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OFFICIAL OPINION NO. 38

August 15, 1956

Mr. Harley G. Hook
Director
Indiana Department of Conservation
311 West Washington St.
Indianapolis, Indiana

Dear Mr. Hook:

Your letter, requesting my Official Opinion concerning fish ladders, reads as follows:

“What is the authority, duties, and responsibilities of the Indiana Department of Conservation to build fish ladders over dams or to maintain and repair existing fish ladders?”

The answer to this question is found in the Acts of 1937, Ch. 21, Secs. 106 and 107, as found in Burns' Indiana Statutes (1956 Repl.), Sections 11-1617 and 11-1618, which read as follows:

“(a) The owner or owners of any dam across any of the rivers, streams or watercourses in this state now existing or hereafter constructed, when such dam is the height of four [4] feet or over, shall construct and maintain fish ladders on such dam sufficient to allow the fish below the dam to pass over such dam into the waters above. *Such fish ladders shall be constructed in such manner and of such materials as shall be prescribed by the director.*

“(b) If the owner or owners of any such dam shall fail or refuse to comply with the provisions of this act, then *it shall be the duty of the trustee of the township* in which such dam is situated, notwithstanding it may be within some incorporated city or town, to proceed to erect on said dam such ladders as will afford a passage for such migrating fish below such dam over into the waters above such dam, *and the cost thereof shall be a debt due from the owner or owners of such dam and water power, and shall constitute a lien on such dam and water power and so much of the real estate*

on each side of said dam as may be used in connection therewith belonging to such owners and necessary to a proper use and enjoyment of such dam and water power, and if the owner of such dam shall fail or refuse to pay the amount thereof to such trustee, on demand, he shall sue and recover the same, and may also have foreclosure of such lien as in case of foreclosure of mortgages, and the Court shall order the sale of such dam, water power and real estate as other real property is sold on execution without relief from valuation or appraisal laws; and wherever any dam is now located or may be constructed across any river, stream, or watercourse forming the boundary line between two townships, or between two counties, then the trustee of either township in which any part of said dam is situate, in case of such failure, may construct such ladder and have the same remedy against such owner or owners as is provided where any such dam is situate wholly in one township.”

“(a) It shall be the duty of the owner or owners of any dam in the state of Indiana to keep the fish ladders required under provisions of this act in repair, and if any shall become out of repair, the owner or owners of the dam on which such fish ladder is located shall repair the same. The trustee of the township in which such dam is located shall, upon failure of the owner or owners thereof to repair such dam or keep the same in repair, after thirty [30] days’ written notice to the owner or owners of such dam, make such repairs as may be necessary or proper and recover the cost thereof from such owner or owners as provided in this act in cases of failure to construct such fish ladders.

“(b) It shall be unlawful for any person, firm, or corporation to fail to construct or permit to become out of repair any fish ladders required under the provisions of this act.” (Our emphasis)

You will note that there is no reference to the Indiana Department of Conservation and the only one to the Director of the Indiana Department of Conservation is that “such fish ladders shall be constructed in such manner and of such mate-

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rial as shall be prescribed by the Director." The Act cited above makes the owner or owners of dams of the height of four [4] feet or over responsible for constructing and maintaining fish ladders. They shall construct such fish ladders in the manner and as of such material as to be prescribed by the Director of the Indiana Department of Conservation. If they fail or refuse to do so, I find no authority for the Director of the Indiana Department of Conservation to build or to repair such fish ladders, but it becomes *the duty of the trustee of the township in which such dam is situated to erect such ladders.*

It is also the duty of the owners of the dam to keep fish ladders in repair and upon failure to so do the trustee of the township shall, after proper notice, make such repairs.

The Act also provides that it shall be unlawful for any person, firm, or corporation to fail to construct or permit to become out of repair, any fish ladders required under the provisions of the Act, and the Act further provides:

"Any person violating any provisions of this act for which no specific penalty is hereinbefore provided shall be deemed guilty of a misdemeanor and upon conviction shall be punished, for the first offense, by a fine in any sum not less than ten dollars [\$10.00] or more than one hundred dollars [\$100.00], to which may be added imprisonment in the county jail not to exceed sixty [60] days, and for any subsequent violation of any provision of this act for which no specific penalty is hereinbefore provided such person shall be deemed guilty of a misdemeanor and shall upon conviction be fined not less than twenty-five dollars [\$25.00] nor more than two hundred fifty dollars [\$250.00], to which may be added imprisonment in the county jail not to exceed sixty [60] days. * * *"

Acts of 1937, Ch. 21, Sec. 157, as found in Burns' Indiana Statutes (1956 Repl.), Section 11-1809.

Such criminal action may be initiated by an affidavit by any complaining citizen upon approval of the prosecuting attorney of the county in which the offense occurs, as in other criminal actions.