AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
April 15, 2016 Meeting Minutes

AOPA COMMITTEE MEMBERS PRESENT
Jane Ann Stautz, Chair
Jennifer Jansen
R. T. Green

NRC, DIVISION OF HEARINGS STAFF PRESENT
Sandra Jensen
Scott Allen

GUESTS PRESENT

Paul Walthers	Lisa Walthers
Rachael Cardis	Donald Stuckey
Lucy Cress	Kenneth Smith
Ed Harcourt	Sean Wooding
John Byrer	Duke Snyder
Ron Richards	Michael Andreoli
Fritz Nodine	

(There were three others in attendance whose signatures were not legible.)

Call to Order

Jane Ann Stautz, Chair, called the meeting to order at 9:03 a.m., EDT, at the Fort Harrison State Park, Garrison, 6001 North Post Road, Lawrence Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum. The Chair, Jennifer Jansen, and R. T. Green introduced themselves.

Consideration and approval of minutes for meeting held on November 17, 2015

Jennifer Jansen made a motion to approve, as presented, the minutes of the meeting held on November 17, 2015. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

Consideration of Final Order following remand from the Steuben Circuit Court in *Cress v. Byrer and DNR*, Administrative Cause No. 12-192W

The Chair explained the matter for consideration is the Findings of Fact and Conclusions of Law with Final Order Following Remand by the Steuben Circuit Court. She explained that the Commission's Modified Final Order, dated September 4, 2014 was taken on judicial review to

the Steuben Circuit Court in Cause No. 76C01-1410-MI-335. "I think it's really a matter for us to then…review the modifications that have been made" to the Commission's Modified Final Order. The Chair stated that the modifications in the Final Order Following Remand address the distance between the pier and the boundary line. She noted the attorneys for Cress and Byrer were not present. The Chair then opened the floor for Committee member discussion and questions.

Sandra Jensen, Administrative Law Judge, explained that deleted language and added language in the Final Order Following Remand are shown as stricken font (Findings 34, 39, 40; Final Order) or bold font (new Findings 35 and 36), respectively. Judge Jensen said the amendments would make the Final Order Following Remand consistent with the Steuben Court's Order on Remand.

The Chair stated, "When we looked as 15 feet verses eight feet, it was more with regard to safety consideration and allowance of ingress and egress around that. So, I don't think there was any real question as to the actual boundaries and placement of the pier; it was more dealing with the distances and safety around that." She noted that the language in the Final Order Following Remand specifying the placement of Byrers' boats is deleted, which "gives them flexibility with regard to boat placement."

R. T. Green moved to approve the Findings of Fact and Conclusions of Law with Final Order Following Remand, as presented, as the Natural Resources Commission's Final Order. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order on Summary Judgment in the matter of *Oakwood Property Owners Association v. Mekus*; Administrative Cause No. 15-038W

Judge Jensen stated that Oakwood Property Owners Association (the "Association") is represented by Michael Andreoli and Greg Mekus is represented by Donald Stuckey. She noted that both attorneys were present.

Michael Andreoli stated that he and several members of the Association were present in regards to this matter. He also referenced several enlargements of maps and photographs previously admitted into evidence during the administrative hearing. He explained that the initial plat, Oakwood Place, included a number of lots, street and an easement commonly known as the "Hill Street Easement" (the "Easement"). "In essence…when the original plat was done there weren't any rules or regulations promulgated at that particular time as to how you use those common easements." He stated that it was clear that the property owners that have lake access have the ability to place boat lifts and piers to serve their respective properties. Andreoli explained that those persons, like Mekus, that own off-lake property "essentially still have riparian rights set out in the original plat. …However, our argument…is that these riparian rights don't remain unfettered. "

Andreoli said the Association was created and recorded in 2007, and the Association subsequently adopted regulations governing the use of the common areas, in particular the Hill Street Easement. He explained that homeowners are required per the adopted regulations to file

an application for a request to place structures lakeward of the Hill Street Easement. "Mr. Mekus went out and put his personal boat lift and watercraft in that particular easement. He installed a pier…[He] did not seek permission and was asked to remove it, but he did not move it." Andreoli said that the Association removed Mekus' boat lift. "We think the [Association] was in a position to be able to bring this matter and prosecute this particular case."

Andreoli, citing *Snyder, et al. v. Linder, et al.,* 9 CADDNAR 45 (2002), said there is no argument "that if you want to put a common pier there, it can be utilized." He noted, however, that Mekus placed a permanent boat lift adjacent to the common pier for Mekus' personal use. He explained that in *Snyder* the placement of the pier was allowed so long as the pier was subject to common use, but *Snyder* found that the placement of a boathouse was prohibited. Andreoli stated that he did not understand the difference between the placement of boathouse and a boat lift, both could be considered a temporary structure. A boat lift "has the same practical impact on whether the Common Usage Doctrine is violated. People cannot utilize this pier appropriately if this boat lift is there…and there is no common usage of that particular boat lift." Andreoli stated that if the Mekus boat lift is allowed to remain, then other Association members should have the same right to place another boat lift to further restrict the common usage of the pier. He stated that Mekus violates the Common Usage Doctrine by placing his boat lift. He stated, "In essence, the Judge's ruling doesn't reach a determination as to what's going to happen with that [boat lift]…that really prevents common usage."

Andreoli stated that the nonfinal order would have a chilling effect on property owner associations that are legally and duly organized to be able to bring these types of actions to try to enforce the associations' promulgated rules and regulations governing the placement of these types of structures. "Our concern is that if this ruling is allowed to stand in its current fashion it really precludes HOA's from bringing these kinds of cases. It was our thought that these are exactly the types of things that ought to be brought in front of the board by HOA's that are duly constituted in the event that there are violations of their rules and regulations." Andreoli argued that allowing the Mekus boat lift to remain "flies in the face of *Snyder*, in that [the boat lift] is an exclusive use." He concluded by stating that the placement of the boat lift is an exclusive use as opposed to a common use.

The Chair asked whether the Mekus boat lift was removed from the water each fall.

Rachael Cardis, President of the Association, stated that the Mekus boat lift was seasonal and removed in the fall and placed back in the water in the spring. "It's never been before the DNR for any kind of individual license nor has it adhered to our bylaws."

Donald Stuckey, representing Greg Mekus, clarified that the Mekus boat lift meets the definition of a temporary structure as defined at 312 IAC 11-2-25. He recalled that 312 IAC 11 provides a specific size limitation for a boat lift. "There's nothing in the record that suggests this boat lift does not comply with the administrative rules; there's nothing in the record that this has ever interfered with anybody's use of the easement; there's nothing in the record that reflects that anyone else has attempted to put a pier here or a boat here over the last several years." Stuckey highlighted the Association's argument that it has a regulation that requires Mekus to seek permission first in order to place a boat lift. Stuckey stated, "We suggest—just as Judge Jensen

did—that [Mr. Mekus'] riparian rights not only are created by the development of the subdivision itself, but also [Mekus] has riparian rights by operation of law because the easement runs to the lake." Stuckey noted that Mekus' lot is located in the subdivision.

Stuckey stated that there is no evidence in the record indicating that the Mekus boat lift does or does not meet size requirements as provided in 312 IAC 11. He also stated that evidence is clear that the Mekus boat lift is a temporary structure. Stuckey concluded and stated that Mekus should continue to have the right to place a pier and boat lift as Mekus' riparian rights permit.

Michael Andreoli provided his rebuttal. He said that Judge Jensen found that about 30 lot owners within the subdivision possessed riparian rights. He said Judge Jensen also found that the potential exists that a pier extended from the Hill Street Easement or any other subdivision easement abutting the shoreline of Hamilton Lake may be appropriately characterized as a group pier, which may not be placed under the general license authority. "The [Association] represents 139 residents there. This is contra to any type of a group pier in terms of its use or ability to be used as a group." Andreoli said that the Nonfinal Order "essentially amounts to a race to the water…Whoever gets to the easement first can put whatever they want in there."

Andreoli said that those who purchase lots directly on the lake and have direct access to their boats pay a premium for that lakefront access. He explained that those that own off-lake property do not have direct access to the lake, but that "does not mean that they do not have riparian rights; they do. The problem is that the riparian rights that Mr. Mekus seeks to use are an easement, which is common to all in the particular development." Andreoli stated that the Mekus boat lift may prevent individuals owning property in the subdivision to use the pier to swim and fish when Mekus moors his boat in the boat lift. Andreoli said, "We would have no problem for instance—it would seem not to be an argument—if he was using the lake and he wanted to moor his boat there for a temporary period of time to go up to the house or do whatever, those things, I think that would be an appropriate use." He stated that the Mekus boat lift, if kept in the lake through the active boating season, "does not seem to us to be a temporary use of that particular facility, and more in line with a boathouse." Andreoli concluded and stated that the Mekus boat lift violates the common usage by being in the lake permanently during the time the lake is being actively used.

The Chair asked whether the Association considered applying for a group pier.

Rachael Cardis said the Association has discussed applying for a group pier, but the Association was waiting upon this Committee's final order. "If [a group pier] is sought, we just want to make sure that it's an understanding from this [Committee] that nothing goes in water, whether it's an individual license application or a group pier."

The Chair then opened the floor for Committee member discussion.

Judge Jensen indicated that she did not necessarily disagree with statements made today by either party. "It just appeared to me that enforcement of homeowner's association rules don't belong here. The riparian rights issue seems to have been decided by *Snyder*." She recalled that *Snyder* ended in a similar situation where those who already had piers installed were allowed to leave

those piers in place. "It's noted that while there may be something relative to the [Association], this just isn't the place." Judge Jensen stated that the Findings of Fact address the placement of the Mekus pier and boat lift in that Mekus cannot place his pier and boat lift to the interference of anyone else. She also noted that the Association is not a riparian owner in this case and the Association did not identify even one riparian owner who claimed that Mekus' pier and boatlift created interference with their exercise of riparian rights. Judge Jensen also referred members to proposed corrections that she had issued.

The Chair asked whether there were any objections to Judge Jensen's proposed corrections as submitted.

Andreoli replied that the Association appreciated the corrections that were made addressing some of the specific objections, but stated that the corrections do not address the Association's overall concern.

Stuckey stated that he did not have an objection to the corrections as presented.

The Chair then asked whether the Committee members had any further discussion.

R. T. Green said, "If we let things stand the way they are the idea is that within our duty, the DNR's duty, given the nod to *Snyder*, we really can't do anything."

The Chair commented that the AOPA Committee would not have authority to resolve the pier and boat lift placement given the facts of this case and the fact that there is not a direct issue of interference.

Green agreed with the Chair's statement. "There's a great potential of [interference] because of the 'race to the water', but until somebody goes to the water at the same time there is no issue for us to decide, right?"

Cardis commented that *Snyder* found that the common use is to all the residents of the association and not exclusive to one member of the association. "It's a popularity contest. Whether he applies for an individual license or we apply for a group pier, that's how this is going to have a findings and a conclusion. We spent time, energy, and money to get some resolution from this [Committee] and your *Snyder* ruling in 2001 that said 'it's for common use' that case was decided based on piers. And now you're furthering this with exclusive use for one individual member. So…why this board can't re-rule, I guess, on the fact that we're violating the common use at this time. If we need to apply for a group pier, we will."

Stuckey stated that the *Snyder*, and subsequent cases, as cited by Judge Jensen discuss placement of boat lifts within the riparian boundaries.

The Chair commented, "It's only a matter of time as these cases evolve that we see the different variations because it is complex. Just like part of my question around 'temporary versus permanent'–again what do we have jurisdiction over and the challenges with the way the statutes, the laws, and the permitting process are written. While I see that, that temporary

structure does limit the use and enjoyment of that pier by other property owners, the question I have is on the facts before us, if we take that leap, given the current case, right?"

Green agreed. "As I understand it, we've made attempts in other cases to try to have some consistency of ruling, but in each time we've given a nod to, in essence, each lake having its own individual plat issues that do affect riparian rights. And until there's some consistency on how things are platted—which there won't be, I guess, for a while—that is just the way we've got to rule."

For clarification, the Chair stated, "I see a difference between the [Association] bringing this forward or if the [Association] and other property owners that also have similar riparian rights such as Mr. Mekus, or the Mekus Family, then we would have opportunity to rule."

Judge Jensen indicated that the Nonfinal Order, at Paragraph 2, provides that Mekus' right to extend and maintain a pier into Hamilton Lake is subject to the competing interest of other riparian owners and Mekus' use must allow for common use by other lot owners.

The Chair asked whether there were any objections to Judge Jensen's modifications to the Nonfinal Order as offered by Judge Jensen. Hearing none, the Chair asked for a motion.

R. T. Green moved to affirm the Findings of Fact and Conclusions of Law and the NonFinal Order, as modified, in the matter of *Oakwood Property Owners Association v. Mekus* as the Final Order of the Commission. Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of objections with respect to Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Walthers v. DNR*, Administrative Cause No. 13-147W

Judge Jensen stated that Sean Wooding is Counsel for the Department of Natural Resources (the Department"), and noted that Paul Walters ("P. Walthers") was self-represented. She noted both Wooding and Walthers were present.

P. Walthers introduced himself and his daughter, Lisa Walthers ("L. Walthers"). P. Walthers stated that he prepared a written statement, and requested the Committee's permission for L. Walthers to read his statement into the record. P. Walthers provided a copy of the written statement to Committee members.
The Chair asked Department Counsel, Sean Wooding, whether he had seen or was provided a copy of the written statement in advance of today's meeting.

Sean Wooding responded that he was not given a copy of Walthers' written statement in advance of today's meeting. P. Walthers provided a copy of his written statement to Wooding.

L. Walthers read aloud the prepared statement. The written statement is attached to these minutes as "Exhibit A".

Sean Wooding, Counsel for the Department, indicated that the Department renewed its Motion to Strike the Petitioner's Untimely Filed Written Objections. He noted that Administrative Law

Judge Dawn Wilson issued her Nonfinal Order on March 7, 2016, which then established a March 28, 2016 deadline to file objections. Wooding said that P. Walthers improperly filed his written objections by only serving the Commission. He also noted that Judge Wilson, on March 28, 2016 responded regarding the P. Walters filing requesting verification from P. Walthers that his written objections were served upon all parties contemporaneously with submission to the Commission and with receipt of the verification, the Commission would act upon the filing. Wooding stated that on March 30, 2016 the Department received, by email from a nonparty, L. Walthers, P. Walthers' written objections. Wooding stated that the email from L. Walthers "was not verification of the written objections being filed contemporaneously with the submission to the Commission. This email was a late filing that missed the deadline for Written Objections." He stated that Judge Wilson found that P. Walthers' written objections filed on March 30 were not identical to the written objections previously submitted to the Commission on March 24.

Wooding stated that P. Walthers improperly filed his written objections after the established deadline. He also noted that *pro se* individuals are to be held to the same standards as an attorney in administrative proceedings. Wooding noted that Judge Wilson denied the Department's Motion to Strike the Petitioner's Untimely Filed Written Objections. He requested the AOPA Committee grant the Department's renewed Motion to Strike and affirm the Findings of Fact and Conclusions of Law with Nonfinal Order as its own Final Order in this matter.

Wooding addressed P. Walthers objections individually, as follows:

- He stated that a Final Status Conference was held without L. Walthers presence. Wooding noted that the presence of L. Walthers' was not required in this matter. Wooding explained that Lisa Walthers was not an attorney or a party in this case. "In civil matters, no court appointed attorney is generally given, so that is also a baseless objection."

- Wooding noted that P. Walthers had not exchanged witness and exhibit lists with the Department even after several extensions and opportunities were given to P. Walthers by Judge Wilson. "[P. Walthers] was told that if he didn't exchange exhibits and witnesses that they could be objected to by a party at the hearing and not allowed in." Wooding also noted that P. Walthers failed to file final witness and exhibit lists with the Department or with Judge Wilson.

- Wooding stated that the Department responded to and answered extensive discovery requests by P. Walthers. "If [P. Walthers] didn't understand or like the answers that is not the DNR's fault."

- Wooding explained that P. Walthers, during the administrative hearing, attempted to enter into evidence a map purporting to show the drainage area of less than one square mile. Wooding noted that Judge Wilson did not allow the map into evidence, because the map was not exchanged with the Department. Wooding also noted that the map attached to P. Walthers' objections "shows a point above Forest Lake Dam at a state highway bridge, not the dam itself. So it shows a different drainage area."

- Wooding stated that contrary to P. Walthers' contention, the Department did not approve the Thornridge Subdivision. Wooding explained that the Department approved a storm drainage outfall pipe associated with the subdivision that was in the floodway. "None of the homes are in the floodway, so the DNR would not have any part of approving homes that were not in a floodway."

- Wooding explained that the Richards settlement was not allowed into evidence, because it was determined not to be relevant. The Richards requested to withdraw their appeal of the Notice of Violation (the "NOV"). "The Richards have put extensive amounts of money, payment toward the 'decommission fund' of the dam, construction access, permission to use their property for fill. They have gone above and beyond their part to help the situation at Forrest Lake Dam."

- Wooding said that P. Walthers' argument that the Richards have the same ability to dewater the Forest Lake is incorrect. He stated that the spillway and Forest Lake is on P. Walthers' property. He also noted that the Department attempted to settle with P. Walthers, but was unsuccessful.

- Wooding noted that any arguments related to storm water runoff into Lake Forest would be regulated under local ordinances through the Hendricks County and the Town of Avon.

- Wooding stated the Department has proven through substantial evidence that the NOV dated August 22, 2013 served upon P. Walthers, owner of the Forest Lake Dam, was proper and the Lake Forest Dam falls under Department's jurisdiction. He stated that the Department proved through testimony, modeling, and other evidence entered into record at the hearing that the Forest Lake Dam is a high hazard dam in which failure of the structure may cause loss of life and serious damage to homes according to IC 14-27-7.5-8. He also stated that the Department has shown that the Forest Lake Dam is in a state of disrepair, dangerous, and failing. "For the safety of those downstream, Mr. Walthers needs to take responsibility for the dam that he owns and either repair or decommission the dam in accordance with the NOV issued."

- Wooding stated that the Forest Lake Dam is on, in, or along a stream according to IC 14-27-7.5-8, because the "ditch that runs into Forest Lake Dam is the stream."

Wooding stated that the Department objects to L. Walthers presenting for P. Walthers, because L. Walthers is not a party to this case or an attorney. Wooding stated that the Department objects to the exhibits attached to P. Walthers' written objections, for the reason that the attached exhibits were not admitted into evidence at the administrative evidence. He concluded and stated that the Department agreed with Judge Wilson's Nonfinal Order and requested that the Commission affirm the Nonfinal Order as a Final Order in this matter.

The Chair then opened the floor for Committee member discussion.

The Chair requested clarification regarding the assignation of the 90% versus 60% ownership of the Forest Lake Dam between P. Walthers and Richards.

Wooding stated that the ownership percentages were assigned by Judge Wilson. He explained that the Richards own a small portion of the dam, but P. Walthers owns both the main and emergency spillways, Forest Lake, and the "part of the dam that is actually failing and crumbling at this moment."

The Chair then asked, "Am I correct that there is some question with regard to the state of the dam? There has not been any additional engineering, evidence, or by, Mr. Walthers, your own engineers with regard to claims as to the condition?"

P. Walthers replied, "No ma'am. I've had so many things that I can't technically class from an attorney's point of view. I gave up, because I didn't get straight answers regardless of what they said. I have stacks of paperwork and I've had people review all of the answers on our disclosures, and each attorney would change the answers. …No, I haven't hired an engineer, because the last word I got—'either do what we say or we are going to hire an engineer and a contractor and send you the bill'—that's what I got from the DNR."

The Chair stated, "The reason I'm asking is I am trying to get and ensure as much as we can the accuracy of the Findings that are included in the Nonfinal Order and whether or not to leave [the percentages] in if it's relevant to this or whether we should clarify. …It's a disputed finding at this point."

R.T. Green asked, "Mr. Walthers, are you saying the dam is not in disrepair?"

P. Walthers stated that he has looked at 15 to 20 ponds and noted that "things can be done, trees can be taken away, you know, all those things, but you do remember that it's a 75 year old dam…Now all these things go on. The estimate is to prove the dam was safe would cost $40,000, $50,000, or $100,000. How do you prove a dam is safe? Then other questions come in—Well, if you can't prove it then you need to spend $500,000 to get it remodeled. Now we are only talking about a group of people that have 12 homes around [Forest Lake] and all that becomes impossible. And to prove it's safe, how do you do that?"

P. Walthers referenced the map attached to his written objections.

Wooding noted that the map P. Walthers was referencing was not admitted into evidence.

The Chair explained to P. Walthers that the AOPA Committee can only consider exhibits admitted into evidence and part of the record.

P. Walthers asked questions regarding the issue of his filing of written objections. "I filed. And they're saying that I got it in the wrong address. Tell me what the right address is. Then tell me how a mail room person can pick my packet up that is going to this Committee and open it up and give it to everybody?"

Wooding asked whether it would be an appropriate time for the AOPA Committee to make a ruling on the Department's renewed Motion to Strike.

The Chair opened the floor for discussion as to the Department's renewed Motion to Strike Petitioner's Untimely Filed Written Objections.

Jennifer Jansen stated, "I would be inclined to deny the motion."

Green stated that he was in agreement with Jansen. "Let it all come in. Wisdom tells me that is the better course."

The Chair then denied the Department's renewed motion.

Green asked, "My understanding is below this dam there are landowners that would be in the way if this dam were to fail?"

Judge Jensen stated that Judge Wilson's Nonfinal Order found that there were landowners below the dam that would be impacted if the dam were to fail.

P. Walthers provided rebuttal. He said that the Forest Lake dam impounds less than 35 acres and is 75 years old. He asked, "How deep can it be?" He stated the Judge Wilson denied the entering of evidence "because of the technicalities that I'm not an attorney and they want to prove their point. …I do understand Indiana law. If I'm charged with a felony don't I get a right to an attorney?"

Green explained to P. Walthers that P. Walthers was not charged with a felony in this administrative matter. "You're not entitled to an attorney in this situation."

The Chair stated, "I appreciate the complexity of this matter." She explained that the AOPA Committee is tasked with reviewing Judge Wilson's Findings of Fact and Conclusions of Law with Nonfinal Order.

Wooding provided Department's rebuttal. He said that the Department entered into evidence inundation models prepared by the Department's professional engineers showing homes flooded up to a foot of water should the Forest Lake Dam break. He noted that the Department entered into evidence drainage area maps showing the current drainage area of the Forest lake Dam as greater than one square mile.

Jansen asked, "Can you tell us when those maps were updated?"

Wooding stated that the maps entered into evidence were recently updated.

P. Walthers asked, "Can any of these people tell me how many acres of water are in the pond? Simple question, from a technical point of view."

Wooding explained that the Department is only claiming jurisdiction on the drainage area.

P. Walthers argued that the high hazard classification is directly related to the water that is in the Forest Lake.

The Chair stated, "It goes back to what is the jurisdiction of DNR with regard to the maintenance and condition of the dam and the drainage way off of that. Again, we are limited by what is before us."

P. Walthers questioned the Department's modeling and standards and said, "They do whatever they want to do."

The Chair called for a motion.

Green moved to affirm, as presented, the Findings of Fact and Conclusions of Law and NonFinal Order in the matter of *Walthers v. DNR* as the Final Order of the Commission.
Jennifer Jansen seconded the motion.

Green stated, "Mr. Walthers there is no vendetta…from…this Committee." He noted that there have been cases before the Committee similar to this and the issue in all of the previous cases relates to dam failure and whether the dam presents a hazard. "It's not something that we take lightly, because not only the landowner's rights need to be considered, but all those below [the dam]. When it's considered by the DNR to perhaps be potentially a hazard it's not something we take lightly. And it's not something that we like to do to punish landowners. It's just unfortunately the responsibility of lake owners—manmade lake owners—and they do fail from time to time. And that's the fear. Perhaps it's because of the 75 years that have passed that have made it difficult to be able to maintain that lake at this particular point in time and the dam in particular."

L. Walthers stated, "From my observations…you are going to go with what the Judge, but you didn't question anything. [The Department] got away with saying that the Richards just as much of the dam as [P. Walthers] does. No one has looked at a map to see where the property line is to know if the 60-40 is accurate or the 90-10 is accurate."

Green said, "At the end of the day, whether the accuracy in that respect is spot on may not be the material issue that we have before us."

L Walthers, stated, "It absolutely is on rights and responsibility."

Green replied, "I understand that, but I respectfully disagree." He explained that the AOPA Committee's concern is whether the dam is a hazard or the potential for failure of the dam. Green noted that evidence submitted would support the dam's eventual failure.

The Chair noted that a motion was made and seconded to affirm the Findings of Fact and Conclusions of Law with Nonfinal Order as the Commission's Final Order. She called for a vote. Upon a voice vote, the motion carried.

Consideration of objections with respect to Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *G. W. Sedgwick and Fahlsing v. DNR*; Administrative Cause No. 15-020W

This item was withdrawn.

Discussion of the Attorney General's Opinion on corporate representation in administrative hearings; Administrative Cause No. 15-066A

Sandra Jensen, Director of the Commission's Division of Hearings, noted that a request was made to the Attorney General's Office (the "AG") for an advisory opinion regarding, primarily, the need for corporations to be represented by counsel. She said that there is a concern that small corporations with minimal monetary claims or other claims involving the Department may be dissuaded from seeking administrative review because of the cost if they are required to obtain counsel. Conversely, Jensen expressed her concern with a lay person representing a corporation in an administrative review that may impact the rights of shareholders and other folks.

Jensen explained that the AG's position under AOPA, is that there are two parts to the statutory provision regarding representation. She explained that under the first provision an individual person, a natural person, can represent themselves or be represented by their duly authorized representative such as an attorney, someone under a power of attorney, or another individual. Jensen noted that, as in *Walthers v. DNR*, Lisa Walthers spoke on behalf of Paul Walthers with Paul Walthers being present, "I don't see any problem with that under AOPA, and that's typical and relatively normal."

Sean Wooding asked whether it was normal in administrative proceedings before the Commission that persons are represented by a non-attorney.

The Chair said, "It does occur from time to time, especially given the nature of the matters" before the Commission "without formal or legal representation."

Jensen explained that the second provision under the AOPA provides that "whether or not, participating in person, any party may be advised and represented, at the parties own expense, by counsel or unless prohibited by law, by another representative." Jensen said the AG interprets this second provision to allow: (1) representation by an attorney or (2) by a non-attorney representative. However, with respect to the latter, Jensen noted the AG's determination that an administrative rule is a law by which the Commission could restrict the representation by non-attorneys, particularly related to corporations and other non-natural persons.

Jensen noted that a rule authorizing representation by a person who is not an attorney might establish a restriction consistent with the AG opinion that the person be a director, board member or other agent approved by the corporation's board, rules or by-laws. She observed that a proposed rule might require the corporation to submit documentation verifying corporate board action authorizing the representation and acknowledging the potential perils of proceeding without an attorney.

Jensen said the AG's Opinion also provides some possible practice tips with respect to a party acknowledging their understanding that representation by a non-attorney presents possible shortfalls. Jensen also observed that the AG's opinion confirms that nothing contained within AOPA relative to representation authorizes a person who is not an attorney to practice law. She noted that the AG's Opinion discusses the practice of law and seems to suggest that the Commission may adopt a policy or procedure that identifies what the Commission considers to be the practice of law. Jensen observed, "Even if we approve a lay person to represent someone, when the case goes to a point of practice of law then we are in a bind again."
Jensen proposed that these guidelines might be best set forth in a non-rule policy.

Jensen noted that through a rule and non-rule policy, small corporations "would still have the ability to have someone who is not an attorney represent them, but they would have to acknowledge" that representation by a non-attorney is "at their own peril. And a corporation would, under [its] governing requirements…have to approve the representation by a non-attorney."

Jensen discussed several examples of *pro se* parties or parties represented by non-attorneys filing documents not in compliance with AOPA and 312 IAC 3.

The Chair said, "I hadn't appreciated that until these matters came up. Again, you want some flexibility when you're dealing with the citizens of the state and trying to accommodate, but you have to have rules and you have to, again, follow the procedure."

The Chair then opened the floor for discussion.

Jensen stated that the Office of Environmental Adjudication (the "OEA") and other agencies are awaiting this Committee's recommendation. She noted that the Commission attempts to keep its rules consistent with OEA in regards to administrative review. Jensen said OEA is "in the same realm that we are with some small corporations. [OEA] likes having that latitude to offer some ability for non-attorneys to do some representation." She noted several state agencies that may consider adopting joint administrative rules.

The Chair stated, "That may be something worthwhile to pursue, again getting a few more thoughts and minds around this as to how to structure that….When you get to the details of it and the potential implications, you start looking at some of the different scenarios…of what is the practice of law and respecting that boundary."

The Chair asked whether the Committee supported moving forward with a proposed rule governing non-attorney representation in administrative matters before the Commission.

R. T. Green and Jennifer Jansen answered in the affirmative.

The Chair suggested a presentation be made at the Commission's next scheduled meeting outlining this Committee's recommendation to move forward with a proposed rule.

Jensen said she would draft language for the Committee's review.

Adjournment

Prior to adjournment, John Byrer addressed the Committee regarding the consideration of the Final Order following remand from the Steuben Circuit Court in *Cress v. Byrer*. Byrer stated that his attorney indicated to him that there would be an opportunity to address this Committee.

Judge Jensen explained that at the time of the granting of the continuation request in *Cress v. Byrer*, it was expressly noted to the parties' attorneys that there would be Committee consideration but no opportunity for oral argument or presentation. She noted that counsel for each of the parties responded they would not be attending today's meeting.

Byrer commented, "If a person is going to be subjected to a final order, they should have a chance to speak."

Judge Jensen explained that objections were filed previously regarding the Nonfinal Order that was subsequently taken on judicial review to the Steuben Circuit Court. She explained that the opportunity to address this Committee was at the Committee's August 28, 2014 meeting at which this Committee considered objections filed regarding the Findings of Fact and Conclusions of Law with Nonfinal Order. Judge Jensen explained that the Steuben Circuit Court remanded the matter back to the Commission to make additional findings consistent with the Court's remand order.

The Chair said, "This wasn't to re-open it beyond the correction or modification based on the direction from the Court".

Byrer said, "So, the point of the [meeting] in this case is just, mainly, a formality?"

R. T. Green replied that today's meeting "was showing the public, on the record, that we are doing what we were ordered to do" by the Steuben Circuit Court.

Byrer indicated that he understood, and stated "That's fair enough."

The meeting was adjourned at 2:32 p.m., EDT.

Oral Arguments –

Introduction – Paul Walthers, one of two owners of the Lake Forest Dam.

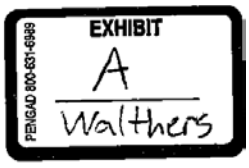
In addition to the specific errors of fact previously sent to you, there are three areas to address:

1. The critical error by the ALJ in not allowing the Settlement Agreement and Release with Ronald Richards who owns a minimum of 40% of the dam.

   The Settlement was created and signed by DNR attorney, Sean Wooding, and the Judge should have allowed it into evidence. To disallow the agreement into evidence is suspect and raises ethical concerns since -
   a. The settlement of $5,000 establishes a cap – limiting my exposure
   b. The settlement reduces potential liability
   c. The settlement establishes precedent
   d. The settlement demonstrates the DNR is not protecting life and property downstream as the Richards home is on the dam and if the DNR is at all accurate, the property most at risk for damage.

2. The overall bias of the Judge to rule in favor of the DNR despite the lack of evidence.
   a. Jurisdiction – the Judge only used DNR maps and calculations and did not refer to calculations used by the Indiana Department of Transportation and my information which demonstrates the drainage was/is less than 1 square mile.
   b. High Hazzard Classification – Testimony by DNR employees established that they did not establish the dam was high hazard, but continue to use the terminology when referring to the lake forest dam.
   c. The failure of the Judge to understand the DNR approval that took place for the Thornridge subdivision.

3. The Judge's unprofessional and punitive actions against me since I am without legal counsel even though the Judge refused to appoint legal counsel upon my request which violated my rights.
   a. The Judge did not ensure that all interrogatories were answered by the DNR prior to the hearing.
   b. The Judge continued with the hearing date even when she knew the parties had not provided required documents.
   c. The Judge's constant negative comments with regard to my lack of legal counsel.



[redacted]

#24-The Judge held a final status conference which required attendees to attend in person knowing that Paul Walther's daughter would be unable to attend.

The Judge moved forward with the hearing despite knowing full well the exchange of exhibits and witness list had not taken place. And, knowing that the DNR had not provided satisfactory answers to the questions posed by Walthers. (This statement of fact was omitted from Administrative Law Judge (ALJ) which demonstrates the ALJ's bias towards the DNR.)

The ALJ still moved forward with the hearing which is an error and a violation of Walther's rights.

#36 to #38- The ALJ failed to allow calculations from the State of Indiana into evidence which demonstrated the drainage area was less than 1 square mile. (Another example of bias by the ALJ.)

#51- The ALJ failed to understand that approval by the DNR was required in order for the Thornridge development to move forward and therefore was approval for the housing development as no approval permit was necessary for the property to remain as cornfield. (Exhibit D.)

#68-Reference is made to "unauthorized" utility shed. There are three sheds on the dam, one of which is owned by Ronald Richards and was documented in an exhibit picture. The ALJ failed to document that there is a private home on the dam property, owned by Ronald Richards which was stated numerous times by Walthers and included in various exhibit documents by the DNR.

#118 & #119- ALJ states that Walther's owns 90% of the Forest Lake Dam. This is not a statement of fact as the Richards' own a minimum of 40% of the Dam. This fact was stated numerous times during the hearing. [redacted]

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#122-the ALJ refused to allow the settlement by the Richard's to be entered as evidence. This is a critical error as the settlement offers no solution to the safety of property or life downstream.

The Richards have the same ability to dewater the lake as Walthers and for the DNR to release one owner demonstrates the dam safety is a ruse. The ALJ should not have issued a final order of dismissal to the Richards.

The NonFinal Order requires Walthers to comply with the requirements identified under the section of the NOV identified as "Action Appropriate to Mitigate the Violation by completion of either all of Action 1 or all of Action 2, within 90 days.

The final order is without merit as it does not include all dam owners and only refers to the NOV solutions which is in conflict with a letter issued from the DNR dated November 25, 2015.

Neither the DNR nor ALJ have demonstrated the dewatering solution is compliant with all local, state or federal agencies and without risk of violation(s). ALJ Stephen Lucas (#9) stated that the DNR would be responsible to confirm that any solution required by the DNR would be in compliance with all local, state, and federal agencies. Without this confirmation the ALJ is unable to order requirements of the dam owners.

For 43 years, I have owned a 6.8 acre pond, south of US 36 by State Road 267 in Hendricks County.

Over the past 43 years, the development of new growth in the Town of Avon, Avon School System, new subdivisions, CXS Railroad, widening of County and State Highways, have increased rain and storm water into my unnamed ditch (farmer's pond) often "illegally" without any active government restrictions or controls of rate of water flow. Now to add to the issue, the Town of Avon is building a $15 Million Dollar Bridge on State Road 267 and a new mile of road water drainage goes into my pond.

The Department of Natural Resources (DNR) on February 28, 2013, declared my dam is a "high hazard" which is highly disputed. Also, DNR staff declared there

would be a $10,000 fine and a $1,000 a day cost until "I hire an engineer and contractor which must do whatever DNR demands". Or, I must prove the dams is safe. Or, I must get rid of the pond and dam which is 75 years old and functioning. The final option requires paying DNR "tens of thousands" extortion money which then would satisfy the issue with DNR.

I am 84 years old fighting bladder cancer and on a limited income. The Judge appointed by the Governor denied me a court Appointed Attorney.

How can DNR and the State of Indiana hold an individual responsible for an increase in surface water drainage of which I have had no control?

My property rights, civil rights, and due process are being aggressively violated by the Indiana Department of Resources.

I do not have tens of thousands of dollars to respond to a three year court case when the DNR keeps changing attorneys (three times) and judges once.

Also the interpretation of the law and the facts are inconsistent with the very poor quality of disclosures made by the DNR.

DNR approved 95 acres of downstream ground northwest of the dam for Thornridge residential subdivision (Exhibits 9 and D).

Now DNR says my dam puts Thornridge at risk when there is less than 35 acre water in the pond (Exhibit 6).

DNR declared seepage in the dam. Over the last six months, I have had many capable people (engineers and contractors) to try to find seepage which they could not.

JURISDICTION:

DNR never produced maps indicating where the water shed begins and what has been added illegally over the years.

State Agencies are required to give full disclosure of maps and models especially to the public when jurisdiction becomes a factor.

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Also, more clarity is needed with Indiana Statutes code which regulates small dams. When DNR gives them hazard classification.

If the DNR makes all the interpretations of what is and what is not.. this only lends to abuse and extortion.

There are no streams, creeks or rivers running into Forest Lake Pond. There is a storm water ditch coming out of and off Avon roads, parking lots and streets.

I have a DNR map describing topographic N3945-W8622.517.5 (Exhibit 9)

This map shows less than one square mile of water drainage area. (Exhibit 9 and Exhibit C-13.)

It appears Indiana Law Statutes IN 14-27-7.5-1 does not say **any** one of the following. (Exhibit BB)

It appears DNR and their supervisors gave Dr. Richard's attorney strong advice (orders?) to obtain an engineer and contractor to remove the 75 year old emergency spillway. Which I strongly objected to. This only removed 7 acre water of pressure. This action caused trespassing and thousands of dollars worth of damage to the emergency spillway. Also, this has changed the water way out of the pond which now makes the road and bridge at high risk during heavy rains. (Exhibit 10).

Paul Walthers shares ownership with Donald D. and Carolyn A. Richards of Lake Forest Dam. (Exhibit A 1).

How can pursuant to Indiana Code 14-25.5, Actions 1 and 2 cited in Exhibit A 1 be performed without notice of violation being changed or dismissed?

[redacted]

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Statements made at the DNR hearing on February 9, 2016.

I have been receiving inspection reports from the DNR since 1975. Mr. Richards was never contacted by the DNR until 2013, even though he has been a dam owner since 1978.

Since receiving the violation letter, I have struggled to obtain the most basic information from the DNR. Even during this hearing certain staff members would not answer the most basic question. The closest to any vindication was when a DNR staff member admitted that the DNR did approve the Thornridge subdivision. This has been after years of them denying any involvement.

DNR has not proven Lake Forest Dam is under their jurisdiction. Yes, they have a report that states the drainage area/watershed is over 1 square mile. In their own files that number has changed and I have a report by the Department of Transportation that states the drainage area is .86 which is what is being used to build a 15 million dollar bridge.

Mr. Crosby explained how to properly build a dam and if someone was building a new dam, I am sure his approach is fine. The Lake Forest dam was built 75 years ago and despite all of the criticism held up just fine until I stopped maintaining the dam. After the violation letter was received, I soon stopped proactively caring for the dam that I have worked on almost every day for 45 years. The DNR also forced me out of my home of over 35 years because they are taking away my pond and life's work.

The DNR's position has been that the violations and required corrective actions are due to safety – to prevent the loss of life and property. Yet the Richard's are able to walk away from the issue with a $5,000 payment to the DNR. I am unclear how the hazard has been removed and how life and property are now out of harm's way.

The DNR demand to rebuild the dam is cost prohibitive and something I cannot afford. Decommissioning the lake is also cost prohibitive and will require a court order as Lake Dwellers whose property values fall will consider litigation. There will also be issues when those on well water no longer have easy access to water in the water table.

Over the past 45 years, I have been willing to be responsible for the dam and any downstream impact as the risk is minimal. This is not a high hazard as there is not enough water in the lake to cause a threat to life and property downstream despite what the DNR has presented.

The DNR has stated that the dam in under their jurisdiction and if that is the case, they need to be prepared to own the problem. I have done the best I could with the increased storm water that flows through my property. If the town of Avon had not grown with new school systems and subdivisions, my farmer's pond and dam would have few changes in the past 50 years.

The decommission of the dam must be completed by the DNR and they must be prepared to own the impact of their changes.

- Loss of property values
- Loss of well water
- Loss of wildlife

Without the benefit of water slowing down water-

- Increased water flow and the risk to Hubbard's house
- Wash out of the lower road
- Increased water flow and the risk of erosion to Thornridge homes along the stream bed.

And, finally there must be approval by the Army Corp of Engineers for the removal of the water retention pond as well as confirmation from the Federal, State and local government building the new bridge over the railroad tracks.