

STATE OF INDIANA) MARION COUNTY SUPERIOR COURT
) SS: CIVIL DIVISION 12
 COUNTY OF MARION) CAUSE NO. 49D12-1605-PL-017105

PAUL WALTHERS,)
)
) Petitioner/Counter-)
) Respondent)
) v.)
)
) DEPARTMENT OF NATURAL)
) RESOURCES,)
)
) Respondent/Counter-)
) Petitioner.)

FILED
 (269) JUL 03 2018
Nylon A. Eldredge
 CLERK OF THE MARION CIRCUIT COURT

COURT’S ORDER ENFORCING THE ADMINISTRATIVE FINAL ORDER

The Department of Natural Resources (“the Department”), by counsel, has filed its Verified Motion for Court Order Enforcing the Administrative Final Order between the Department and Respondent Paul Walthers. Pursuant to Indiana Code § 4-21.5-6-1, which authorizes the Department to “. . . apply for an order in a circuit or superior court to enforce an [administrative] order,” this Court now enters this order enforcing the Administrative Final Order, a copy of which is attached to the Department’s Amended Verified Counter-Petition for Civil Enforcement as Exhibit G.

FINDINGS OF FACT

1. Respondent Paul Walthers (“Walthers”) owns approximately 90% of the Forest Lake Dam located in Hendricks County, Indiana.
2. On August 22, 2013, the Department issued a Notice of Violation (“NOV”) to Walthers, finding, in part, that the Forest Lake Dam was an unsafe, unauthorized, high-hazard dam, and that its owners had failed to maintain and keep the structure of the dam in the 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 engineering principles, in violation of Indiana Code § 14-27-7.5.

3. The NOV gave Walthers two options for mitigating the violation. In short, Walthers could either: (1) hire a professional engineer to reconstruct the dam and spillway to a safe condition, or (2) hire a professional engineer to develop a plan to safely and permanently dewater and control breach (decommission) the dam.

4. On August 31, 2013, Walthers filed correspondence with the Natural Resources Commission (“Commission”) requesting administrative review of the NOV.

5. An evidentiary hearing was held on February 8 and 9, 2016, before an Administrative Law Judge (“ALJ”), at which evidence and arguments were presented.

6. On March 7, 2016, the ALJ issued its Findings of Fact and Conclusions of Law with Nonfinal Order, which affirmed the NOV and ordered Walthers to comply with the requirements set forth in the NOV within 90 days.

7. The ALJ found, among other things, that Forest Lake Dam is in a “progressive state of failure,” and that “[u]pon a breach, there is a high likelihood that an uncontrolled discharge would result in serious consequences downstream,” including property damage and a reduction in values of downstream properties. The observed defects include:

- a. Sandbags obstructing flow in the primary spillway;
- b. Large trees and roots weakening the embankment;
- c. Uncompacted and unstable fill dirt on the downslopes;
- d. Pipes and internal erosion within the dam;
- e. Improper location and undersized open chute spillway built over manmade fill;
- f. Cracks and extensive erosion, including large voids in the dam ;

- g. Seepage bypassing the pipe and occurring at a time when no water was entering the pipe, indicating internal erosion within the dam;
 - h. A concrete wall reducing the capacity of the auxiliary spillway; and
 - i. Concrete blocks and debris blocking the emergency spillway intake.
8. Walthers appealed this decision to the Commission's AOPA Committee, which held oral argument on Walthers' objections on April 15, 2016.
 9. On April 18, 2016, the Commission issued its Notice of Final Order of the Commission, affirming, without modification, the Findings of Fact and Conclusions of Law with Nonfinal Order as the findings of fact and conclusions of law with final order of the Commission.
 10. On May 16, 2016, Walthers filed a Verified Petition for Judicial Review in Marion County Superior Court under Cause No. 49D06-1605-PL-017105.
 11. After briefing and a hearing, the parties tendered proposed findings of fact and conclusions of law.
 12. On or about May 1, 2017, the court issued an order denying Walthers' Proposed Findings of Fact and Conclusions of Law.
 13. On June 2, 2017, Walthers filed a Motion to Correct Error, challenging the court's denial of his petition for judicial review.
 14. On June 7, 2017, the Court denied Walthers' Motion to Correct Error.
 15. On June 8, 2017, the Department filed a Motion to Submit Proposed Order, resubmitting its proposed findings of fact and conclusions of law.
 16. On June 13, 2017, the Court denied the Department's Findings of Fact and Conclusions of Law as moot.

17. On July 20, 2017, Jon Eggen, Manager of the Compliance and Enforcement Section of the Department's Division of Water, visited the Forest Lake Dam and observed that Walthers has failed to comply with the terms of the administrative Final Order.

18. On March 12, 2018, Mr. Eggen again visited the Forest Lake Dam and observed that Walthers has failed to comply with the terms of the administrative Final Order.

19. To date, the Respondent has failed to wholly comply with the Administrative Final Order.

CONCLUSIONS OF LAW

20. As a matter of law, Respondent may not use this action to collaterally challenge the terms of the Administrative Final Order.

21. As noted above, Respondent's petition for judicial review was denied on May 1, 2017.

22. Soon thereafter, the Court denied his motion to correct error.

23. Respondent did not timely file an appeal.

24. Section five of the Administrative Orders and Procedures Act is the "exclusive means" for judicial review. Ind. Code § 4-21.5-5-1.

25. Quite appropriately, in a civil enforcement action such as the case at bar, a party may not relitigate the terms of the administrative order. *See Yellow Cab Co. v. Williams*, 583 N.E.2d 774, 778-779 (Ind. Ct. App. 1991); *see also Linthecome v. Bd. of Trustees*, 585 N.E.2d 651, 652 (Ind. Ct. App. 1991); *State ex rel. Basham v. Medical Lic. Board*, 451 N.E.2d 691, 696 (Ind. Ct. App. 1983).

26. "Permitting a second opportunity for review would defeat the purposes of the rules." *Yellow Cab Co.*, 583 N.E.2d at 779.

27. The Department commenced this proceeding by filing its Amended Verified Counter-Petition for Civil Enforcement pursuant to Indiana Code Section 4-21.5-6-1.

28. Pursuant to this statute, the Department “may apply for an order in a circuit or superior court to enforce [the administrative] order.” *Id.*

29. This Court’s only function is to ensure that the Final Administrative Order is entered as an order of this Court and enforced according to its terms.

ORDER

This Court ADOPTS and ORDERS as an order of this Court that Respondent Paul Walthers shall comply with all aspects of the Administrative Final Order within 60 days. This compliance shall include, but shall not be limited to, compliance with the requirements identified in the Notice of Violation dated August 22, 2013, under the section titled “Action Appropriate to Mitigate the Violation.” Respondent is ordered to complete all of Action 1 or Action 2, as described in the aforementioned Notice of Violation, within 60 days.

Date: July 2, 2018



Judge, Marion Superior Court, Civil Division 12

Distribution to the following:

Paul Walthers
11565 North Lambert Court
Mooreville, IN 46158

David C. Dickmeyer
OFFICE OF THE INDIANA ATTORNEY GENERAL
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770