AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION

May 14, 2013 Meeting Minutes

MEMBERS PRESENT

Jane Ann Stautz, Chair
R.T. Green
Jennifer Jansen

NATURAL RESOURCES COMMISSION STAFF PRESENT

Sandra Jensen
Stephen Lucas
Debra Freije

PARTICIPANTS AND GUESTS PRESENT

Joseph Caracci
Barbara Caracci
Stephen Snyder
Eric Wyndham

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 8:38 a.m., EDT on May 14, 2013 in the Multipurpose Room of the Nature Center located at Mounds State Park, 4306 Mounds Road, Anderson, Indiana. With the presence of three members, the Chair observed a quorum. She, R. T. Green, and Jennifer Jansen introduced themselves.

Consideration and approval of minutes for meeting held on March 7, 2013

R. T. Green moved to approve the minutes of the meeting held on March 7, 2013 as presented. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of objections to "Modified Summary Judgment with Modified Nonfinal Order" of the Administrative Law Judge in *Mueller-Brown v. Caracci and DNR,* Administrative Cause No. 12-122W

Stephen Lucas, Administrative Law Judge, introduced the persons who would present oral argument on the Caraccis' objections. He said the Caraccis were acting pro se, and Joseph Caracci would present their objections. Stephen Snyder was the attorney for Cindy Mueller-Brown and would present her response to the objections. Eric Wyndham was the attorney for the DNR and would present argument on behalf of the agency.

The Chair called upon Joseph Caracci to present argument in favor of his objections.

Joseph Caracci said, "When the administrative law judge gave his decision that we must move our boatlift, we basically accepted the first nonfinal order because the stress of continuing the case to a hearing was having too much of an effect on both our physical and mental health. We just wanted the matter before us to end. We simply asked the judge to clarify his conflicting decision on whether our riparian area was determined by extension of the onshore property or by a line perpendicular to the shoreline. We, more than anyone, want to resolve the movement of the boatlift and pier, and only have to do it once." He said he did not want his neighbors on Webster Lake "to become aggrieved persons and have to seek another administrative review. This will occur if the Second Principle is followed per the judge's ruling to extend the onshore property lines beyond the shoreline of 105º. This will cause confusion since the majority of the owners, including the Claimant, place their piers perpendicular to their shorelines as was noted in the aerial views we submitted, and their pier to follow the Third Principle. Respondents swear to the facts that are shown in pages one through seven of our written objection presented last week. We show that all the information the judge has put in his augmentation in Findings 43 to 48 are irrelevant to the Nonfinal Order, because some pertain to the First Principle of Bulletin 56. Others actually support the Respondents position that the onshore property lines are not within the perpendicular parameters set by the Second Principle. Finding 48…does not even have any language specified that supports the Second Principle. We have also provided evidence substantiated by the Claimant's own official survey, that the angle of which the onshore property line meets the straight shoreline, is 105º. The angle also falls within the range of obtuse angles in Bulletin 56 that demonstrate the use of the Third Principle. We do not understand how the judge obtained this position and why he refused to answer our request to clarify whether the Third Principle was applicable to the case before us. We therefore ask the review committee to please resolve our conundrum as quickly as possible, and really that the judge erred [when he determined he] did not believe that the Third Principle applies. Give us reasonable guidance so that we can try and correct the issue the right way as quickly as possible in order for us to get back to enjoying the lake and our lives."

Caracci said he would like to use the rest of his time to describe the injustices he and his wife suffered, "between the original nonfinal order and modified nonfinal order. We hope others in the future who try to defend themselves without an attorney before the NRC will not suffer as we have suffered. Because of some of our health problems, the weather, and a need of a clarification from the judge on conflicting statements of his nonfinal order, we asked for an extension to resolve a matter that was eventually granted in the modified nonfinal order and a clarification of his ambiguous order. From that point on, items occurred that the way to a quick solution we sought by over two months and still resulted in a hearing before you today. The ways and the manner in which the systems were made by the Claimant's attorney, DNR attorney and administrative law judge appear to go under harassment, and it was conduct to the extent that extreme stress was suffered by Respondents that put us at the point that we had to challenge what was being done to us. At approximately two weeks from March 22nd to April 6th, Respondents sent nine documents involving the Claimant's attorney or the administrative law judge. In our response to the original summary judgment, we clearly explained to the judge that we needed clarification of his nonfinal order. That per the Claimant's own survey, the onshore property

lines were 105º to the straight shoreline. Yet, he directed us to extend the lines perpendicular to the shoreline. We explained the Third Principle fit our situation. Instead of receiving a clarification as we requested the judge, the judge never…commented at all on the Third Principle as it was. It appeared as if it never existed."

Caracci continued, "On March 28th, the attorney for the Claimant filed his Claimant's response, and asked that the judge deny the response of attempting to modify to Summary Judgment. He said that Respondent's request to change to summary judgment ruling be denied. We did not request the ruling be changed, but only wanted clarification of the judge's conflicting language in his ruling and reasons why. The very next day the Claimant's attorney filed a 'Motion to Strike' as quoted on page eight of our written objection. He claimed that we did not comply with TR 56, Indiana Rules of Trial Procedure…. The Respondents felt this appeared to be a form of harassment as all the documents named were, in fact, filed prior to the issuing of the Nonfinal Order within the time limits given by the judge. We also felt it was frivolous since the Claimant's attorney had also just used evidence from the exact same period the previous day. We responded to the judge of our displeasure with the motion, and that it was totally vague, since no specific evidence was listed. Nor was any explanation of which specific sections of TR 56 or how they were violated given. To protect ourselves, we also included our own motion to strike, requesting the Commission to strike similar vague documents of evidence for the same rule TR 56. On April 6th, we received orders from the judge. In the first order, instead of clarifying the conflicting language of the nonfinal order as we requested, the judge indicated he would not address the relocation of the boatlift into our riparian area in this proceeding or whether it would constitute as a temporary or permanent structure following relocation. He also indicated that issuing of an individual or general license are determinations for the DNR prior to any administrative review. The judge held that following the relocation of the boatlift in a different location, and if no affected persons sought administrative review, the DNR decision would become final…."

Caracci added, "[W]e immediately on April 8th contacted John Eggen, DNR Compliance and Enforcement Section Manager. He had handled the initial complaint to the DNR file in June 2012. Mr. Eggen responded on April 18th that he felt it looked like the Third Principle would apply. He added that I should check which principle the others in Hiner Park were following. He indicated that it was possible I could find myself back in court again, if the other neighbors were using the Second Principle. He also reviewed the rules on the licensing with me. I later informed Mr. Eggen that it appeared that most of the owners in Hiner Park were using the Third Principle, included the Claimant, and sent him copies of aerial views. Mr. Eggen later responded that he had turned my information over to survey to review and comment but had not received a response. Mr. Eggen responded on May 3rd that he had discussed my email with Division of Water's legal counsel and was advised that he could no longer assist me. During the entire period of communication, I had kept Mr. Eggen informed of all the proceedings in this case. The second order by the judge on April 6th referred to the Mueller-Brown 'Motion to Strike', and the Judge's decision was even vaguer than the original 'Motion to Strike'. He simple stated for the reason stated in the Claimant's 'Motion to Strike', the motion was granted in all parts, and the documents were ordered stricken. The judge did not mention what parts of documents were stricken. None were specifically listed by the Claimant in their motion. Nor did he list the specific items of TR 56 we violated since, again, none were listed. The judge also did not rule

on the Respondent's 'Motion to Strike' that we asked for on April 2nd. He has never even acknowledged its existence. The above are only the issues that occurred during the two-week period between the filings of the nonfinal orders. Although we indicated we accepted the judge's ruling to move the pier and boatlift, we did not agree with his decision on the boatlift and pier not meeting the requirements of a lawful nonconforming use structure. It was only due to health reasons that we chose not to take it to a hearing. In that decision the judge again ignored the preponderance of evidence, including government documents, minutes of their meetings, pictures, letters, and even our sworn affidavit we provided. He refers in Findings 48, 49, 52 of the original Nonfinal Order, and 55, 59, 60 of the Modified Nonfinal Order that no evidence was provided that the boatlift was legally placed, was ever a temporary structure, and that a permit was required at time of placement. Yet, we clearly show that the boatlift was placed in 1995 by a reputable dealer in front of our house on common property as a temporary structure and did not need a license. The original plat clearly show this and contain no mention of riparian rights since our properties ended 35 to 70 feet from the shoreline, the rest being common property. The only reason the boatlift became permanent was that it remained for 17 years in six feet of muck. It could not be removed without special equipment and without damage. Not one of the owners before or after replat in 1997 ever complained during those 17 years. We ask the review committee to review the entire case…. If you do find that the case was handled improperly and decisions were intentionally made against the rules and regulations that should have been followed in this case, we ask that the rulings in favor of the Claimant's request for summary judgment be denied, and the Committee rule in favor of the original Respondents' request for summary judgment. I can add—being up at the cottage today, Lots 8, 9, and 10, if they follow the Second Principle, all would be in violation of the riparian rights act and the Second Principle as the judge ordered."

The Chair asked the AOPA members if they had any questions for Mr. Caracci.

R.T. Green responded, "Not at the moment."

Jennifer Jansen added, "None for me."

Stephen Snyder spoke as attorney for Cindy Elizabeth Mueller-Brown. "I think there is always a problem when one party is proceeding in an administrative action like this, pro se. We know that the rules of the Commission require strict compliance with Trial Rule 56 in the event of a motion for summary judgment. I think most of us have an idea of how that rule applies and what must be done and what must not be done. Certainly, at the time I filed the motion for summary judgment on behalf of the Claimants, we followed Trial Rule 56. We designated evidence, and we provided affidavits. Mr. Caracci attempted to follow the rule, and I will give him credit for that, he did. There were certain portions of affidavits that he filed that I moved to strike because they were hearsay, and they were stricken. We went to a hearing on the motion for summary judgment, and it was granted. Subsequently, Mr. Caracci chose not to file objections to the original, but requested clarification in regard to the determination of the riparian boundaries as they existed in Webster Lake. When he filed that request for clarification, I filed a response to it. The response essentially stated that [the First Principle] of Bulletin 56 is what applies, for the simple reason that the parties who own lots in Hiner's amended plat have agreed as to what the riparian area is. On the face of the plat, it clearly states that the riparian areas for the lots in that

subdivision are extensions of the sidelines of the lots into the water of Webster Lake. Mr. Caracci was a party to that agreement, and signed that plat, acknowledging those were his riparian rights. Bulletin 56 is very clear in that it says if the parties have agreed through subdivision covenants, or whatever, as to the designation of the areas the riparian rights, that controls over any other principle in Bulletin 56. That's the First Principle. As a result, since we have that in this case, [the Second Principle and the Third Principle] are inapplicable. Whichever one you might argue might be applied had the parties not agreed, really doesn't make any difference, because [the First Principle] controls. That's the position of the Claimant in this matter and always has been."

Snyder continued, "There was a lot of discussion about whether or not the boathouse and pier placed by Mr. Caracci became lawful nonconforming uses. I think Judge Lucas outlined that clearly in his opinion that they were not legally placed, therefore, they could not be lawful. The problem with alleging that they are lawful nonconforming uses, as opposed to the DNR, is really not a problem, because that relates only to the permitting process. Alleging that they're lawful nonconforming uses as to Mueller-Brown is really irrelevant. Because we don't care whether there was a permit or not a permit. We're saying that our riparian areas are being violated by location of them. If there was not consent or permission given originally, or hasn't been subsequently, then they can't be in our riparian area. Whether it's lawful or unlawful, as far as the DNR is concerned, doesn't affect the rights of Mueller-Brown. All we're asking the Committee to do is simply affirm Judge Lucas's decision on summary judgment as it applies Bulletin 56, exactly as it's required to be applied, to the extent it is a requirement as opposed to just guidance. But in this case, Mr. Caracci consented. He and his wife both signed the restrictive covenants in the subdivision. Both agreed to the re-plating, and, as a result, riparian lines are pretty well fixed and established."

The Chair asked the AOPA members if they had any questions of Mr. Snyder.

R. T. Green and Jennifer Jansen replied in the negative.

The Chair then recognized Eric Wyndham to speak on behalf of the DNR.

Wyndham stated, "Initially, the Department was not made a party to this. Mueller-Brown filed an action against the Caraccis. The Department, through me, did file a request that we be provided with copies of all pleadings, orders and notices, just so we could kind of monitor the proceeding. There was an indication in the original petition that Mr. Caracci's wife had talked to Jon Eggen. That Jon Eggen, who is with Compliance and the Enforcement Office with the Division of Water, had done a field inspection of the site. I think I had filed in the record that that was not true. I don't know whether Mueller-Browns thought it was somebody else, but it was not meant for Mr. Eggen."

He continued, "Regarding Mr. Caracci's statements of what Mr. Eggen originally told him, there is no affidavit from Mr. Eggen in the record. I think that would be considered hearsay. I am not privy to the conversations that Mr. Eggen had with Mr. Caracci. I think there were some. I think Mr. Eggen did send the Caraccis a letter of possible violation. I think there have been

conversations on that, but that's not a part of this proceeding. As a result of the mentioning of Mr. Eggen, Judge Lucas ordered that the DNR become a party."

Wyndham added, "Obviously, I reviewed the motion for summary judgment and the documents …supplied by Mr. Snyder. I reviewed the responses from the Caraccis. The Department filed a response indicating that we were not taking the position to the motion for summary judgment. In other words, we would accept whatever Judge Lucas decided."

Wyndham said, "Mr. Caracci has done a pretty good job of responding pursuant to Trial Rule 56, pro se, but still I'm not sure he complied with the rule. I think any statements made by other people have to be in affidavit form and factual form. He cannot speak for those people. I think we all have AOPA and we all have Trial Rules so the judicial system and the justice system have some organization to it. I think the law is that everybody is strictly required to comply with Trial Rule 56. The only thing we would say is that on behalf of the Department is that, based on my review of Judge Lucas's order, the designated documents that were provided in the summary judgment motion and the response, we would have to support Judge Lucas's order."

The Chair stated, "That was fairly straight-forward as far as the DNR's position and involvement in the matter before us." She then asked whether there were any further questions or comments. Hearing none, she recognized Caracci for rebuttal.

Caracci responded to Snyder's comments regarding the First Principle. "We contested that…. Judge Lucas in his findings noted that it was contested on how the extension of the lines were and what was written up in there. There was no indication of extension into the water as riparian rights. The extension that was mentioned was the extension from our original lot lines to the shoreline. I was present at the meetings that were held by the attorney that represented us before the Planning Commission of Kosciusko County, and they are the ones that ruled that we had the right. That was, in fact, common property, and we had the right to extend the lines from the end of our property to the shoreline. That is the extension that he has quoted in there. In our papers, we have stated that we contest what that extension meant. It simply meant the extension from the line to there. It didn't cover that we did have riparian rights. I admit to that, but it did not state how those riparian rights were, and it did not state 'extended into the waterway'. It was just giving us the rights per our new extension that we now own the property to the lake and that we have riparian rights. It did not have any indication as to the definition of how those rights were to be determined."

The Chair referred to an enlarged copy of the Replat of Hiner Park on Webster Lake (as inserted in Finding 31) which Steve Snyder provided during the oral argument for demonstration purposes. She said the Replat reads "riparian rights for each lot are vested within those boundaries of the shoreline delineated by the lot lines extended as shown in the Replatted subdivision."

Caracci agreed with the quoted language but added, "Right, be extended as he has indicated, and Mr. Snyder did not provide the original plat. The original plat for all of this was common property. All of this here was common property. There were no lines extended to the shoreline. There were no lines extended to the shoreline. This was all common property." He said during

the replatting process, the boundary lines were extended to the shorelines. This extension is what was noted in the description. "That's what I'm saying, and that's actually what it was. The reason we did this is because the grandson of the original plat, who developed this property, had property on the other side of W17. He was selling lots and telling the people that they could go down and put piers, boat lifts, anything. They could park their cars. They could picnic on that property, the common property, and it was public property. We all got together as an association, hired Mr. Richard Helms to represent us. We quoted Mr. Helms in our descriptions. The way it worked I had given to Mr. Lucas. We took this to the Planning Commission and the Planning Commission ruled—we have minutes—that this was, in fact, property that was owned by the people of Hiner Park. It was not public property. It was common properties for all of our use and how we used it. We used to just put trees and things and everything there. In fact, my original pier when I bought this in 1981, and the pier that is in question here, was exactly where it is now. It was only extended out, and I provided pictures of that. It was on common property, and the original plat did not list anything about riparian rights, because our property rights ended where the pins are located in each of these locations."

The Chair asked, "But this is a correct representation of the replat with the boundaries lines extended?"

Caracci agreed the enlarged replat that the Committee members were viewing was a correct representation of the boundaries. "I just want to explain what that word 'extended' meant. That's the extension that we went from our original property down to the shoreline. That is why that First Principle does not apply. We challenge that. The judge in his own nonfinal order said that the [First Principle] did not even have to be applied." He asserted Finding 40 indicated the First Principle "did not have to apply, and that [the Second Principle] applied. The [Second Principle] says you will extend the lot lines. The lot lines are 105º, and he said to extend them perpendicular. I could have just accepted that, and gone and drawn my lot lines and determined my riparian zone as perpendicular to the shoreline. But I didn't want to come back, I didn't want to have any other questions by moving my pier and saying the perpendicular as Judge Lucas said. I can't go 105º and go perpendicular…. In the Second Principle, none of the drawings exceed 95º. None of them. They're from 90º to 95º. There are two separate drawings in the Third Principle that cover 104º, 110º, 130º. Ours is 105º. So I'd say that in that obtuse, acute angles are at least no less than 104º. By simple logic, it says that we fall within the Third Principle. That was my whole thing that I wanted clarification what the Judge was saying. Did he err in saying that the Second Principle instead of Third Principle, and that we were going to perpendicular. Or did he err in saying extend the lines and he shouldn't have left perpendicular in there. I couldn't do both. And I didn't want to come back here. I wanted it resolved. I have anxiety… I've gone over the edge".

Chairwoman Stautz stated, "It is very challenging as you deal with the complexity of Trial Rules and procedure here, but we do appreciate the information that has been provided in the matter before us." She then asked whether Stephen Snyder had additional comments.

Snyder stated, "No. I think you have before you what was presented properly under the Summary Judgment upon which Judge Lucas based his decision."

Wyndham added, "Mr. Caracci admitted that talking about lawful nonconforming use, Mr. Caracci stated that whoever put the pier out that is in question, put it out when there was a common area. I don't think anybody had riparian rights to put out that pier, which probably means that it was unlawful when it was installed. Mr. Caracci has admitted that it is a permanent pier, which under our rules, does not qualify him for a general license, which again probably makes it an unlawful pier. I don't think, based on [Caracci's] own evidence and testimony that he can lawfully claim that the pier is a lawful nonconforming use."

Caracci stated, "We took that out of the question…. Our biggest point in this whole thing was the Third Principle. I would like Mr. Wynhdham to tell me why the Third Principle does not apply."

Chairwoman Stautz stated, "Mr. Caracci, I appreciate it, but I believe we have the information." She noted the Commission adopted Information Bulletin #56 because there are a number of ways to extend boundaries relative to riparian rights and the ability to place piers. "It is very challenging, as we know, with regard to lake shores and property there." Chairwoman Stautz thanked the parties. She then called for a motion regarding the Modified Summary Judgment with Modified Nonfinal Order.

Jennifer Jansen moved to affirm the Modified Summary Judgment and Modified Nonfinal Order in the matter of *Mueller-Brown v. Caracci and DNR* as the Summary Judgment and Final Order of the Commission. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

Consideration of Request by All Parties for Order to Make an Anticipated Entry by Administrative Law Judge Ripe for and Subject to Direct Judicial Review by a Circuit Court or Superior Court in *Sommers, et al. v. LaPorte County Convention and Visitor's Bureau and Department of Natural Resources*, Administrative Cause No. 13-068L

Steve Lucas, Administrative Law Judge, introduced the item. He said for consideration was the parties' joint request for his disposition administrative review to become a final order rather than a nonfinal order. If the request were granted, the proceeding would be handled similarly to administrative review of an NOV for surface coal mining under SMCRA or of a licensure action from the Geologist Licensure Board. His disposition would be ripe for judicial review. He would expedite the disposition so an aggrieved party could seek judicial review relief before the activities anticipated by the subject permit were conducted. This expedited process is sought by the parties because the period between conduct of a hearing on the merits and the event authorized by the application, a motorboat race on Stone Lake in LaPorte, were insufficient to meet statutory requirements for filing objections to a nonfinal order, "much less having those objections considered by the AOPA Committee." He added the boat race was a matter of significant interest in the City and County of LaPorte.

Lucas shared the contents of a draft order that would implement his understanding of the parties' request. He said he had informed the parties if the AOPA Committee determined not to grant their request, he would write a nonfinal order and provide notice for filing objections. Any objections would be tendered for a later meeting of the AOPA Committee. An opportunity

would follow for judicial review of the AOPA Committee's final disposition. After judicial review, an aggrieved party could appeal. At whatever level a final disposition was achieved, the disposition would become a citable precedent. He informed the parties this item was on the AOPA Committee's agenda, but whether public comment would be allowed was at the Chair's discretion. In fact, no party or attorney for a party appeared for the AOPA Committee meeting.

R. T. Green reflected he wanted to be responsive to local wishes but wondered whether the AOPA Committee had legal authority to grant the requested relief. Flexibility might warrant mitigating timing limitations, which preclude judicial review before conduct of an event that is the subject of a permit, but should the flexibility be set forth in AOPA or in a Commission rule rather than an AOPA Committee order? Even if the authority existed to grant the relief requested, and it would be well-received in this proceeding, what kind of precedent would be established for subsequent proceedings?

Jennifer Jansen said she shared Green's concerns. She said the Indiana General Assembly established a process for exhaustion of administrative remedies. If filing objections and review of those objections on behalf of the Commission should not be required for boat races, the statutes governing the Commission could be modified just as they were for SMCRA NOVs. She observed exhaustion of administrative remedies was an essential element of the review process.

The Chair added she agreed with the perspectives of Green and Jansen. The Commission needed to act within legislative parameters. If an exception is appropriate to facilitate dispositions and to accommodate time limitations between DNR approval of a permit and the effective date of the permit, it should come from the law. Also, the AOPA Committee should be wary of establishing a bad procedural precedent.

R. T. Green moved to deny the parties' request on the basis the AOPA Committee lacked authority to modify, by order, the process governing an ALJ's issuance of a nonfinal order (and to foreclose the opportunity for an aggrieved party to file objections and have them heard by the AOPA Committee). As part of his motion, the administrative law judge was directed to provide a draft order of denial for consideration and issuance by the Chair on behalf of the Committee. Jennifer Jansen seconded the motion. The Chair called for a vote, and the motion passed unanimously.

5. Adjournment

The meeting adjourned at approximately 9:40 a.m.