Minutes of the AOPA Committee of the
Natural Resources Commission
March 21, 2006

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Matthew T. Klein
Mark Ahearn

NRC Staff Present

Stephen L. Lucas
Jennifer Kane

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 10:40 a.m., EST, on March 21, 2006 at the Garrison, 6002 North Post Road, Fort Harrison State Park, Indianapolis (Lawrence), Indiana. With all three members of the Committee present, the Committee Chair observed a quorum.

Matthew T. Klein of the Indiana Department of Environmental Management introduced himself.

Mark Ahearn of the Indiana Department of Transportation introduced himself.

Approval of Minutes for Meeting Held on September 20, 2005.

The Chair identified a correction to the draft minutes of September 20, 2005. She noted that two not three members of the Committee were in attendance. With the correction, the Committee discussed and approved by acclamation the minutes for the meeting held on September 20, 2005.

Consideration of Oral Argument with respect to Objections to Findings of Fact, Conclusions of Law, with Non-Final Order of Administrative Law Judge in *Hoosier Environmental Council v. Department of Natural Resources*; Administrative Cause No. 97-065R.

Matthew Klein abstained regarding this item. "I think I have a conflict, and I will not participate in the voting at this time, or questions and answers."

Michael Mullett, representing Hoosier Environmental Council (HEC), indicated, "This is a case of first impression—one of award of attorney fees and litigation expenses under Indiana SMCRA." He said Special Administrative Law Judge, Wayne Penrod, originally granted HEC "everything that was requested." The Commission vacated that award in its entirety "finding that HEC was not eligible for an award." HEC sought judicial review. Marion Superior Court ruled that HEC was "both eligible and entitled, and the amount of the award was the aggregate amount of fees and expenses that HEC reasonably incurred in the underlying permit proceeding." He explained that DNR appealed, and Court of Appeals affirmed the trial court with respect to the

eligibility determination, but vacated the entitlement decision "not because it disagreed with it but because the court did not have the authority to reach that issue." On remand, the determination of eligibility and the facts underlying the determination of eligibility are "law of the case. What we are dealing with here on remand are the issues of entitlement and the question of amount."

Mullett noted that Judge Jensen "tracked" the legal framework in terms of the eligibility issue "very well." He noted there was one argument with regards to legal framework with which the judge phased the case, and "essentially denied HEC any award for what she characterized as the 'Objections and Judicial Review' phase of the underlying permit proceedings. We think this is clear error. We think it is a misreading *Utah International*, and ignored teaching of another case that is directly on point—*Save Our Cumberland Mountains, Inc.*" He said the "critical issue" in looking at the *status quo* is to compare the permit that was initially issued by the DNR with "where things stood" once the permit became final. He noted the permit was "changed in significant ways", and HEC was a prevailing party. "That outcome, if you will, is what you look at in terms of *status quo*." The statute is "quite clear that if at the end you have achieved sufficient success to be a prevailing party", you are "eligible." He said there is a "causal nexus" between the activity a party engaged in during the process and the outcome that makes a prevailing party. Judge Jensen "correctly found that the 'causal nexus' exists. The only real issue is the amount."

Mullett said the statute is "quite clear and specific" regarding the "aggregate amount" to include judicial review. "HEC protected and preserved virtually everything that it had gained in the administrative review phase, and what it protected and preserved, and retained was sufficient to make it a prevailing party." He said HEC is entitled to an award for time and expense incurred during the objection phase during the judicial review phase. "To rule otherwise would be completely contrary to legislative intent." He said the omission of fee award for expenses incurred during the judicial review phase would not result in a "fully compensatory" award, and it would not "serve the underlying purpose here with regard to attracting competent legal counsel to assure citizen participation."

Mullett noted that the request for a fee award included a $5,000 retainer Mullett, Polk & Associates claimed in addition to the hourly rates. He interpreted that the nonfinal order advanced the retainer compensation as "somehow in violation of rules of professional conduct, but as a practical matter it is simply not true." He explained that all cases cited have a situation where a party or attorney tried to keep retainer when it had not performed subsequent legal services. "Here, you have a situation where obviously Mullett, Polk & Associates continued to perform legal services for five years." The case law is "quite clear that there is nothing unethical or nothing improper about charging a retainer in addition to an hourly rate. So we would submit that the retainer was clearly stated in the affidavit, clearly within the scope of what's reasonable and appropriate as fair and commercial practice…; and, therefore, should be allowable."

Mullett indicated that HEC did not challenge the allowance of the difference between Mr. Goodwin's rate of $150 and his contingent rate of $225. "We think Mr. Goodwin's service was worth $225, but we do think that's within the discretion of the Commission to determine the contingent rate." Mullett reserved the remainder of his time for rebuttal.

Ihor Boyko, counsel for Department of Natural Resources (DNR), commended Judge Jensen for the detailed nonfinal order. "This was a difficult case factually." He noted several disagreements with the nonfinal order. Boyko described the case as "overstated" and "inflated—overstated from the point of view that HEC's success is overstated." He explained any success HEC achieved "did not match" what HEC was seeking in its original petition for administrative review. Boyko

noted that HEC's original petition sought a stay of the permit, which was not achieved. HEC did achieve "some changes" to the permit, but "those were not what they set out to do."

Boyko said the shifting of fees against the state is an exception to the American Rule. "Any question as to whether or not what the outcome should be must strictly be construed in favor of the state." He indicated DNR is "basically" raising four objections. First, Boyko indicated that the Judge, in her nonfinal order "committed a more critical error" finding that HEC was entitled to 100% of fees requested during the administrative review phase. He said the applicable statute requires that fees be "appropriate and reasonably" incurred. "HEC did not achieve 100% success."

Secondly, Boyko referenced the objection to the award of fees and expenses for witness Charles Norris during the administrative review phase. "That type of award has to be appropriate and also has to be upon a finding that a person made a substantial contribution. Boyko noted that the nonfinal order contained no finding that Norris's testimony made a "substantial contribution" to the outcome. He said, in a review of the facts in this case, DNR "submits that [Norris] made no contribution to the ultimate outcome so as to justify any fees at all." Boyko said that an "objective standard" as to whether or not Norris made a substantial contribution would be to review Judge Teeguarden's nonfinal order. "Judge Teeguarden goes to great lengths to cite the testimony of other witnesses, but in no way in his opinion does he cite any testimony from Charles Norris." Boyko said Norris "did not make a substantial contribution, and certainly not enough to justify $15,000 in fees and expenses."

The third objection is the award of fees and expenses for HEC employees. Boyko noted that Judge Jensen cites *Salisbury Laboratories*, and said the reliance is "misplaced". He explained that several facts in *Salisbury Laboratories* would "render [this case] inapplicable. It was based on an award of in-house litigation expenses, under a Georgia statute, and was a case between private parties." He further explained that there was no governmental entity or SMCRA issue involved. "We feel the awarding of fees and expenses for HEC employees should be reversed based on the *Burger King* case." Boyko said that the court, in *Burger King*, held that the expenses of in-house counsel are ongoing expense—a fixed corporate expense. He said the salaries of HEC employees are fixed expenses. "It doesn't matter if they are working on this case or another case. That's a fixed expense."

DNR's final objection is to the award and claim of fees and expenses of Mullett, Polk & Associates. "They have two attorneys working on the fee petition level of the case." He noted that, in some cases, the attorneys are billing at $280 an hour. Boyko said that general court guidelines should be followed regarding "billing judgment". "The fee petition phase of a case should not result in a second major litigation." He said the requirement of two attorneys "would need to be justified." Boyko urged that the billable hours should not exceed what was awarded in the underlying case, which in this instance is $150 an hour. "To put it in perspective, for the fee petition case, there are a total of almost 200 attorney hours claimed. Whereas, in the underlying administrative case there were 458 attorney hours, and that included twelve days of hearing, objections before the Commission, and judicial review in the Davies Circuit Court." Boyko said the amount claimed for the fee review phase is "excessive" and "needs to be reduced."

Boyko said HEC relies on *Save Our Cumberland Mountains, Inc.* to support an award of all fees and expenses claimed. He noted that the fact situation in *Save Our Cumberland Mountains, Inc.* was "a little different than what we have here. The government ultimately agreed to the relief that was originally sought by the plaintiffs." Boyko noted that HEC did not achieve the relief it sought in its petition for administrative review. "Here we are dealing with a policy issue of the

disposal of coal combustion waste. There is no bright line statutory requirement or standard involved here as was the case in *Save Our Cumberland Mountains, Inc*. This is a policy issue that the Commission wrestled with." Boyko noted that no statute was violated in the issuance of the underlying permit. "That should enter into consideration as to entitlement of fees."

Boyko indicated that he did not "mean to allege anything sinister" regarding the claim of retainer fee. He said the Judge correctly found that there were "simply no facts shown as to the actual arrangement HEC had as to the retainer. I think it's more of a failure to prove. We don't know what the exact arrangement is." Boyko said that speculation of HEC's arrangement would not be sufficient to award the retainer fee. He also indicated that the HEC's mention of "additional fees" could not be addressed until those fees are claimed. Boyko requested that the total amount of fees and expenses claimed by HEC should be reduced rather than increased. "I would propose that the Committee basically eliminate all fees and expenses awarded to HEC employees and eliminate the total fees and expenses awarded to witness Charles Norris.

Boyko said, "Basically reduce to 25% the fees and expenses awarded to Mr. Goodwin, and reduce up to 25% the fees and expenses awarded to Mr. Mullett in the petition phase." Boyko reserved his remaining time of two minutes.

Mullett responded that DNR, from the initiation of the case, has continued with "its unrelenting hostility to the underlying legislative intention." He said the fee statute is part of a comprehensive program that was developed to delegate to Indiana permitting authority under Indiana SMCRA. "The legal framework that has been developed to implement the fee shifting provisions around the state is something that is binding." He said the framework does not "deprive" the Commission of its discretion; it "just limits it to application of certain standards and criteria."

Mullett noted that causal nexus is "key. Once causal nexus has been established, then there is entitlement, then the only question is the amount." Regarding "substantial contribution", Mullett noted that it is not whether a witness made substantial contribution individually to the outcome. "It's whether HEC, in terms of its total effort, made a substantial contribution." Mullett explained that the Norris testimony primarily contributed to the coal combustion waste and disposal ratio. He noted the fees and expenses claimed for Norris testimony were fees and expenses incurred by HEC as part of the effort, part of the aggregate amount, and "clearly a reasonable amount". Mullett said DNR is "wrong and cannot challenge in terms of whether individual items made a substantial contribution."

Mullett noted that, with a discount of particular claims, "you have to show the claims on which HEC did not experience success." He said HEC was successful on two out of two procedural issues, five out of eight substantive issues, with significant success on four of the eight. "When you have that level of success you are entitled to compensation for all of the issues unless there is a showing that the issue on which you did not succeed is unrelated to the issues on which you do succeed." Mullett noted that Judge Jensen "properly" found that "everything was related" to the issues HEC raised to contamination of ground and surface water.

Mullett reiterated that the instant case is precedent setting. "The case law is quite clear that there is no requirement that the dollar amount fee phase be less than or greater than the underlying permit phase." He said the standard is whether the claim is reasonable in relationship to the effort. Mullett also noted that Judge Jensen found that HEC employees performed a "paralegal role" that would have otherwise required time and expense of an attorney. He concluded, "The

other objections by DNR are contrary to the legal framework that is law of the case" and "binding on Indiana".

Boyko noted that the "25% ratio issue" was not argued, witness Norris did not testify to that, and it is not in HEC's briefing. "HEC's goal was to try to reach and achieve a complete denial of the permit, and they failed in that." Boyko noted, however, that HEC did achieve "some" success regarding the ash disposal ratio set at 25%, but objected to that ratio, which the Commission subsequently increased to 50%.

Boyko indicated that DNR, at the urging of Special Judge Penrod, did initiate settlement discussions. He said HEC rejected "at least two" settlement offers. Subsequently, DNR requested mediation, but "that fell on deaf ears." Boyko reiterated that HEC's success is "overstated", and the claim for fees and expenses is "inflated".

The Chair asked whether the Committee members had any questions or clarifications.

Mark Ahearn asked for clarification whether DNR submits that a claimant is constrained by the initial proceedings or objections in seeking a claim of fees and expenses. Boyko answered that claimants are not "necessarily constrained, but that goes to the entitlement issues, the amount that should be properly awarded." Boyko added that initial pleadings establish a "road map" of the case, and sets a framework for what is to be proved and achieved. "If they fall short of that, then that has to be taken into consideration as far as reducing their claim."

Ahearn asked, "Could it not be the case that, typically deep in a soul of a lawyer they asked for everything they thought they may get, and there is really no way of knowing what that initial target is?" Boyko answered that the complaint was filed by Jeff Stant, a non-lawyer and head of HEC at that time. The initial administrative appeal set out what HEC wanted to achieve, and "even when they achieved the 25% they objected to that. They obviously did not consider that a success in their own minds." Boyko said that Judge Jensen "properly denied" fees for the objections phase. He said the initial pleading must be reviewed along with the final results to determine the entitlement amount.

Mullett responded that DNR's counsel "very well knows that the brief filed by HEC did basically advance alternatives in terms of conditions on the permit. The historic record must be reviewed in terms of the Commission's action of overturning, reversing, or denying a permit that DNR issued, the frequency of that is virtually nil. The only thing you ever get from the NRC is modification." He noted, "To the extent that to be awarded fees you would have to get the permit reversed rather than modified is virtually *mission accompli*." Mullett indicated that at the objections hearing in the underlying permit phase, HEC "offered to accept right then and there Judge Teeguarden's order and walk away if nobody else filed objections." He also said that HEC made a counteroffer to DNR's settlement offers, but there "wasn't a meeting of the minds for reason counsel well understands." Mullett said that HEC has not litigated the case "excessively in terms of using a junior lawyer to do most of the work under my supervision. That certainly is very, very standard practice."

Ahearn referred to the bottom of page nine and top of page ten of "Respondent DNR'S Objections to Nonfinal Order". "Had you asked opposing counsel for those emails or for recitation of what happened in those meetings with anticipation they would say that's attorney-client privilege?" Boyko answered, "I would anticipate so, yes." Ahearn continued, "I'm going on the concept that a formulaic number works… How do you know what's enough?" Boyko answered that the courts have established guidelines stating that generally the fee petition should

not result in a second major litigation. "I think there is even a case that I cite that says that generally the fee petition stage should not exceed 5% of the underlying phase."

Jane Ann Stautz said that eligibility was "clearly" established in the Court of Appeals. She "applauded" Judge Jensen for "all the calculations and summary of the information." She addressed the parties: "Remind me where you are at with your requests for what you believe would be the reasonable entitlement to fees in this case?" Boyko responded that the fee award would be "$11,966.21 and $7,889.33 added together and that would result in a total of $19,855.54." Mullett referred the committee members to paragraph seven on page 16 of "HEC's Objections". He said, "The sum of $99,023.72 for the Foertsch Permit Proceedings and $25,875.65 for the HEC Fee Proceeding equals $124,899.37, which is the amount that DNR should be ordered to pay HEC in lieu of the $89,930.05 included in the Nonfinal Order." He said the amount would reflect the compensation for the objections and judicial review phase, and "adding back in the $5,000 retainer, but not addressing what was made using the $150 hour rate rather than the $225 hour rate for Mr. Goodwin."

Stautz indicated that she "appreciates" the use of retainer fees. "The background for that often times it may not only be specific to a case that someone has contracted your services for, but it may be you are working on other matters with the organization or the business entity." Stautz indicated that it was "difficult" to review—as it seemed to Judge Jensen—to decipher and understand "and be careful not to speculate" what that retainer fee "really did amount to." Stautz also noted that HEC had "very detailed and more specific" notation with regard to billing statements. "Questions around being cautious in just awarding those retainer fees, because, as those of us in the practice can appreciate, the amount of retainers can vary significantly dependent upon the organization or entity you are working with." She added that it was difficult to add the retainer without more information and "trying not to speculate."

Regarding the retainer fee, Stautz asked, "Am I correct in my understanding that there wasn't anything further provided?" Mullett responded, "There is a misunderstanding here." He referred to his "Second Supplemental Verified Statement" in which Mullett included an explanation:

> In addition to the hourly fees and expense reimbursement…Mullett and Associates seeks compensation for its $5,000 retainer. In my professional opinion based upon experience and expertise… this amount would be reasonable and customary in addition to the fees and expenses claimed. When an Indianapolis law firm with experience, expertise and reputation comparable to Mullett and Associates undertakes for a for-profit business plan an administrative proceeding under significant difficulty and complexity of the Foertsch fee petition ligitation.

He indicated that Mullett and Associates does a "significant amount" of public interest litigation, but it also has a standard practice. "What is the presumptive reasonable rate is what you would charge the standard fee for service client for the same case in that market." Mullett noted that it is "unrebutted" that the "$5,000 retainer plus the $180 hourly rate" would be the presumptive amount. "There is no evidence in the record that the $5,000 retainer would be unreasonable." He indicated, under *Save Our Cumberland Mountains,Inc.*, "that is all we need as far as a *prima facie* case is concerned." Mullett also noted that at oral argument Judge Jensen inquired into "what our retainer factors were. I responded to those questions, but clearly I was not trying to make a record." He said the question is whether paragraph ten of the "Second Supplemental Verified Statement" is sufficient to support the retainer.

Stautz asked, "How would you characterize the overall success and award of fees in this matter?" Mullett indicated that he would rely on the determination that was made by the Marion Superior Court. "You have to have a significant success on a significant issue." He added that all agreed that Judge Teeguarden's ten issue framework is the "standard against which we judge here." HEC prevailed on two procedural issues, which were a prerequisite to reaching the substantive issues. Mullett said on the eight substantive issues "there clearly were three issues" on which HEC did not prevail. The remaining five issues, HEC "got something significant. On four of them, we got conditions added to the permit." Mullett noted that the end result of setting an ash disposal ratio "influenced Departmental and Commission policy thereafter." He concluded that HEC did not achieve 100% success, and HEC would have preferred the permit rescinded, "but that is unrealistic in this context." Mullett said the permit condition requiring "additional testing" before disposal "is not a stay as such, but it amounts to a stay in terms of delaying the disposal". He indicated "he did not know how" to put a percentage on HEC's success. He said that HEC's success was a "major precedent setting success."

Boyko reiterated that what the original petition set out to achieve must be compared to the actual outcome. He said that HEC ultimately achieved 50% disposal ratio. "You could say that's a 50% success, but I don't know. I would argue that it is something less than 50%, because that is not what they set out to achieve." Boyko said the case is "sort of amorphous". He explained, "HEC set out to do one thing, and the administrative law judge found something else."

Stautz said that the complexity of the case causes continued "struggle with allocation." She entertained a motion as to the nonfinal order. Mark Ahearn moved that the AOPA Committee "take it under advisement given the number of elements to consider and to have time to consider Mr. Boyko's brief submitted immediately prior to this hearing." Stautz seconded the motion. The motion was approved upon voice vote. Stautz suggested that May 16, 2006 would likely be the timeframe for a final decision.

Consideration of Oral Argument with respect to Objections to Findings of Fact, Conclusions of Law, with Non-Final Order of Administrative Law Judge in *Charles Crafton, Clarinda Crafton, James Rodocker and Brenda Rodocker and Bobby Maupin, Anna Maupin, Kerry DeArth and Robin DeArth v. Department of Natural Resources and Arvin Hopkins*; Administrative Cause No. 05-145W

James Rodocker, Claimant, explained that during the administrative hearing he referenced an Indianapolis *Daily Star* article, which indicated the state of Indiana was spending "how many millions of dollars on wetlands." He said, "Legal counsel on the other side said that was hearsay. The Judge said she would take that under consideration." Rodocker indicated that he "felt like it was a cut and dry deal before we even get there."

Rodocker addressed the stockpiling of materials within the area. "They said that there would be no stockpiling. The judge made a comment that said, 'No stockpiling.' I think that's what it means—a clean and respectable place instead of an eyesore like they have on [SR] 267 now." Rodocker also indicated that he did not understand "why someone working for DNR would overturn the permit by the DNR."

Rodocker read a letter prepared by his son and with which he agreed. The letter stated in substantive part:

DNR elects to choose to grant permission to destroy the land which causes adverse impacts to dedicated citizens who have lived in the area for years and generations. Just because someone may own the land does not mean they should be able to use loopholes to do things that have more negative impacts. This should be about the spirit of the law more than the letter of the law, because we know it is impossible to write a perfect law in advance of any situation.

Since the DNR does not have the resources to police any potentially environmentally destroying operation, then the only way to protect the land is not that Commission to tamper with. So, the DNR must violate its missions protecting Indiana's natural resources. There are three options of whom to grant permission to tamper with the land.

1. Someone who has proven trustworthy to have his opportunity before demonstrating they can do self-police and do things the right way.
2. Someone who has never had this opportunity before; and thus, may not be trustworthy.
3. Someone who has proven to be trustworthy because they have this opportunity before them but proven incapable or unwilling to self-police and prove they do the wrong thing.

By choosing to allow this person to mine the land it is clear that choosing option three as the worst option, and a bad choice by any standards, let alone any standards of Indiana government. The state ought to be proud of its efforts to protect the land, and, in this instance, it grants permission to mine the land. We do not want to be disappointed by our state or our elected government. By allowing this travesty to proceed any further is disappointing and a lack of personal and professional responsibility. On the part of the DNR and anyone else who has the opportunity to do the right thing, it is clearly allowing the wrong thing to happen. Please do the right thing: deny the permit; protect the land; and reward the life-long residents of this area who have personal property to protect, family to protect.

Clarienda Crafton, Claimant, questioned the meaning of "temporary" regarding the permit condition allowing temporary stockpiling of materials and temporary storage of equipment. She requested that "there be a specific time for stockpiling debris and also the equipment cannot sit there for 20 years and say it's temporary." Crafton referred to the DNR's permitting policy. "The policy it seems like it helps the business to obtain their permit…The biologist aided in correcting problems that he had so he could get his permit. And, yet, when we asked for a postponement of the public hearing due to personal—trying to get people into the library—we were denied." She said there should be a "two-way street."

Crafton noted that she used the Commission's database, CADDNAR, to search previous case law to support her contentions. Crafton indicated that she cited several decisions regarding mining, and noted that the cases "were disallowed… because it was mining not gravel. And, yet, I received my deposition of the gravel pit, and the appellate court judge used the same ruling using mining." Crafton reserved her remaining time for rebuttal.

Ihor Boyko, Department counsel, said, "As far as addressing the allegation of assisting only business interests in obtaining permits, the DNR helps anyone who comes in and applies for a permit." He said that "no favoritism was shown to the particular applicant. This is a thing we do as a matter of course." Boyko also said that DNR "guides" applicants through the permitting process since the "rules and regulations can be complicated, as well as some internal procedures involved."

Boyko explained that the CADDNAR case referred to by Crafton was cited for a procedural issue "not necessarily to apply to this particular case. I think the Judge cautioned the parties not to cite mining cases for substantive matters."

Boyko noted that the Department "walked the site" to assess the buffer zone. He said there was concern regarding fish and wildlife resources. "Actually, the biologist recommended increasing the buffer zone on at least one side of the stream 200 feet." Boyko said the Department's site review resulted in a "better permit as far as protecting" the resource. Regarding the Claimants' issue that the area be monitored, Boyko explained, "The biologist walking the site is standard procedure. If there is a need for monitoring, I guess that might occur on a case by case basis." Boyko concluded that the objections raised by the Claimants do not "give reason to overturn the permit."

Timothy Currens, Counsel for Respondent Hopkins, addressed the Committee. He said the findings of fact and conclusions of law prepared by Judge Jensen are "extremely well done." Currens also noted that Judge Jensen "bent over backwards" to assist the *pro se* parties during the administrative process.

Currens addressed the Claimants' objection that DNR employees "extended" assistance to Hopkins "over and above." Currens noted that Hopkins hired an engineer to assist in the permit process. He also noted that Judge Jensen addressed this particular objection in a September 8, 2005 prehearing order. Currens explained that the Claimants were allowed to file additional pleadings to identify a relationship between their objections and the permit that was issued. "This was not done. So I'm not even sure why we are addressing this again." Currens said that the remaining objections by the claimants address "factual" issues that the Claimants "still disagree with."

Currens concluded, "The judge applied the law appropriately…. There is no misstatement or misapplication of the law." He requested that the Committee affirm the nonfinal order.

Clarienda Crafton indicated that she "appreciated" DNR "walking through the area." She added, however, "Every day it seems like I see something new and different. That area is constantly changing. New wildlife is coming in. That's what I meant by 'monitor'".

The Chair asked whether the Committee members had any questions or clarifications.

Stautz noted that the nonfinal order provides for two special conditions that address the "issues around the use of the term 'temporary' including some guidance around 'no excavation, stockpiling of over burden or disturbance of any type'". She said, "It's common practice in these situations that if you do observe something you can make the Department aware of those considerations."

Stautz asked for clarification of Claimants Rodockers' objection regarding maintenance of the buffer zone. She noted that Special Condition #3 in the nonfinal order proposes that the buffer zone "not be managed. The intent behind that, in protection of the natural resources, is to keep that as natural and pristine." Stautz asked, "Do you object to Special Condition #3?" Rodocker explained, "People come in there and throw trash in there and trucks sit around in there. That's not natural."

Matt Klein, Committee member, noted that the case is controlled under the Flood Control Act. He inquired, "The issuance of the permit does not prevent Mr. Hopkins from discharging storm water without a permit into waters of the state?" Currens answered, "Correct." Klein asked, "It doesn't absolve him of disposing of solid waste without a permit?" Currens answered, "Correct." Klein then asked, "It doesn't absolve him from many other responsibilities that he may have whether it

be disturbing wetlands and getting 401 Water Quality Certification or a 404 permit? This is simply under the Flood Control Act?" Currens again answered, "Correct."

Klein noted that the citizens within the area could "call in" to the Department, Department of Environmental Management, or the State Department of Health for issues that arise. Boyko commented that the floodway is under the Department's jurisdiction. "I don't think this absolves [the permittee] of any other legal requirements." Currens added that the permit "merely" allows excavation or construction in the floodway.

Mark Ahearn asked of Claimants whether they considered any facts in the record "wrong?" Rodocker replied, "You are exactly right. In black and white, it's right. What they do is wrong. And, when we try to get it taken care of, like I said before [DNR staff] don't have the time or the resources to oversee it. Somebody's got to be in charge."

Stautz noted that the AOPA Committee is "very much constrained" to review the facts, record, and the recommendation from the administrative law judge's nonfinal order. She also commended the Claimants' "interest in the preservation and protection of the natural resources." Stautz reiterated that the Committee's jurisdiction is "limited to the permit associated with the Flood Control Act." She instructed the Department to continue to assist the Claimants when "questions or calls" arise.

Stautz entertained a motion as to the nonfinal order. Mark Ahearn moved to affirm the nonfinal order with the special conditions, as stated. Matt Klein seconded the motion. Upon a voice vote the motion carried.

Adjournment

Jane Ann Stautz called for adjournment at approximately 12:20 p.m.