

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
August 9, 2023, Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jennifer Jansen

NRC, DIVISION OF HEARINGS STAFF PRESENT

Elizabeth Gamboa
Aaron Bonar
Scott Allen

GUESTS PRESENT

Rebecca McClain
Raymond Rehlander
Kimberly Rehlander
Will Gooden
Gary Hancock

Call to Order

Jane Ann Stautz, Chair, called the meeting to order at approximately 1:59 p.m., ET, at the Natural Resources Commission, Division of Hearings, Indiana Government Center North, 100 North Senate Avenue, N103, Hearing Room, Indianapolis, Indiana. The Chair noted AOPA Committee member, Bart Herriman, was not present. He recused himself because of a potential conflict interest in the matter under consideration at the meeting. With the presence of two members, the Chair observed a quorum.

Consideration and approval of minutes for the meeting held on March 7, 2023

The Chair noted an amendment in the last paragraph on page six to add the word “need” in the sentence. The complete sentence should be: “Herriman agreed and said a review of the regulation itself would also help to avoid confusion and put the applicant on notice that they may need to show an unusual or extraordinary circumstance.”

Jennifer Jansen made a motion to approve the minutes of the March 7, 2023 meeting with the above amendment. The Chair seconded the motion. Upon a voice vote, the motion carried.

Consideration of Summary Judgment Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Rehlander v. Department of Natural Resources, Lenzen, Templin, & Amelio*; Administrative Cause No. 22-025W

The Chair recognized the Petitioner, Raymond Rehlander.

Rehlander presented oral argument which is summarized as follows:

A riparian zone is defined by Information Bulletin Number 56 as “the portion of public waters where a riparian owner has particular rights that are correlative to those of citizens, under the public trust, and exclusive of those of neighboring riparian owners.” Administrative cause number 18-059W, paragraph 88, says that Rehlander and Amelio are riparian owners and finding 89 says that Lenzen, Templin, Dempsey, and Kaminski are not riparian owners. The order in the current case as well as in the case of 18-059W has awarded riparian rights to a non-riparian owner granting them exclusive access to Bass Lake. The prescriptive easement grants them no exclusive rights to the easement property. Rehlanders also have rights to the easement.

The two orders do not grant Rehlander deeded riparian rights to access to Bass Lake safely, reasonably, equitably, and exclusively. These two piers intersect approximately 148 feet from the shoreline. Testimony from Mr. Kent and Mr. Lang in administrative cause number 18-059W established that the property boundary intersects the straight shoreline at an approximately 78-degree angle. The pier placed by Rehlander’s father-in-law was affirmed in administrative cause 92-338W and was placed perpendicular to the shoreline. Rehlander’s pier is in the same location. At 148 feet from the shore, the Rehlander pier runs into “their” pier. Administrative cause number 92-338W placed a stipulation that the easement holder’s pier could not approach within 16 feet of the Rehlander pier. Currently the piers are within eight feet of each other because Rehlanders extended their pier approximately 140 feet from the shoreline. There are other cases that show the Easement holders do not have riparian rights or exclusive usage.

The Chair noted the riparian boundaries had previously been litigated and resolved. The matter currently before the AOPA Committee is the awarding of the group pier permit by the Department of Natural Resources (Department).

Rehlander continued with his argument as follows:

Rehlander questioned “What is the Rehlander northern riparian boundary?” The Rehlander/Amelio property boundary intersects at 210 feet with the Rehlander pier extended perpendicular from the shoreline per the law of *Nozek*. What law establishes the property boundary?

The Chair again noted the previously litigated issues would not be revisited. The motion for summary judgment is regarding the validity of the group pier permit.

Rehlander responded:

312 IAC 11-4-8 says the group pier cannot interfere with the property interest of an adjacent riparian owner. The group pier is an interference with Rehlanders' riparian interest because it is within 16 feet of the Rehlanders' pier.

There is no justification for allowing the group pier to be 300 feet long. The Department is not following 312 IAC 5-6-3. Mr. Rehlander distributed a copy of 312 IAC 5-6-3.

According to Rehlander, 312 IAC 11-3-1 (b)(8) says it cannot be a group pier. How does the pier satisfy 312 IAC 5-6-3? Rehlander argued the group pier is clearly not to be permitted.

The Chair recognized Rebecca McClain, counsel for the Department..

McClain presented oral arguments on behalf of the Department which is summarized as follows:

The riparian boundaries had previously been decided by the Commission. Administrative case 18-059W addressed the reasonable buffer zone for navigation. The ALJ has already determined that the 7 feet between the piers is necessary for navigation. This was provided under the permit.

312 IAC 5-6-3 established the length of the pier under a general license. This provides guidance for the Division of Law Enforcement that an individual pier configuration is acceptable for navigability. Under the group pier license requirements, there needs to be a reasonable buffer zone that provides for reasonable navigation with adjacent property owners and the public. Based on the drawing provided, the number of boats, and the position of the boats on the pier, the Division of Law Enforcement recommended approval of the group pier permit.

The Chair recognized Will Gooden, counsel for Respondents Robert Lenzen and Marvin Templin.

Gooden presented oral argument on behalf of Lenzen and Templin, which is summarized as follows:

In paragraph 61 of the Order on Summary Judgment with Finding of Fact, Conclusions of Law, and Non-Final Order (Non-Final Order) the Administrative Law Judge (ALJ) properly noted that Bass Lake is subject to a special exception under 312 IAC 5-6-3 allowing a pier to be up to 300 feet in length as long as it does not extend over water more than 3 feet deep because of the lake's unusual shallowness.

The determination and delineation of the riparian zones between the Amelio property and Lenzen/Templin Easement property, and between the easement and the remainder of the Rehlander property, have been decided. In paragraph 39 of the Non-Final Order, the ALJ noted that the conditions of the group pier were complied with as approved. In paragraph 44, the ALJ noted Rehlander did not dispute or provide contrary evidence to the assertion

that the group pier was installed precisely as required by the Final Order in administrative cause number 18-059W. In paragraph 45, it was found that the Rehlanders' pier was installed at an angle in violation of the seven feet of clear space requirement. The group pier is installed as required in 18-059W within the 20 foot riparian zone allowing for a buffer of 7 feet of clear space between the riparian boundary and the remaining Rehlander property and 2 feet of clear space from the Amelio property line on the north side. Rehlander is trying to rehash the prior decision of the Commission and of the Fulton Circuit Court. Lenzen and Templin requested clarification of the order on the encroachment of the Rehlander pier into the clear space. Lenzen and Templin had requested the Rehlanders be enjoined from infringing on the 7 foot clear space as part of their Motion for Summary Judgement. The ALJ found the issue was waived because it was not pled. Respondents noted that the ALJ found that 7 feet of clear space is required and that Rehlanders are violating the requirement. Lenzen and Templin therefore requested the Commission issue an injunction to prohibit Rehlander from encroaching into the clear space.

The Chair recognized Gary Hancock, counsel for Nicholas Amelio. Rehlander objected to Amelio presenting oral argument unless the riparian boundaries are going to be reconsidered. Rehlander questioned what interest Amelio had in telling Rehlanders how piers should be constructed on Rehlander's property.

The Chair responded that Amelio has been recognized as an intervening party. Gary Hancock represents Amelio as counsel and will be given an opportunity to present oral arguments.

Hancock presented oral argument on behalf of Amelio which is summarized as follows:

Amelio owns property immediately adjacent to and north of the easement. Whatever happens in the easement affects Amelio. Petitioners' argument lacks legal merit and the ALJ's order is well-reasoned and supported. Rehlanders' argument was a plea to reconsider the decision in 19-059W. This argument is barred by collateral estoppel. Respondents have riparian rights as the dominant easement holder and the Petitioner is the subservient easement owner. Law enforcement inspected the pier. Department staff reviewed the permit application and found the pier meets the safety requirements. Special conditions were placed on the pier to meet the safety requirements. Petitioners do not like the outcome of the previous decisions. Amelio requested summary judgment be affirmed with the injunction requested by Mr. Gooden.

Rehlander gave a rebuttal statement as follows:

11-4-8 requires a buffer zone between the shoreline and 200 feet from the shoreline. Rehlander questioned how a 300-foot pier fits within that buffer zone. No one has told him how the group pier meets this requirement. According to Rehlander, the Commission, the Department, and Amelio are trying to prevent the Rehlanders from utilizing their deeded riparian right to erect a pier exclusively in an exclusive riparian zone 300 feet from the shoreline, following the law of *Nozek*.

The Chair requested additional questions or discussion from the Committee.

Jansen asked the Respondents to restate their request regarding the encroachment. Gooden responded that the ALJ did not address the request by Lenzen and Templin to issue an order enjoining further encroachment by the Rehlanders into the buffer zone even though the ALJ found Rehlanders violated the buffer zone requirements. Although this is technically a counterclaim, the issue could have been addressed. Gooden requested an injunction to prevent the encroachment.

The Chair requested the parties respect the previously ordered buffer zones. A discussion of the Commission's jurisdiction to issue the injunction ensued. ALJ Gamboa noted that the enforcement of the Commission's order and the issuing of the injunction is not within the Commission's jurisdiction but is a matter left to civil courts. The Chair agreed.

The Chair noted law enforcement reviewed the placement of the pier and that the Chair did not have further questions. The Chair asked if there was a Motion on the Summary Judgment Findings of Fact and Conclusions of Law with Nonfinal Order.

Jennifer Jansen moved to accept the Summary Judgment Findings of Fact and Conclusions of Law with Nonfinal Order as written. The Chair seconded the motion. No further discussion was had.

The Chair called for a vote to accept the Summary Judgment Findings of Fact and Conclusions of Law with Nonfinal Order, in the matter of *Rehlander v. Department of Natural Resources, Lenzen, Templin, & Amelio*. On a voice vote, the motion unanimously carried.

Adjournment

The meeting was adjourned at approximately 2:30 p.m. ET.