AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
May 17, 2024, Meeting Minutes

AOPA COMMITTEE MEMBERS PRESENT
Jane Ann Stautz, Chair
Bart Herriman
Jennifer Jansen

NRC, DIVISION OF HEARINGS STAFF PRESENT
Elizabeth Gamboa
Aaron Bonar
Scott Allen

GUESTS PRESENT
Rachael Tran
Bill Eberhard
Ihor Boyko
Rebekah Singh
Kent Baker
Steve Snyder
Sean Griggs

Call to Order
Jane Ann Stautz, Chair, called the meeting to order at approximately 12:55 p.m., ET, at the Division of Hearings Hearing Room, Indiana Government Center North, 100 North Senate Avenue, Room N103, Indianapolis, Indiana. Jennifer Jansen appeared telephonically. With the presence of three members, the Chair observed a quorum.

Consideration and approval of minutes for the meeting held on April 29, 2024

Jansen made a motion to approve the minutes of the April 29, 2024, AOPA meeting. The Chair seconded the motion. Upon a voice vote, the motion carried. Bart Herriman abstained from voting because he was not in attendance at the April 29, 2024, AOPA meeting.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Shorewood CD v. Drew*; Administrative Cause No. 22-041W

Herriman recused from discussions or voting in this matter due to a potential conflict of interest.

The Chair recognized Administrative Law Judge (ALJ) Bonar.

ALJ Bonar noted a motion and a response to the motion, were filed on May 16, 2024, and have not been reviewed or ruled on by the ALJ. The Chair noted the filings.

The Chair recognized Rachael Tran, counsel for the Petitioners, Shorewood Conservation Development, LLC. and Robert E. Baker (collectively hereinafter Baker).

Tran presented oral arguments, which is summarized as follows:

> The issue involves a safe buffer space and whether Information Bulletin #56 (IB56) should be applied to allow each party to have ten feet of clear space. 312 IAC 11-1-4 states the Commission "shall consider as guidance riparian zones within public freshwater lakes." IB56 states: "To assist with safe navigation, as well as to preserve the public trust and the rights of neighboring riparian owners, there ideally should be ten feet of clearance on both sides (for a total of twenty feet) of the dividing line between riparian zones. At a minimum, a total of ten feet is typically required that is clear of piers and moored boats, although the area may be used for loading and unloading boats and for active recreation." The standard is twenty feet although there have been cases that allowed deviations when there a smaller shoreline area, when the shoreline is irregular, or party agreement.
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> The Drews have 80 feet of shoreline and the Bakers have 50 feet of shoreline. Both parties agreed that principle two of IB56 applies, and both parties have adequate shoreline to allow for ten feet of clear space.
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> Exhibit O shows an earlier pier configuration for Drew and Exhibit U is the current Drew pier configuration showing only a ten-foot buffer space. In the past the Bakers had enough clear space, but the current configuration of the Drew pier makes the space too confined, difficult to navigate, guests cannot temporarily moor their watercraft, and there is a safety concern.
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> The Findings of Fact and Conclusions of Law with Nonfinal Order (Nonfinal Order) hinders the Bakers' use, infringes on their rights, and increases the safety concerns. The limited space increases the cost for the Bakers because the company who takes out and installs the pier must do it in sections, assembling the pier sections on the shoreline.
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> During the administrative hearing Mr. Drew was asked why he didn't move his boatlift to the opposite side away from the Baker's property. Mr. Drew's response was, "because I don't want to." The Drews are putting their two piers on each end of their 80-foot shoreline while keeping their middle area open. There was no evidence of any exceptions to the buffer in IB56. The Nonfinal Order deviates from IB56, allowing for a five-foot buffer for each party. The justification seems to be in Paragraph 39 that says there has not been any collisions or safety incidents due to the piers' current configurations, which sets new precedent and could impact other Indiana lakefront property owners.
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> The Bakers are requesting the guidelines in IB56 and the precedent established in previous cases followed and a twenty-foot total buffer be ordered.

Tran requested that Kent Baker be able to address the AOPA Committee and that Baker is not adding anything new that is not before the AOPA Committee.

Snyder objected to Baker making additional comments because it would be additional witness testimony. There is not supposed to be additional evidence taken at oral arguments before AOPA and Baker's comment would not be proper. Snyder argued Baker's comments may deviate from what the record in the matter states.

Eberhard states he has read what his client [Baker] intends to say and there is no new evidence Baker will be presenting.

The Chair stated the comments by Baker would be allowed and recognized Kent Baker over Snyder's objection.

Baker's statements are summarized as follows:

> There is no need for the Drews to be in the riparian zone. The alternative is for the Drews to put their boat in the clear area in the middle of their property, but the Drews do not want to obstruct their view of the lake. Baker is not asking Drew to reduce the size of the pier, just reconfigure the pier the way it used to be and put the boat on the other side of the pier.

Snyder commented that what Baker stated is not in the record and renewed his objection.

The Chair recognized Steve Snyder, counsel for the Respondents, William and Diane Drew (Drew).

Snyder presented oral argument, which is summarized as follows:

> Snyder said he has only seen one case where the twenty-foot separation was required on Lake Wawasee. The ALJ in that case ordered the twenty-foot separation because no party argued for anything less and it involved one lakefront property with 250 feet and one lakefront property with 62feet.
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> The ALJ in this matter found the Drews owned two lots and that they are not combined as a single lot. IB56 is a nonrule policy that serves as guidance, not a statute or administrative rule. The ALJ weighed the evidence, determining there was seventeen feet of space between the piers. Exhibit F is a detailed survey that shows the 7.7feet between the piers on the east side of the Baker's property. It is not unusual for there to be less than a ten-foot buffer areas between piers. The other party is asking the AOPA Committee to reweigh the evidence in the matter.
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> Exhibit U is a picture that shows a pontoon boat in the temporary mooring area of the Baker pier, which is not where that boat normally is. The area where the pontoon boat is

in Exhibit U is the open space between the Drew pier and Baker pier. There were several exhibits that showed previous pier configurations including Exhibit 9, Exhibit 6, and Exhibit F, and the ALJ based his decision on the evidence that was in front of him. The riparian rights owner can choose to keep their area empty or put something in it. In this case, the Drews decided they want to put a pier in their riparian area. The Drews' pier is within the guidelines of IB56, does not interfere with navigation, does not create a safety issue, and there is plenty of room to swim.

The evidence presented sustains the Nonfinal Order and five feet of clear space for each property is more than adequate to provide appropriate safety and navigation.

The Chair recognized Tran for rebuttal.

Tran presented rebuttal arguments, which is summarized as follows:

Yager v. Ryan, 14 CADDNAR 50 (2016) (*Yager*) was cited and is similar *Shorewood CD v. Drew*. In *Yager,* IB56's second principle applied due to the amount of shoreline available, and each party was ordered to keep ten feet of clear space. Similar cases decided by the Commission supporting Baker's position are *WAWA, LLC v. E. Mark Deister,* 16 CADDNAR 2 (2021) and *McCulloch v. Day & Schramm*, 12 CADDNAR 40 (2009). IB56 is in place to protect the parties and there are no exceptions that would cause a deviation in the current matter. The reconfiguration of the Drew's pier and added boat lift makes the space between the parties' piers narrower.

If future courts look at a ruling in this matter where the buffer area is five feet, which deviates from IB56, it could set a bad precedent with repercussions impacting the safety areas between piers on the lake.

The Bakers have been providing ten feet of space between their pier and the Drews' pier, but the Drews have only provided four to five feet of clear space. The Bakers have a smaller lakefront and want a safety space of ten feet for each property.

The Chair asked to clarify that Exhibit U was the pier configuration in 2023 and that there is a the "jut out." Baker answered yes.

Snyder said Exhibit F shows the distance between the riparian line and the jut out pictured in Exhibit U and the Nonfinal Order addresses the boat lift.

Eberhard stated the ALJ determined the boat lift sits behind the jut out and the picture shows the boat lift is not there.

The Chair noted that IB56 is a guidance document that the Commission adheres to and the ALJ heard the evidence presented at the administrative hearing. The Chair noted some corrections in the Nonfinal Order include clarifying the page numbers, Paragraph 23, "the parties seek the" should say "the parties seek to", and in Paragraph 24, the second sentence "make" should have an "s".

Jansen moved to approve the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Shorewood CD v. Drew*, with amendments and the typographical corrections previously identified. The Chair seconded the motion.

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 *Shorewood CD v. Drew.* On a voice vote, the motion carried with Jansen voting aye on a roll-call vote.

Consideration Findings of Fact, Conclusions of Law, and Nonfinal Order in the matter of *Beckman & Boyko v. Department of Natural Resources*; Administrative Cause No. 21-047R

The Chair recognized Sean Griggs, counsel for the Petitioners, David Beckman and Alan Boyko (hereinafter Petitioners).

Griggs noted he filed Objections to the Findings of Fact and Conclusions of Law with Nonfinal Order (Objections) on March 27, 2024, pursuant to Indiana Code 4-21.5-3-29(d) and the Department of Natural Resources (hereinafter Department) filed Respondent DNR's Response to Petitioners' Nonfinal Order Objections (Response) on May 15, 2024, which is 49 days after the Objections were filed. Griggs stated the untimeliness of the Department's Response is prejudicial to the Petitioners.

The Chair noted the Response filed by the Department was a late submission.

Griggs presented oral argument, which is summarized as follows:

> The Department improperly listed Petitioners on the federal Applicant Violator System (hereinafter AVS), which is a list of people who are prohibited from owning and controlling coal mining operations.
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> The Department's Response claims the AOPA Committee should treat the Nonfinal Order as a negative judgement and examine the evidence most favorable to the prevailing party together with reasonable inferences drawn therefrom. The Department is wrong, and the cases cited in support of the claim do not apply. There is controlling president in *Indiana DNR v. United Refuse Co.* where the Indiana Supreme Court in its ruling said, "Section 29 of AOPA requires that ALJs make findings of fact based on evidence presented at the hearing and base recommendations exclusively on that record." The ALJ should conduct a de novo review. The Petitioners have the burden of proof to show they were improperly listed on the AVS by a preponderance of evidence. It is unreasonable the Department would attempt to impose a different standard that is not based on Indiana law.
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> The Petitioners work for FTI Consulting (FTI), a business advisory firm specializing in insolvency and bankruptcy support work. The Petitioners help companies in financial difficulties with selling assets, selling the business, and other financial aspects.

White Stallion Energy (WSE) was the mining operator who hired FTI to provide temporary restructuring and financial advice. The terms did not include controlling mining operations. After WSE went into bankruptcy, FTI and the Petitioner's services were not needed until the bankruptcy court appointed the Petitioners to continue to provide restructuring and financial advice to WSE.

The Department put the Petitioners on the AVS because they hold the titles of officers representing WSE. The Nonfinal Order relies on the definition of owned or controlled under 312 IAC 25-1-94(b), where there is a presumption that an officer has sufficient control over a business and should be included on the AVS. The presumption of the titles that were given to the Petitioners by the bankruptcy court is why the matter was decided in favor of the Department. The bankruptcy court added "Restructuring Officer" to the original title given to the Petitioners to make it clear the Petitioners' purpose was to restructure WSE out of bankruptcy. In Paragraph 100 of the Nonfinal Order the Petitioners, as Chief Operation Officer (COO) and Chief Financial Officer (CFO) respectively, were presumed to be owners and controllers of WSE under 312 IAC 25-1-94. The presumption the Petitioners are owners and controllers of WSE are also in Paragraphs 38, 42, and 44 and played a key role in the decision. The presumption is found in 312 IAC 25-4-122.2 that says someone challenging an AVS listing must prove by a preponderance of the evidence that the person does not own or determine the manner of mining operations.

312 IAC 25-1-32.5 is applicable to decisions under Section 122.1 to Sections 122.3 of 312 IAC 25-4. The ALJ applied 312 IAC 25-1-94 and the Petitioners believe 312 IAC 25-1-32.5 should have applied because it says the persons challenging the AVS listing are not people that determine how mining operations are done. There is evidence in the record that the Petitioners did not determine how mining operations were conducted, and they did not control the mining operations. After the bankruptcy petition was filed, mining operations stopped, and the bankruptcy court approved everything that happened at WSE. Matt Ubelhor testified that prior to bankruptcy he (Ubelhor) and Steve Chancellor oversaw mining operations at WSE. The Petitioners testified regarding their roles at WSE, their limitations, and that their duties did not include mining operation. A WSE board member testified about the limited roles of the Petitioners and the engagement letter prevented them from carrying out mining operations.

The problem is the interpretation 312 IAC 25-1-32.5, which says a person must be in a position to "determine" mining operations. Paragraphs 95 and 96 of the Nonfinal Order interpreted "control" from Section 32.5 to mean the Petitioners would be in a position to "influence the manner in which those activities are conducted." Being able to influence is not the same as determining or deciding something. The misinterpretation of the control element in the Nonfinal Order has a far-reaching impact that could extend to anyone who could influence a mining operation. Influencers could include lenders, the bankruptcy judge, officers, consultants, all employees, accountants, legal counsel, or anyone even tangentially affiliated with a mining company could have influence over the mining decisions which is in a misinterpretation of the law.

The Nonfinal Order applied an erroneous burden of proof because Section 122.2 says the standard of proof is "preponderance of the evidence." However, Paragraph 98 of the Nonfinal Order indicated that the Petitioners have not met their burden of establishing that they did not have direct or indirect control authority to determine the manner in which operations were conducted. This is a higher standard than required by the regulation The evidence had to be 51% in favor of Petitioners, but now they have to prove they did not have direct or indirect authority. Further, relevant facts cannot be based on speculation. The ALJ found "it is "reasonable to conclude that the information provided by Petitioners influenced the decisions made by the lenders and the bankruptcy court. Thus, Petitioners were in the position to at the very least indirectly determine how the coal mining operations were conducted." Petitioners would have committed a crime if they attempted to dupe the bankruptcy court and it is not reasonable to conclude this is what the Petitioners were trying to do.

The facts that should have been considered were the engagement letter setting forth the scope, the bankruptcy court's order that approved a limited scope for the Petitioners, and the sworn testimony of Ubelhor, who was making mining operation decisions at WSE. Because none of these facts were determinative, the Nonfinal Order is speculative in deciding Petitioners should be on the AVS. The conclusion is detrimental to the mining industry, the bankruptcy process, and undermines the process so someone would be afraid to do their job if they were under threat of being placed on the AVS.

Because the Nonfinal Order misinterpreted the law, ignored important facts, improperly weighed those facts, and misapplied the law to those facts, the Petitioners request the Nonfinal Order be reversed

Herriman questioned who would be liable if there were violations after the bankruptcy petition was filed. Ubelhor said water sampling was not permitted. Could people making decisions absolve themselves of liability for the violations due to the bankruptcy proceedings? Griggs answered the permit holder, WSE, had a CEO who lasted until bankruptcy was filed, when he was fired. He is still an officer of the parent company. He was Ubelhor's boss and made decisions up to the bankruptcy filing. Griggs argued Alcoa's coal was removed from the mine, but that mining operations stopped upon the bankruptcy filing.

Herriman questioned who was calling the shots after the bankruptcy petition was filed. Griggs explained the lenders had a say, but the bankruptcy judge made the decisions. The violations involve WSE properties that have not been sold.

The Chair asked finding of fact 97, referring to the contract for removal of coal to Duke. It is indicated Beckman had authority to execute the contract. Griggs argued the coal was already owned by Duke and awaiting delivery.

The Chair recognized Ihor Boyko, Counsel for the Respondent, Department of Natural Resources (hereinafter Department).

Boyko presented oral arguments, which is summarized as follows:

The burden of proof is by preponderance of the evidence, but 312 IAC 25-4-122.2(b) should also be considered where it says: "In meeting the burden of proof, a challenger must present reliable, credible, and substantial evidence. This modifies the preponderance of the evidence standard of proof.

Paragraphs 87 through 89 of the Nonfinal Order, the ALJ cites the applicable rules. Petitioners complain about a misapplication of 312 IAC 15-1-32.5. But the regulatory framework creates a series of interlocking broad definitions as set out in Paragraphs 87 through 89. Petitioners have not presented reversible error.

The Petitioners make an argument that the presumption found in 312 IAC 25-1-94 does not apply to the burden of proof provision. 312 IAC 25-1-1 specifically states that the definitions apply throughout article 25, so the definition does apply.

The Petitioners say the restructuring activities by Petitioners were limited. Exhibit 26 from the administrative hearing shows that almost 200,000 tons of coal were produced from four surface mines. Petitioners were in the position to control the excavation of that coal. Excavation is an activity which falls within the definition of a coal mining operation. Even if the Petitioners needed an order from the bankruptcy court, Petitioners were in the position to make the decision to request the order and may not absolve themselves of responsibility for the decision.

The Non-Final order was not based on speculation. The ALJ made inferences, but judges may make reasonable inferences. The facts presented are very detailed and supported by citations to the record. Petitioners made mining operations. The fired people, they hired people, and they excavated coal in the ground. The Department believes the ALJ correctly found the facts and properly applied the law.

The Department believes the law and facts were correctly applied and requests the Nonfinal Order be affirmed.

The Chair recognized Griggs for rebuttal.

Griggs presented rebuttal arguments, which is summarized as follows:

The Petitioners made recommendations to the bankruptcy court because it was their job, but that is not having the final say. Boyko recommendation on the budget, and if the bankruptcy court approved it, they moved forward. If the bankruptcy court denied the request, the money was not spent. The Petitioners observed and made recommendations to the bankruptcy court on how to maximize the value of WSE assets with the hopes of selling those assets.

The coal that had been removed had had been blasted was out of the ground, waiting to be treated, and loaded. Boyko added his understanding was that the coal had not been excavated.

Jansen said she struggles with the idea that Petitioners' are put in the position of following the bankruptcy court's order and risk being put on the AVS list or not following the court order and being fired.

The Chair questioned whether Ubelhor and Chancellor were listed on the AVS. Boyko responded that they were not in violation. The Chair noted the challenge of carrying out the orders of the bankruptcy and a need to be in compliance with the rules and regulations.

Herriman questioned who would be accountable for violations and it seems Petitioners had some level of responsibility based on the evidence. Taking the State's position to its logical conclusion, FTI could also be placed on the list for alleged violations.

Herriman noted some corrections in the Nonfinal Order include Paragraph 23, Rashda Butar's last name is spelled two different ways. Also, Paragraph 71 should have a period after "public stream", Paragraph 76 "purchase" should be plural. The Chair noted corrections in the Nonfinal Order to include two times in Paragraph 54 "Office" should be "Officer."

ALJ Gamboa said she would check but believes Buttar's name has two "T" s and will make corrections as needed.

Griggs noted there were three paragraphs number "89." The Chair adding number and pagination needed to be corrected.

Boyko asked if paragraph 23 was in fact incorrect, but it was determined that the paragraph was correct.

The Chair noted that a lay person looking at this would say WSE had the permit and was directing operations and should not WSE individuals be on the AVS. However, that was not the issue before the committee.

Herriman asked if the AVS prohibits those on the list from owning, controlling or operating mines or if the AVS list is used merely to inform other states. Griggs said he has yet to see who would, without question, issue a mining permit to someone on the AVS list. Griggs is not sure if a state would grant permit upon further questioning. The federal AVS indicated it was up to the individual states as to how they handled the information on the AVS.

Griggs stated WSE was not a good operator and got themselves into trouble and Chancellor was removed from the AVS list while the Petitioners were added to the list. Chancellor would then be able to get permits in other states. Griggs asked why previous officers or the remaining director with WSE were not on the AVS list. Griggs said the Petitioners are still appointed by the bankruptcy court and must stay until the WSE assets are sold and the job is complete. Griggs noted the Petitioners inherited WSE's violations when they joined the company for restructuring. When a new violation affected properties off-site of the mines, the bankruptcy court approved funds to correct the violation. When the violation only impacted on the mine property, the bankruptcy court did not approve the funds for correction.

Herriman noted the Petitioners do not want to own mines and Griggs affirmed the Petitioners could not own mines under their contract.

Boyko noted that AVS is a permit-blocking system. A person involved in mining who gets put on the AVS cannot open a mine in Kentucky. The chair asked how one gets off the list. Boyko indicated that the persons listed on the AVS could make an agreement with the state for removal from the AVS.

The Chair asked if the Department has any recourse against a former mine owner or operator that were permit holders who were removed because of bankruptcy, but that at the time they were in the owner or operation position and violations occurred during their tenor. Boyko responded Chandler was filed and most of the violations occurred after the bankruptcy petition was filed.

Jansen noted it seems the AVS is to deter bad behavior and it seems fundamentally unfair that the people who made bad decisions are free to continue their behavior and the people making current decisions for the company at the direction of a court would be put on the AVS list.

Herriman said it is concerning the lenders or whoever would make decisions to not utilize sufficient funds to bring the mine in compliance. Herriman said it seems some people are not being held accountable and he is not inclined to hold the Petitioners solely responsible even though they did provide more than accounting services. Herriman said the Petitioners did make some decisions related to the broad definition of mining.

Herriman moved to remand and to amend the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Beckman & Boyko v. Department of Natural Resources*. The ALJ should rewrite the findings of conclusions to reflect that even though Petitioners played a significant role in mining operations, both financial and otherwise with respect to the mining level here, it does not rise to the level of being placed on the AVS, especially due to the fact that others who had more control were not placed on the AVS. Jansen seconded the motion.

Jansen noted the system is not effective if it allows violators who are no longer with a company to be removed from the AVS. Jansen recommended the Department and the Commission review and make recommendations to make future changes on who should be added to the AVS.

The Chair called for a vote to remand and to amend the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Beckman & Boyko v. Department of Natural Resources* with amendments and the typographical corrections previously identified. On a voice vote, the motion carried with Jansen voting aye on a roll-call vote.

The Chair instructed the ALJ to circulate the amended order to the AOPA committee and to the parties.

Adjournment
The meeting was adjourned at approximately 2:27 p.m. ET.