

**Minutes of the AOPA Committee of the
Natural Resources Commission**
August 23, 2006

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn

NRC Staff Present

Sandra Jensen
Stephen Lucas

Other Present

Ihor N. Boyko
Joel Wieneke

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 8:36 a.m., EDT, on August 23, 2006 in Conference Room 10, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana. With two members of the Committee present, the Chair observed a quorum.

Mark Ahearn of the Indiana Department of Transportation introduced himself.

Approval of Minutes for Meeting Held on July 13, 2006.

The Committee discussed and approved by acclamation the minutes for the meeting that was held on July 13, 2006.

Consideration of 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. Discussion of ALJ Draft “Amended Findings of Fact and Conclusions of Law with Non-Final Order” Distributed to the AOPA Committee and the Parties on August 9, 2006. Deliberations by the AOPA Committee with No Oral Argument or Presentations by the Parties or the Public.

The Chair opened the Committee discussion. “Our major item before us this morning is the consideration of the objections to the findings of fact, conclusions of law, with nonfinal order of the administrative law judge in the *Hoosier Environmental Council versus DNR*. Again, we’ll note that this is for our deliberations only. We will have no oral argument or presentations by the

parties. We appreciate the ALJ being present as well.” Also present was attorney for the Department of Natural Resources, Ihor N. Boyko.

Jane Ann Stautz continued, “If you’ll recall from our July 13 meeting, we did request some amendments to the findings of fact and to the conclusions of law and remanded it. We appreciate the follow-up and response to that. I understand that this has been distributed to all parties?”

Sandra Jensen, Administrative Law Judge, responded: “Yes.”

Stautz said, “Based on that, I do appreciate the additional clarification. I also noted there were some corrections to the calculations, as well. I appreciate the attention to detail with regard to that.”

The Chair continued, “We’ve had two meetings where we discussed this matter. I think we should have had ample time to review, not only the materials that have been recently submitted to us, but also the submissions by the parties. For purposes of discussion today, the nonfinal order would require the Department to pay the sum of \$90,107.39 in litigation expenses, including reasonable attorney fees.” This determination was made by the administrative law judge following a remand with instructions from the Committee and previously from the Indiana Court of Appeals with administrative review as to entitlement. The determination of attorney fees was made “using the lodestar methodology for that.” I would “move today that we would affirm the findings, conclusions and nonfinal order as amended by the administrative law judge” following the July 2006 remand.

Mark Ahearn reflected. “I would agree Judge Jensen’s corrections and clarifications in drafting, putting it in a sequence of the different phases of the entire proceeding, and that combined with the arguments received and the parties’ documentation, were extremely helpful. Being the person who raised several issues at the last meeting, I want to thank you. Having said that, I would...second your motion.”

Chairwoman Stautz said “if there were any questions or comments,” those could be presented. “I think the items that we have talked about in the past have really been addressed in the modifications and amendments” made by the administrative law judge.

Ahearn added, “I would agree with you. Tying in with the relevant cases and administrative laws was” very helpful to me.

Stautz concluded, “I don’t have anything further for discussion. This case has been well presented, and I know this has been a very complex case and a case of first impression before us, especially as to guidance around the calculation of fees, and the question of entitlement. I think those questions have been answered here. I think with that, I would call for the vote. All in favor of” approving the “Amended Findings of Fact and Conclusions of Law with Non-Final Order” of the administrative law judge, “signify by saying ‘aye’.” The motion passed.

Sandra Jensen, Administrative Law Judge, said that entering the room was “Mr. Wieneke of the Hoosier Environmental Council.”

Joel Wieneke responded, “Yes, I’m appearing on behalf of Mr. Mullett today.”

The Chair reflected, “Just for your notice, we had indicated earlier there was no oral argument or presentations. We just finished our discussion, and approved and affirmed the nonfinal order for payment of ninety thousand and some odd dollars in costs and expenses.”

Wieneke said, "Okay."

Jane Stautz continued, "You should have received a copy" of the administrative law judge's amended findings and conclusions with nonfinal order "a couple of weeks ago."

Wieneke added, "We have. Then I guess that's it?"

The Chair responded, "That is it at this point. Again, I appreciate everybody's patience for all this. I know I've honed up on my case law in this area."

Ahearn added, "Yes, so have I."

The Administrative Law Judge responded, "Yes, no problem. Thank you."

Wieneke asked, "Any estimate on when the minutes might be out?"

Jensen responded, "We'll have minutes of this meeting, and I would imagine what I will do is put the final order together today for the Chair's signature." The final order should "be out in a matter of days."

Wieneke responded, "All right."

Consideration of General Delegation of Authority to an Administrative Law Judge to Address, as a Nonfinal Order, Any Matter Appropriate to Application or Interpretation of a Final Order of the Natural Resources Commission where the Commission Retains Jurisdiction Over a Proceeding. Continuing AOPA Committee Discussion from July 13, 2006 meeting.

Chairwoman Stautz reflected, "The other item we have before us is the proposed delegation of authority to the ALJ to address any matter that may be appropriate with regard to a final order of the NRC or this Committee where the Commission retains jurisdiction over the proceeding. If you'll recall we had that initially brought before us at the July 13th meeting and then asked that it be put in the form of a resolution. Hopefully, you've had a chance to review [the proposed resolution] for comment on that."

Mark Ahearn asked the Chair whether she had "any questions or issues? Is there any reason we shouldn't go ahead and act on the resolution?"

Stautz responded, "I think it would help as it is currently drafted. The presiding ALJ, the individual who is most familiar with the proceedings, would be delegated the authority. It makes sense to allow that. Again, if there were any issue or consideration, it would still come before the NRC's AOPA Committee. We would retain jurisdiction."

Ahearn asked, "Is there any way that a party would somehow be disadvantaged because of this? I'm not sure I have any problems with it. I'm not sure we shouldn't just go ahead and do it."

Stautz answered, "That's a good question, although I don't perceive that. I'm looking to folks here in the room as to their perspectives. Steve?"

Ahearn reflected, "I think we have a failsafe because the Committee still retains jurisdiction."

Stephen Lucas, Director of the Division of Hearings, said, “Right. That’s right.” He added, “We have a lot of situations where the situation could come up. We have retained Commission jurisdiction in a lot of agreed orders, and we have at least a few adjudicated orders where the Commission retains some jurisdiction,” but “we don’t have a lot of experience with this issue.” He said if the issue were to arise in the absence of a delegation along the lines proposed, “I almost think the parties might expect the ALJ would seek to address the problem with the parties and see if it can be worked out. If not, a hearing or briefing schedule would be established. If the parties still disagreed, it would come back to the AOPA Committee. In the absence of the delegation, however, probably the legal purist would say we need to come before the AOPA Committee first and see if you want to appoint an ALJ.”

Ahearn suggested, “With the delegation, it would be administratively more efficient.”

Lucas answered, “I think so.”

Jane Stautz then moved for approval of the following resolution:

The AOPA Committee delegates authority to the administrative law judge, who conducted a proceeding, to provide administrative review and to issue a nonfinal order with respect to any contested matter where a final order provides that the Natural Resources Commission (or the AOPA Committee of the Natural Resources Commission) retains jurisdiction following entry of the final order. If the administrative law judge who conducted the proceeding is no longer an employee of the Commission or is otherwise disqualified, the director of the division of hearings shall assign an administrative law judge to perform the functions anticipated by the delegation. The AOPA Committee retains jurisdiction, in accordance with 312 IAC 3-1-12, to review any nonfinal order where a party files timely objections.

Mark Ahearn seconded the motion, and it passed on an oral vote.

Adjournment

Jane Ann Stautz called for adjournment at approximately 9:05 a.m.