

Objection to the Issuance of Permit Approval No. INM024520
City of South Bend, Saint Joseph County, Indiana
2002 OEA-NFO 1119 (02-W-J-2907)

Advisory Decision:

**This decision is provided for informational and research purposes only.
This decision is not a final order and did not fully dispose of all the issues in the case.
For those who are not parties to this specific case, this decision is not binding precedent
and may not be binding authority on other cases.**

TOPICS:

permit renewal
automatic stay
Ind. Code § 4-21.5-3-5(g)
Ind. Code §13-15-3-6(a)
in pari material
activity of a continuing nature
statutory construction

PRESIDING JUDGE:

Vogel

PARTY REPRESENTATIVES:

Petitioner: Kari Evans
IDEM: Anne Patterson

ORDER ISSUED:

November 19, 2002

INDEX CATEGORY:

Water

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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	

IN THE MATTER OF:)	
)	
OBJECTION TO THE ISSUANCE OF)	
PERMIT APPROVAL NO. INM024520)	CAUSE NO. 02-W-J-2907
CITY OF SOUTH BEND,)	
SAINT JOSEPH COUNTY, INDIANA)	

ORDER DENYING AUTOMATIC STAY

Findings of Facts, Conclusions of Law and Final Order
Denying the Motion for Automatic Stay filed by the City of South Bend

This matter comes before the Court pursuant to a hearing, October 29, 2002, on the Motion For Automatic Stay filed August 26, 2002 by the Petitioner, City of South Bend, by counsel, and the Motion in Response to Motion for Automatic Stay filed by the Indiana Department of Environmental Management (IDEM) on August 27, 2002; AND THE COURT, having taken evidence and duly considered the motions and evidence hereby finds:

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) pursuant to Ind. Code § 4-21.5-7.
2. The facts relevant to the City of South Bend's Motion for an Automatic Stay are as follows:

The Indiana Department of Environmental Management ("IDEM") issued NPDES Permit No. IN0024520 ("NPDES Permit") on October 1, 1988 to the City of South Bend, Indiana. The NPDES Permit expired on July 31, 1993; however, because South Bend timely submitted an application for renewal it was administratively extended and subsequently modified on August 31, 1993. On June 6, 2002 the IDEM issued a Combined Sewer Overflow ("CSO") National Pollutant Discharge Elimination System permit No. INM024520.

The CSO permit terms supersede the requirements contained in Attachment A of NPDES Permit No. IN0024520; however, Parts I, II, and III of NPDES permit No. IN0024520 remain in effect. On or about June 24, 2002, Petitioners filed their Petition for Administrative Review and Request for Stay of Effectiveness of the conditions concerning discharges from CSOs in I.A.2 and I.A.3 of the CSO Permit. The Court scheduled hearing on the Request for a Stay for August 28, 2002.

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On August 26, 2002 Petitioners filed a Motion for an Automatic Stay of the CSO Permit No. INM024520 pursuant to Ind. Code §§ 4-21.5-3-5 (g) and 13-15-3-6- (a) arguing that the foregoing statutes permit an automatic stay to be issued in the instant case. The Court heard evidence on October 29, 2002 on the sole issue of whether an automatic stay is authorized by Ind. Code §§ 4-21.5-3-5 (g) and 13-15-3-6(a).

3. Ind. Code § 4-21.5-3-5 (g) states in part "If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature and review is granted under section 7 of this chapter, the existing license does not expire until the agency has disposed of a proceeding under this chapter concerning the renewal, unless a statute other than this article provides otherwise."
4. Under Ind. Code § 13-15-3-6(a), "When a person holding a valid permit concerning an activity of a continuing nature has made a timely and sufficient application for a renewal or a new permit in accordance with the rules of one (1) of the boards, the existing permit does not expire until a final determination on the application has been made by the department."
5. Ind. Code §§ 4-21.5-3-5 (f) and (h) discuss the procedure for requesting a stay and a hearing on such request for a permit grant, renewal, restoration, transfer or denial of a license; § 4-21.5-3-5 (h) states, in part, "an administrative law judge shall, as soon as practicable, conduct a preliminary hearing to determine whether the order should be stayed."
6. When Ind. Code § 4-21.5-3-5 refers to a stay or stay hearing, it explicitly refers to "stay" in each instance. Section (g), upon which the Petitioner's rely, does not refer to a "stay" at all, but provides information regarding the "expiration" of existing licenses when an application for a renewal of a permit has been filed.
7. Petitioner, City of South Bend, argues that the CSO Permit replaces the CSO discharge provisions in the NPDES Permit; and that the CSO Permit is a permit renewal of an "activity of a continuous nature" so that the original terms of the NPDES Permit remain in effect during the appeal procedure and the new conditions in the CSO Permit are "automatically stayed" pending the outcome of the appeal, pursuant to Ind. Code § 4-21.5-3-5 (g) (R. pgs.6-8).
8. IDEM responds that the CSO permit is not a renewal permit, but a new permit that triggers the elements required for a stay hearing under Ind. Code § 4-21.5-3-5 (f) for a permit grant, renewal, restoration, transfer or denial of a license, and § 4-21.5-3-5 (h). Further, IDEM argues that section (g) does not apply to the situation where an application for a renewal is filed and renewal is granted; and that to apply section (g) to a renewal which has been granted would render sections (a) and (f) meaningless with respect to permit renewals. (R. pg. 12). The Court agrees that the interpretation offered by the City of [*5] South Bend would render sections (a) and (f) meaningless.

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9. When interpreting a statute or administrative regulation, courts are guided by several rules of statutory construction. Where a statute is clear and unambiguous on its face, the court must not interpret the statute; however, where the statute is ambiguous, the court must ascertain the intent of the legislature and interpret the statute to effectuate that intent. When so doing, the court reads the statute as a whole and attempts to give effect to all provisions. Indiana Department of Natural Resources v. Peabody Coal Company, (1995), Ind., 654 N.E. 2d 289 at 295.
10. Ind. Code § 4-21.5-3-5 (g) "If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature and review is granted under section 7 of this chapter, the existing license does not expire until the agency has disposed of a proceeding under this chapter concerning the renewal, unless a statute other than this article provides otherwise. ..." is ambiguous in that it is unclear from the language of the statute as to what is being reviewed. Is it referring to the failure of IDEM to act on the renewal or is it referring to review of a denial of an application?
11. Where several sections of a statute refer to the same subject matter, they are to be interpreted *in pari materia* and construed together so as to produce a harmonious result. Bova v. Roig, M.D. et al, (1992), Ind., 604 N.E. 2d. 1 at 3.
12. Ind. Code § 4-21.5-3-5 (g) and Ind. Code § 13-15-3-6(a) are two statutes that refer to the same subject, specifically where "a person holding a valid permit concerning an activity of a continuing nature who has made a timely and sufficient application for a renewal or a new permit in accordance with the rules of one (1) of the boards". In construing those statutes to produce a harmonious result, the Court looks to the language of the IC 13-15-3-6 (a), "the existing permit does not expire until a final determination on the application has been made by the department."
13. It is clear that section (g), therefore, in IC 4-21.5-3-5, if construed with the above language, applies where a decision is pending from IDEM on an application for a renewal of a permit for an activity of a continuing nature. The permit is administratively extended and the permittee may continue to conduct business under the existing permit until the reviewing Court has ruled. Less clear is the alternate meaning proposed by IDEM, that where a renewal application is denied and an appeal is filed, the permit is extended until a final ruling by the Court. The Court does not address a denial at this time since we are dealing with a permit that has been issued.
14. When construed as part of a harmonious scheme, Ind. Code § 4-21.5-3-5(g) and Ind. Code § 13-15-3-6(a) refer to the expiration of an existing license when an application is pending and not to an automatic stay of existing conditions in the permit where a new permit or permit renewal for an activity of a continuing nature has been issued by IDEM.

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15. In the appeal of the CSO NPDES Permit No. INM024520, a hearing on a request for a Stay of the conditions, pursuant to Ind. Code § 4-21.5-3-5 (f) and § 4-21.5-3-5 (h), for a permit grant, renewal, restoration, transfer or denial of a license, is the appropriate course of action.

IT IS THEREFORE ORDERED that the Motion for Automatic Stay filed by the City of South Bend is hereby DENIED this 19th day of November, 2002 in Indianapolis, Indiana.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

Candace T. Vogel
Administrative Law Judge