

**Minutes of the AOPA Committee of the
Natural Resources Commission**

September 18, 2007

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn
Robert Wright
Doug Grant
Mary Ann Habeeb

NRC Staff Present

Sandra Jensen
Stephen Lucas
Jennifer Kane

Guests

Lindy Burris
Robert Clark
Jon Eggen
James Hebenstreit
Ann Z. Knotek
Amy E. Romig
Stephen R. Snyder
Charles White
James Bruner

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 11:05 a.m., EDT, on September 18, 2007 in The Garrison, Ft. Harrison State Park, 6002 North Post Road, Indianapolis (Lawrence), Indiana. With all five members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on March 12, 2007

Doug Grant moved to approve the minutes for the meeting held on March 12, 2007. Mary Ann Habeeb seconded the motion. Upon a voice vote, the motion carried.

Consideration of “Findings of Fact and Conclusions of Law with Non-Final Order” and “Claimants’ Objections to Findings of Fact, Conclusions of Law and Non-Final Order” in *Cruse & Cruse v. DNR*, Administrative Cause No. 05-029W

The Chair reported this item was continued upon the motion of the Claimants pending a ruling, from the U.S. Bankruptcy Court, of the effect on the subject penalty assessment on the Claimants’ discharge in bankruptcy. The continuance was entered by the Chair and distributed to other members of the Committee in an email dated September 17, 2007.

Consideration of “Findings of Fact and Conclusions of Law with Nonfinal Order” and “Respondents’ Objections to Findings of Fact and Conclusions of Law with Nonfinal Order” in *Rufenbarger & Rufenbarger v. Blue, et al. and DNR*, Administrative Cause No. 06-246W

Steve Lucas, Administrative Law Judge, introduced this item. He said Amy Romig had recently entered her appearance as attorney with John Lloyd, IV, and she was present on behalf of all parties represented at hearing either by Lloyd or by Richard Helm. In the findings, these were identified as the Faas Group and the Blues, respectively. Stephen Snyder was present as the attorney for the Rufenbargers, and Ann Knotek was present as the attorney for the Department of Natural Resources.

The Administrative Law Judge indicated for consideration was the denial of a license application and a dispute as to riparian zones for a portion of Winona Lake, a public freshwater lake in Kosciukso County. He presented a blow-up of a simplified and reformatted survey of the site identified as “NRC AOPA Committee Sketch”. He said the parties had stipulated to its usage as a visual aid during oral argument.¹ He noted that the scale of 1”=30’ should have been removed from the blow-up, but the blow-up was otherwise to scale. The Administrative Law Judge identified a dotted line extended into Winona Lake from the southern boundary of an “8’ INGRESS & EGRESS EASEMENT”. He said this line approximately closely, but was not identical to, the line determined in the findings to be the separation between the riparian zones of the Rufenbargers to the south and the Blues (and easement of the Faas Group) to the north. The precise line would be formed by a bisection of the angle formed by the northern boundary of Lot 40 and the southern boundary of Lot 41.

Amy Romig presented oral argument in favor of the objections. She distributed a version of the demonstrative exhibit which she indicated also had other significant markings identified. Romig asked whether either of the other parties had objections to her use of the demonstrative exhibit. Snyder and Knotek responded they did not object. She explained that the dotted line separating riparian zones, as previously described by Judge Lucas, was highlighted in blue. The northern boundary of the Faas Group’s riparian zone was highlighted in yellow.

¹ This stipulated visual aid, and four visual aids developed by the Claimants from this visual aid, are attached and incorporated into the Minutes.

Romig stated the nonfinal order was based on testimony, in part, from Lt. John Sullivan. She said Sullivan testified it generally made sense to have a minimum ten feet of space between riparian owners to provide for safe navigation. Romig reflected upon a second demonstrative exhibit, which included the Administrative Law Judge's determination the Faas Group should not place structures or boats within five feet of the boundary as identified with the blue highlight. A pier was highlighted in orange which identified what the nonfinal order allows. The nonfinal order goes on to provide that the Faas Group should only be allowed to use the area north of the pier for the placement of piers. "That essentially takes the value of that easement. They can have one ten-foot wide boat lift in their easement, and that simply isn't what they negotiated for when they got the easement from the Blues and their predecessors."

Romig said there were two solutions that the Committee could make. Option Number 1 would be to change the requirement that there be a five-foot setback from the blue line. With this option, "the Faas Group would agree to use only the north side of the pier. That would give them 18 usable feet. It also prevents interference with the Rufenbargers." Option Number 2 would be to have the Faas Group move their pier to the northern edge of their easement and use the space south of the pier to the blue line. "There are two common sense options that I am presenting to this Committee that will fix the problems."

Romig argued that the nonfinal order found the Faas Group would have access to the lake, and a severe hardship would not be imposed. "This simply isn't true. As I've shown you in the drawings, ten usable navigational feet in which they're expected to put three or four boats, which is typically what they use on their pier, just will not work. It does impose a hardship on the Faases the way the nonfinal order is written."

Romig urged that 312 IAC 11-1-2(c) requires that before issuing a license, the Department shall consider the likely impact upon the applicant and other affected persons. "The impact on the Faas Group here is not fair, and it results in a taking of their rights. Although there is not a lot of law on the taking of riparian rights, there is case law on the taking in other contexts." For example, ingress and egress is a property right which cannot be taken without just compensation. Here the Faas Group cannot do much besides bringing in bass boats, "and that's simply not what they negotiated for in the easement."

Romig stated, "I respectfully request that the Committee follow either Option Number 1 or Option Number 2 as I've presented them to them. The Faas Group wants to be reasonable. They're not objecting to the limitation of the pier length at 100 feet. They're not objecting to only using one side of the pier. However, we request that either they be allowed to use the south side of the pier, if it's placed on the north end of the property, or they be allowed to not have a five-foot set back be imposed upon them so they can have the full use of their pier."

Stephen Snyder presented argument on behalf of the Rufenbargers. He said the purpose of this adjudication was to determine the respective property rights of the parties. "What

we're really here to determine is (1) the policy of the Department of Natural Resources in regard to the approval of pier permits; and, (2) the appropriate use of property rights that are created."

Snyder stated "there are only two lots here. There is Lot 41, and there is Lot 40." The Blues own Lot 41. They "chose to burden their portion of riparian area with an easement that permitted pier usage by eight individuals. The easement was actually created by their predecessor in an erroneous location, where they had no right to grant it, and it was then modified recently to be the one that was litigated in this particular matter. But, had the Blues not granted that easement, they had ample room for a pier in front of their property, as well as a pier in front of the Rufenbarger property, which would be appropriate. It is the Blues who have decided, not only should there be one user on their lot, there should be a total of nine users on their lot."

Snyder urged that policy considerations were aptly expressed by the Department in this proceeding. The Department said that "if someone chooses to burden the shoreline with an additional use or uses, the person who creates that burden should also be the person who suffers that burden. In this case, what the easement holders would like is to pass at least a portion of that burden onto the Rufenbargers, who did not grant the easement and who had no control over whether the easement was granted or not, other than through the proceedings that are before you today."

Snyder urged that the placement of the piers, with five feet of clearance on either side of the riparian line, "enforces a policy that has been in effect for several years, through the local Conservation Officers, on each individual lake." He said there were two reasons for the policy. "One, it provides a space for access for the individual property owners to their respective piers. Two, it also preserves the right of the public to access those areas that are between the piers. Being a lake owner, I can tell you that one of the most favored places for bass fishermen to fish is between the piers. If they cannot access it, they're being denied access to that asset that's being held by the State in trust for the public. That's precisely why the Department would actually prefer ten feet on each side of a common line, but acknowledging the realities in certain situations, is willing in this case to reduce it to five."

Snyder urged that if the Faas Group is allowed to place its pier immediately adjacent to the northern boundary of the Rufenbarger's riparian zone, "that, in effect, means that the Rufenbargers will have to preserve more open space by utilizing more of their riparian area to maintain open water than just the five feet which is required in the nonfinal order. Ten feet is probably reasonable along this shoreline to provide the public with access. Five feet is not."

Snyder argued that "it boils down to a classic argument that I want more than I have. Because I have some form of an easement, that was granted by the Blues in this case, that doesn't quite provide me with enough space to do what I want to do, I should be entitled to usurp on the rights of my adjacent property owners and use some of their riparian zone. The question here is whether the riparian rights of the Rufenbargers "can simply be

taken away, as opposed to limiting the use of the easement. The appropriate thing for the easement holders in this case to do would be to go back to Mr. Blue and say, ‘The easement you granted us in 2005 is inadequate to serve our needs. Will you grant us a larger easement? Or will you share a pier with us, so that we can move farther north, which you can use as well as us, and we can put boats on both sides of the pier?’”

Snyder urged, “I think the public policy statement that was expressed by Ms. Knotek, during the hearing in this case, and in the post-hearing briefs, is very clear. That is, if you burden your property with additional easement rights, you should bear the consequences of that burden rather than shifting that burden to an adjacent property owner. And I think Judge Lucas’s decision took that very much into consideration, and preserved the rights of all parties, even though it may limit the easement holders’ rights to something less than they would prefer to have.”

Ann Knotek presented argument on behalf of the Department of Natural Resources. She said that in addition to the particulars of an individual case, the agency was interested in developing a consistent framework for its regulatory responsibilities on public freshwater lakes. “Toward that end, I want to thank the Administrative Law Judges, Judge Lucas and Judge Jensen, and also the AOPA Committee for helping the Department to develop that framework.”

Knotek said the instant proceeding is interesting because “this is round two. The Department was not a party in round one. In many ways, the result is not that much different from round one, in our perspective. What we’re really doing here is working in terms of riparian rights being balanced against the public rights.”

Knotek stated, “One of the things I want to focus on that has been raised in the Blues’ and easement holders’ position is they’re claiming that some sort of taking has occurred here.” What the Committee is to decide is limited to the agency jurisdiction from the shoreline and out into the lake. “What I always go back to when looking at one of these cases is to the Lakes Preservation of Act of 1947, at IC 14-26-2-5, where it states: ‘A person owning land bordering a public freshwater lake does not have the exclusive right to the use of waters of the lake or any part of the lake.’ So we really can’t have a taking of a right to place temporary structures or boats into the lake. There could potentially be some sort of taking argument with regard to the easement rights on land, but that is not what the Department is regulating. It’s not where our jurisdiction is, and, frankly, it’s not our area of expertise.”

Knotek said in round one, there was a determination by the Commission there was no prescriptive easement to place piers into the water. “That was reiterated in the pending nonfinal order.”

Knotek indicated she also wished to address the assertion in the objections that their riparian area had been reduced. “It was only with this order that the riparian zones were defined in this case. As you can see from the visual that was provided, it’s a fairly complex analysis just to get to defining these zones, not just to defining the easement people, but both neighbors.” The nonfinal order does not reduce the riparian area of any

party. Rather, it provides there is a “five-foot setback, that because of the regulatory concerns of the Department, they are required to observe and not place structures or boats in that area.” She added that from an examination of the visuals, a person would observe that “this is going to have some effect on all of the property owners in this area in terms of everyone being required to observe this five-foot setback.” She said the gist of the Faas Group’s argument is “that just isn’t fair because we have just 18 feet. That is the hard rub of this case.” From the Department’s perspective, the goal is to appropriately consider and balance riparian rights, as well as the rights of the public.

Knotek urged that “One of our basic principles is that riparian owners have rights, but they only have rights that go so far out into the lake with regard to public rights, and also only so far laterally with regard to the fellow riparian neighbors.” She said the nonfinal order had accomplished “a balancing here. Certainly, we would prefer that there were more frontage to work with for everyone, but the nonfinal order represents a fair and reasonable balancing of all of the counterbalancing interests. The Department recommends that the AOPA Committee adopt that as the final order.”

Mark Ahearn asked what was wrong with Steve Snyder’s assertion that the Faas Group simply does not have a large enough easement to accomplish its wishes, and the remedy would be to go back to the Blues and ask for a slightly larger easement.

Romig responded, “We don’t have an insufficient easement if we’re allowed to use the easement. The easement is only insufficient with the unreasonable burdens placed upon it” by the nonfinal order. She added that “this is an easement the Faas Group has had since 1992. Simply because the Rufenbargers bought property, and now they object, we think it’s unreasonable for the Rufenbargers to impose upon the Faas Group to pay more money and get a bigger easement.”

Mary Ann Habeeb asked for clarification with respect to the five-foot “free zone or setback” requirement. “It’s a regulatory purpose, and it has to do with, among other things, safety, is that where you’re going with that?”

Knotek responded, “There are actually two different regulatory angles involved with the setback. The first comes in in terms of navigational safety. What that means is that there simply has to be room for boats to maneuver for ingress and egress to piers in order to do that safely. The Department, and specifically the Division of Law Enforcement, is very concerned that navigational safety is maintained, especially when we are making a permitting decision. The second issue which comes in has to do with the public trust. The lake, and access within the lake, once you’re off the shoreline, belongs to everyone. The Department does not support a situation in which basically we are covering the entire shoreline...with structures and boats so that there is not access” to the public. “In terms of navigational safety, the Department prefers to see a ten-foot setoff on both sides of a shared riparian boundary. In some cases, that is just not realistic.”

Ahearn asked, “A total of 20 or a total of ten” feet of clearance?

Knotek responded “a total of 20.” She acknowledged that in some cases, however, “given historic usage of the lake,” 20 feet “simply is not possible.” The Department’s expert testimony supports the proposition that “the minimum that can support navigational safety is ten feet.” The alternative suggested here, in the objections, is that the riparian owner which should provide all the setback is the Rufenbargers, the neighbor of the Blues’ and the Faas Group’s neighbor.

Mary Ann Habeeb moved to approve the “Findings of Fact and Conclusions of Law with Nonfinal Order” as the Commission’s “Findings of Fact and Conclusions of Law with Final Order”. Mark Ahearn seconded the motion.

The Chair called for discussion by the AOPA Committee with regard to the motion.

Habeeb stated, “I’m concerned about the navigational safety issue, and that’s certainly a large consideration for the Commission. I’m looking at the decision as being the most equitable way of providing for navigational safety given the fact that they’ve balanced the considerations already to make sure that is protected and the rights of the public are protected and that everyone does get consideration on this matter, keeping in mind that everyone is not going to get what they want.”

The Chair added, “I’m concerned with the importance of access to property owners and the public, as well as safety.”

Habeeb reflected, “I’m a little bit concerned Option Number 1 and Option Number 2 do not really promote the safety issue and are not really equitable for all parties—by not considering the rights of the Rufenbargers.”

Ahearn added, “I think I agree with Mary Ann.”

Robert Wright stated, “It does seem a little unfair to me. I understand the Commission controls the riparian rights, but if you think that you have an 18-foot easement, and suddenly they impose a five-foot setback, you suddenly have an eight-foot easement. It almost appears to me, based on what counsel is saying, maybe there’s no such thing as a riparian easement. If that be the case, I suppose you can change the rules at any time.”

Chairwoman Stautz asked for additional comments.

Mark Ahearn asked Amy Romig “how either Option Number 1 or Option Number 2 would not burden the Rufenbargers?” Romig responded, “Especially with Option Number 2, you’ll see that we’re placing the pier on the very north side of our easement. I would expect that option would probably burden the Rufenbargers even less than the order as written.... If the purpose of the five-foot setback is to allow public access and allow the public to sort of use that ten feet of way, by allowing us Option Number 2 to place it at the north side, that’s allowing us to use that additional five-foot as well. If you look at option two, we could place a three-foot pier. We could use a 30” pier on that to maintain that it’s truly a three-foot pier. With a ten-foot boat lift added to that pier, at

that point we're using 13 feet, and it still maintains the five-foot setback. We're not proposing to put our boats in the five-foot setback. We're just proposing that we be allowed to use our easement without the restrictions of which side to place the boats on the pier."

Habeeb asked Snyder whether he wished to provide a response. Snyder responded, "In regard to Option Number 2, I think the same five-foot setback should be required whether the pier is on the north or the south because we have space between the pier on Lot 43 and the easement pier at this time, but there is certainly no assurance that's going to" continue if Lot 43 is sold and the joint pier held by the Hamiltons and the Blues is not continued. "If it doesn't work on the south side putting boats only on the south side of the pier, then it equally won't work on the north side putting boats only on the north side of the pier. It's the same measurement whether you're measuring from the north or the south. The difference is the easement holders are proposing that there be no setback" from the easement line bordering the Rufenbargers. "I think that would be a mistake, especially in light of the policy that has been described by Ms. Knotek."

Amy Romig requested and was granted an opportunity to reply to Snyder's response. She reflected that she was not asking, with Option Number 2, that the Faas Group use only the south side of the pier. "If we use the north side, that's between the Blues and the Faas Group, and it's not the concern of the DNR or the NRC. That's part of the easement between private individuals, and the agreement between those private individuals will govern that.... I think it's a bit of a fallacy to say we might have a pier in the future. We might not. Who knows what agreement the Blues will have with the owners of Lot 43? As far as we know, the Blues and the Faas Group might come up with an agreement to use the same pier, so it's a little premature to say you're going to require a setback on the north, as well, given that's there's no structure there to require a setback from at this point."

Ahearn said, "I would offer this observation. I think one of the reasons that we do policy is not because we know what's going to happen next but because we don't know what might happen next."

Chairwoman Stautz then called for a vote on the motion by Habeeb to adopt the nonfinal order of the Administrative Law Judge as the final order of the Commission. The motion passed 4-1 with Robert Wright in opposition. The Chair declared that the "Findings of Fact and Conclusions of Law with Nonfinal Order" were approved as the Commission's "Findings of Fact and Conclusions of Law with Final Order".

Consideration of "Findings of Fact and Conclusions of Law with Non-Final Order" and "Claimants' Objections to Findings of Fact and Conclusions of Law with Nonfinal Order of Administrative Law Judge" in the matter of *Hobson Family Farms, LLC and Royden Hobson v. Ron Lambermont and The Department of Natural Resources*, Administrative Cause No. 07-012W

Sandra Jensen, Administrative Law Judge, introduced this item. She said several issues were raised in objections by the Hobson Family Farms, LLC and Royden Hobsen (the "Claimants") to a permit issued by the Department of Natural Resources to Ron Lambermont under IC 14-28-1 (the "Flood Control Act") and 312 IAC 10. The permit was needed for construction activities in association with a canoe livery on Sugar Creek in Park County. As the proceeding advanced, the several issues narrowed to whether the Department properly considered the cumulative effects of the project as anticipated by IC 14-28-1-22(e) and (f) and 312 IAC 10-2-39. "There is also consideration of the jurisdictional limits of the Department of Natural Resources relative to floodway construction activities." Based upon Commission precedents, the nonfinal order concludes "the only things within the jurisdiction of the Natural Resources Commission are those activities which are occurring within the floodway itself."

James A. Bruner presented oral argument in favor of the Claimants' objections. He said his clients own real estate directly across Sugar Creek from the area affected by this permit. Included in the permit are a canoe landing and a footpath to the landing. "The primary issue arising from the Claimants' objections is whether or not the Department, in issuing the permit to Mr. Hobson, properly considered the cumulative effects of this permit activity, together with other activities and actions in the area, upon fish, wildlife, and the botanical resources of Sugar Creek."

Bruner said there were two reported Indiana decisions affirming that the Department must properly consider cumulative effects for projects subject to permitting under the Flood Control Act. "We have no Indiana cases directing specifically how the Department is to engage in that analysis of cumulative effects and to what extent it is to be done. However, there are a number of Federal cases, and the language contained in the Indiana Code regarding the consideration of cumulative effects is the same language taken from a Federal statute covering the same areas. There is, therefore, Federal precedent covering what should be done in analyzing and determining cumulative effects." He said the Federal precedent indicates the requirement is for "some quantified and detailed information. General statements about possible effects and some risk do not constitute a hard look." He said another Federal case specifies that an analysis of cumulative effects shall consider the area in which the proposed project would have an impact, the impacts which would be expected, other past or present activities that have had or are expected to have impacts in the same area, impacts from these other actions, and the overall impact that can be expected from the individual impacts if they allowed to accumulate.

Bruner said the Department's environmental analysis was performed by Brian Boszor. "He testified essentially that he only looked at this 14-by-75 area that was directly affected by permit," although he made a "passing notice in his testimony to being aware there was another public canoe access site across the creek from this one but did not indicate in his testimony that he took into consideration any other actions, whether farming, etc., outside of the affected area as to the cumulative effect of this upon the fish, wildlife, and botanical resources."

Bruner agreed the Department only had jurisdiction to require a permit under the Flood Control Act, because Lambermont wished to perform construction within the floodway of Sugar Creek. “If the permitted area were not in the floodway, then we would not even be here. But that does not mean that in looking at the cumulative effects upon fish, wildlife, and botanical resources that these other actions and these other existing things outside of the direct-in-the-floodway area of this particular permit are not to be taken into consideration.” He urged that the Department failed to consider other activities within the floodway which had caused its degradation and had failed to consider scientific literature bearing upon cumulative effects. “It’s our opinion that the review conducted by the Department, regarding whether or not the cumulative effects of this project, along with other things existing along this area of Sugar Creek at Turkey Run State Park, taken together, have an unreasonable detrimental effect upon fish, wildlife, or botanical resources, given those standards set forth in the Federal case law that we have cited in our objections. We are asking, then, that the Commission establish specific rules in Indiana relating to these permits as to what the extent of an inquiry into cumulative effects and as to what that analysis should be, and that the Commission adopt the standard for cumulative effects set forth in this Federal case law precedent as the law in Indiana, and that based upon then an examination of the record in this case, that the permit be vacated because of inadequate consideration of cumulative effects upon fish, wildlife, or botanical resources.”

Lindy Burris presented oral argument on behalf of the permit applicant, Ron Lambermont. She said that after a two-day hearing, “Judge Jensen wrote a very thoughtful and thorough order addressing all of the evidence in this matter. Her order found that Mr. Hobson...had not carried his burden of proof to prove by a preponderance of the evidence that the DNR permit should be set aside for DNR’s failure to consider any number of factors under Indiana law—one of them being cumulative effects, and that’s what’s being addressed here today.” She urged that it was important to note that, in a proceeding before the Commission, the burden of proof rests with a challenger to a permit “once the permit has been issued” by the Department. “It does not rest with Mr. Lambermont, and it does not rest with DNR.”

Burris reviewed several Findings of Fact which she said demonstrate the Department had properly considered cumulative effects. Included were Findings 140, 141, 146, 147, 148 and 149, which identify substantive matters determined in evaluating cumulative effects, as well as Findings 135 through 139 which “explained DNR’s procedures for determining direct and cumulative effects and how they were generally implemented in this case.”

Burris urged that Judge Jensen carefully considered the evidence. The Judge found that the Claimants did not present any evidence that would have changed the conclusions by the Department that there were no cumulative effects. Finding 155 “says no evidence exists in the record to establish that any unreasonable effects would result in any other decision for the permit, and, at no time, did” the Claimants’ experts “offer any opinions that cumulative effects of the permit, in conjunction with other projects, would be unreasonable.” Burris cited Finding 156.

With respect to the Claimants' request that the Department adopt Federal standards pertaining to cumulative effects, Burris said "we do not believe that permit review is the proper forum to consider new reviews to apply retroactively." She added that "it would be unfair to apply a standard that the parties were not aware of. When initially filing for a permit," an applicant "should know the law that applies at the time."

Mary Ann Habeeb asked Lindy Burris for her client's perspective as to whether the Department had jurisdiction to look outside the floodway in considering cumulative effects.

Burris responded that "We believe the Department has jurisdiction to consider matters within the floodway, very clearly, within the Flood Control Act. Outside the floodway, the Department does not have jurisdiction to consider those effects."

Mark Ahearn observed that IC 14-28-1-22(c)(1) was, by its terms, limited to considering activities which adversely affect the efficiency of or unduly restrict the capacity of the floodway. Yet section 22(c)(2) and 22(c)(3) are not specifically limited to effects within the floodway. IC 14-28-1-22(c)(2) speaks to protecting against an unreasonable hazard to the safety of life or property, without limitation to where that hazard might exist. IC 14-28-1-22(c)(3) speaks to protecting against unreasonably detrimental effects upon fish, wildlife, or botanical resources, without limitation to where those detrimental effects may occur. "Are we saying that if something unreasonably detrimental or hazardous occurred outside the floodway..., that the DNR would be precluded from considering that?"

Burris responded, "If it happens outside the floodway, it's outside of DNR's jurisdiction. Regarding those two sections that you just now referred to in the statute, the unreasonable hazard to life or property, in the regulations and in the case law, clearly refers to passing the floodway when the floods come up. It has to do with the 100-year flood, which is the regulatory flood." She said the case law for unreasonable detrimental effects upon fish, wildlife, or botanical resources also were directed "to those effects within the floodway itself. It's actions within the floodway that also affect resources within the floodway."

Charles White presented oral argument on behalf of the Department of Natural Resources. He said, "Today, the Department respectfully requests that you affirm Judge Jensen's findings of fact and conclusions of law. The Department concurs with all points raised by the attorney for the Respondent, Ron Lambermont." He urged that the Administrative Law Judge conducted a full and fair hearing over a period of two days. White concurred with Judge Jensen's conclusions that the Claimants failed to meet their burden of proof. He said that between the Division of Water, the Division of Nature Preserves, and the Division of Fish and Wildlife, collectively 25 site inspections were performed to make sure that the terms of the project would conform with the Flood Control Act, including those pertaining to cumulative effects.

White referenced several conditions placed on the permit by Jon Eggen, one of the Department's experts, formerly within the Division of Fish and Wildlife, "to take into account sedimentation and erosion control." Boulders were required on both sides of the

footpath to the landing “to discourage people from straying off the boat ramp.” He said the Department’s experts concluded the new boat ramp “which employs sedimentation and erosion control measures, is much preferred than Mr. Lambermont’s use of the prior boat ramp, which is the public access ramp, and that did not employ any erosion or sedimentation control measures.”

White urged that “The statute never said that there will be no cumulative effects. The statute states that the Department shall consider cumulative effects..., and there shall be no unreasonably detrimental effects upon fish, wildlife, and botanical resources. No one ever claimed that there was absolutely no negative effect at all. It’s just that according to the statute, it didn’t rise to the level of us denying the permit.”

Doug Grant asked whether it was “normal the DNR has to go to a site 25 times?”

White responded, “No, it’s not normal. It appeared to me that both Mr. Lambermont and Mr. Hobson have had a little history with each other.” There was a desire by the Department to support being good neighbors. Also, there were persons in the community who were concerned with adding any more boat ramps along Sugar Creek. “We wanted to make sure that we got it right.”

Mark Ahearn expressed the perspective that he found the Department’s process “very troubling.” He asked that if there were a public records request, could the Department produce documents to show that cumulative effects were considered. “It strikes me that the Department has kind of asked Judge Jensen to pull together testimony from, I counted, at least eleven...different witnesses...and, sort of fabricate from that, that a cumulative effects study or analysis was considered. It seems to me an unfair burden to put the Judge under. It ought to be, it seems to me, that we could point to and say, ‘Here is what the Department did’, given that the General Assembly found that it was important for us to identify unreasonable cumulative effects.”

White responded, “If a citizen came up and wanted to get a file in this case, every academic piece, every handwritten note that was produced by neighbors; everything is in the file still.” He urged that if there was to be a more defined standard, it was for the legislature or the courts to determine. “But the way the case law is now, the standards that we have, our experts did the best that they could.” He said, “Everything that was submitted is in the file.”

Mary Ann Habeeb said she believed Ahearn was asking, “What specifically is in the file that deals with the issue of cumulative effects?”

White responded that the file included memos, emails, reports, photographs and other documents submitted by citizens or considered by the Department’s experts. He said “CE-1” was a notation that would allow for quick location in the agency’s computerized system, as a kind of “executive summary”, to identify matters pertaining to cumulative effects. “The file is now one of the thickest files in the Department. It would have any learned treatise.... Simply everything is in there that was submitted in the public hearing.

Any technical reports, any environmental comments or similar matters would be in the actual file.”

The Chair invited James Bruner to provide any response he might have.

Bruner responded, “I just want to cover two points briefly. One is that, at the hearing in this case, at the conclusion of the presentation of the other evidence, the Claimants made a motion to the Administrative Law Judge to have her include in the record, for this case, all of the materials in the DNR file.” This request was made because the Department’s witnesses testified they considered “everything they had”. Bruner said granting the motion would have resulted in the inclusion in the Commission’s record of all documents, regardless of whether they were previously marked as exhibits. “That motion was objected to by the Department, was objected to by Mr. Lambermont, and was denied by the Judge.” He said he didn’t know how the Judge could effectively evaluate witness testimony that indicated everything was considered, if the Judge didn’t also have all the materials relied upon for evaluation.

Bruner said, “The second thing is the problem is that we do not have a standard established for what the Department is to do to conduct an adequate cumulative effects analysis. We have cited to the Committee and to the Commission the most-relevant standards we have. Those are the standards applied by the federal courts in the same sorts of situations. There are no Indiana standards established.” Bruner reflected that the Allen Circuit Court recently vacated a permitting decision in another matter because the Department failed to consider cumulative effects. “The courts are looking at this..., and there need to be standards set for what constitutes a proper and legitimate cumulative effects analysis.”

The Chair said judicial review of another proceeding was not in the instant record before the AOPA Committee and was not a matter upon which action could be taken.

Mary Ann Habeeb noted that a decision by the Allen Circuit Court also was not a reported decision.

Lindy Burris again urged that “Mr. Hobson carried the burden of proof after the permit has been issued—to prove that something was not considered or to prove that something should have been considered, and wasn’t, which would have changed the result. No evidence was provided. He did not carry his burden of persuasion. Regarding changing the standard, this is not to proper forum to go back and apply new rules.”

Chairwoman Stautz summarized. “We have before us findings of fact and conclusions of law in this matter.” She asked if a member of the Committee had a motion.

Robert Wright moved to approve the “Findings of Fact and Conclusions of Law with Non-Final Order” of the Administrative Law Judge as the final disposition by the Commission. Doug Grant seconded the motion.

The Chair asked for Committee discussion of the motion.

Mark Ahearn stated, “I have no doubt as to the adequacy of the file or that the Department considered cumulative effects. What troubles me is I don’t believe the legislation instructs the Department of Natural Resources to create a file. I think it instructs the Department of Natural Resources to take those elements of the file that are relevant to cumulative effects and describe how..., it’s the Department’s burden, to explain how all that massive data is somehow relevant in a positive or a negative sense to the next incremental step of determining cumulative effects. I don’t see that the Department may have done that. With regard to the motion, I do think that the facts have conspired against Judge Jensen to listen to ten witnesses and to somehow decide what the cumulative effects may have been. I don’t think that’s how we ought to handle this. Regardless of whether we know specifically what ought to be in the cumulative impacts analysis, I just don’t see that it’s actually gotten done.”

Ahearn said he would also ask that Findings 106 through 109 be stricken “unless someone can tell us how the credibility or sincerity of Hobson is relevant to what we’re doing today. The sole question is cumulative effects. I was troubled by the passive voice. Also, I was troubled by the words ‘give pause’, ‘ponder’, and ‘called into question’.

Ahearn summarized. “So, I’m suggesting two things: (1) my position on the motion in total; and, (2) an amendment to the motion if we are to consider the main motion.”

Jane Ann Stautz and Mary Ann Habeeb asked whether Ahearn wished to remand the nonfinal order to the Administrative Law Judge to clarify Findings 106 through 109 or whether he wished to offer an amendment, to Wright’s motion for affirmation, to strike those Findings.

Ahearn answered that if the Committee approves Wright’s motion to affirm, “then we have no intention of remanding. My motion, then, would be to strike.”

The Chair sought clarification from Ahearn. “I take it, then, that was a motion to strike” Findings 106 through 109.

Ahearn responded, “It was.”

Habeeb seconded the motion.

Robert Wright asked whether his original motion or Ahearn’s motion to amend would be considered first.

The Chair responded that the motion to strike should be considered first. “So that’s what’s here on the table.” She then invited the three attorneys representing the parties to comment on the motion to strike Findings 106 through 109.

Charles White responded, “It’s the Judge’s job to be able to weigh the credibility of the witnesses. That’s what these paragraphs go to. Again, there have been issues as to how much of this back and forth had to do more with (1) neighbors who just don’t get along; (2) I just don’t want it in my back yard; and, (3) how much of Hobsons’ alleged activities were actually not helping by doing the same thing which was alleged conducting other boating operations. That’s what went to the sincerity or the credibility, and the Judge, I believe, is simply going through these paragraphs and trying to just weigh the credibility of what his testimony was.”

Ahearn reflected, “I absolutely agree that in a case other than this the credibility of the witness might be an issue. What we’re trying to determine” is the Department’s consideration of cumulative effects. “I don’t see how the credibility [of the Claimants] is relevant. I can see how the credibility of experts might be at issue, but I don’t see how that applies here.”

James Bruner stated, “I would be in favor of having these paragraphs stricken in their entirety.”

Lindy Burris stated, “We agree with the Department.”

The Chair then called for a vote on the motion to strike Findings 106 through 109 of the Findings of Fact. The motion carried 4-1 with Doug Grant in opposition.

Chairwoman Stautz then called for a vote the motion to affirm the nonfinal order of the Administrative Law Judge, but with Findings 106 through 109 stricken.

Mary Ann Habeeb said before taking the vote, “I have one comment. I certainly take heed to your comments, Mark, with regard to the fact the Department doesn’t have one document with everything all sewn up in a one package, but I do think there is replete in the record evidence which shows that cumulative effects was considered and that it was part of the decision-making process. Although in a perfect world it would certainly be nice to have that, and maybe looking forward I hope the Department will maybe take of the fact that that would be a preferable way to do business, I don’t know that it was essential or necessary or critical in the decision making here. For that reason, I’m supporting this decision on cumulative effects because I think they did make that evaluation, and did do that thought process, and did do what the statute on its face asked for.”

Habeeb added that the record seemed to reflect that the Claimants failed to carry their burden of proof. “The record does seem to have ample evidence to show that the decision was adequate and was correct.”

Ahearn said, “The Department shouldn’t have been surprised that cumulative effects was required by the statute. It shouldn’t have made the Administrative Law Judge go across a smorgasbord of all the evidence and somehow magically deduce that there was no cumulative effect.”

Habeeb replied, "I would agree."

The Chair then took a vote on the motion. The motion passed 4-1 with Mark Ahearn in opposition. The Chair declared that the "Findings of Fact and Conclusions of Law with Non-Final Order", with the deletion of Finding 106 through Finding 109, were approved as the Commission's "Findings of Fact and Conclusions of Law with Final Order".

Consideration of Request to Amend the Definition of "Marina" as Used in the Regulation of Public Freshwater Lakes, Navigable Waters, and Lakes on DNR Properties; Administrative Cause No. 07-176W

Chairwoman Stautz then called for consideration of proposed amendments to three rule sections addressing the regulation of "marinas". She observed the proposal would also be before the general meeting of the Commission, scheduled for later in the day, for consideration as to preliminary adoption. The subject was previously reviewed by the Advisory Council.

James Hebenstreit, Assistant Director for the Division of Water of the Department of Natural Resources, presented this item. He noted the Committee already had the proposed amendments, and he also distributed copies of the rule defining "group piers".

Hebenstreit said the Commission "a couple of years ago created the definition for 'group pier'. That was largely to address pier facilities that were for condominium complexes and multi-family uses. We wanted to do that so we could look at each individual application for a 'group pier'. It was no longer covered in the general license. When we wrote that rule, we really didn't look at the 'marina' definition. But, in most of the condominium complexes, you could probably say the people pay some fee for their pier, so that rolled the 'group pier' into almost being a 'marina'. This is hopefully a simple fix to try and create some differentiation between 'group piers' and 'marinas'. A 'marina' would now have to have two items in the listing for what constitutes a 'marina' instead of one."

The Chair stated, "I appreciate the efforts of the Department and of the Advisory Council to take a look at this issue. I think this amendment would hopefully address some of the issues that have been on the issue between group piers and marinas."

Mary Ann Habeeb said, "I would congratulate the Department in the brevity of words."

Mark Ahearn added, "I think it is good governance. This issue went through the AOPA Committee then we sought the perspectives of the Advisory Council."

Stephen Snyder, an attorney from Syracuse and who represented a party in a former adjudication where "marina" status was an issue, was invited to speak. "The only question I would have, and I don't have the rule in front of me, but if you require two of

those items to constitute a marina, could you then be eliminating some things you might want to cover? I happen to have experience with one situation where the only thing a marina does is sell fuel. Do you want to eliminate that from your arrangement? They do have piers, but they don't offer docking space. They just sell fuel."

Ahearn asked if the Advisory Council considered the situation described by Snyder.

Hebenstreit responded that specific examples were not considered by the Advisory Council. He said most marinas have been in existence for several years so the Department really did not have a lot of experience with permitting them.

Habeeb said, "Then maybe you want to consider just taking 'docks' out of the rules—just eliminating the existence of docks as constituting a marina. It would be just as easy a fix to take the word 'docks' out. It's still going to go out for public comment."

Ahearn said, "I would agree. As I recall, the AOPA Committee was concerned with magically transforming a 'group pier' into a 'marina'."

Snyder said, "But I'm familiar with another situation where all they do is provide dock space."

Habeeb asked, "And that's a marina?"

Snyder responded, "It is, at least from a zoning perspective. They do charge a fee, but the only thing they do is provide dock space."

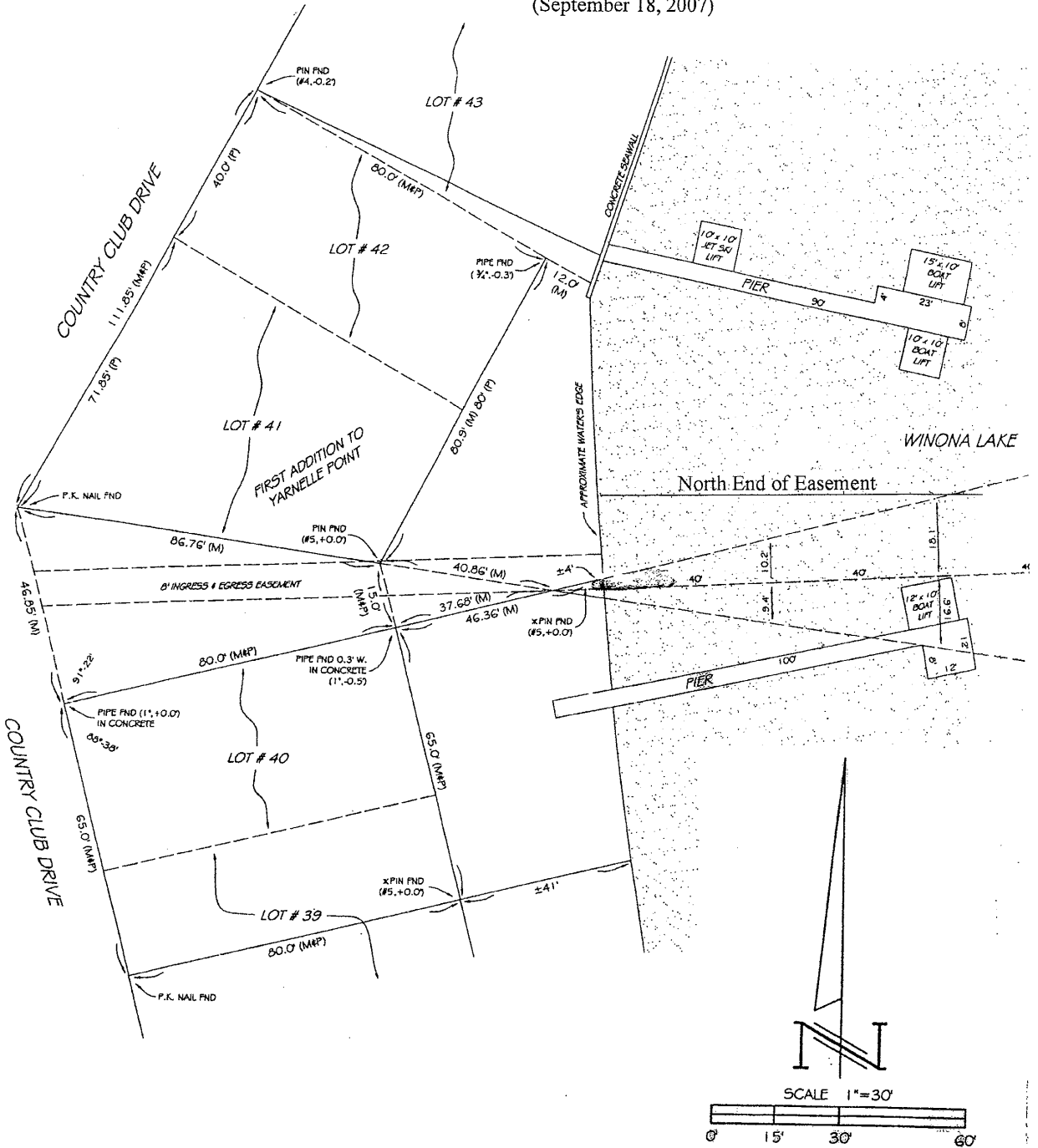
The Chair observed that this discussion would be revisited during the Commission meeting.

Habeeb said "We should consider the matters" presented in the AOPA Committee.

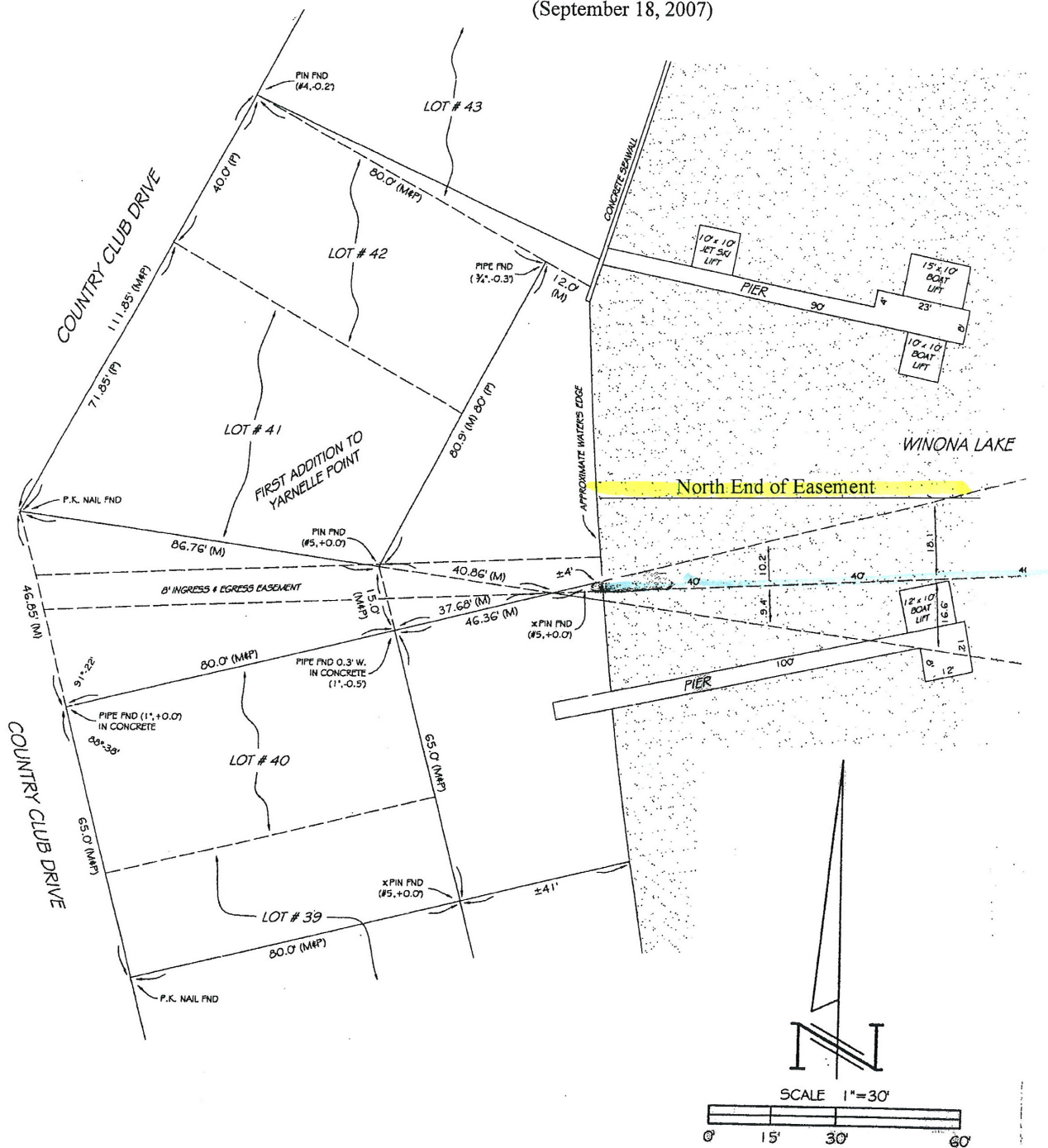
Adjournment

The Chair called for adjournment at approximately 1:16 p.m.

NRC AOPA Committee Sketch
Rufenbarger, et al. v. Blue, et al.
 Administrative Cause No. 06-246W
 (September 18, 2007)



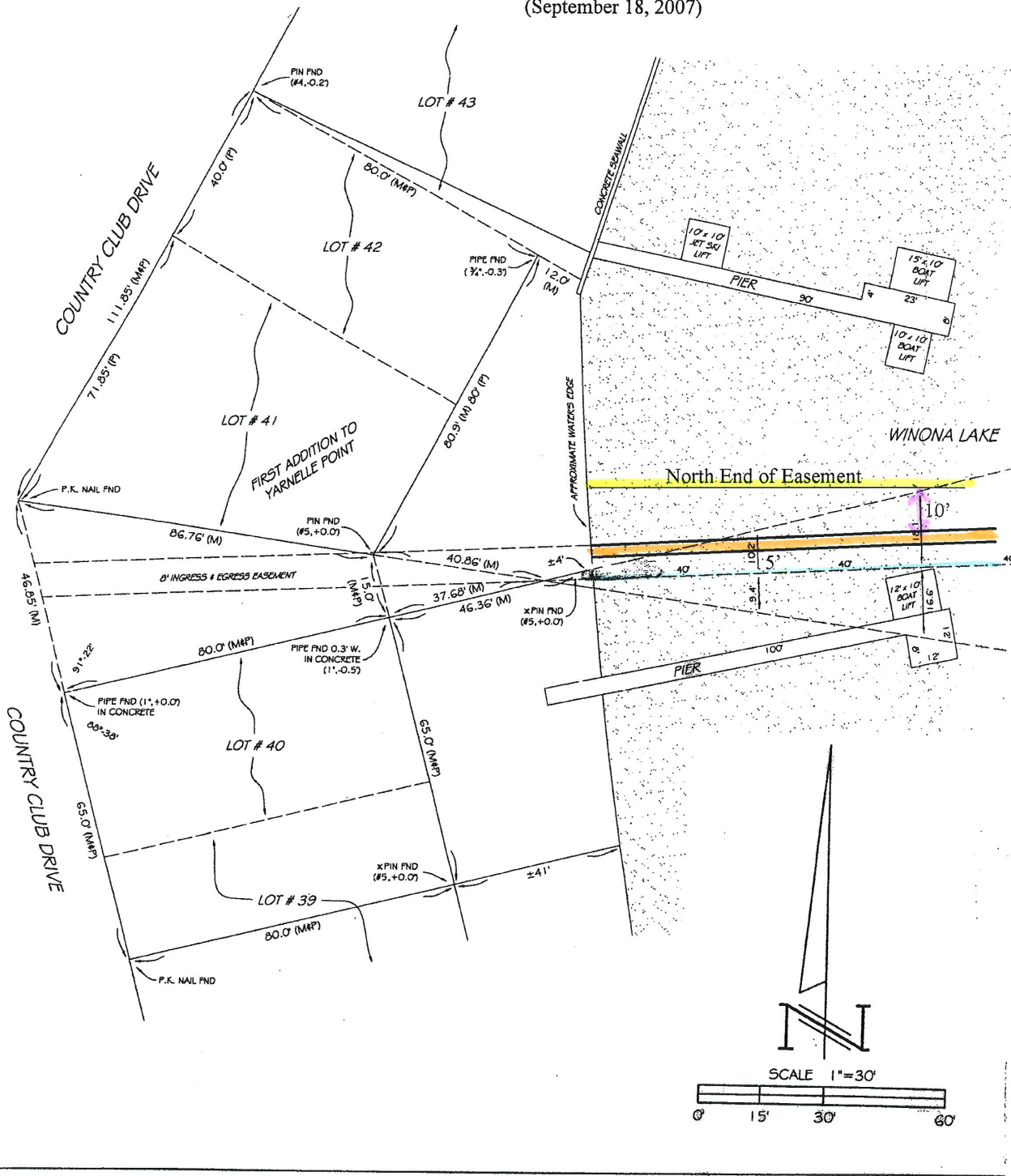
NRC AOPA Committee Sketch
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Claimants Visual Aid - 1

Pier Location as Ordered

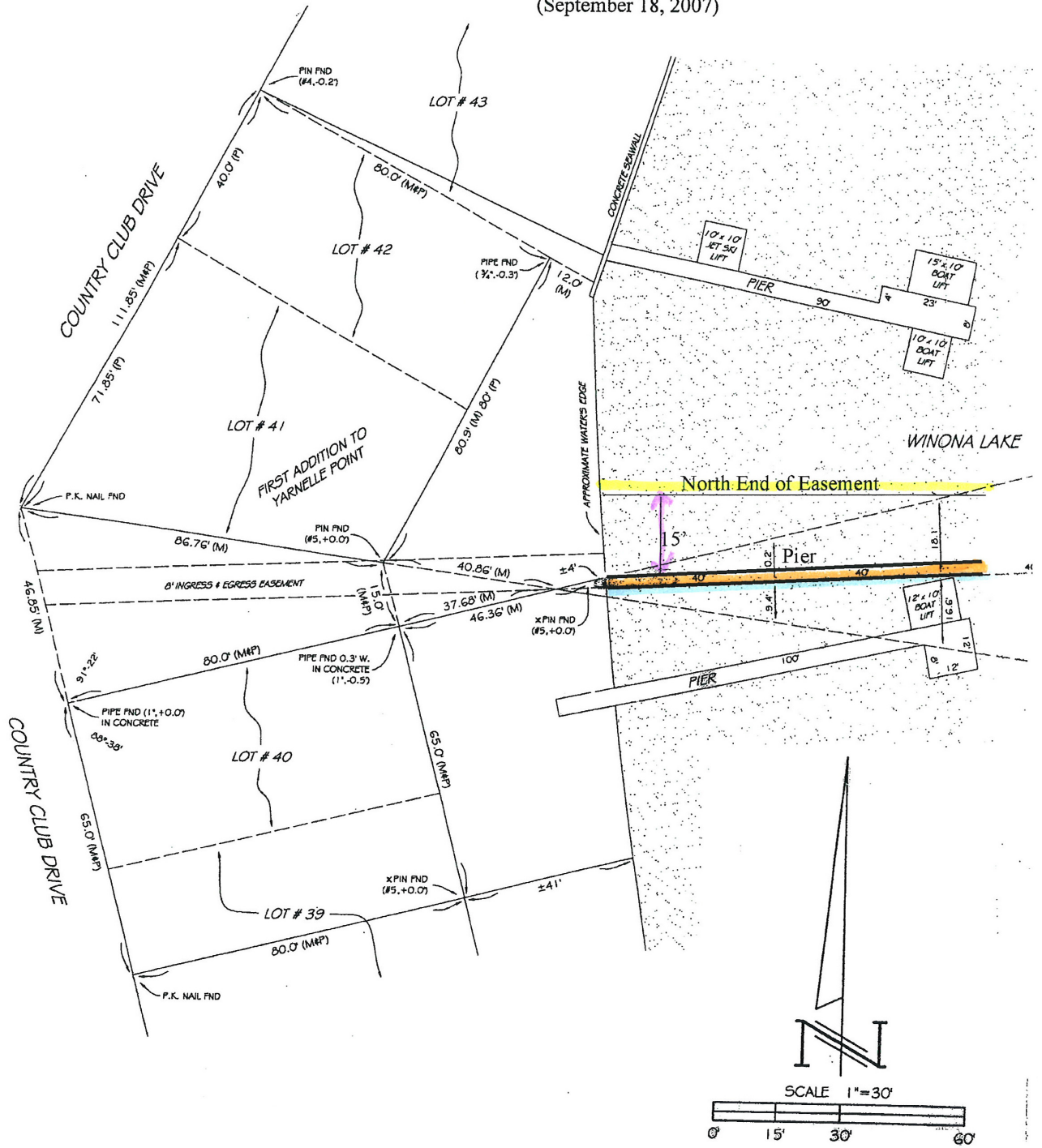
NRC AOPA Committee Sketch
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Claimants Visual Aid - 2

Option Number 1

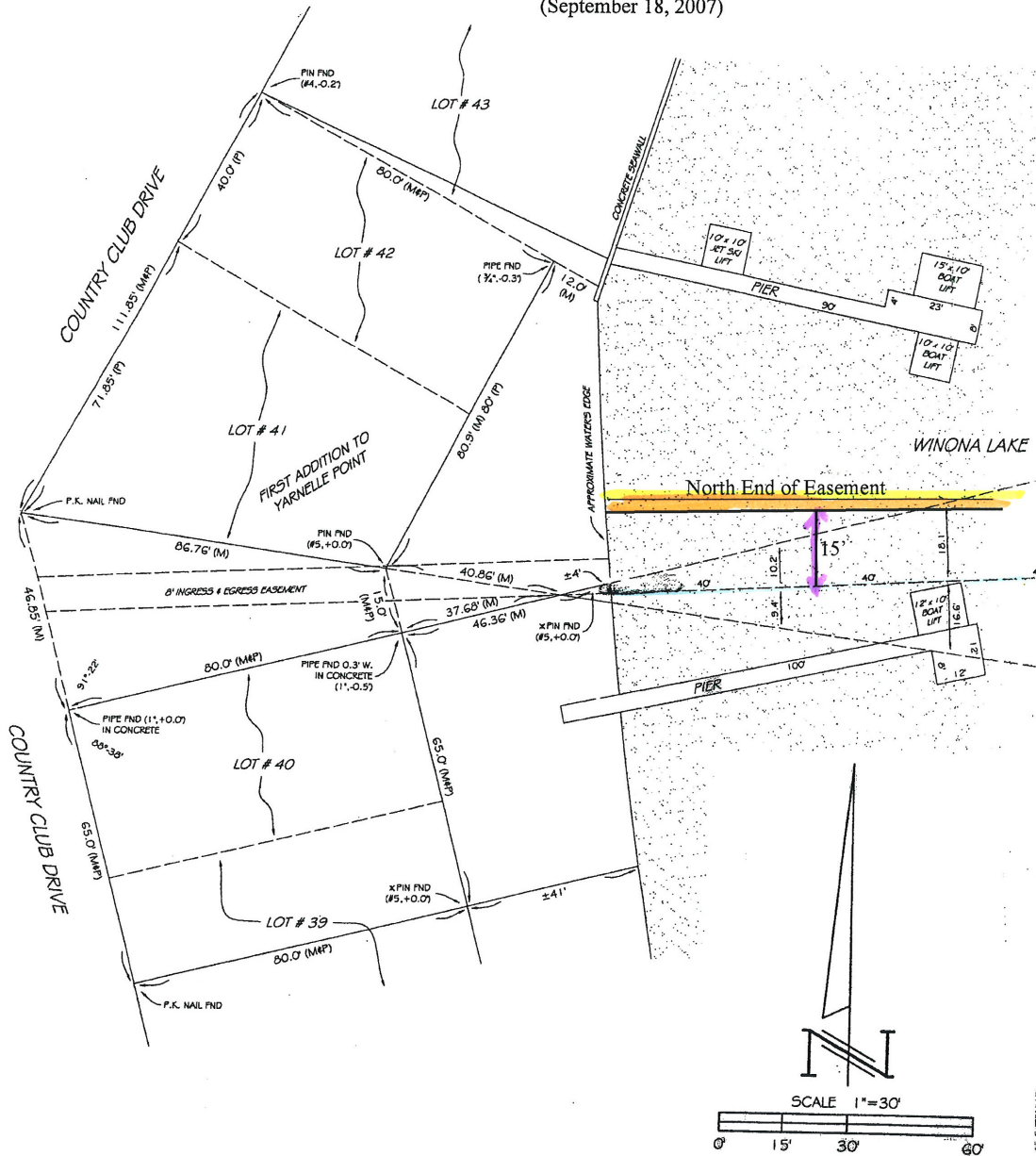
NRC AOPA Committee Sketch
Rufenbarger, et al. v. Blue, et al.
Administrative Cause No. 06-246W
(September 18, 2007)



Claimants Visual Aid - 3

Option Number 2

NRC AOPA Committee Sketch
Rufenbarger, et al. v. Blue, et al.
 Administrative Cause No. 06-246W
 (September 18, 2007)



Claimants Visual Aid - 4