Hoosier Environmental COUNCIL

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Via Email: wrobinso@idem.in.gov
William Robinson, Wetland Project Manager
Wetlands and Stormwater Section, Office of Water Quality
Indiana Department of Environmental Management

RE: Public Comments of the Hoosier Environmental Council on the Isolated Wetland Individual Permit for the I-65 and County Line Road Development, IDEM ID # 2023-430-49-WLR-A

Dear Mr. Robinson,

Please accept these public comments on behalf of the Hoosier Environmental Council ("HEC") regarding the application for an Isolated Wetland Individual Permit ("Permit") submitted by Gershman Partners ("Applicant") as part of its proposal to impact 3.37 acres of state regulated wetlands to develop speculative industrial, commercial, and retail space along County Line Road and Arlington Road in Marion County, Indiana.

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 to 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.

Regulatory Concerns

I. The Applicant did not demonstrate that wetland activity is without reasonable alternative as required by Indiana's Isolated Wetlands Law.

HEC is concerned that the Applicant has not considered practical alternatives to wetland activity. Specifically, Indiana's Isolated Wetlands Law requires applicants to "*demonstrate*, as a prerequisite to the issuance of the permit, that wetland activity *is without reasonable*

[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/.

alternative." IC 13-18-22-5 (a)(1)(A). To meet these regulatory requirements, it is customary for applicants to analyze practical alternatives to impacting wetlands.

In the alternatives analysis that was submitted, the Applicant states that the project "*will not be successfully completed"* without wetland impacts, and that "*appropriate steps have been taken*" to avoid impacts.[2] However, the Applicant does not *demonstrate* why the project will not be successfully completed, or *what appropriate steps were taken* to avoid wetlands. Instead, the Applicant *assumes* that the project will not be successfully completed without wetland impacts and that appropriate steps were taken to avoid wetlands by making a single statement, rather than *demonstrating* why this is the case.

Further, it appears that the Applicant did not attempt to evaluate *any alternatives* to wetland activity. The alternatives analysis consists of one development plan. This gives the impression that the Applicant only considered one engineered design and layout, and therefore did not appropriately consider potential engineered layouts that may have avoided more wetlands. As a contrasting example, for permit number 2021-293-06-ERL-A, developers applying for an isolated wetland permit *demonstrated* that they considered total avoidance of wetlands by *submitting engineering drawings of multiple layouts* and providing a factual analysis as to why certain layouts were more feasible than others.[3] For these reasons, HEC respectfully requests that the Applicant submit an alternatives analysis that thoughtfully demonstrates that wetland activity is without reasonable alternative for the purposes of IC 13-18-22-5 (a)(1)(A).

II. The wetlands may significantly affect the chemical, physical, and/or biological integrity of Pleasant Run Creek and should be evaluated under significant nexus.

All of the wetlands that were delineated on the development area were deemed non-jurisdictional under the Clean Water Act ("CWA"), based on an approved jurisdictional determination ("AJD") from the United States Army Corps of Engineers ("USACE"), which concluded that the wetland features are not hydrologically or ecologically connected to any Waters of the United States ("WOTUS").[4] Absent from the AJD is the completion of a significant nexus determination and related documentation that would have alluded to how the USACE came to this conclusion.

Due to a district court decision in 2021 that blocked the Navigable Waters Protection Rule, Indiana has been implementing the CWA pursuant to the pre-2015 WOTUS regulatory regime, which encompasses the significant nexus determination.[5] The most recent federal court decision under Sackett v. Environmental Protection Agency ("EPA"), which was decided on May 26 of

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[2] Page 5, Full Isolated Wetland Permit Application.
[3] Memorandum, V3 Companies. Accessible at https://www.hecweb.org/wp-content/uploads/2021/08/20210714_V3_FedEx_Comment-Response_FINAL.pdf.
[4] Approved Jurisdictional Determination (August 22, 2022), LRL-2022-181. Accessible at https://www.lrl.usace.army.mil/Portals/64/docs/Regulatory/JDS/LRL-2022-181%20AJD.pdf?ver=J7lXmA-Al9AQEgnlDiaL3w%3d%3d.
[5] Definitions of "Waters of the United States": Rule Status and Litigation Update, US Army Corp of Engineers. Accessible at https://www.usace.army.mil/Media/Announcements/Article/3394482/12-may-2023-definition-of-waters-of-the-united-states-rule-status-and-litigatio/.

this year, may not apply to this Permit because the AJD was issued before the Supreme Court decision was made.[6] Thus, significant nexus may still apply here.

According to guidance under significant nexus, agencies will decide jurisdiction over *wetlands adjacent to, but not directly abutting, a relatively permanent non-navigable tributary* (also known as a WOTUS) *based on a fact-specific analysis* to determine whether they have a significant nexus, and *thus significantly affect the chemical, physical, or biology integrity of a WOTUS.*[7] Adjacent is defined as "border, contiguous, neighboring," and "wetlands separated from a [WOTUS] by [man-made barriers] are [considered] adjacent wetlands." The wetlands are *adjacent to Pleasant Run Creek*, approximately 1,500 feet away, but *not directly abutting, i.e., separated by man-made barriers*—in this case, a residential subdivision. Pleasant Run Creek flows into the White River, a traditional navigable water ("TNW"), which means that Pleasant Run Creek would be considered a WOTUS. Thus, the wetlands meet the regulatory requirements to undergo a fact-specific analysis to prove whether there is a significant nexus with Pleasant Run Creek.

To determine whether these wetlands have a significant nexus, i.e., significantly affect the chemical, physical, and biological integrity of Pleasant Run Creek, the USACE must consider the following functions and factors: 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 wetlands 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. This evidence is not an exhaustive list. Rather, it is to provide support for the *fact-specific analysis* that these wetlands possess the requisite nexus, and thus, should be considered WOTUS and ultimately regulated under the CWA. Given that it is the agency's burden to apply the significant nexus determination, which was absent from the AJD, HEC respectfully requests that the agencies do due diligence to the wetlands so that they accurately characterized under federal law. If they are not considered a WOTUS and do not possess the requisite nexus, HEC would greatly appreciate the reasoning behind this conclusion.

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[6] Supreme Court Ruling in Sackett v. Environmental Protection Agency, US Army Corps of Engineers. Accessible at https://www.usace.army.mil/Media/Announcements/Article/3409141/26-may-2023-supreme-court-ruling-in-sackett-v-environmental-protection-agency/#:~:text=Environmental%20Protection%20Agency,-HQUSACE%20Regulatory&text=The%20U.S.%20Environmental%20Protection%20Agency,Environmental%20Protection%20Agency.

[7] Page 8, CWA Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States. https://www.hecweb.org/wp-content/uploads/2022/04/CWA-Jurisdiction-Following-Rapanos-v-US-and-Carabell-v-US-12-02-08.pdf.

Size, density, and/or number of waters. The Permit proposes to impact 3.37 acres of state regulated wetlands. However, approximately *19.9 acres of wetlands* were delineated in total: 3.37 acres of state regulated, impacted wetlands; 13.9 acres of unregulated, impacted wetlands; and 2.63 acres of unimpacted wetlands.

This is a substantial amount of wetland acreage. For comparison, the wetland acreage, when considered in total as a "wetland ecosystem," is larger than almost every individual park within the nearby City of Greenwood Park system, and is about half the size of University Park, which is the "largest and most popular park" in Greenwood.[8] Further, land trusts like the Central Indiana Land Trust have protected wetland and riparian habitats of similar size—for example, the White River Bluffs nature preserve is only 12 acres.[9]

These comparisons provide a glimpse into the size of nearby protected natural areas, open spaces, and wetland habitats. The wetland ecosystem is not marginal in size – it is comparable to, and in some cases larger than, protected natural areas. Thus, 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 because *at best it is a large and fairly intact wetland ecosystem.*

Ability to retain floodwaters. According to the EPA, just one acre of wetland can store anywhere between 1-1.5 million gallons of floodwater.[10] Given that there are nearly 20 acres of wetlands on site, this means that these wetlands are storing between 20 million-30 million gallons of floodwater. The development of this area and subsequent wetlands 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. Indeed, the strategic plan makes clear that much of the land east of the I-65, which encompasses the development area and its 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*.[11] Clearly, the wetlands have a large role in storing floodwater, which is supported by the city's own observations.

Provision of wildlife habitat and food resources. The wetlands are situated within undeveloped agricultural land that contains mature woodlands. As previously mentioned, the development of the area is guided by the strategic plan, which encompasses a region east and west of I-65, between Stop 11 and County Line Road. The strategic plan recognizes that "notable woodlands dot the [entire region]," and that "older woodlands tend to be *more biodiverse and more important as habitat*."

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

[9] White River Bluffs, Central Indiana Land Trust. Accessible at https://conservingindiana.org/preserves/white-river-bluffs/.

[10] 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.

[11] Page 11, I-65/County Line Road Strategic Plan. Accessible at https://citybase-cms-prod.s3.amazonaws.com/98748e6140d34b9f8e5977bff6593d10.pdf.

Over the last three decades, several woodlands and wetlands within the region have been partially or entirely removed due to development, including a *significant wooded wetland* that was identified as a potential conservation area.[12] The implications of this woodland and wetland habitat loss means that local wildlife are forced to seek out new undeveloped areas for shelter and food—much like the proposed development area. Indeed, the area contains some of the last remaining woodlands in the region—all of which are *at least* twenty years old, and according to residents in the area, some are as old as 100 years.[13]

Further, the segment of Pleasant Run Creek, located approximately 1,500 feet north of the wetlands, has experienced tremendous development pressure over the last two decades, with a large portion of the surrounding area being converted to urban land uses.[14] According to the Upper White River Watershed Regional Watershed Assessment and Planning Report, nearly 82 percent of land located in the Pleasant Run Creek watershed is urbanized.[15] Estimates from 2000 show that the Pleasant Run Creek watershed has the smallest percentage of wetlands (.06 percent) out of the 17 sub watersheds in the Upper White River watershed, and that percentage of wetlands continued to shrink by 2008.[16] The watershed assessment notes that wetlands are "virtually non-existent" in the Pleasant Run Creek watershed.[17]

According to local observations by residents in the area, sandhill cranes (a state special concern species), bald eagles, great horned owls, red-tailed hawks, herons, foxes, deer, coyotes, bats, shrews, snakes, and tree frogs are among some of the species that frequent the wetlands and greater ecosystem. The wetland delineation report, which serves as a habitat survey for wetland plants, soils, and hydrology, reveals a diverse assortment of native trees species within the wetland ecosystems, including silver maple, bur oak, pin oak, dogwoods, common hackberry, black willow, green ash, and honey locust.[18] Clearly, the wetlands serve as some of the last remaining, high-quality areas where wildlife is able to find shelter and food in the Pleasant Run Creek watershed. To say that the wetlands and the surrounding ecosystem can provide wildlife habitat and food resources would be an understatement.

III. Indiana's wetland mitigation program is not effectively replacing wetlands needed to offset wetland losses and should be utilized as a last resort.

The Department of Natural Resources ("DNR") implements the Indiana Stream and Wetland Mitigation Program ("IN SWMP"), also called in In-Lieu Fee ("ILF") program, which allows the DNR to sell stream and wetland mitigation credits to be used as compensatory mitigation for unavoidable impacts to comply with provisions under the CWA and Indiana's

[12] Land use change from 1992 to 2021, Exhibit 1; Page 11, I-65/County Line Road Strategic Plan.
[13] Data obtained from photographs from Historical Aerials by NETR Online, https://www.historicaerials.com/.
[14] Land use change from 1992 to 2021, Exhibit 1.
[15] For reference, the development site is in the Upper White River watershed, *and* within the Pleasant Run-White River sub-watershed.
[16] Page 29-32, Upper White River Regional Plan. Accessible at https://thewhiteriveralliance.org/wp-content/uploads/2018/08/Upper-White-River-Watershed-Regional-Plan.pdf.
[17] Page 161, Upper White River Regional Plan.
[18] Page 42-48, Full Isolated Wetland Permit Application.

Isolated Wetlands Law.[19] In this case, the Applicant is planning to purchase 8.425 acres of wetland mitigation credits in the *Upper White service area*.[20]

The ILF program allows for wetlands to be lost now with the goal of mitigating them later. According to the most recent program report, credit sales have exceeded what the DNR anticipated, *especially in* central Indiana and *the Upper White service area*.[21] Additionally, the report notes that "the credit sales *in the Upper White are outpacing any sponsor's ability to fulfill these credits quickly enough by implementing mitigation projects in the service area*."[22] Essentially, credit sales are "outpacing [the ability] to…[implement] mitigation projects in the [Upper White] service area," something that the *DNR did not anticipate*.[23] This raises the very real concern that wetlands are being lost, their mitigation is becoming backlogged, and the agency is not adequately prepared to remediate this issue because this outcome was not anticipated. This is problematic because Indiana has already lost 85 percent of our wetlands and, if development trends continue, there may not be places to mitigate wetlands in the Upper White service area.

The Indiana Wetland Task Force, created when the legislature passed SEA 389, released a report which states that implementing the ILF mitigation projects with the three-year time frame is a "challenge," and that wetlands and streams are being lost "without a timely replacement of the functions and values to the watershed as required."[24] It then goes on to state that "we need to stop the loss of existing wetlands while restoring or replacing wetlands on the landscape through both regulatory and non-regulatory approaches and incentives."[25] Lastly, the report makes clear 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.*"[26] It is clear that, at this time, Indiana's wetland mitigation program is not effectively replacing wetlands needed to offset wetland losses and should be utilized as a last resort.

Non-Regulatory Concerns

I. The destruction of wetlands violates principles of the I-65/County Line Road Strategic Plan.

When discussing practical alternatives to wetland activity, the Applicant claims that "other properties were considered, but this property [is desirable] … [and that] the area has been zoned for development, is considered a priority development area by the City of Indianapolis, and a TIF (Tax Increment Financing) district has been proposed in this area to encourage the

[19] Page 1, IN SWMP 2021 Annual Report, Indiana Department of Natural Resources. Accessible at https://www.in.gov/dnr/land-acquisition/files/la-2021-INSWMP-AnnualReport.pdf.
[20] Page 5, Full Isolated Wetland Permit Application.
[21] Page 8, IN SWMP 2021 Annual Report.
[22] Page 8, IN SWMP 2021 Annual Report.
[23] Page 8, IN SWMP 2021 Annual Report.
[24] 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.
[25] Page 3, Indiana Wetlands Task Force Final Report.
[26] Page 4, Indiana Wetlands Task Force Final Report.

development of the site."[27] This gives the notion that the development of the site, as proposed, is essentially *inevitable* because it is supported by the city and by economic incentives.

The Applicant neglected to mention that the development of this area is also guided by the strategic plan, wherein one of the overarching development principles is to *sensitively incorporate the natural assets of the area into development*, which includes wetlands.[28] The strategic plan also states that *environmental characteristics of the land* should have a *modifying effect on the primary land use*, meaning that the primary land use should change and *be adaptable* to the environmental characteristics of the land. The Plan further states that *careful attention* should be given to the wetlands and forested areas so that they are *conserved*."[29]

HEC understands that the Indiana Department of Environmental Management ("IDEM") cannot legally enforce local environmental ordinances and city planning recommendations. However, it appears that the strategic plan, as well as state and federal water quality laws which seek to *restore and maintain* the chemical, physical, and biological integrity of the waters of the state and Nation, 317 IAC 2-1-1.5, 33 USC 26 §1251 (a), *share the common goal of conservation and restoration of wetlands*. Yet despite these goals and overarching values, only 2.63 acres of wetlands—less than 15 percent of the total wetland acreage—is going to be preserved and incorporated into the underlying development.

Conclusion

Indiana's Isolated Wetlands Law is intended to allow development while protecting water quality. HEC shares this goal of wanting to protect Indiana's water quality. This Permit will impact nearly 20 acres of wetlands within the White River watershed, where a portion of our program work is focused. This program work aims to track developments to protect environmentally sensitive areas such as wetlands and streams. HEC does not intend to prevent development, rather, we work to encourage responsible watershed development.

The Applicant did not demonstrate that wetland activity is without reasonable alternative, as required by IC 13-18-22; the impacted wetlands may significantly affect the chemical, physical, and/or biological integrity of Pleasant Run Creek and should be evaluated under significant nexus; Indiana's wetland mitigation program is not effectively replacing wetlands needed to offset wetland losses; and the destruction of wetlands violates principles of the I-65/County Line Road Strategic Plan. For these reasons, HEC respectfully requests that, at minimum, the regulatory deficiencies are addressed before the approval of the Permit so that Indiana's waterways are being protected to the utmost extent.

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

[27] Page 5, Full Isolated Wetland Permit Application.
[28] Page 15, I-65/County Line Road Strategic Plan.
[29] Page 16, I-65/County Line Road Strategic Plan.

Sincerely,

Susie McGovern

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