

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
March 7, 2023, Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jennifer Jansen
Bart Herriman

NRC, DIVISION OF HEARINGS STAFF PRESENT

Elizabeth Gamboa
Aaron Bonar
Scott Allen

GUESTS PRESENT

Rebecca McClain
Alex Kutanovski (Appeared virtually by video and audio)

Call to Order

Jane Ann Stautz, Chair, called the meeting to order at approximately 1:35 p.m., ET, at the Natural Resources Commission, Division of Hearings, Indiana Government Center North, 100 North Senate Avenue, N103, Hearing Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum.

Consideration and approval of minutes for the meeting held on October 4, 2022

Bart Herriman made a motion to approve the minutes of the meeting held on October 4, 2022. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *South Lake Sailing Association, Inc & Cedar Lake Yacht Club, Inc. v. Department of Natural Resources; Administrative Cause No. 21-010W*

The Chair recognized Alex Kutanovski representing the Petitioners.

Kutanovski presented oral arguments for the Cedar Lake Yacht Club and South Lake Sailing School (Petitioners), as follows:

The Petitioners own a parcel of real estate on Cedar Lake and has operated on that parcel for several decades. Starting in 2010 the Petitioners were granted approval to operate an aerator on the lake during the winter season between the months of October and March to prevent significant damage to the pier from freezing and thawing of ice. The Petitioners operated the winter aerator for over a decade with no safety incidents and no issues raised by the Department of Natural Resources (Department) or any other authority.

In 2021 a group that races motorbikes on the lake contacted the Department with concerns of the winter operation of the Petitioner's aerator. At that time the Petitioners were made aware they were required to apply for renewal of the certificate of approval to operate the aerator every two years. The Petitioners were shocked to learn they needed to renew their permit to operate the aerator since the Lake Point Condo Association operates a winter aerator on Cedar Lake without renewal requirements. The Petitioners paid the fee and filed an application with the Department to allow the continued operation of the winter aerator. The Department denied the application and the Petitioners appealed that denial.

Kutanovski questioned whether it is appropriate for the Department to accept applications and the payment of fees related to winter operation of aerators if the Department has an unwritten policy or position that unilaterally denies those requests, and whether it is appropriate for the Department to take a position that all operations of winter aerators on freshwater lakes are unreasonably dangerous without basing the decision on known incidents, expert reports, or formal studies. Kutanovski further questioned whether it is appropriate for the Department to selectively enforce the operation of winter aerators while allowing other property owners to operate aerators.

The Department currently accepts a one-hundred-dollar application fee from those applying to operate an aerator on a freshwater lake between October 1 and March 31. The Department also sends a letter indicating the application is under review and a determination is pending. At the Administrative Hearing, Department staff testified that though there is no written or formal review process for winter aerators, the applications are denied without receiving a substantial review on their merits. The testimony indicates someone at the Department reviewed the application and took an unsupported, unilateral position that the operation of these types of winter aerators are unreasonably unsafe.

By accepting the application fee, the perception is the Department is taking an impartial and unbiased review of the application and reviewing the application on its merits. The reality is the Department merely sees the application is for the winter operation of an aerator and stamps "denied" on the application. The citizens of Indiana deserve better.

Department staff, including the Director of the Division of Water and two Conservation Officers, provided testimony at the Administrative Hearing and none testified that they were aware of any situations where the operation of an aerator during the winter had caused a safety concern. In fact, one of the Conservation Officers, with decades of experience, could not identify an incident where the use of winter aerators was

unreasonably unsafe. The Department staff could not provide or reference any studies that had been prepared to support the Department's policy position regarding the use of winter aerators. The Department was not able to provide any expert reports that were available to support the policy position on winter aerators but relied on a baseless theory to deny the application for a winter aerator. The Department relied on the general opinion that thin ice is unsafe regardless of whether it is caused naturally or by an aerator. Indiana is a state where water freezes and ice thaws, but the Department is taking a position that thin ice is unreasonably unsafe.

Throughout the process, the Department has said thin ice, which may be caused naturally or with an aerator, is an unreasonable safety concern, yet the Department has not acted on the use of an aerator by the Lake Point Condo Association. Instead, the Department has focused on the use of the winter aerator by the Petitioners. There are also multiple documented incidents of individuals who have never applied for a permit or certificate to operate an aerator and the Department has not issued any Notices of Violations or acted regarding the operation of those aerators, which is selective enforcement.

There is nothing to suggest or show that the operation of an aerator at Lake Point Condo Association or anywhere else on Cedar Lake is any safer than the aerator operation proposed by the Petitioners. The reason the Department was inspecting the Petitioner's aerator operation was because of an inquiry by an organization that races motorbikes and snowmobiles on the lake. The racing of motorbikes and snowmobiles on the ice presents a greater safety concern than the operation of an aerator, but the Department allows those races to occur despite incidents with the motor races on the lake. Last year one of the snowmobiles ran into the Petitioner's pier. The Cedar Lake Fire Department has had several safety incidents related to the motor races on the lake and no incidents related to the operation of aerators to protect the piers.

The Petitioners would like the Department to implement a fair and equitable review process for applications that is based on supported facts and circumstances related to the application rather than an outdated and unsubstantiated policy position. The operation of aerators is more popular, and the engineering associated with the aerators have proven safer.

The Chair asked if there were any questions.

Herriman asked if the Petitioners application included items such as where the aerator would be located and why the aerator would not present a hazard.

Kutanovski responded in the negative and said that the Petitioners filled out their application for the winter aerator with the same information they had in the 2010 application that was approved. During the administrative case the Petitioner hired an engineer, who spoke with the aerator manufacturer. The engineer's report included specifications for the aerator. It was stated during the administrative case and the subsequent application that the aerators would be placed in the "area of influence" where the melting of ice could be controlled.

Herriman asked if piers were temporary structures and needed to be removed in between seasons.

Kutanovski said he believes there are some piers on Cedar Lake that are permanent structures. The Petitioners' pier has extensions that come out before winter, but the main pier is permanent and remains in the lake.

The Chair said her recollection is some of the piers were grandfathered in.

Herriman asked if the Petitioners' pier was grandfathered.

Kutanovski said it was his understanding the Petitioners' pier is one of those that was grandfathered.

The Chair recognized Rebecca McClain representing the Respondent.

McClain presented oral arguments for the Department of Natural Resources (Department), as follows:

There was no evidence presented on the lawful nonconforming use of the pier and whether or not it was a permanent pier. There was testimony by law enforcement and the Division of Water that north Indiana lakes have other recreational uses including snowshoeing, cross country skiing, and ice fishing that occur during the winter.

The reasoning for the general license being issued in 2010 under 312 IAC 11-3-1.2 is that aerators were a relatively new product and law enforcement was looking into the safety risks. Since then, the Department has enacted rules that aerators be operated only between the end of March to the beginning of October.

The Petitioners' application was for the winter months, which falls outside the general license period. An aerator creates open water and thin ice. Some of the evidence presented by the Petitioners at the Administrative Hearing was the open water was the "zone of influence," but the engineer arbitrarily settled on 150 percent increase from the open water to where thin ice would be. However, evidence was presented at the hearing that law enforcement did an onsite inspection of the lake and observed where the current was carried causing the thin ice out past the Petitioner's pier and riparian area into the public trust area. The Administrative Law Judge (ALJ) determined the use of the aerator was an impact to public safety, an impact to the public trust, and would impact all the other winter recreational uses.

The policy is clear: the general license to use an aerator is only good from the end of March to the beginning of October and there is no general license for the winter. There was no evidence presented by the Petitioners at the hearing that it's generally safe to use an aerator. A blanket statement that there are no injuries or emergencies is not enough to show that aerators should be allowed at this location. Thin ice a threat to recreational users at all Indiana lakes and that is why there is a Department policy to only allow

aerators starting in March through October. Thin ice is a safety hazard and takes up valuable recreational area from the public during the winter.

The Department is requesting the ALJ's Findings of Fact and Conclusions of Law with Nonfinal Order be upheld and made a Final Order in the matter.

The Chair asked if there were any questions.

Herriman asked if there were any set of facts where the Department would approve permit for the use of an aerator during the winter.

McClain responded, "not to my knowledge." She added that there are not many applications for the use of aerators in the winter. There was also no evidence presented that there were other aerators permitted during the winter. Further, unlawful use of aerators during the winter does not indicate they should be allowed. McClain stated there is not a lot of precedent as to what facts would make an aerator allowable.

Herriman observed that "and there is no additional standard." Herriman said the first part of Section 1.2b sets forth elements that need to be met to get a permit in the non-winter months but there is nothing there for someone who wishes to get a permit during the winter months.

McClain responded a person would just need to apply for a permit and typically with freshwater lake permits the Department will grant a general license if the requirements in the rules are followed. Other permits that may not follow the rule requirements would go through the navigational and safety review by the Division of Law Enforcement and the Division of Fish and Wildlife review. For example, if someone wanted a longer pier than what is allowed or if someone wants to operate an aerator during the winter months, the permit application would be reviewed. Division of Law Enforcement recommended a denial of the Petitioners' application because it would impact recreational lake users in the winter.

Jansen said the Petitioner mentioned the condo association that also uses an aerator during the winter and asked if that is the same party referenced in section 19 of Findings of Fact and Conclusions of Law.

McClain said she wasn't sure but believes section 19 of Findings of Fact and Conclusions of Law is referencing Lake Point Condo Association.

The Chair asked if there was a Motion on the Findings of Fact and Conclusions of Law with Nonfinal Order

Bart Herriman observed the proposed Findings of Fact and Conclusions of Law with Nonfinal Order were well drafted and moved to accept the Findings of Fact and Conclusions of Law with Nonfinal Order. Jenifer Jansen seconded the motion with recommended amendments to finding seven on page four to include the word "application" after the word "permit."

The Chair called for a vote to accept the Findings of Fact and Conclusions of Law with Nonfinal Order, with amendments, in the matter of *South Lake Sailing Association, Inc & Cedar Lake*

Yacht Club, Inc. v. Department of Natural Resources. On a voice vote, the motion unanimously carried.

The Chair noted item four on the agenda was removed.

The Chair noted that the *South Lake Sailing Association, Inc & Cedar Lake Yacht Club, Inc. v. Department of Natural Resources* matter has brought to light some opportunities to improve operations in the Department. The AOPA Committee recommendation is that the Department, particularly the Division of Water and the Division of Law Enforcement, review and make improvements or modifications on a written policy and transparency around permit applications. This is to avoid potential situations where citizens are not aware of what the steps are, and to provide the information needed to have a permit application considered by the Department. Along with the written policy and transparency, there should be steps and requirements for review including types of evidence or information that would be needed.

The Chair said that she is aware of other states adopting new technology around piers to prevent ice buildup and damage that is caused by ice, but they also have additional requirements for safety, markings, and posting. There are also requirements around liability insurance and indemnification, so there is more to be considered when looking at public safety. The Chair requested the Department look at other available options and an opportunity to refer the matter to the Advisory Council for additional work.

Jansen agreed that bringing better transparency to the permit application process is needed, even it is having a policy clearly stated up front so people know what would be expected.

Herriman agreed and said a review of the regulation itself would also help to avoid confusion and put the applicant on notice that they may need to show an unusual or extraordinary circumstance. The current rule has no standard and leaves the people in the dark.

Adjournment

The meeting was adjourned at approximately 2:05 p.m., ET.