States Army Corps of Engineers (USACE) must consider the following functions and factors when evaluating whether wetlands have a nexus with a water of the United States (WOTUS): the contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); *retention and attenuation of floodwaters and runoff*; modulation of temperature in a WOTUS; *provision of habitat and food resources for aquatic species located in a WOTUS*; *the distance from a WOTUS*; hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow; *the size, density, or number of waters that have been determined to be similarly situated*; the landscape position and geomorphology; and the climatological variables such as temperature, rainfall, and snowpack. 40 CFR § 120.2 (c)(6).

There is evidence that the wetland ecosystem may significantly affect the chemical, physical, or biological integrity of Pleasant Run Creek based on a few factors, including the size, density, and/or number of waters, the wetlands' ability to retain floodwaters, and their ability to provide wildlife habitat and food resources, which is further detailed below. However, this evidence is not an exhaustive list. Rather, it is to provide support for the USACE to complete a fact-specific analysis that demonstrates whether the wetlands possess the requisite nexus and could be considered jurisdictional.

Size, density, and/or number of waters. 45 acres is a substantial amount of wetland acreage. For comparison, the wetland acreage is larger than every individual park within the nearby City of Greenwood Park system, including University Park, which is the "largest and most popular park" in Greenwood.[8]

The wetland ecosystem is not marginal in size – it is comparable to, and in some cases larger than, protected natural areas. A wetland ecosystem of this size, which consists of multiple, smaller diverse wetlands, surely warrants consideration of its ability to significantly affect the chemical, physical, and biological integrity of Pleasant Run Creek.

Ability to retain floodwaters. According to the EPA, just one acre of wetlands can store anywhere between 1-1.5 million gallons of floodwater.[9] Given that there are nearly 45 acres of wetlands on site, this means that the wetland ecosystem is storing between 45 million - 67.5 million gallons of floodwater.

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[8] City of Greenwood Parks. Accessible at https://www.greenwood.in.gov/division/blocks.php?structureid=39#blockContent-166

[9] Functions and Values of Wetlands, Environmental Protection Agency. Accessible at https://www.epa.gov/sites/default/files/2021-01/documents/functions_values_of_wetlands.pdf.

The development of this area and the impacted wetland ecosystem is guided by the I-65/County Line Road Strategic Plan (strategic plan), which outlines overarching goals and environmental factors that should be considered in new developments. The strategic plan makes clear that much of the land east of the I-65, which encompasses the development area and the impacted wetlands, is *poorly drained and subjected to localized flooding*, and that the old farm field tiles that were built about a century ago are *inadequately draining the land*.[10] Clearly, the wetlands have a large role in storing floodwater, supported by the city's own observations.

Provision of wildlife habitat and food resources. In addition to the wetlands being *potentially historic wetlands that are likely important habitat sites, support species in need of conservation, and can provide an important refuge to wetland species in an urban landscape*, the wetland ecosystem is situated within undeveloped agricultural land that contains mature woodlands. The strategic plan, which encompasses a small region beyond the development boundary, recognizes that "notable woodlands dot the [entire region]," and that "older woodlands tend to be *more biodiverse and more important as habitat*."

Over the last three decades, several woodlands and wetlands within this region have been partially or entirely removed due to development, including a significant wooded wetland that was identified as a potential conservation area.[11] The implication of this woodland and wetland loss within this small region means that local wildlife are forced to seek out new, undeveloped areas for shelter and food—much like the proposed development area and impacted wetlands.

The development area contains some of the last remaining wetlands and woodlands in the region, some of which are at least twenty years old, and according to residents in the area, some are as old as 100 years.[12] To say that the wetland ecosystem can support wildlife and provide food resources would be an understatement.

HEC believes that there is a high potential that all the wetlands within the development area may be considered jurisdictional and subject to additional regulation based on the evidence provided above.

Mitigation concerns

The most recent data from IDEM shows that this segment of Pleasant Run Creek is considered impaired.[13] The Pleasant Run Creek watershed is experiencing tremendous development pressure, with nearly 82 percent of land urbanized.[14] Estimates also show that the watershed has the smallest percentage of wetlands out of the 17 sub watersheds in the Upper

[10] Page 11, I-65/County Line Road Strategic Plan. Accessible at https://citybase-cms-prod.s3.amazonaws.com/98748e6140d34b9f8e5977bff6593d10.pdf.
[11] Land use change from 1992 to 2021, Exhibit 3; Page 11, I-65/County Line Road Strategic Plan.
[12] Data obtained from photographs from Historical Aerials by NETR Online, https://www.historicaerials.com/.
[13] https://www.in.gov/idem/nps/online-e303d-tool/
[14] Land use change from 1992 to 2021, Exhibit 3.

White River watershed.[15] Wetlands are considered "virtually non-existent" here.[16] The need to protect wetlands in the Pleasant Run Creek watershed is not a matter of speculation.

In addition, Indiana's wetland mitigation program does not require applicants to mitigate wetlands in the same sub-watershed. Therefore, the approval of the Application could lead to a very real and substantial degradation of Pleasant Run Creek because the wetlands will be filled and/or urbanized, with no requirement for them to be placed near or within the Pleasant Run Creek watershed.

Further, the state's mitigation program is becoming backlogged, and wetlands are being lost without a timely replacement of the functions and values to the watershed as required.[17] A recent report commissioned by the Indiana legislature cautioned that "Indiana is at a point where the cumulative loss of wetlands is having a measurable negative impact on residents, particularly from a water quality standpoint."[18]

The 404 permitting program requires a demonstration that, to the maximum extent possible, steps have been taken to avoid impacts to wetlands, potential impacts have been minimized to the extent appropriate and practicable, and that compensation will be provided for any unavoidable impacts.[19] HEC is concerned that the Applicant has not considered all practical alternatives to wetland activity, and that the proposed mitigation is not sufficient in protecting water quality and ensuring no net loss of wetlands.

Any wetland impacts are not required to be mitigated in the Pleasant Run Creek watershed which could lead to a reduction in water quality. The Applicant is proposing to impact potentially historical wetlands that support species in need of conservation and serve as important habitat sites in a sub-watershed and region that has experienced tremendous wetland loss, with wetlands being "virtually non-existent." HEC believes it is imperative that the Applicant provide a more thoughtful demonstration and consider using conservation development techniques as part of this analysis.

Conclusion

The approval of this Application will permit impacts to a 19.38-acre jurisdictional wetland that is associated with a 45-acre wetland ecosystem that contains potentially historic wetlands that support species in need of conservation and HEC believes that further investigation is warranted into the quality of the ecosystem. In addition, there is concern that the wetlands may significantly affect the chemical, physical, and/or biological integrity of Pleasant Run Creek and could be considered jurisdictional. Lastly, the Application could negatively impact Indiana's water quality unless steps are taken to mitigate the wetlands in the same sub-watershed or incorporate conservation development techniques into the development that will ultimately

[15] Page 29-32, 161 Upper White River Regional Plan. Accessible at https://thewhiteriveralliance.org/wp-content/uploads/2018/08/Upper-White-River-Watershed-Regional-Plan.pdf.
[16] Page 161, Upper White River Regional Plan.
[17] Page 3, Indiana Wetlands Task Force Final Report, accessible at https://www.hecweb.org/wp-content/uploads/2022/09/Final-Wetlands-Task-Force-Report-9.26.pdf.
[18] Page 4, Indiana Wetlands Task Force Final Report.
[19] Environmental Law Institute. Accessible at https://www.eli.org/sites/default/files/eli-pubs/d18__05.pdf.

protect and preserve the wetlands. For these reasons, HEC respectfully requests that the Application is denied until these regulatory deficiencies are addressed so that Indiana's wetlands and waterways are protected to the utmost extent.

With Appreciation,

Susie McGovern

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