

**AOPA COMMITTEE  
OF THE  
NATURAL RESOURCES COMMISSION  
October 6, 2021 Meeting Minutes**

**AOPA COMMITTEE MEMBERS PRESENT**

Jane Ann Stautz, Chair  
Jennifer Jansen  
Bart Herriman

**NRC, DIVISION OF HEARINGS STAFF PRESENT**

Sandra Jensen  
Dawn Wilson  
Billie Franklin  
Scott Allen

**GUESTS PRESENT**

Jack Birch	Rebecca McClain
Stephen Snyder	Lavern Bontrager

**Call to order and introductions**

Jane Ann Stautz, Chair, called the meeting to order at 9:03 a.m., ET, at the Fort Harrison State Park, Inn, 5830 North Post Road, Roosevelt Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum.

**Consideration and approval of minutes for the meeting held on March 16, 2021**

Bart Herriman made a motion to approve the minutes of the meeting held on March 16, 2021. 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 *Bontrager v. Department of Natural Resources*; Administrative Cause No. 18-123W**

The Chair recognized Lavern Bontrager (Bontrager), *pro se* Petitioner

Bontrager stated his concerns included the channel by his house having mosquitoes that carry diseases and flooding on his property from the lake. He said in 2014 he had a fence around his channel to keep kids from getting into the channel, but his son's friend went around his garage

too fast on a four-wheeler and through the fence into the channel. Bontrager stated that the channel near his house is dangerous and no one has used the channel since he bought his property in 1998.

Bontrager said the channel has caused water to be high resulting in property damage, including tree damage.

The Chair recognized Rebecca McClain (McClain), counsel for the Respondent.

McClain stated a permit was required for Bontrager to fill the channel and Bontrager requested an after-the-fact permit for filling a channel. McClain stated the channel was dedicated as a part of the public freshwater lake. She noted the channel is habitat for fish, wildlife, and botanical resources, and filling the channel would remove the habitat. McClain said Bontrager's permit application also had deficiencies which included, failing to notify adjacent land owners, failing to provide a proper description that would include identifying what material would be used to fill the lake and things of that nature. McClain stated for those reasons the Department of Natural Resources (Department) denied the permit application.

The Chair asked if there were questions.

Herriman stated that he is a visual thinker so it would be beneficial for him to be able to review exhibits in the Findings of Fact and Conclusions of Law to better visualize what is happening. He asked McClain if the lack of exhibits was due to a lack of a complete petition by the petitioner or if the Department provide exhibits to help the Committee better understand what is going on.

McClain stated the exhibits included the permit application and noted that the application is available on the Department website but she did not have them with her. She stated the Department file includes the deed where the channel was dedicated to the lake, pictures provided by Bontrager, deficiency notices, a memorandum created by a department inspector who observed the channel had been filled and notes from the Army Corps of Engineers. McClain added that she could provide her post-hearing brief to the Committee that has exhibits attached.

Herriman said whether it's the responsibility of the Department's counsel or the Administrative Law Judge (ALJ) it would be helpful to see more visual information presented to the Committee in the future.

The Chair noted Herriman's concerns for more visual information provided to the Committee. The Chair also noted the Department should provide additional documentation to the Committee if needed.

The Chair asked if there was a motion.

Jennifer Jansen moved to accept the Findings of Fact and Conclusions of Law with Nonfinal Order as submitted Bart Herriman seconded the motion.

Herriman commented that the late filed motion by the Department is unacceptable. Herriman also commented that, going forward, drafts Findings of Fact and Conclusions of Law with Nonfinal Order need more clarity and could benefit from the inclusion of exhibits, noting that the nonfinal order being reviewed appears to wander at times.

The Chair called for a vote to accept the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Bontrager v. Department of Natural Resources*. On a voice vote, the motion unanimously carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Robert L. Myers, et al v. Boydston Mill Association, Inc.*; Administrative Cause No. 19-022W

The Chair recognized Steve Snyder (Snyder), counsel for the Respondent.

Snyder stated he represents the Respondent, Boydston Mill Association, Inc. (Association). Snyder said the first of two issues is which principle of Information Bulletin #56 (IB #56) should apply and the second is there a valid homeowner's association which would allow the application of Principle One of IB #56 to apply.

Snyder stated the subdivision provided for lake access on a strip that was a part of the dedicated plat. Snyder stated that a preliminary plat was approved by the county planning commission but a final plat was never recorded. Snyder said the intent was for lake access per testimony by one of the developers but the intent was never formalized. Snyder stated each lot is a metes and bounds description in a non-plat which means that leaves us with no restrictive covenants and no specific provisions for the lakefront area that was transferred to the homeowner's association by the developer.

Snyder stated in the 1970's piers were placed to allow lake access and mooring space for off lake owners and have always been regulated by the homeowner's association. Snyder said one of the four family members, who developed the property and at one time owned the Petitioner's (Myers) property, testified by deposition about the pier placement and the intent for lot owners' lake access. He noted in the 1970's the placement of piers was prior to rules related to riparian areas and when the Myers purchased the property the Association's pier was on the lake. Snyder stated there were several documents in possession of the Myers that would have shown or referenced the rights of the Association to have the pier.

Snyder stated Exhibit DD shows Webster Lake as a cove and in determining riparian boundaries Principle Four would require a line drawn from the middle of the lake to -where property lines meet the shore. Snyder said under the Fourth Principle of IB #56 the Myers has adequate space for their two piers and the Association pier is within

its own riparian area. He said there was one incident of a reckless boater, but otherwise, the pier operation has been safe.

Snyder said the large pier at the end of the Association property for the benefit of the off-lake owners was expected by the previous owner of the Myer property. Snyder requests an

application of Principle One for the homeowners' association, acknowledging he used the term loosely.

The Chair acknowledged Jack Birch (Birch), counsel for the Petitioners.

Birch stated Myers bought the property in 2016 with the Association's pier in place but did not understand the extent of the interference at the time. In 2018, Myers' grandchild was swimming near the Myers' pier and a pontoon nearly ran over the grandchild as it crossed over the Myers' riparian area and docked at the Association's pier.

Birch stated no evidence presented at the hearing proposed removal of the Association's pier. Birch stated the evidence was that there has been no effort by the Association to reconfigure their pier to fit within the Association's riparian area. Birch stated the Association's shoreline is 27 feet in length and the Association's pier is over 37 feet wide and has been extended over time in width and length. Birch also stated the number of pier slips have also increased over time.

Birch stated there was a lack of evidence to show the Myers should have been aware of any functioning homeowners association, is a substantial stretch and would not be legally sufficient to bind the Myers to it. Birch asserted that the Myers do not intend to prevent pier placement by the Association, they simply want the Association to stay within their riparian area.

Birch stated the Association has not obtained a group pier permit from the Department, as required. Birch noted the order on summary judgment found the Association pier did not qualify as a nonconforming use due to changes in the pier.

Birch noted that substantial evidence was presented at the administrative hearing did not support an application of Principle Four. In addition, Birch noted that the evidence presented was that the shoreline is straight and asks that the nonfinal order be affirmed.

On rebuttal, Snyder said the determination of a "lawful nonconforming use" is a technical issue and when the Indiana Legislature gave the Department the authority to regulate piers in 2000, it created hundreds of nonconforming uses throughout the state. Snyder said the Association pier as of July 1, 2000, was a lawful nonconforming use.

The Chair asked if there were questions.

Herriman referenced Exhibit DD and said it appears most of the piers around this body of water appear to be perpendicular to the shoreline. Herriman said if IB #56 is interpreted as proposed it appears many of the piers would encroach into other riparian zones and asked if that is accurate.

In response, Snyder noted that it appears to him that Principle Four has been applied by homeowners and that some encroachment may result from any application.

The Chair noted the importance of the observation made by Snyder but also noted the need to be cautious that other property owners are not represented, and the Committee is only reviewing IB #56 and the principles as it applies to the current parties.

The Chair asked how many property owners in the subdivision utilize the Association pier.

Snyder said the maximum has been 13 property owners and there is a waiting list to obtain dock space.

The Chair asked about the Association being dissolved at one point and if the Association had ever been reestablished.

Snyder said the original Association was administratively dissolved by the Indiana Secretary of State for failing to file a biennial report and was prohibited from reinstatement because it was dissolved for more than five years. Snyder said, because the Association could not be reinstated, they had to create a new corporation, transfer the assets, and adopt the same bylaws and guidelines.

Herriman asked about Respondent's Objections to Findings of Fact and Conclusions of Law with Nonfinal Order (Respondent's Objections), paragraph four stating, "The shoreline and shape of the cove at issue is almost identical to the shape of the bay depicted in the diagram on page 7 of Information Bulletin 56."

Snyder said paragraph 4 of the Respondent's Objections refers to the "round lake theory" in the Fourth Principle of IB #56, how the principle is applied to a round lake, and it is identical to the current case.

Herriman asked about the area of the lake where the party's properties are located.

Snyder replied the area is a cove in Webster Lake that has no name.

The Chair asked if there was a motion.

Herriman said he struggles with the issue of diminished riparian areas for others in the area, but he is inclined to uphold the order.

Bart Herriman moved to accept the Findings of Fact and Conclusions of Law with Nonfinal Order as submitted. Jennifer Jansen seconded the motion.

The Chair called for a vote to accept the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Robert L. Myers, et al v. Boydston Mill Association, Inc.* On a voice vote, the motion unanimously carried.

**Consideration of recommended amendment to 312 IAC 3, Procedural Rules;  
Administrative Cause No. 21-AD-028**

Sandra Jensen, Natural Resources Commission Director, presented this item. Jensen stated most of the proposed rule amendments to 312 IAC 3-1-7 are because of statutory changes that took place in the last legislative session.

Jensen said the old requirement for administrative review to be initiated by written documentation, by personal delivery or by United States mail was eliminated. She said the Commission's Division of Hearings (Hearings) can now accept newly initiated cases by email that is already in place.

Jensen stated the previously established time for personal delivery and email delivery occurred during business hours on the day it was received, or it would be filed the following business day. She said that statute changed to include filings received outside of business hours are now filed on the date of submission, so the previous time requirement was eliminated.

Jensen said the deadlines for filing pleadings and responses has sometimes been an issue and the Office of Environmental Adjudication has an identical rule and sets definitive timelines for people to work with.

Jensen stated 312 IAC 3-1-8 is being repealed. She explained at one time the Commission had three ALJ's, and upon motion the Director could appoint the other two ALJ's, and the non-moving party could choose one. Jensen said currently, to appoint two, there would need to be one paid ALJ under contract with the Commission, and that is unlikely. Jensen noted she gave an opportunity for the Department's general counsel to offer input and she has not received any feedback.

Herriman asked if the Administrative Orders and Procedures Act (AOPA) IC 4-21.5-3 applies only to appeals and if so, would the changes to 312 IAC 3-1-8 comply with the edicts of AOPA.

Jensen replied that the proposed changes to 312 IAC 3-1-8 comply with AOPA and she said she does not see an unintended consequence as it relates to AOPA. She said there are three different statutes that apply to the disqualification of ALJ's and none of those reasons offer an automatic change of judge option. Jensen added AOPA has Section 3 that applies to administrative review.

The Chair asked if there was a motion.

Jennifer Jansen moved to accept the recommended amendments to 312 IAC 3 as submitted. Bart Herriman seconded the motion.

The Chair called for a vote to accept the amendments to 312 IAC 3. On a voice vote, the motion unanimously carried.

Jensen clarified there is not currently moratorium exception on the proposed amendments to 312 IAC 3 and the vote to accept the amendments should reflect that.

The Chair confirmed the vote to accept the amendment to 312 IAC 3 is approved for preliminary adoption pending moratorium exception.

**Information Item: Overview of online Petition for Administrative Review form and updated email filing processes**

Billie Franklin, Commission's Division of Hearings, gave a presentation to the Committee on the Commission's website and how parties can fill out a petition using the online form. She demonstrated the applicability of the form and answered questions.

The Chair thanked Sandra Jensen for all of her hard work as the Chief ALJ, management, and leadership over the Commissions, Division of Hearings.

**Adjournment**

The meeting was adjourned at 10:04 a.m., ET.