

**AOPA COMMITTEE OF THE
NATURAL RESOURCES COMMISSION**

Meeting Minutes of March 15, 2011

MEMBERS PRESENT

Jane Ann Stautz, Chair
Mark Ahearn
R. T. Green

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Cameron Clark

Call to order

Jane Ann Stautz called the meeting to order at 12:33 p.m., EDT on March 15, 2011 in The Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum.

Consideration and approval of minutes for meeting held on January 11, 2011

R. T. Green moved to approve the minutes of the meeting held on January 11, 2011 as presented. Mark Ahearn 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 *Thomas Majewski v. Department of Natural Resources*, Administrative Cause No. 07-235W

Jane Ann Stautz reflected the only proceeding for consideration during the meeting was *Majewski v. DNR (07-235W)*. Both parties waived oral argument and agreed the Administrative Orders and Procedures Act Committee would deliberate based upon the Claimant's objections and the parties' briefs. Both parties filed timely briefs, and the Chair expressed appreciation for the thoroughness and professionalism of counsel.

The Chair observed that for consideration was administrative review of DNR's denial of PL-20,899, a permit to place material within Cedar Lake, a "public freshwater lake" located in Whitley County. The Lakes Preservation Act (IC 14-26-2) and 312 IAC 11 are regulatory

authorities. The parties do not dispute that Cedar Lake is a public freshwater lake but disagree concerning the placement of a geotextile within waters adjacent to Majewski's property. The DNR characterizes the application as one for an "underwater beach" and Majewski as one for a "safety project". The Chair then opened the floor for questions, comments, and discussion.

Mark Ahearn asked for Committee perspectives concerning the likely precedential ramifications. Here the placement of pea gravel on a Geotex® nonwoven geotextile was considered. The administrative law judge also provided context for application of the Lakes Preservation Act. The ALJ discussion was more than dictum but perhaps was not all essential to the disposition. On the other hand, he was inclined to the perspective the discussion was appropriate and could be helpful to understanding of the Lakes Preservation Act both here and in the future.

R. T. Green asked whether the ALJ's nonfinal order was consistent with prior decisions by the AOPA Committee, including the *Meyers Subdivision* case decided in January. Ahearn responded he believed there was consistency. Although the subjects at issue were not closely related, they both applied the Lakes Preservation Act. An important aspect was responsibility for protection of the natural scenic beauty and the protection of public freshwater lakes in their present state. Riparian interests should be balanced with the rights of the public.

The Chair suggested the outcome was largely governed by the applicable rules. The Commission adopted 312 IAC 11 to assist with the balancing of private rights and the public trust. To find for Majewski, the AOPA Committee would have to determine the rules were somehow inapplicable. Ahearn responded that, under the right facts, the AOPA Committee might remand a proceeding to an administrative law judge to determine if an overriding legal principle superseded the specifics of the rules.

Ahearn observed the Claimants cited *Indiana Department of Natural Resources v. Town of Syracuse*, 686 N.E. 2d 410 (Ind. App. 1997). He then asked Steve Lucas, the administrative law judge, whether he believed the enactment of IC 14-26-2-23, as promoted by the Lakes Management Work Group, would cause the result of *Town of Syracuse* to be different today. The administrative law judge answered he understood *Town of Syracuse* held that piers supported on auger poles were not subject to DNR and Commission jurisdiction because they were outside the intended legislative scope. The Lakes Management Work Group and others discussed the breadth of *Town of Syracuse*, whether it applied to all temporary structures or merely to piers on auger poles—arguably one of the least obtrusive structural uses of lake shorelines. The administrative law judge said he believed IC 14-26-2-23 did change the law regarding piers on auger poles since the statutory language now refers specifically to jurisdiction over temporary structures. *Town of Syracuse* might still properly be cited for the proposition that activities which are inconsequential to the values of the Lakes Preservation Act are not regulated by the Lakes Preservation Act.

Jane Stautz drew Committee attention to Finding 37. She suggested the purpose of 312 IAC 11-4-4 was to disqualify the geotextile, for which Majewski sought a DNR license, at the site where Majewski wished to place the material.

Green said he was unconvinced by the objections and briefs that the ALJ's nonfinal order should be reversed. He said he would support affirmation.

Mark Ahearn moved to approve the findings of fact and conclusions of law with nonfinal order of the administrative law judge as the final disposition of the Natural Resources Commission. R.T. Green seconded the motion.

The administrative law judge asked permission to offer two technical clarifications. He said he had not wished to offer them until the likely direction of the AOPA Committee was apparent. The first would be to strike, at the end of the final sentence in Finding 32, the phrase "as such by the administrative law judge". Although he believed the sentence was accurate as written, he also believed it had universal application, including application to the Commission. Reference to the "administrative law judge" was unproductive. The second was to replace the West Law citation for *Soames v. Indiana Department of Natural Resources*, a matter which the AOPA Committee previously addressed, with an N.E.2d citation. The AOPA Committee accepted these clarifications by consent.

The Chair then called the motion for a vote on the motion, including the two offered clarifications. The motion passed 3-0.

Adjournment

The meeting adjourned at 12:52 p.m., EDT.