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

March 18, 2008

AOPA Committee Members Present
Jane Ann Stautz, Committee Chair
Mark Ahearn
Doug Grant
Mary Ann Habeeb
Robert Wright

NRC Staff Present
Sandra Jensen
Stephen Lucas
Jennifer Kane

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 12:34 p.m., EDT, on March 18, 2008 in the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With all Committee members present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on January

Robert Wright moved to approve the minutes for the meeting held on January 22, 2008. Mary Ann Habeeb seconded the motion. Upon a voice vote, the motion carried.

Consideration of "Findings of Fact and Conclusions of Law with Non-Final Order Following Order of Remand Issued October 11, 2007" of the Administrative Law Judge with "Objections of Claimant Hoosier Environmental Council, Inc. with Respect to Non-Final Order on Second Remand" in *Hoosier Environmental Council v. Department of Natural Resources (Litigation Expenses Remand II)*, Administrative Cause No. 97-065R

Sandra Jensen, Administrative Law Judge, introduced this matter. She said the present action is for recovery of fees under the Indiana Surface Mining Control and Reclamation Act ("Indiana SMCRA"), which is a state counterpart to the federal law. "This is a case of first impression for the state of Indiana." Jensen provided a brief history of this matter. In 2003, the Commission substituted Special Administrative Law Judge Penrod's findings and nonfinal order with its own, finding that the Hoosier Environmental Council (the "HEC") was to "receive no fees and expenses", which resulted in Court of Appeals

reverse and remand reported at 831 N.E.2d 804 (*first remand*). In August 2006, the Commission entered its final order on remand. Both the HEC and the Department of Natural Resources (the "DNR") filed judicial review. In July 2007, the Marion Superior Court found that the Commission "erred as a matter of law when it awarded no compensation to HEC for the Objections and Judicial review Phases of the Foertsch Permit Proceedings", and remanded the matter back for further proceedings (*second remand*). The present nonfinal order is result of this second remand.

Jensen noted that there were three "potentially substantive" corrections to the nonfinal order. "The parties did not file objections relative to these… and are in concurrence with those corrections".

On page 52, the Nonfinal Order is amended as follows:

> The Department is ordered to pay to HEC, the total sum of ~~ninety-eight thousand, one hundred seven dollars and thirty-nine cents~~ **ninety-nine thousand, one hundred fifty-four dollars and fifty-seven cents**, $99,154.57, in costs and expenses, including reasonable attorney fees.

On page 46, Finding 279 is amended as follows:

> Delete "~~one~~", to read: "fifty-seven percent (57%)".

On page 47 and 48, the table in Finding 285, is amended to read as follows:

	Administrative Review Phase		Fee Proceeding Phase	
	Hour Based Fees	Expenses	Hour Based Fees	Expenses
Fry	------------------	-------------------	$ 862.67	$118.00
Stant	$10,540.00	$ 672.90	$ 30.00	----------------
Waldo	$ 879.45	-------------------	-------------------	----------------
Norris	$12,675.00	$ 2,429.90	-------------------	----------------
Goodwin	$46,837.50	$ 1,027.31	$ 3,300.00	$364.63
Mullett	--------------------	-------------------	$24,450.25	$375.31
SUB-TOTAL	$70,931.95	$4130.11	$28,642.92	$857.94
TOTAL	**$75,061.95**		**$16,815.49 ($29,500.86 reduced by 43%)**	
	COMMISSION OBJECTION PHASE		**JUDICIAL REVIEW PHASE**	
	Hour Based Fees	Expenses	Hour Based Fees	Expenses
Fry	---------------------	-----------------	$ 3,384.01	$ 180.50
Waldo	---------------------	-----------------	$ 78.00	$ 35.00
Norris	---------------------	-----------------	---------------------	-----------------
Goodwin	$10,612.50	$ 568.21	$ 3,450.00	$ 1,097.44
Mullett	---------------------	-----------------	---------------------	-----------------
SUB-TOTAL	$10,612.50	$ 568.21	$ 6,912.01	$ 1,312.94
TOTAL	**$4,192.77 ($11,180.71 reduced by 62.5%)**		**$3,084.36 ($8,224.95 reduced by 62.5%)**	
GRAND TOTAL			**$99,154.57**	

Mark Ahearn noted that in Finding 115 the word "that" should be amended to "than". MaryAnn Habeeb noted in Finding 124, page 24, fourth to last line, the word "succeeding" should be amended to "succeeded". Jensen affirmed the corrections.

Michael Mullett, representing the HEC, indicated three remaining fee and expense items that remain in dispute: (1) attorney's fees and expenses to be awarded for the services of attorney Max Goodwin; (2) litigation expenses to be awarded for the wages and expenses of HEC employees Fry, Waldo, and Stant, as paralegal assistants to attorney Goodwin in the "objections" and "judicial review" phases of the underlying Foertsch permit litigation; and (3) the derivative of (1) and (2), the recovery percentage resulting from 57% to "69.3%".

Mullett said the law of the case relates both to conclusions of law reached on judicial review and findings of fact that have been made earlier that have been allowed to stand in the course of the judicial review process. "There are two sets of facts that are particularly significant." First, attorney Goodwin petitioned for a total of 458 hours and HEC employee Stant claimed a total of 590 hours. Mullet noted that the Commission, in its August 2006 order, allocated 123.75 hours of Goodwin's time and 61.5 hours of Stant's time to the objection and judicial review phases of the underlying case, which are found at Finding 239, and Findings 256 and 257 respectively.

Mullett explained that the nonfinal order disallows "in its entirety" 30 hours of the 123.75 hours of Goodwin's time and disallows all 61.5 hours of Mr. Stant's time. "Having disallowed those portions of Mr. Goodwin's and Mr. Stant's time, as far as the balance of Mr. Goodwin's time, and as far a Mr. Waldo's and Mr. Fry's time and expense the nonfinal order allows only 37.5% of that time and expense. It's HEC's petition that both of those determinations are errors of law, because they both contravene the law of the case and the specific legal conclusions of Judge Keele's order from which this proceeding is now a remand. The basic reason that the Goodwin time, the 30 hours, and the Stant time of 61.5 were originally not allowed, is because they were allocated to the objections and judicial review phases of the case. At that particular time, HEC was not being awarded any money for those phases. Mullett explained that the theory that the Commission had at that particular point was that the determination of awards should be done on a phase by phase basis. Judge Keele's order finds the Commission's determination is "wrong as a matter of law; that what matters is the result in the end. That's what determines whether or not a party is eligible and entitled to an award based on the result in the end, and then the party is entitled to an award for the aggregate fees and expenses reasonably incurred in all phases of the case—administrative review, objections, and judicial review."

Mullett directed the attention of the AOPA Committee members to Judge Keele's Findings 12, 15, 16, 21, and 22. Those findings are "basically the reason we are here". He noted that HEC is entitled to the aggregate of the fees and expenses it incurred in those phases, "because the issues that were at stake on which HEC prevailed in the case, were legally related to the issues in the case on which [HEC] did not prevail. When

that's the case, then you are entitled all of the fees and expenses that you've incurred whether or not you prevailed with respect to particular issues or not."

Mullet said that since HEC is now allowed to recover for the objection and judicial review phase, "our position would be we should get 100% of that time" for Stant, Goodwin. "But even if you accept the nonfinal order, we should get at least 37.5% of that time and that expense." Mullett provided the AOPA Committee members *HEC's Modifications to the NRC Order on Remand and ALJ Non-final Order on Second Remand*[1].

Ihor Boyko, Counsel for the Department of Natural Resources, stated that HEC is requesting the AOPA Committee to "ignore the law, and I don't think that is the intent of Judge Keele's second remand." The remand order is "not at all clear as to what Judge Keele intended. I think he did intend to continue to have the AOPA Committee and the NRC exercise their legal discretion in this case. There's nothing that I see in Judge Keele's remand order that says 100%". He noted Judge Keele criticized the NRC order for disallowing HEC's fees and expense in their entirety for the objections and review phases (Finding 13, p. 6). However, Judge Keele concluded that "it's not warranted to deny in their entirety fees" and that HEC is "entitled to reasonable fees". (Conclusion of Law 15, p. 7) Boyko stated that the law requires that fees be "reasonably incurred." He

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[1] In pertinent part, the *Modifications* document is inserted here:

HEC's reading of the Superior Court Order requires an award in full of the following additional fees and expenses completely disallowed in the Commission's August, 2006 Order on Remand, and partially disallowed in the ALJ's Non-final Order on Second Remand for the so-called "Objections" and "Judicial Review" phases of the underlying Foertsch permit proceedings:

Goodwin Fees (*see* Finding 239 & App. B) 123.75 hrs x $150/hr =	18,562.50
Goodwin Expenses (*see* Finding 244 & Appendix B)	1,665.65
Fry Time (*see* Findings 249-250 & Appendix B)	3,384.01
Fry Expense (*see* Findings 251-252 & Appendix B)	180.50
Waldo time (*see* Finding 253 & Appendix B)	78.00
Waldo Expense (*see* Finding 254 & Appendix B)	35.00
Stant Time (*see* Finding 259 & Appendix B)	1,230.00
Total	$25,135.66

Adding this total amount to the previously approved amount for the "Administrative Review Phase" of $75,061.95 (*compare* NRC Finding 276 and ALJ Finding 273 of same amount) results in a new total for all three phases of the underlying Foertsch proceeding prior to the HEC fee proceedings of $100,197.61 (*compare* ALJ Finding 273 of $82,339.08)

Dividing this new total by the initial HEC Fee Request for the underlying Foertsch litigation as previously found by the NRC of $144,683.42 (*compare* NRC Finding 262 and ALJ Finding 272 of same amount) results in a recovery percentage of 69.3% (*compare* ALJ Finding 274 of 57.0%). Applying this percentage to the amount of otherwise allowable fees and expenses for the "Fee Petition Phase" through May 31, 2002, of $29,500.86 (*see* NRC Finding 274 and ALJ Finding 283 of same amount) results in a new award for the "Fee Petition Phase" through May 31, 2002, of $20,444.09 instead of the $15,045.44 approved in the initial Commission Order on Remand (*see* Finding 276) or the $16,815.49 in the ALJ's Non Final Order (*see* Finding 284).

Finally, summing $100,197.61 and $20,444.09 results in a total ward to HEC of fees and expenses through May 31, 2002 of $120,641.70 instead of the $90,107.39 previously approved by the NRC (*see* finding 276) and the $99,154.57 currently proposed in the ALJ's Non-Final Order (*see* Ordering Paragraph).

noted that the law uses the word "aggregate", but "that's tempered by other requirements—that fees be reasonably incurred, a requirement that the costs be appropriate, there has to be some degree of success on the merits, and a substantial contribution made."

Boyko said that HEC continued to litigate in the objections and judicial review phases, and "they actually lost ground. They lost ground before the Natural Resources Commission and they completely failed to achieve any kind of success at all before the Daviess Circuit Court, which basically affirmed" the NRC. He noted that HEC has been determined to be a prevailing party, DNR is "no less" a prevailing party. DNR was affirmed. HEC did not achieve the stay of the permit. "We are not dealing with a give-away program here. Each dollar that is awarded has to be justified and based on legal principles. Attorney fees under the 'American Rule' are the exception, and any doubt has to be construed in favor of the states." The Commission has been "more than liberal" in awarding fees to HEC in this matter. "In my mind 37.5% for unsuccessful phases of the case is more than adequate compensation to award HEC." Boyko concluded that the Administrative Law Judge's nonfinal order should be affirmed, and the Hoosier Environmental Council's objections should be rejected and denied.

Mullett referenced Judge Keele's Finding 12, and stated that DNR's arguments are "misplaced here on the second remand. They were the arguments that were rejected by Judge Keele". He stated that Finding 12 "rebuff[s] the theory being advanced by DNR. The contract here is between what the Commission did with the administrative review phase, which was correct, and what it did with the objections and judicial review phase, which was incorrect." Mullet noted that the relevant SMCRA authority for the instant case is "not the *Utah International* case, that the DNR and the Commission relied on; it's *Save Our Cumberland Mountains*. In that case the court ruled that what mattered with whether the group had achieved a requisite degree of success for the reward of fees in the end, not whether it achieved success at each stage of the case along the way." He concluded that HEC is entitled to the recovery of reasonable fees and expenses for all phases, and not merely the administrative review phase of the Foetrsch permit proceeding. He noted that the AOPA Committee has discretion, but "not to make errors of law."

Boyko agreed with Mullett that the AOPA Committee does not have the authority to make errors of law. "Again, I do not see anything in Judge Keele's order that requires the Commission to ignore legal principles on remand." He noted that if Judge Keele expected the Commission to apply 100% requirement, "then he would have stated so, and I don't see that".

The Chair opened the floor for AOPA Committee member discussion.

Habeeb asked whether the DNR ~~participate~~ participated in the objections phase and the judicial review phase. Boyko answered, "Yes. In fact, during the objection phase, as I recall, DNR just wanted a footnote removed and something else corrected. During the judicial review phase, it was actually Foertsch that filed the objections. So DNR was just

there as a party." Habeeb asked whether DNR defended the Commission's position on the judicial review phase. Boyko answered in the affirmative. Habeeb then asked, "What is your position on the challenge by HEC that the Commission should exert the influence of the Court in the prior decisions that said you should look at all the issues, and if all the issues that were litigated are the same issues on administrative review that are the ones on appeal; therefore, it's the aggregate?" Boyko stated that as he recalled HEC was arguing that the permit should be denied. "They weren't happy with what they achieved so they were continuing to argue on judicial review that the permit should be denied…There was a component of their argument that did not succeed at all on judicial review."

Habeeb asked, "Are there any different issues on objection and judicial review than on the administrative review phase?" Boyko explained that the permit originally allowed for a disposal limit of coal combustion waste of 75%, which was modified by the Commission to 50%. "So, actually HEC lost ground during the objections phase".

Mark Ahearn stated, "The very reason that there is a case in controversy here is because there is really no clear guidance from any court that says 'pay them all' or 'don't pay them all'. So that then leaves us with trying to come up with a calculus involving the factors of which party was successful on what issues, to what extent were they successful, and to what extent are those issues connected. It's asking, initially Judge Jensen, and now us to look not just at procedurally what's happened, but to look at the facts that occurred." Ahearn also stated that he did not think Judge Jensen's findings and conclusions contained errors of law.

Ahearn then moved to affirm Judge Jensen's findings of fact, conclusions of law as written. Robert Wright seconded the motion.

Chairwoman Stautz asked if there was further discussion. Habeeb stated, "I don't think we are bound by 100%. I don't think it's the law for us, arguably anyway."

Chairwoman Stautz called for a vote on Ahearn's motion. The motion carried on a voice vote by 5-0.

Consideration of "Findings of Fact and Conclusions of Law with Non-Final Order on Competing Motions for Summary Judgment" of the Administrative Law Judge with "Objection to Notice of Filing of Findings of Fact and Conclusions of Law with Non-Final Order" by Rodney Faulk in *Rodney L. Faulk v. Department of Natural Resources*, Administrative Cause No. 07-165D

Sandra Jensen, Administrative Law Judge, introduced this matter. She said the case is "relatively complicated in terms of trying to sorting through the administrative rules and statutory authorities." She said Faulk's application for a wild animal possession permit, to possess a Capuchin monkey. She summarized, "What it amounts to essentially is that

within the State of Indiana the Department is basically in a position where it cannot, in my determination, issue a permit for the possession" of a Capuchin monkey.

Rodney Faulk, attorney, indicated that he was representing himself, as well as represented by Evan Hammond. Faulk noted that he filed an application for a wild animal possession with the Department on July 17, 2007. He noted that Capuchin monkeys are native to Nicaragua and Costa Rica. "They are very friendly and affable towards humans. They are very affectionate." Faulk provided AOPA Committee members pictures of the six-month old female Capuchin. "She seemed to be very likable, loving, and not a threat to humans, and for that reason, I applied for the permit." The permit was subsequently denied.

Faulk indicated that his first legal argument relates to a fairness argument. He said he initially inquired about acquiring a permit for the Capuchin monkey. The Department sent a letter dated May 25, 2007, stating that "spider monkeys were not illegal in Indiana, but the Capuchin monkey from the Cebidae was. Subsequent to that, I was directed to 312 IAC 9-3-18.5, exotic animal, which relates to primates." He noted that the Department forwarded by facsimile a list from Wikipedia indicating that Capuchin monkeys are within the Cebidae subfamily, and "that was the source of the law. Anyone can contribute to Wikipedia. I'm not saying they are not correct. I'm just saying it appears to me to be a little far-reaching to use that as a source when [section] 18.5 limits the restrictions on permitting to the marmoset within the Capuchin family."

Faulk indicated that a Class I wild animal permit pursuant to 312 IAC 9-11 "can and should be issued, because the Capuchin monkeys fall within the permitting scheme and they are not a danger to human life." Faulk noted that Capuchin monkeys have been used in the U.S. to assist persons with physical impairments in the Helping Hands Program. He said, "The Department has maintained that rule 11 provides specifically for the animals permitted therein, namely rabbits and squirrels." Faulk referenced 312 IAC 9-11-5, which covers "*any wild animal which, because of its nature, habits, or status, is not a threat to personal or public safety*", and the "Capuchin monkey certainly is not a threat to personal or public safety."

Faulk pointed out the Department argues that 312 IAC 9-11 does not include Capuchins specifically. "Well, it doesn't really include any animals specifically, but mammals are mentioned there. Primates are mammals, and certainly the Capuchin monkey is a primate. My point here is that if I'm asked to interpret 312 IAC 9-11-1 that there is no primates or Capuchin monkeys mentioned, then what's good for the goose is good for the gander, and the state should be stuck with the way 312 IAC 9-13-18.5(c) is written, such that the marmoset would be the only species within the Cebidae family." Faulk said that if 312 IAC 9-13-18.5(c) was "deemed to be enforceable, then I would just ask that the 'except as otherwise' provision be determinative upon whether or not a Capuchin monkey is lawful under these [rules] as written. And I revert back to [312 IAC] 9-11-1 in that, 'except as otherwise' provision could be pulled in…because the animal is not a threat to person's personal safety. "

Faulk then introduced Evan Hammond. Hammond addressed specifically IC 14-22-2-6(a)(4), which authorizes the Department to regulate the taking, chasing, transporting, and selling of wild animals. "I think it was admitted in Judge Jensen's order that this particular statute by itself does not include a component of the possession of an exotic animal. So, from that point if you just look at that statute, there is a lack of authority for the DNR to regulate the possession of such primates." He further noted that the Department directed his attention to IC 14-22-6-1, which states that "[a] person may not take, chase, or possess a wild animal, except as provided by: (1) a statute; or (2) a rule adopted under IC 4-22-2 to implement this article." He stated, "Our position in this would be but if you apply the 312 IAC9-11, it essentially eliminates this by authorizing a person to possess any wild animal without regulation, except for those specifically identified within 312 IAC 9-11-6 through 312 IAC 9-11-8. A Capuchin monkey is listed no where in that section."

Faulk stated, "The only thing I'm asking for is just a permit for the Capuchin monkey. I think if spider monkeys were left out because of a poorly enacted or adopted statute…that you give the Capuchin monkey a chance. They are very docile animals. They wouldn't bite anyone; it's not in their nature…They can be trained at age three and live to age 45." Faulk concluded, "If you grant me the opportunity for a permit, I don't think you are opening the floodgates for people to have monkeys running around."

Ann Knotek, attorney for the Department, said that many persons possess exotic animals without the benefit of a permit and without the benefit of consulting with the Department to find out what is required from a regulatory standpoint. "Of course, with Mr. Faulk being an attorney himself, he is sensitive to the needs to follow the law. I just want to commend him for that." She also thanked the Division of Fish and Wildlife staff for "all their hard work."

Knotek indicated that the Department is seeking to have the nonfinal order affirmed. "This was challenging to wade through all of the hoops that are present in the fish and wildlife statutes and regulations…This is a very long regulatory rule covering obviously a lot of different animals." She said 312 IAC 9-11 specifically lists of wild animals a person can possess. "With regard to the Class I, it basically talks about rabbits and squirrels." 312 IAC 9-3-18(e) lists wild animals that a person cannot possess. "So we basically have these two regulations kind of coming up against each other, and they are framed from different starting points, and I think that has added to some of the difficulty in this case."

Knotek said the Judge Jensen "took upon herself" to do further research into the law that the Department "perhaps had not done, and found that while there were sections cited as authority, she did not find that they told the whole story. However, there was, if you will, a greater umbrella that gave statutory authority in IC 14-22-6-1. So perhaps one thing this could lead to would be a technical amendment to the rule syncing up the administrative rule with what was found in the nonfinal order to be the proper authority."

Knotek noted that citing to the wrong authority "does not mean a lack of authority" as found by Judge Jensen. ~~She said noted that Faulk believes that a permit for a spider monkey can be obtained, but not a permit for a Capuchin is arbitrary.~~ She noted Faulk argues it's arbitrary to allow a permit to possess a spider monkey but not to allow a permit to possess a Capuchin monkey. "I'm not going to try to second guess why the Department chose the species that it did. If you look at that list there are all sorts of extremely unusual animals, tapers, and aardvarks…. However, one point that was made to Mr. Faulk…is that he has been advised that if he would like to pursue this permit he can petition the Natural Resources Commission as a body for a rule change." Knotek said the Department has determined that it is not going to extend a permit to Faulk; however, Faulk would have the option to seek a rule change. "I think that addresses some of the fairness concerns that [Faulk] has presented."

Chairwoman Stautz opened the floor for discussion.

Doug Grant asked, "There is a long list of wild animals that are permitted, is that what I understand?" The Chair added, "And how is that determined?" Knotek explained that the list of exotic mammals is codified at 312 IAC 9-3-18.5. The Chair asked, "How is this list developed and kept up to date?" Grant asked, "How do we get Mr. Faulk to keep his monkey?" Habeeb asked, "What's in the Cebidae (marmoset)?" Knotek explained, "It is my understanding is that that family is called "New World monkeys, and they are found in Central and South America." Habeeb then asked, "So that's his monkey?" Knotek answered in the affirmative. She explained the Capuchin is popularly known as the "organ grinder" monkey.

Habeeb asked for clarification, "Under the marmosets, is [Faulk's] monkey?" Faulk answered, "No, that's incorrect. The Cebidae family has marmosets, Capuchins, and two other species, but the Capuchins are not listed and that's part of my argument. A strict interpretation of 312 IAC 9-3-18.5 is to just limit not permitted animals to the marmoset in the Cebidae family."

Knotek said, "My understanding from the Department was that the Capuchins were included with what was published in the rule that they cannot have." The AOPA Committee requested further clarification from Linnea Petercheff, EPO Staff Specialist, from the Department's Division of Fish and Wildlife. Petercheff explained that the list of exotic mammals was formatted by Family, because there are way too many species to list in an administrative rule. The intent was to prohibit the taking of those particular species of animals…So, we listed Families, and then in parenthesis we listed some of the species under the Families to give an idea of what kinds of animals were in that particular Family. It wasn't meant to be an all-inclusive".

Habeeb again asked, "You have Cebidae—the rule says 'no marmosets'. Is [the Capuchin] monkey over here, or is [the Capuchin] monkey under the marmoset?" Petercheff said that the Capuchin monkey is in the Family Cebidae. "It is not a marmoset; it's just in the same Family as marmosets."

Ahearn asked the Department whether Finding 61 of Judge Jensen's nonfinal order was an "accurate statement". Knotek said that the statutory authority initially cited "speak to taking, transporting, et cetera, and don't specifically say 'possession'". She said the reason the Department cited the authorities was that "'possession' was implicit in those other four activities…The Department would argue that those authorities are a big enough umbrella to cover the administrative rule to give it proper authority." Ahearn disagreed with Knotek's interpretation. "I think the General Assembly knew what 'possession' meant, because they use it in other statutes but they don't use it here…I think Judge Jensen found her way to the correct answer for this specific case…I'd feel a little less than sanguine about having this opinion posted in CADDNAR for every lawyer and everyone that wants a permit to rely on and to look at for guidance for what the agency thinks it ought to do in terms of permitting these animals…I think we ought to look awfully seriously at either doing technical corrections, or at least deciding what are we permitting and what we are not, and why does it take two lawyers from Marion to come argue about one monkey. Shouldn't it be clear in our rules and not a trap for the unwary"?

Knotek said the specific permitting program at 312 IAC 9-11, with regard to wild animals, lists what animal can be possessed with a permit. "The Department said, and I think quite properly, that there is no room for the Capuchin monkey in that program." 312 IAC 9-3-18.5 lists exotic mammals not allowed for possession.

Ahearn asked the Department for clarification of Judge Jensen's Finding 39. Knotek said, "What that speaks to is the issue where [Faulk] was told 'you cannot have the Capuchin because the Cebidae family is out', but how about a spider monkey? ~~We don't regulate that.~~ We don't regulate that.'" Ahearn then asked, "Would a normal citizen that read that understand that?" Knotek said a "normal citizen" would contact the Department for clarification.

Ahearn said, "I think it is wise for us to give weight to the Department's technical skill and ability". Robert Wright asked, "I wonder why a spider monkey is allowed and the Capuchin monkey isn't allowed?" Ahearn responded, "Knowing that is not my role here today, the real issue is that we probably have to rely upon the expertise [of the Department] even though you say it may not be fair, because I'm sure the spider monkey is not that much different than [the Capuchin] monkey."

Faulk explained, "Spider monkeys are sweet until they get to be about two years old…They get very mean…That's why I didn't choose a spider monkey".

Knotek said Faulk's argument is persuasive, but "I think it goes to the fairness issue and not the legal issue. I think it would be better served by coming back to the Natural Resources Commission and presenting those arguments" for rule change.

Chairwoman Stautz indicated that the present case has brought up "opportunities" for reexamination of the fish and wildlife rules. She then called for a motion.

Doug Grant motioned to approve Judge Jensen's Findings of Fact, Conclusions of Law, and Nonfinal Order as presented. ~~MaryAnn~~ Mary Ann Habeeb seconded the motion.

Chairwoman Stautz asked if there was further discussion. Ahearn said, "[The Department] raised an observation that is applicable to this case, but which is dangerous in government and that's 'wrong authority doesn't mean lack of authority'. That's kind of like inviting the agency to go find a reason for doing something that is not authorized." Habeeb commented, "I agree that the agency certainly shouldn't go shopping for authority, but I do think that from a legal standpoint just because the word 'authority', the authority section of a rule is misstated or incorrect that doesn't mean the rule doesn't have authority…I would suggest that be cleaned up as quickly as possible so that the public understands what the authority correctly is."

Chairwoman Stautz called for a vote on Grant's motion. The motion carried on a voice vote by 5-0.

Consideration of "Findings of Fact and Conclusions of Law with Nonfinal Order" of the Administrative Law Judge with "Claimant Department of Natural Resources' Objections to Finding of Fact and Conclusions of Law with Nonfinal Order" in *Department of Natural Resources v. Freeman Orchard Association, Inc*., Administrative Cause No. 07-129W

Stephen Lucas, Administrative Law Judge, introduced this matter. He explained that for consideration in this matter is the application of the concept of nuisance within the concept of lawful nonconforming use as applied through the rules under the Lakes Preservation Act. "We have had a little experience with lawful nonconforming use, but almost no experience with nuisance within that umbrella of lawful nonconforming use." He noted that the AOPA Committee is "blessed" with the present Counsel "who are very experienced in this area."

Knotek, Counsel for the Department, indicated that the evidence presented by Lt. Sullivan, District 1, which serves Lake Wawasee, discussed a meeting between the lieutenant commanders and Lt Col. Samuel Purvis in terms of formatting an "organized strategy on how to deal with the pier situation" on the public freshwater lakes. Knotek explained that the first time the Department attempted to "bring back" a set of piers on Clear Lake, the Commission's decision was "if you want to bring them back saying that they are too long there is a remedy and that is to pursue them as a nuisance if they are a lawful nonconforming use." She noted that the piers on Clear Lake were found to be a nuisance. Knotek said the 198-foot long pier at issue here is "considered and was established" as a lawful nonconforming use, and the Department pursued "bringing the pier back" as a nuisance as regard to public safety.

Knotek stated that Judge Lucas's Finding 13 cites to 312 IAC 11-5-2(d)(3), that a determining factor of a lawful nonconforming use as a nuisance to public safety the structure would extend more than 150 feet lakeward from the shoreline. She also noted

that Paragraph F in the Nonfinal Order finds that the subject pier "has some impact on navigation and the public trust, but no safety issue is posed" is the "gist" of the Department's objection. "In my reading either the administrative rule is incorrect, the conclusion is incorrect, or there is something happening here that I'm not sure of, and I think one of the issues is that into the whole mix of nuisance has come this issue of 'unreasonable adverse affect' upon public safety. I think that is a new term, and I think probably having spent some time going over this in the mean time, what we are really dealing with here is a rule that states that anything greater than 150 feet has this adverse impact on public safety by definition of its length." Knotek noted that evidence was presented that the subject pier presented this "adverse impact on the safety such that it was a nuisance. Of course we had evidence to the contrary."

Knotek commented that the "bottom line" of the nonfinal order is that the administrative rule exists that defines this "adverse impact solely on length and supports our position, and the question is where does the yellow card turn into the red card, and obviously the Judge's decision said that length itself is not good enough." She explained that the Department's program has been to remove piers out of the high speed boating area, and "we are going to compromise and let the ones already out there stay 175 feet even though we prefer 150, but we are not going to agree to 200."

Stephen Snyder, representing Freeman Orchard, provided the AOPA Committee members a copy of the governing rules. "Being the owner of a riparian area, or at least land abutting the lake, I've always wondered how the state ended up with all the titles to all the lakes when, in fact, when the original government patents were issued by the federal government the landowners got the land under the lakes. The Lakes Preservation Act is the answer." He noted that in 1952 the Legislature adopted the 200-foot restriction zone, and presented his theory as to the intent of the legislation. "My theory is that somebody was about to file suit in regard to the Lakes Preservation Act. The Legislature said, 'We got to throw a bone to the riparian owners because we have taken away all their land and now they want something to protect that area that's immediately adjacent to their lakefront property." Snyder commented that the 1952 legislation "severely" limited the public's right to use any property within 200 feet of shore "as compensation or maybe compromise for having taken all of the land that these owners had prior to 1947." He noted, "That is nothing more than me surmising what happened…but I have no way to prove that fact."

Snyder stated that the public's right to use public freshwater lakes and individuals owner's rights that are created by riparian usage are "always in conflict." He noted that he "understands" the Department's argument; however, reading the regulations in questions "there are different words in different places. "If a pier is presumed, per say, to adversely affect public safety if it's over 150 feet, then that was what the Natural Resources Commission intended—that it does adversely affect public safety. The question then becomes is that, by itself, enough to allow a Section 8 order removing that pier or a portion of it that exceeds 150 feet in length. You have to go one step further, because there has to be a finding that not only that it's adverse to public safety, but that it constitutes a nuisance." Snyder noted that Judge Lucas found that the pier may

adversely affect public safety. "From a very technical standpoint, anything that sticks out from the shoreline affects public safety in an adverse manner."

Snyder said Judge Lucas's nonfinal order finds that the regulations "require a nuisance that adversely affects public safety as opposed to something that simply adversely affects public safety." He noted the nonfinal order also finds that the subject pier "adversely affects public safety by the fact that it is over 150 feet long, but it doesn't affect it significant and unreasonable extent that it becomes a nuisance."

Snyder noted that the 2007 version 312 IAC 11-5-2 was in effect when the instant case was tried and the decision entered. Amendments were made ~~in~~ to the rule that became effective on January 1, 2008. Snyder questioned which version of the rule applies. "Now, I'm not saying that is the basis for your decision, because I think the Judge's decision is sustainable on other bases, but it presents an interesting question."

Knotek said that the history Snyder presented regarding the Lakes Preservation Act is an "interesting theory". ~~commented that~~ But her experience with the 200-foot-from-shore restriction is "it's a law enforcement statute that talks about where boats can and can't operate at high speed. Clearly, the goal of law enforcement is to get piers, other temporary structures, out of the high speed boating area." Knotek said the Lakes Preservation Act program has been aimed at "being sensitive towards the riparian right owners' expectations of having their piers in the lake, and really the 175 feet was seen as a compromise measure." Knotek noted that previous precedents have "talked about this balancing of riparian rights and the public rights from the beginning. One of the things that is clear in the Public Freshwater Lakes Act is that no riparian owner has the right to put any structure or use any part of the lake exclusively."

Mark Ahearn noted that the nonfinal order does not cite to any evidence that the subject pier is a nuisance. Knotek explained that testimony presented by the Department was through Lt. John Sullivan. "He testified that in his opinion…that he found the pier to be a nuisance in terms of public safety by definition of its length." Ahearn noted that "nobody cited any accidents." Knotek explained that the Department has a scheme that is set up where a "pier that is 150 feet or less…that is an expectancy that there is going to be temporary structures within that distance of shore. Then between 150 feet and 200 feet, you have a kind of a 'no man's land' where the idea is that that's a buffer zone. And then 200 feet out into the lake, if it's a high speed boating lake that is an area that is unrestricted and available for people to do high speed boating."

Ahearn asked, "The Department doesn't intend for that to be prospectively applied?" Knotek noted that the discussion hinges on temporary piers structures as lawful nonconforming uses. "I think there is a challenge conceptually dealing with these temporary structures, because it's not like they are going to eventually crumble away and be replaced….They come in and they go out. So what we are really talking about, in my view, is the expectancy of the riparian owner to possess that length of pier year after year…If [the Department] is going to go after a pier as a nuisance because [the Department] believes that it's intruding in the high speed boating area and into the

public's expectation of using that part of the lake…I think that that is the conceptual difficulty with these temporary structures. It's not the monetary value of the pier itself, it's the expectation that these riparian owners are going to have a place to put their boats year after year, and that they can lock in this right even though, obviously under the current permitting rules, such a pier would not be permitted." Knotek noted that in the case involving piers on Clear Lake, the Department made the unsuccessful argument that temporary piers should not be "looked at in the same way as a seawall because they were not truly permanent." The Department was then given the opportunity to pursue the piers as "nuisance, and that's what we pursued here." She concluded, "The gist of this whole argument is, "Do we have to show more? Do we have to show the crashing into the pier, the complaining neighbors, or something more in addition to the length?"

Ahearn noted that the Department might have presented evidence other than length and an officer's testimony. Knotek said, "I have to suggest that if we go searching for discontented neighbors, I think we are likely to find them if we need that in the future." She noted that the Department believes it has presented "enough" to find the pier a nuisance.

Doug Grant inquired as to how the case was initiated. Knotek explained that the Department's Division of Law Enforcement, through Lt. Sullivan, canvassed Lake Wawasee to document piers that were in excess of 150 feet. The Department then approached "person to person for most of them and persuaded most of the residence to bring…their piers back. We had a number who just did it. We had several that were contested that we were able to work out, and we have a few holdouts."

Grant commented the length of piers "does make a hazard when they are at different lengths. Ahearn commented that to establish a nuisance it is fact sensitive. Habeeb asked whether the Division of Law Enforcement found that all piers over 150 feet were a nuisance. Knotek said the Division of Law Enforcement identified the piers over 150, but "focused on piers that are greater than 175 feet, because [Lt. Sullivan's] feeling is that if people wanted to get onboard and come into compliance that he would give them 25 feet above the 150 in a sign of cooperation…if they were a lawful nonconforming use legitimately established".

Ahearn asked, "What is the problem on [Lake] Wawasee?" Knotek explained that the "long piers are the problems…in terms of they were identified as being out in the high speed boating area. The Department went around systematically went around to bring them back." She noted that the issue has been dealt with "primarily through voluntary compliance and then there are a few that have not, and those are still of concern to the Department."

Snyder stated that a pier not only has to adversely affect public safety, "but it has to constitute a nuisance as well." He noted that the rule states that a structure adversely affects public safety if it is, among other criteria, extended or located more than 150 feet lakeward, from the shoreline, "but that still doesn't say that a pier more than 150 feet long is a nuisance and that's the key in my opinion".

Knotek noted that the Department argues that the 175 feet would "respect the buffer zone. The Department did not argue to take it back to 150."

Snyder commented, "You are taking something away if you shorten that pier, but I don't think this was ever intended to amortize out of existence lawful nonconforming uses even though they come out every year and go back in the next spring. I think this was simply to say, 'If we find a nuisance is created by this use that is adverse to public safety, then it can be removed,' but there has to be some evidence." He noted that "though respected' one conservation officer's opinion that a pier is a nuisance "isn't good enough under the law. There has to be some evidence to support that, and there was no evidence. In fact, the evidence was there were two other piers with similar length in the immediate area." Snyder also noted that evidence was presented indicating that boats "travel 300 feet away from the shore in this location because of the curvature of the shore, because of what's on the shore, or because people have had that habit for the last 60 ~~year~~ years, or whatever the case may be."

Habeeb noted Judge Lucas "inserts a new standard 'significant and unreasonable,' which isn't in the rule", and asked for the Department's opinion. Knotek answered, "In a sense that's what this case tells us, because this is the first iteration of this particular case. I think what you have is a concerted effort on the part of Law Enforcement to bring back these long piers in acknowledgement of the rights of the riparian." She added, "The place where I disagree with this expectation is that the statute specifically states that no riparian owner has an exclusive right to use any part of the lake. The Department is pursuing opening up the high speed boating area. What we are going to learn from this case is what hoops does the Department by order of the Natural Resources Commission have to do to make this happen? Do we need a rule change? Do we need a statute change? Are we on the right track? Do we need more evidence? What does it take?" Knotek concluded that the Department is pursuing this "concerted" program in a "fair way" in terms of all of the lake owners, and would apply to all public freshwater lakes.

Chairwoman Stautz called for a motion. Robert Wright moved to approve the Judge Lucas's nonfinal order as presented. Doug Grant seconded the motion.

Chairwoman Stautz asked if there was further discussion. She asked whether the AOPA Committee was "comfortable" with the determination in Finding 43G that the subject pier does not pose both "significant and unreasonable" adverse affects upon public safety? "The concern there is that the statute and rule only really talks about impacting public safety. It doesn't go to the level of what is significant or what is an unreasonable affect."

Habeeb noted that Findings 20, 21, 25, 43, and 43G address the significant and unreasonable standard. "I think what we need to find is that [the pier] is a nuisance…Do we need to find that it was a significant and unreasonable adverse affect on public safety to find that it was a nuisance?" She added that "clearly we have to find [the pier] a nuisance and that it has to adversely affect public safety? Do we want a standard of 'significant and unreasonable'?"

Ahearn noted that Finding 43G is limited to the subject pier. "There is an argument that there is no applicability to anyone else." Habeeb said Finding 20 "makes the standard. It has to be more than a scintilla…but do we want 'significant and unreasonable?'" She added, "The sole issue is whether [the subject pier] is a nuisance."

Ahearn suggested strike the last sentence in Finding 20, and "in each of the other places where [significant and unreasonable] is used as a modifier to the clause 'adverse affects" inserting the word 'sufficient'. The sole issue is whether the subject pier has sufficient adverse affect on public safety so as to pose a nuisance." Habeeb said, "I like that standard." Ahearn said the motion could be amended to include the substitution of the word "sufficient" for "significant and unreasonable". Wright agreed to modify motion by amending the nonfinal order by striking the last sentence in Finding 20, and in Findings 21, 25, 43, and 43G the phrase "significant and unreasonable" to read "sufficient".

Habeeb noted a clerical error in Finding 21, that the word "on" should be inserted after "affects".

Chairwoman Stautz called for a vote on Wright's motion to approve the nonfinal order as modified. The motion carried on a voice vote by 5-0.

Consideration of "Findings of Fact and Conclusions of Law with Nonfinal Order" with "Objections to Findings of Fact and Conclusions of Law with Non-Final Order in Accordance with IC 4-21.5-3-29(d)(1) and (2)" by the Claimants in *Scott Stites, David M. Relue, Mark Pontecorvo and Peter Walters v. RCI Development LLC and Department of Natural Resources*, Administrative Cause No. 06-184W

Stephen Lucas, Administrative Law Judge, introduced this matter. He said for consideration was a license that was issued by the Department for a "group pier". "It's one of the first cases that addresses the 'group pier' issue," which arises as a result of Natural Resources Commission amendments made to the pier rules in 2005. In the course of the proceeding, license terms were modified, but "it ended up with an a affirmation of the modified version of the group license from which other persons on the lake took issue and have now filed objections."

Judge Lucas noted that in Finding 58, the first sentence, the word "was" should be stricken. Habeeb noted another clerical error in Finding 2. The word "Act" was omitted in Finding 2 at the end of the second sentence.

Kim Thomas, representing Claimants, stated that funneling "becomes a big issue on public lakes when you start funneling down in and adding more piers. 'Group piers' is what this matter is about." He said most piers on public freshwater lakes were authorized by the Commission through a general permit, in other words, no permit.

"Group piers" require a permit, and IC 14-26-2-23(e)[2] requires the Commission to adopt objective standards for issuing permits for piers. "If it needs to be permitted, you first have to adopt objective standards."

Thomas said, "When I was doing the hearing on this case, Steve Hazelrigg, an attorney out of Fort Wayne that I've known for thirty-some years, said 'How are you challenging it.' Before we got started, we had a long conversation. Steve says, 'How you going to challenge this. They don't have standards for how you get a group pier. There's what you get when you don't have to get a permit, but how do you get a pier once you need a permit?' I said, 'You're right. There isn't.' I think it's First Sergeant Snyder, and also Neil Ledet, were quite honest when they said they were never faced with issuance of a permit for a group pier before." He added, "I assume there was so much argument and hatred for so long about funneling that everyone stayed away from doing group piers."

Thomas urged that all the lakefront that is "people friendly" for development has already been developed. The area sought to be developed by RCI Development is not.

Mark Ahearn asked, "What would you have us do? Would you have us vacate the order?"

Thomas answered, "Yes."

Ahearn continued, "What would you have us do next?"

Thomas responded, "I think you have to go back and develop objective standards, for the issuance of 'group piers', so that ~~no~~ not only do people know what they have to do to qualify, but other people know what they can object to."

Doug Grant asked whether Steuben County had adopted an anti-funneling ordinance.

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[2] As enacted in P.L. 152-2006, SEC. 3, IC 14-26-2-23(e) provides:

(e) The commission shall adopt rules under IC 4-22-2 to do the following:
(1) Assist in the administration of this chapter.
(2) Provide objective standards for issuing permits under this section, including standards for the configuration of piers, boat stations, platforms, and similar structures. The standards:
(A) may provide for a common use if the standard is needed to accommodate the interests of landowners having property rights abutting the lake or rights to access the lake; and
(B) shall exempt any class of activities from licensing, including temporary structures, if the commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in section 5 of this chapter.
(3) Establish a process under IC 4-21.5 for the mediation of disputes among persons with competing interests or between a person and the department. A rule adopted under this subsection must provide that:
(A) if good faith mediation under the process fails to achieve a settlement, the department shall make a determination of the dispute; and
(B) a person affected by the determination of the department may seek administrative review by the commission.

Thomas responded, "What they did was, in an effort to do that, they thought that what they could do was pass some regulations that said you had to have 100 feet for your first pier, 50 feet for your second pier, 25 feet for your third pier. Because at the time they never really figured out everything that was going to be usable, but when Steuben County thought about passing that ordinance, they thought, 'Well, people are going to have to go out and buy houses to get access, and they're not going to spend that kind of money….' So the developers have gone to the ground that has never been developed before, never touched before, and tried to get that property. They can't build there but they can build in the back. So, it's kind of a new thing."

Grant continued, "You're saying that they do have an ordinance, but they're using un-buildable frontage,"

Thomas answered, "Yes."

Chairwoman Stautz asked for argument from the attorney for RCI Development, Steven Hazelrigg. She was informed he was not present.

The Chair then recognized Ann Knotek, attorney for the Department of Natural Resources.

Knotek observed that the attorney for the Claimants was seeking to set aside the DNR permit because there were no objective standards. She referenced IC 14-26-2-23 which is now the statute for permitting activities on public freshwater lakes. She said 23(c) "tells the Department what we must do with regard to permitting situations, including "group pier" situations:

> (c) The department may issue a permit after investigating the merits of the application. In determining the merits of the application, the department may consider any factor, including cumulative effects of the proposed activity upon the following:
> (1) The shoreline, waterline, or bed of the lake.
> (2) The fish, wildlife, or botanical resources.
> (3) The public rights described in section 5 of this chapter.
> (4) The management of watercraft operations under IC 14-15.
> (5) The interests of a landowner having property rights abutting the lake or rights to access the lake.

She said what we have is a regulatory design which authorizes certain activities which qualify for a general permit. For other activities, a discreet permit is required. Temporary piers is a big category, "because if we were required to permit every single pier, I can't imagine how many people we would have to have doing it." The "group pier" concept was approved by the Commission because it was believed a "group pier" would "not fit with this off-the-rack scheme. Most of the piers, you're going to buy off the rack, but some of them just don't fit. That's what the "group pier" rule accomplishes." By disqualifying a group pier from a general permit, "it goes back to IC 14-26-2-23(c)," and the DNR individually scrutinizes each application for a "group pier"

with reference to subsection (c). "The evidence presented at hearing provided amply that extreme care in review was taken with this particular permit. It went through numerous revisions. There was individual care given to the permit application by the Division of Water, which provides the technical staff, the Division of Fish and Wildlife…, and it also was reviewed by Law Enforcement."

Knotek reflected "One of the things that is different" for a group pier permit "is that a plan is required. I think that that has been one of the great strengths of the group pier rule is that the Department in processing these permits is requiring the person building the piers to commit themselves on paper to the layout of the pier and the number of watercraft that they plan to dock on those piers." She emphasized Finding 43 and asked that "Judge Lucas's nonfinal order be affirmed."

Mark Ahearn asked, "Is the Department going to do what the General Assembly said it should do when it enacted IC 14-26-2-23(e)(2)?"

Knotek responded, "I think what that is really speaking to is what has already been accomplished, which is itemizing under the general license rule, all of the things that make something not qualified for a general license. That's what I meant by off the rack."

Ahearn continued, "My grief with this opinion is it starts at a point in time and looks back and says 'We did a thorough job' of analysis. We looked at the number of boats. We looked at plant life. We took into account safety. We look at biological issues. My thought is that's wonderful," but it may not be fully responsive to the legislative will.

Knotek replied, "The rule that denotes the objectives for the general license gives you that laundry list. When you're taken out of that, the focus changes to whether the Department has considered IC 14-26-2-23(c) and these rules." She said this process was reviewed and applied in the first "group pier" case it considered, one originating from Lake Wawasee which was decided by the AOPA Committee, where the attorney for the remonstrant "threw every handful of mud that could be thrown at how the Department processes permits and the standards it uses." She said the "group pier" concept was then "brand new. The thing that stuck in that case had to do with the definition of 'marina'… In that case we went through is the Department doing the correct job by following its procedures, and the answer in that case was 'yes'."

Ahearn stated, "The General Assembly instructed us, under the administrative rules IC 4-22-2, to adopt standards. Not to point to something else but to adopt standards…. I guess I agree with the folks challenging the ruling."

Knotek responded, "If you look at 312 IAC 11-3-1, which discusses general licenses, that gives you the laundry list of very specific pronouncements which have been passed by the Natural Resources Commission as help to people to how they can put out their piers." By taking "group piers" out of the class that qualifies for a general permit, the Commission has required individual scrutiny for each permit. "The Commission has said, 'These piers, because of their nature, and the particular challenge of regulating

them, just fitting into this laundry list is not good enough. Maybe a group pier which would follow those rules wouldn't be a problem, and that pier would be permitted quickly. However, most of the group piers have to do with vertical property arrangements, condominiums, funneling issues with neighborhoods in the back, and what it usually means is there's a small part of waterfront where the riparian owner wants to concentrate as many groups of piers as possible. So the 'group pier' permit rule says, 'You have to get a permit. You have to show us your layout. We are going to do in depth reviews of this individual pier permit."

Ahearn asked, "How would I know what you're going to review?"

Knotek responded, "We're going to review the factors the DNR reviews" in every Lakes Preservation Act permit.

Chairwoman Stautz asked Thomas if he had any response.

Thomas responded, IC 14-26-2-23(c) indicates the DNR "may" issue a permit. "May" is a permissive term. IC 14-26-2-23(e) states the Natural Resources Commission "shall" adopt objective standards. "It's not permissive. They must before they issue those permits."

Grant asked, "There would be no limit on the number of 'group piers' on this lake?"

Knotek responded that the DNR does review the structure of a "group pier" and the number of slips under the current rule. There is no review of the number of piers that may be placed under a general permit. "With proper local zoning," the DNR does not limit the number of people who may request a group pier.

Granted added, "Somewhere down the line, we have to establish criteria that allow for the general use of the public freshwater lakes by all the people. We can't end up putting 5,000 boats on every lake."

Ahearn reflected, "I've looked at the rule, and the rule just seems to say length and environmental harm." He added, "I think the General Assembly in this section was saying, 'We want to give some guidance to both remonstrators and license seekers so they have some sense for whether they should even consider bringing an application, so they have some sense of what the playing field is like, rather than operate in a world that is so vague that you have to submit your plans to DNR, and the DNR tells you if it's okay or not. You can't know. You have to negotiate back and forth. That troubles me."

Knotek reflect, "I would just point out, as an irony of this case, the presentation that the applicants made was within the length of [what would have been appropriate for] a general license. They asked for piers that were no greater than 149 feet because they were trying to design conservatively and fit within the Department's criteria so they would have the expectation that the permit would be granted."

Mary Ann Habeeb moved to accept the findings of fact and conclusions of law and to issue a final order consistent with the nonfinal order of the administrative law judge. The Chair seconded the motion.

Habeeb said in her experience, she has learned that rules can always be written better and more clearly. "I'm struggling myself with how one would actually effectuate strictly one, two, three, four objective standards for a kitchen sink kind of approach that would apply to all situations, when I know that lakes have various and different circumstances surrounding each one of them, and that piers are different depending circumstances. Having said that, I think that clearly something better can always be looked at. I would suggest that this Committee strongly recommend to the Advisory Council that it take another look at what we have in terms of rules, with a recommendation of considering improving the rules we already have. Having said that, I think there is regulated scheme that fits the requirements of the statute and gives a list of objective standards."

Habeeb added, "I also looked at IC 14-26-2-23. It's what I would call a permissive statute rather than a prohibitory statute. By that I mean there's no penalty imposed on the Commission for failure to do something as the legislature has determined it to be done. Since the statute is written in that manner, certainly the 'must' is important, but I think they did write rules. I think that they could be improved, but I don't think that they fail in this instance to provide what is needed to give this permit. I would recommend that the permit be issued."

Ahearn responded, "I could be proven wrong, but I don't think they wrote rules. I think they had rules."

Habeeb responded, "But I think they work. I think they can be improved, but I think they work."

Ahearn moved to strike the last sentence of Finding 32. "We don't want to discourage citizen comment." Habeeb joined the motion. "It's gratuitous." Habeeb then amended her motion to approve to incorporate the change. Jane Ann Stautz joined in the amendment.

Habeeb reflected, "I was specifically interested in the fact that they needed to make findings with regard to the public trust doctrine. At 312 IAC 11-1-2, the rules provide that before issuing a permit, the Department shall consider the 'public trust doctrine', as well as the likely impact on other affected persons. That provides specificity."

Ahearn stated, "I assume if we vacate the order, they don't get to put in their pier next year. In my mind, it's another matter of hard cases make bad law, but it's not their fault. I think we're going to see these coming back if it's always the agency's discretion, and we can't find any way to come up with some objective standards, we are dooming ourselves to hearing these over and over."

Chairwoman Stautz reflected, “A failure to affirm this puts other group piers that are currently out there at risk. My suggestion would be to affirm this but to direct the Department to suggest to the Commission further standards to clarify.”

Habeeb added, “As expeditiously as possible.”

Stautz stated, “It could be a nonrule policy document as well as a rule.”

Grant inquired, “Explain to me why this decision would put all other group piers in jeopardy.”

Stautz answered that remonstrators could challenge any group pier permit on the basis the AOPA Committee had determined there were no objective standards.

Ahearn observed. “This statute was enacted in 2000, and there have been eight years.”

Stautz added, “But we have had other group pier cases, and we have looked at what’s under the general license as well as at other places in the rule. We’ve affirmed the issuance of a group pier license before.” Having performed these reviews establishes standards through Caddnar, and to now determine there are no standards could be inconsistent.

Robert Wright, “I think here you’re talking about a group pier and you’re talking about such an influx of people, onto a lake, that maybe we need to have a higher duty to provide specific standards than we do in other areas that are more subjective. Here, I think there was an obvious ‘taking’ back in the 1950s when they passed this Act and gave us this authority. Again, I think that my responsibility would be that we closely guard the expansion of the peoples’ rights that live on these lakes.”

Habeeb added, “I would make just one note. Clearly, I don’t know the whole legislative or regulatory histories. Mark had indicated the statute was written in 2000.”

Ahearn interjected, “And I don’t know that.”

Habeeb added, some of the rules were originally enacted in 1999 and readopted in 2005. After discussion, Ahearn and Habeeb agreed readopted could have been to prevent “sunset”.

Ahearn said, “It would be extremely helpful if someone in the agency could point and say, ‘Here’s the list of objective standards.’”

Habeeb reflected, “I also look to what I think the role of this Committee is. We should try and give effect to all the Commission’s rules that are here, to give credence to them, and to try and construct them in a logical manner, and that gives full effect to what the statute intended. If a court were to find that they are inadequate, then so be it.”

The Chair then called for a vote to affirm the findings of fact and conclusions of law with the nonfinal order of the administrative law judge, as amended. Habeeb and Stautz voted in favor of the motion. Ahearn, Grant, and Wright voted against the motion. The motion failed.

Mark Ahearn moved to vacate the order of the administrative law judge for the reason that the Commission has not provided objective standards. Robert Wright seconded the motion.

Ahearn observed that the attorney for the permit applicant was not present. He might seek judicial review on the basis that the Commission standards were sufficient to review and grant the permit.

The Chair reflected, "That's where I go back and look at the analysis the DNR performed for this permit application. They looked at the application information, the configuration, the public and riparian rights, and the impacts to fish, wildlife, and botanical resources prior to issuing the license for the group pier."

Ahearn reflected, "I agree, but my frustration is that if I'm the next-door neighbor, the only consolation I know they're doing it correctly is DNR's assertions to me that there will be a thorough review. If my neighbor is building a four-story home, and I live in a place that doesn't have zoning for four-story homes, I know I have some basis. All I have here is some assurance from the agency that 'We'll do a thorough review.'"

Habeeb reflected, "I think it boils down to the scheme of when you have a general license versus an individual license. My agency does that on a regular basis. IDEM has general licenses, to which most activities apply. If you fall under a general license, then you get your permit. It's a done deal. However, if you don't fall under a general license, then you get a more particularized review. You get an individual license. That's what happened here. They didn't fall under the general license criteria. They fell under the individual license criteria. Your neighbors are put on notice that because they're under an individual license, something is a little different than the general license." Because it was under an individual license, "the agency went under a thorough review of all the requirements" of 312 IAC 11 and the Lakes Preservation Act. Requiring an individual license for a group pier did cause greater scrutiny of the RCI activity than if it qualified under the rule for a general license.

Ahearn said, "I would say the proper review touched on all the things the agency might have included in its list of objective standards. I think we can do this. Being that no one from RCI is here, I think we could request the parties to re-brief these issues, and bring it back to us at a later date, and make the decision then."

Habeeb said, "You're thinking augmentation of the record then?"

Ahearn responded, "I don't want the factual record augmented. We want deeper analyses into the law of what this really means. Have all the sides brief it in fairness to the party that's not here. I think we can do that if we're not prepared to make a decision today."

The Chair stated, "We do have a motion pending to vacate the nonfinal order of the administrative law judge."

Ahearn responded, "I could withdraw my motion. I feel like I'd like to know more—when the different statutes and when the different rules were adopted and the chronology of both the statute and the rule-makings and the explanation of how this is the formulation of objection standards. If the second would consent, I'd withdraw the motion to instead remand and instruct the parties to more fully brief the issue on the matter of IC 14-26-2-23(e)(2) with respect to this proceeding."

Wright responded, "Yes, I agree."

The Administrative Law Judge suggested the two attorneys who were present, and who participated in the proceeding, might be invited to "offer any objection to or to at least speak to the proposed remand process."

Bradley Kim Thomas stated, "I think you have the authority to do that. The issue would be that you would have to set the timetable, I assume."

Ann Knotek stated, "The Department has no objections to the additional briefing."

Chairwoman Stautz suggested a briefing schedule of 30 days.

Mary Ann Habeeb added that the AOPA Committee should commit to considering the briefing as soon as possible after the completion of briefing.

Mark Ahearn moved to remand the proceeding for the parties to examine and explain for the AOPA Committee the relationship of IC 14-26-2-23(e)(2)(B) to the issuance or denial of the permit authorized by PL-20374. Wright seconded the motion. Ahearn, Wright, and Grant voted in favor of the motion. Stautz and Habeeb voted against the motion.

The Chair directed the Administrative Law Judge to prepare a draft order consistent with the motion and to distribute the draft order to members of the AOPA Committee before distribution.

Adjournment

At approximately 3:31 p.m., the meeting was adjourned.