

STATE OF INDIANA

) IN THE MARION SUPERIOR COURT, CIVIL
DIVISION 12

COUNTY OF MARION

) ENVIRONMENTAL DIVISION
) CASE NO: **49D12-1605-PL-017105**

PAUL WALTHERS

FILED

V.

269

APR 13 2018

DEPARTMENT OF NATURAL RESOURCES

Myla A. Eldridge
CLERK OF THE MARION CIRCUIT COURT

**ORDER ON PETITION FOR JUDICIAL REVIEW AND
ORDER ON MOTION FOR ORDER ENFORCING ADMINISTRATIVE FINAL ORDER**

On May 16, 2016, Petitioner Paul Walthers (“Walthers”) filed a *Petition for Judicial Review* under the Administrative Orders and Procedure Act (“AOPA”) appealing a final decision of an Administrative Law Judge of the Department of Natural Resources. AOPA Committee of the Natural Resources Commission issued a Notice of Final Order affirming and adopting the Findings of Fact and Conclusions of Law of the ALJ as the final order of the Commission. (R. at 111-131, Findings of Fact and Conclusions of Law with Final Order).

FACTS

Walthers, along with neighbors Ronald and Carolyn Richards (“Richards”), own a small pond in Hendricks County called Forest Lake. The undisputed evidence is the pond was created when a dam was built about 75 years ago (“Forest Lake Dam”). For 50 years Walthers has lived on and has been a caretaker for the lake. (Tr. of Adm. Hearing p. 207.) No permits were obtained for construction of the dam. ¹ The Indiana Department of Natural Resources (“DNR”) mailed a warning letter to Walthers and the Richards in February of 2013. The DNR informed them it had jurisdiction over the dam and the dam failed to meet DNR safety and compliance requirements. The warning letter instructed the dam owners on the steps they should take to address the dam’s safety issues. (Adm. Hearing Ex. 2.)

¹ There is no evidence that a permit was needed to build a pond or a dam 75 years ago.

The DNR mailed a Notice of Violation Letter (“NOV”) to Walthers and Richards on August 22, 2013. The letter claimed Walthers and Richards violated the Dam Safety Act. The NOV asserted: Forest Lake Dam was a high hazard dam; state statute, I.C. 14-27-7.5 Regulation of Dams, required the owners to maintain the dam in a safe condition; the owners had failed to properly maintain Forest Lake Dam; and, the owners must either (1) hire an engineer to repair and maintain the dam or (2) hire an engineer to dewater and decommission the dam. (Adm. Hearing Ex. 1.) Richards hired an engineer to perform some work on the dam and lowered the water level as per DNR instructions. The Richards then entered into a settlement with the DNR and were dismissed from the action.

The DNR alleged it had jurisdiction of the Dam because Forest Lake has a drainage area in excess of one square mile. (Tr. of Adm. Hearing p. 39.) David Knipe is an engineer and section manager for the DNR Division of Water, Central Basin Team. He has been employed by the DNR for 24 years. To calculate the drainage area for Forest Lake dam, Knipe obtained a one-foot topographic map from Hendricks County. Knipe then used a software program called Arc Hydro which is built into ArcGIS to analyze the contour mapping and determine which way water was flowing and how much area was draining into Forest Lake. Using the computer programs and topographical information Knipe calculated that the drainage area for Forest Lake Dam is 1.23 square miles. (Tr. Of Adm. Hearing p. 65-68.)

Knipe acknowledged that drainage areas can change with time and the Forest Lake Dam drainage area might have changed over the years due to local development. The DNR does not regulate stormwater runoff. (Tr. Of Adm. Hearing p. 78.)

Suzanne Delay is a hydraulic engineer employed by the DNR Division of Water. She testified the Forest Lake Dam is a high hazard dam because, should the dam fail, there is the potential that structures downstream² could have more than a foot of water in them. (Tr. of Adm. Hearing p. 82-83.) Delay arrived at this conclusion using a “simplified breach calculation” and assuming the dam held 55 acre feet of water. The 55 acre feet of water was a figure from the DNR dam safety records.

George Crosby, the DNR manager of the Dam and Levee Safety Section testified the Forest Lake Dam was not sufficiently strong, not in a good state of repair, not designed to remain safe during infrequent loading events, and dangerous to life and property. (Tr. of Adm. Hearing

² Houses in the Thornhill subdivision.

p. 126-127.) Kenneth Smith, a civil engineer and assistant director of the DNR Division of Water, also testified. Smith testified he had visited Forest Lake Dam and believed the dam was in a progressive state of failure. (Tr. of Adm. Hearing, p. 154.)

Walthers presented testimony that development in the town of Avon in Hendricks county has both altered and increased the water flow to the pond. Walthers argues the construction of certain Avon Schools, CSX Railroad, certain subdivisions and the widening of state and county highways improperly diverted water into the Forest Lake drainage area which increased the drainage area to over one mile, improperly giving DNR jurisdiction over the Dam. Walthers also presented testimony the water volume of Forest Lake was insufficient to cause damage to the Thornhill subdivision.

Walther's timely filed a Verified Petition for Judicial Review in Marion Superior Court.³ The Court denied Walther's petition and his motion to correct error. The Court also denied DNR's proposed findings. To date, Walther's has not complied with the Administrative Final Order. The DNR filed an *Amended Verified Counter-Petition for Civil Enforcement*. I.C. 4-21.5-6-1.

ISSUES

Whether the DNR properly exercised jurisdiction over Forest Lake Dam and whether the Administrative Law Judge's findings are supported by substantial evidence?

STANDARD OF REVIEW

The Indiana Court of Appeals recently reviewed an appeal from a state agency and set forth the standard of review.

Pursuant to Indiana's Administrative Order[s] 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.

³ The cause was originally assigned case number 49D06-1605-PL-017105. Pursuant to a motion to transfer filed by the DNR, this cause was transferred to the Environmental docket, Court 12.

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 *646 Ind. Dep't of Env'tl. 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 Env'tl. 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). Jay Classroom Teachers Ass'n v. Jay Sch. Corp., 55 N.E.3d 813, 816 (Ind. 2016).

Moriarity v. Indiana Department of Natural Resources, 91 N.E. 3d 642, 645 (Ind. Ct. App. 2018).

DECISION

The DNR argued it has jurisdiction to regulate Forest Lake Dam because the dam has a drainage area of more than one square mile. The DNR has jurisdiction to regulate dams if any one of three conditions are met.⁴ For our purposes, the relevant consideration is that the dam have “a drainage area above the dam of not more than one (1) square mile.” (I.C. 14-27-7.5-1(1)(B).) While Walther submitted contradictory drainage area evidence, the Court concludes the record contains substantial evidence supporting the ALJ’s finding. The ALJ made findings which were supported by testimony in the record that:

34 David Knipe is the Engineering Section Manager, for the Central Basin Team for DNR’s Division of Water. Knipe has been with DNR for over 24 years. Knipe manages engineering functions

⁴ Sec. 1. This chapter does **not** apply to the following:

(1) A structure that meets the following conditions:

(A) Is built for the sole purpose of erosion control, watering livestock, recreation, or providing a haven or refuge for fish or wildlife.

(B) Has a drainage area above the dam of not more than one (1) square mile.

(C) Does not exceed twenty (20) feet in height.

(D) Does not impound a volume of more than one hundred (100) acre-feet of water.

(Emphasis added.)

within the Division of Water, including flood plain mapping and hydraulics. See testimony of Knipe.

35 On behalf of DNR, Knipe calculated the drainage area above the Forest Lake Dam. Knipe conducted his analysis by using “ArcHydro” software, an ArcGIS mapping program and StreamStats, an online product available to the general public through the United States Geological Survey (USGS) website. With these products, he reviewed “one foot contour mapping” that he obtained from Hendricks County records and subdivision plans for the upper end of the watershed. See testimony of Knipe.

36 Knipe performed an analysis and determined which way water flows in the area above the dam. He then concluded that the watershed, or drainage area, is approximately 1.23 square miles. See Testimony of Knipe, Eggen and Exhibits F and G.

Findings of Fact and Conclusions of Law, p. 6-7. As stated earlier, the Court may not reweigh the evidence and substitute our determination for that of the Administrative Law Judge, if the finding is supported by substantial evidence. See *Moriarty, supra*.

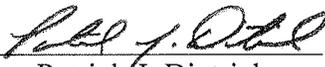
ORDER

This Court, having previously affirmed the Administrative Final Order, now GRANTS the *Amended Verified Counter-Petition for Civil Enforcement*.

This cause is set for hearing on the **11th day of May, 2018 at 9:00 a.m.**

All of the above is SO ORDERED THIS 13 day of April, 2018.


Com. Therese Hannah


Judge Patrick J. Dietrick

DISTRIBUTION: Via Electronic Notice.