

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
February 14, 2018 Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jenifer Jansen
Bart Herriman

NRC, DIVISION OF HEARINGS STAFF PRESENT

Sandra Jensen
Dawn Wilson
Scott Allen

GUESTS PRESENT

Patrick Roberts	Ryan Mueller
Anthony Spahr	Jon Eggen
Elizabeth Gamboa	

Call to order and introductions

Jane Ann Stautz, Chair, called the meeting to order at 9:00 a.m., ET, at the Natural Resources Commission, Division of Hearings, 100 North Senate Avenue, Room N103, Hearing Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum. The Chair, Jennifer Jansen, and Bart Herriman introduced themselves.

Consideration and approval of minutes for the meeting held on January 16, 2018

Jennifer Jansen made a motion to approve, as presented, the minutes of the meeting held on January 16, 2018. Bart Herriman seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Miami County, et al. v. DNR*; Administrative Cause No. 14-146W

The Chair recognized Elizabeth Gamboa, Counsel for the Department.

Gamboa explained the subject of this matter is six dams in Hidden Hills located in Miami County. She stated that the Department is granted jurisdiction over the maintenance and repair of all structures in, on, or along rivers, streams, and lakes in Indiana. Gamboa said that the

Department claimed jurisdiction over the repair and maintenance of those dams located in the Hidden Hills subdivision. Gamboa stated that the dams do not qualify as an exemption from jurisdiction under the Dam Safety Act (IC 14-27-7.5-1), because it is the Department's position that all the Hidden Hills dams are over 20 feet high. Gamboa said that Russell Bellar testified during the administrative hearing that he built the dams to increase the value of the property before he sold the lots to what is now the Hidden Hills subdivision.

Gamboa stated that the dams came to the attention of the Department between 2011 and 2012 when a Department employee was engaged in a discussion with the Mayor of the City of Peru about future development plans. She indicated that the Division of Water determined that the dams were not being maintained; were unsafe; and were in various stages of failure. Gamboa said that the poor condition of the dams was not disputed and very little maintenance had been done on the dams since their construction. She stated that the Department met with the property owners, but after no improvements were made to the dams, in October 2014, the Department issued Notices of Violation (NOV) for all six dams.

Gamboa stated that the Department first determined that the dams were over 20 feet; and therefore, the Department had jurisdiction. She said that when Bellar constructed the dams he excavated and filled the natural stream bed. Gamboa stated the Department's position that the height of the dams is determined by measuring "from the bottom of the lowest point in the natural streambed at the midline of the structure to the top of the structure itself." She stated that because the natural streambed had been destroyed it was impossible to determine the lowest point of the streambed prior to disturbance. She explained that Department's engineers used Light Detection and Ranging (LIDAR) and computer models to determine the lowest point in the natural streambed. Gamboa acknowledged the Petitioners' position that the Department should have used other methods to identify the natural streambed but stated that the Department's method represents sound engineering principles as was determined by the ALJ. She noted the Department's report, drafted by Rodney Neese, which calculated the height of the dams, was properly admitted into evidence as a business record, an exception to the hearsay rule.

Gamboa said that the Findings of Fact and Conclusions of Law with Nonfinal Order (Nonfinal Order) determined that the proper measurement of a dam's height was from the lowest point of the natural streambed to the top of the spillway, as provided in a previous statute. Using this method of measurement the ALJ determined that the Department did not have jurisdiction over the northeast dam and southeast dam. Gamboa noted that the Nonfinal Order found in favor of the Department with regard to the NOVs for the other four dams. She stated that there are public roads constructed over some of the dams that had been dedicated to the public, which caused the Miami County Board of Commissioners and Miami County to be identified as part owners of the dams making it necessary for them to be named as parties.

Gamboa stated that the Nonfinal Order's conclusion that proper measure is to the top of the spillway "is contrary to current law and contrary to legislative history with regard to dam safety." Gamboa said that the Department was given jurisdiction over repair and maintenance of all dams in Indiana since the first dam safety statutes were enacted in the early 1960s. She noted that the first dam safety statutes applied to all dams; not only dams constructed before or after a certain time period.

Gamboa explained that the Nonfinal Order does not consider sound public policy reasons for including the top of the structure as the relevant point in determining the dam height. She said that most of the dams in Indiana were constructed before 2002, and under the Nonfinal Order the Department would have to determine when the dams were constructed and what statutory definition applies. She said that any dam constructed before 2002 would not be included in the broad grant of jurisdiction. Gamboa noted that “this is a maintenance statute and a safety statute, it is retroactive in application to all dams in this State.”

Gamboa offered that older dams are more likely to experience deterioration and unsafe conditions, which was the reason for the original enactment of legislation in the 1960s. Gamboa stated that taking dams out of the Department’s jurisdiction would impair the Department’s ability to carry out its statutory mandate and would be counterintuitive to the statute. By example, Gamboa explained that in 2002 the General Assembly added a provision that required the Department to assign hazard classifications to dams based on the amount of damage that could occur if a dam were to fail and breach. This classification establishes how often dams are required to be inspected. Gamboa concluded that the Department’s inability to assign hazard classifications to dams constructed before the 2002 statutory amendments would prevent the Department from enforcing the requirement to have dams inspected regularly.

Gamboa explained that measuring a dam only to the top of the spillway does not reflect the structure’s capacity to retain water that would flow downstream in the event of a dam failure. For this reason, Gamboa stated it would be reasonable that the General Assembly amended the dam safety statute to provide for measuring the height of a dam to the top of the structure, which provides a more accurate measurement.

Gamboa stated that Department’s regulations on dam safety were previously contained in Title 13 of the Indiana Code but were re-codified in 1995 to Title 14 at which time a “savings clause” was provided at IC 14-8-3. Gamboa observed that the Petitioners have not alleged any economic loss that would occur if the current definition of height is applied. She also noted that there should not be a constitutionally protected right to “maintain a property in a manner that is unsafe to others.” Gamboa concluded that determining the height of a dam based upon the current definition would not constitute an “unconstitutional taking of property.”

Gamboa stated the Department’s position that it does have jurisdiction over all of the dams and requested the Commission to modify the Nonfinal Order as outlined in the Department’s objections to the Nonfinal Order.

The Chair recognized Anthony Spahr, Counsel for Hidden Hills Residents.

Spahr explained that this case involves a western chain of three berms and an eastern chain of three berms with each chain running north to south. Spahr recognized the Administrative Law Judge’s (ALJ), determination that the Northeast and Southeast berms were outside the Department’s jurisdiction. Spahr noted that the berms were constructed in dry ravines between 1991 and 1996. Spahr explained that the statutes governing the jurisdiction of dams were repealed in 2002, and there is no retroactivity language in the statute. Spahr said that “the [ALJ]

correctly applied the 1985 version of the dam regulation statutes by measuring the height of the structures from the center and bottom of the natural watercourse up to the spillway.” Spahr said that the Department presented evidence in the administrative hearing that used the wrong standard. Spahr stated that the calculated berm elevation cannot support the Department having jurisdiction over any of the berms. Spahr that Nonfinal Order is arbitrary and capricious, is not supported by the substantial and reliable evidence, and is not in accordance with the law.

Spahr said that Greg Deeds’ and Russell Bellar’s testimony from the administrative hearing were not accurately reported in the Nonfinal Order. Spahr requested that the Committee “do its due diligence and review these concerns about arbitrary and capricious decision-making and any findings not supported by the evidence; do their due diligence by having a transcript be prepared of this two day trial and then be able to read through the evidence so it can make an educated decision.”

Spahr stated that the Department has only alleged that jurisdiction over the Hidden Hills berms is based on the berms being greater than 20 feet in height. Spahr said that the Department did not offer any allegations regarding the unpermitted nature of the dams. Spahr pointed out that evidence admitted at the hearing included an email written by Mr. Smith indicating that the Department “selected not to have any NOV brought with regard to the berms being unpermitted.” Therefore, in Spahr’s opinion citation to any case relating to unpermitted activity is improper.

Spahr said the Department failed to meet its burden of proof. Spahr said that the basis for the height of the “berms” were calculations prepared by Rodney Neese, a former Department surveyor. Spahr stated that Neese did not conduct field measurements, but instead used LIDAR measurement maps. He said Neese conducted “a field study to look at the properties, but failed to include in his report the LIDAR measurements showing the beginning points and the ending points that he used for calculating the heights of these berms.” Spahr noted that “there is no way to independently verify the accuracy of Neese’s report” and observed that Neese was not subpoenaed and did not testify at the hearing. Spahr argued that Neese’s report constitutes hearsay and there was not a proper foundation provided to admit the document. Spahr maintained that Jon Eggen was not able to testify that the document admitted as evidence was a “true and final version” of the report or to all of the required elements to qualify the report for admission as a business record. Spahr stated that Darrin Miller testified to the report, but was unable to answer questions related to the method that Neese used in drafting the report and was unable to independently verify certain data contained within the report. Spahr stated that the Burke Engineering Report was admitted as hearsay over objection and could not be the sole basis for a determination. Spahr averred the Department failed to provide evidence of actual elevation measurements that are not hearsay. Spahr offered the opinion that the Department should have subpoenaed Neese to provide testimony at the administrative hearing.

Spahr stated that the Department did not meet its burden of proof and therefore the burden of proof does not shift to the Hidden Hills Property Owners to prove the case by hiring its own surveyors to do their own calculations.

Spahr stated that this proceeding has cost his clients “tens of thousands of dollars” in a case in which the Department’s evidence is based upon the wrong standard and its evidence is unreliable. Spahr said that the Department has failed to establish a prima facie case. He noted that the testimony of Miller was just a rubber stamp on the work Neese had done without any independent verification. He noted that the Nonfinal Order points out two calculation discrepancies in the Neese report that Miller did not identify in his testimony. Spahr stated that Miller relied on the survey and everything he testified to was inadmissible hearsay.

Spahr recognized the Department’s public policy argument and the Department’s duty to protect the public, but Spahr noted the equivalent responsibility for the Department to follow the law. Spahr stated that whether a statute may be applied retroactively is set forth in *State of Indiana v. Pelley*, 828 N.E.2d 915, 919 (Ind. 2005). Spahr noted that the 1995 dam safety statute was repealed, and stated that the 2002 dam safety statute was passed with no explicit retroactivity language. He stated that because there is no retroactive language, the ALJ applied the proper 1985 dam safety statutes, with which the Department’s evidence does not comport.

Bart Herriman asked Spahr to explain the facts in the matter of *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754, 1991, which Spahr had cited on page 13 of his Objections to the Nonfinal Order.

Spahr stated that he could provide only “very limited information” noting that the *Peabody Case* is cited on page 37, finding 206, of the Nonfinal Order with regard to a criminal proceeding and fines. Spahr read from the Nonfinal Order, “the burden of production may shift to the alleged violator when the agency pursuing sanctions for the violation has demonstrated a prima facie case of violation, but the ultimate burden of persuasion may never so shift.” Spahr stated that because the Department has not met its burden of proof to establish a prima facie case there is no burden shifting. Spahr stated that the Department does not have sufficient and reliable evidence. Spahr explained that Deeds, the Hidden Hills Property Owners surveyor, provided testimony that he assisted in the platting of the Hidden Hills property, which provides him with intimate knowledge of the area. Spahr said that Deeds provided testimony at the hearing indicating there were more reliable and cost-effective methods to “more reliably calculate the location of the center of the natural watercourses and also their heights.”

The Chair noted the AOPA Committee would only consider information that is in the record and would not consider any new facts or information not in the record.

The Chair recognized Patrick Roberts, Counsel for Miami County and the Miami County Board of Commissioners (Miami County).

Roberts acknowledged that Miami County did not file objections “because the [ALJ] ordered us to construct roads and those kinds of things which we originally agreed to do ... that was somewhat in our favor so therefore we didn’t have any objection to do that...” Roberts addressed the Department’s calculation of the height of the structures explaining that the LIDAR data only provides an elevation of the top of water and does not provided data regarding what is below the water’s surface.

The Chair recognized Gamboa to provide rebuttal.

Gamboa stated that the Department has met its burden of proof. She noted that through undisputed evidence the dams were established to be unsafe and are without proper repair or maintenance. Gamboa also argued that the dams are within the jurisdiction of the Department. Gamboa noted the ALJ's recognition that this case identifies the complications associated with a "destroyed natural streambed" when no pre-construction elevation data exists.

Gamboa stated that Neese's report explains how LIDAR was used and that the LIDAR method is accepted in the engineering community in determining elevations. Gamboa pointed to page 15 of the Nonfinal Order, where she noted that the ALJ's full explanation. Gamboa stated that the Commission has held that a person cannot benefit from the fact that the natural streambed was destroyed by construction activity.

Gamboa said that since the 1960s the Department has had jurisdiction over the repair and maintenance of dams and the Department continues to hold owners accountable for keeping dams in good repair.

The Chair recognized Spahr to provide a rebuttal response.

Spahr stated that there was testimony that repairs were done to the berms. He pointed out that within the Nonfinal Order the ALJ acknowledges that there was mowing, root and tree removal, and concrete or stone used to shore up some of the structures.

Spahr stated that within the Nonfinal Order there are blanket inclusionary statements, such as "total destruction of the streambed" that are not supported by testimony received at the hearing. He stated that no testimony was offered to indicate that there was total destruction of the streambed. He argued that there are methods of finding the natural streambed, such as core samples and ground penetrating radar, but that the Department did not want to spend the time and money to find the streambed. Spahr noted that the Department has the burden of proof so it should have spent the time and money to find the streambed.

Spahr stated that there is no specific retroactive intent in the dam safety statute and the Department never addressed in its objection the alternative option in determining if a statute should be applied retroactively. He stated that the Department never addressed the "vested rights; vested property rights and the constitutional rights" of the Hidden Hills Property Owners to use and enjoy their property and increased property values. Spahr stated that there is no remedial aspect to the dam safety statute. Spahr highlighted the fact that the Department did not prove that retroactive application does not violate vested property rights or constitutional rights. Spahr argued that the Department's action results in a constitutional taking of the Hidden Hills Property Owners property rights.

The Chair stated that the question is whether the Department has jurisdiction over the dams and similar structures in Indiana. The Chair commented that the public policy to protect property and people is what drove the original dam safety legislation and regulations. The Chair noted her struggle to understand why dams or structures built prior to the regulations or recodification

would be omitted from its application. The Chair also considered the burden of proof noting that the Department conducted inspections and applied what the Department stated was sound engineering principles.

The Chair questioned whether the burden shifts to the property owners to say that the property owners are excluded from the jurisdiction of the Department. The Chair offered her position that the burden had shifted and no “additional information or data suggesting that any of the dams should be excluded from jurisdiction.” The Chair stated her opinion that the NOVs should stand. The Chair recognized the other members for input.

Jennifer Jansen commented that it does seem clear that the dam safety statute was promulgated because of safety concerns, and to say that it can’t apply retroactively “does not make sense to me.”

Bart Herriman stated that it would be problematic if the Department would not have the ability to regulate the dams in situations where there are multiple dams in a row under 20 feet in height, which proceeded to fail.

Herriman noted some concerns, as Spahr noted, regarding the hearsay evidence. Herriman acknowledged being unaware why Neese was not present to testify. Herriman stated uncertainty whether hearsay is the only evidence on the record. Herriman also noted uncertainty with respect to why “permits were not pulled,” whether necessary from the Department or from Miami County. Herriman stated, “It causes me consternation that somebody can come in and do something like this without pulling a permit and then turn around and stand back and say well...we didn’t feel like we had to measure it.”

Gamboa responded that no permits were issued when the dam structures were constructed. Herriman stated, “That’s my point.”

The Chair entertained a motion.

Herriman stated, “Well, I am new to this Committee, so I don’t know if I should jump right in and make a motion.”

The Chair explained that motions can be amended.

Herriman stated, “It seems to me that the [Department] should have the authority to regulate dams in the State of Indiana, regardless of when constructed. ...I guess I would move to amend that portion of the Findings of Fact and Conclusions of Law to provide for that authority.”

The Chair stated, “So we have a motion to amend the Findings of Fact and Nonfinal Order to reflect that the [Department] has jurisdiction over the dams. I request a clarification on that, would that be then all six NOVs, the Notice of Violation for all six dams? I just want to make sure because there were six dams there.”

Herriman answered in the affirmative.

The Chair said, “So that amendment or clarification is so noted.” The Chair then asked for a second.

Jennifer Jansen seconded the motion.

The Chair then asked whether there was any further discussion on the motion.

Herriman stated that it seems the Department should have the authority to regulate dams in Indiana regardless of when the dam was constructed, and the Department should have the ability to monitor dams in Indiana to ensure that the dams are safe and in good repair regardless of the technical dimensions of the dams.

ALJ Jensen asked the Committee for clarification on its motion. “If you were to look at page 43 of the Nonfinal Order, I think this is the easiest way for me to understand. I guess the inquiry that I have is whether or not the Committee’s position is that from a public policy standpoint and a safety standpoint that the new statutory language, which limits the Department’s jurisdiction to those dams that are 20 feet in height from the natural streambed to the top of the dam, be applied retroactively.”

The Chair said, “I might state that differently. I would say that the DNR would have jurisdiction over those structures—over dams and structures. The exclusion if a... dam owner, I guess, or property owner to meet the exclusion then of less than 20 feet would use the new measurement of the streambed to the top of a structure, to determine whether or not they would be excluded from the jurisdiction of the DNR for that structure.”

ALJ Jensen then asked whether it is the intention of the AOPA Committee to modify and reverse Finding 231. She noted that Finding 231 found that statutes are to be given prospective effect only and nothing within Indiana Code § 14-27-7.5-1 reflects that retroactive application was intended.

The Chair answered in the affirmative, that Finding 231 would be reversed, and that retroactive application was intended. The Chair noted that there would be significant alterations to the Nonfinal Order.

After obtaining clarification, ALJ Jensen indicated that she is able to modify the Nonfinal Order in a manner consistent with the AOPA Committee’s intent. ALJ Jensen suggested that the alterations to the Nonfinal Order will be significant and suggested that she present a redline version to the Committee for consideration and approval at the next AOPA Committee meeting. ALJ Jensen noted that copies of the redline version of the Revised Nonfinal Order would be provided to the parties as well.

The Chair stated that there was a motion and a second, and asked if there was any further discussion.

Herriman asked about the AOPA Committee's policy or procedure regarding the preparation of a transcript as was requested by Spahr.

The Chair stated that the AOPA Committee historically has relied on the Nonfinal Order unless remanded for further discussion or a decision. She added that transcripts can be requested and can be made available but she could not recall an occasion when the AOPA Committee has requested preparation of a transcript.

ALJ Jensen stated that the audio of a hearing is always available to anyone, but explained that a hearing would not customarily be transcribed except upon request of the parties.

The Chair called for a vote on the matter. Upon a voice vote the motion carried.

Information Item: Mediation Firewall Procedure; Administrative Cause No. 16-103X

The Chair explained the Mediation Firewall Procedure as the proposed procedure as it relates to file management and managing communications between party and the Commission. The Chair stated, "I don't know if you want to add anything further to that. I think it was fairly self-explanatory; I appreciate the procedure being put in place."

Sandra Jensen, Director of the Commission's Division of Hearings, explained that during a continuing mediation education course she had inquired about ethical issues associated with the practice of having one Commission ALJ mediate a case presided over by the other Commission ALJ. Jensen stated that it was suggested that to continue with the practice a Mediation Firewall Procedure should be established and be on file for the Commission's Division of Hearings to follow.

Adjournment

The meeting was adjourned at 9:50 a.m., ET.