Minutes of the AOPA Committee of the Natural Resources Commission

December 8, 2006

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn
Bryan Poynter

NRC Staff Present

Sandra Jensen
Stephen Lucas
Debra Michaels

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 8:01 a.m., EST, on August 23, 2006 in Conference Room 2, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana. With all three members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on August 23, 2006.

The Committee discussed and approved by acclamation the minutes for the meeting that was held on August 23, 2006.

Consideration of Oral Argument with respect to Correspondence from Joe Bergan in response to "Findings of Fact and Conclusions of Law with Nonfinal Order of Summary Judgment" of Administrative Law Judge in *Joe Bergan v. DNR*, Administrative Cause No. 05-203D

The parties did not appear for this item. Following a brief discussion by the members of the Committee, Mark Ahearn moved to approve the ALJ's "Findings of Fact and Conclusions of Law with Nonfinal Order of Summary Judgment" as the findings of fact, conclusions of law and final order of the Natural Resources Commission. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Oral Argument with respect to "Respondent Dennis Hill's Objection to Notice of Entering Findings of Fact and Conclusions of Law and Request to Re-Open Hearing to Allow Additional Evidence" and "Findings of Fact and Conclusions of Law with Nonfinal Order" of Administrative Law Judge in *Thomas S. Winterrowd v. Dennis Hill and Department of Natural Resources*; Administrative Cause No. 06-029D

The parties did not appear for this item. Following a brief discussion by the members of the Committee, Mark Ahearn moved to approve the ALJ's "Findings of Fact and Conclusions of Law with Nonfinal Order" as the findings of fact, conclusions of law and final order of the Natural Resources Commission. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Oral Argument with respect to "Respondent Intervenors' Notice of Objections to Findings of Fact and Conclusions of Law with Nonfinal Order" and "Findings of Fact and Conclusions of Law and Nonfinal Order" of Administrative Summary Judgment in *Stephen L. Jansing* (Claimant) *v. Department of Natural Resources* (Respondent) *and Terry Hawkins, et al.* (Respondent Intervenors); Administrative Cause No. 04-009W

The parties appeared and presented oral argument to the AOPA Committee. Stephen Jansing appeared on his own behalf. The Department of Natural Resources was represented by its attorney, Ann Z. Knotek. The Respondent Intervenors were represented by their attorney, William W. Barrett and were present in the person of Terry Hawkins.

In accordance with an "Entry Regarding Objections that Aver the Occurrence of Inappropriate Ex Parte Communications and Entry Regarding Motion for Briefing Schedule and for Transcription", the services of a court reporter were provided by Debra Michaels. Upon an appropriate request by a party, a transcript of the recording would be prepared. The AOPA Committee announced that no additional oral argument would be received unless subsequently ordered by the Committee. [The transcript as prepared by the court reporter is attached as Appendix A.]

The AOPA Committee approved a schedule for post-argument briefing. Under this schedule, the parties are provided until January 8, 2007 to file contemporaneous briefs. Copies of the briefs were not required to be served upon the other parties or their attorneys.

Consideration of Oral Argument with respect to "Objections to Administrative Law Judge's Findings of Fact and Conclusions of Law with Non-Final Order" by Dean Ray and Thomas Blackburn and John Blackburn; with respect to "Objections to Findings of Fact and Conclusions of Law with Non-Final Order" by Wehrenberg Property Owners; and "Findings of Fact and Conclusions of Law with Non-Final Order" of Administrative Law Judge in *Dean Ray* (Claimant) *v. Thomas Blackburn, John Blackburn, Michael Lukis, James Wehrenberg, Kim Wehrenberg, Peter Wehrenberg, Holly Wehrenberg Oliver, Gretchen Wehrenberg Stewart and Thomas Scheele* (Respondents) *and Michael Lukis* (Cross and Counter Claimant) *v. Dean Ray, Thomas Blackburn, John Blackburn, James Wehrenberg, Kim Wehrenberg, Peter Wehbrenberg, Holly Wehrenberg Oliver, Gretchen Wehbenberg Stewart and Thomas Scheele* (Respondents) and "Findings of Fact and Conclusions of Law with Non-Final Order" by Administrative Law Judge; Administrative Cause No. 05-101W

The parties appeared and presented oral argument before the AOPA Committee. Counsel, George Martin represented Dean Ray, John Blackburn and Tom Blackburn. Kim Wehrenberg, counsel, appeared on behalf of the Wehrenberg property owners. Counsel, Stephen Snyder, represented Michael Lukis.

George Martin observed that increasing values associated with lakefront property have caused property owners to avoid any type of encroachment that might diminish that value. Martin explained that Lukis has imposed upon his neighbors a large pier, which interferes with his clients' and other neighbors' placement of temporary structures and impedes their access to Lake James. Martin asserted that in years prior to Lukis' ownership of property in the area, the remaining parties, who have owned their properties for "time immemorial," have had no unresolvable disputes concerning the placement of temporary structures.

Stephen Snyder, counsel for Lukis, disputes Martin's contention that no disputes arose in the past, pointing out particularly that Becker, the predecessor in title on the. Lukis' property, was involved in a dispute with the Blackburns regarding encroachment by the Blackburns upon him.

Martin displayed one of the stipulated exhibits admitted as evidence during the administrative hearing, which ultimately became Exhibit A to the Non-Final Order. This exhibit demonstrates the riparian zones determined by the administrative law judge for the Ray, Blackburn and Lukis properties. Martin stated, "Unfortunately, if you apply the case law [the administrative law judge] is just wrong…it's just wrong. She did not do it correctly." Martin argued that the riparian zones as determined by the non-final order essentially condemned Ray's property. "He has no value…that's called inverse condemnation in Indiana." Mark Ahearn inquired of Martin what he believes the case law does say.

According to Martin, through *Bath v. Courts*, Indiana adopted the principles set forth in *Nosek v. Stryker* for determining these types of cases. "You have got to achieve a just result," and the methods established by *Nosek* are tools for accomplishing that task. Martin argued that *Nosek* requires a determination that affords each riparian owner the ability to reach navigable water within his or her exclusive riparian zone. Three methods were set forth in *Nosek*, however, Martin explained that "you may have to amend them in a particular case" to achieve "exclusive access within a riparian zone to navigable water."

First, Martin explained that *Nosek* authorizes the extension of landward boundary lines lakeward in situations involving a straight shoreline with landward boundary lines perpendicular to that shoreline. Second, Martin discussed *Nosek's* methodology for addressing a straight shoreline where landward boundary lines are not perpendicular to the shoreline. In this instance, Martin characterized *Nosek* as requiring the extension of landward boundary lines at a right angle to the shoreline. Martin argued that the third method set forth in *Nosek*, which involves an "apportionment," is applicable to irregular shorelines such as in the instant proceeding. During Martin's discussion of apportionment in the context of the instant proceeding, he presented a diagram, which he acknowledged was not evidence admitted in the record but was a "schematic of the way it can be done." Jane Ann Stautz stated that "all we can act upon is the proposed order that is before us and the objection that has been brought as it relates to the testimony and information that has been put into evidence at the hearing."

Martin then argued that the apportionment method involves proportioning each riparian owner's share of the shoreline and applying those proportions to the "line of navigability." Then by "drawing straight lines from the termini of the navigable water line to the respective termini of the corresponding shoreline pertaining to each owner," the respective riparian zones are determined in proportion with their shoreline. According to Martin, apportionment would allow both Ray and the Blackburns to have access to navigable water from within their riparian zones.

Martin also argued that the covenants for the Gleneyre subdivision, referenced in the non-final order, are inapplicable to the instant proceeding. Furthermore, Martin raised the matter that Lukis purchased his property with knowledge, as expressed in Lukis' commitment for title insurance, that states the commitment was subject to the riparian rights of people of Lake James.

Wehrenberg argued that the Wehrenbergs are not involved in this proceeding because their riparian area is involved in this dispute, but instead because a sailboat owned by the Wehrenbergs is alleged to be located within the riparian area of Lukis. Wehrenberg displayed a photograph, identified as administrative hearing exhibit L3, depicting the sailboat immediately in front of the

Lukis pier and explained that the non-final order concludes that the Wehrenbergs did not contend that the sailboat was in the riparian area of Lukis, which Wehrenberg described as "clearly an error" based upon the photograph. Furthermore, Wehrenberg argued that within the Wehrenbergs' brief in support of their objections, they specifically state that the sailboat was located within the Lukis riparian area. In order to establish adverse possession a person must show "control, intent, notice and duration." Wehrenberg argued that the Wehrenbergs had met the criteria for establishing adverse possession as to the sailboat's placement against Lukis' riparian rights. Wehrenberg further argued that any evidentiary difficulty with respect to proof of the location of the sailboat resulted from Lukis' removal of the anchor, which constituted "spoiliation" of evidence. Wehrenberg stated, "we don't see how there could be a determination that there was not adverse possession in this case."

The Wehrenbergs' second objection pertained to the determination in the non-final order that the sailboat presented a safety issue because of its location with respect to Mr. Lukis' pier. Mr. Wehrenberg identified evidence from Ray and the Blackburns to the effect that the sailboat did not present a problem for them and that only Lukis had complained about the sailboat's location.

Thirdly, the Wehrenbergs objected to any determination of the Scheele and Wehrenberg riparian areas because these area were "never in controversy in this case, the only reason Wehrenberg and Scheele are in these cases is because Wehrenberg has a sailboat in Lukis' riparian area and Scheele had a raft that was allegedly within Lukis riparian area, therefore there should be no determination of what the Wehrenberg and Scheele riparian areas are because we were not given an opportunity to present any evidence on that issue."

Finally, Wehrenberg agreed with Martin's reliance upon an apportionment method for determining the parties' riparian rights.

Stephen Snyder disputed that the area in question is actually a cove. Instead, he urged that the area of lake frontage belonging to Ray, the Blackburns, the Wehrenbergs and Scheele is curved with that curvature ending at the Blackburn property and then "straightens out" in the area of Lukis' lake frontage. Snyder argued that there is "some question as to how far you can apply *Nosek*." Snyder characterized the non-final order as an attempt to "compromise based upon what was owned at the shoreline by the various parties involved." Snyder identified the shoreline footage of each of the other parties in comparison to the much greater expanse of shoreline owned by Lukis. Snyder conveyed that Lukis paid for his property as did, presumably, the remaining parties and argued that the parties each got what they paid for. However, in Snyder's view the remaining parties now seek through this proceeding to gain space from someone else, namely Lukis.

Snyder argued that there is no such thing as exclusive rights of a riparian owner as to the public, citing the Natural Resources Commission's prohibition on "U" shaped piers for the reason that such a pier would exclude the public from a portion of the lake. However, Snyder acknowledged the existence of exclusivity as it relates to riparian neighbors. By example, Snyder presented the scenario of a three foot shoreline at which a person seeks to place "an eight and a half foot wide pontoon boat, an eight foot wide speed boat… at what point does that three feet widen to twenty-five feet. That's what these gentlemen are asking you to do."

Snyder argued that no evidence was presented by which it could be concluded that any of the parties can not reach navigable waters. However, Snyder pointed out that to afford each riparian owner a riparian zone consistent with the method sought by Martin and Wehrenberg, "everybody would be out there buying a little three foot strip to the lake because your rule would then say that

the adjacent property owner has to give up his rights to the extent that the owner of the three foot wide property needs more so that he can access navigable waters."

Snyder pointed out that as originally platted the Ray and Wehrenberg properties were one lot with sixty (60) feet of shoreline, but were subsequently divided. In Snyder's opinion, but for the division of that lot, "we would not be here."

Snyder argued that the non-final order actually placed a larger burden upon Lukis by requiring the removal of a boat lift from the east side of his pier and prohibiting the placement of anything, including the docking of a boat, on east side of his pier. This provides approximately twenty-two feet of Lukis' riparian area for the purpose of allowing the adjacent property owner to access his pier.

Snyder argued that riparian rights as determined in the non-final order are directly proportionate to the amount of shoreline owned by each party. The fact that a riparian owner wants to place structures into the lake that are larger than the area available is not justification for expansion of riparian rights as sought here. Snyder concluded that *Nosek* was applicable and had been properly applied by the administrative law judge.

Martin argued in rebuttal that Ray and the Blackburns are not asking for more, only for the AOPA Committee to apply the law and provide them access to navigable waters. Martin further argued that Snyder was correct in his position that riparian rights should be in direct proportion to the amount of shoreline owned but that the administrative law judge failed to determine the riparian rights consistent with the proportion of their shoreline.

Wehrenberg reiterated on rebuttal that an apportionment involving the use of a line of navigability would have properly identified the parties' respective riparian zones.
Mark Ahearn expressed that the role of the AOPA Committee is to review the administrative law judge's order and determine whether something has been presented through briefing materials or oral argument that would prompt the vacation or modification of that order. Ahearn indicated that he had received no information that caused him to believe the order should be vacated or modified and moved to affirm the non-final order. Jane Ann Stautz agreed stating that the extension of the boundary lines provides each of the parties with access to navigable waters in proportion to their lake frontage although they may not be able to accommodate all of the watercraft they might desire.

Bryan Poynter asked the administrative law judge how it was decided to establish the parties' riparian zones as depicted in Exhibit A to the non-final order. The administrative law judge responded that the exhibit was stipulated into evidence at the administrative hearing and stated her agreement with the applicability of *Nosek*. Further, ALJ Jensen explained that with the irregularity of the shoreline some type of proportioning would have to be undertaken. Despite the lengthy discussion presented for the AOPA Committee's benefit, the administrative law judge emphasized that there was no evidence presented by the parties during the administrative hearing regarding the concept of "line of navigability." There was evidence in the record confirming that the depth of the water would allow Ray and the Blackburns to navigate watercraft in those zones, despite the zones being restricted to areas near the shoreline. There was no issue here that watercraft needed to be placed some distance from the shoreline in order to navigate. "While they are not perfect apportionments … the riparian zones came out at least in general terms consistent" with each parties lake frontage. "It seemed like the best option available" based upon the evidence that was in the record.

Wehrenberg inquired as to whether the motion to affirm the non-final order included affirmation of the determination that adverse possession had not been established with respect to the sailboat's location within Lukis' riparian zone. ALJ Jensen confirmed that the issue of adverse possession associated with the sailboat was an issue ripe for consideration by the AOPA Committee. The ALJ summarized her findings as concluding that the sailboat was located in an area of overlapping riparian interest of the Wehrenbergs and Lukis, and the non-final order required the sailboat to be relocated to an area nearer to the Wehrenberg's shoreline and outside of Lukis' riparian zone. Wehrenberg again maintained that any determination that the sailboat was not located within Lukis' riparian zone was in error. Snyder clarified, citing finding 97 of the non-final order, that the Wehrenbergs during the administrative hearing never contended that the sailboat was located within Lukis riparian area. After further discussion on this point initiated by Wehrenberg, the ALJ noted that in their proposed findings of fact and conclusions of law with proposed order at proposed findings 21 and 22, the Wehrenbergs in defending against Mr. Lukis' complaint "specifically state that their sailboat was not in the riparian area of Lukis. Despite what the evidence showed at hearing, despite the photograph that has been shown and was admitted in evidence" the Wehrenbergs maintained that the sailboat was not in the riparian area of Lukis. Wehrenberg pointed out that the Wehrenbergs did dispute the conclusion that the sailboat was not within the riparian area of Lukis in their objections. The ALJ noted that the position adopted by the Wehrenbergs on objections before the AOPA Committee, which the administrative law judge noted were filed after the evidence was received at the administrative hearing and after the non-final order had been issued, was contrary to the evidence presented by Wehrenbergs during the administrative hearing and in their proposed findings of fact and conclusions of law.

Mark Ahearn moved to approve the ALJ's "Findings of Fact and Conclusions of Law with Non-Final Order" as the findings of fact, conclusions of law and final order of the Natural Resources Commission. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried. Bryan Poynter voted against the motion.

Consideration of Oral Argument with respect to "Claimant Save Our Rivers, Save Our Land & Environment, and Don Mottley's Objection to the Findings of Fact and Conclusions of Law with Non-Final Order on Competing Motions for Summary Judgment"; "Respondent DNR's Objections to the Findings of Fact, Conclusions of Law and Nonfinal Order on Summary Judgment Dated August 24, 2006; "Intervenor/Respondent Rockport River Terminals, Inc.'s Objections to the Findings of Fact and Conclusions of Law with Non-Final Order on Competing Motions for Summary Judgment of the Administrative Law Judge Dated August 24, 2006" and "Findings of Fact and Conclusions of Law with Non-Final Order on Competing Motions for Summary Judgment" in *Save Our Rivers, et al. v. City of Rockport, Department of Natural Resources and Rockport River Terminals, Inc.*; Administrative Cause No. 05-082W

The parties appeared and presented oral argument before the AOPA Committee. Counsel, Joel Weineke, represented Save Our Rivers, Save Our Land and Environment, Don Mottley, as well as the Duncans and the Michels, who Weineke indicated are members of Save Our Rivers. Dennis Conniff, counsel, appeared on behalf of Rockport River Terminals, Inc. and Ihor Boyko, counsel, appeared for the Department of Natural Resources.

Weineke indicated that the non-final order addresses the Claimtant's concerns that the Department of Natural Resources "had not done their job in evaluating this coal combustion waste… that was going to be placed in the floodway of the Ohio River." Furthermore, the Claimants would have likely withdrawn their objections if not for the competing objections filed

by Rockport River Terminals and the Department. Mr. Weineke argued that the Claimants' objections center on their position that the administrative law judge "should have granted summary judgment on the fact that the fill project would actually violate the flood control act not just the fact that DNR failed to do its analysis in determining whether it would violate the flood control act."

Mark Ahearn sought clarification of the Claimant's objections to which Mr. Weineke stated the Claimants position was that the project would actually violate the flood control act. "Judge Jensen … found that DNR had failed to do the appropriate analysis in order to ascertain whether coal combustion waste, a contaminant, would constitute an unreasonable hazard to the safety of life and property …"

Weineke argued that on the motion of Rockport River Terminals certain paragraphs of Charles Norris' affidavit, evidentiary material submitted in support of the Claimant's motion for summary judgment, were stricken inappropriately by the administrative law judge. Additionally, the Claimants' argued that the determination that the portion of Don Mottley's affidavit, in which he states that the source of the coal combustion waste to be used as fill for the project was American Electric Power, was hearsay was also inappropriate. Weineke argued that the inappropriate determinations by the administrative law judge with respect to Mottley's affidavit resulted in the Claimants inability to present waste analyses associated with coal combustion waste from American Electric Power. The waste analyses that ultimately were not admitted as evidence on summary judgment would have shown that the coal combustion waste has been characterized by IDEM as a Type I waste, which is "the most toxic of all the restricted waste types and it requires, typically when IDEM is handling it under the Solid Waste Management Board, it typically requires several protections to be used… liners, collection of the leachate, prevention of water from flowing onto it and other requirements."

Weineke argued that the evidence, inappropriately stricken from the record, was sufficient for a determination that the project presented an unreasonable detrimental affect upon fish, wildlife and botanical resources and presented an unreasonable hazard to the safety of life and property, in light of the fact that the project occurs in a floodway, which is prone to be inundated by water and also occurs on top of the Ohio alluvial aquifer.

However in support of the non-final order's conclusion Weineke noted that the DNR's biologist, who completed the environmental review of the permit, acknowledged in his report that "the use of coal ash as fill may have negative affects and has been criticized in the public hearings but I don't have a contaminants background so someone else needs to address that." Additionally, according to Weineke, through interrogatories served upon the Department it becomes apparent that no analysis was conducted to ascertain the effects the coal combustion waste as a contaminant but instead the Department relied solely upon the prohibition placed on IDEM to regulate coal combustion waste as solid waste.

In response to the Department's objection, which raises the issue that the administrative law judge did not, in the non-final order, provide a template for the analysis appropriate to determine the affects of the placement of contaminants within a floodway, Mr. Weineke argued that a template already exists through reference to the *Wells* case cited in the non-final order.

Conniff stated that in addressing this matter there are two issues to be taken into consideration. First, he argued that it is necessary to consider the nature of the project, which he described as an engineered structural fill that will be constructed in the floodway consisting of partially, but not solely, of coal combustion byproducts. Conniff explained his characterization of the fill material

proposed for use in the project as coal combustion byproducts instead of coal combustion waste. Coal combustion byproducts, he explained, are "well recognized and can be used in a beneficial way such as in a structural fill and they do not constitute waste." As an engineered structural fill there are various aspects, including compaction, which will prevent leaching. Conniff argued that various aspects of the design make it a good project for the location involved.

Secondly, he observed it is the Claimants' allegation that the project "will, in fact, violate the Flood Control Act." Conniff notes finding 75 of the non-final order, in which the administrative law judge determined that the Claimants presented no evidence relating to the use of coal combustion waste as structural fill. Additionally, Conniff directed the AOPA Committee's attention to finding 78 of the non-final order, which concludes that the potential for unreasonable detrimental affects upon fish, wildlife and botanical resources and the threat to health and safety must be based upon site specific characteristics. Conniff concluded that the Claimants presented no site specific data to support their motion for summary judgment. Weineke objected to Conniff's conclusions, stating that the use of this fill on top of the Ohio alluvial aquifer constitutes some evidence of the site conditions existing in the area.

Conniff presented the AOPA Committee with two "primary objections." First, Rockport River Terminals objected to the determination that it had not produce sufficient evidence to support its motion for summary judgment. Conniff explained that as he understood the non-final order the sole reason for the conclusion that the Department did not conduct an adequate review focused on the statement of Daniel Gautier, the environmental biologist who stated in 2004 that he did not have a contaminants background.

However, Conniff notes, in opposition to Gautier's earlier qualification, that Gautier executed an affidavit in 2006 in which he provides an "unqualified endorsement that in his opinion this project did not constitute an unreasonable hazard or present unreasonable affects" provided that certain conditions contained within the approved permit were met. According to Conniff, Gautier's affidavit was unrebutted by the Claimants. Furthermore, Conniff noted the affidavit of Hebenstreit, which was also presented as evidence on summary judgment by Rockport River Terminals, in which he expresses his opinion that the project will not result in unreasonable hazards or unreasonable detrimental affects. Again, Mr. Conniff argues that Mr. Hebenstreit's affidavit was unrebutted by the Claimants. Conniff then cited the administrative law judge's determination that there was insufficient evidence provided by the Claimants to establish that the project would, in fact, result in unreasonable detrimental affect to fish, wildlife and botanical resources or an unreasonable threat to the safety of persons or property.

Conniff concluded that if Rockport River Terminals failed to provide sufficient evidence to prevail on its motion for summary judgment, "at worst that creates a genuine issue of material fact." We've illustrated that a review was conducted by DNR that took into account all aspects of the project, it is obvious that they were aware as to the potential for contaminants present in the material, yet they reviewed that… they approved it…" Ultimately, Conniff urged that the non-final order should be reverse and summary judgment should be granted in Rockport River Terminals' favor or alternatively a determination should be made that genuine issues of material fact exist and the matter should be remanded for a hearing on those issues. The issues as stated by Conniff include whether the Department conducted an adequate review and whether the project will result in unreasonable hazard or unreasonable detrimental affects or hazards to the safety of persons or property.

Boyko explained that the Department maintains three objections to the non-final order. First, Boyko cites an inconsistency between finding 78 in which it is determined that the Claimants did

not consider the site conditions and did not meet their burden of proving that unreasonable detrimental affects or a threat to the safety of people or property would result. In comparing that to a determination that the Claimants bear the burden of proof in establishing that no genuine issue of material fact existed on that point, Boyko concludes that a grant of summary judgment on the basis of inadequacy of the Department's review was in error. "The fact that the Claimants failed to meet their burden of proof is further supported by the fact that [DNR] is given no guidance in terms of scientific testing or what methods [DNR} is to use to guide [DNR] in reviewing this permit on remand."

With respect to finding 97 through 100 of the non-final order Boyko cites the administrative law judge's use of the general language dictionary in determining that coal combustion byproducts were a contaminant. Using the broad definition of contaminant found in the general language dictionary nearly any substance, even benign or non-hazardous materials, could be viewed as a contaminant. Mr. Boyko cited IC 13-19-3-3(2)(e), which prohibits the regulation of coal combustion byproducts as a solid waste when used for beneficial purposes such as structural fill.

Boyko lastly cited objections to findings 118 through 122 of the non-final order. He again refers to statutory prohibitions on the regulation of coal combustion byproducts as a solid waste when used as structural fill.

Weineke, on rebuttal, reiterated that Gautier clearly indicated his lack of knowledge and inability to review the contaminants issue involved with the project and further noted the Department's confirmation through responses to interrogatories that it had no chemist, no toxicologist, or other such expert to review this permit.

Noting that summary judgment is a "very powerful tool," Mark Ahearn offered that an order consistent with Conniff's suggestion that genuine issues of material fact exist that warrant a hearing. The administrative law judge inquired whether it was the intent to reverse the determination that the project as approved would not adversely affect the efficiency or unduly restrict the capacity of the floodway because no party had objected to that particular finding. Jane Ann Stautz moved to grant summary judgment as set forth in finding 123 that the project as approved will not adversely affect the efficiency or unduly restrict the capacity of the floodway, deny the summary judgment granted to the Claimants and remand that and "have a full hearing conducted with regard to the appropriateness and thoroughness of the analysis and the other objections that have been brought before us." Ahearn seconded the motion. Upon a voice vote, the motion carried.

Consideration of Oral Argument with respect to Informal Objections by Respondent's Representative and "Findings of Fact and Conclusions of Law with Non-Final Order" of Administrative Law Judge in *Department of Natural Resources, Division of Oil and Gas v. William E. Hill, d/b/a Hill Oil Company*; Administrative Cause No. 06-009G

The parties appeared and presented oral argument before the AOPA Committee. Bonnie Bergstrom appeared on behalf of William Hill, doing business as Hill Oil Company. Counsel, Ihor Boyko, appeared on behalf of the Department.

Bergstrom explained that two of the permits, 18045 and 17183, identified for revocation in the non-final order are located on her farm and indicated her desire to keep those two permits. Bergstom further indicated her intention to find an operator to whom she can transfer the permits and lease the wells.

Boyko indicated that some of the violations at issue in this proceeding have been ongoing since 2005 and the violations have not been abated in that time. Boyko noted that the revocation of the permits would not prevent Bergstom from leasing the wells to an operator at a later time. However, following revocation of the existing permits a new operator would be obligated to seek new permits.

Jane Stautz clarified that the non-final order required the wells to be plugged, which would prevent the operation of the wells in the future. She moved to amend the proposed order to remove permits 18045 and 17183 for a period of 90 days to allow Bergstrom to find an operator and facilitate the transfer of the permits. In all other respects the proposed order would be affirmed. The administrative law judge was granted continuing authority with respect to permits 18045 and 17183. Ahearn seconded the motion. The motion carried by voice vote.

Adjournment

Jane Ann Stautz called for adjournment at approximately 12:35 p.m.

APPENDIX A

AOPA COMMITTEE CHAIR, JANE STAUTZ: We took a brief recess, as we had a couple of other matters that we addressed earlier. And, I know at 8:30 here were scheduled to have before us the matter of *Jansing v. DNR and Terry Hawkins, et al,* before us in Administrative Cause Number 04-009W. And, there had been a request for the proceeding to have a Court Reporter present and a transcription available. And, that is being done as so noted. With that I believe we have representatives before us. Are you Mr. Barrett?

WILLIAM BARRETT, ATTORNEY FOR RESPONDENT

INTERVENORS: Yes, ma'am. Thank you.

MS. STAUTZ: Thank you, Counselor. And, then DNR– – –

ANN KNOTEK, ATTORNEY FOR RESPONDENT, DEPARTMENT OF NATURAL RESOURCES: Ann Knotek for the Department.

MS. STAUTZ: Okay.

STEPHEN JANSING, CLAIMANT (Pro se): I'm Steven Jansing, the Claimant.

MS. STAUTZ: Good morning.

MR. JANSING: Good morning.

MS. STAUTZ: With that we have the opportunity before us the Proposed Order and Findings of Fact and Conclusions of Law in respect to this matter. We've also received Notice of Objections to those Findings of Fact and Conclusions of Law. And, also a request or motion for a briefing schedule and transcription, and which the transcription we've addressed already, that there is a request for a motion for a briefing schedule. And then there is an entry by the ALJ in this matter regarding those objections, particularly with regard to the ex parte communications and then the briefing schedule. So, with that and as background for this and for fellow committee members here, I think we'll turn it over to Mr. Barrett. Counselor, if you would like to take a few minutes to present your objections to the proposed findings.

MR. BARRETT: Thank you. Good morning Committee Members. For the record, my name is William Barrett. I am counsel for the Respondent Intervenors in this matter. With me is Terry Hawkins. As counsel, also present in the room are additional Respondent Intervenors, Jennifer Hawkins and Martha Wentworth. We filed eight objections to the Nonfinal Order that Judge Lucas entered on September 28th. Those can be grouped together into four groupings; four categories. And, I'm going to go through the procedural and factual history of the case, as appropriate, as I go through those groupings. The first group of objections could be categorized as procedure irregularities. Judge Lucas, in his Order, addressed the procedural history of the case. But, we're going to review it now so that it will have some meaning for you as I go through the objections. In April of 2000– – excuse me, in the fall of 2001, September, the Claimant, Stephen Jansing filed his application for a license under cause number 19,011. A public hearing was held on that application in January of 2002 in LaGrange County. A denial was entered by the Department in December of 2003, and the Claimant timely brought his appeal before Judge Lucas for an evidentiary hearing appealing for the denial of the permit application; that was in January of 2004. In February of 2004, I, on behalf of some of the Intervenors, those who are present and some additional Intervenor, petitioned to intervene. Over the next two months,

additional parties joined in the intervention petition. The Department and the Claimant objected to those motions Hearings had. And a Non-final Order was entered on April 26th of 2004 by Judge Lucas, which was appeal to this committee through objections filed by the Department. A hearing– – two hearings were held by this committee on July 9th and October 12th of 2004, and October 15th of 2004. This committee, in essence, let stand, Judge Lucas's Nonfinal Order, subject to further review, at the hearing, on the merits. That set the procedural background. Then, in July of 2005; July 21st and 22nd of 2005, July 21st there was a status conference, or really a prehearing conference, among counsel, Mr. Jansing, and Judge Lucas. There was all but which was an Order the next day on July 22nd 2005, which is discussed at length in Judge Lucas's Non-final Order that we're hear about, which set the stage for the evidentiary hearing. And, the effect of that was, at the status conference, the Department and Claimant announced that they had reached a proposed settlement, which would change the terms of the application that the Claimant had originally sought and for which denial was originally entered. I and the Respondent Intervenors had not been party to any of those discussions or negotiations. Not withstanding the fact that the bulk of them took place after the intervention Order by Judge Lucas of April of '04 and the, what I call the "let stand" Order of this committee of October of '04. So, it was a revelation to us that there was a proposed settlement. The Department was prepared to grant the Claimant a license pursuant to that settlement, which was a modification as I said, of his original application. Judge Lucas would not allow that, and because of our objection, and gave the Claimant the option of either dismissing his appeal and refilling according to the terms of the modified project, or going forward and letting the hearing proceed with the participation and objection of the Respondent Intervenors. Not surprising, the Claimant decided to go forward rather than start again. Parceled with that, Judge Lucas issued an Order that said, because there is now an agreement between the DNR and the Claimant, the burden of proof in the evidentiary hearing will rest with the Respondent Intervenors. Just so we're all on the– – we're all clear as to how we got there, when the Respondent Intervenors joined in this case, they joined to support the

Department's original decision. And they therefore were in a position of defending against an appeal because their position had prevailed, originally, the denial. Now, as a result of the settlement, or proposed settlement, between the Department and the Claimant, in the middle of an AOPA proceeding, the burden of proof has been shifted from the Claimant to the Respondent Intervenors. And, moreover, not only was the burden of proof shifted to them, but they are put in the untenable position of having to prove a negative to what they were required to prove, in essence, that the original denial from December of 2003 by the Department was not erroneous. Rather than the Claimant being required as he would have been to prove that it was erroneous. And that set the stage for the hearing that was held on April 4th. So, we have really three main objections that stem from that procedural history. First, as to the ex parte issue, in which Judge Lucas issued his notice on after we filed our objections. Less there be any ambiguity about that; that was not directed at Judge Lucas. Judge Lucas involved himself in no way in any improper proceedings. And, I want to make sure that is on record. That was not directed at him. And, to the extent it was interpreted as such, that was poor drafting on my part. It was directed instead at the Claimant and primarily the Department, and specifically at the Department, not to Ms. Knotek who is the third attorney representing the Department in these now almost three year old proceedings. It is directed instead to her predecessors as counsel for the Department, and to Mr. Hebenstreit, the Assistant Director of Division of Water, who conducted these negotiations with Mr. Jansing in disregard; willful disregard of the Order that granted the Respondent Intervenors party status. And, because of that, there is a violation of 312 IAC 11.1.2, which requires the Department to take into account not only the interests of the Claimant, but other affected persons. And it is our– – our position that it was impossible for the Department to take our interest into account when they were willfully ignoring our participation in this case. In the abstract, in a petition where there are no objections, no remonstrators, no AOPA proceedings, the Department can, I am sure, take notice of and be cognizant of the interests of people affected by a petition. But, to suggest that that's true under these facts, when you have people who remonstrated, who

joined in the AOPA hearing, who were granted permission after a lengthy briefing and argument to continue as parties, and then to say "we don't need to talk to them, we know what their interests are", it is an affront to the process. And they could not have taken our interest into account. Second, because of the option that Judge Lucas allowed the Claimant to have whether to go back and start again with a modified project or to proceed, and the Claimant having chosen the latter course, there was never a public hearing on the project description that the Claimant and the DNR agreed to. In other words, the whole beginning process of a license process was skipped. Now the response to that is, well, the appli– – the project application that's at issue now is a mere subset of the original project application, so that a public hearing would have been fruitless. That in my view presumes the conclusion. The public hearing requirement in a license application serves its own purposes to it, allowing the public to participate in these decisions; to have their say, to have their voice, have their day in Court is the shorthand. And, to suggest that that process can be skipped, strikes me as nonsupported by what the statutory intent is. So, that's the second problem with the procedural posture of the case, is that there was no public hearing as there had been on the original application back in January of 2002. And, the third objection, which I've really already discussed, is the burden of proof issue; the shifting of the burden of proof to the Respondent Intervenors to prove a negative. The second grouping of objections could be really categorized as a discussion of the natural scenic beauty standard, which is the heart of the substantive dispute here. Now, of course, the Legislature has described "natural scenic beauty" in IC 14-26-2-5(a) as "the natural condition as left by nature without man-made additions or alterations". That statutory definition has been repeated in the relevant regulation 312 IAC 11-2-1-4. The interesting thing, and where this entire case has been tried, is that the statute 14-26-2-5 doesn't end at subpart (a), there is subpart (c) and (b) as well, obviously. And, subpart (c) provides that, as to this case, these Respondent Intervenors have a vested right; and that phrase has to mean something, and Judge Lucas's original Order on the intervention petitions discuss that at length; they had a vested right in the preservation of public freshwater lakes in

Indiana, and in this case, we're referring to Dallas Lake of course, in LaGrange County; in its present state. And there's the– – there's the rough, or there's the issue. The testimony of Mr. Hebenstreit at the April 4, 2006 hearing; and he has worked for the Department for 32 years; was that he is unaware of any public freshwater lake in the State of Indiana that does not have man-made alterations. So, if the natural scenic beauty standard is to apply only in places where there are no man-made alterations, it doesn't exist in Indiana, because there is no lake– – public freshwater lake in Indiana that doesn't have such alterations. And, that leads to the ascertainable standards issue. Judge Lucas, in his Order found that the Legislative definition copied in regulations, does provide an ascertainable standard. However, – – I'd like to review some of the testimony on this point, from the hearing. First, Mr. Ledet– – Neil Ledet, another long time employee of the Department, testified that local conditions are taken into account when analyzing whether the natural scenic beauty statute and regulation are implicated. If local conditions are to be taken into account, and that– – that stems of course from the– – I don't want to get the name wrong, the *Zapfee* case from the Court of Appeals back in '92 that talk about taking local conditions into account. Well, by what standards are local conditions to be taken into account? That ruling from the Court of Appeals provided at the very best or the very most, a conceptual framework, or suggestion that local conditions are to be taken into account. Well, how are they to be? In other words, as to the issue here, how is the Department to draw a distinction between a lake where there are no boat houses, such as Dallas Lake, which was the testimony, versus a lake where there are many, such as Lake Wawasee, which was again part of a testimony produced at the April 4th hearing. Second, Mr. Ledet testified that he wasn't aware of any specific guidelines that go with natural scenic beauty. Mr. Hebenstreit, when asked about this issue whether local conditions are to be taken into account, said that "we might look at a situation by situation but; in general, lake permits are evaluated the same way." And again he agreed that he's not aware of any lake in Indiana; public freshwater lake that hasn't been altered in some fashion. He also testified that he is, and I'm quoting, "not sure what the natural scenic beauty standards means".

Now, if the person in charge of the– – Assistant Director of the Division of Water, a 32 year employee of the Department charged with the review of these applications doesn't know what the standards are, then who could? How can either the Claimant or the Respondent Intervenors or any member of the public be expected to know, if the person charged with the administration and enforcement of the statute and regulation does not know? Mr. Hebenstreit also testified as of the date of January of '06, in response to an interrogatory, that he was unaware of any boathouses existed on Dallas Lake. Not that he had found out there are none, but that he was unaware. In other words, his analysis of the Claimant's application, he did not take into account the local conditions of Dallas Lake despite what Mr. Ledet is done and what he said is done; we might look at it situation by situation. An interesting point that falls under this objection; and I would encourage the Committee to review the transcript and the documents that were produced at the hearing; Mr. Hebenstreit did testify that he– – it was his belief that this natural scenic beauty rule is inapplicable to the Claimant's request, because the shoreline at the site had been altered. And, that the rule was in applicable only to unaltered shorelines. However, evidence was presented, and for the record, it was Respondent Intervenor Exhibit M, that showed a case– – and Respondents Exhibit M was an Order from the Department, an Order from the Department denying an application by a restaurant owner in Lake County, Indiana on Cedar Lake, which is a public freshwater lake, to rebuild a pier. And, that application was denied in part– – and this was a pier where, if you read Exhibit M, people would park their boats and then come into the restaurant. That application was denied, in part, because restoration of the pier would have a deleterious affect on the natural scenic beauty of Cedar Lake. Either the rule applies where there are piers or the rule applies only where the shoreline is unaltered. It can't apply in both, or it can't exclusively apply in both. And, again, the Department itself; the body charged with administration of this statute and this regulation is so unclear about what the rule means, it is internally inconsistent in its rulings and its decisions. Perhaps most telling on this point, and I'll cite directly to the transcript at pages 217 and through 221, Mr. Hebenstreit admitted that the

DNR has no rules applicable to boathouses such as the one the Claimant sought, and that the DNR had no objective standards to assess a case like the Claimant's. And, he said that the standard, in his view, was a subjective one. Indiana Law does not allow regulatory agencies to impose subjective standards in an application like this. That violates the ascertainable standards rule. And, I would point out, referring back to the language of the Order; the September Order. Again, Judge Lucas found that the statutory and regulatory definition was sufficient. His analysis, respectfully, excludes again in that narrow portion subpart (c) of the relevant statute; the vested right in the present state part. Moreover, having found– – Judge Lucas having found that the statute doesn't apply where there's a developed shoreline, in paragraph 151 of the Order, he nonetheless applies it to places that are developed. I'm afraid he falls into the same conceptual trap that the Department has fallen into, in that regard. Specifically, it's almost unimaginable that there is a shoreline in Indiana on a public freshwater lake that hasn't had some development. And, that if the statute is going to have any meaning; and you must presume that the Legislature intended for it to have meaning, that it has to apply where things are developed as well. Also, there was discussion in the Order and at the hearing on the effect of view. And, there is– – there are administrative decisions discussing view and those are cited in the Order; what is the effect of view. Well, again, having decided that view is not a right; and we don't assert that it is a right, by the way. And, there's been some discussion about that throughout these proceedings. We don't dispute– – we don't assert that there is a right to a view, but. And, Mr. Eggon from the Department testified on this point when I asked him, well, how does one– – how do you access beauty, Mr. Eggon. Which of the five senses do you use? You use sight. View has to have some effect, or some impact. And, in paragraph 134 of the Order, Judge Lucas refers to the visual impact of a structure or facility and how that differs in a developed area versus an undeveloped area. So, again, we are pointed to the conclusion that there is no real standard by which to assess the applicability or to review the effect on natural scenic beauty of an application such as this. And, I would just point out, for the record, a couple of decisions from the Courts; the standard

law of which you are well aware, is that administrative decisions must be based upon ascertainable standards to ensure that agency action will be orderly and consistent. The test to be applied in determining whether an administrative agency regulation can withstand a challenge for vagueness is where it is so indefinite that persons of common intelligence must necessarily guess at its meaning and difference to its application. All that I've said in the last few minutes have been about how the Department itself, those people have differed as to its application. And, I'm quoting from *Canard v. Secretary* decided by the Court of Appeals decided in 2004 and recorded at 817 N.E. 2d 1274. And, of course the Supreme Court has adopted the rule that– – as we know as originally discussed in the *Podray* case by the Court of Appeals and where the Supreme Court's review of the ascertainable standards requirement in *State Board of Tax Commissioners v. New Castle Lodge, Loyal Order of Moose,* decided in 2002 and recorded at 765 N.E. 2d 1257. The last point on this, this leads to the question of the present state of Dallas Lake and paragraph 114 of the Order makes a Finding of Fact that it was common place at the time the Lakes Preservation Act was adopted in 1947 for there to be boathouses on Dallas Lake. That finding is contrary to the evidence and unsupported by the evidence. And, the only evidence was that the only boat house of any size, and I'll come back to what I mean by that in a moment; of any size, was the one that existed on the Claimant's predecessors and interest property. There was no evidence of any other boathouse other than low quansa hut-type boathouses as opposed to big garages that more obscure the landscape. No evidence of those at all, other than the one that the Claimant now wishes to build on the site of. And, all of those were removed by the 1970's. And, the only one that was left; and this leads to our third category, third group; the nonconforming use issue. The only one that was left was the one owned by the Claimant's predecessors and interest. The Order– – the September 28th Order found that the issue of the natural scenic beauty standard had to yield to a nonconforming use of the boathouse. In other words, I said I'd review the factual history at the appropriate point; here it is. The evidence at the hearing shows that as of the time of the Lakes Preservation Act in 1947, there was a boathouse on site. There's no dispute

about that. That boathouse, the remaining testimony is that the use of that boathouse; and I'm drawing a distinction between the actual use and the zoning concept of use as the existence of the structure. The actual use of that boathouse was abandoned by not the Claimant's immediate predecessor and interest, but by that persons predecessor and interest; a family known as the Abbys who stopped using the boathouse; had boats come in and out of many years before they sold the property, or before the property was sold to the Claimant's predecessor and interest, Mr. King. The boathouse in a dilapidated condition continued to sit on the site. But it was not used for a number of years; its use was abandoned by the Abbys. The Abbys tendered, I believe, from estate sale; the testimony was, to Mr. King the parcels. Mr. King never used the boathouse. Didn't try to clean it up or unsilt the wells, and put boats in there; didn't use it. Instead he tore it down. And, by the time the Claimant took title to the parcel in June of 2001, we are now two generations in the chain of title; two generations removed from any use of that facility. There was no use of that facility. That facility did not exist at the time the Claimant took title to the parcel. Judge Lucas's Order provided, actually stated that had there been no prior nonconforming use; and we dispute that there was, as I just said– – I'm sorry, I don't remember the exact paragraph, but he– – thank you– – he asserted– – well, and that's– – there we go, yes. "If the boathouse were proposed here as a new structure, the evidence would not support its approval." And, the proceeding paragraph, the last sentence right above what I just read, he stated, "where the possible exception of where boathouses are common to a neighborhood, construction of a new boathouse is an anathema to the values of the Lake Preservation Act." We agree. And, this is a new boathouse, because the use was abandoned two generations in the chain of title, before the Claimant took title. The structure itself was abandoned one generation before the Claimant took title. When the Claimant took title he took title to a boat well. And there are many boat wells, but there was no boathouse. There was no prior nonconforming use as at the relevant time. And, then the last issue is the question of the cumulative effect of the activities in the– – activities to be proposed by the application. There were six witnesses who testified; three employees of the

Department, two Respondent Intervenors, and the Claimant. Of those witnesses, five have been to, and are familiar with Dallas Lake; the Claimant, Mr. Hawkins, Ms. Wentworth, Mr. Ledet, and Mr. Hebenstreit from the Department. The testimony of Mr. Hawkins and Ms. Wentworth and Mr. Ledet was that this part of Dallas Lake silts up rapidly. The two Respondent Intervenors have been going there for 35 years. Mr. Ledet has been familiar with the lake in his official capacity for 25 years, I believe. And, that therefore, part of the reason the Abbys abandoned the use was because it silted up and they didn't re-dredge it. Mr. Eggon, who is a new resident of Indiana, a new employee of the Department, and who has never visited Dallas, said that he looked at aerial photos and said he didn't believe that it'd silt up, contrary to the evidence of people who had been there for decades. The cumulative effect to of what will have to be repeated re-dredging applications for this boathouse to be put to the use the Claimant wishes to put it to will be deleterious to the aquatic life both flora and fauna in the lake. It will disturb the lakebed repeatedly and continue to cause trouble. So, the finding that there was no negative cumulative effect is contrary to the evidence. I don't– – I don't see that a cursory review of aerial photos can stand up against the Department's own employee, to say nothing of the Respondent Intervenors who've been there for years. I believe that covers the objections. I'd be happy to take any questions that anyone might have.

MS. STAUTZ: Okay. We can do this a couple of ways. We can either ask questions now, or we could also ask for response from the Claimant and DNR. Unless you have specific questions– – –

AOPA COMMITTEE MEMBER, MARK AHEARN: My preference would hear response while the testimony is still fresh in the air.

MS. STAUTZ: Okay. Mr. Jansing or– – counsel, I'll leave it to the choice of you two; the Claimant or Respondent.

DNR COUNSEL, ANN KNOTEK: You want me to go first?

CLAIMANT, STEVEN JANSING: Yeah, you go first, if you're ready.

MS. KNOTEK: Okay. Members of the Committee, again, my name is Ann Knotek, I'm a staff attorney with the Department of Natural Resources. As Mr. Barrett indicated earlier, I am the third attorney in this case. I inherited it about a year or so ago. And, I have been with the case from the point at which it was set for hearing and Discovery was taking place and then conducted the hearing on behalf of the Department. From the Department's perspective, this case is properly primarily about lawful nonconforming use. A focus on that from the beginning might have helped move this case along. I just want to respond briefly to some of the points raised by Mr. Barrett. With regard to the ex parte communications between the Department and the Claimant in terms of crafting settlement agreement; leaving that part alone for you evaluate on its own, I would just offer the perspective that the Department was well aware of the Respondent Intervenors' position. Clearly we knew– – the Department and testimony was offered at the hearing, but the Department was aware of their position. There was also ample testimony given at the trial to reinforce that– – at the hearing, to reinforce that position. And, frankly, their position was considered by the Department. With regard to the natural scenic beauty issue; in my observation, this has an issue that kind of tracks along with the Supreme Court's "I know it when I see it" definition of pornography that you may be familiar with. Everybody has a different idea as to what natural scenic beauty is.

MR. AHEARN: I assume it's the definition you're referencing.

MS. KNOTEK: Yes.

MS. STAUTZ: Thank you for that clarification.

MR. AHEARN: Thank you for that clarification; I appreciate it.

MS. KNOTEK: I think that one of the things that I just want to call to your attention is that with regard to the Department testimony given on the issue, Mr. Ledet who is the Fisheries Biologist with whom I work closely and his testimony has been offered at numerous hearings over the years, was called as an adverse witness to the Department's official position, which was given by his supervisor Jon Eggon. So, you know, this is really an issue– – and then the Division of Water's spoke person, Jim Hebenstreit, you know, was challenged by that issue as well. This is something on which it's not an easy issue and it's one that I feel this particular Non-final Order is extremely helpful for the Department because it offers some guidance for the Department staff people to digest and try to apply to making these permitting decisions. Just as a side note, I'd like to suggest that the– – just the position of natural scenic beauty in Cedar Lake is somewhat a contradiction in terms. And, finally, you know, really with regard to natural scenic beauty, the perspective of the Department is that what the Department is looking at is the view from a person in a boat, on the lake, looking toward the shoreline. And, in this case, the position of the Respondent Intervenors is primarily looking from their houses out into the lake, and I think that's where a lot of the issues arose in this case. That being said, again, the Department's position is that the Non-final Order prepared by Judge Lucas offers the Department very helpful guidance in trying to make difficult decisions. And, primarily, the Department sees this as a Lawful Nonconforming Use case. We don't have a lot of experience with boathouses old or new anymore. It's something, you know, Mr. Barrett offered testimony that the Department said that if we got a new boathouse permit it probably wouldn't be granted. And, I think that that, you

know, the perspective over the years has been against permitting permanent structures to be placed in the public freshwater lakes. There's reference in the Order to permanent piers, and those were allowed to be maintained. There was great enthusiasm from the Respondent Intervenors on maintenance of permanent pier, which were seen to contribute to natural scenic beauty. The Department's preference would have been for those to be removed. So, I think with that being said, the Department takes the position that this Non-final Order should be affirmed.

MS. STAUTZ: Thank you, Counselor. With that, Mr. Jansing.

MR. JANSING: Again, I'm Steve Jansing, the Claimant. And, it's going to be difficult for me to respond to his 30 minutes of objections and the ten (10) minutes that I'm allotted, but I'll try. The– – I'll start out with some of this background. Since the initial meeting I had with the Department of Natural Resources counsel, at that time was Stephanie Roth, and the Department of Natural Resources Assistant Director, Jim Hebenstreit and myself, it was evident that the Claimant and the Department would be able to reach a settlement. This was mainly since the most important issue that I had was the construction of the boathouse. And, right or wrong, the Department seemed to have little concern specific to the boathouse. The Claimant's intent from the beginning of the appeal; when I very first filed the appeal was to reach an agreement with the Department of Natural Resources on a proposed project, and exercise my right to rebuild the boathouse that I'd already been given a zoning and boating grants to do, and a building permit from LaGrange County. The Respondent Intervenors accusation that the Claimant was rewarded for improper ex parte negotiations and settlement with the DNR is just false. The issues of the case were narrowed long before the Respondent Intervenors were granted their intervention. The negotiations agreements between the Department and the Claimant took place prior to the Respondent Intervenor intervention as stated in the DNR's filing dated March 29, 2005. The Department of Natural Resources requested an extension of time, by Counsel Stephanie Roth, and

filed it dated March 29, 2005. This was served upon the parties, including Mr. Barrett, counsel for the Respondent Intervenors. The following was in that filing: (1) The Department anticipates preparing an Agreed Order that will address a portion of the issues contained within the broad requests of permit application PL-19,011. Although these issues were addressed prior to the Respondent Intervenors' intervention, a copy of the Agreed Order will be provided to the Respondent Intervenors. (2) Neither of the parties nor the Respondent Intervenors can properly prepare contentions until said Agreed Order is drafted and narrows the issues of this cause. The Administrative Law Judge filing dated April 5, 2005, granted this extension without objection from the Claimant or the Respondent Intervenors. If the Respondent Intervenors' claim of not being aware of any discussions, negotiations, or agreements taking place between the DNR and the Claimant, their counsel was asleep at the wheel. He was ignoring the plain meaning that was discussed in previous conference calls that were held by Judge Lucas, and the filings. The Respondent Intervenors were informed. Then an agreement on the project was reached by the Department and the Claimant through Michael Reeder, the counsel for the DNR– – the second counsel for the DNR. I was told by Michael Reeder, counsel for the DNR, that he had contacted Mr. Barrett, counsel for the Respondent Intervenors. And, the Respondent Intervenors did not approve of the amended project description as stated in Michael Reeder's filing dated June 28, 2005. No other details as to why were provided in that filing. Further, the Respondent Intervenors filed objections to the amended project in the Respondent Intervenors' filing dated July 5, 2005. In that filing, the Respondent Intervenors' counsel stated: The Respondent Intervenors object to the proposed amended project description. Mr. Barrett also stated, he conveyed that objection to the counsel of the DNR, during the week of June 20, 2005. The Respondent Intervenors' counsel also stated that he informed the DNR's counsel that the Intervenor Respondents would likely agree to a settlement of the Claimant's appeal if certain conditions were met. These certain conditions were not made aware to the Claimant, even when they were requested to do so, during a teleconference status held July 21, 2005. So, negotiations

or discussions between the Respondent Intervenors and DNR, through counsel, took place without the Claimant's participation. Logical conclusion from that is that the Respondent Intervenors were not willing to negotiate anything that allowed a boathouse, which left the DNR no recourse but to submit the only possible Agreed Order that is acceptable; the DNR's interpretation of the Lake Preservation Act and is acceptable to the Claimant. The Department could not overlook approving the boathouse, because their counsel felt that they could not support that position in a hearing. And, some responses to some of the objections; the Administrative Law Judge did not error by continuing the proceedings. The Administrative Law Judge could have approved an Agreed Order and let the Respondent Intervenors appeal that Agreed Order. But, instead he allowed the proceedings to continue to afford the Respondent Intervenors the advantage of administrative review—and administrative appeal. Although an Agreed Order would have been the most expedient method of resolution for this lengthy time of proceedings, the method chosen by the Administrative Law Judge was mostly the fairest to all parties. Had a new permit been filed, the DNR would have approved it and we would be right back where we were with the Burdon of Proof being on the same Respondent Intervenors—where it belonged. The difference in that scenario is that it would have been an initial delay. Any public right to object to the voice– – to object and voice their concerns on the amended projects were granted in the DNR's public hearing held in LaGrange County on January 2, 2002, since the original project discussed at the public hearing contained all the elements contained in the downsized project described in the amended project description. So, the public hearing about the amended project, the other part, it doesn't matter. All elements that were in the amended project were discussed in the public hearing. And, they were able to ask me questions, I offered up to answer questions; they didn't have any. The burden of proof was shifted on the merits of the case– – excuse me, the burden of proof was shifted when the merits of the case were defined and contentions were filed, and the Respondent Intervenors refused to agree to the terms that were agreed to by the Department; the licensing authority, and the Claimant. As previously stated, a new permit could

have been filed at the Claimant's expense and undue delay, only for the result that ended in the administrative review with the burden of proof being placed on the same Intervenors. The cumulative effects were discussed during the testimony at the hearing and all portions of the amended project, the dredging, boat well construction– – boathouse construction have commonly been approved by the DNR and in the past, and were presented in multiple permits that were submitted into evidence at the hearing. In applying the natural scenic standard, only a contorted application of this standard would imply the rebuilding of a 70 plus year old landmark boathouse, would be a disfigurement to the natural scenic beauty of Dallas Lake. That same interpretation that they want to use would eliminate anyone's ability to construct a house or building close enough to the water that obstruct anybody's view from a landward angle. That was the basis of their argument in the hearing. In applying the continuation of lawful non-conforming use, the Respondent Intervenors cannot claim undisputed evidence was presented that demonstrate the former owners of the boathouse, the Abbys, abandoned it. The claim is disputed. Even the Respondent Interevenors own counsel's line of questioning refutes the statement of abandonment. And, I'll explain. You can see that cross-examination by Barrett on page 195, in the transcript, where the line of questioning is asking if concrete had been added by the Claimant around the boat well. The response was no. There was some badgering of the Claimant by Mr. Barrett about a nonexist– – –

MR. BARRETT: I'm going to object to the characteriza– – –

MR. JANSING: [phrase inaudible].

MR. BARRETT: I'm talking. I'm going to object to the characterization. And, I'd also like to know who is the witness testifying as opposed to the lawyer was asking the questions.

MR. JANSING: I'll get– – it was me. I was testifying, you were asking me questions.

MS. STAUTZ: And, let's be careful on our characterizations.

MR. JANSING: Okay. Well, the Claimant– – I was the Claimant and he was questioning me about concrete that I– – that they suspected that I added around this boat well in lieu of getting a permit. That's just plain false; I didn't do it. And, the Kings did not add the concrete and the conclusion is the Abbys must have done it. The concrete appeared to be recent enough to ask the Claimant if I added the concrete. That in itself would dispel abandonment by the Abbys since it is an obvious attempt by the Abbys to repair the boathouse for use. Another important thing to talk about is that the Respondent Intervenors did not present a case of abandonment during the hearing, or during their Findings of Facts and Conclusions of Law and Nonfinal Order, filed September 25, 2006. The Respondent Interevenors' case of abandonment was presented after the Administrative Law Judge's decision. This last ditch effort at presenting an abandonment as a case is unsupported. Testimony from Mr. Hawkins that he felt any summer he would show up and that the boathouse would have finally fallen in the water in testimony that someone used the boathouse 15 years ago, does not constitute abandonment. Photographs were presented at the hearing that showed recent concrete work and supporting beams added for supporting the building when it was still in existence. This doesn't constitute abandonment. Also, another issue– – –

MR. BARRETT: I'm going to object to anything that purports to be testimony outside the record. There were photographs adduced. I was at that hearing; I have reviewed that transcript many times. I do not recall any testimony as to the age of beams, or to the age of concrete improvements. If the Claimant can cite to pages in the transcript that characterize those items in the photos, so be it. If he does not, I object to testimony at this proceeding.

MS. STAUTZ: So noted.

MR. JANSING: I would– – I would counter with the fact that– – I'll leave it at the fact that if counsel felt that there was photographic evidence that indicated that the concrete was recent enough that I had put it there, it must be pretty darn recent. That's all I'll say. And, it can't be disputed; just plain and simple. Okay. Next issue I have is due to several instances of perjury in– – –

MR. BARRETT: I object to the characterization of testimony.

MR. JANSING: I was going to say– – –

MR. BARRETT: There has been no contempt citation filed. There has been no charge levied by a prosecutor. There has been nothing competent to support the allegation of perjury. I object and I move it to be stricken from the record.

MS. STAUTZ: So noted and will be stricken as to that as not before us or has not entered into this as near as I can ascertain from my reading of this. And, I'm looking at the Committee members here, so not before us today.

MR. JANSING: Well, it was mentioned in my filing of the case in my Facts of Findings that were submitted to Judge Lucas. So, they are part of the record; it is part of the record. It was filed by me. During Mr. Hawkins' testimony, he described in– – I described in detail those instances in my filing, but– – and I requested that the Judge weigh his testimony accordingly with regard to the– – and– – and, his testimony should be held accordingly, especially, when it comes

to the history of the prior owner's intentions, so-called abandonment testimony, and the history of Dallas Lake. George Terry Hawkins has a law degree from the University of Louisville. And although he has voluntarily agreed to refrain from practice within the common law of Kentucky, he is listed on the Kentucky Bar Association and should know better than to contradict his own testimony. He should be held accountable for his actions and at least– – –

MS. STAUTZ: I don't know if this is relevant for this.

MR. BARRETT: I'm going to object again– – –

MS. STAUTZ: Yeah. If we can stick to the facts before us with regard to the structure at issue and whether or not it's a lawful nonconforming use or not and the maintenance issue before us, I'd appreciate it.

MR. JANSING: Okay. My personal analogy of the Kings' intention, my predecessors, was to remove the boathouse only for the purpose of re– – –

MR. BARRETT: I'm going object. If the witness– – see he's even drawing me into it. He's not a witness; this is argument. If he wishes to cite to the record, by all means do so; I object to any testimony.

MR. JANSING: In the hearing– – this has to do with the nonconforming legal use and has to do with the progression that he had talked about, about two generations, all right. My predecessors, the Kings, intentions were to remove the boathouse– – –

MR. BARRETT: I object to this person acting as an advocate on his own behalf, trying to act as a witness to give what is incompetent testimony in any form in this country; to state the intentions of another person. If there are documents or testimony of record that apply, let him cite it.

MR. JANSING: If you would let me finish, I will say– – –

MS. STAUTZ: If you– – you need to stick to the findings that are before us and the record that's before us, and reference there to any objections or any support of those.

MR. JANSING: Okay. I can– – I can reference to the stuff that was presented in the hearing, can I not?

MS. STAUTZ: Yes, you may.

MR. JANSING: Okay. Presented in the hearing was my testimony as such. And, Claimant Exhibit 1 is evidence that the Kings' intention was to rebuild the boathouse. Also, presented was Claimant's Exhibit 4 which was an invoice from the Kings for boathouse– – for– – referencing the boathouse seawall permits. So, to say– – for Mr. Barrett to state that the Kings' intentions were not to rebuild the boathouse, or to tear it down just to have it torn down, is preposterous. For those reasons, claiming a lawful nonconforming use of it being abandoned by the Abbys, or the Claimant, is exempt from the privilege of lawful nonconforming use, is just false. The Respondent Intervenors claim that the Administrative Law Judge errored in Finding of Fact the placement of a boathouse was common place in 1947. Even the Respondent Intervenors' testimony, by Mr. Hawkins on page 32, dispels that the Administrative Law Judge errored. Mr. Hawkins talked about a quansa hut. He also talked about, and I'll quote him– – he was talking

about another boathouse and elaborated on one. But, to quote what he said. "Several– – about the same time period"… Then he elaborated on this one that was part of a house, or a garage; it was connected to a house. So, that was not a quansa hut; it was larger than a quansa hut. But, he talked about several at the same time period and his quote is: "But, they've all long since been removed. They were– – twenty, thirty years ago, they were gone." That's his quote. So, evidentially, there were some boathouses, more than one quansa hut that existed on the north shores of Dallas Lake. During the hearing, the Claimant presented evidence of permanent structures in the north shores of waters of Dallas Lake in immediate proximity of the project as well as pictures of the current existing boathouses, current existing boathouses on the Indiana Chain of Lakes, which Dallas Lake is a part of. It remains an undisputed fact that the building variance and permit to reconstruct the boathouse has been issued to the Claimant. And, the boathouse that was in existence for so many years was in existence before any Respondent Intervenors acquired their properties. And, the fact remains, as I stated in the original public hearing, that if I'm not granted the authorization to reconstruct the boatwell– – or boathouse over the current boat well after dredging and rebuilding the boat well walls, I intend to rebuild the boathouse immediately outside of the Department of Natural Resources' jurisdiction, by the authority already granted me by the LaGrange Zoning and Building departments. Unfortunately, this would require an elaborate overhead extension for me to even get my boats from the lake. But, even so, the unobstructed view that the Respondent Intervenors are attempting to gain across my deeded property, at my expense, through these proceedings will ultimately obstruct– – ultimately be obstructed to a greater extent than the original boathouse by a land baron boathouse that I would be forced to construct in the event that the Administrative Law Judge's Nonfinal Order is not made final. In conclusion, although I do not agree with the entire Findings of Facts and Conclusions of Law filed by the Administrative Law Judge on September 28, 2006, and reserve my rights, the Nonfinal Order authorizing a reconstruction of the boathouse with the limitation to the same size as the previous boathouse, is acceptable. For the affirmation, I

requested that the Administrative Law Judge's Nonfinal Order of September 28, 2006, be affirmed.

MS. STAUTZ: Thank you, Mr. Jansing. With that I would open it up for some discussion and if there are, again, kind of monitoring time here as far as if there are any additional clarification as well, but first for Committee Members questions. I think one that I know I had was one with regard to the proposed Order there that it was going to be provisional upon providing the external dimensions of the boathouse that was formerly there, and that it would not extend beyond those– – that former footprint of that. Have you provided or do you have those dimensions? I did not see that, or.

MR. JANSING: No, because it was after– – it says after the final Order, not the Nonfinal Order. Otherwise, I would have provided them within 30 days. But, I do know what they are. Well, do you want them after the– – –

MS. STAUTZ: That's fine. But, you do have those. Questions, comments?

MARK AHEARN, AOPA COMMITTEE MEMBER: Let me ask, does– – if I may, and this is for Ms. Knotek. You said the Department's– – at one point you, I think, offered this morning that the Department's determination of dealing with beauty, was from the lake in, not from the shore out. Is there anything in case law or regulation or anything that support that?

MS. KNOTEK: Well, I think that where that perspective comes from is going back to the original Public Trust language in the Public Freshwater Act of 1947. And, you know, the jurisdiction given to the Department is from the shoreline into the lake, and that's the main concern of the Department. The development of the law has been to balance the regulatory

authority of the Department and its charge to be concerned with the Public Trust that is balanced with the rights of the riparian owners to utilize their lake front property. So, I think that that– – you know, I think it's mostly one of perspective. And, when the Department seeks to safeguard the Public Trust, what we're really concerned about is the experience within our jurisdiction and that experience on the lake. The perspective of the riparian owner; the first concern that the riparian owner has is, generally speaking, to their property values and their experience interfacing with the lake from their frontage. So, I think that that's mainly the distinction that I was trying to point out. And, it's clearly that the riparian owner also has is encompassed within that Public Trust. They're citizens of the state as well. And if anything, a lot of times, have a heightened concern with their lake, not just as an owner, but also as a member of the public, and someone who is out on that resource.

MR. AHEARN: I have one more.

MS. STAUTZ: Oh, sure. Go ahead.

MR. AHEARN: Not a question. I'm going to offer an observation and comment for counsel, if you want. You know, I'll show my hand on this a little. I am a little bit troubled by the procedural elements that exist, that ultimately, one way or another support Judge Lucas' Order. And, it seems we have at least three that we're being asked to dispose of or pine on. And, if we were to turn this into a Final Order or to render a Final Order, it strikes me that in so doing we would also dispose of the procedural issues, which I think are significant and possibly need some examination on their own right. And, let me just say I'm not comfortable that we've– – I'm not comfortable that the Order addresses the issue that Mr. Barrett raised on the allegation; the ex parte communication, which is maybe a– – without suggesting any intent to do anything wrong, but the question he asked and looking at it is how does the– – how do the Respondents' interests,

are they taken into account in that set of circumstances? And, I would add further, how does the rest of the public see all the interests, except that we do government in the open, how does the rest of the public see that. So too, in presenting the– – and the Order presenting the option of modify or proceed, I think I'm not convinced yet that we've disposed of the issue of should there have a public hearing in the process. And, I'm open to have anyone either augment that or instruct me otherwise from here. And, then finally, to the extent that there is a shift of a burden of proof, I'm not comfortable we've disposed that issue either. Is it is the case that if the option, instead of proceeding, had the Order been go back and modify and– – I don't know if it started with the *de novo* review or fresh process; would that process have been put in place, the process so to speak, for addressing the procedural issues; would that have cleaned up the procedural issues? And, I'll just say two more observations that concern me about this Order. And, then anybody can address them that wants to, and that would be helpful. Counsel Knotek said that Judge Lucas's opinion offers some very helpful guidance to the Department about what we want to do in the future. And, I'm not certain that these are the procedures and facts we want to take forward as guidance to the Department in the future. It seems there are a lot of controversial issues in it. And, Mr. Jansing offered the thought of fairest to the most number of people, and I don't know if that's our standard. Having said all that, I'm most concerned about the procedural issues that are embedded in this, that it would get subsumed if we adopt this, or. Can either party help me; anyone?

MS. KNOTEK: Well, I have a response to that, and this is coming into the case somewhat as a late player. But, I think that the issue of standing was disputed early on in the case, and that particular issue was raised to the AOPA of Natural Resources Commission, which declined to make a ruling, and held that out to be decided by the Administrative Law Judge at the conclusion of the case. So, I think that that puts– – frankly, it puts the Administrative Law Judge in a very difficult position, because the issue which is key to moving the case forward is

unresolved. And, obviously, there was great divergence in views between the three parties on how that should have been resolved. So, I think in that sense it made proceeding with the case in any orderly fashion extremely difficult. So, that's just my perspective.

MR. BARRETT: If I might.

MS. STAUTZ: Sure.

MR. BARRETT: I'm sorry; you looked like you were getting ready to ask a question on that, and I don't want to– – –

MR. AHEARN: No, no, no. I'm– – I need help on this.

MR. BARRETT: The issue of the intervention did make this a procedurally awkward case, throughout. And, your observation that it's a procedurally awkward case or not clean case might not be the one to use as the president for further evaluation of the substantive issues, is probably well made. I do have to dispute Ms. Knotek's statement that that question, that status; party status; the intervention status is unresolved. It is resolved. The AOPA's Order; this Committee's Order of October of '04, the very last sentence of it said after the hearing on the merits, the parties are free to object and brief this again. No one did. There's been no objection by the DNR, no objection by the Claimant. And, although the Committee retains plenary authority to review the Nonfinal Order, that issue is not before you on the motion of any party. I wanted to make sure that that procedural posture is clear. The question of the perceived futility of a public hearing; in criminal law there are what is know as critical stages of the proceedings at which the Defendant must always be present; his arraignment unless it's waived, selection of the jury; return of a verdict; imposition of sentence. And, there are many times when a Defendant

would probably rather absent himself from a position of a sentence, unless he can be procedurally deemed to have waived it, he's to be there. And, that's because the law imposes on those who carried out a duty to adhere to proper procedure, that there is benefit in following procedural norms. And, in that analogy and in the case that we're here to talk about, there is benefit from the public having access to governmental decision-making. And, to suggest that the requirement be circumvented; the requirement of public hearing be circumvented, merely because of convenience to do so, is incorrect. Now, I would stand on that. And, if I could have just a moment to– – I would say– – –

MS. STAUTZ: Just a couple minutes, we do need to– – –

MR. BARRETT: Yes. I know we need to go. And, understanding that the main issue is the nonconforming use versus the natural scenic beauty within the procedural aspects, which we've now discussed, all of Ms. Knotek's observations and the fact that Mr. Ledet was called as an adverse witness, the fact that the humorous aside, the natural scenic beauty standard and Cedar Lake had little to do with one another. The question that was asked whether is the perspective from the shore out or from the water in and her answer to that; and I don't disagree with her point– – I don't say that her point is invalid. But everything she said underscores my point, which is there is no standard. Mr. Ledet views it differently from other members of the Department. The riparian owners view it from the shore. The Department wants to view it from the water. Cedar Lake, an obviously developed lake and has more stories than I'm apparently aware of, the standard applies; Dallas Lake it doesn't. There are no ascertainable standards for the imposition of the natural scenic beauty standard. The use did not exist when the Claimant took title. To suggest that mere nonuse does not amount to abandonment, while altruism cannot carry through three generations of owners. He's not the one who stopped using it, it was his

predecessor's predecessor in interest that did. And his predecessor tore it down. There was no use; there can be no nonconforming use. Thank you.

MS. STAUTZ: Thank you. Appreciate the testimony before us this morning, and brings us to our action as a committee unless Bryan you had any further questions or comments on this.

BRYAN POYNTER, AOPA COMMITTEE MEMBER: There's a motion for an opportunity to Brief.

MS. STAUTZ: That's right. We have Findings of Fact and Conclusions of Law with a Nonfinal Order before us. We've heard testimony, there's a request for a motion for a briefing schedule on some transcription of which is currently being done. So, it's with regard to the motion for establishment of a briefing schedule, which we have the authority to determine. We delegate that responsibility as appropriate, which we've done in other matters. Would like any discussion or motion around Briefing schedule in this matter; noting that there's been a lot in the record currently, and over the number of years that this case has proceeded, whether or not there is value in additional briefs.

MR. AHEARN: If the Committee were to grant the motion for additional briefing, would we look at some abbreviated, yet usable time limit?

MS. STAUTZ: Generally that's the case of what would be reasonable for the parties involved in this to prepare the briefs. I would think that this has been protracted, so I would probably suggest an abbreviated schedule.

MR. AHEARN: And, then there's probably a process with the additional briefing material, we would then– – I hate to say it– – defer a decision unsigned– – of course we would,

until we have that additional briefing material. I like the concept of additional briefing material, at least based on some discussion here and the record created. And, then the record created if the parties– – –

MS. STAUTZ: For clarification on that?

MR. AHEARN: Yeah.

MS. STAUTZ: Okay. Would you like to put that in a form of a motion?

MR. AHEARN: I'd like to hear on how long you think is a reasonable time to allow counsel to brief.

MS. STAUTZ: Well, I'm one to brevity. Normally, I would say a couple of weeks, but I also know that we're in the middle of a holiday season here, and out of respect for the parties here; 30 days.

MR. AHEARN: So moved.

MR. POYNTER: Second.

MS. STAUTZ: Okay. All those in favor of a motion for a briefing schedule set at 30 days from now for parties to prepare briefs and then we will again put this on our next Committee Meeting Agenda then to have an opportunity to review those briefs and disposition of this matter at that time. All in favor.

MR. AHEARN: I.

MR. POYNTER: I.

MS. STAUTZ: I.

ADMINISTRATIVE LAW JUDGE, STEPHEN LUCAS: May I ask for a couple of clarifications?

MS. STAUTZ: Sure.

MR. LUCAS: Number one, are these to be simultaneous briefs. In other words, all the parties will file their briefs by January 30. And, number two, is the AOPA Committee today concluding oral argument, or does it anticipate subsequent argument, or is it too early to ask that question?

MS. STAUTZ: I would like it to be simultaneous briefs.

MR. LUCAS: I agree.

MS. STAUTZ: Because of the nature of the– – I mean, I think the issues have been before that they've heard each others positions on this. Do you concur on that?

MR. AHEARN: [phrase inaudible].

MS. STAUTZ: You know, with regard to any additional oral testimony, I'm– – I mean, I've set through this since '04 so– – –

TERRY HAWKINGS, RESPONDENT INTERVENOR: So, have we.

MS. STAUTZ: So, I'm deferring to the two newest folks here as to whether or not you would find that helpful.

MR. AHEARN: Well, can we not always request that if we think we need it?

MS. STAUTZ: I think we could.

MR. AHEARN: All right.

MR. LUCAS: So, there would not be additional oral argument unless– – –

MS. STAUTZ: Anticipated, unless– – –

MR. LUCAS: Unless other Committee Members ask for it? All right.

MS. STAUTZ: Thank you for clarifications on that. Thank you to everyone here this morning.

MR. JANSING: Just one clarification.

MS. STAUTZ: Sure, Mr. Jansing.

MR. JANSING: What's the date that the simultaneous submittal of briefs is– – what's the date?

MS. STAUTZ: Well, what's a business for that?

MR. BARRETT: January 7th is a Sunday, which is 30 days from today.

MS. STAUTZ: 8th is a Monday.

MR. LUCAS: That'd be January 8th?

MS. STAUTZ: January 8th. Thank you.

[End of Recordation of Oral Argument]