

**Minutes of the AOPA Committee of the
Natural Resources Commission**

March 16, 2010 Meeting Minutes

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn
Mary Ann Habeeb

NRC Staff Present

Sandra Jensen
Stephen Lucas
Debra Michaels

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 12:55 p.m., EST, on March 13, 2010 in the Roosevelt Room, Fort Harrison State Park Inn, 5830 North Post Road, Indianapolis, Indiana. With three members of the Committee present, the Chair observed a quorum.

Approval of minutes for meeting held on January 12, 2010

Mark Ahearn moved to approve the minutes for the meeting held on January 13, 2010. Mary Ann Habeeb seconded the motion. Upon a voice vote, the motion carried.

Oral Argument to Consider “Modified Findings of Fact and Conclusions of Law with Nonfinal Order” of Administrative Law Judge, in the matter of *Clem, Landis and the Cass County Drainage Board v. Ruble and the DNR*; Administrative Cause No. 08-098W

The Chair called upon Eric Wyndham, attorney for the Department of Natural Resources, to provide oral argument.

Wyndham provided the committee with a packet that included Stipulated Exhibit III admitted at the administrative hearing, which contained aerial photographs of the property locations, the floodways, and culverts. The packet also contained the CADDNAR case *Gosset v. Town of Albany*, citing IC 36-9-27.4.

Wyndham explained that the case involves a floodway permit for construction that was applied for and issued to Carl Ruble. The permit authorized the construction of a pond and cleaning of a ditch, removal of trees, and rebuilding of an over-flow pipe in a spillway. Part of the Department's objections is directed to Finding 66 and Finding 67. In those findings Judge Jensen ruled that the Department's jurisdiction was limited to the floodway but also ruled that the Department's application of that jurisdiction in this particular case was in error for not considering overland water flow from Mr. Landis' property which is located north of Ruble's property, divided by a county road.

Wyndham cited Indiana Code 312 IAC 10-1-2(c), which indicates that the flood plains subject to regulation of the Department along water ways are those having a drainage area of at least one square mile. He said, "The evidence was undisputable that the drainage area was less than one square mile, which is the reason that the Department did not consider the overland flow from Crooked Creek across Landis' land which is outside the Wabash River floodway" involved in this case. He said the area of Landis' property over which the waters of Crooked Creek supposedly flow onto Ruble's property was over an unnamed flow area tributary over his [Ruble's] property that connected to the Wabash River through a ditch between the Clem's and the Ruble's. He said that Ruble's project occurred solely within the floodway of the Wabash River. No information was presented to the Division of Water during the pre-permit review indicating flow from Crooked Creek would create problems as a result of Ruble's project. Wyndham noted the parties were served notice of the application which also advised the right to a public hearing that the parties did not request. He stated the Claimants did not present any professional or engineering materials indicating that the project would interfere with the efficiency or the capacity of floodway or cause any damage to life or property.

Wyndham stated that Ruble's application included photos with dimensions of the proposed pond, which was a 99' x 61' foot. He said Ruble presented evidence showing the slope of the pond and how he would square off the wall opening through which the water had "historically" flowed to the Wabash River. "It appeared from the way the Department interpreted Judge Jensen's ruling, that if we had to consider the waters from Crooked Creek, which was not even involved in the floodway for this project, going over somebody else's land; a lot of which was not in a floodway; then was the Department to consider where the water source came from which Crooked Creek to flood? We feel that that kind of obligation is contrary to the wording and intent of the Flood Control Act."

Wyndham explained the Department's position that IC 36-9-27.4 "puts a responsibility of regulation of natural surface water courses through the County Commissioners or to the Cass County Drainage Board." Wyndham cited *Gosset v. Town of New Albany*, a 2004 CADDNAR opinion in which Judge Lucas determined that no permit was necessary for construction along an unnamed tributary to the Mississinewa River where the drainage area was less than one square mile. Wyndham said for that reason, the Division of Water did not consider any factor, any flow outside the area of the Wabash River floodway.

Wyndham referenced the Department's Objection 4, noting Judge Jensen's determination "Ruble's conclusion that water will not back up beyond the pond constructed on his

property, is not supported by professional evaluation, and is unconvincing.” He said Darrin Miller, a professional engineer and hydrologist with the Division of Water, reviewed the cross sections of the application and the technical aspects of the application. He concluded there was no impact on life or safety, and modeling was not required because of “the Department’s 5% rule”. The Division of Water’s technical staff reviewed the application. David Arnold from the CCDB testified as long as Ruble’s spillway opening was 4 x 6 feet, there would be no back up of water onto Landis’s property because the culvert under the road was 4 x 6 feet. Landis testified he had Babich review the situation and prepare a written report, but Landis did not provide the Department with the report or provide the report as evidence.

Wyndham referenced the Department’s Objection No. 5 involving Judge Jensen’s conclusion at Finding 68, that “Ruble’s pond and spillway...will have an impact upon the water from every source, including the overland flow from Landis’s property”... and that a “full evaluation” by the Department “of the pond and spillway was required.” He said that Hebenstreit and Miller, both engineers with the Division of Water, testified as Claimants’ witnesses, that there was no impact on the Wabash River floodway as a result of this project. Wyndham said the Claimants did not present professional evidence other than the Division of Water employees.

Wyndham referenced Finding 40 where Judge Jensen found that the pond consisted of excavation below the adjacent grade, and stated that excavation below the adjacent grade “would not, in and of itself, present an obstruction to the floodway of the Wabash River” and that it would “logically increase the capacity and possibly the flow efficiency of the floodway.” He said that the Claimant, who had the burden of proof, provided no evidence that Ruble’s project adversely affected the efficiency or unduly restricted the capacity of the floodway or created any unreasonable hazard to the safety of life or property. Wyndham explained further that no evidence was presented that showed a hazard for safety to the Clem property. Wyndham said that the “main issue” was that the Department should not be required to review areas where information was not provided and where the area is outside its jurisdiction.

Jim Brugh, presented argument on behalf of Claimants. He said his clients’ position was to support the determination by Judge Jensen. Judge Jensen’s ruling is “well supported” by her findings, and her findings are based upon the record of the administrative hearing.

Brugh argued that hydrologist Darrin Miller’s testimony indicated he was only looking at the Wabash River from the point of view of the rules and did not consider where the water was coming from that Ruble intended to dam up. Judge Jensen identified the short-coming in the Division’s approach to reviewing this permit application.

Brugh noted the Claimant’s case is about flood waters from Crooked Creek. Brugh noted that Crooked Creek and the Wabash River both have floodways. He said the evidence proved water from Crooked Creek comes out of it banks, at least once a year, flows over Landis’s land, under the county culvert “hopefully” and over Ruble’s land through a

breach in an old wall. Brugh said Ruble was constructing his dam by plugging up the old wall and creating his pond from waters that historically have flowed through the breach.

Brugh stated Dave Arnold, Cass County Commissioner, mistakenly said the size of the culvert was the same, 4' x 6' feet in size, as the opening in Ruble's dam. Evidence in the record was that the width of county culvert, under the county road, is 14' x 6' feet. "You don't need to be an engineer to know that's not an even flow, 14 x 6 through a 4 x 6 opening doesn't work."

Brugh explained Landis hired Babich, an engineer with JF New, to conduct a review, and was advised verbally that Ruble's project was wrong. Brugh said his clients did not have the \$10,000 dollars needed for the preparation of a full report for the administrative hearing. Brugh noted Ruble also did not have engineering data.

The Chair admonished Brugh to limit his argument to evidence in the record. "I do not believe that that report has been entered into the record and adds to any reference to that or facts." Brugh explained he was responding to the issue raised by Wyndham to which the Chair commented, "So, let's stick to the record and what's been entered into the record and the information there."

Brugh referenced *Gosset v. Town of Albany and the DNR* cited previously by Eric Wyndham. He said the "case doesn't apply." *Gosset* involved a project that was not inside the floodway. Judge Jensen decided "what I call a floodwaters case." He referenced Finding 68 of Judge Jensen's Nonfinal Order, which states "Ruble's pond and spillway are situated inside the floodway of the Wabash River, and will have an impact upon waters from every source, including overland flow across Landis's property, entering that floodway. Therefore, the full evaluation of the impacts of the pond and spillway upon the floodway of the Wabash River was required."

Brugh acknowledged there are statutes concerning the obstruction of natural surface water courses that are applicable to a county drainage board and observed that those statutes provide different standards from the matter before the AOPA Committee. Brugh noted that the Flood Control Act says to protect the people. "That's what Judge Jensen has done by her decision."

Brugh explained that when Crooked Creek is "coming out of its banks" that it is not draining "a mere square mile" but rather that it is draining 35,000 thousand acres. "This is a major flood event that the Flood Control Act is supposed to protect people against, and the Division is supposed to put that into practice. And, the Judge did that in this case, because the Division had avoided that fact." The Department did not consider the annual flooding of Crooked Creek, as a source for Ruble's pond.

Brugh stated in regard to DNR not being "put on notice" that Clem and Landis both wrote letters to the Department describing flooding history of Crooked Creek.

Chairwoman Stautz provided an opportunity to Eric Wyndham for rebuttal.

Wyndham said opposing counsel's reference to a dam was erroneous as there was nothing in Ruble's permit application pertaining to the construction of a dam. Wyndham referred to assertions Ruble planned to plug up the wall and responded nothing contained within Ruble's application indicated to the Department that Ruble planned to install a control device in the wall. "Basically, he [Ruble] was going to restructure the opening," and that is all the Division of Water could evaluate. This proceeding "is not about Crooked Creek," it is about Mr. Ruble's construction in the Wabash River floodway.

Wyndham said Ruble's project was an effort to save his home and its foundation. He reiterated the Division of Water's jurisdiction being more than or at least one square acre of drainage area, and there is no evidence of that in this case. "Crooked Creek is not a part of this case. It shouldn't be if you interpret and look at the Flood Control Act and the rules adopted as a result. Pretty much, that's my response."

Mark Ahearn referencing Judge Jensen's findings that Ruble's planned construction of a spillway to impound water in his pond occurred in the floodway of the Wabash River. He asked DNR's counsel whether the construction was inside or outside the floodway. Wyndham responded that Ruble's project occurred within the floodway of the Wabash River, but Landis' property is located outside the floodway of the Wabash River. Part of the Landis property is located within the floodway of Crooked Creek and the remainder is "outside all floodways".

In response to an inquiry by Mary Ann Habeeb, Wyndham initially described the floodway as the blue area on Exhibit A.

Habeeb referenced a statement in the Department's objections that "the floodplains subject to regulation are along those waterways having a drainage area of at least one square mile." She asked about the location of the floodplains.

Wyndham clarified the blue area on Exhibit A is actually the floodplain. The floodway would be a smaller area within that floodplain. Judge Jensen interjected that her recollection of the testimony was that the blue shaded portion of Exhibit A, which was Stipulated Exhibit III at the administrative hearing, was referenced as floodway and not floodplain.

In response to an inquiry by Habeeb, Brugh agreed with Wyndham that a portion of Landis's property was not in the floodplain of either waterway. Wyndham argued the area of Landis' property that is outside the floodplains within the jurisdiction of the drainage board.

Habeeb continued, "To me that's kind of important because of the jurisdictional issue. Discussion was had and statements were made in both briefs and the decision regarding floodway, not necessarily in concert with floodplain, which I saw as being key."

Ahearn asked, "Are you suggesting the Landis's don't have the authority to challenge this permit?"

Habeeb replied, “Well, I’m just trying to figure out where the jurisdiction of everybody is. They’re adjacent landowners; so, yes, they have jurisdiction. “I’m not questioning their standing.”

The Chair commented, “Whether it’s DNR jurisdiction versus County’s supervision.”

Habeeb replied, “I guess I’m looking at the relevance then of 312 IAC 13-10-1-2. If a floodplain wasn’t at issue, if the floodplain is what was discussed, and if the drainage area is not one square mile, what’s the jurisdiction of the Department to issue a permit? What did I miss? Am I missing something here?”

Wyndham stated, “Our position is that the Division of Water was not required to consider anything...”

Habeeb asked, “What is your permitting authority if it’s less than one square mile? If you’re saying that you do not have a drainage area of one square mile, is that not your position?”

The Chair reflected, “Is this construction or not.”

Habeeb questioned, “His is construction under a different statute. So, he’s saying that 312 IAC 10-1-2 does not apply because there’s not a drainage area within the floodplain of one square mile?”

Wyndham replied, “Yes.”

Habeeb said, “And, your jurisdiction for issuing this permit, then, is the statutory construction in a floodway?” Am I correct?”

Wyndham replied, “Yes.”

Habeeb said, “And your jurisdiction for issuing this permit, then, is the statutory construction in a floodway, am I correct?”

Wyndham replied, “Yes.”

Habeeb commented, “Okay, apples, oranges. I apologize. I’m just trying to track this and understand where we are because, if we didn’t have a delineation of a floodplain, I wasn’t sure where we were going.”

The Chair asked Wyndham if the Department’s position is that it has jurisdiction over the construction of the excavation of the pond and spillway construction.

Wyndham responded “Yes.”

The Chair asked, the DNR “does not have jurisdiction to take into account potential flooding or waters from the flooding and the floodway on the other side of the road, which was off of Crooked Creek, is that correct?”

Wyndham responded, “Yes”.

The Chair continued, “And, it does not have jurisdiction to take into account potential flooding or waters from the flooding in the floodway on the other side of the road, which was off of Crooked Creek, is that correct?”

Wyndham answered, “Yes.”

Habeeb said, “Because it [the pond] is not in the floodway, and we do not have one square mile in a flood plain. Those two things aren’t there. Okay.”

Ahearn asked, “So, you’re saying regardless of what the Rubles may have built on their property, there is no authority to look at impacts beyond the one square mile?”

Habeeb replied, “No, there’s authority to look beyond the impacts to the floodway, because the flood plain rule doesn’t trigger, because there’s not one square mile of drainage area involved.”

Wyndham stated, “It’s our position that the impact on the Wabash River floodway is what is at issue here. And whether any flood waters from any source have an impact on the Wabash River floodway; and the evidence was clear that it did not from the engineers of the Division of Water.”

Ahearn referenced Finding 46 and Finding 52. He quoted Finding 46: “From the testimony of Ware and Mueller, particularly, it was not evident that they clearly understood Ruble’s intentions with respect to the construction of the spillway.” From Finding 52: “The conclusion that water will not back up beyond the pond constructed on his property is not supported by professional evaluation and is unconvincing.” Ahearn said he felt the Judge was “exposed to all of it, and the temper and demeanor of the witnesses, and took two opportunities to say simply wasn’t convinced that the DNR knows what they ought to know”. Ahearn said he was a little troubled DNR’s argument is that there was so little evidence for which to make a decision. Judge Jensen also commented on the “so little evidence” issue in her findings. “Are those statements somehow irrelevant because of the floodplain, floodway issue, or something?”

Wyndham replied, “Well, I think there would have to be information presented to make them relevant.” The Department’s view was “how far does the agency have to go in evaluating impacts on a floodway. Is it a mile? Is it all waterways within a mile of an area? Is it water sources...that flood Crooked Creek or that floods Landis’s property or that comes down to Ruble’s property? I mean, I think that’s what the Department has problems with. Where does their [DNR’s] responsibility end, as far as evaluating a project?”

Habeeb told Wyndham she understood the Department's concern. On the other hand, "was there sufficient evidence in the application to make an informed decision and what effects the construction would have on the floodway?"

Ahearn said he was concerned by the number of times the idea was referenced that the Department "couldn't tell, the Department didn't know, or no evidence was submitted." The administrative law judge said at least twice, "I don't believe what they're telling me. I don't think they know what they're telling me." Ahearn referenced 312 IAC 14-28-1-1 from Sandra Jensen's Nonfinal Order. The legislature "went out of its way" concerning the importance of flood control issues—"the loss of lives and property damage caused by floods is a matter of deep concern to Indiana affecting the life, health, and convenience of the people." It seems like the Department should have known more in the face of the legislative charge. How do you help me past that concern?"

Wyndham said during the review process, the Claimants mentioned flooding from Crooked Creek, but they provided no documentation. The Division evaluates projects based on the 5% rule. If there is less than a 5% change, "through years of experience" the agency has learned there would be an increase of no more than 0.15 foot in a regulatory flood. "That's acceptable under the rule." Ruble provided photographs, which were not to scale, but did show by writing on those photographs where the pond was and what he intended to do with the wall. Wyndham acknowledged that Ruble provided no pre-permit information that showed his plan to construct a control device in the low opening.

Ahearn asked, "Does the Department know what the finished product of the pond will look like—the pond, the spillway, a dam, an opening. Will there be..."

Wyndham replied, "There is no dam. I think there's been information submitted subsequent to the hearing that showed what the finished product is."

Ahearn expressed concern as to how the Claimants could have known to "create evidence" of the impact of the project without knowing what the project would be once permitted and completed.

Wyndham responded that during the pre-review process, there was no evidence submitted that a control device would be placed in the wall. Outside a "very very gentle reference", there was no information stating the impacts of water flowing from Crooked Creek across Landis's property. "I think the Department is very concerned to what extent it has to go in reviewing an application without information presented. Does it have to go to all waterways within a square mile or two miles? I think that gets where it's basically not the intent of the Flood Control Act. I think that requires a consideration of the impact on the floodway in which the project was located."

Mary Ann Habeeb then inquired regarding Finding 49 and Finding 50. Finding 49 states that "Any structure placed in a floodway for the purpose of creating backpressure on

floodwaters and slowing the force of floodwater offers the potential to create an up gradient surcharge of water. The degree of surcharge will vary based upon the characteristics of the structure and the floodwaters experienced.” Finding 50 states “The up gradient surcharge created by the spillway was not evaluated....” Habeeb asked Wyndham if the Department’s position was that they did not have jurisdiction to evaluate the up gradient surcharge, that they did not have sufficient information to evaluate the up gradient surcharge, “or something else?”

Wyndham answered, “Basically, I think, number one, there was not information, and number two, if we have to go beyond the floodway area itself or the project area, to what extent is that responsibility? I think the rule says that we have no responsibility in an area where there’s less than one square mile radius.”

Habeeb said, “So, even if there had been information about an up gradient surcharge, in this instance, it would not have been relevant or considered because you did not have one square mile. Is that your position?”

Wyndham replied, “Right. And the impact on the Wabash River floodway is what was considered.”

Habeeb continued, “To take it one step further, that jurisdiction with regard to the up gradient surcharge outside of DNR’s, in your opinion, jurisdiction, would have been the jurisdiction of another governing body; the county drainage board?”

Wyndham replied, “Yes.”

Ahearn referenced Finding 54 which states “From the plans provided by Ruble and reviewed by the Department it is impossible to determine how high the floodwaters will have to rise and thus how far the floodwaters will be backed up before they will flow over Ruble’s proposed spillway. Therefore, it is also impossible to determine whether the floodwaters entering the floodway of the Wabash River will be backed up to such an extent as to have impacts upon Landis, the Clems or the CCDB.”

Ahearn then asked Wyndham, “Is it impossible?”

Wyndham answered, “Based on the information presented to the Division that the opening in the wall was going to be repaired, I think [the Division] felt that there wasn’t going to be any back flow caused by the project.”

The Chair asked Wyndham for clarification concerning the structure of the opening of the wall. “As I read through it, the visual that I was getting was that it was a rough opening and that they were repairing it or squaring it up with new cement or whatever, just to finish it off. But it wasn’t to reduce the width or the size of the opening. Am I correct?”

Wyndham replied, “From my understanding that is correct.”

Jensen interjected, “But that’s not what I was hearing at the hearing. And, I think there’s a finding in there to the effect that that’s exactly where my problem was. There was reference to the construction of a spillway, but the Department’s witnesses did not know what that spillway height was going to be. They did not know the size of that spillway. They did not know, or at least they could not tell me at the administrative hearing, what that spillway consisted of. Did it consist of a control structure? Was it five feet high? I didn’t know. That’s where findings such as Finding 54 came from. There was simply insufficient information for me to determine.”

Habeeb referenced Findings 49 through 54. She asked Wyndham if the Department’s position was that the jurisdiction only extended to the floodway of the Wabash River and not to any effects of the project on the floodway, flood waters or floodplain of Crooked Creek.

Wyndham answered “That’s correct.” He said a photograph was submitted showing how Ruble planned to square off the wall opening. He did not indicate how the wall height would be increased, so the Department did not have reason to believe there would be an increase in the height of the wall.

Habeeb said hypothetically, “Take away Crooked Creek from this example, and all you had was the construction in the Wabash River. There was no Crooked Creek. You had something else. This would have been a simple case.”

Wyndham replied, “We wouldn’t be here today because their whole argument is Crooked Creek.”

Ahearn asked Wyndham, “What bad happens if we affirm Judge Jensen’s order as written?”

Wyndham replied that the Division of Water questions to what extent the agency must investigate the general area of a project and its flood impact.

Jensen referenced Finding 47. “...The drawings show a line across the gap in the existing stone wall very roughly depicts the planned height of the spillway, etc...” She said, “As I think somebody already pointed out, the statement that water flowing into the floodway of the Wabash River from any source—no matter where it came from—that was my concern is that given the lack of information that was presented at the administrative hearing, it was a concern to me whether it was floodwaters from Crooked Creek or whether it was just from precipitation falling somewhere else. This is a construction that is within the floodway of the Wabash River—water entering that floodway prior to hitting this spillway. Without design construction plans, I could find no way, no matter where the water came from, to determine whether there was a problem—thus remand.”

Ahearn asked if the Judge’s findings and order were to be affirmed, as written, would the negative consequences would be that the Department would be “kind of lost. They don’t know how far to go?”

Wyndham replied, “And, Judge Jensen in her order, which we have no problems with, allowed the opportunity for additional information to be submitted to the Division of Water, which is in the process of being done. By the same token, to what extent do they have to dilate this project to determine whether the permit should be amended or not? And based on the rule and prior decisions their jurisdiction is limited.”

Habeeb asked Brugh, “Given the effect of the rule and the one-acre within the flood plain issue, given those constraints, how does the Department have jurisdiction over your client’s property?”

Brugh replied, “Because the construction is in the floodway of the Wabash. This, I call it a dam—this plugging of the old wall.”

Habeeb asked, “Where is there evidence that there’s plugging of the wall?”

Brugh answered, “In the record.” He said the evidence shows that before Ruble poured concrete, there was a 12-foot wide by 7-foot high hole in an old wall which flood waters from Crooked Creek could rush through. The “permit was the basis” of Ruble pouring concrete into the breach of the old wall to create his pond and stop the flood waters.

Habeeb asked, “From Crooked Creek?”

Brugh replied, “Right.”

Habeeb asked, “But not affecting the Wabash?”

Brugh replied, “Depends on how you look at it. That’s where I think Judge Jensen got it right.... This is the argument that is being made by the Department, ‘We don’t know how far we go.’ A guy is asking for a permit to build a pond. Don’t you think you should ask the guy where the water is coming from?”

Habeeb asked, “If you don’t have one-acre drainage area. How does the Department have jurisdiction? Because I think, that’s what the evidence in the record is. Excuse me, one-square mile.”

Brugh said, “My starting point, Ms. Habeeb, is not that IAC rule. My legal thinking is as broad as the scope of the Flood Control Act. It doesn’t refer to things like the floodway and mileage. It says; protect the people in the state from flooding. The only part of the state government which is tasked with the enforcement of the Flood Control Act is the Division in this case.”

Ahearn asked, “I want to be sure we don’t make too much out of what is really a notice provision. I assume the Landises, because they’re adjoining property owners, are entitled to notice. Presumably any citizen that learned about it some other way could object to what was happening in the Wabash floodplain, could they not? This is just who gets noticed. This is not a standing issue. I guess I’m just persuaded by the fact that it’s

inside the Wabash floodplains might be the controlling issue, rather than who got notice or who brought it.”

Habeeb said she had one more question of Claimants’ attorney regarding remedies and consequences of “what we do here. What is your position with regard to jurisdiction of the Drainage Board?”

Brugh answered, “Concurrent.”

Habeeb asked Brugh if the Cass County Drainage Board also has jurisdiction over the waters flowing over Ruble’s property.

Brugh replied, “Yes, but it’s a different statute.”

Habeeb said, “But it’s still jurisdiction over those flows?”

Brugh commented, “Right. But they’re not exclusive.”

Habeeb said, “I understand. I may not agree with that, but I understand your position.”

Ahearn questioned if the Cass County Drainage Board could make the same argument as the DNR concerning “how far to measure. If this is a valid argument, doesn’t it apply to anybody that is making that argument?”

Brugh commented, “The way I read it, there’s two different statutes. They have different purposes. That’s why I said there’s a difference with the resulting concurrency of the jurisdictions. The purpose of the Flood Control Act stated in that first section is very broad” concerning the protection of people and property from flooding in the State of Indiana. There are no recent cases in the area of natural surface water courses. It’s just a different law, and it has a different history, compared to the Flood Control Act.”

The Chair referenced Judge Jensen’s modified nonfinal order. She then asked Judge Jensen if there were any objections to her modifications.

Jensen responded that there were no objections to the modifications.

The Chair referenced the modified order findings of fact, Findings 56 and 57 referencing revoking and remanding the permit application back to the Department. Finding 75 said to “...evaluate the proposed spillway and pond in accordance with Indiana Code 14-28-1-22(e)(1-2) and may require submission of additional information.” The Chair said her understanding was “there was no additional change or consideration as far as not posing a jurisdictional issue as to what we’ve been talking about, correct?”

Habeeb replied, “Well, I think we need to decide the jurisdictional issue, though, because that would affect the scope of their approval and the scope of DNR’s project review.”

The Chair and Ahearn both said they agreed with Habeeb.

Ahearn asked Habeeb to explain her view of the jurisdictional issue.

Habeeb responded that she was “troubled by the interpretation of the Judge” relative to extensive jurisdiction. The rule clearly states one square mile in the floodplain, “and we don’t have it here—and that she is regulating flows from rain water, which is surface waters, and other surface waters going across the property that occur regardless of any project. If the project scope is limited to affect on the Wabash River floodway, and to the extent a floodplain would have—there would have been jurisdiction over the floodplain. We don’t have it because we don’t have one square mile. I’m concerned with the extent of jurisdiction.”

Ahearn said he was not sure that Judge Jensen had enough information from the Department to determine geographical jurisdiction.

The Chair said whether there was sufficient information before the Department to determine whether to issue the permit “was one issue. If we understand the *de novo* aspect of this before the ALJ and agree with those findings—that’s why I was trying to clarify what those actual findings and proposed nonfinal order 74 through 79 would really mean; I’m comfortable with that.” She said she was not comfortable with findings that would bring into play whether the Department has jurisdiction and to what extent it has to take into account the floodway of Crooked Creek.

Habeeb responded, “The flooding that may occur from Crooked Creek.”

The Chair affirmed, “Yes. Thank you for that clarification.”

Ahearn said rarely do an ALJ or the AOPA Committee overturn a DNR determination following a review of evidence by the agency’s professionals. “This is not that. This is you just didn’t bring me enough that I could even overturn your judgment. It might well have been that the Department said, ‘being consistent with what [DNR believes] 14-28-1-1 is about, we did further analysis that we thought was reasonable, and we either do or don’t see a problem, and now you’ve got an actual conclusion...to depend on in a ruling or not,’ as opposed to saying ‘there just wasn’t enough, and we don’t know how far we should go.’ I distinguish having evidence that you looked at... that the professionals look at ... and saying, ‘This is what we think that evidence means,’ and just saying, ‘There wasn’t enough for us to know, and we don’t know how far to look.’”

Habeeb stated that she could theoretically accept the ruling as long as the decision with regard to approval of the permit was not conditioned upon the effect from the flooding from Crooked Creek—that the Wabash River and its floodway are what is to be considered—the effects on the Wabash River.

Ahearn said he believes the Judge was saying, “I don’t how much more, but it’s got to be more than this that you present, because it seems like this is sort of the bare minimum.”

Habeeb responded, "If there's insufficient evidence upon which to make an adequate evaluation, there were choices other than approve the permit. Maybe that's where we fault here."

The Chair commented, "I understand that if there is a need to remand it for additional information and consideration and addition drawings or clarification" but said she had concern on how to address the need to have adequate information for the determination of the issuance of the permit, without broadening it so far as to consider another floodway.

Ahearn said a "distinguishing element" of this case was that it was so close to the Wabash River.

Habeeb replied, "But is it. Is agency jurisdiction limited the effects on the Wabash of the construction?"

Ahearn questioned, "How do you know until you know what they're doing?"

Habeeb answered, "I tend to agree with that."

Sandra Jensen said her "dilemma was that both the spillway and the pond are inside the floodway of the Wabash." Whether it's floodwater from Crooked Creek or whether it's just precipitation, it enters the floodway of the Wabash River and hits the pond and spillway. "Wherever the water comes from, it enters the Wabash floodway."

The Chair said if the Department was evaluating the construction within the floodway of the Wabash and evaluating potential effects, the load of the pond would be taken into consideration. She asked if there were to be "a breach or if the spillway was full, how it would impact the Wabash River?"

Wyndham responded, "I think that was done in this whole process based on the information that was given Division of Water to the permit."

Habeeb referenced page 5 of the Department's brief and said, "I'm trying to see if there's a conflict between this rule and the Judge's interpretation of looking at all ...effects that this construction would have on the Wabash." The Department is not regulating the floodplain, but rather it's regulating construction. She noted the Department is not regulating construction within the floodplain but it is regulating construction within the floodway. "So, we are not trying to regulate activities in the flood plain. What we're trying to regulate is the flow of water in the floodway." She said 312 IAC 10-1-2, states that floodplains subject to regulation are those along waterways having a drainage area of at least one square mile. "You've already stated that this permit is being done pursuant to construction in a floodway, which is a statute. It's a separate authority, so we're trying to make sense of both laws... a rule and a statute. The rule says that you are regulating floodplains and the statute says you regulate construction in a floodway. To regulate that construction in a floodway, it could make sense to understand all the effects of that

construction, whether it's in a regulated floodway or not, because you're looking at the effects of the construction, from whatever source."

Ahearn said, "If you read the introductory clause of (c) it says 'except as provided in (b)'. Subsection (b) 'goes out of its way to pull the statute in, and it says that this is a big, big deal. We really, really want to be careful with floodways. I'm not necessarily sure how it applies in the instant case other than I think if there's an error to be made here, it's in the error of having enough information to make sure that the intent of the statute. and then the carry-over intent of the rule, we get fully effectuated."

Habeeb stated, "I don't see any way that this rule conflicts with what the Judge was trying to do... trying to understand what the jurisdiction is. I think maybe the Judge was right."

Ahearn replied, "I think so, too. I think it's unlikely we're going to find a bright line task that says, 'Go 600 paces and stop.'"

Habeeb added, "But, I disagree with some of the findings."

The Chair said she also disagreed with some of the findings.

Ahearn continued, "I think this is one where professionals are called upon to exercise their professional skill, and look at some evidence, and then come to the trier of fact, which typically doesn't typically overturn decisions based on evidence before it, of professionals who are skilled in that discipline."

The Chair said that her concern was on behalf of the Department's position. "If they are looking at the construction, what's within their jurisdiction as to the type of impacts and the extent of the impacts that they are concerned about and how far away from the property, if you're considering that surface water runoff, because again you have concerns about this once a year flooding." The property owner would bear the burden of addressing surface water runoff. "That's where it's got balancing of interest between the different property owners, and is that within the jurisdiction of DNR in issuing a permit for construction within one floodway versus the other?"

Habeeb responded, "The DNR's jurisdiction is on the floodway of the Wabash River. Yes, it is limited to the floodway—period. It should consider the effects of the impacts of the spillway, but upon the floodway. It doesn't say upon other's properties, necessarily. That would be the jurisdiction of the County Drainage Board."

Ahearn questioned the outcome if the Department had decided the information submitted was deficient. They Department requested more detail, and after receiving and analyzing a more a detailed plan of construction. the determination was that there was no impact beyond the elevation of the pond, and "insufficient impact more than 30 feet away, or a mile away. But if they had done some analysis and told us that our hydrologist or someone looked at all these things, and it's our now our professional opinion" that the

permit should be issued because neither concepts nor requirements of the statute or the rule were violated.

The Chair said one other consideration was “how do we best move this forward.” She referenced the DNR’s objections to the “conclusions” on page 9. The Department stated that a full evaluation of the impacts of the pond and spillway on the Wabash River floodway was performed based on information presented. “We’re making a judgment call, or the Judge has, and we’re agreeing that” the Department did not have sufficient information? Even though DNR argued that no professional information or opinion was presented by the Clems, Landis, the CCDB, or any other person that the pond or spillway would adversely affect the Wabash River?

Ahearn responded, “I don’t know why the Department didn’t ask for more.”

The Chair commented, “But, is that our job to do that, or if the folks were on notice...

Wyndham said, “Can I respond to that? I didn’t mean to interrupt you.”

Ahearn answered, “Sure.”

Wyndham said, “I think the Department looked at this as small project; a 60 x 90 pond, and repair of a spillway hole that’s been there for years and years and years. If the Department is going to have to require professional engineering designs and modeling on every single project, you’re going to take away the availability, financially and otherwise, of anybody getting a permit for construction in a floodway.”

Ahearn responded “not necessarily to every single project. I think the distinguishing element in this is the proximity to the Wabash. I’m just uncomfortable with the Department’s approach saying, ‘Well based on what was given us, this is reasonable—we’re going to have this permit issue.’ I’m not going out to the extreme of saying for the smallest pond you have to do full blown modeling, but some sort of professional analysis beyond what was given us—which everybody acknowledges was not a lot—this is the decision we make.”

The Chair then offered Brugh an opportunity to speak.

Brugh quoted Finding 62 where the administrative law judge referenced IC 14-28-1-22(d): “The plans and specifications must be sufficient to prove to the Department Director to permit otherwise complies with legal requirements.”

The Chair said, “Right, but what we’re hearing from the Department is that it believes the agency had sufficient evidence. So, again, I’m going to question professional opinions of the Department’s engineers and staff. I’m looking for a path forward as it relates to this.” The Chair asked if the construction had already been completed.”

Wyndham replied, “Pretty much, I think.”

Judge Jensen asked Wyndham if additional information was submitted to the Department for further review.

Wyndham responded, “Yes.”

Ahearn asked the Chair if the “findings of fact” were to be adopted as written if there were findings that she would strike or seek to be modified after review of the additional information and a revised order, “or are they so intertwined that you’d say that that’s a challenge?”

The Chair replied, “That’s the challenge for me.” She said she would be “very comfortable agreeing with the decision to revoke the permit or require that a new permit be applied for or additional consideration, after additional evidence was provided. But, it’s some of the findings of fact that I’m...”

Habeeb stated that she agreed with the findings of fact.

Ahearn responded, “I think I am too.”

Habeeb said after reviewing the findings, and “in light of her reevaluation of the rule” and how the rule affects this proceeding, she was ready to make a motion.

Ahearn said, “I want to be sure from Jane Ann we understand what we think, potentially, bad comes out of accepting these findings of fact.”

The Chair said, “I think you broaden the scope what they have to take into consideration and the scope and depth of other floodways and other occurrences as to maybe even an annual event involving surface water. Is it an annual event or a ten year event or every 100 year event? We’re bringing in other floodways than just the Wabash. That’s where I’m still not 100% clear on that level of jurisdiction to consider outside the construction within the floodway.”

Ahearn replied, “Unless we specifically say it’s our intent that the findings and conclusions spring from and are limited to the facts of this case, we can limit its own precedential value in the way we word it. I think we don’t want to make a statement that’s so sweeping that in another hearing in two years, in the same way that we saw the case from CADDNAR presented, saying this applies. We would then see this case and say this applies, and then it compels us to distinguish, or counsel, to distinguish the facts of those cases in front of the AOPA Committee years hence. I think the Judge was careful to say ‘in the instant case’ she doesn’t believe the DNR did what it should have. That’s my comfort zone with that concern.”

Habeeb commented, “I’m looking at the nonfinal order, as written, and I’m trying to establish, as written, what the Department really needs to do and what the parties really need to do is this remand is to continue.” She referenced Finding 75 which stated, “The sole purpose of the remand is to allow Ruble, at his discretion, to pursue his application

with respect to the construction of a spillway and pond. If he chooses to pursue this aspect of his application, the Department shall fully evaluate the proposed spillway in accordance with IC 14-28-1-22(e)(1-2), and may require the submission of additional information by Ruble.” Habeeb observed that Ruble had already submitted his information, and the permit has been approved. “So, are we looking at more detail and more specificity with regard to the spillway and pond?”

Ahearn replied, “I don’t know if it is or not, but it may be a case.”

Habeeb stated, “I think we need to make that clear.” She told Judge Jensen she was referencing Finding 75 of the Nonfinal Order.

Sandra Jensen replied, “Right, and 75 hinges on 74, where I revoke and remand that portion of the permit authorization that pertains to the construction in the spillway.”

Habeeb continued, “We don’t know what he will submit, if anything, but Ruble may choose to re-submit.”

Sandra Jensen reflected the Claimant had already submitted additional information.

Habeeb moved to accept the Modified Findings of Fact and Conclusion of Law with Nonfinal Order of the administrative law judge, as written. Ahearn seconded the motion.

The Chair asked for any further discussion or comments.

Habeeb stated she was not sure she agreed with the DNR’s concerns. “Clearly, they are professionals, and they have conducted this application in a very professional way and had a lot of testimony on it.” Her concern was with the application of the rule “to this particular proceeding. I’m not seeing a conflict.” All waters should be considered that would affect the floodway of the Wabash River, and the Department’s review would be limited to the floodway of the Wabash River and the effects of the construction on the floodway.

Ahearn stated that he agreed with Habeeb. “It may, and it may not be, but it well may be the case that because it’s a 99 x 61 foot pond, it’s not hard for the professionals to look at that and say ‘the impact doesn’t extend, or the spillway doesn’t extend any farther, it is what it is.’”

Habeeb added, “With additional information about what the spillway, it may well be the testimony was that it was going to be below the current level, so it may well be that there would be no effect on the DNR’s decision to approve.”

Ahearn continued, “But we don’t know that.” If filling the breach is factored, the Department “may say we learned an ‘Oh-my-Gosh fact. Oh, my Gosh, look at what else happens.’ I think the statute contemplates this level of analysis.”

The Chair asked for final approval of the Modified Findings of Fact and Conclusions of Law with a Nonfinal Order. Upon a voice vote, the motion carried.

Adjournment

At 2:34 p.m., EST, the Chair declared the meeting adjourned.