Minutes of the AOPA Committee of the
Natural Resources Commission

January 22, 2008

AOPA Committee Members Present
Jane Ann Stautz, Committee Chair
Mark Ahearn
Doug Grant
Mary Ann Habeeb

NRC Staff Present
Sandra Jensen
Stephen Lucas
Jennifer Kane

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 1:16 p.m., EST, on January 22, 2008 in the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With four members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on December 19, 2007

Mary Ann Habeeb moved to approve the minutes for the meeting held on December 19, 2007. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Consideration of "Findings of Fact and Conclusions of Law and Nonfinal Order of Summary Judgment" with "The Vorndrans' Objections to the Findings of Fact and Conclusions of Law and Nonfinal Order of Summary Judgment, Dated November 2, 2007" in *Roebel, et al. v. Vorndran, et al.*, Administrative Cause No. 07-030W

Steve Lucas, Administrative Law Judge, introduced this matter. He said the parties were both ably represented by legal counsel. James A. Federoff of Fort Wayne was the attorney for the Roebels and others. Jeremy J. Grogg, also of Fort Wayne, was the attorney for the Vorndrans.

The Administrative Law Judge said the Nonfinal Order has two main elements. One of these is a group pier enjoyed by the Roebels and others for which a "Consent Declaratory Judgment" was approved by the Natural Resources Commission as a final agency order. The second is a pier enjoyed by the Vorndrans under authority of a general license, and which is the subject of a Memorandum of Understanding between the parties, but for

which neither the DNR nor the Commission have rendering of a final determination. The Department of Natural Resources was also invited to attend and participate because the Nonfinal Order would remand the proceeding to the DNR for review and an initial determination concerning the Vorndrans' pier.

The Administrative Law Judge asked the AOPA Committee to make technical corrections in its consideration of the Nonfinal Order. He said the year "2007" in Finding 11, Finding 12 and Finding 13 should be changed to the year "2005".

Jeremy Grogg presented the objections of the Vorndrans. He said in 2002, the Vorndrans sought a license for a group pier. Following a successful mediation by Tim Rider, a Memorandum of Understanding was entered between the Vorndrans and the Roebels by which they agreed not to complain about each others pier. He said the MOU did not specify where the Roebels' pier would be located, but the location of the Vorndrans' pier was specified. The manner in which the Roebels located their pier has caused problems for the Vorndrans. In 2004, the Roebels "turned their backs" on the Memorandum of Understanding and brought the present action against the Vorndrans. Upon receipt of the Roebels' complaint, the Vorndrans filed an answer claiming the Roebels had abandoned the MOU, effectively invalidating the Consent Declaratory Judgment. As a counter-claim, the Vorndrans also sought relief as to the location of the Roebels' group pier.

Grogg urged that "under Indiana law, a consent judgment is both contractual and adjudicatory in nature. Because it's contractual in nature, and it has with it that hint of an agreement between the parties, Indiana law looks to the rules of contract construction in interpreting a consent judgment." Under the Indiana common law of contracts, "when two documents are entered at the same time and are part of the same transaction, they're one document." He urged the Administrative Law Judge erred in finding he "could not look outside the parameters of the Consent Declaratory Judgment." Grogg added that "the Memorandum of Understanding was not only the consideration for the Consent Declaratory Judgment, it was part of the Judgment itself. Without the Memorandum of Understanding, there would be no Consent Order. If the Memorandum of Understanding fails, there would be no Consent Order." He added that under Indiana law, "one party is not free to rescind their obligations [under a consent agreement] and hold the other party to theirs." After one party breaches an aspect of an agreement, he said, the other party may treat the agreement as a whole as being invalidated.

Grogg argued that the Vorndrans can request the Commission to modify a consent judgment. "When you look at the intent of the parties, if situations change, that consent agreement can be modified. The perspective there is to take a look at the judgment and determine whether the judgment has a prospective application." He said at issue is an agreement to maintain a pier year-after-year, so it has prospective application.

Grogg said the Vorndrans were also seeking relief from how the Roebels are maintaining their group pier. He said, under 312 IAC 11-3-2, a person may seek administrative review of the placement or maintenance of a temporary structure. "Once a pier permit is received, that does not give the permit holder free reign to maintain the pier however they

desire. Once they step outside the bounds of the permit they received, it is appropriate to bring another request for review." Here the petitioners received their permit to have a group pier, but the permit gave no dimensions, and the manner in which they now install the pier violate the rights of the Vorndrans. He said this issue was not addressed in the motions for summary judgment and includes factual matters yet to be resolved. He said even if the Commission does not invalidate the Roebels' group pier, the matter should be remanded to the Administrative Law Judge to determine if its placement violates the terms of the group pier permit.

James Federoff presented oral argument on behalf of the four owners of the Roebels' group pier at the South Bay Condominiums. He said the parties tried to mediate in the instant proceeding, but the mediation was unsuccessful. "As is typical of the cases that you hear all the time, this is a pier dispute. Both the South Bay pier and the Vorndrans' pier last year were in the same position that they were previously, that was approved as a part of the prior proceedings and consent judgment." Federoff urged that, despite what Grogg is "contending today, there was an agreement as to the location of the piers" of both parties. They were to be located as they were in 2004, and Federoff argued the two piers continue to be located as they were in 2004. "The crux of the problem that has developed for the clients that I represent, and this isn't before you because it's a factual matter, but to put it in a proper frame of reference, is the real problem results from the canvas cover on the [Vorndrans'] boat lift. It's about four feet off the water, and it projects about four feet beyond the end of the pier."

Federoff reflected, "We cannot contend and we do not contend that the Vorndrans' pier as placed, or the length of it, or the lift itself, need to be changed or should be changed. We agree to their current configuration. What we disagree with, and believe causes riparian rights issues for my clients, is the canvass cover because of the manner and location in which it is placed. There are ways to solve this, and we've been trying to find that methodology, and, hopefully, we can continue to do so."

Federoff continued, "What the Vorndrans have attempted to do in this case is collaterally attack the consent judgment that was entered…by the NRC back in 2005." He said the same parties were involved in the earlier proceeding that are involved in the instant proceeding, and DNR was an additional party in 2005 to the Consent Declaratory Judgment. "As Judge Lucas noted in the Nonfinal Order, there are only limited circumstances where a final order entered by the NRC can be collaterally attacked under AOPA, and those typically involve newly discovered evidence or the correction of clerical mistakes. There also is a methodology to seek modification of a final order for cases of fraud. The Vorndrans have never alleged fraud, and they certainly haven't proven any fraud. Only the DNR can seek to revoke the group pier permit that was issued as part of the Consent Declaratory Judgment."

Federoff urged, "That MOU is a private agreement. We don't think that we have breached—that is, that South Bay has breached it, because we are not seeking to change the agreed locations of either the pier or the lift of the Vorndrans. Contentions to the

contrary are incorrect. We think that Judge Lucas resolved this case properly, and his Nonfinal Order should stand and should be affirmed."

Jeremy Grogg offered rebuttal argument. He said the Petitioners "now seem to have changed their tune quite a bit. If you review their petition for administrative review…, there is no mention of a canvass cover. The only request for relief that is there is that the Commission determine that 'the location and configuration of the Vorndran pier, and the lift, during the 2006 boating season, interfered with the Petitioners' riparian rights, infringed on the Petitioners' access to Lake James, and unduly restricted Petitioners' navigation.' The second request for relief is for the Commission 'to determine that configuration and location of the Vorndran pier and the lift during the 2006 boating season failed to meet the criteria for a general license pursuant to 312 IAC 11-3-1 and prohibiting the Vorndrans from installing the Vorndran pier and the lift in the same location and manner or any other location and manner which fails to comply with 312 IAC 11-3-1.'" He urged, "They didn't file this because of the canvass cover. They filed this because they were challenging the manner in which we had our pier and lift installed—which is in direct violation of the terms of the Memorandum of Understanding." Grogg concluded that the Petitioners' "tune has changed because we brought it to the Commission's attention that they have violated the Memorandum of Understanding, which was the sole consideration for our consent to their order."

The Chair thanked Jeremy Grogg and James Federoff and asked whether any members of the AOPA had questions.

Mark Ahearn asked why the proceeding was before the Natural Resources Commission and not before a civil court, if the sole issue was whether there was a breach of contract pertaining to the parties' Memorandum of Understanding.

Jeremy Grogg responded that "the first reason why it is here is because the breach of contract allegation was filed as a response to [Roebels'] petition." But "more importantly, our response and our counter-claim was more of a two-parter. It was—(A) Yes, kind of a breach of contract, but their permit fails because the consideration for our consent fails." (B) "We're not simply challenging our Memorandum of Understanding. Our second argument has nothing to do with the Memorandum of Understanding. It has to do with the fact that the manner in which their pier is presently located and presently maintained is interfering with our riparian rights."

Ahearn asked whether the Memorandum of Understanding was "anywhere referenced in the Consent Declaratory Judgment".

Grogg answered, "It's not specifically referenced in there. I tell you what, I wish that it would be, but it does reference the mediation. It references that the mediation took place."

Mary Ann Habeeb asked whether Grogg filed a motion for summary judgment or a motion for partial summary judgment.

Grogg answered, "It can probably best be characterized as a motion for partial summary judgment, except for the fact that if we would have been granted the relief we sought in…the motion…, the original permit would have been voided. It was streamlined. The dispute was narrowed into one issue. In our opinion, we would have been back to square one with regard to the permitting process. That's why it was captioned as a motion for summary judgment rather than as a partial motion for summary judgment."

Habeeb indicated she was "confused as to the relief" the Roebels and others were seeking. "Is it the pier, the boatlift, and the boatlift cover? Or is it just the boatlift cover?"

James Federoff responded. "To answer your question specifically, it's the boat lift cover that's causing the problem. The solution might be moving the lift" so that the cover no longer causes a problem. "We're not asking that that be done. The cover could come off. The cover feature of that lift and the pier assembly is what is causing the problem with the safe navigation of watercraft."

Federoff continued. "I can see how [the petition that was challenged initially] could be read to challenge the locations of the pier and the lift. However, I assure you that is not our intent. That is not our request, and that is not our goal. That was not the goal in our petition to try and get those things moved. We are trying to find some solution so that watercraft can be safely navigated. I think Judge Lucas's remand order for a DNR determination of the licensure issues pertaining to the Vorndrans' pier is going to more closely examine the problems that do exist in navigation."

Habeeb reflected that Finding 1 of the Nonfinal Order states the Roebels' petition to establish "the location, size, and manner of use of a pier and boat lift" by the Vorndrans. She asked if Finding 1 was correct.

Federoff responded that "the Petition stated that generally. Again, it's a Petition without fleshing out the facts, and we didn't file a motion for summary judgment to more specifically state our argument. But I can assure the Committee now that we…do not request that the Vorndrans' pier or lift be moved, if there is some other solution. I think that's part of what DNR's review would involve."

Federoff continued, "I think the key is, and I think Mr. Ahearn hit the point on this—The MOU is a private agreement. If there is a complaint about breach, it's a private action. It's a contract action. That consent judgment didn't reference the MOU, and it didn't condition the continued effect of the group pier permit, which was issued as part of the consent judgment, upon compliance with the MOU. It wasn't part of it. DNR wasn't a party to the MOU."

Ahearn asked Grogg if there was an action challenging the location of the Roebels' group pier prior to the initiation of this proceeding. Grogg answered, "There was not. We brought it as a counter-claim in this matter."

The Chair observed that the AOPA Committee "really has two piers for consideration." She asked whether Doug Grant had any questions or observations.

Grant asked the parties whether the dispute arises from an extension of the boat lift. "Have we got a three-foot issue here?"

Federoff answered, "It's three or four feet. That's all it is."

Grogg answered, "I don't want to characterize it as that's the only issue. That may be the issue that sprung this as they're stating now, just the lift. But there's a real problem here when you see this. Our pier goes directly into theirs. It's more than the lift. It is not safe."

Mark Ahearn said he had concerns with the Nonfinal Order which did not bear directly upon "the issues in the water" for the placement of the South Bay group pier or the Vorndrans' pier. He suggested Findings 14 through 17 addressing the application of IC 4-21.5-3-31 and the modification of final agency orders needed scrutiny. "Maybe Judge Lucas could help us understand." Ahearn said he was unable to reconcile particularly Finding 15 and Finding 16 with the language in the statute.

The Administrative Law Judge re-examined these Findings, and he said he had incorrectly cross-referenced the subsections of IC 4-21.5-3-31 to the facts in this proceeding. The AOPA Committee and the Administrative Law Judge then discussed the application of IC 4-21.5-3-31 and its appropriate statutory construction. They agreed that subsection (b) and other portions of the section might rationally be construed in different ways.

The AOPA Committee ultimately determined the exhaustive application of principles of statutory construction to IC 4-21.5-3-31 would violate judicial economy because the application was unnecessary. Under any of the theories of statutory construction presented, the facts here did not form a proper basis for modification of the Consent Declaratory Judgment using IC 4-21.5-3-31. A preferable approach in the Final Order would be to delete Finding 15 and Finding 16 and replace them with a straight-forward single Finding 15 that stated IC 4-21.5-3-31 could not properly provide relief.

Ann Knotek, attorney for the DNR, addressed the AOPA Committee. She said she represented the DNR in the first mediation of this case, which resulted in the Consent Declaratory Judgment. She said the DNR signed the Consent Declaratory Judgment "which predates a private side agreement, which the DNR did not sign and is not bound by." Knotek said there were two different kinds of reviews coming before the Natural Resources Commission. One is where private parties seek to have a resolution of their riparian rights dispute. The other is a permitting action where the DNR is the permitting authority for the placement of a pier. "Here we have both kinds of cases getting mashed together. The DNR has not been involved in this iteration of the case. I would have concerns if the Commission were going to undo a permit, which was issued by the Department, in a proceeding where the DNR is not a party."

Knotek continued, "Here we have at least one side saying that we have a private contractual side agreement that can void a permit by the Department two years after it was issued and after the time for appealing that particular permit. That's one thing going on. I think the other is, in terms of going forward, the DNR has continuing regulatory authority over the entire public freshwater lake that is Lake James. If there is a developing or changing conflict, then I believe that the Department would have regulatory authority over that. That is separate from anything that would come from the original consent decree and possibly separate from anything that would come from the Nonfinal Order. Certainly, the DNR would properly have to be involved as a party."

Knotek concluded, "The DNR's position is to support making the Nonfinal Order a Final Order, other than some of the renumbering and re-lettering. The Department supports the underlying Findings and resulting Nonfinal Order, particularly with regard to whether a side issue can be used to void a permit of the Department." She said that "if there is something new or different that needs to be dealt with, that could be dealt with in terms of the DNR's regulatory authority over the public freshwater lakes."

Mary Ann Habeeb directed the attention of the AOPA Committee to the second sentence of Paragraph (3) of the Nonfinal Order:

> To the extent authorized by the doctrine of primary jurisdiction, the Memorandum of Understanding may be considered with respect to a license determination under IC 14-26-2 and 312 IAC 11-3.

She said "there may be other principles of law at issue with regard to the applicability of that MOU. I don't know if that's the only one. Do we want to be so limiting in the Nonfinal Order? I'm not saying that I disagree with this statement," but there may be other applicable "principles of law that may be apropos with regard to that MOU and other matters that may be considered on remand by the DNR."

The Chair summarized, "Are we narrowing it too much there?"

Ahearn reflected that the DNR needed to be careful not to become consumed with interpreting contract terms. The AOPA Committee would be saying in Paragraph (2) that the Commission does not generally become involved with the interpretation of private agreements, and the Roebels or the Vorndrans could always take the MOU to a civil court for disposition.

Habeeb moved to strike the second sentence of Paragraph (3).

Chairwoman Stautz asked whether the AOPA Committee could come to an agreement on the wording of the Final Order as a whole.

Ahearn added, "I would agree with Mary Ann, and when we get to it, that's what I would vote to do. But the Chair is trying to get to the global."

Stautz responded, "I am." She then asked if there were additional questions or comments "before the Chair will entertain a motion."

Mark Ahearn moved to affirm the "Findings of Fact and Conclusions of Law and Final Order of Summary Judgment" entered by the Administrative Law Judge with the following amendments:

> (1) In Finding 11, Finding 12, and Finding 13, the word "2007" shall be stricken and replaced with the word "2005".
>
> (2) The entirety of Finding 15 and Finding 16 shall be stricken. A new Finding 15 shall be issued to read as follows: "The record of this proceeding does not provide an appropriate basis, under IC 4-21.5-3-31, for the modification of the Consent Declaratory Judgment." Subsequent sections shall then be renumbered to reflect the elimination of former Finding 16.
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> (3) Paragraph (3) of the Nonfinal Order shall be modified by striking the following sentence: "To the extent authorized by the 'doctrine of primary jurisdiction', the Memorandum of Understanding may be considered with respect to a license determination under IC 14-26-2 and 312 IAC 11-3.

Mary Ann Habeeb seconded the motion.

The Chair called for discussion on the motion. Ahearn asked whether the AOPA Committee was comfortable with the wording of Paragraph (1) of the Nonfinal Order. The response from the members was in the affirmative.

Chairwoman Stautz asked if there was further discussion. There was none.

Stautz called for a vote on Ahearn's motion. The motion carried on a voice vote by 4-0.

Consideration of Findings of Fact and Conclusions of Law with Non-Final Order of the Administrative Law Judge and of any Objections to the Non-Final Order in *Hoosier Environmental Council v. DNR (Litigation Expenses Remand II)*, Administrative Cause No. 97-065R

Chairwoman Jane Stautz reported this item withdrawn because the time had not yet expired for the filing of objections. She reflected this item, with objections, would likely be placed on the agenda of the next AOPA Committee meeting.

Adjournment

At approximately 2:38 p.m., the meeting adjourned.