

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
September 17, 2019 Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jenifer Jansen
Bart Herriman

NRC, DIVISION OF HEARINGS STAFF PRESENT

Sandra Jensen
Dawn Wilson
Billie Davis

GUESTS PRESENT

Matthew Rea
Cortland Gundling

Call to order and introductions

Jane Ann Stautz, Chair, called the meeting to order at 8:38 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 March 11, 2019

Bart Herriman made a motion to approve, as presented, the minutes of the meeting held on March 11, 2019. Jennifer Jansen 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 *Cortland Gundling v. DNR*; Administrative Cause No. 19-028L

The Chair noted after moving the agenda items and waiting to accommodate the Petitioner, Cortland Gundling, who was running late, arrived at 9:08 a.m., ET for oral arguments before the AOPA Committee.

The Chair recognized Cortland Gundling.

Gundling explained that the permit denial relates to an event held for eight years on Brookville Lake, four years with no permit. He noted that the last four years permits were required to hold the event and the events occurred with no complaints or issues. Gundling said when a change in Department of Natural Resources (Department) staff happened there were accusations that people associated with the event were “rowdy” and drunk. Gundling stated that these claims were not true.

Gundling stated that at trial the evidence showed that the concerns of the Department about people being drunk or disorderly were unfounded. Gundling highlighted that the Department could not produce any witnesses who had attended an event that could corroborate those claims. Gundling noted that he lost only because of a safety issue expressed by the Department related to overcrowding. Gundling noted that regardless of an event being held overcrowding is an issue. He said the Department’s opinion was that the boats needed more separation and Gundling said, “That is the boater’s responsibility”. Gundling stated the boating lanes have always been open at the event, there has never been a safety issue. Gundling noted that on a normal holiday weekend there are over 400 boats in the same shallow water where the concert event is held, which is more congested than the raft up that has only has 200 to 225 boats.

Gundling said before the 2017 event permit was approved, Gundling contacted the Department for a safety meeting, and the Department did not feel a safety meeting was necessary. However, in 2018 the Department denied the event permit citing concerns. He said that Lake James, in Angola Indiana, has an event called the “Sandbar Party” with 600 boats in attendance and the Department does not have a problem patrolling and watching that event.

Gundling said that 75% of boats that attend the event that he organizes are already on the water and at the marinas. He said the event helps to promote boater safety with regard to wearing lifejackets and not drinking while operating a boat.

The Chair asked if there were questions from the Committee.

Herriman observed the event promotes boater safety and is a fundraiser for a children’s hospital, and asked if Gundling or the event is associated with a non-for profit organization.

Gundling answered in the affirmative.

Herriman asked how the event promotes safety and how is the event distinguished from “a big party on a lake”.

Gundling said during the first four years without being required to have a permit for the event, it was just a “band on a boat.” After an incident with a person who was harassing a young girl at the event the Department required them to get a permit. Gundling explained that because the event was now permitted they could advertise the event and Lieutenant Bevel, with the Department, suggested bringing a Law Enforcement public relations boat to the event to help promote safety. During that event kids who were wearing life jackets were given free ice cream certificates. Gundling stated that two years ago after his grandson passed away the event began to raise money for “Giving Hope”.

The Chair recognized Matthew Rea, Counsel for the Department.

Rea stated that the Administrative Law Judge (ALJ) decision was based on substantial evidence and safety is the primary concern when the Department reviews a special event permit. Rea said the other issues in the appeal the Department views as peripheral.

Rea referenced finding 53 of the Nonfinal Order, which reflects that Department's witnesses, based upon their knowledge of the past raft up events, concluded that the event posed a "clear and immediate danger to public health or safety and interferes with use of Brookeville Lake by other users." Rea said there is no way of predicting how many boats could attend the event, but it was estimated at a minimum 250 boats would participate, which would create congestion. Rea stated there is "also no dispute that there is no real way to organize the boats" to provide for access by emergency personnel. Rea stated that, to a lesser extent" the event would require significant commitment of Department staff time, which was also considered in the decision to deny the special event permit.

Rea said that the event was a "clear and immediate danger to public health or safety" under 312 IAC 8-2-15 and requested that the Findings of Fact and Conclusions of Law with Nonfinal Order be upheld and made a final order of the Commission.

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

Herriman said that Gundling indicated that there had never been a safety issue and asked if there was evidence on the record of an injury or safety issue.

Rea stated, "I think there might have been one injury... they were able to get to them, but that is obviously no guarantee that that would be the case in every emergency." He noted that photographic evidence submitted at trial reflected the event does cause significant congestion and there is no way to keep boats organized in a manner to allow access or provide for an emergency response.

Herriman stated "there are some things about this proceeding that are troublesome in my mind." He observed that an applicant needs to submit an application 30 days before the event and that Gundling submitted his special event permit application in a timely manner. Herriman further noted the ALJ's reference to the Department's "ultimate" denial of Gundling's application and referenced Gundling's complaint that the Department's response was not timely, asking Rea what the Department's standard is with respect to a response to a special event permit application.

Rea stated that the rule does not provide a standard but offered that the Department tries to provide a response in a reasonable amount of time for the person whose application is approved to prepare for the event. Rea noted that this event has gone on for several years and this application was reviewed by the Department's executive office and a cost benefit analysis, by which the Department evaluates multiple factors was prepared. Rea stated his uncertainty

whether a cost benefit analysis is prepared in all cases and offered that effort may have delayed the process.

Herriman said that Gundling had his application submitted at the beginning of 2019, well before the 30-day requirement since the event was in August 2019. Herriman said the Department could have waited until mid-August to approve, deny, or not act at all on the permit and he said, “it seems like a little bit of a disservice to the general public.”

Rea stated “you could call that a flaw in the rule itself, that’s not how [the Department] actually handled this.”

The Chair stated that the special permit review process could be an item to recommend to the Advisory Council for further review. Stautz suggested that some guidelines regarding the review process for these applications and the timeliness of response should be established.

ALJ Jensen noted that Gundling previously filed for administrative review regarding his 2018 application for which he never received a response from the Department. Gundling stated that no written response was issued by the Department for the 2018 special event permit.

Gundling asked to address the safety issue on the event.

The Chair recognized Gundling to provide rebuttal.

Gundling stated, “To say [the event] is a clear and present danger is a little off the wall, it’s not a national security event. It’s a bunch of boaters that get on the lake, have a good time...”

Gundling noted where he has seen fights on the lake on a normal boating day on the lake.

Gundling said that at the event no one is breaking the law and that there are no rules on how close boats have to be when they are anchored or tied up. Gundling stated that the Conservation Officers do not have many rescues and they are involved with the more serious problems, such as a drowning. Gundling stated usually when there is an injury other boaters help take care of and transport an injured person back to shore. He noted that the Conservation Officers “are busy people” and there are some weekends Conservation Officers are not patrolling or working on the lake.

Gundling noted that at one time Brookville Lake had fireworks on the dam where several hundred boats were on the water, in one place, and the Department did not have an issue or deem that activity unsafe.

Recognizing that this proceeding involves a permit that would create some responsibility for the State, Jansen asked how the raft up event would be different from any other time when several boat decide to tie up and have a party. She questioned how this event is any more dangerous than a regular day on the lake.

Rea stated that 200 to 250 minimum number of boats, in one area, makes the event more significant than a regular day. Rea noted that the event Facebook page has 4,000 people on it so

it is hard for the Department or the event organizers to determine how many people will actually attend the event.

Jansen asked if the Department grants permits for similar events and if so what makes this raft up event at Brookville Lake different from those other similar events.

Rea stated that he is unaware of another similar event for which the Department has granted a permit.

Herriman asked if the cost benefit analysis uses objectively verifiable criteria, something in a regulation, or is it something the Department developed and uses as a guideline.

Rea stated that the cost benefit analysis is a tool to help evaluate events and for the property manager to document the reason that a decision was made when approving or denying a permit.

The Chair recognized Gundling.

Gundling stated that permits used to be issued in three weeks, not three months, and he was unaware of the cost benefit analysis for the event permit decision. He questioned why there were no issues with being able to get the permit in 2017, but in 2018, the event permit was denied for no apparent reason. Gundling said there was no logic in the decision in 2018 other than there was “a change in command.” Gundling said that possible complaints are from fishers the event is held in a small, out of the way, shallow cove in an idle zone, so kids can swim and be safe; however, they’ve found out it’s a prime spot for walleye fishing.

Herriman noted the event date has passed and asked ALJ Jensen what relief Gundling is seeking in the matter.

ALJ Jensen observed that the administrative review process for the 2018 case was already past the date of the event because Gundling’s ability to seek review was delayed by the fact that he did not receive a response to his application. She noted that in 2018, Gundling, who was now aware of his ability to seek review, agreed to dismiss the proceeding with the understanding that he would file another case if the 2019 special event permit was held up or denied. ALJ Jensen stated the Committee could decide to move forward, for the ALJ to review further, or remand the case back to the ALJ so that next year Gundling could apply for a similar event permit. She said the relief would be at the discretion of the Committee.

The Chair noted that the Committee decides based on the facts and information as presented and the challenge is that the Committee cannot anticipate the future. The Chair stated the Department could benefit from additional guidance and she will recommend that the Advisory Council look at the event permitting process, the scoring system, and the safety requirements so there is transparency and “consistency across the state so there is not disparity between different events...”

The Chair noted that the order issued by the ALJ denies the event permit.

Jansen stated that she is still unsure with how the raft up event is different from an ordinary day on the lake when there is high boat traffic. Jansen acknowledged that the Department cannot predict how many boats will attend the event, but questioned how the Department could predict how many boats will be on the lake on any given day. Jansen also noted her struggle identifying any action the Committee can take since the event date has passed.

Herriman stated there is a public safety issue with boat overcrowding on several lakes including Lake James that was noted by Gundling. Herriman said, "I am more candidly upset with the customer service that Mr. Gundling has received in the last two years. It is galling to me that he can't get any response on permit applications." Herriman said that he would defer making a motion.

Jansen questioned the value of remanding the decision back to ALJ Jensen with the date of the event having already passed.

ALJ Jensen offered that during the Prehearing Conference Gundling noted that the delay in receipt of a response from the Department might create the need to amend the date of the event if a permit was to be issued. ALJ Jensen said, "The only other potential aspect would be to consider the application as an amendment for the date and reconsider it." She recognized "It would not resolve it for this permit application but it would leave the application pending for an amended date for next year if, in fact, it's what [Gundling] wanted to do."

The Chair asked Gundling if he is interested in pursuing an event permit in the future.

Gundling answered in the affirmative and stated that he would like to hold the event at the same time next year.

Jansen moved that the Committee remand the decision allowing for amendment of the pending permit application to include a date in 2020, and to reconsider the Department's special permit process, and how the event could be made safer.

Bart Herriman seconded the motion.

The Chair asked if there were additional questions or comments.

Herriman and Jansen noted the dissatisfaction by the Committee and opportunities to improve the Department's special permit review process.

The Chair called for a vote on the motion to remand the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Cortland Gundling v. DNR* to the ALJ for consideration of a date in 2020 and reconsider the Department's special permit process, safety procedures, and timeliness of the process. On a voice vote, the motion unanimously carried.

ALJ Jensen stated that she would prepare a remand order to include the signature of the AOPA Committee Chair and after the order will schedule a status conference with the parties.

The Chair encouraged the Department to have a broader discussion regarding “procedures and standards for event permits like this across the State, not just this situation, but I think there needs to be greater transparency and communication on what those standards are.”

Information Item: Administrative Review Guide

The Chair noted that the guide includes items that come before the AOPA Committee, gives an overview of the administrative review process, talks about legal representation, how to request an administrative review, filing documents, the administrative hearing process, objections, and the judicial review process. She asked if there were questions or discussion.

Herriman asked if the guide was an amendment to an already existing administrative review guide.

Chief Administrative Law Judge (ALJ) Jensen stated that the guide presented to the committee is the first document of that type. She noted that frequently Division staff receive inquiries about the administrative review process and offered that the guide would offer a more efficient means of addressing those inquiries. She also observed that this protects the Division staff from any appearance that they inadvertently provided legal advice or assistance to a party.

The Chair sought confirmation that the intent is to post the administrative review guide on the Commission’s website and expressed appreciation that links to resources are incorporated into the document.

ALJ Jensen noted that on the guide under “Legal Representation” where it to a form entitled “Designation of Non-Attorney Representative” there will be a link to a fillable PDF form. She said there will be a statement on the form advising that it is a suggested format containing all necessary information but recognizing that the form’s use is not mandatory.

Herriman asked who a non-attorney representative might be and asked if a non-attorney could represent an organization.

ALJ Jensen said that the Administrative Orders and Procedures Act (AOPA) allows an authorized individual to represent another person, including organizations and corporations. She stated non-attorney representation has led to problems in knowing whether an individual appearing on behalf of a corporation or organization has the authority to represent the entity. ALJ Jensen noted that to decrease these issues the Commission adopted 312 IAC 3-1-3.5 to, at minimum, have the individual appearing verify that they are authorized to represent the organization.

Herriman said, “I don’t know if AOPA or [Designation of Non-Attorney Representative] would trump the unauthorized practice of law.”

ALJ Jensen replied that the Division worked with the Unauthorized Practice of Law Committee of the Indiana State Bar Association (ISBA) when developing 312 IAC 3-1-3.5. ALJ Jensen said

the chair of the committee helped draft a section that says, “The designated representative may not make legal arguments, address legal issues, or otherwise engage in the representation of a party through the application of knowledge, judgment or principles associated with a profession for which admission, licensure, permitting, or registration, is required.” Jensen acknowledged that the practice of law without a license is not in the purview of the Commission and the language in 312 IAC 3-1-3.5 is similar to language found in consumer protection statutes.

ALJ Jensen said 312 IAC 3-1-3.5 also allows the ALJ to reject or rescind a party's designation of representation by an individual who is not an attorney if the ALJ determines that the Constitutionality of a law is at issue or the representative will be required to make legal arguments. She noted that the ISBA is supportive, but is also observing to see how the rule is applied. Jensen further noted that most Commission cases are more fact sensitive, although occasionally a case is purely focused on the interpretation of law.

The Chair thanked the Division of Hearings staff for their work on putting together the Administrative Review Guide.

Adjournment

The meeting was adjourned at 9:40 a.m., ET.