

NOTICE OF DISAPPROVAL

TITLE 312 NATURAL RESOURCES COMMISSION
LSA Document #05-57

November 14, 2005

Steve Lucas, Division of Hearings Director
Indiana Natural Resources Commission
402 West Washington Street, Room W272
Indianapolis, Indiana 46204-2739

Re: LSA # 05-57

Dear Director Lucas:

The Natural Resources Commission ("Commission") submitted LSA Document number 05-57(F) to the Office of the Attorney General on September 30, 2005. On November 14, 2005, we discussed our concerns about the rule with you. Pursuant to Indiana Code section 4-22-2-32, our office has reviewed the rule and has determined that the rule should be disapproved as being inconsistent, with the requirements of the Administrative Orders and Procedures Act ("AOPA") at Indiana Code chapter 4-21.5-3.

As you noted, section 14-10-2-2 allows the Commission to appoint administrative law judges who are employees of the Commission. The section following section 14-10-2-2 states, "except as provided in IC 14-34-2-2 [regarding surface coalmining], the [C]ommission is the ultimate authority of the department under IC 4-21.5." Ind. Code § 14-10-2-3.

Pursuant to the provisions of AOPA, if an ALJ issues an order, the ultimate authority for the agency must issue a final order affirming, modifying or dissolving the ALJ's order. Ind. Code § 4-21.5-3-29(b). An ALJ who is by statute deemed the ultimate authority for the agency, such as an ALJ acting under the authority of 14-34-2-2, may issue what is considered the "final order" of an agency without additional review. However, "[i]f the [ALJ] is not the ultimate authority, the [ALJ's] order disposing of the proceeding becomes a final order when affirmed under [section 4-21.5-3-29]...." Ind. Code § 4-21.5-3-27(a).

Section 4-21.5-3-29(b) does provide that "the ultimate authority or its designee" may issue the final order. However, the statutory language makes clear reference to the "designee" and the ALJ as being two separate entities. The Commission's proposed rule allows the ALJ to also act as the Commission's designee in the issuance of final orders. It is the opinion of our office that designating the same ALJ who issued the proposed order to act as the Commission's designee in the issuance of a final order would bypass the necessary third person review of ALJ orders contemplated and required by AOPA. If the legislature envisioned the ALJ as potentially also being the designee for purposes of issuing the final order, parts of section 29 would not fully make sense. For example, it would not make sense for the ALJ acting as a designee to "remand the matter, with or without instructions, to an [ALJ] for further proceedings." Ind. Code § 4-21.5-3-29(b).

The status of the Commission's ALJs under 14-10-2-2 as employees of the Commission would not, in our opinion, automatically make the ALJs proper "designees" under section 29. As cumbersome as it may be, AOPA specifically provides for review of ALJ proposed orders by the ultimate authority who then must issue the final order. Under 14-10-2-3, the Commission is the ultimate authority for DNR except as expressly noted at 14-34-2-2. We presume that if the legislature had intended the ALJ to issue final orders in other cases besides those under 14-34-2-2, it would have expressly granted that authority as it did under 14-34-2-2. Additionally, in our opinion, default and dismissal orders issued by ALJs must also undergo final review by the ultimate authority or its designee.

Sincerely,

Gregory F. Zoeller
Chief Counsel - Advisory

Rebecca Walker
Deputy Attorney General