



3. On April 20, 2011, Mr. Majewski filed a Verified Petition for Judicial Review pursuant to IND. CODE § 4-21.5-5-7, seeking judicial review of the Commission's Final Order.

**B. Facts Disclosed in the Administrative Record.**

4. Mr. Majewski owns real property located at 1755 East Schug Road, Columbia City, Indiana, which is located on Cedar Lake. Mr. Majewski purchased the real estate in January 2007 and the residence located on the property had been built approximately one year before he purchased the real estate. (Hearing Transcript 10:20-11:3.)

5. In the summer of 2007, the first summer Mr. Majewski owned the property on Cedar Lake, his granddaughters were swimming in the water approximately 10-15 feet from the shoreline. One of his granddaughter's foot caught in between some tree limbs resulting in her only being able to keep her head above water by putting her arms behind her. (Hearing Transcript 12:4-19.) Mr. Majewski discovered several trees and limbs embedded in the lakebed, which due to the muck and silt, continually became exposed by the wave action of the lake. (Hearing Transcript 23:10-19, 25:1-8, 26:1-7, 27:8-21, 34:4-23, 51:9-15; Petitioner's Exs. 4, 5, 6, and 7.)

6. Mr. Majewski found a barrel approximately 45 feet into the water. (Hearing Transcript 15:8-9.) Mr. Majewski was given permission by the DNR to remove the barrel. (Hearing Transcript 15:1-16:22.) During the removal process, half of the barrel broke off leaving a jagged edge. Mr. Majewski was unable to remove the remainder of the barrel, and the jagged barrel continues to remain in the lakebed. (Hearing Transcript 15:1-22.)

7. Due to safety concerns, on October 11, 2007, Mr. Majewski requested the DNR allow him to install Geotex® and to pour pea gravel on top of the Geotex® in an area several feet away from the shoreline. (Hearing Transcript 60:20-61:11.)

8. Mr. Majewski is the former director of Verizon Telecommunications and has extensive experience with Geotex® in water applications. (Hearing Transcript 8:8-9:4.) In addition, Mr. Majewski had previously been given permission by the DNR to use Geotex® for his property on Lake James in order to resolve a high density silt issue. (Hearing Transcript 44:18-45:3, 45:10-17.)

9. During the administrative hearing, Mr. Majewski was allowed to provide his expert opinion regarding the application of Geotex®. (Final Order, ¶ 44.) In providing his expert opinion, Mr. Majewski stated that using the Geotex® to support the pea gravel in an area several feet from his shoreline would eliminate the safety hazards presented by the sunken trees and the jagged barrel. (Hearing Transcript 37:9-23, 59:19-60:2.)

10. The DNR elected to treat Mr. Majewski's request as an application for an underwater beach. Disregarding the safety hazards raised by Mr. Majewski, the DNR considered Mr. Majewski's application to be for only recreational purposes and reviewed the application only as an application for an "underwater beach."

11. In strictly applying the administrative code provisions for an underwater beach, the DNR denied Mr. Majewski's request to install Geotex® to support the pea gravel, citing that his request did not conform with the regulations for an underwater beach. The Commission upheld the DNR's denial, and Mr. Majewski timely filed his verified petition for judicial review before this Court.

## **II. CONCLUSIONS OF LAW**

### **A. Standard of Review**

1. The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity. I.C. § 4-21.5-5-14(a).

2. The validity of agency action shall be determined in accordance with the standards of review as applied to the agency action at the time it was taken. I.C. § 4-21.5-5-14(b).

3. The Court is required to make findings of fact on each material issue on which the Court's decision is based. I.C. § 4-21.5-5-14(c).

4. The Court is allowed to grant relief under I.C. § 4-21.5-5-14(d) only if the Court determines that a person seeking judicial relief has been prejudiced by an agency action that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

**B. Mr. Majewski Did Not Submit an Application for an Underwater Beach**

5. There is a safety hazard in the water several feet from the shoreline of Mr. Majewski's property on Cedar Lake. The evidence presented to the Commission and to this Court demonstrated that there are serious safety issues. In accordance with the Finding of the Administrative Law Judge, the local conditions in the water several feet from the shoreline of Mr. Majewski's property on Cedar Lake impair Mr. Majewski's enjoyment and the enjoyment of his family to use the lake. (Final Order, ¶ 42.)

6. Pouring pea gravel in the silty and mucky lakebed will not remedy the safety hazards presented in this matter. A neighboring property owner had poured three dump trucks full of pea gravel in the lakebed, all of which disappeared into the muck. (Hearing Transcript 32:18-33:8.)

7. The Geotex<sup>®</sup> proposed by Mr. Majewski would form a stable foundation for the pea gravel and would provide an effective barrier from the sunken trees and barrel.

8. Mr. Majewski, in presenting his expert testimony on the application of Geotex<sup>®</sup>, testified that he believes the Geotex<sup>®</sup> non-woven textile is an appropriate remedy. There was no other qualified expert testimony presented to the Commission on this issue. The DNR did not challenge Mr. Majewski's expert qualifications before this Court, and, therefore, any challenge to Mr. Majewski's expertise has been waived.

9. In order to be an underwater beach, the area must be both lakeward of the shoreline or waterline of the lake and be used for a recreational purpose. 312 IAC 11-2-27 provides that:

- "Underwater beach" means an area of a lakebed that is **both** of the following:
- (1) **Lakeward of the shoreline or waterline** of a public freshwater lake.
  - (2) Used for a **recreational purpose**, such as wading or swimming.

10. Mr. Majewski asserts that the definition of "underwater beach" includes a requirement that the area be "immediately adjacent" to the shoreline. A requirement that the "underwater beach" be "immediately adjacent" to the shoreline does not exist in the regulation. Any area "lakeward of the shoreline or water line" of a public freshwater lake will fall within the definition if it is used for recreational purpose.

11. Recreational purposes means the following:

- (1) Fishing.
- (2) Boating.
- (3) Swimming.
- (4) The storage of water to maintain water levels.
- (5) Any other purpose for which lakes are ordinarily used and adapted.

I.C. § 14-26-2-5(b).

12. Mr. Majewski's application requested that he be allowed to use Geotex<sup>®</sup> as the foundation for the pea gravel over eight feet from the shoreline of his property in order to cover the hazardous conditions of the trees, tree limbs, and jagged barrel to avoid injury to persons and property. The parties do not dispute that there is a safety hazard in the area currently presented

to the Court. The hazard exists not only as to Mr. Majewski's family but to the general public as well.

13. The evidence in the administrative record was that Mr. Majewski's application was to remedy the safety hazard, not for a recreational purpose as required by 312 IAC 11-2-27.

14. The Commission erred in upholding the determination that Mr. Majewski applied for an underwater beach. There is no evidence that the application was only for recreational purposes

15. Mr. Majewski did not apply for an underwater beach. This matter is remanded to the Commission and the Commission is instructed to grant Mr. Majewski's application to allow the placement of Geotex® with pea gravel poured on top to remedy the safety hazards currently existing in the lakebed.

**B. Geotex® is Not a Filter Cloth**

1. Even though this Court has found that Mr. Majewski's application was not for an underwater beach, in order to address all of the questions raised by the parties herein, the Court will address whether Geotex® is a filter cloth under 312 IAC 11-4-4(b).

2. The Administrative Code provides that a license shall not be issued for the placement of (1) filter cloth; or (2) an impermeable material beneath or in an underwater beach. 312 IAC 11-4-4(b). Again, these limitations do not apply since the Court has determined that Mr. Majewski's application was not for an underwater beach. However, the Court will address this issue for the purposes of completeness.

3. The DNR failed to present any evidence at the administrative hearing that Geotex® is a filter cloth. Matt Buffington, the DNR Biologist, testified that he was slightly familiar with

Geotex<sup>®</sup>, but in different applications, and he was not familiar with the semi-permeable Geotex<sup>®</sup> product proposed by Mr. Majewski. (Hearing Transcript 106:1-10, 18-23, 110:21-23, 111:2.)

4. James Hebenstreit, the Assistant Director for the Division of Water, also testified that he was not familiar with Geotex<sup>®</sup>. (Hearing Transcript 96:1-3.)

5. During the administrative hearing, Mr. Majewski presented expert testimony regarding Geotex<sup>®</sup>, as well as an exhibit explaining Geotex<sup>®</sup>. Geotex<sup>®</sup> was described as Geotex<sup>®</sup> non-woven geotextiles used in environmental engineering projects, and specifically used in subsurface drainage, separation, stabilization, erosion control and cushioning applications. (Petitioner's Ex. 8.) The material data sheet for the Geotex<sup>®</sup> product did not state it was a filter cloth. One of the key properties noted for Geotex<sup>®</sup> was its permittivity: "This value is a measure of the geotextile's ability to pass water. When multiplied by the thickness, you can determine the permeability of the geotextile." (Petitioner's Ex. 8.)

6. The term "filter cloth" is not a defined phrase under Indiana law. The only reference at the administrative hearing to Geotex<sup>®</sup> possibly being a "filter cloth" was the DNR's attorney, who objected to the Geotex<sup>®</sup> datasheet. (Hearing Transcript 36:5-17.) The Administrative Law Judge overruled this objection. (Hearing Transcript 37:4-5.) In fact, at the administrative hearing, the DNR's attorney stated that filter cloth and geotextiles were two separate materials: "filter cloth" or "geotextile." (Hearing Transcript 73:4, 107:2, 108:8.)

7. The permeable nature of Geotex<sup>®</sup> does not render it a "filter cloth." Since the regulations do not simply state that no permeable materials could be used in an underwater beach, the reasonable interpretation of the regulation is that there is no express ban on non-woven geotextiles.

8. The Administrative Law Judge erred in finding that there was “little dispute but that the textile is a filter cloth.” (Final Order, ¶ 37.)

9. The evidence presented to the Commission demonstrated that using Geotex® as a foundation for the pea gravel would resolve the safety hazards; it would cover the jagged wood and barrel and not allow the edges to cut through the material. (Hearing Transcript 37:9-23.)

10. Again, Mr. Majewski did not apply for an underwater beach. In addition, the Geotex® proposed by Mr. Majewski is not a filter cloth as contemplated by 312 IAC 11-4-4(b). This matter is remanded to the Commission and the Commission is instructed to grant Mr. Majewski’s application to allow the placement of the Geotex® with pea gravel poured on top to remedy the safety hazards currently existing in the lakebed and the subject of this matter.

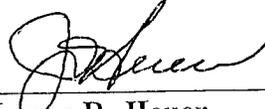
11. For all of the above reasons, the Court hereby concludes that the Commission’s Final Order should be set aside because Mr. Majewski has been prejudiced by the DNR’s denial and the agency action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (3) without observance of procedure required by law; and (4) unsupported by substantial evidence.

Based on the foregoing **Findings Of Fact and Conclusions of Law**, the Court now enters **Judgment** as follows:

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT** judgment be entered in favor of the Petitioner, Thomas C. Majewski, and against Respondent, the Indiana Department of Natural Resources; that the Commission’s order shall be set aside; that this administrative matter be remanded to the Commission with instructions that the Commission grant Mr. Majewski’s application to allow the placement of the Geotex® as a foundation for the pea

gravel poured to remedy the serious safety hazards that currently exist in the lakebed and the subject of the current matter.

**IT IS SO ORDERED** this 26<sup>th</sup> day of November, 2012.



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James R. Heuer

**JUDGE, WHITLEY CIRCUIT COURT**