

STATE OF INDIANA	)	GRANT COUNTY SUPERIOR COURT 1
	) SS:	
COUNTY OF GRANT	)	CAUSE NO. 27C01-1511-PL-73

JOHN E. MORIARITY, and	)
MAE E. MORIARITY,	)
	)
Petitioners,	)
	)
v.	)
	)
INDIANA DEPARTMENT OF	)
NATURAL RESOURCES	)
	)
Respondent.	)

**FILED**  
 AUG 29 2016  
*Chester G. Massey*  
 CLERK GCC

**Findings of Fact, Conclusions of Law and Court Order Enforcing the Final Order**

John and Mae Moriarity petitioned for this Court's judicial review of an administrative Final Order applying the Dam Safety Act to the dam on their property. The Indiana Department of Natural Resources filed an answer and cross-petition for civil enforcement of the same administrative Final Order.

After submission of the administrative record and briefs on the merits, this Court heard oral argument on April 25, 2016. In attendance were the counsel of record for the parties, consisting of Donn Wray and Michael D. Conner for the Moriaritys, and Deputy Attorney General Timothy J. Junk for the Department of Natural Resources. John and Mae Moriarity were also in attendance. The Court, having taken the matter under advisement pending subsequent briefing by the parties, now enters the following Findings of Fact, Conclusions of Law, and Judgment.

## I.

**Standard of Review**

This is an administrative appeal, and thus the Court's review is strictly circumscribed by Indiana's Administrative Order and Procedures Act. Our Supreme Court recently set forth the standard of review of an agency action:

Pursuant to Indiana's Administrative Order and Procedures Act ("AOPA"), we may set aside an agency action only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence." Ind. Code § 4-21.5-5-14(d) (Supp. 2012). The party seeking judicial review bears the burden of proving the agency action is invalid for one of the above five reasons. *Id.* § 4-21.5-5-14(a).

Further, when reviewing a challenge to an administrative agency's decision, "this Court will not try the facts de novo nor substitute its own judgment for that of the agency." *State Bd. of Registration for Prof'l Eng'rs v. Eberenz*, 723 N.E.2d 422, 430 (Ind. 2000) (citing *Ind. Dep't of Envtl. Mgmt. v. Conard*, 614 N.E.2d 916, 919 (Ind. 1993)). Rather, we defer to the agency's findings if they are supported by substantial evidence. *Ind. Dep't of Envtl. Mgmt. v. West*, 838 N.E.2d 408, 415 (Ind. 2005).

On the other hand, we review an agency's conclusions of law de novo. *Nat. Res. Def. Council v. Poet Biorefining—N. Manchester, LLC*, 15 N.E.3d 555, 561 (Ind. 2014). Although an agency's interpretation of a statute presents a question of law entitled to de novo review, the agency's interpretation is given "great weight." *West v. Office of Ind. Sec'y of State*, No. 49S02-1511-PL-668, 2016 Ind. LEXIS 414, 2016 WL 3090189, at \*3 (Ind. June 2, 2016) (quoting *Chrysler Grp., LLC v. Review Bd. of Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 123 (Ind. 2012)). In fact, "if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation." *Id.* This is true even if another party presents "an equally reasonable interpretation." *Chrysler*, 960 N.E.2d at 124 (citing *Sullivan v. Day*, 681 N.E.2d 713 (Ind. 1997)).

*Jay Classroom Teachers Ass'n v. Jay Sch. Corp.*, 2016 Ind. LEXIS 521, at \*6-8.

## II.

### Findings of Fact

This case is an administrative appeal of a determination by the Indiana Natural Resources Commission (“the NRC”) in its capacity as the final agency authority for the Indiana Department of Natural Resources (“the DNR”) that it has jurisdiction over a structure on private lands in Grant County, Indiana maintained by the Petitioners, John and Mae Moriarity (“the Moriaritys”), which the DNR claims is a dam subject to its regulation. The Moriaritys challenge the NRC’s final order, and the directives contained therein which include, *inter alia*, periodic engineering inspection and maintenance of the dam and dewatering of the associated lake, as well as imposing civil penalties in the amount of \$10,000. The Court identifies the facts relevant to its determination of this appeal below.

### A.

#### Undisputed Facts

The record contains a number of undisputed facts. The following findings of fact were entered by Administrative Law Judge (“ALJ”) Lucas on May 7, 2013 and are not disputed by the Parties:

a. John E. Moriarity and Mae E. Moriarty own real property as Husband and Wife in Section 15 and Section 16, Township 24 North, Range 8 East, Van Buren Quadrangle, Grant County, Indiana (the “Moriarity real estate”).

b. Sometime between 1998 and 2000, the Moriaritys caused a water impoundment to be constructed on the Moriarity real estate.

c. the impoundment was constructed without the prior written approval of the DNR and without a DNR permit.

d. The impoundment is formed by a dam that impounds a volume of water which greatly exceeds 100 acre-feet.

e. Because it does not qualify for an exception under I.C. § 14-27-7.5-1, the dam that forms the water impoundment is part of a "structure" as defined at I.C. § 14-27-7.5-5. The structure is in operation and is subject generally to the Dams Safety Act.

f. The Moriaritys are collectively the "owner" of a structure as defined at I.C. § 14-27-7.5-4.

g. The Department issued a Notice of Violation against the Moriaritys on May 14, 2012.

On November 21, 2013, the parties stipulated that the dam structure is more than 20 feet high in some spots and impounds more than a volume of 100 acre-feet of water. On November 21, 2013, the parties further stipulated that the Moriaritys did not apply for or obtain a permit from the DNR prior to building the dam. Thereafter, ALJ Catherine Gibbs heard the testimony and evidence, and on October 8, 2015, entered her Notice of Final Order of Natural Resources Commission. Judge Gibbs found by uncontroverted evidence that the Moriaritys did not comply with the requirement to have a professional engineer to inspect the dam every two years and did not submit any reports to the Department. Final Order ¶ 58. The Moriaritys have not presented any such records to dispute this finding of fact.

**B.****Presence of Streams and a Lake on the Moriarity's Property**

The jurisdictional issue raised by the Moriarity's appeal is bound up in the question of whether streams and a lake are present on the Moriarity property. Substantial evidence supports the ALJ's finding that the lake on the Moriarity property was formed by damming the streams that were observed on the Moriarity real estate. The evidence also showed water flowing in a defined channel and through a culvert, and a small wooden footbridge under which water flowed into the lake behind the Moriarity Dam. The US Geological Survey found at least seven channels crossing the Moriarity real estate. The fact that the Moriaritys built their dam at a downstream location on their farmland creates an inference that the Moriaritys were aware of the streams and that they expected the streams to fill their impoundment with water. This inference is further supported by the presence of the culvert and the footbridge -- people do not usually build dams, culverts and bridges unless there is some waterway in the vicinity, such as the streams on the Moriarity property.

Substantial evidence also reveals that there are structures that could be damaged if the dam would fail, including a church, house, and a highly trafficked county road. Evidence revealed deficiencies in dam construction which could lead to failure of the dam, including the use of a plastic pipe not designed for a spillway system, the presence of sinkholes and depressions, and signs of water seepage.

**III.****Legal Analysis and Conclusions of Law**

As noted by our Supreme Court, the party seeking judicial review bears the burden of demonstrating the invalidity of the agency action. *Jay Teacher's Ass'n, supra*, 2016 Ind. LEXIS

521, at \*6-8. Review is circumscribed by the standard set forth by Ind. Code § 4-21.5-5-14. This Court will defer to the Agency's factual findings unless they are unsupported by substantial evidence. *Jay Teacher's Ass'n, supra*, 2016 Ind. LEXIS 521, at \*6-8.

A.

*The DNR's Jurisdiction Over the Moriarity Dam and Lake*

The Dam Safety Act outlines the powers, duties, rights and responsibilities of the DNR in I.C. 14-27-7.5-8:

(a) The department:

(1) *has, on behalf of the state, jurisdiction and supervision over the maintenance and repair of structures in, on, or along the rivers, streams, and lakes of Indiana;*

(2) shall exercise care to see that the structures are maintained in a good and sufficient state of repair and operating condition to fully perform the intended purpose;

(3) shall grant permits for the construction and operation of structures in, on, or along the rivers, streams, and lakes of Indiana;

(4) may adopt rules under IC 4-22-2 for permitting, maintenance, and operation that are necessary for the purposes of this chapter; and

(5) may vary the standards for permits, maintenance, and operation, giving due consideration to the following:

(A) The type and location of the structure.

(B) The hazards to which the structure is or may be exposed.

(C) The peril to life or property if the structure fails to perform the structure's function.

(b) The department shall establish by rule the criteria for assigning a hazard classification to a structure that is based on the potential consequences resulting from the uncontrolled release of the structure's contents due to a failure of the structure. The hazard classification system must include the following classes of structures:

(1) High hazard: A structure the failure of which may cause the loss of life and serious damage to homes, industrial and commercial buildings, public utilities, major highways, or railroads.

(2) Significant hazard: A structure the failure of which may damage isolated homes and highways, or cause the temporary interruption of public utility services.

(3) Low hazard: A structure the failure of which may damage farm buildings, agricultural land, or local roads.

*(Emphasis added)*. The primary issue raised by the Moriaritys in their appeal is whether the Moriarity dam is a structure “in, on, or along the rivers, streams, and lakes of Indiana”. The NRC concluded that it is.

It can be concluded that the Moriarity dam falls within the jurisdictional of the DNR under the Dam Safety Act if it adjoins or is fed by a “stream”. The term “stream” is not defined in the Dam Safety Act, and therefore the Moriaritys complain that the term lacks any ascertainable standard, citing *State Board of Tax Comm. v. New Castle Lodge No. 147*, 765 N.E.2d 1257 (Ind. 2002) and *Podgor v. Indiana University*, 381 N.E.2d 1274 (Ind.Ct.App. 1978). Our Courts have required that administrative decisions be based on ascertainable standards in order to be fair and consistent rather than arbitrary and capricious. *New Castle Lodge*, 765 N.E.2d at 1264. Such standards give fair warning as to what the agency will consider in making its decision. *Id.*

The Moriaritys argue that since the term “stream” is undefined in the statute, and since DNR referred to a number of different sources to determine if “streams” were present on the Moriarity land, there was no ascertainable standard, and thus, the DNR enforcement actions with regard to their dam are unlawful. It should be noted that the caselaw cited by the Moriaritys does not require that all terms contained in regulations or statutes be defined. If a term is undefined in a statute, courts should apply the word’s plain, ordinary and usual meaning, unless to do so would be contrary to the Legislature’s intent. *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 639 (Ind. 2012). Courts have found it useful to examine various meanings that may apply to a statutory term in the context of the statute’s apparent legislative intent. *Id.*

Here, seems clear that the General Assembly intended to proffer a broad grant of jurisdiction to the DNR with regard to dams in Indiana. I.C. 14-27-7.5-1 contains a specific enumeration of dams to which the Act does not apply (none of which are applicable here). The language in I.C. 14-27-7.5-8, granting “jurisdiction and supervision over the maintenance and repair of structures in, on, or along the rivers, streams, and lakes of Indiana” would clearly seem to be intended to be read broadly with regard to dams not specifically excluded in Section 1 of the Act. The clear public-safety related purpose of the Act -- to provide a regulatory structure which would allow the repair or dewatering of structures which are a threat to life, limb, or property -- would support a broad reading of the terms in Section 8. Thus, general usage definitions of the term “stream” consistent with this purpose are most useful in interpreting the statute.

The parties below spent much time examining a variety of definitions of the term “stream”. Ultimately, the ALJ concluded:

45. The parties also do not agree as to the definition of “stream”. The DNR’s witnesses all provided definitions of “stream” as flowing water through a defined channel. The DNR’s definition is consistent with the definitions provided by the parties as Exhibit 3, which includes definitions from both standard English dictionaries and technical dictionaries. . . . The legislature chose to use the word “stream” and chose not to define it. As “stream” has a common meaning, the failure to define it supports the conclusion that the legislative intent must have been to use the plain and ordinary meaning. Further, the DNR’s longstanding interpretation relies on the ordinary meaning of stream. Applying the rules of statutory construction, “stream” is clear and unambiguous and requires no further interpretation.

\* \* \*

47. Given that the word “stream” should be given its plain and ordinary meaning, the Moriaritys’ arguments that the statute does not present “ascertainable standard” must fail.



Final Order ¶¶ 45 & 47. Webster's 3d New International Dictionary, defines a "stream" as: "1a: a body of running water flowing in a channel on the surface of the ground." Webster's 3d New Int'l Dictionary (2006) at 2258. The definition of "stream" used by both the Department and Administrative Law Judge Gibbs is consistent with the dictionary definition. As noted by the ALJ, a court may look to an agency's interpretation for evidence of the legislative intent of a statute. *Shell Oil v. Meyer*, 705 N.E.2d 962, 976 (Ind. 1988). A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts. *Board of Sch. Trustees v. Marion Teachers Ass'n*, 530 N.E.2d 309, 311 (Ind.Ct.App. 1988). Here, the ALJ found that DNR has a long-standing interpretation that it has jurisdiction over structures such as the Moriarity dam.

There is substantial evidence to support the ALJ's finding of fact as to the definition of "stream" used by the DNR, the conclusion that streams exist on the Moriarity property, adjacent and flowing into the Moriarity Lake, and that the lake was created by the damming of streams. Photographs thereof were admitted into evidence at trial, supported by the testimony of various DNR employees and experts that visited the property. (See. e.g., Smith Test. 55, 56, 59-74, and 81, testifying as to Photos 15-17, 19-20, 23, 26, 27-30, 32-35, 40, 43, 44, 51, 52 & 54; Crosby Test. 361; Eggen Test. 235, 236, 238 & 240; Neese Test. 183-193; Miller Test. 283-303).

Any argument that there is an insufficient ascertainable standard in the statute as to the jurisdiction of DNR to regulate dams is without merit. A citizen of Indiana who constructs a dam to hold back water which regularly (even intermittently) flows on his land is not operating in the dark as to the probable presence of a "stream" on his land. Indeed, the entire purpose of building a dam is to stop the regular flow of water. The statutory language granting DNR

“jurisdiction and supervision over the maintenance and repair of structures in, on, or along the rivers, streams, and lakes of Indiana” gives more than fair notice to the dam builder who chooses to block the flow of water on his property that he need comply with the Dam Safety Act unless he falls within the exceptions delineated in Section 1 of the Act. The law requires only standards that “give fair warning as to what the agency will consider in making its decision,” *New Castle Lodge, supra*, 765 N.E.2d at 1264. The Dam Safety Act passes this test.<sup>1</sup>

B.

*High Hazard Dam*

Having concluded that the DNR had jurisdiction, the ALJ also found that the Moriarity dam was a “high hazard dam” as described in I.C. 14-27-7.5-8 and 312 IAC 10.5-3-1. The ALJ found that DNR’s contention was supported by evidence in the record, citing the testimony of several expert witnesses. The Moriaritys challenge this determination, citing the testimony of their own witness. The Moriaritys’ argument on this point is little more than an invitation to reweigh the evidence, which is not the function of this Court on appeal.

To this end, the Moriaritys challenge the testimony of Department witness Suzanne Delay, a Professional Engineer. The Moriaritys did not object to her testimony at the time that it came in, but later moved to strike her testimony. To preserve error, a contemporaneous objection is required in Indiana. *Bogner v. Bogner*, 29 N.E.3d 733, 740 (Ind. 2015). As such, any error in the admission of Delay’s testimony is waived. Notwithstanding the waiver, the ALJ properly noted that “[w]hile there was sufficient evidence presented to call into question some of Ms. Delay’s conclusions, there is no basis for striking her testimony. Any evidence of

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<sup>1</sup> The Moriaritys argue that “cartographic” definition of the concept of “stream” is required. Nothing in the Dam Safety Act requires that DNR develop and publish mapping of a proposed regulatory area in order to engage its jurisdiction.

inconsistencies in the report goes to the weight of the evidence, not its admissibility.” There was sufficient and substantial evidence to conclude that the Moriarity dam was a “high hazard dam”.

C.

*Inspection Order*

The Dam Safety Act imposes upon the owner of a High Hazard dam the duty to have a professional engineer inspect the dam every two years. *Ind. Dept. of Nat. Res. v. Lake George Cottagers Assoc.*, 889 N.E.2d 361, 364 (Ind. Ct. App. 2008) (the owner of a dam built in 1928 has the statutory duty to inspect and repair). The Department’s answer filed December 1, 2015, includes a Verified Counter Petition for Civil Enforcement pursuant to Ind. Code § 4-21.5-6-1. Pursuant to this statute, the Department “. . . may apply for an order in a circuit or superior court to enforce an [administrative] order.” *Id.* This Court has the authority to enter an order to compel the inspection of the dam, as requested by the Department and mandated by the administrative Final Order.

IV.

Judgment

In light of the deferential standard applicable to this proceeding, this Court AFFIRMS the decision of the NRC below. This Court adopts the following portions of the Final Order Section D as an Order of this Court and ORDERS the Moriaritys to do the following:

1. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to draw down the water level in the Moriarity impoundment lake to an elevation between 840 and 845 feet NAVD. They shall, both jointly and severally consult with a professional engineer duly licensed in Indiana pursuant to IC 25-31 qualified in dam construction, maintenance and safety to develop a safe and appropriate dewatering plan for accomplishing the draw down as herein ordered.

2. The water level of the impounded lake shall be maintained between 840 and 845 feet NAVD until the Moriaritys,

both jointly and severally, have complied with the remainder of this Order as set forth below in Paragraphs 3 and 5.

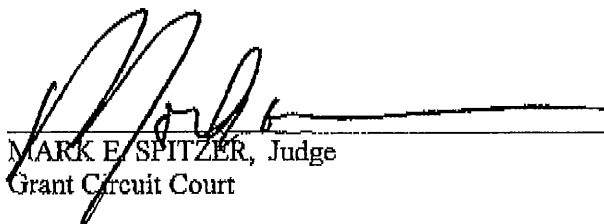
The Moriaritys may rebuild the dam and allow the lake to refill if and when they have their dam inspected by a professional engineer licensed pursuant to Ind. Code 15-31, submit a written inspection report to the Department, obtain permits, complete all maintenance and repair required by the Department, and otherwise comply with inspection and repair requirements of Paragraphs 3 and 4 of the Final Order Section D.

In lieu of inspecting and repairing the dam under the above requirements, the Moriaritys may elect to dewater, breach and permanently decommission the dam, if done so under the direction of a professional engineer qualified in dam construction, safety and maintenance, as per Paragraph 5 of the Final Order Section D.

As per Paragraph 6 of the Final Order, this Court orders that John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to pay the following civil penalties for violations of the Dam Safety Act:

- a. \$5,000 for not submitting a high hazard inspection report for 2011 as required by Ind. Code 14-27-7.5-9(a); and
- b. \$5,000 for not maintaining and keeping their dam in a state of repair and operating condition required by the exercise of prudence, due regard for life and property and the application of sound and accepted technical principles as required by Ind. Code 14-27-7.5-9(c).

SO ORDERED THIS 24 DAY OF AUGUST, 2016.

  
MARK E. SPITZER, Judge  
Grant Circuit Court