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STATE OF INDIANA	)	PORTER COUNTY SUPERIOR COURT 5
	)	
COUNTY OF PORTER	)	CAUSE NO. 64D05-2512-RA-013842

	)
	)
SAVE THE DUNES CONSERVATION FUND, INC.,	)
Petitioner,	)
	)
vs.	)
	)
TOWN OF OGDEN DUNES/SCOTT KINGAN and DEPARTMENT OF NATURAL RESOURCES,	)
Respondents.	)
	)

PETITIONER'S CONSOLIDATED REPLY BRIEF IN SUPPORT OF JUDICIAL REVIEW

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INTRODUCTION

Save the Dunes' Opening Brief demonstrated that this case presents a single, recurring, and publicly important question of statutory interpretation left unanswered by both reviewing agencies below: whether the Department of Natural Resources ("DNR") may lawfully interpret the Public Trust Statute's codified, common-law definition of Lake Michigan's ordinary high water mark ("OHWM") as interchangeable with the U.S. Army Corps of Engineers' regulatory definition. That question determines where Indiana's public trust ends and private property begins along Lake Michigan, and thus defines the public rights that attach to that boundary. Yet neither the Natural Resources Commission ("NRC") nor the Office of Administrative Law Proceedings ("OALP") ever answered it. The NRC improperly treated the issue as a factual dispute and denied summary judgment. The OALP then dismissed the proceeding as moot without deciding the question at all.

The Respondents' briefs confirm these errors. Rather than defend the NRC and OALP's collective failure to decide the critical legal question presented, Respondents raise a series of unfounded procedural arguments in an effort to prevent this Court's review. DNR, for the first time in this nearly three-year proceeding, raises a baseless and barred challenge to Save the Dunes' standing. DNR also insists the case is moot while at the same time confirming it will continue to interpret the Public Trust Statute exactly as it did in this case in future permitting. DNR also argues this Court lacks jurisdiction to review the NRC's ruling even though the OALP entered a final order disposing of the entire proceeding, leaving no further administrative remedies for Save the Dunes to exhaust.

Even when DNR finally addresses the merits of its interpretation of the Public Trust Statute, it largely ignores the established rules of statutory construction that apply. DNR never meaningfully grapples with the legal significance of the General Assembly's decision to codify

the common-law OHWM definition recognized in *Gunderson*, never explains why its own post-*Gunderson* guidance interpreting that common-law definition suddenly became "outdated," never reconciles its admission that it did not determine the common-law OHWM "as that term is defined," and never addresses the settled rules of statutory construction demonstrating that the Public Trust Statute's definition is not interchangeable with the Army Corps' distinct federal regulatory definition.

As detailed further below, Respondents' arguments have no foundation in the law or record and ultimately confirm that the publicly important legal question left unanswered by the NRC and the OALP should have been decided in Save the Dunes' favor. Accordingly, Save the Dunes respectfully requests that the Court reject DNR's newly raised procedural defenses, reverse the OALP's dismissal order, vacate the NRC's summary judgment order, grant summary judgment in favor of Save the Dunes on the proper interpretation of Indiana Code § 14-26-2.1-2, and remand this matter for further proceedings consistent with the Court's decision.

I. DNR's Newly Raised Defense that Save the Dunes Lacks Standing Ignores the Agency Record, is Barred by AOPA and, In Any Event, Save the Dunes Has Standing to Seek This Court's Judicial Review.

For the first time in this nearly three-year proceeding, DNR insists "[t]he Court should deny Petitioner's Verified Petition for Judicial Review in its entirety because Petitioner never had standing to seek administrative review of the challenged construction permit before the Natural Resource Commission or OALP in the first place." DNR Resp. at 8. In support, DNR contends that "nowhere in the Petition for Administrative Review, or elsewhere in the agency record, does [Save the Dunes] identify a member whose pecuniary, property, or personal interest, including their public trust rights, had been harmed by the approval of LM-255 . . . [or] describe the nature of the alleged harm." DNR Resp. at 8-10. DNR is wrong for at least three reasons.

First, Save the Dunes identified two of its members, by name, in its disclosure of witnesses, and described the nature of their injuries in sworn answers to Respondents' discovery. Second, DNR's never-before-raised defense is barred by AOPA, which prohibits judicial review of issues not raised before the agency, except in two narrow circumstances, neither of which apply here. Ind. Code § 4-21.5-5-10. And third, Save the Dunes is expressly authorized by AOPA to seek judicial review as a named party to the agency proceeding below. Ind. Code § 4-21.5-5-3(a)(2).

Finally, to the extent additional evidence is necessary because DNR failed to raise the issue before now, Save the Dunes has submitted supplemental affidavits further confirming that Save the Dunes' members are aggrieved and adversely affected by the NRC and OALP's collective failure to address DNR's unlawful interpretation and application of the Public Trust Statute's definition of Lake Michigan's OHWM. Without question, Save the Dunes has associational standing to seek the Court's judicial review of the agencies' error. DNR's baseless and untimely argument otherwise should be rejected by the Court.

A. DNR's new argument on standing is expressly barred by AOPA.

AOPA is clear that a person may not obtain judicial review of issues not raised before the administrative agency, with two exceptions: (1) where the issue concerns notice of the proceedings, and (2) where the interests of justice would be served by judicial resolution of an issue arising from a change in the controlling law occurring after the agency action was taken. Ind. Code § 4-21.5-5-10; *State v. Langen*, 708 N.E.2d 617, 622 (Ind. Ct. App. 1999). Neither of these exceptions apply here—the issue of Save the Dunes' associational standing has nothing to do with notice, and DNR's new argument did not arise from any change in the law.

AOPA's prohibition on judicial review of new issues not raised before the agency is strictly enforced by Indiana courts. For instance, in *State v. Langen,* a licensed real estate broker sought judicial review of a final agency order suspending his license. 708 N.E.2d at 619. The broker

argued that the Indiana Real Estate Commission violated AOPA by failing to issue its final decision within the applicable statutory time period. *Id.* at 622. The Court of Appeals rejected the argument as waived because the broker failed, despite multiple opportunities, to object to the timing of the Commission's final ruling, including after the Commission established a briefing schedule beyond the statutory deadline and later extended the time for issuing its final decision. *Id.* Because the broker waited until judicial review to raise the issue, and because neither exception in Indiana Code § 4-21.5-5-10 applied, the court held that judicial review of the issue was barred. *Id.* at 622-23. There is no reason for a different outcome here.

DNR was on notice from the outset of the administrative proceedings below that Save the Dunes was asserting associational standing to act on behalf of its members. Indeed, DNR spends three pages of its response brief quoting Save the Dunes' administrative petition to make the point. DNR Resp. at 8-10. Yet DNR never moved to dismiss for lack of standing, which is the usual procedural mechanism for challenging a petitioner's standing at the outset of a case. *See e.g., Ind. Family & Soc. Servs. Admin. v. Anderson,* 155 N.E.3d 621, 624 (Ind. Ct. App. 2020); *21st Amendment, Inc. v. Ind. Alcohol & Tobacco Comm'n*, 84 N.E.3d 691, 695 (Ind. Ct. App. 2017).

Nor did DNR raise the issue of standing following discovery and the parties' exchange of preliminary witness lists even though Save the Dunes identified two of its members by name—Nancy Moldenhauer and Susan Mihalo—as standing witnesses who would be called at the final hearing.[1] And contrary to DNR's assertion that Save the Dunes never demonstrated that any of its members are "aggrieved or adversely affected," Save the Dunes again identified its members, Susan Mihalo and Nancy Moldenhauer, and described the nature of their injuries in sworn answers

[1] Rec. Pt. 3 OALP01816 (Petitioner's Preliminary Witness and Exhibit List (Aug. 11, 2023)).

to written discovery.[2] Nevertheless, DNR never deposed either witness, never challenged or rebutted Save the Dunes' discovery responses, and never disputed the factual basis for Save the Dunes' associational standing.

Instead, DNR proceeded to litigate this case on the merits for nearly three years. It engaged in extensive fact and expert discovery, moved for summary judgment, opposed Save the Dunes' motion for summary judgment, moved for reconsideration of the NRC's summary judgment ruling, participated in proceedings concerning the emergency stay, and supported the Town's motion to dismiss for mootness. At no point during any of those proceedings did DNR ever mention standing, much less argue that Save the Dunes "never had standing to seek administrative review . . . in the first place." DNR Resp. at 8. That argument is three years too late. The factual basis for Save the Dunes' associational standing was fully known to DNR throughout the administrative proceeding. It failed to raise the issue below, and AOPA prohibits DNR from raising it now on judicial review. The Court should therefore reject DNR's newly raised standing argument as barred under Indiana Code § 4-21.5-5-10.

B. Even if the Court reaches DNR's newly raised standing argument, Save the Dunes has associational standing.

[2] *See* Exhibit A (Petitioner's Objections and Responses to DNR's First Set of Interrogatories to Petitioner at pp. 2-3, 6-7 (Int. Ans 2, 6) (Oct. 4, 2023)); and Exhibit B (Petitioner's Objections and Responses to the Town of Ogden Dunes/Scott Kingan's Initial Discovery to Petitioner at pp. 10-12 (Int. Ans. 12, 13, 15) (Oct. 4, 2023)). These discovery responses were exchanged during the administrative proceedings below but were never filed with the NRC or OALP because neither Respondent challenged Save the Dunes' standing. Save the Dunes submits them now solely in direct response to DNR's newly raised standing argument. *See Brightpoint, Inc. v. Pedersen,* 930 N.E.2d 34, 39 (Ind. Ct. App. 2010) (concluding that evidence submitted in a reply brief "in direct response" to arguments raised in an opposing party's response brief is "a legitimate use of a reply"). Moreover, under Indiana Rule of Evidence 201, a court may take judicial notice of filings and pleadings in the very case before it. *Prime Mortg. USA, Inc. v. Nichols,* 885 N.E.2d 628, 667-68 (Ind. Ct. App. 2008). DNR cannot plausibly claim prejudice from materials that were disclosed to it during discovery and that confirm facts DNR elected not to challenge during nearly three years of administrative litigation.

Even if DNR's newly raised argument on standing were not barred by AOPA, the Court should reject it because Save the Dunes has standing to seek judicial review. Not only does AOPA expressly recognize Save the Dunes' standing to seek judicial review as a party to the proceeding below, but the administrative record itself demonstrates that Save the Dunes' members are aggrieved and adversely affected by DNR's unlawful interpretation and application of the Public Trust Statute. And to the extent additional evidence is necessary because DNR failed to raise the issue until now, the supplemental affidavits submitted with this Reply further confirm that Save the Dunes' members are aggrieved and adversely affected.

1. Save the Dunes is expressly authorized by AOPA to seek judicial review.

Setting aside DNR's barred claim that Save the Dunes lacked standing to seek *administrative* review, AOPA confirms that Save the Dunes categorically has standing to seek this Court's *judicial* review. As the Indiana Court of Appeals explained, "[t]he doctrine of standing focuses on whether the complaining party is the proper person to invoke the court's power." *Ind. Family & Soc. Servs. Admin. v. Anderson,* 155 N.E.3d at 624. In proceedings for judicial review of an agency action, AOPA enumerates who those proper persons are. *Id.* (citing Ind. Code § 4-21.5-5-3(a). Specifically, AOPA states:

> (a) The following *have standing* to obtain judicial review of an agency action:
>
> (1) A person to whom the final agency action is specifically directed.
>
> (2) *A person who was a party to the proceedings of the ultimate authority that led to the final agency action, including the agency whose order was under review in the proceeding.*
>
> (3) A person eligible for standing under a law applicable to the final agency action.
>
> (4) A person otherwise aggrieved or adversely affected by the final agency action.

Ind. Code § 4-21.5-5-3(a) (emphasis added).

Each of these categories confers an independent basis for standing. *See e.g., Ind. Ass'n of Bev. Retailers, Inc. v. Ind. Alcohol & Tobacco Comm'n*, 836 N.E.2d 255, 257 (Ind. 2005) (explaining that AOPA's "explicitly enumerated" categories of persons that "have standing to obtain judicial review of an agency action . . . ultimately require that the person be 'aggrieved or adversely affected' or be a subject of the order or a party to the agency proceedings." (emphasis added)); *21st Amendment, Inc.* 84 N.E.3d at 696 (explaining that issue of standing under Section 4-21.5-5-3(a)(3) was a "matter of first impression" because "courts [had] previously decided standing questions under the other subsections of the statute," but had "not yet had occasion to address standing under Indiana Code section 4-21.5-5-3(a)(3)").

Save the Dunes has standing to seek the Court's review under the plain language of section 4-21.5-5-3(a)(2). Indeed, AOPA defines a "person" to mean "an individual, agency, political subdivision, partnership, corporation, limited liability company, association, or other entity of any character." Ind. Code § 4-21.5-1-11. In turn, a "party" to an administrative proceeding includes "a person expressly designated in the record of the proceeding as a party to the proceeding." Ind. Code § 4-21.5-1-10. Construing these AOPA provisions, the Indiana Supreme Court made clear that a person who merely "attend[s], remonstrate[s], and offer[s] testimony" at an agency hearing, but is "not designated as a party to the proceeding" does not have standing under Section 4-21.5-5-3(a)(2). *Ind. Ass'n of Bev. Retailers, Inc. v. Ind. Alcohol & Tobacco Comm'n*, 836 N.E.2d 255, 257 (Ind. 2005). On the other hand, a person that petitions for administrative review and is designated as a party to the administrative proceeding "*clearly* has standing under Section 4-21.5-5-3(a)(2)." *Ind. Family & Soc. Servs. Admin. v. Anderson*, 155 N.E.3d at 624 (emphasis added); *see also Peabody Coal Co. v. Ind. Dep't of Nat. Res.,* 664 N.E.2d 1171, 1174 (Ind. 1996)

(concluding "[DNR's] director is 'a person who was a party to the agency proceedings,' entitling him to judicial review of the ALJ's ruling"). That is the situation here.

Save the Dunes, an Indiana not-for-profit corporation, is a "person." And Save the Dunes was expressly designated as the Petitioner—a "party" of record—in the administrative proceedings below. Thus, under the plain language of Indiana Code § 4-21.5-5-3(a)(2), Save the Dunes has standing to seek this Court's judicial review. Remarkably, Save the Dunes' Verified Petition for Judicial Review cites Section 4-21.5-5-3(a)(2) as the legal basis for Save the Dunes' standing to seek judicial review in this case.[3] Yet conspicuously absent from DNR's response brief is any mention of this controlling AOPA provision. The Court should thus reject DNR's unfounded and barred challenge to Save the Dunes' standing.

2. Save the Dunes demonstrated below that its members are "aggrieved or adversely affected."

The Court should also reject DNR's new standing challenge because it rests on a factual premise that is demonstrably false. According to DNR, Save the Dunes "failed to ever demonstrate during the administrative proceedings that at least one of their members had been 'aggrieved or adversely affected'" by DNR's approval of Permit LM-255. DNR Resp. at 10. The administrative record proves otherwise.

As DNR's own response brief confirms, Save the Dunes' administrative petition made clear that the organization was acting on behalf of members whose public trust rights were adversely affected by DNR's approval of the permit.[4] Indeed, Save the Dunes alleged that it brought the administrative appeal "on behalf of its members who regularly exercise their public

[3] Save the Dunes Verified Petition for Judicial Review at 6, ¶13 (stating "Save the Dunes has standing to seek the Court's judicial review under Indiana Code § 4-21.5-5-3(a)(2) because Save the Dunes was a party to the proceeding that led to the OALP's Final Ruling.")
[4] Rec. Pt. 3 OALP01856-57 (Save the Dunes' Petition for Administrative Review ¶¶11-17).

trust rights to recreate in, use, and enjoy the natural resources of Lake Michigan" and who were "aggrieved and adversely affected" by DNR's approval of the revetment.[5] The Petition further alleged that DNR's approval of the revetment would impair public access to and enjoyment of the shoreline, diminish the natural scenic beauty of Lake Michigan, and adversely affect the public trust rights of Save the Dunes' members.[6] What DNR fails to mention, however, is that Save the Dunes did not stop with its pleading allegations.

In discovery, DNR specifically asked Save the Dunes to "[i]dentify and describe the facts, documents, and/or witnesses" supporting its allegations on associational standing.[7] And Save the Dunes did so "under penalties of perjury," not only identifying its members, Nancy Moldenhauer and Susan Mihalo by name but also describing the subject matter of their testimony:

> **Answer to DNR Interrogatory 2:**
> Nancy Moldenhauer and/or Susan Mihalo, as long-time members of Save the Dunes, may be called to testify as to: their membership and involvement with Save the Dunes; their use and enjoyment of the Lake Michigan shoreline in and around the Town, including the surrounding Indiana Dunes National Park and Lakeshore; their knowledge of relevant facts, events and the history of the Town's beach erosion problem and attempts to privatize the beach; their communications with Town residents and others who are concerned about and oppose the revetment; and the harm they will each suffer if the revetment is built.
>
> **Answer to DNR Interrogatory 6:**
> Nancy Moldenhauer and Susan MiHalo are long-time members of Save the Dunes who both regularly exercise their vested rights as citizens of the State of Indiana to use and enjoy the natural scenic beauty of Lake Michigan and its shoreline in and around the Town of Ogden Dunes, including the surrounding Indiana Dunes National Lakeshore . . . [B]oth witnesses will testify as to their reasonable concern that the revetment, if built, will greatly diminish their access to and continued enjoyment of the Ogden Dunes' stretch of beach and the neighboring [National Park Service] West Beach property, and will diminish the natural scenic beauty of

[5] Rec. Pt. 3 OALP01856-57 (Administrative Petition at ¶¶14, 16).
[6] Rec. Pt. 3 OALP01856-57 (Administrative Petition at ¶¶12, 15-16).
[7] Exh. A at pp. 6-7, 13(Save the Dunes' answer to DNR Interrogatory 6); Rec. Pt. 3 OALP001856, OALP001858 (Petition for Administrative Review ¶¶14, 23).

> the lakefront that they have a vested right to enjoy unencumbered by manmade structures . . .[8]

Having requested and received this information, DNR never challenged it. DNR never deposed either witness, never sought additional discovery regarding their alleged harm, never introduced contrary evidence, never argued that Save the Dunes' responses were insufficient, and never moved to dismiss for lack of standing. Instead, DNR proceeded to litigate the merits of the case through discovery, summary judgment, reconsideration, emergency-stay proceedings, and mootness without ever raising the issue of Save the Dunes' standing.[9] DNR cannot now pretend that the very information about Save the Dunes' members that it requested and received, somehow does not exist.

And that evidence, long in DNR's possession, is more than sufficient to demonstrate that Save the Dunes' disclosed members are "aggrieved or adversely affected" within the meaning of AOPA. The Indiana Supreme Court made clear in *Huffman v. Ind. Office of Envtl. Adjudication,* that the "judicial doctrine of standing" does not apply to administrative proceedings "because AOPA identifies who may pursue an administrative proceeding"—namely, those who are "aggrieved or adversely affected" by the challenged agency action. 811 N.E.2d 806, 809 (Ind. 2004). To that end, the Court explained that being "aggrieved" does nor require proof of personal injury. Instead, it requires evidence a "personalized harm" that occurs when "personal, pecuniary, or property rights are adversely affected." *Id.* 810-812. Accordingly, a person is "aggrieved" if

[8] Exh. A at pp. 2-3, 6-7, 13.

[9] For that matter, DNR's failure to raise standing as an issue during the summary judgment proceedings below is particularly telling. Answers to interrogatories are competent evidence that may be relied upon in summary judgment proceedings. Ind. Trial Rule 56(C); *May v. Ind. Dep't of Child Servs.,* 46 N.E.3d 502, 509 (Ind. Ct. App. 2016). Thus, if DNR believed that Save the Dunes' discovery answers were insufficient to demonstrate associational standing, it certainly could have raised the issue in briefing the parties' cross-motions for summary judgment.

they have "a substantial grievance, a denial of some personal or property right, the imposition of a burden or obligation," or a "*legal interest* which will be enlarged or diminished" as a result. *Id.* (emphasis added). Put another way, a person is aggrieved or adversely affected when he has "suffered or [is] likely to suffer in the immediate future harm to *a legal interest*, be it a pecuniary, property, or personal interest." *Id.* at 810 (emphasis added).

To illustrate, the petitioner in *Huffman* was held to be "aggrieved and adversely affected" by the renewal of a water pollution permit due to the *potential* health risks she might face given her employment managing property near the pollution discharge authorized by the permit. *Id.* at 815-816. Similarly, in *Save the Valley v. Ind.-Kentucky Elec. Corp.,* the Indiana Court of Appeals concluded that members of an environmental organization were aggrieved and adversely affected by the issuance of a landfill permit because they resided, worked and recreated in the area near the landfill and could be adversely affected by the landfill's impact on groundwater and emissions of fugitive dust. 820 N.E.2d 677, 682 (Ind. Ct. App. 2005).

Here, the evidence of threatened harm to the legal interests of Save the Dunes' members Susan Mihalo and Nancy Moldenhauer is arguably more compelling than in *Huffman* and *Save the Valley.* Indiana's Public Trust Statute makes clear that all "citizens of Indiana have a *vested right* in the preservation and protection of Lake Michigan." Ind. Code § 14-26-2.1-4(d) (emphasis added). They also "have *a vested right* to: (1) enjoy the natural scenic beauty of Lake Michigan; (2) enjoy and use the natural resources of Lake Michigan; and (3) use Lake Michigan for recreational purposes." Ind. Code § 14-26-2.1-4(c) (emphasis added). A "recreational purpose" is defined to include "walking, fishing, boating, swimming" or "any other recreational purpose for which Lake Michigan is ordinarily used." Ind. Code § 14-26-2.1-4(b). And the phrase "natural scenic beauty" refers to "conditions produced by nature *without manmade additions or*

alternations." Ind. Code § 14-26-2.1-4(a) (emphasis added). In other words, the legal interests at stake here are not merely recreational, they are vested rights.

To be clear, a "vested right" is a legally enforceable right that cannot be taken away without consent. *See Bailey v. Menzie,* 542 N.E.2d 1015, 1019 (Ind. Ct. App. 1989) (explaining that a "right is vested when . . . the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest"); *Thacker v. Butler*, 134 Ind. App. 376, 382, 184 N.E.2d 894, 897 (1962) (observing a "vested right" is one that is "complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent."); *see also Black's Law Dictionary* 1520 (10th ed. 2014) (defining "vested right" as "[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent").

As Save the Dunes disclosed in discovery, its members Susan Mihalo and Nancy Moldenhauer regularly exercise their vested rights to use and enjoy Lake Michigan's shoreline and its natural scenic beauty. DNR's approval of massive stone wall along the Lake, and the flawed interpretation of the Public Trust Statute on which it rests, threatened to diminish those vested rights and therefore threatened the very sort of legal interests *Huffman* held are sufficient to render a person "aggrieved or adversely affected." Thus, DNR's new argument that Save the Dunes never demonstrated it had "at least one member" who was aggrieved or adversely affected by DNR's issuance of Permit LM-255 is patently untrue.

3. Save the Dunes' supplemental affidavits respond directly to DNR's newly raised standing challenge and remove any doubt that Save the Dunes' has associational standing.

Even if the Court concludes that DNR's newly raised standing challenge is neither barred by AOPA nor disproven by the administrative record—which it plainly is—the supplemental affidavits submitted with this Reply independently confirm that Save the Dunes' members are

aggrieved and adversely affected by DNR's interpretation and application of the Public Trust Statute.

The Court may properly consider these affidavits because they are submitted in direct response to DNR's newly raised standing challenge. Indiana courts recognize that a party may submit evidence with a reply brief when that evidence is offered "in direct response" to arguments first raised in an opposing party's response brief. *Brightpoint, Inc. v. Pedersen,* 930 N.E.2d 34, 39 (Ind. Ct. App. 2010). That is precisely the circumstance here. As detailed above, DNR never challenged Save the Dunes' standing before the NRC or OALP. Only in its Response to Save the Dunes Opening Brief on judicial review, did DNR argue for the first time that Save the Dunes failed to identify any member who is "aggrieved or adversely affected."

The affidavits submitted with this Reply directly address that contention. Nancy Moldenhauer attests to her longstanding use and enjoyment of Lake Michigan's shoreline and public trust resources, her exercise of vested rights protected by the Public Trust Statute, and the manner in which DNR's interpretation and application of that statute adversely affects those interests.[10] Save the Dunes' Executive Director, Betsy Maher, likewise confirms that the organization seeks the Court's judicial review on behalf of its members, including Nancy Moldenhauer, whose interests are adversely affected by DNR's interpretation of the Public Trust Statute.[11]

Importantly, these affidavits do not identify a new member, a new injury, or a new theory of standing. Rather, they provide sworn confirmation of the same interests and injuries that Save the Dunes disclosed during the administrative proceedings and that DNR elected not to challenge.

[10] Exhibit C (Affidavit of Nancy Moldenhauer).
[11] Exhibit D (Affidavit of Betsy Maher).

Thus, even if the Court looks beyond the administrative record, these supplemental affidavits merely reinforce what the record already demonstrates: Save the Dunes has associational standing to seek judicial review of the agency action challenged in this case.

In sum, DNR's new standing challenge fails at every level. It is barred by Indiana Code § 4-21.5-5-10 because DNR never raised it before the NRC or OALP. It ignores AOPA's express recognition in Indiana Code § 4-21.5-5-3(a)(2) that as a party to the administrative proceeding below, Save the Dunes has standing to seek judicial review. And DNR's new argument is contradicted by both the administrative record and supplemental affidavits demonstrating that Save the Dunes' members are aggrieved and adversely affected by DNR's unlawful interpretation and application of the Public Trust Statute. The Court should therefore reject DNR's newly raised standing challenge and proceed to the merits of this appeal.

II. Respondents' Arguments Confirm the Public Interest Exception to Mootness Applies.

Respondents' briefs reinforce that this case presents an unresolved, publicly important question of statutory interpretation that is certain to recur. As DNR puts it, the agency "considers the state statutory OHWM definition in §14-26-2.1-2 and the USACE OHWM definition in 33 § 328.3 *to be identical*." DNR Resp. at 4-5 (emphasis added). That is the interpretation of the Public Trust Statute that DNR relied on in approving the Town's OHWM delineation. That is the interpretation that DNR and the Town defended throughout the proceedings below. And that is the interpretation DNR continues to insist is the "proper interpretation" of the statute that it will continue to apply. DNR Resp. at 30. So while the Town may have abandoned Permit LM-255, DNR has not abandoned its legal interpretation of the Public Trust Statute that is at issue here.

And, aside from their repeated refrain that this case involves a "fact-specific administrative action" that is confined to "one delineation, for one permit, for one revetment project, in one town

on Lake Michigan" (e.g., DNR Resp. at 17), neither Respondent explains why DNR's *interpretation* of the Public Trust Statute is somehow not a matter of great public importance. *Gunderson* squarely held that it is. 90 N.E.3d 1171, 1175 n.3, 1185 (Ind. 2018) (concluding DNR's interpretation of its statutory authority as allowing it to supplant the common-law OHWM definition and use a fixed regulatory value instead, presented an issue of "great public interest.") The Court explained that the significance of the issue lies in the fact that the common-law OHWM establishes not only the extent of public trust shoreline, but also the rights that attach to it. 90 N.E.3d at 1175 n.3, 1186-87. The same is true here.

DNR's interpretation of the common-law definition of Lake Michigan's OHWM, now codified in statute, will be used to draw the legal boundary between public trust and private land every time DNR determines the location of the OHWM in a permitting decision, as the agency itself concedes. DNR Resp. at 3. Given the "strikingly different" outcomes that can result from application of the common-law definition versus Army Corps' definition,[12] DNR's insistence that the two definitions are "identical" is no less publicly important than its prior insistence in *Gunderson* that the common-law OHWM could be replaced with a fixed regulatory value.

Even so, Respondents try, but fail, to distinguish *Gunderson.* For its part, the Town insists that "nowhere in the *Gunderson* opinion does the Court address mootness or the public interest exception" because "the controversy existing in *Gunderson* remained live throughout the litigation." Town Resp. at 8. That is demonstrably false. The Court expressly relied on the public interest exception to mootness in rejecting DNR's similar argument that "the case was rendered moot when . . . the Gundersons sold their Disputed Property to a real estate developer." *Gunderson v. State*, 90 N.E.3d at 1175 n.3 (emphasis added, internal citation omitted). The Court reasoned

[12] R. Pt. 1 OALP000051 (Order Denying Summary Judgment at ¶¶ 77, 80).

that it "need not decide the question of mootness" because the case involved "questions of great public interest." *Id.* The Town's contention otherwise relies on patently misrepresenting the facts and ruling in *Gunderson*.[13]

DNR's attempt to distinguish *Gunderson* fares no better. According to DNR, *Gunderson* stands in "stark contrast" because it involved DNR's adoption of a statewide regulatory definition of the OHWM whereas this case "presents only the question of whether Respondents correctly applied the now-codified OHWM definition in delineating the OHWM for a single construction permit along a small portion of the Lake Michigan beachfront, not a statewide policy shift." DNR Resp. at 15-16. There are two key problems with this.

First, DNR's argument cannot be reconciled with its position before the NRC. After the NRC denied the parties' cross-motions for summary judgment concluding the question of DNR and Army Corps' "overlapping jurisdictions" and "overlapping delineation factors" presented genuine issues of material fact,[14] DNR moved for reconsideration of that ruling. In support, DNR

[13] This is not the only misstatement of law in the Town's brief. In its version of the "Standard of Review," the Town fundamentally misrepresents the law governing judicial review of an agency action. The Town declares that "an agency's interpretation of a statute is entitled to great weight, unless [the] interpretation would contravene the statute itself." Town Resp. at 2. Not so. In 2024, the Indiana General Assembly eliminated judicial deference to agencies' findings of fact and interpretations of law. *See* 2024 Ind. H.E.A. 1003 § 12 (codified at Ind. Code § 4-21.5-5-11). The amendment strikes statutory language that previously prohibited a court from "substitut[ing] its judgment for that of the agency." *Id.* Instead, the new law unambiguously provides that a court "shall decide all questions of law . . . *without deference* to any previous interpretation made by the agency." *Id.* (emphasis added). This reform restored the judiciary's traditional, independent role in reviewing agency determinations—both legal and factual—and removed any presumption of correctness previously afforded to administrative findings of fact and conclusions of law. *See Ind. Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC,* 248 N.E.3d 1205, 1210-11 (Ind. 2024) (observing that the General Assembly "[in 2024] enacted major administrative-law reforms declaring among other things, that a court must decide legal questions 'without deference' to interpretations by an AOPA agency" such that courts must determine whether an agency's interpretation is "right," not merely "reasonable"). The Town's representation otherwise is wrong.

[14] R. Pt. 1 OALP000051 (Order Denying Summary Judgment at ¶¶ 83-86).

was adamant that these issues "are questions of law and statutory construction," not fact, and "should be decided as a matter of law."[15] Accordingly, DNR averred "[i]t would be an exercise in futility to have a hearing on the merits related to [DNR's] interpretation of the definition of the OHWM, which is a question of law and not a question of fact."[16] Thus, for DNR to say now that this case turns on a "fact-specific administrative action" to avoid application of the public interest exception to mootness, amounts to gamesmanship.

So too is DNR's insistence that *Gunderson* is distinguishable because here, "DNR is not attempting to change [the OHWM definition] through statewide rulemaking" as it did in *Gunderson.* DNR Resp. at 15. That argument is impossible to square with DNR's acknowledgement that the Public Trust Statute *codified* the common-law OHWM definition that the agency insists is "identical" to Army Corps' regulatory definition. DNR Resp. at 5. That agency interpretation of a state statute is not specific to Permit LM-255 or the facts of this case. It is the legal interpretation DNR continues to defend as the "proper interpretation" of a statute that applies to DNR's permitting activities along the entire stretch of Indiana's Lake Michigan shoreline. DNR Resp. at 30. Thus, while *Gunderson* involved a statewide regulation that DNR believed had supplanted the common-law OHWM definition, this case involves DNR's interpretation of a statewide statute that the agency believes permits the common-law definition to be treated as identical to the Army Corps' distinct definition. Both cases present the same, publicly important legal question: whether DNR may effectively redraw Lake Michigan's public trust boundary through an interpretation of law that departs from the common-law OHWM definition recognized in *Gunderson*.

[15] Rec. Pt. 1 OALP000203-204 (DNR's Motion to Reconsider).
[16] Rec. Pt. 1 OALP000205 (DNR's Motion to Reconsider).

Having failed to distinguish *Gunderson,* DNR next tries to sidestep other controlling precedent. DNR Resp. at 16-17. DNR contends that the Indiana Supreme Court's decision to apply the public interest exception to mootness in *Matter of Lawrence,* 579 N.E.2d 32 (Ind. 1991) does not apply because that case involved "life and death decisions" that are "notably absent from this case." DNR Resp. at 16. While it is true that DNR's interpretation of Lake Michigan's OHWM is not a matter of "life-or-death," that does not mean the issue is not one of great public interest. *Gunderson* already said that it is, irrespective of any life-or-death consequence, precisely because the OHWM establishes the property boundary between public and private land and thus the scope of public and private rights.

Indeed, Indiana courts have similarly applied the public interest exception to decide otherwise moot cases that do not implicate life and death scenarios but nonetheless raise issues of substantial public concern. A notable example is *Indiana Education Employment Relations Board v. Mill Creek Classroom Teachers Association*, 456 N.E.2d 709 (Ind. 1983). That case involved a teacher association's collective bargaining lawsuit against a school board for failing to maintain the status quo on teacher salaries during contract negotiations as required by state statute. 456 N.E.2d 709, 711 (Ind. 1983). The Indiana Supreme Court relied on the public interest exception to reach the merits despite the lower court's conclusion that the case had been rendered moot by the signing of a new contract. *Id.* at 711. The Court reasoned that the issue was "of great public interest since violations of the statute governing collective bargaining . . . would necessarily undermine the bargaining relationship between school corporations and teachers and have a detrimental effect upon the overall educational environment." *Mill Creek,* 456 N.E.2d at 711. The fact that no one was facing a life-or-death consequence played no role in the Court's decision.

Even so, DNR tries to distinguish *Mill Creek*, asserting that unlike the evidence of recurring statutory violations presented in that case, Save the Dunes has offered only "speculation as to what *might* occur in other fact specific instances . . . not what has 'repeatedly occurred.'" DNR Resp. at 16 (emphasis in original). This argument fails because it rests on a misleading premise that conflates the legal question presented here—whether DNR's interpretation of the Public Trust Statute is lawful—with the separate factual question of where the OHWM falls at a particular location along the shoreline.

DNR is clear that it "considers the [Public Trust Statute's] OHWM definition in § 14-26-2.1-2 and the USACE OHWM definition in 33 C.F.R. § 328.3 to be identical." DNR Resp. at 4-5, 30. Save the Dunes disagrees because that interpretation conflicts with the Public Trust Statute's plain language, objective, and purpose and is thus unlawful. Pet. Opening Br. at 29-39. No amount of site-specific evidence can resolve that disagreement. The question is not where the OHWM is located at a particular site, but whether DNR's interpretation of the statute is correct. That issue turns on principles of statutory construction, not disputed facts, which is precisely why it presents a question of law for the Court. *Horseman v. Keller*, 841 N.E.2d 164, 168 (Ind. 2006) (observing that "the law is clear that 'the interpretation of a statute . . . is not a question of fact, but one *of law* reserved for the courts." (emphasis in original)).

Furthermore, Save the Dunes is not speculating about what *might* occur in the future. Save the Dunes has demonstrated that the legal question presented in this case *is certain to recur.* DNR is the state agency charged with safeguarding the public trust and thus has a legal duty to determine the location of the OHWM every time it considers a permit application for construction along the lakefront. Pt. Opening Br. at 21-22. DNR's own brief confirms this. DNR Resp. at 2-3. And every time it does so, DNR's interpretation of the Public Trust Statute will govern that determination.

The physical characteristics observed at a particular site may vary, but DNR's interpretation of the statute governing how those characteristics are evaluated does not. The recurrence of the issue is therefore not speculative, it is inevitable so long as DNR is allowed to continue applying that unlawful interpretation.

DNR's related assertion that this case does not present a "new or novel" issue confirms that the legal issue presented is certain to recur. DNR insists that "there are no new or novel issues to resolve in this matter" because its "application of the public trust doctrine and delineation of the OHWM along Lake Michigan are *regular occurrences* and have been for decades" DNR Resp. at 17-18 (emphasis added). More fundamentally, DNR again conflates the legal question presented here with a factual one that is not. Save the Dunes does not contend that identifying the location of the OHWM along Lake Michigan is novel. The unresolved question is whether DNR may lawfully interpret the Public Trust Statute's OHWM definition as "identical" to the Army Corps' regulatory definition. DNR identifies no Indiana court that has ever decided that legal question. To the contrary, the NRC declined to decide it, the OALP dismissed the case before it could be resolved, and DNR is trying to evade this Court's judicial review of the issue now.

Finally, the Court in *Mill Creek* did not hold that the public-interest exception applies only where a party can demonstrate a history of repeated violations as DNR contends. Rather, the Court found the issue recurring because it arose "whenever negotiation on a new contract continues after the start of a new school year" and therefore would predictably arise again in the future. 456 N.E.2d at 711. The same is true here. Whenever DNR reviews a permit application requiring identification of Lake Michigan's OHWM, the agency's interpretation of the Public Trust Statute—that it believes allows it to use Army Corps' definition and methods—will again determine where the public trust boundary is drawn. Thus, under the reasoning of *Mill Creek* itself, the recurrence

requirement is plainly satisfied. *See also Horseman,* 841 N.E.2d at 170 (observing that the public interest exception to mootness applies when the same legal question has "*the possibility* of repetition." (emphasis added)).

In short, Respondents' arguments do not undermine application of the public-interest exception to mootness—they confirm it. DNR continues to defend an interpretation of the Public Trust Statute's OHWM definition that determines where the public trust boundary is drawn along Lake Michigan. Because that boundary defines both the extent of public trust land and the public rights that attach to it, the issue is unquestionably one of public importance. And because DNR intends to continue applying the same interpretation in future permitting decisions, the issue is equally certain to recur. *Gunderson, Lawrence,* and *Mill Creek* all confirm that the public interest exception to mootness applies here. The OALP's failure to apply it was clear error.

III. In Any Event, the Respondents' Arguments Confirm the Case is Not Moot.

Respondents' arguments likewise confirm that this case is not moot. Although both Respondents insist that no effective relief remains available following the Town's abandonment of Permit LM-255, DNR Resp. at 11-13; Town Resp. at 3-6, that position rests on a fundamental mischaracterization of the dispute. Respondents repeatedly portray this case as a fact dispute over a single permit for a single shoreline project. But the central controversy has always been a legal dispute over whether DNR lawfully interpreted the Public Trust Statute's OHWM definition in approving that permit. Nevertheless, the Town asserts that Save the Dunes is only now "*reframing the litigation* as a challenge to DNR's interpretation of Indiana's Public Trust Statute" to avoid the "straightforward conclusion" that "there is no cognizable controversy to be resolved." Town Resp. at 4 (emphasis added). This assertion is pure sophistry.

DNR's interpretation of the Public Trust Statute's OHWM definition has been the centerpiece of this case from the outset. Save the Dunes' administrative petition challenged DNR's approval of Permit LM-255 on the grounds that DNR relied on an unlawful interpretation of the Statute's Lake Michigan OHWM definition.[17] Save the Dunes' motion for summary judgment likewise focused extensively on that legal question.[18] And when the NRC declined to resolve it, DNR itself moved for reconsideration, agreeing with Save the Dunes that the dispute presents a pure question of statutory construction that should be decided as a matter of law.[19] For that matter, here are DNR's exact words:

> The question of law at issue here is the definition of [the] ordinary high water mark (OHWM) under Indiana law. This issue was not decided despite extensive briefing by the parties.
> . . .
> *There is no factual dispute* on how to interpret the definition of ordinary high water mark.
> . . .
> Petitioner's case *rests solely* on misapplying the law, not the facts.
>
> In other words, whether Respondents applied the correct factors to delineate the OHWM in March 2023 depends *only on the legal arguments* that the definitions of OHWM are the same in the federal and state law.
> . . .
> It would be an exercise in futility to have a hearing on the merits related to the interpretation of the definition of OHWM, which is a question of law and not a question of fact.[20]

For the Town to say that Save the Dunes is now "reframing" this case from a fact dispute to one about DNR's unlawful interpretation of the Public Trust Statute requires a suspension of reality.

[17] Rec. Pt. 3 OALP001859-001863 (Save the Dunes' Pet. for Admin. Rev. at 9-13).
[18] Rec. Pt. 1 OALP00512-00520 (Save the Dunes' Memorandum in Support of Summary Judgment at 24-32).
[19] Rec. Pt. 1 OALP00203-00205 (DNR Mot. for Reconsideration or Clarification).
[20] Rec. Pt. 1 OALP00203-00205 (DNR Mot. For Reconsideration ¶¶1, 3-4, 9, 15)

This history also exposes the flaw in DNR's view that the voluntary cessation exception to mootness does not apply. DNR contends that "even though the Town has abandoned the revetment project and LM-255," Save the Dunes is relying on the "speculative conduct of private nonparties" to demonstrate that a controversy still exists, not any conduct of DNR or the Town. DNR Resp. at 13. But that characterization is belied by the history discussed above. Save the Dunes challenged DNR's interpretation of the Public Trust Statute's OHWM definition from the outset, and DNR acknowledged that its interpretation of the Statute—that is, DNR's *own conduct*—is the central legal question in the case. The conduct of nonparties is a concern only because that legal question remains unresolved.

As detailed in Save the Dunes' Opening Brief, the NRC issued an emergency stay to halt private landowners from proceeding with revetment construction under licenses issued by the Town, which argued that a DNR permit was not needed because the landowners were building "above" the disputed OHWM. Save the Dunes' Opening Br. at 11, 22-23. If DNR's interpretation is correct—that the Public Trust Statute's OHWM definition is "identical" to Army Corps' definition—then the landowners' construction may proceed above the Army Corps-drawn OHWM without violating Indiana law. But if Save the Dunes is correct—that the two definitions are not the same—then DNR's unlawful interpretation shifts the public trust boundary lakeward and permits construction to occur on public trust land. Save the Dunes' Opening Br. at 7-9. Either way, the legality of that third-party conduct turns entirely on the unresolved statutory interpretation question presented in this case. Thus, the continuing controversy is not about speculative future conduct by third parties. It is about the unresolved legality of DNR's interpretation of the Public

Trust Statute, which continues to govern the parties' rights and obligations today.[21] In sum, even apart from the public-interest exception, which clearly applies here, effective relief remains available, and thus the case is not moot. The OALP's contrary conclusion should be reversed.

IV. DNR's Contention that the Court Lacks Jurisdiction to Review the NRC's Summary Judgment Ruling Has No Foundation in the Law or Facts of this Case.

As a final effort to avoid this Court's review of the legal question left unanswered by the NRC and OALP, DNR asserts that this Court "lacks jurisdiction" to review the NRC's summary judgment ruling because the ruling was "not a final order reviewable under AOPA" and Save the Dunes "failed to exhaust its administrative remedies." DNR Resp. at 20. Both depend on glaring misstatements of law and fact. Although the NRC's summary judgment ruling was interlocutory *when issued*, it became final and reviewable when the OALP, the ultimate authority, issued its final order dismissing the proceeding in its entirety. DNR's contrary argument depends on misrepresenting the law, including the plain language of AOPA, and ignoring the procedural history that followed the NRC's ruling. Indeed, under DNR's theory, once the OALP dismissed the proceeding in its entirety, the NRC's erroneous denial of summary judgment became forever insulated from judicial review. Nothing in Indiana law supports that extraordinary result.

DNR's exhaustion argument is equally flawed. Save the Dunes pursued every administrative remedy available to it, including moving for reconsideration of the NRC's ruling, briefing DNR's motion for reconsideration of the NRC's ruling, and opposing the Town's motion to dismiss before the OALP. In doing so, Save the Dunes urged both agencies to decide the legal question of DNR's unlawful interpretation of the Public Trust Statute that DNR baselessly claims

[21] For that matter, the Town represented to this Court that the litigation has "stymied" its efforts to "complet[e] necessary improvements" demonstrating that the legal dispute at issue is very much alive. *See* Town's Motion to Set Briefing Schedule at ¶6 (Mar. 10, 2026).

they never had the opportunity to address. Once the OALP entered its final dismissal order, over Save the Dunes' objection, no further administrative remedies remained for Save the Dunes to exhaust. DNR's assertion otherwise has no foundation in AOPA or the procedural history of this case.

The NRC's summary judgment ruling was made final by the OALP's final order. Save the Dunes exhausted every administrative remedy available to it, and this Court has jurisdiction to review the legal question the NRC and the OALP erroneously failed to decide.

A. The NRC's Summary Judgment Ruling Became Final and Reviewable When the OALP Dismissed the Proceeding.

DNR spends four pages of its brief arguing a premise that Save the Dunes does not dispute: when the NRC denied the parties' cross-motions for summary judgment, that ruling was interlocutory. DNR Resp. at 20-24. But that observation does not answer the dispositive question here. The issue is not whether the NRC's ruling was final when issued. The issue is whether it became final once the OALP dismissed the entire proceeding. The law is clear that it did. Yet, instead of accurately stating the law, DNR distorts it at every turn.

To start, DNR declares "[t]he denial of summary judgment is not a final judgment, but an interlocutory order that *may only* be raised in an interlocutory appeal." DNR Resp. at 23 (emphasis added, internal quotation removed).[22] Not true. Although "a party who seeks review of denial of a

[22] In support of this proposition, DNR selectively quotes from a footnote in the Indiana Court of Appeals decision in *T.R. Bulger, Inc. v. Indiana Ins. Co.*, 901 N.E.2d 1110, 1114 n.5 (Ind. Ct. App. 2009). What DNR fails to mention is that the procedural posture in that case was entirely different. There, the appeals court held on appeal of a final grant of summary judgment, that the opposing party could not cross-appeal the trial court's previous denial of summary judgment because the appellate court had already denied the party's previous interlocutory appeal of that summary judgment denial. *Id.* That is not the situation here. Save the Dunes never sought interlocutory review of the NRC's summary judgment ruling. Rather, it seeks review only after the OALP entered a final order disposing of the entire proceeding. DNR's reliance on inapposite authority governing interlocutory appeals misses the point entirely.

motion for summary judgment *must do so ordinarily* by way of interlocutory appeal," once final judgment has been entered, "the *interlocutory nature of the denial of summary judgment terminates*." *Keith v. Mendus*, 661 N.E.2d 26, 35 (Ind. Ct. App. 1996) (emphasis added). Accordingly, if a party does not bring an interlocutory appeal of a summary judgment denial, the party "may nevertheless pursue appellate review after the entry of final judgment." *Id.* (explaining further that the court "has long addressed appeals from denials of motions for summary judgment following entry of a final judgment or order." (emphasis added))

That is precisely what occurred here. Instead of pursuing an interlocutory appeal, Save the Dunes waited to seek review of the NRC's summary judgment ruling following entry of the OALP's final dismissal of the case. Thus, the various authorities DNR cites governing interlocutory appeals have absolutely no application here. *See, e.g.,* DNR Resp. at 22 (citing the AOPA provision requiring a petitioner to show "immediate and irreparable harm" and "the lack of an adequate remedy at law" in order to seek interlocutory review of a non-final agency action.)

Recognizing this, DNR next insists the OALP's dismissal order "is not a final judgment on the merits" because "[a] moot case lacks a 'controversy at issue' for the trier of fact to adjudicate on the merits." DNR Resp. at 24. This argument is misleading and baseless; misleading, because the OALP's refusal to "adjudicate the merits" of this case does not mean its dismissal order is not a "final order," which is the dispositive inquiry here. DNR's argument is baseless because as DNR's own brief acknowledges, a "final agency action" subject to judicial review under AOPA "is either (1) 'the entry of an order *designated as a final order*' . . . or (2) an agency action 'that *disposes of all issues* in a proceeding for all parties after the exhaustion of all available administrative remedies.'" DNR Resp. Br. at 21 (citing Ind. Code § 4-21.5-1-6, emphasis added). Both definitions of final agency action are satisfied here.

The OALP's dismissal order leaves no doubt. It expressly states, "[t]his is a final order."[23] And, the OALP's dismissal ended the proceedings for all parties with no further administrative remedies to exhaust. Indeed, the dismissal order advised the parties of their "Appeal Rights," stating "[a] person who wishes to seek judicial review of this final determination must file a petition for review in an appropriate court within thirty (30) days of the date this Order was served."[24] For DNR to now say that the OALP's dismissal order is somehow not final because it is "not a final judgment on the merits" is tantamount to substituting a requirement that appears nowhere in AOPA's definition of a final agency action.

Even so, DNR makes much of the fact that when the NRC denied summary judgment, the presiding administrative law judge ("ALJ") was not the NRC's ultimate authority. DNR Resp. at 22-23. No one disputes that. But it is beside the point because the NRC never became the ultimate authority in this case, the OALP did. Before the NRC's ALJ had a chance to rule on the pending motions for reconsideration, jurisdiction over the proceeding was transferred to the OALP, which became the ultimate authority. Ind. Code § 4-15-10.5-12 (the OALP "is the ultimate authority in any administrative proceeding under its jurisdiction.") Rather than deciding the pending motions before it, the OALP dismissed the case as moot, thereby terminating the administrative proceeding in its entirety. That final order is plainly subject to judicial review. Ind. Code § 4-15-10.5-12 ("[j]udicial review under [AOPA] shall be taken directly from a final decision of the [OALP]"); Ind. Code § 4-21.5-3-27(a) ("the ultimate authority's order disposing of a proceeding is a final order.").

[23] Rec. Pt. 1 OALP00002 (Order Granting Mot. to Dismiss at 2 (Nov. 17, 2025)).
[24] Rec. Pt. 1 OALP00002 (Order Granting Mot. to Dismiss at 2).

So too is the NRC's interlocutory summary judgment ruling, which became final and reviewable upon entry of the OALP's final order. To hold otherwise would create an untenable jurisdictional loophole. Indeed, under DNR's theory, an agency could avoid judicial review of its own erroneous interlocutory ruling simply by entering a final order dismissing the proceeding without addressing the error, as the OALP did here. Nothing in AOPA or elsewhere in Indiana law authorizes such a result. The OALP's final order terminated the interlocutory nature of the NRC's summary judgment denial. *Keith v. Mendus*, 661 N.E.2d at 35 (once a final judgment or order has been entered, "the *interlocutory nature of the denial of summary judgment terminates*"). This Court therefore has jurisdiction to review both the OALP's erroneous dismissal and the NRC's denial of summary judgment for Save the Dunes.

B. Save the Dunes Has Exhausted Every Administrative Remedy Available to It.

DNR's exhaustion argument fails for the same reason as its finality argument: it flatly ignores the procedural history of this case and, in particular, what occurred after the NRC erroneously denied summary judgment. According to DNR, "neither the NRC nor OALP had a chance . . . to determine whether Respondents properly delineated the OHWM under Indiana law" because Save the Dunes failed to exhaust its administrative remedies. DNR Resp. at 24-26. The record demonstrates precisely the opposite.

After the NRC denied the parties' cross-motions for summary judgment that had already extensively briefed the issue, DNR moved for reconsideration, pointing out to the NRC that it had improperly treated that pure question of statutory interpretation as a factual issue. Save the Dunes agreed and likewise moved for reconsideration, urging the NRC to decide the unresolved legal

question before proceeding to a final hearing.[25] The NRC responded by vacating the final evidentiary hearing and ordering briefing on the pending motions for reconsideration.[26] Thus, rather than abandoning the issue, both parties expressly asked the NRC to resolve it before any further proceedings occurred. DNR's own brief acknowledges as much, conceding that "[b]oth Petitioner and DNR filed motions to reconsider the order denying summary judgment" and that "[n]either the NRC nor OALP issued an order on these cross-motions for reconsideration prior to dismissing the matter as moot." DNR Resp. at 25 n.6.

When jurisdiction transferred to the OALP, the pending motions transferred with it. After the Town moved to dismiss the case as moot, Save the Dunes urged the OALP to deny the motion and decide the publicly important question of statutory interpretation left unresolved by the NRC.[27] The OALP declined to do so and instead dismissed the case.[28] Thus, DNR's repeated assertion that the agencies "never had a chance" to decide the issue is directly contradicted by the record below—and, indeed, by DNR's own description of it. The agencies had every opportunity to decide the issue. They simply refused to.

More fundamentally, nowhere in its response brief does DNR identify a single administrative remedy that Save the Dunes purportedly failed to pursue. Nor could it. AOPA makes clear that the OALP "is the ultimate authority in any administrative proceeding under its jurisdiction," and judicial review "shall be taken directly from a final decision of the office." Ind. Code § 4-15-10.5-12. Once the OALP dismissed the proceeding, there was nowhere else for Save the Dunes to go within the administrative process.

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[25] Rec. Pt. 1 OALP000086 (Pet'r's Combined Mot. Reconsider & Correct Error, & Resp. to DNR's Mot. Recons. or Clarification ¶ 1); Rec. Pt. 1 OALP000203 (DNR Mot. Recons. or Clarification).
[26] Rec. Pt. 1 OALP000180 (Order Vacating Hr'g & Setting Deadline for Pleadings).
[27] Rec. Pt. 1 OALP000035 (Pet'r's Resp. Opp'n to Town's Mot. Dismiss for Mootness).
[28] Rec. Pt. 1 OALP00001-00002 (Order Granting Motion to Dismiss).

DNR's exhaustion argument therefore turns AOPA on its head. Save the Dunes did everything AOPA required. It presented the legal issue to both the NRC and the OALP, urged both agencies to decide it, opposed dismissal of the case as moot, and sought judicial review only after the OALP entered its final order. The agencies' collective refusal to decide the legal question after nearly three years of litigation cannot be transformed into a failure by Save the Dunes to exhaust its administrative remedies.

In short, DNR's argument that this Court lacks jurisdiction collapses under both the law and the procedural history of this case. The OALP's final dismissal order rendered the NRC's interlocutory summary judgment ruling final and reviewable, and Save the Dunes exhausted every administrative remedy available before seeking judicial review. This Court therefore has jurisdiction to review both the OALP's erroneous dismissal order and the NRC's erroneous denial of summary judgment and should proceed to decide the publicly important legal question the agencies refused to resolve.

V. DNR's Merits Arguments Confirm the NRC Erred in Denying Summary Judgment for Save the Dunes.

Having spent most of its response brief attempting to avoid judicial review, DNR finally turns to the merits. Yet even then, DNR never attempts to defend the NRC's erroneous denial of summary judgment that is based on a non-existent fact dispute. That omission is telling since DNR itself asked the NRC to correct that error and decide the legal question presented. And Save the Dunes extensively briefed this issue in its Opening Brief demonstrating that the NRC's errors violate Trial Rule 56. Pt. Opening Br. at 23-29. Yet, DNR never responds to those arguments. Instead, DNR bypasses the issue entirely and asks this Court to grant summary judgment in its favor as though the NRC's errors never occurred. DNR has thus waived any argument that the NRC correctly denied summary judgment, warranting reversal of the ruling for that reason alone.

DNR's merits arguments fare no better. According to DNR, "[w]here the parties disagree" is whether the Public Trust Statute's list of physical characteristics is exhaustive. DNR Resp. at 26. But that framing fundamentally mischaracterizes the dispute. Save the Dunes' Opening Brief demonstrates through multiple, independent principles of statutory construction that DNR's interpretation cannot be reconciled with the Public Trust Statute's plain language and purpose. Those principles include the legislature's decision to codify the common-law OHWM definition recognized in *Gunderson*, the material differences in language, purpose, and application between the state and federal definitions, DNR's own post-*Gunderson* guidance interpreting the common-law definition, and DNR's sworn admission that it did not determine the common-law OHWM "as that term is defined." Pt. Opening Br. at 29-39. DNR scarcely acknowledges these arguments, much less refutes them. Instead, it focuses almost exclusively on whether the statutory list of physical characteristics is exhaustive while ignoring the broader statutory construction analysis demonstrating why the NRC should have granted summary judgment for Save the Dunes. The Court should correct the NRC's error.

A. By Failing to Defend the NRC's Denial of Summary Judgment, DNR Has Waived Any Argument that the Ruling Complied with Trial Rule 56.

Save the Dunes' Opening Brief devotes six pages to demonstrating the NRC's clear error in denying the parties' cross-motions for summary judgment in violation of Indiana's summary judgment standard and Trial Rule 56. Pt. Opening Br. at 23-29. Those arguments were straightforward. The NRC treated a pure question of statutory interpretation as a genuine issue of material fact, speculated about evidence not designated in the summary judgment record to manufacture a factual dispute, and then declined to resolve the legal question presented despite acknowledging, in detail, the parties' competing statutory construction arguments along with material facts that are not in dispute. *Id.*

Indeed, the NRC's own findings underscore the error. As detailed in Save the Dunes' Opening Brief, the NRC found that following *Gunderson,* DNR published guidance explaining how to identify Lake Michigan's natural OHWM under the common-law definition, including illustrative photos showing the "visible" boundary marked by "recognizable shelving at the toe of the dune bluff and the presence/destruction of terrestrial vegetation"; that the Town's delineation did not follow that post-*Gunderson* guidance but instead used Army Corps' regulatory definition and methods to delineate the OHWM; that DNR approved the Town's delineation, and, by its own admission, "did not make a common-law determination as that term is defined." Instead, DNR viewed its post-*Gunderson* guidance as "outdated" following enactment of the Public Trust Statute because it believed the Statute "superseded" the common-law definition and replaced it with Army Corps' "same" definition, making the agencies' jurisdictional boundaries the same. Pt. Opening Br. at 4-9, 25-29.[29]

The NRC also observed the "striking" and "radical" differences between DNR's post-*Gunderson* guidance for locating the natural OHWM, and the Town's delineation using Army Corps' method, describing the Town's "asserted OHWM" as "more akin to a recent wave break line on the sand [rather] than a long-standing change in soil, terrestrial vegetation, or shelving along the shorefront." *Id.*[30] Nevertheless, the NRC failed to recognize the legal significance of its own findings. And instead, the agency speculated about some hypothetical "environmental factors" or changed site conditions and manufactured a factual dispute where none existed contrary to Indiana's summary judgment standard and Trial Rule 56. Pt. Opening Br. at 11, 27-28.[31] Save the Dunes presented all of this in its Opening Brief. DNR's response never addresses any of it.

[29] Rec. Pt. 1 OALP000063-64 (Order Denying Summary Judgment at ¶¶ 68-70, 77, 80).
[30] Rec. Pt. 1 OALP000051 (Order Denying Summary Judgment at ¶ 80).
[31] Rec. Pt. 1 OALP000065-66 (Order Denying Summary Judgment at ¶¶77, 80, 82)

Apart from a footnote asserting that the NRC did not expressly label those facts "undisputed material facts," DNR never argues the facts themselves are inaccurate, nor does it point to any designated evidence creating a genuine fact dispute. DNR Resp. at 26 n.7. Nor could it. As DNR itself recognized in its motion for reconsideration, the NRC's findings did not create a fact dispute. Rather, they presented "questions of law and statutory construction" that "should be decided as a matter of law."[32]

Bypassing all of this, DNR's response brief simply proceeds as though the NRC's ruling never happened while asking this Court to grant summary judgment in its favor. That is not a defense of the agency decision under review. It is an implicit acknowledgment that the NRC's reasoning is indefensible. Because DNR has failed to respond to Save the Dunes' arguments demonstrating that the NRC's denial of summary judgment violated Trial Rule 56, any contention otherwise has been waived by DNR. *Martin v. Hunt*, 130 N.E.3d 135, 137 (Ind. Ct. App. 2019) ("[f]ailure to present a cogent argument results in waiver of the issue on appeal."); *Phillips v. Lloyd*, 66 N.E.3d 1011 (Ind. Ct. App. 2016) (where a party's "argument is undeveloped, the issue is waived for review").

Without a fact dispute, the only remaining question is the legal one that DNR itself acknowledged should have been decided by the NRC—whether DNR's interpretation of the Public Trust Statute's OHWM definition is lawful. As detailed in Save the Dunes' Opening Brief and further below, DNR's response largely ignores the settled rules of statutory construction that demonstrate the NRC should have resolved that legal question in Save the Dunes' favor.

B. DNR's Response Ignores Settled Rules of Statutory Construction that Demonstrate the Public Trust Statute's Definition of Lake Michigan's OHWM is Not Interchangeable with Army Corps' Federal Regulatory Definition.

[32] Rec. Pt. 1 OALP000203 (DNR's Mot. to Recons.).

DNR insists that the parties' disagreement over the proper interpretation of the Public Trust Statute's OHWM definition boils down to one issue: "whether the list of physical characteristics enumerated in [the definition] is exhaustive." DNR Resp. at 27. Even a glancing read of Save the Dunes' Opening Brief confirms that is simply not the case. In addition to addressing that narrow linguistic issue, Save the Dunes Opening Brief demonstrated through multiple, independent principles of statutory construction that DNR's interpretation that the Public Trust Statute's OHWM definition is "identical" to Army Corps' definition, cannot be reconciled with the Statute's plain language, purpose, application, or its codification of the common-law OHWM definition recognized in *Gunderson.* Pt. Opening Br. at 29-39. DNR's response fails to engage with any of these foundational rules.

While DNR insists that it has always said the legislature codified the common-law OHWM definition in the Public Trust Statute (DNR Resp. at 29), DNR never addresses the legal consequences of legislature's decision. As explained in Save the Dunes' Opening Brief, Indiana courts presume that when the legislature codifies the common law, it intends no change beyond what is declared by express terms or unmistakable implication. Pt. Opening Br. at 35-39. Yet, by codifying the common-law OHWM definition, the Indiana General Assembly did not adopt Army Corps' definition. It did not adopt Army Corps' catch-all phrase that allows delineators to rely on "other appropriate means" to identify the OHWM in the field. Nor did the legislature include any reference—anywhere in the statute—to Army Corps, its Clean Water Act regulations, or Army Corps' delineation methodology. Pt. Opening Br. at 31, 37-38. If, as DNR contends, the General Assembly intended DNR to replace the common-law OHWM with Army Corps' regulatory approach, it would have had to say so clearly—in "express terms or by unmistakable implication." It did not. DNR never addresses this point in its response.

This omission becomes even more striking when viewed alongside DNR's conduct following *Gunderson*. After the Indiana Supreme Court held that the common-law definition of Lake Michigan's natural OHWM is the public trust boundary, DNR developed and published guidance explaining how to identify the location of that natural OHWM on the ground. Pt. Opening Br. at 4-6, 25-26. That guidance was publicly available on DNR's website until the agency abruptly took it down just days after Save the Dunes filed the administrative proceeding below[33]—claiming the guidance is somehow "outdated" due to the enactment of the Public Trust Statute.[34] DNR's response brief never mentions any of this. Nor does it explain why the legislature's decision to codify the very common-law definition that DNR's post-*Gunderson* guidance interpreted somehow rendered the guidance "outdated." DNR's only argument to all of this is that the Public Trust Statute's OHWM definition and Army Corps' definition share similar language. That is not enough. Under well-established rules of statutory construction, words that have one meaning in a particular statutory context frequently have a different meaning in another context. *See* Pt. Opening Br. at 30-35.

Finally, DNR never reconciles its present interpretation with its own sworn admissions. As Save the Dunes demonstrated, DNR admitted under oath that, in approving the Town's permit, it "did not make a common-law determination as that term is defined." Pt. Opening Br. at 10, 25. If the statute codified the common-law OHWM, and DNR admittedly did not determine the common-law OHWM "as that term is defined," then DNR necessarily did not apply the definition the legislature enacted. DNR's response never explains away that contradiction. Instead, it simply

[33] Rec. Pt. 2 OALP001081, OALP001083.
[34] Rec. Pt. 2 at OALP001072 (DNR Resp. to Req. to Admit No. 6)

repeats its conclusion that the two definitions are "identical" while ignoring the statutory construction principles—and its own admissions—that demonstrate otherwise.

Even DNR's chosen issue fares no better. DNR insists that it can rely on Army Corps' definition to delineate the public trust boundary because it is "similar enough" in language to the Public Trust Statute's OHWM definition. Specifically, DNR contends "both the Indiana OHWM definition and the USACE OHWM definition both rely on the same enumerated physical characteristics, the only difference is that Indiana uses the word 'including' while USACE uses 'such as' and 'other appropriate means' to describe the scope of the statutory lists." DNR Resp. at 28. According to DNR, that means "both definitions utilize the same, non-exhaustive list of physical characteristics to identify the OHWM" and therefore it is "entirely proper" for DNR to rely on the federal standard. DNR Resp. at 29-30. There are at least three problems with this.

First, DNR is wrong. Indiana courts interpret "the modifier 'including'" to be "a word of limitation" that is "significantly different from the "verb 'includes.'" *Musgrave v. Aluminum Co. of Am.*, 995 N.E.2d 621, 634 n.9 (Ind. Ct. App. 2013). In contrast, verb "includes," or "include," is widely understood to be a word of expansion, "signal[ing] that the list that follows is meant to be illustrative rather than exhaustive." *In re Order for Payment of Attorney Fees, Reimbursement of Expenses*, 7 N.E.3d 289, 293 (Ind. Ct. App. 2014). For that reason, the Indiana Tax Court made clear that equating the modifier "including" with the verb "includes" is "unreasonable and illogical." *May Dep't Stores Co. v. Ind. Dep't of State Revenue*, 749 N.E.2d 651, 662 (Ind. Tax Ct. 2001). This distinction is also recognized by federal courts. *Dep't of Treasury of Indiana v. Muessel*, 218 Ind. 250, 256 (1941) (citing *Montello Salt Co. v. Utah*, 1911, 221 U.S. 452 (1911)) (explaining that the "ordinary use" of the word "including" is "as a term of limitation, as specifying particularly that which belongs to the genus.")

As a result, courts are skeptical of using "including" as a term of illustration or expansion without additional modifying language such as "including but not limited to." *Dep't of Treasury of Indiana v. Muessel*, 218 Ind. 250, 255–56 (1941) (noting that "[i]f the legislature had intended to use the word 'including' . . . as a term of enlargement rather than as a term of limitation, they could have modified it with the phrase 'but not in limitation of the foregoing.'"); *See also*, *Matter of Estate of Meyer*, 668 N.E.2d 263, 265 (Ind. Ct. App. 1996) (quoting *Muessel* in support of its holding that "including," without additional modification, should be read as a term of limitation).

Second, DNR's fixation on the word "including" only reinforces the flaw in its overall approach. Interpreting the list of physical characteristics in the Public Trust Statute's OHWM definition as open-ended and non-exhaustive, would frustrate the very purpose of the definition, which is to establish the legal property boundary between public trust land and private property. Pt. Opening Br. at 32-35. Property boundaries cannot be defined by an indeterminate list of factors or they would be rendered void. Rather, they are defined by objective physical markers that provide certainty as to where one property interest ends and another begins. *Id.* at 33.

DNR's interpretation would defeat that defeat that legislative purpose. Under DNR's view, the location of Lake Michigan's public trust boundary could be determined by any number of undefined "other appropriate means" borrowed from a federal regulatory scheme the General Assembly never adopted. Such an interpretation would replace an observable property boundary with an inherently discretionary one, frustrating the very purpose for which the Public Trust Statute's OHWM definition was enacted. The Court should reject that interpretation.

Finally, DNR's fixation on the word "including" exemplifies the fundamental flaw in its argument. Statutory interpretation does not turn on a single word read in isolation. As Save the Dunes demonstrated in its Opening Brief, courts must construe statutory language in context,

remain mindful of both what the legislature said and what it chose not to say, presume that the legislature intended the language it enacted to operate logically rather than produce an absurd result, and interpret the statute in a manner that advances—rather than frustrates—its objective and purpose. Pt. Opening Br. at 30-35. The Opening Brief also explained that the legislature's enumeration of specific physical characteristics, while omitting Army Corps' catch-all phrase and any reference to federal regulations or methodology, carries independent legal significance under the settled principle of *expressio unius est exclusio alterius*. *Id*. DNR's response brief never meaningfully engages with any of these established principles. Instead, it repeatedly returns to the premise that the two definitions share similar language. But similarity alone cannot overcome the statutory text the legislature enacted, the common law it codified, or the rules of statutory construction that govern both. Properly applied, those rules compel only one conclusion: the Public Trust Statute's definition of Lake Michigan's OHWM is not interchangeable with Army Corps' distinct federal regulatory definition. The NRC should have granted summary judgment for Save the Dunes. This Court should correct that error.

CONCLUSION

The Respondents' briefs confirm that this appeal presents exactly the question Save the Dunes identified in its Opening Brief: whether DNR may lawfully interpret the Public Trust Statute's codified, common-law definition of Lake Michigan's ordinary high water mark as interchangeable with the U.S. Army Corps of Engineers' distinct federal regulatory definition. Rather than defend the NRC's and OALP's collective failure to decide that publicly important question, Respondents attempt to avoid judicial review through untimely procedural defenses, unfounded mootness and jurisdictional arguments, and a merits analysis that largely ignores the settled rules of statutory construction that apply.

For the reasons set forth in Save the Dunes' Opening Brief and confirmed by this Reply, the Court should reject Respondents' unfounded procedural defenses, reverse the OALP's dismissal order, vacate the NRC's summary judgment order, grant summary judgment in favor of Save the Dunes on the proper interpretation of Indiana Code § 14-26-2.1-2, and remand this matter for further proceedings consistent with the Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 26, 2026, service of the foregoing document was made on the following parties of record via the Indiana courts electronic filing system.

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