

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
March 11, 2019 Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jenifer Jansen
Bart Herriman

NRC, DIVISION OF HEARINGS STAFF PRESENT

Sandra Jensen
Scott Allen
Billie Davis

GUESTS PRESENT

Jennifer Tucker Young
Elizabeth Gamboa

Call to order and introductions

Jane Ann Stautz, Chair, called the meeting to order at 8:59 a.m., ET, at the Fort Harrison State Park, Garrison, 6002 North Post Road, Lawrence Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum.

Consideration and approval of minutes for the meeting held on May 15, 2018

Jennifer Jansen made a motion to approve, as presented, the minutes of the meeting held on May 15, 2018. Bart Herriman seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of DCG Services, Inc., Abydel Farms, LLC, John M. Divine and Linda M. Divine v. DNR; Administrative Cause No. 13-156W

The Chair recognized Jennifer Tucker Young, Counsel for DCG Services, Inc., Abydel Farms, LLC, John M. Divine and Linda M. Divine (the Petitioners).

Young explained that the Department of Natural Resources (Department) issued a Notice of Violation (NOV) on August 22, 2013 to the Petitioners, who filed for an administrative review of

the NOV on September 13, 2013. Young noted that she does not believe there is an issue of the timing of the filing for administrative review.

Young said that the pending matter involves whether or not the Department has proven the NOV. Young stated the Findings of Fact and Conclusions of Law with Nonfinal Order (Nonfinal Order) indicated that the Department's representative witness testimony seemed to carry more weight than the testimony of the Petitioner's witnesses, specifically John Divine and George Ziegler. Young stated that the issue is whether the Petitioners only performed routine ongoing maintenance of the channel that was the subject of the NOV and noted that there were differences in witnesses' testimony. Young added testimony at the administrative hearing was, "that nature had restored the area that was subject of the NOV", and that Officer Mann testified that he saw beaver dams and crop damage due to flooding. Young said that Department's witness, Toby Adams, testified the alterations to the channel could have been caused by beavers.

Young stated that the Petitioners' key witness, Elton Sipes, who is elderly, was unable to travel to Indianapolis, and the Petitioners' request to move the administrative hearing closer to Martin County was denied. Young said that an affidavit by Sipes was presented at the hearing and stated, "[Sipes] gave John Divine permission to keep Sulphur Creek maintained as to continued problems with beavers on the creek." Young offered the opinion that the Department did not meet their burden of proof with regard to unpermitted excavation in the floodway noting that Divine and Ziegler testified that there was no excavation of trees, stumps, and roots, no fill placement, no filling of existing stream channels, but an ongoing beaver dam problem kept the water level in the creek high enough to prevent the drainage of water from tile outlets.

Young said that Divine and his employees or independent contractors testified that they only performed routine ongoing channel maintenance to keep debris out of beaver dams so that a new creek would not form. Young stated, Divine is in a quandary because if he does not maintain the creek and remove the beaver dams the property is going to flood.

Young said there was testimony about some debris and timber on the side of the stream and the testimony of Petitioners' witnesses was that timber was cut, but not by Divine or Ziegler.

Young said that she believes that the Department did not meet their burden of proof with regard to unpermitted excavation and that the work was clearly routine ongoing channel maintenance to stop the flooding caused by beaver dams.

The Chair asked if there were any questions.

Herriman asked if the Petitioners were denying using a backhoe to excavate silt or anything else in the channel.

Young stated, "Yes" that at the administrative hearing the Petitioners denied excavating anything in the channel.

Herriman said that there was evidence from the Department that there were scrape marks from a backhoe and asked if there was a backhoe.

Young stated that the Petitioners had an incident report introduced as an exhibit of an anonymous complaint that Divine was digging in the creek and in a wetland. She said in the report Zeigler told the conservation officer “if people don’t change their minds about these creeks there aren’t going to be any land left. He said he was only cleaning out the creek so the water wouldn’t eat away the bank on the other side.”

The Chair recognized Elizabeth Gamboa, Counsel for the Department of Natural Resources.

Gamboa stated that there was direct evidence by Officer Mann who observed scrape marks in the stream and Ziegler, at the direction of Divine, using a backhoe in that stream.

Gamboa said that the Administrative Law Judge (ALJ) was in the best position to consider and weigh all the testimony from the administrative hearing. She stated there was testimony from four very experienced Department employees regarding Flood Control Act enforcement and they observed the activity that occurred on Sulphur Creek. She said that the witnesses observed trees, with their roots attached, stacked in the floodway, and silt from the bottom of the stream placed along the floodway. Gamboa said that an entire area of trees had been removed from the floodway, Divine was farming in the floodway, and there were field tiles installed in the floodway.

Gamboa stated that the ALJ carefully considered the evidence and determined the activities were in violation of the Flood Control Act. Gamboa said that Divine never sought to obtain a permit for any of the work being done in the floodway. Gamboa noted that the Department does not object to any findings from the Nonfinal Order and the findings support the conclusion that the Flood Control Act was violated as alleged in the NOV.

Gamboa stated that the Petitioners argued that they were merely conducting stream-clearing activities, but that the Flood Control Act has a provision under IC 14-28-1-22 that governs stream-clearing activities. Gamboa noted that one of the provisions that would need to be met is that silt cannot be removed from the bottom of a creek and there was evidence in this case that the silt had been removed and track marks that indicated the streambed had been deepened.

Gamboa stated that the ALJ’s findings in the Nonfinal Order were supported by the evidence presented at the hearing.

Gamboa stated that there were a couple other arguments that the Petitioners raised in the Objection to Finding of Fact and Conclusions of Law with Nonfinal Order (Objections) and asked, “If the Petitioner is waiving those for not having argued those today?”

Young answered “No”

Gamboa stated that the Petitioner’s Objections alleged the ALJ was prejudiced in the proceedings and that the ALJ’s appointment as an ALJ was unconstitutional. Gamboa stated that the Petitioners cite federal cases to support the claim that the ALJ’s appointment was unconstitutional. Gamboa noted that there is an “appointments clause” in the U.S. Constitution

and according to the cases cited by the Petitioners have to do with the appointment of federal ALJ's. Gamboa said that the current matter is a state proceeding governed by state law and there is no indication by the Petitioners that U.S. Constitution provisions apply to the "appointment of a state court ALJ."

Gamboa said that the Petitioners cited several previous decisions by ALJ Jensen to support the Petitioner's allegation that the ALJ was prejudiced. Gamboa stated that the law presumes that a judge is not biased and that unfavorable or adverse ruling by an ALJ would not be sufficient to allege bias or prejudice even if those decisions were in favor of the Department. Gamboa noted that the allegations of prejudice were not raised by the Petitioners except in the post-trial brief filed after the administrative hearing. She noted that AOPA has provisions for the disqualification of an ALJ and the allegations made by the Petitioners are not specific. Gamboa said that the ALJ found that the issues of prejudice had been waived. Gamboa noted that the issue of prejudice is not based on any factual allegations, that not all decisions are in favor of the Department, and the allegation of prejudice is misleading.

Gamboa stated that regardless of beaver dams the Petitioner's activities in Sulphur Creek went far beyond what is allowed under IC 14-28-1-22. Gamboa pointed out that the Petitioners cleared the creek and the silt in the creek, which is not permitted under the Flood Control Act. Gamboa stated that there was no evidence of prejudice and there is no law that supports the ALJ's appointment was unconstitutional. Gamboa requested that the Nonfinal Order be made a Final Order of the Commission.

The Chair asked if there were any questions and after no questions, the Chair recognized Young to offer a rebuttal statement.

Young stated that she wanted to make sure that the post-hearing briefs would be part of the official record. Young stated that she was told by the ALJ that the filed post-hearing briefs would be part of the record of the AOPA oral arguments, they are not part of the record, and it is misleading.

The Chair asked if anyone had any additional questions or comments. The Chair noted that she did not see any objections to any of the findings of fact as proposed in the Nonfinal Order.

Herriman asked for clarification on whether the post-hearing briefs were part of the record.

Young requested, approached, and handed a copy of the ALJ's Notice of Deadline for Filing Post-Hearing Briefs to the Chair.

The Chair noted for the record that she was handed the "Notice of Deadline for Filing Post-Hearing Briefs" document issued by the ALJ on August 29, 2018. The Chair asked if the Post-Hearing Brief was included as part of the official record.

ALJ Jensen replied "absolutely" the Post-Hearing Briefs and every document filed in an administrative proceeding would be part of the official record. ALJ Jensen noted that the Non-Final Order addresses the issue of the ability of the ALJ to serve. She recalled that the Post-

Hearing Brief filed by the Petitioners had a list of cases similar to what was cited in their Objections. ALJ Jensen said that the disqualification of the ALJ was addressed and determined to have been waived due to the fact that the issue was brought up after the administrative hearing was over and Ms. Young had offered no objection before she presided over the administrative hearing. She affirmed that the issue of disqualification was addressed in the Nonfinal Order and was considered as part of the record.

The Chair thanked the ALJ for the clarification and asked if there were additional questions or comments. The Chair noted no other questions or comments and called for a motion.

Bart Herriman moved to affirm the Findings of Fact and Conclusions of Law and Nonfinal Order in the matter of *DCG Services, Inc., Abydel Farms, LLC, John M. Divine and Linda M. Divine v. DNR*, as the Commission's Final Order. Jennifer Jansen seconded the motion. On a voice vote, the motion unanimously carried.

The Chair noted that the discussion item on the agenda had been removed.

ALJ Jensen stated that HB1223 is moving through the General Assembly and that bill, if passed, would pool ALJ's for many agencies, but that currently the Natural Resources Commission ALJ's are exempt. ALJ Jensen noted that what had been on the agenda for discussion was the Commission's automatic change of ALJ rule, but if the General Assembly creates a pool of ALJ's, it might change the availability of judges, and alter the discussion about the rule. For this reason she believed it was appropriate to table the discussion. She noted that HB1223 passed the House, has been through first reading in the Senate, and has been assigned to the Senate Judiciary Committee.

The Chair asked if there were other items or pending matters for the purposes of scheduling future AOPA Committee dates.

ALJ Jensen stated there are some possible matters that might need to be scheduled, but they would not be in the next couple of months.

Adjournment

The meeting was adjourned at 9:24 a.m., ET.