AOPA COMMITTEE OF THE
NATURAL RESOURCES COMMISSION

Meeting Minutes of May 18, 2010

MEMBERS PRESENT

Jane Ann Stautz, Chair
Doug Grant
Mary Ann Habeeb
Mark Ahearn

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane

GUESTS PRESENT

Kevin Green
Eric Wyndham
Jon Eggen
John Moriarity
Becky Moriarity

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 1:21 p.m., EDT, at the Fort Harrison State Park Inn, Roosevelt Ballroom, 5830 North Post Road, Indianapolis, Indiana. With the presence of four members, the Chair observed a quorum.

Consideration and approval of minutes for meeting held on March 16, 2010

Mark Ahearn pointed out a clerical error in the draft March 16, 2010 minutes. He noted that on page seven, the second to last full paragraph, fourth sentence, the pronoun "she" should be added to read: "…opportunities to say **she** wasn't convinced…".

Mary Ann Habeeb moved to approve the March 16, 2010 minutes with the clerical amendment. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Consideration of amendments to nonrule policy document, Information Bulletin #55, regarding receipt of citizen comments filed with the Natural Resources Commission; Administrative Cause No. 10-080A

Stephen Lucas, Director of the Natural Resources Commission, Division of Hearings, introduced this item. He said the Division of Hearings was seeking the perspectives and

directives of the AOPA Committee because issues are mostly legal ones. "It's largely a function of how to deal with rule adoptions, but not exclusively." A nonrule policy document seeks to give order to the receipt of citizen comments and to a hearing officer's reporting of them to the Commission. "Most importantly, we are challenged by new opportunities that come from electronic media. Large volumes of information can be passed to the Commission digitally, which, if we had to do that all in paper form, would be monstrous." Even so, electronic filings can be abused. He also noted Section 6 of the nonrule policy document provides for periodic review with review required this year.

Lucas said the amendments to Section 2 would strike subsections (B) and (C). These subdivisions now require Division of Hearings personnel to make a "reasonable effort" to acquire a citizen's name and resident information. Anonymous comments are "usually the most heated." The citizen response to a staff member's follow-up is typically "rude at best and worse than rude at times".

Lucas said Section 4 relates to the processing of comments. When the Commission gives a rule preliminary adoption, draft language is included, and this stage has sufficient specificity to allow meaningful citizen comments. Sometimes a Department of Natural Resources division will open a rule proposal to public review, but the proposal is not yet ready for consideration by the Commission. If the Division of Hearings receives comments on "ideas that are not really crystallized" by the Commission, for the Division of Hearings to productively process the comments can be difficult or impossible. Amendments to Section 4 would address this situation. "If it's a new DNR concept, the comments would be passed along—with the best interpretation of staff in the Division of Hearings—to the appropriate DNR division. Another amendment would cross-reference Information Bulletin #7, which addresses rule change petitions. If the Division of Hearings does not have enough information to pass the comments to a particular DNR division, the citizen would "be referred to the petition for rule change process".

Jennifer Kane, the Commission's Paralegal, explained that comments are presently received "through a variety of portals—the Commission's Internet contact form, the proposed rule online comment form, by regular mail, and by telephone." Taking comments by telephone is problematic because "it's difficult to translate a person's thoughts into understandable statements." The main contact form does not require the commenter to supply resident information. The proposed rule comment form does require the commenter to provide an email and resident information. This form allows the commenter to identify a particular proposed rule. The proposed rules are categorized online by subject matter, which "makes it easier to direct the comments to a particular rule proposal." Kane said the comment form also includes a category entitled "OTHER," which a commenter could choose if a rule proposal is not listed online and not yet before the Commission.

The Chair observed that the proposed rule comment form can help the Division of Hearings effectively "manage the flow of information."

Lucas agreed, and he explained that the Division of Hearings would routinely continue to receive comments by telephone for "the more technical rules." These kinds of rule proposals usually do not receive "a lot of comments," and "we would not want a process that would tend to have a chilling effect on them. I would really welcome the geologist or the engineer or the business manager calling me on the phone with their insights." On the other hand, "receiving comments by telephone for proposed rules that have broad social interest with massive numbers of comments can almost cause the Division of Hearings to cease to function as an office. There are only four of us, and all we would do would be to answer phone calls. The chances of us getting right what they are saying aren't very good anyway. Not only have we taken all day talking on the telephone, we haven't communicated the comments to the Commission the way the citizens wanted." He said it would continue to be the Commission's prerogative to direct the Division of Hearings to receive telephone comments on any particular rule proposal.

The Chair said, "I trust that you found this nonrule policy document to be helpful over the past year-plus since it has been in place." In my view, the proposed amendments are "very reasonable and thoughtful".

Mary Ann Habeeb said, "I think the proposed amendments make sense. It looks to me like your comments are taken based on the experience that you've had over the course of the first iteration. I appreciate the fact that this is being updated and that you are contemplating additional updates as those are warranted. That you have some kind of policy document is important so that the public can be reasonably informed and put on notice as to how they can transmit information to you in a manner that will move forward their concerns, and the nonrule policy document also protects the integrity of the process as it goes along. I think this does a pretty good job of it, and I appreciate your concerns and time put into trying to make this a more usable document."

The Chair asked, "Do we need an official motion?"

Lucas responded that if the proposed amendments are "acceptable to the members of the AOPA Committee, the proposed nonrule policy document would be tendered to the full meeting of the Commission for action in July."

Mary Ann Habeeb moved that the AOPA Committee indicate support for the proposed amendments to the nonrule policy document and recommended their consideration by the full Commission at its July meeting. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Consideration of Claimant's Motion Requesting Recusal of Mark Ahearn in the matter of *John Moriarity v. Department of Natural Resources*, Administrative Cause No. 08-137W

Upon opening consideration of this agenda item, the Chair recognized Mary Ann Habeeb. Habeeb said, "I would like to recuse from this proceeding and indicate my recusal for the record." Habeeb then also excused herself from the meeting and left the room. She did

not return. With the presence of three members, the AOPA Committee continued to have a quorum.

Mark Ahearn then addressed Moriarity's request for his recusal. He noted Indiana Code § 4-21.5-3-2, with respect to final agency authorities, references that "even a final agency authority can be disqualified for a reason that an [Administrative Law Judge] would have been…. Indiana Code § 4-21.5-3-9(c) says if the judge—and I assume that means in this case the final authority—believes the impartiality might reasonably be questioned or believe that the judge's personal bias, prejudice, or knowledge of a disputed evidentiary fact might influence the decision, an individual assigned to serve alone or with others shall withdraw."

Ahearn continued, "I would tell you in response, Mr. Green, to your letter of yesterday that I am not going to recuse myself." Ahearn observed that "Indiana Code § 14-10-1-1 establishes the Natural Resources Commission. The Commission consists of twelve members, and the first one listed is the Commissioner of the Indiana Department of Transportation or the Commissioner's designee. The General Assembly went out of its way to identify someone from the Department of Transportation as a participant on the Natural Resources Commission, and the Natural Resources Commission selected the members to serve on the [AOPA] Committee, and in so doing, selected me."

Ahearn reflected, "Statutorily, it would be, I would suggest, inappropriate for me to recuse myself. But I would also tell you this—just for your client's and for the sake of the Committee—regarding the project that you reference in your letter suggesting that INDOT has an interest in and that somehow the interest is imputed to me. You included a copy [of the project] with your letter, which is helpful. It identifies what we are talking about as the Garthwaite Road Extension in Grant County. If you look at that attachment, or when we reference that attachment, it's identified as a 'Group 4 Program'. At INDOT, a Group 4 Program is what is known as an 'LPA Project'. It's a local public agency project, and Group 4 includes cities, counties, or towns under 5,000 population. These are projects for county or local units of government—the county initiates, sponsors, designs, prosecutes, and moves forward. The only State connection to them, because there is no State money in them, the only State connection to an LPA project is that with some very limited oversight—we have to make sure that the local entity follows the federal highway rules in using federal money—beyond that, [INDOT] has no connection to the project. If the county drops or the local drops it, INDOT drops it. It's not on [INDOT's] agenda."

Ahearn said he wished to make "two final points in that regard. Until I received the objections to Judge Jensen's Findings and Conclusions, I had never heard of the pond or lake in question. Until yesterday afternoon, I had never heard of this road project in question. So, statutorily and factually, I simply have no connection to this issue. It would have been impossible based on your allegations for me to have formed a bias in any manner. With that being said, I appreciate your diligence, and I will not recuse myself."

Eric Wyndham, Counsel for the Department of Natural Resources, stated, "I did not receive a copy of that [motion], and I feel that I should have as Counsel for the Department. I would object to it on the record for that reason."

The Chair noted Wyndham's objection. The Chair stated, "I'm inclined to move forward with the petition for disqualification of the administrative law judge, and accept Mr. Ahearn's denial to recuse himself." Doug Grant expressed his concurrence.

Consideration of Claimant's Petition for Disqualification of Administrative Law Judge in the matter of *John Moriarity v. Department of Natural Resources,* Administrative Cause No. 08-137W

Kevin Green, attorney for Moriarity, opened by stating the essence of the motion for disqualification of Judge Jensen was "not on demeanor at all. Rather, beginning with the end in mind here, a claimant should not have to overcome the following picture: physically dangerous to the [Administrative Law Judge] when she is visiting his private property such that it warrants an armed guard. A claimant should not have to overcome a judicial officer's conclusion that he was conceding his challenge to jurisdiction based on [Judge Jensen] having listened in on ridge making discussions between the parties. [Moriarity] shouldn't have to overcome that. A claimant should not have to overcome what amounts to clear error in not accounting for a work in progress that had radically updated facts, figures, data, conclusions arrived at with DNR's jurisdictional methods, meaning amount of water accounted, height of dam. These things that were essentially 2007 assessments have weaknesses of their own. But, separate from that and taking them at face value, 2008 when [the Department] agreed to go out there to re-visit the conditions, conveniently the jurisdictional metric that [the Department] had zeroed in on [the Department] conveniently ignored. [The Department] did not re-evaluate the volume impounded by the dam, notwithstanding the fact that there was a new lower, substantially lower, spillway permanently changing the design flood level of that pond."

Green said the Department acknowledged the spillway, but the Department did not re-calculate. He said Moriarity has three grounds for Judge Jensen's disqualification.

The Chair said, "I just want to clarify that right now what we would like to discuss, and to have any additional information on and argument from you, is as it relates specifically to your petition for disqualification of the ALJ."

Eric Wyndham, attorney for the Department of Natural Resources, responded. "In all due respect, the Claimant is grasping at straws here." Judge Jensen's affidavit explained and outlined what occurred regarding "any comments between Ken Smith and [Judge Jensen]. I think the record is complete, and Mr. Green or Mr. Moriarity has not submitted anything to show that anything disparaging was stated about Mr. or Mrs. Moriarity by either Ken Smith or Judge Jensen."

Wyndham added that Smith's affidavit contained a statement that Smith was "concerned with the remoteness of the area and the dirt road. I was out there in April 2008 visit with

Mr. Smith and others, with Moriarity's permission, and I will have to admit that the area is very remote. It's a pretty good size dam." Wyndham provided the AOPA Committee with a copy of Respondent's Exhibit 15, which he said was admitted into evidence during the administrative hearing without objection. He said Respondent's Exhibit 15 depicts the water impoundment at issue and surrounding area.

Wyndham said, "Judge Jensen indicated that as soon as Mr. Smith made the comment that it was his opinion that [Judge Jensen] should not go alone, [Judge Jensen] stopped him and told [Mr. Smith] not to say anything further, which I think was appropriate. I don't think there is anything in the record at all that anything was said to show any bias, prejudice, or affect impartiality of Judge Jensen". He added that "a lot of Mr. Green's objections" are based on what occurred in the order of summary judgment and its denial, or what occurred "before the alleged conversation, so I don't think that can be a part of any disqualification…. The record is pretty clear that Judge Jensen conducted herself in a proper and professional manner. I think the record shows that [Judge Jensen] allowed a complete and full briefing of the summary judgment issue. [Judge Jensen] allowed a full chance for everybody to submit evidence at hearing. That was done."

Wyndham said the Department introduced evidence regarding the volume of water impounded by the dam, and Mr. Moriarity presented "no evidence whatsoever regarding the volume in question. I think it is probably improper now to bring that up."

Green offered his client's rebuttal. "As far as nothing disparaging, give me a break. If any of you were invited to a bridge party, but somebody says, 'Yeah, be sure you take an armed guard'. Come on. Everybody in the business knows what a CO is. That is armed heat…. That's armed police escort." Green urged that Smith "knew what he was saying, and the fact that [Smith] is trying to backpedal now speaks for itself." Green said "armed protection is absolutely disparaging…. It's fundamentally disparaging." Green observed that Judge Jensen did not request a guide. "She knew that [Mr. Smith] wasn't saying, 'Get a guide. Get a guard.'" Green said that Judge Jensen stopped Mr. Moriarity from providing evidence addressing the Department's jurisdictional authority. "The damage was done. How a party is characterized in the judge's mind—that's huge. That is absolutely on point saying these people are not allowed any wiggle room at all."

Wyndham responded by urging that the administrative action involved two notices of violation directed to the construction of a dam without a permit. The character of Mr. and Mrs. Moriarity was not at issue. "That's all that was heard, and that's all that was at issue here. I think the record is clear that there hasn't been any bias or prejudice done by Mr. Smith or the Judge."

Mark Ahearn asked Mr. Green, "To what issue does this alleged statement and your allegation of *ex parte* communication apply? If this is a dispute about a dam and the size of the impoundment, what issue does this go to? Were the Moriaritys witnesses, so their credibility is at issue here? I think the statute contemplates some issue."

Green responded that the Moriaritys are the property owners in interest and "can [the Moriaritys] be trusted in basically a pro-liberty construct to watch out for their own property with public safety in mind without DNR jurisdiction?" He said the Moriaritys have been "impugned as scofflaws when they are seeking to live their private lives on private land in liberty absolutely goes to the core issue of the propriety of DNR jurisdiction, such that the Judge's discreet action would be inclined against letting them live their life in liberty on their own ground."

Ahearn said, "The challenge is not a matter of trust or not. Is the challenge not that there is a threshold size for the impoundment or the dam that then the State requires that certain requirements kick in regardless how trustworthy or lack thereof?"

Green answered, "Correct, but there are threshold triggers. The hope at the time was that the Judge would override the lack of evidentiary showing on our side that there is not nearly the amount of water that there was in 2007, and that there is not nearly the danger to the public that DNR was alluding to." Green added, "It was actually affecting the Judge's discretion to impugn the Moriaritys as scofflaw operators."

Mark Ahearn said, "Here's my challenge with your assertion. It strikes me that the statement by Mr. Smith occurred 21 months after the Judge's initial contact with this case…. Judge Jensen has had plenty of time and lots of contact with this case starting in April 2008." Ahearn noted Judge Jensen amended her order, and "just moments before [Mr. Smith's] statement was made, the Judge granted a motion, a discretionary motion, to go do a site inspection. From my perspective, it strains credibility a bit, at least in my mind…to suggest that after 21 months or so of contact with this case, a single utterance somehow affected [Judge Jensen's] judgment or differently informed the Judge above and beyond the basis and foundation that she had already known or been in contact with in this case."

Green said Moriarity's concern from the very beginning in seeking an administrative remedy was that the Department was overreaching with its notices of violation. My client "wondered whether he would get a fair hearing. It's almost against his farmer's judgment whether he would get a fair hearing in a court sponsored by the Natural Resources Commission—not disparaging government, the government has a job to do." The DNR ignored Moriarity's changes to the spillway and which reduced size of the water impoundment. The Department did not re-measure the height of the dam, and the Department seized "bulldog fashion" on other smaller violations because the earthen levee "doesn't satisfy DNR engineering standards." Green continued, "I submit that the record shows this that there is a thumb on the scale." The levee and water impoundment are "works in progress, and the DNR has not taken that approach."

Wyndham responded that the statute addressing *ex parte* communication and disqualification applies only when there was any communication directed to an issue pending in-chief. "There has been nothing filed by Moriarity or discussed to date where there was any communication between Ken Smith and Judge Jensen regarding any matter at issue in the proceeding." Wyndham urged that Moriarity asked on two separate

occasions for the Department make a site visit. "For [Moriarity] to now allege government intrusion, that's somehow shoved off on Judge Jensen, I think is really ridiculous."

The Chair observed Judge Jensen was not present at today's meeting. She then took notice of Judge Jensen's March 30, 2010 correspondence to AOPA Committee members. She said the following quotation from Judge Jensen's correspondence was informative: "To this day I do not know what Mr. Smith's concern was." The Chair reflected that Judge Jensen did not consider Smith's statement an *ex parte* communication because it was not directed to any substantive issue.

The Chair said, "It is within our authority as to whether or not to approve or deny the petition for disqualification or to modify it in any respect. In this case, there really isn't any option other than to disqualify the [Administrative Law Judge] or to deny the request to disqualify the [Administrative Law Judge]". The Chair then called for a motion as to the petition for disqualification.

Doug Grant said, "I read the material and listened closely. I can't see any reason to disqualify Judge Jensen. I am not persuaded."

Mark Ahearn said, "Being that counsel for both parties are present, either can—we are the final agency authority that hears this—address these issues as they have with us if there is evidence that somehow Judge Jensen excluded or simply didn't deny something we shouldn't have seen…. I would argue that there is not sufficient evidence to disqualify her on the *ex parte* communication. … There is also the ability, because all counsel is here, to remedy anything and submit any evidence the counsel thinks that we need to see as the result of that communication."

The Chair said, "So noted. Thank you for that clarification."

Doug Grant moved to deny the Claimant's Petition for Disqualification of the Administrative Law Judge. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Oral Argument to consider Findings of Fact, and Conclusions of Law, with Nonfinal Order in the matter of *John Moriarity v. Department of Natural Resources*, Administrative Cause No. 08-137W

The Chair explained that each party would have ten minutes to provide oral argument, with an additional five minutes for rebuttal.

John Moriarity asked whether he would be allowed to provide oral argument.

The Chair inquired whether Mr. Green represented John Moriarity. "Normally, we have it where either the parties themselves or the counsel representing that party speaks. So however you want to use that time" is acceptable.

Eric Wyndham stated, "If Mr. Moriarity wants to submit argument, that's fine. But if it's going to be new evidence, I will object to that."

Chairwoman Stautz noted Wyndham's objection. She then called upon Kevin Green, attorney for John Moriarity, to provide oral argument.

Kevin Green summarized in timeline format. He said Moriarity's "backyard project", a 30-acre pond, was constructed because his client "wanted to convert his low-performing highly-erodible farm ground into something that they enjoyed more." In 1999 and 2000, Moriarity received notice that Grant County proposed to extend Garthwaite Road through the Moriarity property, "basically where this pond was starting to take shape". In 2000, "at the behest of DNR, Moriarity spent $15,000 for Bonar [Engineering, Inc.] to draw a draft map, but that wasn't Moriarity's plan. He just wanted to have his backyard working project. It was a work in progress. It was a non-Bonar plan." Green said Bonar's engineering plans were submitted into evidence. In 2002, the Department notified Moriarity by letter that Moriarity had, with the construction of the water impoundment, "blocked a stream outlet". Moriarity responded to the Department's letter by requesting the name of the stream. "Several years went by and there was no response from DNR. In the meantime, thousands of fish are now there, large game fish, as well as other kinds of fish."

Green said in 2007 Grant County sent a letter to the Governor's Office requesting assistance regarding the Garthwaite Road Project extension. "DNR came out and took a lot of high-tech and less than high-tech measurements and came up with a water line there almost 857" feet. In 2008, Grant County received a federal grant for the roadway extension project. Grant County is "primed, locked, and loaded, you might say." Also in 2008, Moriarity invoked his administrative remedy requesting the Department to "re-measure…, but the Department basically repeated the 2007 information. [The Department] did notice new things, different cracks in the dry ground and a new spillway at 853, basically four feet lower than the earlier waterline but [the Department] didn't assimilate that new information into [its] calculations. [The Department] still kept the 2007 calculations."

Green said there was a motion for summary judgment regarding the stream issue, which was denied by Judge Jensen, but Judge Jensen "conceded…jurisdiction, and established in the motion for summary judgment ruling that the 2007 volume [of the impoundment] was established. [Judge Jensen] really didn't have discretion there, because there wasn't any designated counter information to DNR's use of 2007 calculations and information."

Mark Ahearn asked, "Can you help me with the 'concedes jurisdiction' concept? What is the substance of that?"

Green responded that in a conversation between the representing attorneys, Tom Wright and Eric Wyndham, Wright said "in so many words, 'I reserve all rights; however, we do

have things we can talk about regarding settlement, regarding issues that DNR has been raising."

Eric Wyndham interjected, "I guess I would object to any comments regarding settlement talks. I don't think that is a part of this case".

The Chair stated, "No, it's not".

Wyndham continued, "You don't present argument regarding settlement discussions in an appeal case."

The Chair said, "So recognized. So, if you can stay to the facts that have been entered into the record."

Green responded, "I am absolutely addressing material that is in the record and that is actually itemized. This isn't settlement talk. This is status conference case record. In direct response to Mr. Ahearn's question, I don't think it was inappropriate to describe the context in which that came up and how [Judge Jensen] used that…discussion to derive a conclusion that Moriarity is conceding the jurisdiction issue…. [Judge Jensen] said on behalf of Moriarity, 'Moriarity is conceding the jurisdiction issue.'—the very reason [Moriarity] is in court. That's huge." The administrative hearing was held on November 4, 2009 "where basically it was all the experts attesting to how carefully they measured things in 2007. Nobody talked about the new level."

Mark Ahearn asked, "When you say 'new level,' do you mean the spillway at 853?"

Green answered, "Yes. The 853 and substantially lower water impoundment volume." The Department did not re-measure the dam height. He said Judge Jensen's nonfinal order was issued in 2010, which "delivered jurisdiction to DNR with some options, in Mr. Moriarity's perspective, loser options."

The Chair asked, "So, if I'm correct, the Department of Natural Resources has had representatives out there twice to do measurements, right?"

Green answered, "That's correct. One would think it was for measurements. I don't know what they did the second time because there weren't measurements taken. That's how I otherwise would change what you said. [The Department] made two visits, but the second time did not measure."

Kevin Green then yielded his remaining time to John Moriarity.

The Chair said, "Again, as long as there is no additional information that is not already in the record. I need to be very clear on that, because this is not an evidentiary hearing".

John Moriarity said, "In the first place, I have done nothing wrong here accept reading this book."

Eric Wyndham interjected, "I object. That's not in evidence."

Moriarity responded, "I'm not giving it as evidence."

The Chair said, "But you are showing it to us. If there is any clarification of the facts that are in the record, I would appreciate it."

John Moriarity said, "What I want to get to is I've done nothing wrong. The DNR issued this notice of violation, which is invalid. It's really invalid because they issued it under [Indiana Code] 14-8, which is the Flood Control Act". Moriarity said the Flood Control Act exempts structures and projects that have less than one square mile of watershed. "The DNR even measured my watershed at 88 acres. That's far less than a square mile. Also, I'm not in a floodplain. My project is not in a floodway. It's not in a floodplain. That has been submitted as evidence. I admitted a FEMA flood map. The FEMA flood map clearly shows that this whole project is not in the 100-year floodplain, and it's even outside of the 500-year floodplain. I have absolutely no property in this pond area that is in a floodway." Moriarity said the Department does not have regulatory authority outside the floodway. The agency "should never have sent me these notices of violation to begin with."

Becky Moriarity asked whether she could address the AOPA Committee.

The Chair said, "I'm going to indulge here for two minutes, and that's it. Again, it has to be what's already before us."

Eric Wyndham stated, "In all due respect, I realize that I have no question that she is a joint landowner, but she is not a party. [Ms. Moriarity] didn't testify at the hearing."

The Chair recognized Wyndham's objection, and indicated that Ms. Moriarity would not be allowed to present oral argument.

The Chair then called upon Eric Wyndham, attorney for the Department of Natural Resources, to provide oral argument.

Eric Wyndham stated, "I think we have already gone into—unless you want to hear more—regarding [Mr. Green's] Objection 1 of the appearance of interjected bias on behalf of the Judge. I think that has been pretty well argued. I think that Mr. Moriarity has not met his burden to show that there was any *ex parte* statement regarding an issue in the proceeding."

Wyndham said Mr. Green's argument is that Judge Jensen "drew an unreasonable inference" on a dispositive matter in favor of the Department regarding "a key jurisdictional metric" during the summary judgment portion of the proceeding. Wyndham said Moriarity's motion for summary judgment was basically limited to the argument that "there was no stream or river on his property. The issue of volume of the impoundment was never raised by Mr. Moriarity, or his attorney," Thomas Wright,

during the summary judgment portion of the proceeding. Wyndham said that if it was the intent of Moriarity to argue subject matter jurisdiction that "should have been done in a [Trial Rule] 12(B)(1) motion instead of on summary judgment. And, the only time you can convert a 12(B) motion to summary judgment is through a 12(B)(6) motion." Moriarity "used the wrong mechanism" to contest jurisdiction.

Wyndham urged that the Department presented unrefuted evidence during the administrative hearing that the amount of water impounded exceeded 100 acre-feet. This measure is the threshold for agency jurisdiction. "In fact, the initial calculation was 472.9 acre feet of water, which was measured to the ordinary high water mark." He noted that the statute allows measurements to the ordinary high water mark or to the top of the dam, whichever is lower. "The initial measurement was way over 100 acre feet of water."

Mark Ahearn inquired of the significance of Mr. Moriarity's "insertion in this discussion of the spillway being at 853 feet?"

Wyndham responded, "With all due respect to Mr. Green, he was not involved in the case at the time". Wyndham explained that the Department issued the first notice of violation ("NOV") due to construction of the dam without engineering plans or Department permits as required by the Dam Safety Act.

Ahearn asked, "Is that for every dam, or dams that DNR has jurisdiction over?"

Wyndham answered, "A dam built where there is jurisdiction." He said that a cross-section survey of the dam was completed, and "one part of the dam was over 30 feet high." The Dam Safety Act states the Department has jurisdiction "over all structures in, on, or along rivers, streams, or lakes in Indiana. The issue on summary judgment was whether there was a stream feeding the impoundment."

Wyndham said the Department's second visit to the property in 2008 was at the request of Moriarity's former attorney, Thomas Wright, based on an assertion "there supposedly had been some corrections made in response to the first NOV." The Department revisited the site and "found that there really weren't any corrections made and found new violations and new problems, and that led to the second notice of violation." Survey measurements were completed for the second violation and submitted into evidence through a Department witness, Robert Wilkinson.

Mark Ahearn stated, "I'm trying to get you to explain why the Department thinks [it] has jurisdiction? Perhaps you've said it already—the dam is in a stream or waterway in the state of Indiana."

Wyndham responded that affidavits were submitted with the Department's response to the motion for summary judgment, which supported "that there were streams on the Moriarity property that fed to the lake that caused the water impoundment created by the dam." Additional evidence in support of this finding was presented at the administrative

hearing through testimony and maps showing "tree lines, which Mr. Wilkinson testified is an indication of a stream." Judge Jensen ruled that "if a stream is dammed up pursuant to State law, then that creates a levee. She was satisfied that the Department had submitted sufficient legal argument on the ordinary definition of 'streams', and the streams were dammed up creating an impoundment, and that there was jurisdiction for the Department to regulate that dam."

Wyndham said that Mr. Green emphasized that the Department did not make a third visit to the property to "look at the changes that were made." The Department issued the notices of violation. "They were violations at the time, I think, for the purposes of the hearing, and our burden was to show that there were violations at the time. I think that we did, without any problem, submit significant evidence…to prove that there were violations that were alleged."

Wyndham addressed Moriarity's argument that Judge Jensen drew an unreasonable inference on a dispositive matter regarding a key jurisdictional metric. He said that Green and Moriarity requested the Department to make a third visit to the property. Moriarity "tried to submit photographs that were not submitted as evidence at the administrative hearing to try to re-open this matter after the evidence was heard. The hearing was conducted, and it was closed." The Department objected to the introduction of additional evidence after the conclusion of the hearing. Wyndham said that "no professional engineering evidence or testimony at all was presented" by Moriarity to contest the measurements presented by the Department at hearing.

Wyndham said the argument brought forth by Mr. Moriarity that Judge Jensen found Moriarity conceded jurisdiction is a misreading of the July 20, 2009 "Report of Telephone Status Conference". The report references a discussion during the conference on "attempts to settle the matter…regarding the Department's jurisdiction. [Judge Jensen] basically indicated a statement that by the parties willingness to pursue settlement discussions, that she was under the impression that Mr. Moriarity may be conceding the jurisdiction issue." Judge Jensen "did not make that as a finding. She indicated that in the report that that was her understanding." But in an August 20, 2009 status report, Judge Jensen identified the issues for the administrative hearing. One issue was whether there was a stream or a lake existing on the Moriarity property and another was whether there was evidence to support the notices of violation. "There was not any objection ever raised by Mr. Wright, Moriarity's attorney," to the August 20 statement of issues.

Wyndham concluded by urging the Department presented evidence to support the notices of violation. The exhibits that were submitted by the Department and admitted into evidence were "done without objection. There was no evidence submitted at the hearing to contradict the Department's evidence, and the record shows that there is plenty of evidence to show the jurisdiction."

Doug Grant inquired of the significance of the location of the impoundment within or outside of the floodplain.

Wyndham responded that "any stream has a floodplain". There was "never any formal objection through a motion to dismiss or any other motion regarding the mention" of the Flood Control Act. "The Department made it clear early on, and the parties were under the understanding, that this matter and the NOVs were based on the Dam Safety Act." Arguments submitted on behalf of Moriarity were based on the Dam Safety Act.

The Chair then invited Mr. Green to provide rebuttal.

Kevin Green said the State has jurisdiction over regulated floodways. The State "can only issue citations on regulated floodways. It is true that every stream has a floodway, but not every stream is regulated by the State of Indiana." The State's regulation is limited to those streams that draw from a watershed greater than one square mile. "No one says that Moriarity's farm has streams that draw from that large of an area, rather it's 13% of a square mile. This actually goes to the crux of the jurisdiction issue. DNR shouldn't be knocking on [the Moriarity's] door at all through the lens of the floodway."

Green said the Department does not have jurisdiction and should not have issued the notices of violation. Judge Jensen did not consider the "floodway issue to be dispositive. That's fine, but it was still a significant part of the Moriarity challenge to DNR jurisdiction. And yet, in [Judge Jensen's] Findings and Conclusions of Law, she did not address the floodway business at all. It didn't register on her radar screen as significant. And yet, it is a core jurisdictional element of why DNR should be on a particular piece of property." The water impoundment was not constructed within a regulated floodway.

Mark Ahearn noted that Judge Jensen, at ¶ 15c of the Findings and Conclusions of Law, found that the Moriarity dam impounds a volume of more than 100 acre-feet of water and covers in excess of 30 surface acres. He then asked, "How big is this impoundment?"

Green responded the amount of water impounded is "a third of 472.9 acre feet…because of this new lower spillway. So, the impoundment is substantially lower than the 472.9 that all [the Department's] experts attest to".

The Chair asked Green whether he agreed with the volume as stated in ¶ 15c.

Green sated, "I disagree categorically".

Mark Ahearn observed that "a third of the 472 is still more than 100."

Green responded, "There is a reason. There's the amount counted and the amount that's actually walled within, because there are depths that DNR's own experts admit won't drain even if the embankment disappears totally…. To the extent that we are over the jurisdictional amount, that water is contained in the depths and is not a risk to anyone. Technically, it is not impounded by the embankment."

Mark Ahearn asked Wyndham to address Green's assertions.

Wyndham responded that Green's assertions are "matters that weren't brought into evidence. There was never any evidence at the hearing submitted by Mr. Moriarity, or his counsel at the time, of any impoundment less than 100 acre-feet. In fact, the Bonar plans, which Mr. Green briefly mentioned and were admitted into evidence by the Department…, indicated on the preliminary plans that it was over 100 acre feet as planned." Wyndham continued, "I don't know if they lowered the lake or what, but after the hearing, they tried to have [the Department] to come out there and re-open this hearing up so that they can present evidence of something less than 100 acre feet. The fact of the matter is the statutory definition of 'volume' is either at the ordinary high water mark or at the top of the dam. So, it's based on the height of the dam and the amount of water that is subject to the impoundment." Moriarity had "plenty of time" in two years of preparation to contest the volume issue, and Moriarity has "waited until after the hearing was conducted and concluded to do so. I think that is improper."

The Chair said, "So noted."

Green agreed that Moriarity did not designate evidence before or at the time of the hearing regarding the volume of water impounded. "However, the evidence was there and was presented indirectly by DNR itself. DNR's own exhibit noted the lower spillway. [The Department] chose not to integrate that change of circumstance, the new designed flood level locked in by that lower spillway. … [The Department] chose not to integrate that fact into data so that [the Department] is still spouting 2007 conclusions regarding the amount of water impounded." Green characterized the water impoundment as a "work in progress. [The Department] caught us when the water was high. The water is not there now. It can't possibly get there again. To say that those are facts on the ground is false."

Wyndham stated during the Department's 2009 site view, "there was a sizable lake there. So, if there has been any lowering of the lake, it has been since the hearing." He added, "Over a two year period of time, DNR went out there twice and saw violations that weren't cured. There was no evidence presented at the hearing by Mr. Moriarity to contradict any of the measurements or evidence submitted by the Department".

The Chair explained that the AOPA Committee can "only take into account what's been entered into the record." The Chair then invited additional AOPA member discussion.

Mark Ahearn asked, "Did Judge Jensen actually go on the inspection trip?"

The Chair answered in the affirmative, and noted that several findings in the nonfinal order were "based on…observations from a site visit."

The Chair noted that Judge Jensen entered a Nunc Pro Tunc Order to correct typographical errors in the Findings of Fact and Conclusions of Law with Nonfinal Order. The Chair asked the parties whether there was objection to incorporating the corrections into the final decision. Neither party objected to correcting the typographical errors.

The Chairwoman Stautz reviewed the proposed Nonfinal Order, and stated, "I know we didn't touch on all of these during the discussion." She then invited further discussion from AOPA members.

Ahearn reflected, "It strikes me that the evidence, including the site visit, that was before Judge Jensen, and the lack of evidence to the contrary in the record would support Judge Jensen's decision. We would not be making an arbitrary and capricious decision if we approved [Judge Jensen's] Nonfinal Order final."

The Chair said, "I agree. I've read over all of the briefs and the responses."

Ahearn asked, "Mr. Green, having said that's where I think the substance of this case is, the law, the balance of the evidence, and what was before the Judge, is there something about [Judge Jensen's] order that works an impossibility? I assume the lake could be drawn down to the level she suggests, and I assume the Moriaritys could have an engineer look at the dam. I just want to make sure we are not creating a legal nullity or situation that is just impossible."

Green responded, "The difficulty is that it has been, heretofore in my perspective, unnecessary for [the Moriaritys] to make a full-blown engineering project out of it when they are just doing their own farm acreage aquaculture project that doesn't present a hazard at the low level that it exists. As far as impossibility, possibilities come in degrees. An engineering workup for something of this scope is hugely expensive. It's more than a pound of flesh that gets extracted in meeting the State's engineering requirements for something like this that wasn't envisioned as an engineering project from the beginning."

Ahearn expressed the perspective that Judge Jensen "had before her sufficient evidence to issue the Findings of Fact, Conclusions, and Nonfinal Order". He moved to approve the Findings of Fact, Conclusions, and Nonfinal Order with the correction of typographical errors. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Adjournment

Doug Grant moved to adjourn the meeting. Mark Ahearn seconded the motion. Upon a voice vote, the meeting adjourned at approximately 3:03 p.m. EDT.