

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
May 16, 2017 Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jennifer Jansen
R. T. Green

NRC, DIVISION OF HEARINGS STAFF PRESENT

Sandra Jensen
Dawn Wilson
Jennifer Kane

GUESTS PRESENT

Mason Clark	Steve Snyder
Kevin Prosser	Lynn Burry
Elizabeth Gamboa	

Call to order and introductions

Jane Ann Stautz, Chair, called the meeting to order at 8:31 a.m., EDT, 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. The Chair, Jennifer Jansen, and R. T. Green introduced themselves.

Consideration and approval of minutes for meeting held on April 20, 2017

Jennifer Jansen made a motion to approve, as presented, the minutes of the meeting held on April 20, 2017. R.T. Green 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 *Prosser v. DNR*, Administrative Cause No. 16-041W

The Chair recognized Steve Snyder, Counsel for Petitioner.

Snyder stated that he submitted proposed modifications to the Nonfinal Order. He explained that Kevin Prosser, the Petitioner, owns two lots on Lake Manitou, in Rochester, Indiana, and submitted a permit application to the Department of Natural Resources (Department), Division of Water for a 170 foot concrete seawall to span both lots. Snyder stated that initially, Jim

Hebenstreit, Assistant Director of the Department's Division of Water, indicated to Prosser that a channel dug in front of Prosser's properties would make those properties "developed area", and that a concrete seawall would be permitted. Snyder stated that, thereafter, the Department determined that there might not be a "manmade channel" along the front of the Prosser properties and the permit application was denied. Snyder said that the Administrative Law Judge (ALJ) affirmed the denial of permit application PL-22836. Snyder stated that the ALJ found that the Prosser's shoreline was located in an area that was not a "developed area" and was an "area of special concern".

Snyder noted that a "developed area" is defined at 312 IAC 11-2-7, which states:

"Developed area" means the upland side or sides of a manmade channel or an area that does not contain any of the following characteristics:

- (1) An area of special concern.
- (2) A significant wetland.
- (3) A natural shoreline.

Snyder pointed out that the definition's use of the word "or" means that the upland side or sides of a manmade channel would be considered a "developed area".

Snyder stated a "manmade channel" under 312 IAC 11-2-11.8, is defined to mean a "watercourse created by mechanical means that connects to the lake at one (1) or more points and by its construction increases the total length of shoreline around the lake. The term does not include any areas within the lake cleared by either chemical or mechanical means that do not result in an increase in the total length of shoreline around the lake." Snyder stated that 312 IAC 11-2-11.8 could be read to mean that the definition of "watercourse" would include areas within the lake if there is an increase in the shoreline resulting from mechanical clearing.

Snyder observed that 312 IAC 11-4-2 requires a new seawall placed in a developed area to "be comprised of one (1) or any combination of" materials, and the list of materials includes concrete.

Snyder stated that Hebenstreit, initially looked at old aerial pictures, determined that a channel had been dug along the shoreline and stated that there should be no problem with the permit on a manmade channel. Snyder stated that the ultimate decision by the Department was different than Hebenstreit's preliminary determination. Snyder stated that the key evidence presented was the testimony of Joseph Mills and Douglas Sampsel, who observed the excavation of the channel in 1947, when they were each around ten years old. Snyder explained that Sampsel was the son of the contractor and was with his father during the dredging. Snyder said Mills testified that he was the son of the property owner who contracted with Sampsel to do the dredging. Snyder stated that both Mills and Sampsel testified that prior to the dredging there was no room for a boat to get in along the shoreline and after the dredging, there was enough room for a boat to get through. Snyder stated that they both testified that when dredging was done and the dragline was pulled in, a portion of the shoreline was removed in an effort to "straighten it up" so that it would be more useable, using the material removed as fill. Snyder stated that the testimony of Sampsel and Mills was that the activity of dredging lengthened the shoreline of Lake Manitou.

Snyder stated that the ALJ disregarded the testimony of Mills and Sampsel as “not credible”. Snyder’s stated impression after reading the Nonfinal Order was that the ALJ did not believe that two 10 year old boys, at 80 years old, could have a memory that vivid. Snyder noted that most 10 year old boys’ attention would be held by watching construction projects. He recalled his own memories of watching similar projects when he was a boy and that he found those projects to be “intriguing”. Snyder stated that to disregard both Mills’ and Sampsel’s testimony as not credible, because they were 10 years of age when the dredging occurred in 1947, and that their memories at 80 years old might not be that vivid, would be an “abuse of discretion.” He stated that Mills and Sampsel were the only witnesses who observed the dredging and also provided testimony.

Snyder stated that the Department’s speculation on the dredging should be overridden by the eye-witnesses who observed the dredging. Snyder stated that the testimony of Mills and Sampsel was that once the channel was dredged it provided access to the lake. Snyder stated that the testimony fits within the definition of a manmade channel.

Snyder stated that the ALJ found that, because the area lakeward of the permit area is not a “watercourse”, the area does not qualify as a manmade channel. Snyder stated that the definition of watercourse under IC 14-8-2-304 is not applicable to the regulation because it defines a watercourse as something that has defined banks and is “cut by erosion of running water through turf, soil, rock, or other material,” and that is not the case with a manmade channel. Snyder stated that a manmade channel that does not exist before dredging becomes a “watercourse” of sorts, but not a watercourse as defined by the Indiana Code.

Snyder stated that in the Modified Nonfinal Order that he submitted, he revised the findings of the ALJ to make the findings match the testimony of Mills and Sampsel and to show that the proposed permit area is a developed area. Snyder stated that, as Hebenstreit testified, “if it’s a developed area, nothing else matters.” Snyder stated that regardless of what the Division of Fish and Wildlife or the biologists say, if it is a “developed area”, a seawall can be permitted that is concrete.

The Chair asked whether the properties adjacent to the Prosser properties have seawalls.

Snyder stated that the properties on either side of Prosser’s property are not bulkhead seawalls and are comprised of riprap.

The Chair noted that Prosser’s property is in a cove and noted that it appears that three lots wrap around the cove and have riprap at the shoreline.

Snyder affirmed the Chair’s notation and stated that the evolution of the cove came after the channel was completed. Snyder stated that the part of the lake where the subject property is located is now all open water.

The Chair recognized Elizabeth Gamboa, Counsel for the Department, to present oral argument on behalf of the Department.

Gamboa stated that the Department's denial of a permit to build a concrete seawall on Prosser's property and the ALJ's findings were proper. Gamboa stated that there were two reasons that the findings are correct. Gamboa said the construction of the concrete seawall is "unreasonably detrimental and has detrimental cumulative effects upon fish, wildlife, and botanical resources;" and the site is located in an "area of special concern."

Gamboa stated that the Department, in determining the merits of an application, is required by IC 14-26-2-23 to investigate factors to determine the detrimental cumulative effects on fish, wildlife, and botanical resources. Gamboa stated that the regulations require that a permit not be issued unless the Department can make a written determination that the issuance of the permit will not result in significant environmental harm to a public freshwater lake.

Gamboa stated that Nate Thomas, the Department's Lakes Permitting Biologist, conducted an environmental study, which was admitted into evidence as Exhibit C. Gamboa stated that Thomas noted several areas of concern and identified that, within a half mile of the proposed permit site, there had been sightings of species that are listed on the State's "Species of Special Concern" and "Endangered Species" lists. Gamboa stated that a concrete seawall on the Prosser property would be detrimental to the nesting and spawning locations of those species, including turtles and frogs. Gamboa stated that also some species of wildlife can use the voids in a riprap seawall for nesting and protection from predatory animals. Gamboa stated that a concrete seawall's turbidity would decrease water quality, which would also decrease the availability of plant life in the area. Gamboa stated that Prosser did not present evidence to contradict the Department's report. Gamboa stated that allowing the construction of a concrete seawall would severely impact the fish, wildlife, and botanical resources in the area.

Gamboa stated that the ALJ thoroughly and properly analyzed the statutory requirements, heard all of the evidence presented, assessed credibility of witnesses, assigned appropriate weight to the evidence and determined that the proposed permit area is an "area of special concern". Gamboa stated that a new seawall in an area of special concern must be constructed of bioengineered materials or glacial stone.

Gamboa stated that an "area of special concern" is defined in 312 IAC 11-2-2, and includes an "altered shoreline where bulkhead seawalls are at least 250 feet apart". Gamboa stated that under 312 IAC 11-2-26 an "unaltered shoreline" is defined as a "shoreline that does not include lawful permanent structures." Gamboa noted that the Prosser property has an existing seawall that is considered to be an existing lawful permanent structure. Gamboa stated that the ALJ correctly determined that a shoreline can also be altered by dredging, citing to a previous decision that was upheld by the Commission in *In T. Lusher, Jr. v. DNR*, 11 CADDNAR 137, 141 (2007). Gamboa also stated that it is undisputed that bulkhead seawalls are at least 250 feet apart in the proposed project area. Gamboa stated that the Prosser proposed project area meets the definition of an "area of special concern." Gamboa stated the Department is without authority to grant a permit for construction of a concrete seawall in an area of special concern.

Gamboa stated that the "upland side of a manmade channel" hinges on the definition of a watercourse. "Watercourse", as defined at IC 14-8-2-304, for purposes of IC 4-25 through IC 14-29, means a channel that "has defined banks." Gamboa stated that no evidence was provided that

there are or were ever defined banks on the Prosser property. Gamboa stated that there is no evidence that the dredging created a channel with any defined bank.

Gamboa stated that Mills and Sampsel testified that they thought, or assumed, that dredging in 1947 increased the length of the shoreline. Gamboa stated that there is no evidence that the dredging in 1947 actually increased the total length of the shoreline around the lake. Gamboa stated, "There was no evidence that showed what the shoreline length was before and after the dredging." Gamboa stated that the ALJ correctly determined that there was no evidence to support Prosser's argument regarding the subject property being located along a manmade channel.

Gamboa stated that the Department is requesting that the Nonfinal Order be adopted and made a Final Order of the Commission. Gamboa stated the Prosser property is located in an "area of special concern" and a concrete seawall may not be permitted in the area. Gamboa also stated that the construction of a concrete seawall at the Prosser property would have a significant, unreasonable and detrimental impact on the fish, wildlife and botanical resources in the area.

Green asked, if the proposed permit area is located in an "area of special concern," then even if the location met the definition of a "manmade channel," is it the Department's position that its designation as an "area of special concern" would automatically prevent permitting for a concrete seawall? In the alternative, is the Department's position that once a location is declared a "manmade channel," whether an area is an "area of special concern" or not cannot be considered?

Gamboa stated that it would depend whether the property is on the "upland side of a manmade channel". She stated that when the dredging occurred in 1947 there was testimony that the shoreline at that time was insufficient to hold the equipment, because the ground was soft. Gamboa stated that it is the Department's position that the Prosser property is not on the upland side of the manmade channel. She stated that to be on the upland side the Prosser property would need to be near where the channel was created.

Green asked for clarification as to why the Department is arguing that the Prosser property is an "area of special concern."

Gamboa explained that statute and rule provide standards for the type of seawall that can be permitted along a manmade channel and noted that the Prosser property is not along a manmade channel. She stated that the Department has to determine if the permit location is an "area of special concern;" and if the property is located in an "area of special concern," then the Department would not have the authority to issue a permit for a concrete seawall.

Green asked, "If it's a manmade channel then it's not an area of special concern?"

Gamboa answered that Prosser would need to provide evidence that the property is on the upland side of the manmade channel.

Green asked Gamboa to confirm the Department's position. He asked, if the location of the proposed permit area meets the definition of a "manmade channel," whether the area is an "area of special concern" or not, would the statute demand that the permit be denied?

Gamboa answered in the affirmative and stated that it is the Department's position that the permit would still be denied. She stated that the Department believes the Prosser shoreline is located in an "area of special concern", because the Prosser property is not on the upland side of a manmade channel. Gamboa stated that the ALJ found a separate sustainable reason that the Department denied the permit was the detrimental impact to the environment.

Snyder provided rebuttal, stating that a determination that an area is a "developed area" is the "key" that automatically allows for the installation of a concrete seawall, regardless of the effect on fish and wildlife. Snyder stated that Hebenstreit confirmed this position in his deposition testimony taken prior to the filing of the administrative review. Hebenstreit also testified that manmade channels do not require two upland sides. Snyder stated that Hebenstreit testified that, "The language was designed thinking of the channel that would create additional lake frontage and would have lots on both sides, but there are areas on different lakes in the state where one side is clearly above lake level or higher and the opposite side is probably wetland or some type of bulrush, or whatever." Snyder stated that Hebenstreit agreed that the Department would consider a shoreline that was dredged out mechanically to be a manmade channel. Snyder stated that Hebenstreit also stated that small cut or filling of a shoreline, even if only a foot, might create additional shoreline.

Snyder cited to Hebenstreit's expertise and experience with the Department in the permitting process. Snyder stated that he asked Hebenstreit to consider a hypothetical situation where vegetation that had grown up to the shore and there was a channel cut through that vegetation. Snyder stated that Hebenstreit's evaluation was that the Department would look at the upland side to determine if it was a channel. Snyder stated that Hebenstreit stated that someone proposing construction on the wetland side would likely be denied, but the opposite side, where lots would be above the lake, could be a developed area. Snyder stated that dredging does not need to be perpendicular to the shoreline, it can be along the shoreline. Snyder stated that, it can be wetland on one side and wetland on the other side, but if there is a distinct channel that creates additional length to the shoreline then it is a manmade channel. He stated that if the area is a manmade channel, then it is a developed area under 312 IAC 11-2-7, which is defined to be "the upland side or sides of a manmade channel". Snyder stated that the proposed site was dredged and additional shoreline was created, which makes it a manmade channel and thus, a developed area. Snyder concluded his rebuttal by stating that concrete is a permitted form of seawall in any developed area.

Jansen stated that the definition of a "developed area" references the upland side of the manmade channel that does not contain the characteristics of an area of special concern. She said that the definition of "area of special concern" references an altered shoreline where the bulkhead seawalls are at least 250 feet apart, which is absolutely the case here. Jansen asked how this area could be other than an area of special concern?

Snyder stated that the exact wording of the definition of “developed area” is what has to be considered. He stated that if it is a manmade channel, the area is automatically a developed area.

Green asked, “So, if the area is a ‘developed area’ then the ‘area of special concern’ is not a concern?”

Snyder replied in the affirmative, and stated that the area cannot fit the definition of an “area of special concern” if it is a developed area.

The Chair noted that it is an interesting case that deals with the history of freshwater lakes in Indiana, including whether dredging increased the length of a shoreline or not. In looking at the evidence submitted, the Chair stated that she did not see that there was enough information in the evidence submitted to show that dredging lengthened the shoreline

Snyder noted that both Mills and Sampsel testified that they witnessed the dredging as children and testified that the dredging lengthened the shoreline. Rodney Neese testified that maybe it did and maybe it didn’t, based on his review of aerial photographs.

The Chair noted that with no measurements and no boundary such a determination is challenging.

Gamboa stated that there were no exact shoreline measurements presented. She stated that the perceptions of children and assumptions based on those recollection that the shoreline was “straightened” and “he cleaned it up” are not exact measurements. She stated that there would need to be more solid evidence presented that the shoreline was lengthened. Gamboa said that while there may have been a *de minimis* change, the change would not necessarily result in lengthening of the shoreline.

Snyder stated that the depositions of Mills and Sampsel are available for review.

Green stated that, regardless of any credibility determination, “If there is no evidence to show that it increased the shoreline, then it is a guess, its speculation, and does not meet the definition of a ‘manmade channel.’”

Snyder stated that Mills and Sampsel were confident that the dredging did increase the shoreline. He stated that there was no contradictory testimony to what Mills and Sampsel observed.

Green stated that the ALJ has the discretion to accept or reject testimony as speculation at administrative hearing.

Gamboa stated that Mills and Sampsel only witnessed 600-700 feet of dredging of the shoreline. She noted that Mills and Sampsel may have seen a change to the part of the shoreline where they witnessed the dredging; however, she stated that the requirement is that there is a change in the entire shoreline.

The Chair noted that “manmade channel” is defined as a “watercourse created by mechanical means that connects to the lake at one (1) or more points and by its construction increases the total length of shoreline around the lake.” The Chair observed that, if the shoreline is increased two feet, there would be an increase.

Gamboa stated that there was no clear evidence presented as to any change of the shoreline within the 600 to 700 feet that was dredged.

Snyder stated that if dredging occurred within 600 feet and the dredging increased the shoreline by 10 feet, then it increased the entire shoreline of Lake Manitou.

Gamboa stated that it is unknown how much, if any, of the shoreline was increased.

Snyder stated “nobody went out and measured it.”

Snyder stated that the Mills and Sampsel testified to the shoreline being increased. Snyder stated that Neese compared 1940 aerial photographs and to more recent aerial photographs from 1950 and determined that the shoreline appears further landward. Snyder stated that there is no evidence to show that the shoreline was not lengthened, but there is evidence that supports that the shoreline was lengthened.

Green stated that based on the witness testimony, it is not so much credibility but speculation. Green stated that the ALJ was within her purview to weigh the evidence and decided how to consider that evidence. Green stated that he does not believe that there was an abuse of discretion.

R.T. Green moved to affirm, as presented, the Findings of Fact and Conclusions of Law and Nonfinal Order in the matter of *Prosser v. DNR*, as the Final Order of the Commission. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Adjournment

The meeting was adjourned at 9:17 a.m., EDT.