

STATE OF INDIANA
PARKE CIRCUIT COURT
2008 TERM

FILED

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Kim Shortz
CLERK PARKE CIRCUIT COURT

**HOBSON FAMILY FARMS, LLC
and ROYDEN HOBSON,
Plaintiff(s),**

-vs-

CAUSE NO. 61Co1 0710 MI 420

**RON LAMBERMONT and
INDIANA DEPARTMENT OF
NATURAL RESOURCES,
Defendant(s)**

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT**

FINDINGS OF FACT

1. The Department of Natural Resources (" Department") issued to Ron Lambermont ("Lambermont") a Certificate of Approval for Construction in a Floodway, Certificate FW-23862.
2. Certificate FW-23862 was issued under the authority of I.C. 14-28-1-1 et seq., also known as the Flood Control Act ("FCA").
3. The Department is the governmental agency charged with the responsibility of administering the FCA.
4. On January 3, 2007, Royden Hobson and Hobson Family Farms, LLC ("Hobson") filed Petition for Administrative Review and Stay of Effectiveness of Approval Number FS-23862 with the Natural Resources Commission ("Commission").
5. Hobson is the owner of real property situated adjacent to Sugar Creek and adjoining the site owed by Lambermont upon which activities authorized by Certificate FW-23862 will be undertaken.

6. Hobson alleged in the Petition that the Department, in issuing Certificate FW-23862, failed to impose conditions sufficient to protect the environment and Hobson and that activities authorized by Certificate FS-23862 has resulted in the intentional placement of fill in the floodway, as well as the placement of fill into the floodway as a result of unchecked erosion. Hobson additionally alleges that increased canoe and recreational tubing in this segment of Sugar Creek will not only increase consequences of human injuries and the destruction of public and private property, but will also have an unreasonable detrimental impact upon fish, wildlife and botanical resources. More specifically, Hobson sought an administrative hearing to address the following issues:

- a. Whether the construction and operation at the site will cause unreasonable detriment to the fish, wildlife and botanical resources of the stream;
- b. Whether the construction and operation at the site will cause unreasonable harm to life, safety and property;
- c. Whether the construction and operation at the site violates other statutory and regulatory protections of the subject stream, including, but not limited to, the Indiana Natural, Scenic and Recreational River Act, I.C. 14-29-6, the Indiana Nature Preserves Acts, I.C. 14-31-1, the State's anti-degradation standards for water quality, 327 IAC 2-2-2 and 2-1.5-4, the Indiana Department of Environmental Management's Clean Water Act, the State's surface water quality standard set out at 327 IAC 2-1-6 and 2-1.5-8, protections afforded to species of plants and animals that are listed in Indiana as extirpated, endangered, threatened or rare, and the protections against unlawful dredging and filling under Section 404 of the Clean Water Act;
- d. Whether the cumulative effects of this project with respect to safety of life or property, and the fish, wildlife and botanical resources, dictate that the application should have been denied.

7. A two-day administrative hearing was conducted on May 9-10, 2007.

8. The Commission is the "ultimate authority", as defined at I.C. 4-21.5-1-15, for the Department with respect to the FCA. JC 14-10-2-3.

9. Hobson acknowledged at the administrative hearing that Certificate FW-23862 will not result in unreasonable harm to life, safety or property and will not adversely impact the efficiency or capacity of the floodway.

The sole remaining issue for consideration at the administrative hearing involved Hobson's allegation that the Department's issuance of Certificate FW-23862 will directly and cumulatively have unreasonable detrimental impacts upon fish, wildlife and botanical resources.

10. On September 21, 2007 the Administrative Law Judge entered Findings of Fact and Conclusions of Law, affirming Department of Natural Resources' determination to issue Certificate FW-23862 to Lambermont.

11. The final agency decision was issued by the Commission on September 25, 2007 and did not substantially change the Administrative Law Judge's non-final order.

12. On October 23, 2007 Hobson filed a Petition for judicial review.

13. Hobson's Memorandum of Law posit's that the NRC decision to issue Certificate FW-23862 to Lambermont should be overturned because the DNR's analysis was insufficient to determine the environmental impact of this project in conjunction with other impacts past, present or reasonably foreseeable in the future:

A. DNR neglected to study all impacts and activities having an impact within the floodway and, therefore, has not met its burden to show that it engaged in a legally sufficient cumulative effects analysis.

B. The scope of the cumulative effects study is too narrow in that it does not consider all past, present and reasonably foreseeable projects in the study area.

C. The Advisory Counsel of the Natural Resources Commission supports a policy requiring that cumulative effects analysis include projects impacting fish, wildlife, or botanical resources within floodways. (Petitioner's Memorandum pp 5-12)

14. Hobson's brief alleges that the NRC decision to issue Lambermont a permit was (1) arbitrary, capricious, not in accordance with law and (2) that it was not supported by substantial evidence. (Petitioner's Memorandum, p.5)
15. A court may only set aside agency action that is
 - (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.
 - (2) contrary to constitutional rights, power privilege or immunity.
 - (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right
 - (4) without absence of procedure required by law; or
 - (5) unsupported by substantial evidence.Ind. Code 4-21-5-5-14 (d)
16. An agency decision is arbitrary and capricious only when there is no reasonable basis for the decision. Ind. Civil Rights Commission v. Delaware County Circuit Court, 668 NE2d 1219, 1221 (Ind. 1996).
17. A reviewing court may only vacate an agency's decision on the grounds that the agency decision is unsupported by substantial evidence, when the evidence viewed as a whole demonstrates that the conclusions reached by the board are clearly erroneous. Regester v. Ind. State Board of Nursing, 703 NE2d 147, 151 (Ind. 1998).
18. Hobson asks the Court herein to consider a non-rule policy document entitled "Cumulative Effects under the Flood Act" that was recommended for adoption by the Commission by the Commissioner's Advisory Council following the Administrative hearing which was not part of the Record. (Petitioner's Brief p. 13-14)
19. The Administrative Law Judge's finding that the cumulative effects and environmental impact of the project were considered by the DNR is supported by the evidence, to wit:

- There were no past floodway projects in Sugar Creek for five years preceding this permit application (Findings paragraph 137, Record p. 53, Findings paragraph 60, Record p. 40)
- The heavy recreational traffic on Sugar Creek was considered (Findings paragraph 59, Record p. 39-40; Findings paragraph 139, Record p. 53; Stipulated Exhibit I-6A, Record p. 258-259)
- The project site was of such small size and impact that no listed, threatened, or endangered species in the area would be impacted (Findings paragraph 54, Record p. 39)
- There was concern about erosion from the project and the permit required Lambermont to take certain actions to mitigate the adverse impact of erosion (Findings paragraphs 91-92, Record p. 45; Stipulated Exhibit I-12, Record p. 295-296)
- The entire site area of the project, including the effects of roadway, landing areas in the floodway and public access sites upstream and downstream were considered in the issuing of the permit (Findings paragraph 143, Record p. 53-54; Eggen Testimony Record p. 732)
- Materials submitted by the public, other access locations upstream of this site, and the public canoe access site were considered when deciding the cumulative effects of the project (Findings paragraph 144, Record p. 54)
- Relevant literature concerning the site was considered by DNR (Findings paragraph 103, Record p. 46; Findings paragraph 144, Record p. 54)
- The impact of the road portion of the project was considered even though the road was not in the floodway (Eggen Testimony p. 756)
- No evidence was presented that the DNR failed to consider

an actual past or contemporaneous project on or proposed for Sugar Creek (Findings paragraph 147, Record p. 54)

- The use of the new launch site by Lambermont will improve stream quality because of the discontinuation of the use of the current public site (Findings paragraph 17, Record p. 33, Lambermont Testimony, Record p. 699, Eggen Testimony, Record p. 733)
 - Numerous other factual findings by the ALJ support the decision rendered by the Commissioner.
20. Those facts listed in paragraph 18 supra support by substantial evidence the decision to issue the permit to Lambermont.
21. Those facts listed in paragraph 18 supra demonstrate that the Commissioner's decision was not arbitrary, capricious or not in accordance with law.

CONCLUSIONS OF LAW

1. Hobson had standing to obtain judicial review of the Natural Resource Commission's decisions to confirm the issuance of a permit to Lambermont for Construction in a Floodway.
2. Hobson had exhausted his administrative remedies with the Department of Natural Resources and Natural Resource Commission.
3. Hobson timely filed his Petition for Review and timely filed the Agency Record for Review.
4. The Court is prohibited from considering the non-rule policy document submitted by Hobson, as it is not part of the agency record. Ind. Code §4-21.5-5-11.
5. Hobson failed to prove by a preponderance of the evidence that the Natural Resource Commission's action of offering the Approval of a Certificate for Construction in a floodway to Lambermont was in error.

6. Hobson failed to prove that the NRC actions in offering the Approval of a Certificate for Construction in a Floodway to Lambermont was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
7. Hobson failed to prove that the NRC action if offering the Approval of a Certificate for Construction in a Floodway to Lambermont was unsupported by substantial evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Department's determination to issue Certificate FW-23862 to Lambermont is affirmed.

SO ORDERED this 10th day of October, 2008.



DAVID R. BOLK,
Judge

Distribution to:
All counsel of record