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BEFORE THE STATE OF INDIANA  
NATURAL RESOURCES COMMISSION

<b>FRIENDS OF THE WHITE RIVER</b> , an )	Application No.: FW-27680
Indiana non-profit corporation, )	
)	
Petitioner, )	<b>PETITION FOR REVIEW</b>
)	<b>AND STAY OF EFFECTIVENESS</b>
v. )	
)	
<b>STATE OF INDIANA DEPARTMENT OF )</b>	
<b>NATURAL RESOURCES</b> , an agency of the )	
government of the State of Indiana. )	
)	
Respondent. )	
)	

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**INTRODUCTION**

1. Pursuant to Ind. Code 4-21.5 and 312 Ind. Admin Code 3-1, this petition for review and stay of effectiveness challenges the State of Indiana Department of Natural Resources' ("DNR") decision to grant Floodway Construction Permit Application # FW-27680 ("Permit").

According to the Certificate of Approval, the Permit authorizes the Indianapolis Department of

Public Works (“City”) and its agent, the U.S. Army Corps of Engineers (“Corps” or, jointly with the City, “applicants”), to remove “all vegetation” – including roots larger than one-half inch in diameter – “within 15 [feet] of the face of the wall or the toe of the levee” located on the south bank of the West Fork of the White River from Westfield Boulevard to Kessler Boulevard in Indianapolis. The planned vegetation removal would affect approximately two and one-half miles of waterfront property, “with clearing to the edge of the river in isolated locations.”

2. According to the original application, submitted on August 29, 2014, action under the Permit will permanently eliminate more than seven acres of mature hardwood forest and other high-quality riparian habitat, thus displacing a wide variety of local wildlife species, which very likely include the federally-endangered Indiana bat.

3. Contrary to the mandate of Indiana’s Flood Control Act, I.C. §§ 14-28-1-1 *et seq.*, DNR permitted this project to proceed despite the applicants’ failure to establish that the planned activities – including the removal of trees, shrubs, and roots – would not cause unreasonable harm to fish, wildlife, and botanical resources. In fact, as DNR acknowledged during the instant application process, permit issuance – and the associated destruction of riparian habitat – will cause significant negative impacts. These impacts will not be offset by the approved mitigation plan, which inappropriately and inconsistently purports to revise the scope of the project and, in any case, fails to compensate for the actual harm associated with the full extent of vegetation removal authorized under the Permit. Moreover, given the applicants’ failure to demonstrate any compelling factual or legal justification for this project, the serious environmental consequences of the planned vegetation removal are *per se* unreasonable.

4. In addition, DNR's Certificate of Approval did not even address the statutory requirement to evaluate a floodway modification project's cumulative effects *before* approving the relevant application.

### PETITIONER

5. Petitioner Friends of the White River ("FWR") is a 501(c)(3) non-profit organization incorporated in the State of Indiana. For over thirty years, FWR has worked to protect and preserve Indiana's White River. Specifically, FWR advocates in favor of continued water quality improvement, as well as habitat maintenance and restoration along the river's edge.

6. FWR has over 1,000 supporters and volunteers, including 412 active members. Several FWR members live in the Warfleigh and Broad Ripple neighborhoods of Indianapolis, near the portion of the West Fork of the White River in which DNR has authorized vegetation removal. These and other FWR members, including Christine N. Carlson and Daniel W. Vallesky, visit the affected area regularly to enjoy the diverse benefits of a relatively undisturbed wooded river corridor in an otherwise urban setting. Each of these FWR members has specific plans to return.

7. Some FWR members, including Christine N. Carlson, are very concerned that action under the Permit will harm local wildlife, including species that they enjoy viewing recreationally, such as bald eagles, heron, owls, swans, turtles, and crustaceans. Others, including Daniel W. Vallesky, fear that this project will exacerbate air pollution and lead to increased water temperature and turbidity, thereby imperiling fish. Several FWR members, including Christine N. Carlson, expressed these concerns to DNR during the application process by submitting written comments and oral testimony during the public hearings on December 11, 2014 and March 19, 2015.

8. Accordingly, several FWR members, including Christine N. Carlson and Daniel W. Vallesky, are “aggrieved or adversely affected” by permit issuance. I.C. § 4-21.5-3-7(a). Under Indiana law, FWR may seek administrative review on behalf of these and other aggrieved or adversely affected members.

### LEGAL BACKGROUND

9. In enacting the Flood Control Act (“FCA”), the General Assembly sought not only to minimize flood damage, but also to protect and preserve Indiana’s water resources. I.C. § 14-28-1-1. Accordingly, the statute imposes certain minimum standards to ensure that DNR does not authorize activities which would adversely affect a “floodway”— *i.e.*, “the channel of a river or stream; and ... the parts of the flood plain adjoining the channel that are reasonably required to efficiently carry and discharge the flood water or flood flow of a river or stream.” *Id.* § 14-8-2-102.

10. Pursuant to I.C. § 14-18-1-22(e), DNR shall issue a permit allowing floodway modification “*only if* the applicant has clearly proven” that the planned activities will not “[r]esult in unreasonably detrimental effects upon fish, wildlife, or botanical resources.” (Emphasis added). DNR’s regulations define “unreasonable detrimental effects” as “damage to fish, wildlife, or botanical resources that is found likely to occur by the director based upon the opinion of a professional qualified to assess the damage and: (1) creates a condition where recovery of the affected resources is not likely to occur within an acceptable period; and (2) cannot be mitigated through the implementation of a mitigation plan approved by the director.” 312 IAC 10-2-39.

11. Before issuing a permit under the FCA, DNR must “consider the cumulative effects” of the proposed activities. I.C. § 14-28-1-22(f). According to DNR’s regulations, “cumulative effects” include “the impact that results from the incremental impact of the action

when added to other past, present, and reasonably foreseeable future actions regardless of what person undertakes the other actions.” 312 IAC 10-2-18. Notably, “[c]umulative effects can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* In assessing these impacts, DNR must consider “unreasonable detrimental effects upon fish, wildlife, or botanical resources.” *Id.*

## FACTUAL BACKGROUND

### I. The Indianapolis North Flood Damage Reduction Project

12. For decades, the Indianapolis Department of Public Works has collaborated with the U.S. Army Corps of Engineers to design and build the Indianapolis North Flood Damage Reduction Project (“Indianapolis North”), a multi-stage endeavor intended to improve existing levees on the City’s north side.

13. To facilitate planning, construction, and environmental mitigation, the City and Corps divided the project into three segments: 3A, 3B, and 3C. According to the applicants, completion of *all three segments* is necessary to satisfy federal standards governing the modification of local flood insurance rates.

14. The Warfleigh Section of Indianapolis North, also known as Phase 3A, extends along the West Fork of the White River from Kessler Boulevard West Drive to North College Avenue. The City and Corps completed construction of Phase 3A in 2004.

15. The Monon-Broad Ripple Section of Indianapolis North, also known as Phase 3C, extends from North College Avenue to high ground just upstream of the intake of the Indianapolis Water Canal. The City and Corps completed construction of Phase 3C in 2009.

16. To date, the applicants have failed to agree on a proposal for the South Warfleigh Section of Indianapolis North, also known as Phase 3B.

17. In other words, the City and Corps currently have *no viable plan* for the construction or reconstruction of an essential segment of the levee, even though the applicants acknowledge they must complete the entirety of Indianapolis North in order to satisfy federal requirements governing flood reduction benefits. As a result, the vegetation clearing here at issue cannot achieve the purpose articulated in the Certificate of Approval *until* the applicants complete Phase 3B.

## II. Floodway Construction Permit Application # FW-27680

### A. DNR's Analysis of "Unreasonably Detrimental Effects"

#### i. *The Affected Resources*

18. Despite its urban surroundings, the portion of the West Fork of the White River here at issue continues to support high-quality riparian habitat, including mature hardwood forest. Many trees in this area range from 60 to above 80 feet in height, and from 12 to more than 36 inches in diameter. Tree species in the region include: box elder, black locust, black walnut, black willow, cottonwood, silver maple, and sycamore, as well as a variety of ash, buckeye, and oaks.

19. This riparian forest provides valuable habitat for a variety of bird and wildlife species, including bald eagles, heron, osprey, owls, swans, turtles, and crustaceans. As the Corps has acknowledged, numerous trees in the affected area "fit[] the characteristics for primary roost sites for the Indiana bat." U.S. Army Corps of Eng'rs, Final Supplemental Environmental Impact Statement for the Indianapolis North Flood Damage Reduction Project 43 (June 2013). In addition, "there are current records of the Indiana bat within a few miles of the project." *Id.* Thus, "it is very likely that the Indiana bat uses the riparian forests within the area covered by the three phases of [Indianapolis North] as summer habitat." *Id.*

20. The forest also helps to maintain a high-quality fishery by regulating water temperatures, supplying vital nutrients, and shaping diverse underwater habitats. Fish species in the area include: largemouth bass, smallmouth bass, rock bass, spotted bass, black bullhead, yellow bullhead, channel catfish, black crappie, white crappie, gizzard chad, grass pickerel, and a variety of sunfish.

21. The Certificate of Approval authorizes the applicants to remove “all vegetation within 15 [feet] of the face of the wall or the toe of the levee” and all roots greater than one-half inch in diameter, “with clearing to the edge of the river in isolated locations.” Pursuant to Special Condition 1, the applicants must “revegetate all bare and disturbed areas with a mixture of grasses (excluding all varieties of tall fescue) and legumes as soon as possible upon completion.”

22. In other words, the applicants intend to permanently eliminate the vast majority of mature trees and other woody vegetation in the vicinity of Indianapolis North Phases 3A and 3C. Given the nature and scale of the project, action under the Permit will inevitably result in the significant disruption of local fish, wildlife, and botanical communities. Moreover, because the Permit requires the applicants to replace the existing mature riparian forest with only “a mixture of grasses ... and legumes,” the affected resources will *never* recover.

*ii. The Approved Mitigation Plan*

23. The applicants submitted Floodway Construction Permit Application # FW-27680 on August 29, 2014. According to the original project description, the applicants sought to eliminate “all vegetation within 15 [feet] of the face of the wall or toe of the levee,” totaling “[a]pproximately 6.9 acres for Phase 3A and 0.62 acres for Phase 3C of mature bottomland hardwood forest.” The applicants proposed to mitigate their activities – then projected to result in the permanent destruction of more than 7.5 acres of high-quality riparian habitat – by chemically

clearing and re-vegetating 3.12 acres in a portion of Eagle Creek Park located approximately 7 miles from the affected area and not adjacent to any body of water.

24. On October 31, 2014, DNR rejected the applicants' original mitigation proposal. Specifically, DNR indicated that additional mitigation acreage was necessary to offset the planned vegetation removal. Indiana Dep't of Natural Res., Incomplete Application Notice 5 (Oct. 31, 2014). In addition, DNR advised the applicants that "[m]itigation must be in-kind." *Id.* With respect to Floodway Construction Permit Application # FW-27680, "[i]n-kind mitigation would require restoration of bottomland hardwood forest with a direct connection to the West Fork White River or similar stream." *Id.* (emphasis added).

25. DNR also observed that the applicants "ha[d] failed to show evidence that the proposed actions will not negatively impact the quality of habitat" and advised that "[m]itigation ratios may increase based on factors such as habitat quality and cumulative effects." *Id.* With respect to habitat quality, DNR recognized that the U.S. Fish and Wildlife Service "has described the area as a 'high quality fishery' that 'contains a diversity of habitat.'" *Id.* at 3.

26. On March 31, 2015, the Corps revised its assessment of the total acreage affected by the Permit, "after updating plans and specifications for the proposed 3A and 3C clearing." Letter from William M. Turner, Planning Branch Chief, Louisville Dist., U.S. Army Corps of Eng'rs, to Div. of Water, Indiana Department of Natural Res. 5 (Mar. 31, 2015). Specifically, although the approved mitigation plan acknowledged that 7.43 acres would be cleared in association with vegetation removal on Indianapolis North Phases 3A and 3C, *id.* at 3, the Corps inexplicably also asserted that the "[p]roposed clearing on 3A includes 0.48 acres, while clearing on 3C will include only 0.03 acres, for a total of 0.51 acres of vegetation to be cleared *outside ten feet from the toe of the levee.*" *Id.*

27. Elsewhere in this document, the Corps offered yet another formulation of the affected acreage, explaining that “[t]he Levee Safety Officer, Steve Durrett, made an executive decision to clear at a consistent width of 35 to 40 feet from the levee center to the river.” *Id.* at 7.

28. The Corps proposed to mitigate the planned vegetation removal by chemically clearing and re-vegetating 0.54 acres in Eagle Creek Park, located approximately 100 feet from the Eagle Creek Reservoir, but not adjacent to the West Fork of the White River or any similar stream. This parcel is approximately 8 miles from the affected area.

29. In contrast to the opinion of the U.S. Fish and Wildlife Service as quoted by DNR, *see* Indiana Dep’t of Natural Res., Incomplete Application Notice at 3, the Corps asserted in its approved mitigation plan that “the proposed clearing area is comprised mostly of low quality habitat made up of invasive plant species.” Letter from Mr. Turner to Div. of Water at 6.

30. Instead of rejecting this new mitigation plan for failing to adequately address DNR’s concerns or requesting clarification of the project’s effects, DNR merely approved this plan without acknowledging its apparent inconsistencies.

31. Moreover, instead of incorporating *any* of the Corps’ revised assessments of the project’s scope, the Certificate of Approval authorized the applicants to clear “all vegetation within 15 [feet] of the face of the wall or toe of the levee,” as the applicants originally proposed in August 2014. The Certificate of Approval did not include an assessment of the total affected acreage.

*iii. Legal and Factual Justification for the Project*

32. On June 10, 2014, President Obama signed the Water Resources Reform and Development Act (“WRRDA”). Pub. L. No. 113–121. WRRDA § 3013(b) requires the Corps to “carry out a comprehensive review” of policy guidelines for the management of vegetation on levees, including but not limited to Engineering Technical Letter 1110–2–571 (“ETL 1110–2–

571”), “in order to determine whether current Federal policy relating to levee vegetation is appropriate for all regions of the United States.” During the period between enactment of the WRRDA and the adoption of revised guidelines, the Corps “shall not require the removal of existing vegetation as a condition or requirement for any approval or funding of a project, or any other action, unless the specific vegetation has been demonstrated to present an unacceptable safety risk.” *Id.* § 3013(g)(1).

33. On various occasions throughout the instant application process, the Corps has identified ETL 1110–2–571 and Engineering Technical Letter 1110–2–583 (“ETL 1110–2–583”) as justification for the proposed vegetation removal.

34. Like ETL 1110–2–571, ETL 1110–2–583 establishes policy guidelines for the management of vegetation on levees. Because the Corps published ETL 1110–2–583 on April 30, 2014 – before the WRRDA became law – ETL 1110–2–583 also constitutes “current Federal policy relating to levee vegetation” within the meaning of the Act. *See* Pub. L. No. 113–121 § 3013(b). WRRDA § 3013(g)(1) prohibits the Corps from conditioning *any action* on the removal of levee vegetation, in reliance on the policy positions expressed in ETL 1110–2–571, ETL 1110–2–583, or any other guidance document adopted prior to June 10, 2014.

35. In submitting Floodway Construction Permit Application # FW-27680, the applicants asserted that vegetation removal is necessary “[t]o meet Corps of Engineers’ Rehabilitation and Inspection Program requirements....” Determining eligibility for the Rehabilitation and Inspection Program (“RIP”) constitutes “approval ... of a project, or any other action.” *See* Pub. L. No. 113–121 § 3013(g)(1). Therefore, WRRDA § 3013(g)(1) prohibits the Corps from conditioning RIP eligibility on the removal of levee vegetation, in the absence of a site-specific safety analysis. *Id.*

36. On information and belief, neither the Corps nor the City conducted a meaningful site-specific safety analysis in support of Floodway Construction Permit Application # FW-27680. According to the approved mitigation plan, the Corps arrived at one of the relevant decisions regarding the scope of clearing on the basis of an “executive decision,” without reference to relevant scientific or specific engineering evidence. Letter from Mr. Turner to Div. of Water 7.

37. For the reasons set forth above, in submitting Floodway Construction Permit Application # FW-27680, the applicants impermissibly relied on outdated guidance and misrepresented the necessity for the proposed vegetation removal in violation of federal law. Thus, the environmental consequences of the planned habitat destruction are *per se* unreasonable, because the applicants have failed to identify any *valid* factual or legal justification for the project.

B. DNR’s Analysis of “Cumulative Effects”

38. On October 31, 2014, DNR informed the applicants that “[t]ree clearing along the existing wooded corridor of the West Fork White River and previously constructed segments of the Indianapolis North Flood Damage Reduction Project is a significant concern that has not been adequately addressed to date.” Indiana Dep’t of Natural Res., Incomplete Application Notice 3 (Oct. 31, 2014). DNR observed that the applicants had impermissibly delayed multiple mandatory mitigation projects associated with past permits, including but not limited to # FW-19540, which DNR awarded *over fourteen years ago*. The agency expressly warned that failure to resolve these outstanding mitigation requirements “may ... lead to a negative cumulative effects review for the current permit application.” *Id.* DNR also advised the applicants to anticipate cumulative effects “[i]n areas where the riparian corridor is completely eliminated or reduced to only a single row of trees.” *Id.* at 6.

39. As of March 31, 2015, the applicants had not completed *any* outstanding mitigation projects. *See* Letter from Mr. Turner to Div. of Water 2–3.

40. In issuing the Certificate of Approval for Floodway Construction Permit Application # FW-27680, DNR did not acknowledge the applicants’ failure to mitigate prior floodway modification activities or evaluate the impacts associated with the future construction of Indianapolis North Phase 3B. Indeed, the agency failed even to address the statutory requirement to consider “cumulative effects.” *See* I.C. § 14-28-1-22(f).

**SPECIFIC BASES FOR APPEAL – VIOLATIONS OF THE FLOOD CONTROL ACT**

COUNT ONE

41. Petitioner hereby incorporates by reference the allegations presented in all preceding paragraphs.

42. The area affected by Floodway Construction Permit Application # FW-27680 – *i.e.*, the land within fifteen feet of the face of the wall or the toe of the levee located on the left bank of the West Fork White River – constitutes a “floodway” for purposes of I.C. 14-28-1. I.C. § 14-8-2-102.

43. In submitting Floodway Construction Permit Application # FW-27680, the Indianapolis Department of Public Works and its agent, the U.S. Army Corps of Engineers, sought approval to “erect, make, use, or maintain a structure, an obstruction, a deposit, or an excavation; or suffer or permit a structure, an obstruction, a deposit, or an excavation to be erected, made, used, or maintained ... in or on a floodway.” *Id.* § 14-28-1-22(c).

44. The FCA prohibits DNR from approving an application for floodway modification *unless* “the applicant has clearly proven that the structure, obstruction, deposit, or excavation will

not ... [r]esult in unreasonably detrimental effects upon fish, wildlife, or botanical resources.” *Id.* § 14-28-1-22(e).

45. The applicants did not clearly prove, nor could DNR reasonably find, that Floodway Construction Permit Application # FW-27680 will not result in unreasonably detrimental effects on fish, wildlife, or botanical resources.

46. Accordingly, DNR erred in approving Floodway Construction Permit Application # FW-27680.

### COUNT TWO

47. Petitioner hereby incorporates by reference the allegations presented in paragraphs 1–43.

48. The FCA requires DNR to “consider the cumulative effects of the structure, obstruction, deposit, or excavation” in deciding whether to award a permit for floodway modification. *Id.* § 14-28-1-22(f).

49. In issuing the Certificate of Approval for Floodway Construction Permit Application # FW-27680, DNR failed to satisfy the statutory mandate to evaluate the “cumulative effects” of floodway modification, including “unreasonable detrimental effects upon fish, wildlife, or botanical resources.” 312 IAC 10-2-18.

50. DNR’s decision to approve Floodway Construction Permit Application # FW-27680 – without addressing the cumulative effects of the planned vegetation removal in conjunction with as yet unmitigated past and reasonably foreseeable future activities – violates the Flood Control Act. I.C. § 14-28-1-22(f).

## RELIEF REQUESTED

For the reasons stated above, Petitioner respectfully requests that this tribunal grant the following relief:

1. To prevent unnecessary and irremediable destruction of riparian habitat, as well as unnecessary expenditure of resources, stay the effectiveness of DNR's decision to approve Floodway Construction Permit Application # FW-27680 pending the outcome of this petition for review.

2. Enter a judgment that DNR's approval of Floodway Construction Permit Application # FW-27680 was not in accordance with law because the application was approved despite the applicants' failure to establish the absence of unreasonable harm to fish, wildlife, and botanical resources as required by the FCA.

3. Enter a judgment that DNR's approval of Floodway Construction Permit Application # FW-27680 was not in accordance with law because DNR approved the application without consideration of the cumulative effects of the application and other activity on the White River and its tributaries.

4. Remand this matter to DNR for further proceedings consistent with the judgment of this tribunal.

5. Grant Petitioner such other relief as this tribunal deems just and proper.

DATED: June 26, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served by U.S. Mail, first class, postage prepaid, this 26th day of June 2015, upon the following:

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Indianapolis Department of Public Works  
1200 South Madison Ave., Ste. 200  
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Drew Russell  
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