

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION**

September 17, 2013 Meeting Minutes

MEMBERS PRESENT

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

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Debra Freije

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 8:36 a.m., EDT, on September 17, 2013 in the Gates Room of the Fort Harrison State Park, The Garrison, 6002 North Post Road, Indianapolis, Indiana. With the presence of four members, the Chair observed a quorum. She, Doug Grant, R. T. Green, and Jennifer Jansen introduced themselves.

Consideration and approval of minutes for meeting held on May 14, 2013

R. T. Green moved to approve, as presented, the minutes of the meeting held on May 14, 2013. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Consideration of objections to “Modified Findings of Fact and Conclusions of Law with Nonfinal Order” of the Administrative Law Judge in *Markland v. Swistek, d/b/a Crack of Dawn Hunt Club and Department of Natural Resources*, Administrative Cause Nos. 11-171D and 12-125D

The Chair observed the only party present for this item was the Department of Natural Resources. Eric Wyndham was the DNR’s attorney.

Stephen Lucas, Administrative Law Judge, asked Wyndham whether he expected attendance by either of the other parties.

Wyndham said the Division of Fish and Wildlife received a message from Darrell Swistek that he would not attend. Wyndham said he was unaware of the intentions of Hans Markland or his attorney Gordon Etzler.

The Chair asked whether there might have been a problem with service with respect to Markland and his attorney.

R.T. Green added, “Any question as to notice of the meeting?”

Lucas responded he sent notice to Gordon Etzler but had not spoken with him concerning today’s oral argument. He added that Markland telephoned yesterday [September 16], and “almost the first thing Markland said” was that he understood there was a “hearing” this morning. Lucas said he told Markland it was not an evidentiary hearing, but there was an opportunity for parties to offer oral argument to the AOPA Committee. Lucas said Markland did not state whether he or his attorney intended to appear, but he was clearly aware of the meeting.

Wyndham said Swistek was aware of the meeting today, and he left a message with Linnea Petercheff with the Division of Fish and Wildlife, that he would not be present.

The Chair asked whether the Department wished to present additional information prior to the AOPA Committee deliberation.

Wyndham said the Department did “not have any objection to Judge Lucas’s findings and nonfinal order.” He said IC 14-22-31 provides for a shooting preserve license and also provides that rules may be adopted to implement the statute. “Those rules had to be pursuant to IC 14-22-2-6... and the statute says that any rules must be based on data relative to the welfare of the people. Since there wasn’t a rule, the Division of Fish and Wildlife used the qualifications in [IC 14-22-31] which Mr. Swistek met. In the absence of rules, the administrative law judge considered and rejected the possibility of a nuisance. Wyndham said the Department “is not sure whether it was required to investigate the welfare of the people..., because there weren’t any rules adopted. I think it was shown at the hearing that there was sufficient evidence presented that Mr. Markland really was not subject to any nuisance even though he tried to show that he was. There was some contradiction in his evidence as to where his residence was located regarding the shooting preserve site and what he indicated in a written affidavit in a summary judgment response.”

Wyndham said “for future reference, until there may be rules adopted, the Department... would like to have some kind of guidance on what [it] has to do for any future shooting preserve licenses or any renewals by Mr. Swistek regarding to what extent [the Department] has to look into the welfare of the general area or the welfare of any person filing an appeal to a license or in granting a license.” Wyndham asked the AOPA Committee, “Do you agree with Judge Lucas that the Department has to apply the qualifications listed in IC 14-22-2-6(b)?” He concluded, “That’s basically our question now, and I don’t think we have to go into some of the other things raised in the objections.... The Department would like your guidance.” Wyndham noted that the statute states rules “may be adopted, so I’m not sure that rules are mandatory. But I think Judge Lucas was trying to be overly careful to make sure the license in question was not a nuisance to Mr. Markland or to anybody else in the area. The hearing transcript would show Mr. Markland is the only person that testified there was a problem even though there was a shooting range that was closer than Mr. Swistek’s location to his residence that had a lot more shooting.

Mr. Markland testified shooting at that [other] shooting range didn't bother him, but the shooting at Mr. Swistek's location did...."

The Chair stated, "I did not see in any of the briefing documents any further proposed modifications to the nonfinal order on behalf of the Department. Is that correct?"

Wyndham answered in the affirmative. He added the "Department did not have any objections to the modifications made by Judge Lucas. In fact, I think we would support them." He noted local or county zoning laws would not apply to the Department's analyses of whether a shooting preserve license should be granted. "Local zoning laws might apply to Mr. Swistek but not to the Department."

R.T. Green moved to adopt the "Modified Findings of Fact and Conclusions of Law with Nonfinal Order" of the Administrative Law Judge as the Commission's final disposition. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

The Chair proposed that the AOPA Committee members, during the Natural Resources Commission meeting scheduled for later in the morning, "encourage the Advisory Council to take a look at this issue of shooting preserves and determination around potentially a nonrule policy or guidance on what needs to be considered, including the welfare of the people in granting such a license. And, hopefully, through further Advisory Council discussion, and work with the Department's Fish and Wildlife Division, to provide some guidance." She asked whether the other AOPA Committee members supported the proposal. The AOPA Committee members voiced their support.

Lucas said the Advisory Council has looked at the issues "to some extent...as a rule. You have given it a new insight that it be looked at as a nonrule policy document.... I don't think [the Advisory Council] had the discussion that you are focused on."

Sandra Jensen, Assistant Director of the Commission's Division of Hearings, noted there was a rule proposal in process to address shooting preserves. "It's a new rule, but I think, again, what you are talking about and what was requested is a little different than what is actually in the nuts and bolts of that rule proposal."

The Chair said, "I really would be encouraging [the Advisory Council] to look at it as a potential nonrule policy document, "the consideration and the factors to give additional guidance...that may not be in the rule or statute."

Consideration of Claimants' "Motion to Request AOPA Committee Act as Administrative Law Judge" and of responses and motions by other potential Respondents in *Ashley, et al. v. Department of Natural Resources*, Administrative Cause No. 13-118W [No Public Comment]

The Chair reminded those present this item was placed on the agenda for the AOPA Committee's deliberation only, and there would be no testimony. "If there is need for any clarification or additional information, we can seek" it from the Division of Hearings. She added

several of the AOPA Committee members are “probably very familiar with the matter and what has transpired in a number of proceedings before the Department of Natural Resources, eventually through the [Administrative Law Judge] and a number of civil court proceedings.” She then opened discussion.

R.T. Green asked, “If we grant the motion, we sit and hear the case?”

The Chair responded the AOPA Committee would function as administrative law judge. That would include holding prehearing conferences, hearing testimony, and preparing findings of fact and conclusions of law with a final order, “which is unprecedented for us, that I’m aware of.”

Jennifer Jansen asked Steve Lucas if the AOPA Committee had served previously as the administrative law judge.

Lucas responded the AOPA Committee had not acted previously as the administrative law judge. “It has never been done.”

Green then asked about the process if the AOPA Committee did not grant the motion.

The Chair responded if the AOPA Committee denied the motion, the matter would proceed through the ordinary administrative process. “The Director of the Division of Hearings would appoint an administrative law judge..., and, then, ultimately it would come to the AOPA Committee with review of the proposed findings and order,” if objections are filed.

Green asked, “How difficult would it be to get us all together?”

The Chair responded, “There are logistical issues.”

Jennifer Jansen said, “My initial thought is if we are going to do something that is totally unprecedented, I would want to have a very, very good reason for doing so. Judge Lucas, can you articulate a good reason for us to act as the administrative law judge?”

Lucas answered, “That’s a fair question, but I am not the one that should answer it.” He deferred to the pleadings contained in the Committee’s agenda packet. “There’s a written motion.”

The Chair observed the Department’s position is “somewhat neutral as far as what is appropriate to expedite the matter as well.”

Green asked, “Given the logistics, how is that going to expedite it? It seems like it would be quicker the other way.”

Grant stated he was not in favor of granting the motion requesting the AOPA Committee to act as the administrative law judge.

Jansen stated she had reservations about granting the motion.

R. T. Green moved to deny the motion to have the AOPA Committee act administrative law judge in Administrative Cause No. 13-118W. Doug Grant seconded the motion. The Chair called for a vote. Each of the four members present voted to deny the motion.

Lucas said he would appoint an administrative law judge.

INFORMATION ITEM: Brief discussion of “Findings of Fact and Conclusions of Law with Final Order” in *Sommers, et al. v. LaPorte County Convention and Visitor’s Bureau and Department of Natural Resources*, Administrative Cause No. 13-068L

Steve Lucas presented this item. He said three of the AOPA Committee members present considered the parties’ May joint request to obviate the Committee review of objections to a nonfinal ALJ order. Because of the timing, a hearing could not be held and a nonfinal order issued “fast enough so that the AOPA Committee could have objections arguments between the nonfinal order and the scheduled boat race.” Stone Lake is “an extension of Pine Lake in LaPorte but is separated by a channel. In hydrologic terms, it’s probably one lake with Pine Lake, but as a practical matter [for boating], it’s separate and is a ‘small lake’.” As a “small lake”, high-speed boating is generally prohibited on Stone Lake but is common on Pine Lake.

The LaPorte County Convention and Visitor’s Bureau determined to support a weekend of boat races on Stone Lake. A permit request was filed with the Department’s Division of Law Enforcement. A hearing of the facts was held in LaPorte County, and, as administrative law judge, “I wrote a nonfinal order. I did augment some of the conditions for safety and environmental protection, but for the most part, I affirmed the issuance of the permit. No one filed objections. I emphasized to the parties that it wouldn’t be moot because somebody might want to have another boat race.” The boat race was held, and Lucas said he read later in a local newspaper there was interest in a similar weekend of races in 2014.

Lucas said now the *Sommers* decision is final and is a precedent under CADDNAR regarding boat races. “It is an area of the law...where there hasn’t been a serious consideration. Typically, the boat races that [the Department] has approved have been on Lake Michigan or on the Ohio River where there is a lot of space.” He said this item was presented because the AOPA Committee had a significant discussion of the procedural issues. A serious possibility is for another race application in 2014 on Stone Lake and for another request for administrative review. “You may see or hear about these issues again.”

The Chair said, “I do appreciate in the final order the additional conditions around the permit. I think that helped with clarity, as well as for safety considerations and protection of the shore and natural resources.... The decision will provide good guidance in the future in LaPorte, as well for considering such permit requests” at other sites. She thanked Lucas for the update and said she was glad LaPorte was able to proceed with what seemed a well-managed race.

Adjournment

R.T. Green moved to adjourn the meeting. Jennifer Jansen seconded the motion. The meeting adjourned at approximately 9:20 a.m.