

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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DCG Services, Inc., Abydel  
Farms, LLC, John M. Divine,  
and Linda M. Divine,

*Appellants-Petitioners,*

v.

Indiana Department of Natural  
Resources,

*Appellee-Respondent*

April 23, 2021

Court of Appeals Case No.  
20A-PL-1972

Appeal from the Martin Circuit  
Court

The Honorable Lynne E. Ellis,  
Judge

Trial Court Cause No.  
51C01-1904-PL-115

**Crone, Judge.**

## Case Summary

- [1] DCG Services, Inc., Abydel Farms, LLC, John M. Divine, and Linda M. Divine (collectively the Divines) appeal the trial court's order denying their petition for judicial review of the Natural Resource Commission's (NRC) final order upholding the notice of violation (NOV) issued against them by the Indiana Department of Natural Resources (DNR) for violations of the Indiana Flood Control Act (FCA). The Divines assert that the NRC proceedings were contrary to constitutional right, power, privilege, or immunity because the appointment of an administrative law judge (ALJ) employed by the agency that is a party to the action is unconstitutional and the NRC's determination that they violated the FCA is unsupported by substantial evidence. We conclude that the Divines have failed to carry their burden to show that the appointment of the ALJ was unconstitutional. We also conclude that the NRC's final order is supported by substantial evidence. Therefore, we affirm.

## Facts and Procedural History

- [2] On April 6, 2013, DNR Master Conservation Officer Anthony Mann received a report that John was digging in Sulphur Creek in Martin County, which was making the water cloudy and unsuitable downstream.<sup>1</sup> Appellee's App. Vol. 2 at 19. Officer Mann went to the location of the alleged activity and observed an

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<sup>1</sup> The Divines failed to provide much of the administrative record necessary for the resolution of the issues raised on appeal as required by Indiana Appellate Rule 50(A)(2). We thank the DNR for providing the entire administrative record in their appendices.

individual, whom he later identified as John, operating field tile installation equipment in a field not too far from Sulphur Creek. *Id.* at 20-21. Officer Mann also saw George Ziegler, whom he knew as one of John's employees, operating a trackhoe in Sulphur Creek to dig silt out of the creek. *Id.* Ziegler was dumping the silt and debris from the creek on the banks of the creek within the floodway. *Id.* at 24. Officer Mann asked Ziegler what he was doing, and Ziegler said that he was removing a sandbar or silt from a curve in the creek to increase the water flow. *Id.* at 22. Ziegler said that he was following John's instructions and did not know whether John had a permit to dig in the creek. *Id.* at 22-23. With Officer Mann's permission, Ziegler emptied the trackhoe's bucket and stopped digging.

[3] Officer Mann then crossed the creek to talk to John, who by then was in his truck. John told Officer Mann that they were cleaning up beaver dams, although he indicated that beavers were not that much of a problem in the spring. *Id.* at 23, 26. John said that it was necessary to clear out the creek and that he wanted to keep the creek open to maintain it. *Id.* at 24, 48. Officer Mann noticed evidence of a beaver dam in the creek upstream from where Ziegler was operating the trackhoe. *Id.* at 26. Officer Mann prepared an incident report with this information, which he relayed to DNR Environmental Manager Toby Adams.

[4] On April 13, 2013, Adams conducted an inspection of the site. Adams conducted a second inspection on April 30 with DNR Division of Water Compliance and Enforcement Section Manager Jon Eggen and Suzanne Delay,

a registered engineer DNR's Compliance and Enforcement Section. During these inspections, Adams observed and photographed excavation near Sulphur Creek and "spoil piles," that is, dirt or dredge material removed from the creek, placed along the creek bank on both sides of the creek. *Id.* at 53. The spoil piles did not have vegetation growing on them. *Id.* at 54-55. It appeared to Adams that the creek channel had been excavated such that it had been altered or dug into. *Id.* at 55. Adams also observed unsecured trees that had been cut and trees with the root wads still attached piled along the creek. *Id.* at 54, 72.

[5] Eggen also observed excavation of the creek bed and "side casting of soil along the stream creating a long linear berm-like ridge across a majority of the property along the stream" and piles of debris "placed in the floodway." *Id.* at 116. He observed where trees had been cut as well as trees that had their roots still attached, which meant that they were "pulled out or excavated," and debris had been piled up. *Id.* He also observed heavy equipment tracks throughout the property and "bucket marks from dredging of the channel itself." *Id.* at 117. According to Eggen, all this activity required a permit. *Id.*

[6] Delay mapped a floodway for Sulphur Creek using a nationally accepted engineering system. *Id.* at 95. From these maps, her own observation of Sulphur Creek, and photographs from the inspections as well as aerial photographs of the site, she determined that there had been excavation and placement of materials therefrom within Sulphur Creek's floodway. *Id.* at 103.

[7] On August 22, 2013, the DNR filed a NOV against the Divines for “unpermitted excavation within the channel of Sulphur Creek, excavation of tree stumps and roots within the floodway, fill placement within the floodway, and filling of the existing stream channel.” Appellee’s App. Vol. 3 at 32. The NOV stated that the property on which these activities occurred is “owned by John M. Divine and Linda M. Divine”; that they conveyed title of the property to Abydel Farms, LLC, which “is not registered with the Indiana Secretary of State as required by State statute and does not have a registered agent with Indiana as required by State statute”; that although DCG Services, Inc., is the purported registered agent for Abydel Farm, LLC, DCG Services, Inc., is not registered in the State of Indiana as required by State statute; and that John and Ziegler had operated equipment on the site without the required permits. *Id.* The NOV explained that the excavation was unlawful because no permit was acquired beforehand and the project “resulted in unreasonably detrimental effects to fish, wildlife, and botanical resources through reduction and degradation of available habitat, discharge of sediment into the water, and alteration of the physical conditions of the stream,” and the unauthorized work violated the FCA, Indiana Code Chapter 14-28-1. *Id.* at 33. Finally, the NOV provided instructions to mitigate the violation or seek administrative review and imposed a civil penalty of \$5000, with additional penalties if the Divines failed to timely mitigate the violation. *Id.* at 33-34.

[8] In September 2013, the Divines filed with the NRC a written request for administrative review of the NOV. NRC ALJ Sandra L. Jenson was appointed

to the case. In August 2018, the ALJ held a hearing on the matter. The DNR submitted the testimony of Mann, Adams, Eggen, and Delay, and exhibits, including Officer Mann's incident report, photographs, and Sulphur Creek floodway maps. Photographs of Sulphur Creek reveal square marks in the channel from where the bucket of the excavator scooped out material and where the material was placed on the creek bank. Appellee's App. Vol. 2 at 74-75; Appellee's App. Vol. 3 at 29-30 (Respondent's Exs. 14, 15). The Divines introduced the testimony of John, Zeigler, and the Divines' neighbor Jerry Bussinger, and exhibits, including a warranty deed and photographs. In September 2018, the Divines filed a post-hearing brief, arguing for the first time that the appointment of the ALJ was unconstitutional. Appellee's App. Vol. 3 at 167-68. In October 2018, the ALJ issued findings of fact and conclusions of law with nonfinal order, affirming the NOV in all respects except as to the allegation regarding the filling of the stream channel of Sulphur Creek. *Id.* at 133-49.

- [9] The Divines filed an objection to the ALJ's nonfinal order with the NRC, asserting that the ALJ did not address the constitutionality of the ALJ's appointment and that the Divines had engaged only in routine, ongoing channel maintenance, for which a permit was not required. *Id.* at 123. The NRC's Administrative Orders and Procedures Act (AOPA) Committee, which is the agency's final hearing authority, held a hearing on the Divines' objection. In March 2019, the NRC issued findings of fact and conclusions of law with final order, affirming the ALJ's nonfinal order in full. *Id.* at 75.

[10] In April 2019, the Divines filed a petition for judicial review of the NRC's final order. Following the submission of briefs and proposed orders, in July 2020, the trial court issued an order denying the Divines' petition for judicial review and upholding the NRC's final order. In August 2020, the Divines filed a motion to correct error and motion to modify findings, which the trial court denied. This appeal ensued.

## Discussion and Decision

[11] Our review of an administrative agency's order is governed by the AOPA, pursuant to which we may set aside an agency's action if it is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d). The Divines argue that the agency proceedings were contrary to constitutional right, power, privilege, or immunity and that the NRC's final order is unsupported by substantial evidence.<sup>2</sup>

[12] In reviewing an agency's order, we apply the same standard as the trial court. *Ind. Dep't of Nat. Res. v. Prosser*, 132 N.E.3d 397, 401 (Ind. Ct. App. 2019), *trans.*

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<sup>2</sup> The Divines attempt to challenge the NRC's final order based on all five grounds set forth in the AOPA. The DNR asserts, and we agree, that four of the five arguments amount to the same argument that the NRC's final order is unsupported by substantial evidence.

*denied* (2020). Our supreme court has described our standard of review as follows:

Our review of agency action is intentionally limited, as we recognize an agency has expertise in its field and the public relies on its authority to govern in that area. We do not try the facts de novo but rather defer to the agency's findings if they are supported by substantial evidence. On the other hand, an agency's conclusions of law are ordinarily reviewed de novo. While we are not bound by the agency's conclusions of law, an interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself. In fact, if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation.

*Moriarity v. Ind. Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (citations, quotation marks, and brackets omitted). "Substantial evidence is more than a scintilla, but something less than a preponderance of the evidence." *Prosser*, 132 N.E.3d at 401. "Reviewing courts must consider the record in the light most favorable to the administrative proceedings, and may not reweigh the evidence or assess the credibility of witnesses." *Pendleton v. McCarty*, 747 N.E.2d 56, 61 (Ind. Ct. App. 2001), *trans. denied*. The burden of demonstrating the invalidity of the agency action is on the party who asserts the invalidity. *Parker v. Ind. State Fair Bd.*, 992 N.E.2d 969, 976 (Ind. Ct. App. 2013).



**Section 1 – The Divines have failed to carry their burden to show that the agency action is contrary to constitutional right, power, privilege, or immunity.**

[13] The Divines argue that the agency proceedings were contrary to constitutional right, power, privilege, or immunity because the appointment of an ALJ employed by the agency that is a party to the action is unconstitutional. The DNR contends that the Divines waived the issue because they did not raise it until after ALJ Jensen conducted the final hearing. Assuming without deciding, that the Divines preserved the issue, we find their argument waived for lack of cogency.<sup>3</sup> See Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant’s brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (failure to present cogent argument waives issue for appellate review), *trans. denied*.

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<sup>3</sup> The Divines begin their argument with a string of citations to administrative cases, alleging, “None of the following cases in which ALJ Jensen presided and the [DNR] was a party below were in favor of the landowner.” Appellants’ Br. at 15. Presumably, the Divines intend to suggest unfair bias, but the mere fact that ALJ Jensen has ruled against landowners does not amount to a constitutional violation. Further, the only constitutional provision the Divines discuss is the Appointments Clause of the United States Constitution, citing *Lucia v. Security & Exchange Commission*, 138 S. Ct. 2044 (2018). *Lucia* held that that federal administrative law judges of the Securities and Exchange Commission were “Officers of the United States” subject to the Appointments Clause. 138 S. Ct. at 2055. The Divines fail to cite any authority or make any argument that state administrative law judges are “Officers of the United States” or that the Appointments Clause applies to the states.

[14] The Divines also contend that ALJ Jenson demonstrated a prejudice in favor of the DNR through all the evidentiary rulings.<sup>4</sup> See Ind. Code § 4-21.5-3-10(a)(1) (providing that an ALJ is subject to disqualification for bias, prejudice, or interest in the outcome of a proceeding). In the administrative setting, due process requires that a hearing be conducted before an impartial body, one whose members have not been “swayed by preconceived biases and prejudices.” *In re Change to Established Water Level of Lake of Woods in Marshall Cnty.*, 822 N.E.2d 1032, 1041 (Ind. Ct. App. 2005), *trans. denied*. “[W]e presume that an administrative board or panel will act properly and without bias or prejudice,” and we will not disturb an administrative decision unless “actual bias” is shown. *Jandura v. Town of Schererville*, 937 N.E.2d 814, 819 (Ind. Ct. App. 2010) (quoting *Marshall County*, 822 N.E.2d at 1041), *trans. denied* (2011).

[15] Here, the Divines imply that ALJ Jenson was biased or prejudiced in favor of the DNR because she was an employee of the DNR. The AOPA provides, “Before July 1, 2020, nothing in this subsection prohibits an individual who is an employee of an agency from serving as an administrative law judge.” Ind. Code § 4-21.5-3-10(a). Further, we observe that judges, who “are held to a higher standard when it comes to conflicts of interest than are members of an

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<sup>4</sup> The Divines assert that ALJ Jensen rendered several of their exhibits inadmissible despite the DNR’s stipulation to their admissibility, issued rulings against them on witness availability, and admitted the DNR incident report over their objection. Our review of the record does not show that the DNR stipulated to the admissibility of the exhibits that were not admitted.

administrative body,” are not required to recuse for the sole reason that the appointing authority is a party to the proceedings. *Jandura*, 937 N.E.2d at 820; see also *Peterson v. Borst*, 784 N.E.2d 934, 937 (Ind. 2003) (“[A] judge’s recusal is not required because the appointing authority is a litigant.”). In addition, an adjudicator is not automatically disqualified based upon prior involvement with the underlying matter. See *Marshall Cnty.*, 822 N.E.2d at 1042 (rejecting contention that members of panel appointed to hear matter were automatically biased simply because they participated in an earlier proceeding on the same matter that was marred by deficient procedures).

[16] The Divines have not directed us to any evidence of any bias or prejudice other than ALJ Jenson’s evidentiary rulings against them. However, adverse rulings are not sufficient to demonstrate bias or prejudice. *Dan Cristiani Excavating Co. v. Money*, 941 N.E.2d 1072, 1082 (Ind. Ct. App. 2011); see also *Carter v. Knox Cnty. Off. of Fam. & Child.*, 761 N.E.2d 431, 435 (Ind. Ct. App. 2001) (“Adverse rulings and findings by the trial judge do not constitute bias per se.”); *Liteky v. United States*, 510 U.S. 540, 555 (1994) (“[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.”). Accordingly, we conclude that the Divines have failed to carry their burden to show that ALJ Jenson’s appointment is unconstitutional.

## **Section 2 – The NRC’s final order is supported by substantial evidence.**

[17] In its final order, the NRC found in relevant part as follows:

62. The evidence in this instance that the [Divines] were attempting to remove beaver dams and other obstructions from Sulphur Creek is accepted as true.

63. Regardless [of] the [Divines'] intent, the [Divines'] efforts, which included scooping silt out of the channel of Sulphur Creek with a track hoe, is not consistent with Indiana Code § 14-28-1-22(b)(6)(C)'s directive to remove the logs "with a minimum of damage to vegetation."

64. Silt and sedimentation removal from the channel or from within the floodway of Sulphur Creek constitutes an excavation in a floodway, specifically from the stream channel, an activity that required the [Divines] to obtain a permit. Indiana Code § 14-28-1-22(d).

65. The removal of trees from within a floodway by the excavation of the entire trunk and roots also constitutes an excavation, which required the [Divines] to obtain a permit. *Id*[.]

66. Further, the installation of field drainage tile being undertaken by Divine on April 6, 2013 as observed by Mann, constitutes excavation in the floodway requiring a permit from the [DNR].

67. The creation of spoil piles within the floodway of Sulphur Creek of the silt or sedimentation removed from Sulphur Creek's channel constitutes the "deposit" of fill in the floodway, which required the [Divines] to obtain a permit in accordance with Indiana Code § 14-28-1-22(d).

68. The evidence established through the Administrative Hearing that tree debris and woody vegetation removed from the channel of Sulphur Creek by the [Divines] was deposited in the floodway

within the reach of the track hoe is not consistent with the requirement to remove the logs and tree debris from the floodplain or secure it “to resist flotation or dislodging by the flow of water.” Indiana Code § 14-28-1-22(b)(6)(C).

69. Because the tree debris and other woody vegetation was not secured, the piles of woody vegetation and tree debris are appropriately characterized as deposits within the floodway the placement of which required a permit. Indiana Code § 14-28-1-22(d).

Appellants’ App. Vol. 2 at 79-80 (citations omitted).

[18] The Divines argue that the evidence does not support the NRC’s finding that their activities violated the FCA. Specifically, they contend that the evidence presented in the agency proceedings show that they performed only routine, ongoing maintenance of Sulphur Creek, namely, cleaning up debris from beaver dams, and a permit was not required. In support, they cite Indiana Code Section 14-28-1-1(2), which provides, “The channels and that part of the flood plains of rivers and streams that are the floodways should not be inhabited and should be kept free and clear of interference or obstructions that will cause any undue restriction of the capacity of the floodways.” The Divines conveniently ignore the remainder of the FCA.

[19] Section 14-28-1-1, upon which the Divines rely, is titled “Legislative intent,” and subdivision (1) recognizes that “the damage resulting from floods is a matter of deep concern to Indiana” and declares that “the alteration of natural or present watercourses of all river and streams ... should be regulated,

supervised, and coordinated ... according to sound and accepted engineering practices so as to best control and minimize the extent of floods.” Subdivision 14-28-1-1(3) provides, “The water resources of Indiana that have been diminishing should be accumulated, preserved, and protected to prevent any loss or waste beyond reasonable and necessary use.” The General Assembly has charged the NRC with the responsibility of implementing this mission by designing a comprehensive plan for controlling and preventing flood damage and determining the best methods to do so. Ind. Code § 14-28-1-12.

[20] The FCA also contains specific restrictions and requirements, which the NRC found were applicable to the Divines. Indiana Code Section 14-28-1-20(2) prohibits a person from doing any of the following:

Except as authorized under section 26.5 of this chapter, erect, make, use, or maintain in or on any floodway, or suffer or permit the erection, making, use, or maintenance in or on any floodway, a structure, an obstruction, a deposit, or an excavation that will do any of the following:

(A) Adversely affect the efficiency of or unduly restrict the capacity of the floodway.

(B) By virtue of the nature, design, method of construction, state of maintenance, or physical condition do any of the following:

(i) Constitute an unreasonable hazard to the safety of life or property.

(ii) Result in unreasonably detrimental effects upon the fish, wildlife, or botanical resources.

[21] Section 14-28-1-22 provides,

(c) A person who desires to:

(1) erect, make, use, or maintain a structure, an obstruction, a deposit, or an excavation; or

(2) suffer or permit a structure, an obstruction, a deposit, or an excavation to be erected, made, used, or maintained;

in or on a floodway must file with the director a verified written application for a permit accompanied by a nonrefundable minimum fee of two hundred dollars (\$200).

(d) The application for a permit must set forth the material facts together with plans and specifications for the structure, obstruction, deposit, or excavation.

(e) An applicant must receive a permit from the director for the work before beginning construction. The director shall issue a permit only if in the opinion of the director the applicant has clearly proven that the structure, obstruction, deposit, or excavation will not do any of the following:

(1) Adversely affect the efficiency of or unduly restrict the capacity of the floodway.

(2) Constitute an unreasonable hazard to the safety of life or property.

(3) Result in unreasonably detrimental effects upon fish, wildlife, or botanical resources.

Section 14-28-1-22(b) provides that Section 22 does not apply to “removal of a logjam or mass of wood debris that has accumulated in a river or stream subject to the following conditions”:

(C) Except as otherwise provided in Indiana law, free logs or affixed logs that are crossways in the channel must be cut, relocated, and removed from the floodplain. Logs may be maintained in the floodplain if properly anchored or otherwise secured so as to resist flotation or dislodging by the flow of water and placement in an area that is not a wetland. Logs must be removed and secured with a minimum of damage to vegetation.

A person who knowingly fails to obtain a permit commits a class B infraction, and the NRC has the authority to enjoin violations and to issue civil penalties. Ind. Code §§ 14-28-1-33, -35, -36.

[22] Here, Officer Mann testified that he observed Ziegler digging silt out of Sulphur Creek with a trackhoe and depositing the silt and debris on the banks of the creek. Officer Mann also saw John working in a nearby field with drainage installation equipment. Ziegler told Officer Mann that he was cleaning out the creek at John’s direction. Ziegler indicated to Officer Mann that he was removing a sandbar or silt in a curve of the creek to increase the water flow. Adams testified that he saw spoil piles on both sides of the creek and that they did not have vegetation growing on them. He also observed unsecured trees piled along the bank with root wads still attached. Eggen testified that he saw



excavation of the creek bed and piles of soil along the stream and debris placed in the floodway. He saw trees with their roots still attached, which had been excavated. He also saw bucket marks from dredging the channel. Delay also testified that she saw signs of excavation of the creek channel and piles of debris on the creek's banks. Photographic evidence supported their testimony.<sup>5</sup> We conclude that the NRC's final order is supported by substantial evidence. The Divines' argument is merely a request to reweigh the evidence, which we must decline.<sup>6</sup> Therefore, we affirm.

[23] Affirmed.

Riley, J., and Mathias, J., concur.

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<sup>5</sup> The Divines assert that the NRC's decision improperly relies solely on hearsay evidence, pointing to the anonymous tip that caused Officer Mann to investigate. We disagree. The NRC's decision was based on Officer Mann's, Adam's, Eggen's, and Delay's personal observations, and therefore was not based on hearsay evidence.

<sup>6</sup> The Divines also contend that John and Linda cannot be held individually liable because the subject property was owned by a corporation and because there is no evidence that Linda engaged in any activities on the property. Other than these bald assertions, the Divines present no legal argument or citations to legal authorities. Therefore, the argument is waived. *See* Ind. Appellate Rule 46(A)(8)(a)); *Loomis*, 764 N.E.2d at 668. Waiver notwithstanding, their argument is without merit. First, when the conduct that is the subject of the NOV was committed, Abydel Farms had not filed articles of organization with the secretary of state to form a limited liability company as required by the Indiana Business Flexibility Act. *See* Ind. Code § 23-18-2-4 (providing that a person may form a limited liability company by causing articles of organization to be executed and filed with the secretary of state). Second, the FCA prohibits not only the act of excavating or depositing but also the act of "suffer[ing] or permit[ing]" an excavation or deposit in a floodway. Ind. Code §§ 14-28-1-20(2), -22(c)(2). John instructed Zeigler to operate a trackhoe to remove soil from the creek channel and deposit it on the banks, and John was present while Zeigler was doing so. In addition, both John and Linda are principals of Abydel Farms, which owns the property, and thus suffered or permitted John and Zeigler to enter onto the land to excavate from Sulphur Creek and install drain tiles.