

BEFORE THE NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

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ADMINISTRATIVE CAUSE NUMBER: 21-027W
PERMIT FW-30915-0

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IN THE MATTER OF:
CITY OF NEW ALBANY,
Petitioner

v.

ECOSYSTEMS CONNECTIONS INSTITUTE, LLC,
Respondent
and
DEPARTMENT OF NATURAL RESOURCES,
Agency Respondent.

-----x

November 22, 2022

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1 testimony goes.
2 THE COURT: Yeah. Well, yeah --
3 MR. MCINERNY: We'll only have two more
4 witnesses after Mr. Smith.
5 THE COURT: Yeah. I don't want to make
6 that -- I'd rather kind of push through. But on
7 the other hand, I have issues with going for long
8 periods of time without eating.
9 MR. MCINERNY: Me as well.
10 THE COURT: So you don't want me to
11 pass out.
12 MR. GAHL: No, we don't.
13 THE COURT: I did grab a snack while we
14 were on break last time. I could have just said,
15 hey -- did you take us off the record?
16 REPORTER: No.
17 THE COURT: Oh.
18 REPORTER: It's still recording. But
19 I'm not going to type stuff right now.
20 THE COURT: I should really be more
21 aware of that. And gentlemen, feel free --
22 gentlemen and ladies, feel free to take your
23 jackets off.
24 MR. MCINERNY: Oh, Your Honor --
25 THE COURT: I am not one of those

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1 sticklers. You may notice --
2 (Recess)
3 THE COURT: Mr. Smith, you can have a
4 seat right here. And you have been sworn.
5 MR. SMITH: Yes.
6 THE COURT: Mr. McInerny, you may
7 proceed when you're ready.
8 MR. MCINERNY: Thank you, Your Honor.
9 **DIRECT EXAMINATION OF KENNETH SMITH**
10 **BY MR. MCINERNY:**
11 Q Mr. Smith, could you state your full name
12 for the record, please?
13 A My name is Kenneth Eugene Smith.
14 Q May I call you Ken? We've only known each
15 other for four years or so. Ken, could you
16 please provide the Court with your educational
17 background?
18 A I have a bachelor's degree in civil
19 engineering, a master's degree in business
20 administration. I'm a professionally registered
21 engineer in the State of Indiana.
22 Q So you are a licensed PE in the State of
23 Indiana?
24 A Since 1979.
25 Q Okay, and where are you currently employed?

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1 A The Department of Natural Resources in the
2 Division of Water.
3 Q And how long have you been employed by the
4 DNR?
5 A By the DNR, over 46 years.
6 Q Okay, and how long have you worked within
7 the Division of Water?
8 A All of that 46 years.
9 Q Okay, and can you briefly describe -- once
10 again as I -- you wouldn't know, but I asked Ms.
11 Ware, I'm guessing in this time period, your
12 duties have changed over the years, but could you
13 describe your progression of duties within the
14 Division of Water briefly?
15 A Briefly? Now there's -- I'm Irish. I
16 always say that. I started initially at very
17 much an entry level engineering position within
18 the division when I came and was promoted over
19 the years from doing basic hydrology sort of
20 activities to managing a section that advised the
21 public on floodplain matters of properties they
22 were interested in, in addition to doing modeling
23 to do that.
24 I was engaged in activities with our enforcement
25 and compliance activities along the way. And 29

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1 years ago I was promoted to the level of being an
2 assistant director in the Division of Water with
3 the duties comprising of the state's dam levee
4 safety program, a group known as project
5 development where we actually did construction
6 activities and things of structures we had some
7 responsibilities for around the state, surveying
8 matters related to elevations, things like that.
9 For a long time, I also oversaw the compliance
10 and enforcement activities.
11 Q Okay, and what are your current duties?
12 A Current duties, I am in charge of the damn
13 levee safety section, the administrative section
14 that manages the office, the project development
15 section and (indiscernible) matters.
16 Q Can you describe your experience regarding
17 the review of applications for construction in a
18 floodway?
19 A I have been involved with the review of
20 applications on and off in one form or another
21 really throughout my whole career. In doing
22 modeling along the way, we would often provide
23 assistance to the people that we now call
24 technical services that administers and processes
25 permit applications in the office and in various

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1 roles, especially with the dam levee safety
2 section, being involved as applications and
3 questions come in, really focused on kind of that
4 multidiscipline activity associated with dams and
5 levees.
6 MR. MCINERNY: Okay, and for the
7 benefit of Your honor and parties, I'm not going
8 to get into the merits of the ECI application
9 with Mr. Smith.
10 BY MR. MCINERNY:
11 Q But I do want to ask you, are you familiar
12 with the criteria under the Flood Control Act
13 that are necessary to issue a permit for
14 construction in a floodway?
15 A Yes, I am.
16 Q Okay, and does one of those criteria deal
17 with an assessment of whether or not a project
18 will result in unreasonable hazards to the safety
19 of life and property?
20 A That is one of the criteria.
21 Q Okay. I'm going to segue into that area.
22 So if a project will result in no surcharge of
23 floodwaters as a result of the project, would it
24 be expected to result in an unreasonable hazard
25 to the safety of life and property?

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1 MS. WILSON: Object to the question on
2 the ground that he just expressed, which is that
3 he's not going to get into the area and we
4 stipulated that this proceeding is not about the
5 technical merits of the --
6 THE COURT: Ms. McClain?
7 MS. MCCLAIN: I don't have an
8 objection.
9 MR. MCINERNY: I'm asking a general
10 question regarding any project, whether or not
11 any project that does not result in a surcharge
12 would not result in unreasonable hazard to the
13 safety of life and property. It goes to the
14 DNR's assessment of projects In general.
15 THE COURT: I'll give you some leeway.
16 Obviously, it's up to me to determine what weight
17 it's given.
18 MR. MCINERNY: Sure.
19 THE COURT: But I'll give you a little
20 bit of leeway.
21 BY MR. MCINERNY:
22 Q So you can answer the question. Would you
23 like me to restate it?
24 A Please.
25 Q Sure. If a project will result in no

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1 surcharge of floodwaters, will it be expected to
2 result in an unreasonable hazard to the safety of
3 life and property?
4 A If it does not increase flood stages? If
5 the project does not increase flood stages, then
6 that unreasonable hazard to life and property
7 does not apply.
8 Q Is it your understanding that the proposed
9 dam removal by ECI will not result in a
10 surcharge?
11 MS. WILSON: Objection.
12 THE COURT: So noted. I'm going to
13 just a little bit of leeway because, as you
14 pointed out on the city's presentation, we're
15 limited to the issue of ownership.
16 BY MR. MCINERNY:
17 Q And once again, you can answer the question.
18 A The removal of an obstruction in channel
19 would by very definition not increase flood
20 stages. It would do the absolute composite. It
21 would reduce flood stages upstream of dam
22 construction.
23 Q Okay. Thank you. And thank you for stating
24 it in the general manner.
25 MR. MCINERNY: So that's -- I will not

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1 pursue this any further, Your Honor. Okay. I'd
2 like to turn now to low head dam safety in
3 particular. And Your Honor, I raise this because
4 in their motion for the stay here, the city
5 represents that it plans a public recreation area
6 recreation area in the immediate vicinity of the
7 dam which Mr. Summers has testified regarding,
8 which would actually provide public access to
9 this dam area. They further stated --
10 THE COURT: Why don't you go ahead and
11 ask your question, and then we'll see if there's
12 an objection.
13 MR. MCINERNY: Okay. Thank you.
14 BY MR. MCINERNY:
15 Q Ken, is the Providence Dam a low head dam?
16 A It is a low head dam. Yes, sir.
17 Q Okay. As a representative of the DNR, are
18 you involved in any organizations which are
19 focused on dam safety?
20 A Yes, I am.
21 Q And could you tell me, is there any
22 association in particular?
23 A Well, the one that jumps to mind with the
24 largest involvement was the Association of State
25 Dam Safety Officials. That organization over the

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1 years has focused on what I'll call kind of the
2 conventional concepts of dam safety, which is the
3 safety of the dam, big full valley dams. And
4 what we would look at with those sort of
5 structures is to make sure they're structurally
6 sound.
7 So if something should happen, should they fail,
8 there wouldn't be a floodway downstream
9 threatening people on the property downstream.
10 With the low head dams, that's been sort of a
11 newer topic in the nation of dam safety that that
12 association has become involved with that is
13 really dealing with safety at dams, the safety of
14 people that are recreating around the structures
15 and the chances of them being hurt in those
16 activities.
17 With that association, I've been pretty deeply
18 involved over the years. I'm a past president of
19 the association. I've been on their board of
20 directors several times and held every officer
21 position in it and have been involved on many
22 committees dealing with the safety at dams topic
23 particularly as one that after my presidency,
24 I've been able to focus on and help bring to a
25 national level of concern. So the association

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1 has been working on it.
2 Q If a dam was built in roughly 1905, would
3 you anticipate there being the same level of
4 concern with safety associated with such a dam as
5 it would be now in 2022?
6 MS. WILSON: Objection, Your Honor.
7 It's outside the scope of the proceeding.
8 THE COURT: I believe Mr. Summers
9 testified as to the harm that could occur to
10 individuals around the dam. So I believe it's
11 within the scope of the direct testimony of Mr.
12 Summers. So --
13 MS. WILSON: May we just show a
14 continuing objection?
15 THE COURT: Sure.
16 MS. WILSON: Thank you.
17 THE WITNESS: Many of the low head dams
18 that are of concern in the state right now were
19 built in the 1800s. And the fact that they were
20 built a long time ago does not by nature make
21 themselves safe. They are still out there. They
22 present the same sort of safety hazard and
23 problem to recreators as something that might be
24 built, a low head dam that might be built more
25 recently.

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1 BY MR. MCINERNY:
2 Q And I believe you touched on this, but
3 you've testified regarding safety concerns
4 regarding the actual structural integrity of a
5 dam. And is that the focus of the concerns with
6 respect to low head dams?
7 A With regard to low head dams, it's really
8 different. It's the safety of people that are
9 recreating around the structure that might
10 unfortunately go over the structure, be caught in
11 the recirculating currents below it, and because
12 of those unique risks of a low head dam, they
13 could lose their lives.
14 Q And I think you anticipated my question.
15 What would be the major concern regarding safety
16 at low head dams, if you could elaborate a little
17 bit?
18 A Low head dams, by their very nature, can be
19 very deceiving to the public. If there has been
20 minimal rainfall and precipitation above a low
21 head dam for some time period, often there may
22 not be much flow over the structure, and on a
23 sunny day, the public could go out, recreate
24 around a low head dam, have an enjoyable day, and
25 then come back two days later after a rainfall

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1 event and the low head dam will be behaving in a
2 much different fashion.
3 Water will be pouring over it. There will be
4 typically a recirculating current below the dam,
5 that if someone gets in, they become trapped.
6 They start being recirculated with the water
7 going under and then brought back up and kicked
8 back into the face of dam by the water and
9 literally recirculate. That recirculating
10 current, when it is there, is extremely
11 dangerous. In addition to that, in that
12 recirculating current, that water below the dam
13 starts being different.
14 Q In what respect?
15 A It retains air bubbles so that if you're in
16 that, you can't float. You can have on life
17 jackets, life preservers, and they're not going
18 to help you because that water has changed its
19 consistency. It's a whole lot of air bubbles.
20 And so people that get caught in that, their
21 normal response of trying to swim away, trying to
22 get out of it, it's not going to work, and it
23 doesn't work for the people. They just keep
24 sitting there getting toss back into the face of
25 the dam.

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1 Q Okay. Thank you. Is there any
2 documentation of deaths in Indiana attributed to
3 low head dams?
4 A There is not an agency that tracks that
5 data. No one is charged with tracking and
6 keeping a list or developing that. However, one
7 of -- we created a team of volunteers in the
8 State of Indiana more than five years ago to
9 start working on the topic and the issue of low
10 head dam safety.
11 One of the people on that team from the
12 Department of Homeland Security did an extensive
13 amount of research looking through newspaper
14 articles of drownings and searching back and
15 looking to see if it could be determined were
16 these deaths at low head dams. And there were
17 many deaths at low head dams over the history of
18 the last century or more that we could document
19 from newspapers. Recently there --
20 Q Can I -- not to interrupt you, but have any
21 -- do you have knowledge regarding any deaths
22 associated with a low head dam that involved
23 members of the Department of Natural Resources?
24 A Yes.
25 Q Could you explain that?

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1 A About 20 years ago --
2 MS. WILSON: Your Honor, I'm just going
3 to object on the grounds that I think that is
4 substantially far beyond the scope.
5 THE COURT: Okay, and I would note also
6 that Mr. Summers did testify that they haven't
7 received any report. So the door was kind of
8 opened through his testimony as far as the safety
9 of the dam. So I'll allow it. Again, Mr.
10 McNerny, let's move it along.
11 MR. MCINERNY: Thank you, Your Honor.
12 THE WITNESS: About 20 years ago, at a
13 low head dam known as Williams Dam on the White
14 River, there was a death of a conservation
15 officer, Sergeant Karl Kelley. He was part of
16 DNR's river rescue team. They were there at the
17 dam practicing their techniques to try to rescue
18 or retrieve people that might detract in a
19 similar situation. During that training session,
20 things went wrong. A motorboat died and this
21 boat that he was in downstream of the dam got
22 sucked back into the face of the dam and
23 ultimately he lost his life.
24 BY MR. MCINERNY:
25 Q Okay. We've had separation of the

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1 witnesses. So you didn't hear this testimony,
2 but the City of new Albany city engineer
3 testified that the City of new Albany is actively
4 constructing a public recreation area, including
5 a kayak launch immediately downstream of the
6 Providence Mill Dam. Does this proposal present
7 concerns to you with respect to the safety of the
8 public?
9 MS. WILSON: I'm going to just very
10 briefly, Your Honor, respectfully object to the
11 form of the question in that I think it sort of
12 impedes the purpose of the separation of witness
13 order. But I think Mr. McNerny can rephrase.
14 THE COURT: Mr. McNerny, I'd ask you
15 not to refer to the separation of witnesses --
16 MR. MCINERNY: I apologize, Your Honor.
17 THE COURT: I think you're putting the
18 witnesses in a strange position there as they're
19 not allowed to talk about it. So --
20 MR. MCINERNY: I apologize, Your Honor.
21 BY MR. MCINERNY:
22 Q I'll strike that prior question and ask you
23 if you were told that the City of New Albany is
24 actively constructing a kayak launch and public
25 recreation area immediately downstream of the

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1 Providence Mill Dam, would that cause you concern
2 with respect to the safety of the public?
3 A It would cause me concern.
4 Q Okay, and why would that be?
5 A When I think of public access sites and
6 recreational facilities, people are going into
7 the water, there is an attractive thing nearby,
8 water splashing, going over things, making
9 sounds. People are naturally attracted to those
10 structures. And if there is a ramp there to
11 encourage them to put boats in below one of these
12 structures, I really fear for those people
13 because they could get up near the low head dam
14 and get drawn in by a recirculating current if
15 one is occurring and seriously being hurt.
16 Q Could there also be concerns with members of
17 the public approaching the dam from the bank?
18 A People often approach these dams from every
19 direction, from upstream and they get in trouble
20 going over the dam. They approach it literally
21 from the bank walk up to it and either fall in or
22 jump in because it's cool and wet and looks like
23 fun. So, and then people coming upstream, as
24 that conservation officer did, from a downstream
25 area coming up to the embankment and getting

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1 caught in the hazard. So there's really three
2 directions people can come from with the
3 structure stand and be at risk.
4 Q Okay. Would you consider it to be in the
5 public interest to open a public kayak launch and
6 recreational area with the Providence Mill Dam
7 still in place?
8 MS. WILSON: I object to the form of
9 question as beyond the scope. I understand that
10 there was testimony regarding the plans, but
11 again, I think it's beyond the scope.
12 MR. MCINERNY: Your Honor, I would just
13 -- I'm sorry.
14 THE COURT: Go ahead.
15 MR. MCINERNY: I would just note that
16 the city specifically referenced this in their
17 motion for the stay stating -- where is my --
18 MS. MCCLAIN: We also have --
19 MR. MCINERNY: Stating that they had no
20 reason at all to believe that any circumstances
21 will be materially different if the dam remains
22 in place for an additional period of time,
23 stating that there is no imminent safety risk
24 involved with the proposition. So they're
25 claiming there is no risk and in fact, they're

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1 encouraging the public to interact with this low
2 head dam. And so I'm asking Mr. Smith if, in his
3 expert opinion, whether he considers that to be a
4 concern to the public.
5 THE COURT: Ms. McClain, did you have
6 something to add?
7 MS. MCCLAIN: I was just going to say
8 the plans were presented in Exhibit 3 that the
9 city addressed. I can't remember if that was
10 admitted or not though, to be quite honest.
11 THE COURT: Exhibit 3?
12 MS. MCCLAIN: Yeah.
13 MR. MCINERNY: Yes, it was.
14 MS. MCCLAIN: So the plans were
15 explicitly addressed there, highlighting the
16 access area where the dam is located in relation
17 to the access area, additional projects that
18 would be constructed.
19 THE COURT: Okay. Ms. Wilson, I will
20 note your objection, but I am going to allow the
21 testimony.
22 MS. WILSON: Thank you.
23 THE COURT: Thank you.
24 MR. MCINERNY: I only have one more
25 question, Your Honor.

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1 BY MR. MCINERNY:
2 Q Mr. Smith, do you consider it to be in the
3 public interest to remove the Providence Mill
4 Dam?
5 A Yes, I do.
6 Q And would that be for the reasons that you
7 previously stated?
8 A Yes, because every day that that structure
9 is in place, it presents a risk to the public.
10 Q And would you consider a public work that
11 actually attracts the public to that dam to be an
12 even greater concern?
13 A Yes, I would.
14 MR. MCINERNY: Okay. I have no other
15 questions. Thank you.
16 THE COURT: Ms. McClain?
17 MS. MCCLAIN: I do not have any follow-
18 up questions.
19 THE COURT: Okay.
20 MS. WILSON: Just a minute, Your Honor.
21 THE COURT: Sure. Take your time.
22 MS. WILSON: Gathering my thoughts
23 here.
24 THE COURT: You may proceed when you're
25 ready.

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1 MS. WILSON: Thank you, Your Honor.
2 CROSS-EXAMINATION OF KENNETH SMITH
3 BY MS. WILSON:
4 Q Mr. Smith, good afternoon. I'm Jane Wilson.
5 I don't think we have had the pleasure of meeting
6 before. It's nice to meet you.
7 A Nice to meet you.
8 Q You testified, Mr. Smith, that you have been
9 involved with low head dam safety for a number of
10 years, but I don't have in my notes how many
11 years.
12 A I've been aware of it for more than 20 years
13 because of the conservation officer's death.
14 I've really been active both in the state and at
15 a national level with the topic of safety at dams
16 since the death of several young recreators at
17 the Edinburgh dam. I think that was about 2013
18 or 2014.
19 Q Okay, and it's fair to say that that's a
20 concern that is sort of driving your professional
21 interest?
22 A It is a concern among many.
23 Q Now you're familiar with the Providence Mill
24 Dam that's the subject of this proceeding,
25 correct?

1 inspect it or do anything else. And so it's not
2 the city's obligation, frankly, to show we own it
3 or we don't own or who owns it. That's the
4 applicant's, and that's DNR's. And DNR doesn't
5 know, and it issued a permit without knowing
6 that, and that's dangerous. And that's invalid
7 against Flood Control Act and AOPA. Thank you.

8 THE COURT: Okay. Just to confirm,
9 I'll probably issue just a brief order that I'll
10 send out that will confirm that post-trial
11 briefs, if desired, if you desire to file one,
12 would be due by December 2nd.

13 And that concludes, unless anybody else
14 has anything, that concludes our proceeding for
15 today. Thank all of you for coming and look
16 forward to proceeding in this case one way or
17 another.

18 MR. MCINERNY: Thank you, Judge.

19 MR. GAHL: Yeah. Nice to meet you.

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23
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1 CERTIFICATION

2
3 I, Sonya Ledanski Hyde, certify that the
4 foregoing transcript is a true and accurate
5 record of the proceedings.

6
7
8

9 *Sonya M. Ledanski Hyde*

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15
16 Date: April 10, 2023

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