

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
July 21, 2020 Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jennifer Jansen
Bart Herriman

NRC, DIVISION OF HEARINGS STAFF PRESENT

Sandra Jensen
Dawn Wilson
Billie Davis
Scott Allen

GUESTS PRESENT

Matthew Rea
Cortland Gundling
Terry Coleman
Steve Hunter
Terry Hyndman
Jason Lee

Call to order and introductions

Jane Ann Stautz, Chair, called the meeting to order at 11:28 a.m., ET, at the Fort Harrison State Park, Garrison, 6002 North Post Road, Blue Herron Ballroom, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum.

Consideration and approval of minutes for the meeting held on September 17, 2019

Jennifer Jansen made a motion to approve, as presented, the minutes of the meeting held on September 17, 2019. Bart Herriman seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order Following Remand by the Natural Resources Commission in the matter of *Cortland Gundling v. DNR*; Administrative Cause No. 19-028L

The Chair noted the Commission's AOPA Committee remanded the matter to the Division of Hearings on September 17, 2019 and the Division of Hearings' Administrative Law Judge (ALJ)

conducted the Post Remand Administrative Hearing on May 27, 2020. The Chair observed the Findings of Fact and Conclusions of Law with Nonfinal Order Following Remand by the Natural Resources Commission (Nonfinal Order Following Remand) was entered on June 24, 2020 and Gundling filed Objections to the Nonfinal Order Following Remand on June 25, 2020.

The Chair recognized Cortland Gundling (Gundling).

Gundling stated he objects to the testimony of conservation officers and their characterization of unruliness, marijuana use, boating and swimming violations and unsafe behavior during past Brookville Lake Raft Up (Raft Up) events. He said the officers testified they were getting catcalls at the previous Raft Up events and said they were “scared for their safety to enforce the law” but noted that these issues were not mentioned previously. Gundling stated that he was blindsided with these other issues raised at the administrative hearing on May 27, 2020 because these issues had not been raised by the Department prior, and that the other concerns raised did not happen.

Gundling said the Department of Natural Resources (Department) had previously been concerned over alcohol consumption, but alcohol consumption on the lake is legal and no laws were broken.

Gundling said that he met with Department staff, including the Deputy Director of State Parks, Terry Coleman, pursuant to the Commission’s Order Remanding Proceeding with Instructions issued in October 2019. Gundling indicated that the meeting was not not consistent with his interpretation of the AOPA Committee’s Remand Order. Gundling stated he felt “interrogated” and the Department requested a safety plan, but he was unaware that he needed to provide a plan because he had not been asked to provide one previously. Gundling stated that he thought the purpose of the meeting was to identify the Department’s concerns and to try to resolve them.

Gundling noted that he felt the communication with the Department is strained and that they keep changing the expectations for the Raft Up event. Gundling said he submitted a safety plan that included hiring off duty officers, but that proposal and other ideas were rejected by the Department. Gundling stated that one of the issues the Department raised was there would not be enough restroom facilities. Gundling felt that should not be an issue, as the Department does not provide extra restrooms during busier times on the lake.

The Chair recognized Matthew Rea, Counsel for the Department.

Rea stated safety is the primary concern when the Department reviews a special event permit and that the Department no longer allows the type of raft up events that Gundling applied for because of congestion. Rea noted these events are unmanageable because of crowd size and uncertainty concerning how many people might attend.

Rea said Gundling’s Raft Up event has included heavy alcohol consumption according to the officers that testified at the Post Remand Administrative Hearing held on May 27, 2020, and he noted this factor could increase the potential for substantial injury or drowning. Rea said there is no way to ensure that the boats would be able to maintain navigable lanes. Rea said the

Department analyzed the risks and determined there was not a way to alleviate safety concerns for Gundling's event.

Rea said that Gundling provided no feasible solutions in his proposed safety plan. He noted that the Department presented first hand witnesses to Gundling's prior Raft Up events at the Post Remand Administrative Hearing held on May 27, 2020. Rea said that there was testimony from several Conservation Officers who are well qualified and worked the Gundling's event in the past. He said the officers were concerned about the large number of people at the event, their ability to do their job, and the safety of people attending the event. Rea noted the officers witnessed heavy alcohol consumption, marijuana use, at least one physical altercation, and one officer testified to making three "boating while intoxicated" arrests in 2013. He said officers testified about boating safety issues, including people not wearing life jackets while swimming from boat to boat, and their concerns of about people who could be struck by boats while in the water. Rea noted that Officer Wooley testified to his opinion that Gundling's Raft Up has become "too big to manage" from a law enforcement perspective.

Rea stated that Coleman testified that safety is the primary concern of the Department when reviewing an application for a special permit. Rea noted crowd size, alcohol, geographic location of the event, access to emergency services, and whether the event is on land or water are all factors considered in the Department's evaluation of event applications. He said Gundling's Raft Up event had grown in size making it difficult to plan for its safety.

Rea said the Department's position has been consistent under 312 IAC 8-2-15. Rea stated the Department has discretion to deny special event permit applications if that event presents a "clear and immediate danger to the public or causes an undue interference to other users in the area." Rea stated the evidence has shown that Gundling's Raft Up does. Rea stated that Gundling submitted a safety plan to the Department but that it was inadequate to address safety concerns.

Rea said the argument by Gundling that the officers that testified were not credible is a baseless accusation. Rea noted the officers explained in their testimony how they were overwhelmed and articulated safety concerns from Gundling's previous Raft Up events.

Rea said that Gundling makes no specific objections to the Finding of Fact related to Coleman's testimony. Rea requested that the Findings of Fact and Conclusions of Law with Nonfinal Order Following Remand be upheld and made a final order of the Commission.

The Chair asked if there were any questions from the Committee.

Herriman asked Gundling if he recognized the potential safety issues with a large event like his Raft Up event.

Gundling said that he does understand the safety issues and concerns and noted that through his career as an airline pilot he was used to making risk assessments regarding safety. Gundling explained that one of the Department concerns was that anchored boats would move and could not maintain a navigable lane between the boats. Gundling rejected the idea that the boats move when they are rafted up and sited videos that contradict the Department's position. Gundling said

the raft ups in general are not dangerous and there is no evidence to support that they are. Gundling said he believes fireworks on the lakes are more dangerous because that involves a lot of boats on the water when it is dark.

Jansen asked if the Department was aware of any other states that do allow raft up style events. She also inquired if there are proven safety measures available.

Rea said the Department is not aware of any states allowing similar events but that the Department based their decision on their own experiences with raft up style events.

Herriman said he has not heard anyone say before that the Department does not allow these types of raft up events. Herriman asked how the Department is communicating to the public that they are not allowing these types of events so that people do not apply. Herriman said he is concerned that people will apply for special events permits and the Department will not respond timely. Herriman said another concern is that a policy not to allow a raft up event appears to be an edict not supported by any Commission rule or emergency rule.

Rea responded that the special events permit decisions are made on a case-by-case basis.

Herriman said he heard the Department say they no longer allow raft up style events and if the Department no longer allows these style events, the Department should communicate that to the public.

Rea noted the decision by the Department to deny raft up style events has been recent, but that it might be difficult to layout each factor that would cause an event to be characterized as a raft up event.

The Chair stated that the special permit review process needs better guidance and communication for the public, including what should be included with the application and any required components of a safety plan. The Chair suggested the Department could look at a new Information Bulletin to assist people with applying for special event permits and provide clear guidance regarding the Department expectations.

Gundling noted that he thought about moving the event to a Sunday to alleviate congested parking. He said the event had eight years with no problems.

The Chair said that moving the event to Sunday might be a solution to consider for future applications for a special permit, but this matter deals with the current permit that was denied by the Department.

Herriman noted a typographical error in the date referenced in finding 7 of the Nonfinal Order Following Remand. Herriman also stated that in finding 23 of the Nonfinal Order Following Remand it states "Customarily, a special event permit application is reviewed and acted upon at the property management level...customarily, and it says the applicant is supposed to describe the methodology to run the event. Later, it talks about...puts the burden on the applicant to come up with a safety plan. Again, to me it's about as amorphous as you can get." Herriman

stated in finding 30 the statement saying “The Department's belief is fair and reasonable” should be stricken. Herriman noted the inconsistency of a safety plan being needed for a raft up style event when a safety plan does not seem to be a concern for a fireworks event and that the requirements on special events are not uniform.

Herriman asked about where “clear and immediate danger to public health or safety” is located within the Nonfinal Order Following Remand.

The Chair responded that “clear and immediate danger to public health or safety” is in 312 IAC 8-2-15(d)(1) located on page 14 and in 312 IAC 8-2-15(f)(1) on page 15.

The Chair noted the proposed amendment to the date in finding 7 and striking “The Department's belief is fair and reasonable” in finding 30.

The Chair asked about videos and photographs that were submitted as evidence in the administrative hearing.

Administrative Law Judge (ALJ) Jensen answered in the affirmative that there was a slideshow of photographs introduced into evidence.

Jansen said she appreciated the Department’s safety concerns and understands the Department does not feel the event can be conducted safely. She asked if there is a way to hold the raft up style events in the future and if the Department would consider permitting these events if the applicant had an indemnity agreement, bond, or insurance and participant registration.

Rea said there has not been registration so the number of people planning to attend these events has been unknown. He said maybe registration and indemnity agreements are options, but there would still be issues with the logistics of clustering a large number of boats together and the Department being able to address safety.

Coleman added that the environment on the water is dynamic and people who are swimming in the water around the boats make it dangerous when a law enforcement boat or any other boat needs to maneuver through the boats. Coleman noted other factors of concern include the consumption of alcohol.

Gundling stated that at the Raft Up event, the boats are organized in rows with people watching the show and people are allowed to swim. He said that during holiday weekends on the lakes it sometimes gets chaotic, but it is a mischaracterization to say the Raft Up event is “clear and present danger” when there is no data to support that conclusion.

The Chair stated the Department has an opportunity opportunity to improve transparency by clarifying and communicating information to the public regarding special event permit application processes, requirements, and safety plans.

Jennifer Jansen moved to accept the Findings of Fact and Conclusions of Law with Nonfinal Order Following Remand by the Natural Resources Commission, with proposed amendments as to finding 7 and finding 30 as stated by Herriman. Bart Herriman seconded the motion.

Herriman noted that the Department's process for obtaining special events permits could be made clearer and there is improvement needed in the application process.

The Chair called for a vote to accept the Findings of Fact and Conclusions of Law with Nonfinal Order Following Remand as amended by motion in the matter of *Cortland Gundling v. DNR*. On a voice vote, the motion unanimously carried.

ALJ Jensen acknowledged the AOPA Committee's previous directive for the Division of Hearings to collaborate with the Department's Division of State Parks on developing guidelines for the special event permit process. She stated that the Divisions had brief discussions but efforts were delayed to accommodate the Division of State Parks, its busy time near the end of last year, and then this spring efforts associated with COVID-19 halted the work. She stated that the Divisions will continue to work on this project at the best available opportunity.

Adjournment

The meeting was adjourned at 12:08 p.m., ET.