

**OBJECTION TO THE ISSUANCE OF
SECTION 401 WATER QUALITY CERTIFICATION
COE ID # 199600554
RDI/CAESARS RIVERBOAT CASINO, LLC
1998 OEA 001, OEA CAUSE NO.: 97-W-J-1824**

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Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Jennifer Thompson, Esq. for IDEM John Maier for Protect our Woods, Inc. Terri A. Czajka, Esq. Tim Maloney for Hoosier Environmental Counsel Don Mottley for Save our Rivers
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:

OBJECTION TO THE ISSUANCE OF)
SECTION 401 WATER QUALITY)
CERTIFICATION COE ID: 199600554)
RDI/CAESARS RIVERBOAT CASINO, LLC)

CAUSE NO. 97-W-J-1824

**FINAL ORDER GRANTING
CAESARS' MOTION FOR SUMMARY JUDGMENT**

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This constitutes notice that on November 21, 1997, Hoosier Environmental Council (HEC) and Protect Our Woods (POW), by representatives, filed a Joint Motion for Summary Judgment. On November 24, 1997, RDI/Caesars' Riverboat Casino, LLC (Caesars'), by counsel, filed a Motion for Summary Judgment. Thereafter, on December 5, 1997, Caesars', by counsel, filed a Brief in Response to HEC's and POW's Motion for Summary Judgment. On December 8, 1997, HEC, by representative, filed a Motion in Opposition to Caesars' Motion for Summary Judgment, and Save Our Rivers (SOR), by representative, filed a Motion for Summary Judgment and a Motion in support of HEC's Motion to Deny Summary Judgment. On December 9, 1997, the Indiana Department of Environmental Management (IDEM), by counsel, filed a Response to Caesars' Motion for Summary Judgment and a Response to HEC's and POW's Motion for Summary Judgment. On December 12, 1997, POW, by representative, filed a Joinder to Motion of HEC in Opposition to Caesars' Motion for Summary Judgment, and on December 19, 1997 filed a Joinder to Caesars' Response to HEC's Motion for Summary Judgment. Lastly, on December 22, 1997, Caesars', by counsel, filed a Reply Brief in Support of Motion for Summary Judgment.

The Environmental Law Judge considered the Motions, the Responses, and the Reply and hereby finds the following:

Findings of Fact and Conclusions of Law:

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to this controversy pursuant to Ind.Code §4-21.5-7.
2. This is a Final Order issued pursuant to Ind.Code §4-21.5-3-27. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. Ind.Code §4-21.5-3-23(b) provides in pertinent part that "[t]he judgment [on a motion for summary judgment] shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law."

The Indiana Supreme Court has held that "[a] summary judgment is proper only where there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law. [citations omitted] Any doubt about the existence of a factual issue should be resolved against the movant, with all properly asserted facts and reasonable inferences construed in favor of the nonmovant." Schrader v. Eli Lilly and Co., 639 N.E.2d. 258, 261 (Ind. 1994).

4. Caesars plans to construct and operate a riverboat gaming facility at Ohio River Mile 616.8 through 617.4 on the right bank of the Ohio River near Bridgeport, Harrison County,

Indiana. The construction project requires dredging material from the Ohio River and construction in the River; thus, Caesars was required to obtain a §404 Dredge and Fill Permit from the U.S. Army Corps of Engineers (COE), 33 U.S.C. §1344. To obtain a §404 Permit, Caesars must also obtain a §401 Water Quality Certification¹ from the State of Indiana, IDEM. 33 U.S.C. §1341. On June 20, 1997, the IDEM issued the Certification. Thereafter several Objectors filed Petitions for Administrative Review.

Knob Creek issues

5. Objector SOR asserts that the Caesars' project will cause degradation in the water quality of the Ohio River, Knob Creek, and unnamed tributaries and thus violates 327 IAC 2-1-2². Objectors POW and HEC assert that the conditions imposed in the Certification are not protective of Knob Creek's water quality. Neither SOR nor POW have met the burden of establishing that the Certification as issued will not be protective of Knob Creek's water quality Ind. Dept. Of Envir. Mgt. V. Conard, 614 N.E.2d 916, 919 (Ind. 1993) (the party challenging the administrative order bears the burden of proof showing that there are no substantial facts to support the agency's finding or that the action was arbitrary and capricious and outside the jurisdiction or authority of the agency); *see also*, Ind.Code §4-21.5-5-14(c).

The Certification contains Conditions which are protective of Knob Creek. Condition No. 9 requires Caesars to maintain a wooded buffer zone along the entire length of the Creek, requires construction methods to ensure the buffer zone will be protected from construction traffic and sedimentation, and requires replacement of all lost vegetation with mitigation in the unwooded headwater sections of the Creek. (*See* Affidavit of Pelloso, ¶23). Condition No. 11 specifies that run-off from all parking areas must be filtered or treated to remove potential influxes of pollutants to the Creek. (*See* Affidavit of Pelloso, ¶23). Thus, a genuine issue as to the material fact of degradation does not exist and Caesars is entitled to judgment on this issue as a matter of law.

¹Section 401(a) of the Clean Water Act sets forth the standard for issuing Water Quality Certifications:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

²327 IAC 212 provides that "[n]o degradation of water quality shall be permitted which would interfere with or become injurious to existing and potential" beneficial uses of the State's surface waters.

6. Objector SOR contends Knob Creek is an “exceptional use water.” “Exceptional use waters” are designated by the Indiana Water Pollution Control Board through its regulations³. This proceeding is not the appropriate forum by which to have Knob Creek reclassified⁴; therefore, a genuine issue as to the material fact of exceptional use water does not exist and Caesars is entitled to judgment on this issue as a matter of law.

7. Objectors SOR and POW opine that the NPDES outfall proposed as part of the project will become an upstream pollutant during flooding and thereby contaminate or adversely affect Knob Creek and its tributaries. Because the plant will have an outfall to the Ohio River constituting a point source, Caesars is required to have an NPDES permit before it may discharge any pollutants to the water. 33 U.S.C. 1342; 327 IAC 5-2-2. An NPDES permit is separate from a §401 Certification and thus, is not at issue here. Even assuming *arguendo*, that Caesars outfall would contaminate Knob Creek and its tributaries, the matter would be one for an enforcement action pursuant to Ind.Code §13-18-3-6 and Ind.Code §13-30-3-1. Thus, Caesars is entitled to summary judgment on this issue.

Mussel community location and protection

8. Objector SOR argues the Certification does not specifically identify the mussel community location. Objector POW raises concerns that the vessel will cruise over the mussel bed. Notwithstanding the fact that the IDEM is not required to identify the location of the mussel community before issuing the Certification, Condition No. 1 of the Certification requires a floating sediment curtain during construction activities to prevent harm to aquatic habit and life in the Ohio River, Knob Creek, and adjacent terrestrial areas⁵. (*See also*, Affidavit of Saunders,

³327 IAC 2-1-3(a)(6) provides, “All waters which provide unusual aquatic habitat, which are an integral feature of an area of exceptional natural beauty or character, or which support unique assemblages of aquatic organisms, may be classified for exceptional use. Specific waters of the state designated for exceptional use are listed in section 11(b) of this rule.”

⁴327 IAC 2-1-10(a) requires “[a] person who wishes to propose that a particular body of the waters of the state be considered by the commissioner for limited use or exceptional use classification [to] submit to the commissioner a written proposal identifying the water body and the proposed classification, stating the rationale for the proposal, and including any other supporting documentation. After receiving the commissioner’s recommendation on a proposal, if the board determines that a water body is appropriate for reclassification for limited use or exceptional use, it will initiate a rulemaking for that purpose.”

⁵A sediment curtain or floating siltation barrier is a sheet of PVC fabric with floats at the top and weights at the bottom that will be placed around all dredging operations to prevent suspended sediments from leaving the area of excavation. (Affidavit of Saunders, ¶6). Flow-through silt curtains also will be placed around the perimeter of all work areas adjacent to

¶6, Affidavit of Vittor, ¶6; Affidavit of Pelloso, ¶16). Condition No. 3 prohibits Caesars from operating at a cruise depth that will cause disturbance of bottom sediments by propulsion-generated turbulence based on the horsepower and output of the operation of the vessel's propulsion system. Condition No. 4 prohibits the vessel from cruising over portions of the mussel bed. Condition No. 15 requires pre- and post-construction monitoring of the sections of the mussel community located adjacent to the mooring cell and cruise route to verify that the mussels are not harmed by the project as well as remediating any mussel community health problems identified by the post-construction studies having been caused by Caesars' riverboat operations. (See Affidavit of Vittor, ¶6 and Affidavit of Pelloso, ¶16 in which they affirmed the Conditions are stringent enough to ensure the mussel community is protected). In sum, as there is no genuine issue of material fact on this issue, Caesars is entitled to summary judgment. See also, City of Bloomington, 560 N.E.2d 556, 558, and Hamilton Cty. Dept, 567 N.E.2d 165 *supra*.

Objector POW contends the IDEM abused its discretion or acted contrary to law by concluding that the required sediment curtain and monitoring would provide adequate protection to the mussel bed. Objector HEC contends the water quality will be harmed by siltation. The sediment curtain and monitoring requirements are protective of the mussel bed. (Affidavit of Pelloso, ¶39; Affidavit of Saunders, ¶6; Affidavit of Vittor, ¶6). During construction activities, a floating siltation barrier will be installed to prevent suspended sediments from leaving the area of excavation. (Affidavit of Saunders, ¶6). Flow-through silt curtains will be placed around the perimeter of all work areas adjacent to waterways. *Id.* These safeguards will prevent harm to aquatic habitat and life in the Ohio River, Knob Creek, and adjacent terrestrial areas during construction. *Id.*; (Affidavit of Pelloso, ¶16). As Indiana Courts are governed by the presumption that an agency's decision is correct in view of its expertise if the agency's findings are supported by substantial evidence, Caesars is entitled to summary judgment on this issue. City of Bloomington and Hamilton Cty. Dept. Of Pub. Welfare, *supra*.

9. Objector SOR complains that the IDEM erred by not considering information from Caesars' mussel studies. Three species of mussels collected during the 1995 mussel survey Vittor & Associates conducted for Caesars are listed as endangered by the U.S. Fish & Wildlife Service and were identified as dead by Vittor & Associates. (Affidavit of Vittor, ¶4). One specimen of each species was found. Two of these (*Plethobasus cooperianus* and *Cyprogenia segaria*) were initially thought to be "fresh" dead and were sent to experts at the Kentucky Nature Preserves Commission for corroboration of their status. Mr. Ron Cicerello of the Commission concluded that both specimens were "sub-fossil dead," which suggests that the likelihood is low that live protected species are still present in the study area. (Affidavit of Vittor, ¶4). Based on all available mussel information, there is no evidence that live endangered species are located at the project site. (Affidavit of Pelloso, ¶17). Because the Objector did not meet its burden of proof with respect to this issue, Ind.Code §4-21.5-5-14(c), Caesars is entitled to summary judgment.

waterways to protect aquatic habitat and life. (*Id.*)

10. Objector POW contends the IDEM erred by not conducting a mussel study of Knob Creek. Conditions were placed specifically to protect Knob Creek and require Caesars to maintain a wooded buffer zone along the entire length of the Creek, to employ construction methods which ensure that this buffer zone will be protected from construction traffic and sedimentation, to replace all lost vegetation with mitigation in the unwooded headwater sections of the stream, and to control run-off from all parking areas. (Affidavit of Pelloso, ¶26; *see also*, Affidavit of Vittor, ¶7). Consequently, the IDEM did not abuse its discretion or act contrary to law by not requiring a mussel study of Knob Creek; thus, Caesars is entitled to summary judgment on this issue.

Vessel operation and dredging issues

11. Objector SOR complains that the IDEM did not review Caesars' vessel's horsepower and propulsion system before issuing the Certification. Objector POW complains the IDEM issued the Certification before it was provided with the vessel's cruise depth information. Objector HEC complains the operation of the vessel, by increasing sedimentation, will harm aquatic life. Notwithstanding the fact that the IDEM is not required to review the vessel's horsepower and propulsion system or its cruise depth before issuing the Certification, Condition No. 3 of the Certification requires that the cruise depth of the gaming vessel be set to avoid disturbance of bottom sediments by propulsion-generated turbulence based on the horsepower and output of the vessel's propulsion system. This Condition further specifies that the vessel may not cruise when the river stage and draft of the boat place the bottom of the vessel below the minimum distance established by Caesars to avoid disturbance of bottom sediments. (Affidavit of Vittor, ¶6). Certification Condition No. 15 includes long-term monitoring requirements to ensure the biological integrity of the area and requires Caesars to remedy any harm. (Affidavit of Pelloso, ¶10). Should Caesars violate these protective conditions, it is subject to enforcement by the IDEM. Ind.Code §13-18-3-6; Ind.Code §13-30-3 *et seq.* Thus, a genuine issue of material fact as to this issue does not exist, and Caesars is entitled to judgment as a matter of law.

12. Objector SOR contends the Certification will modify the gaming vessel's cruise route. Certification Condition No. 15(D) prohibits harm to the mussel community by the riverboat operations. If the IDEM determines that harm is being caused to the community, the IDEM will notify Caesars of changes in the cruise route it believes are necessary to protect the mussel community. Caesars will then have the obligation to obtain Indiana Gaming Commission approval of those changes. *See* 68 IAC 8-1-2(d) (requiring Commission approval of excursion route) and 68 IAC 8-1-2(f) (addressing deviations from standard excursion). If Caesars fails to obtain approval, the IDEM could consider it to be in violation of its Certification and subject Caesars to enforcement. Ind.Code §13-18-3-6; Ind.Code §13-30-3-1. Because there is no issue of material fact with respect to route modification, Caesars is entitled to summary judgment.

13. Objector SOR contends that the Certification does not allow for public comment on maintenance dredging. Condition No. 5 specifies that this Certification does not authorize

maintenance dredging; thus, maintenance dredging is outside the scope of this appeal and Caesars is entitled to judgment in its favor on this issue.

14. Objector SOR complains that the Certification does not designate an exact location for disposal of the dredged material associated with the project. Objector HEC complains that water quality will be harmed by dredging. The §401 Certification process is limited to determining whether Caesars' activities resulting in a discharge to navigable waters will comply with Indiana's applicable effluent limitations and water quality standards. Moreover, the Certification requires that all dredged material be disposed at an appropriate off-site location (Certification, p. 2, Project Scope ¶B) or at upland disposal sites (Condition No. 6). And too, Certification Condition No. 10 requires that berms and other appropriate structures be used to control all sediment containment areas, that these areas must be located at least fifty (50) feet away from any water body (including wetlands), and that water decanting from wet dredged materials must be channeled into sediment basins. (*See also*, Affidavit of Pelloso, ¶11). In sum, Caesars is entitled to summary judgment on this issue.

15. Objectors POW and HEC raise concerns regarding the plans for the storm sewage collection, treatment, and disposal and whether they were properly considered by the IDEM. Prior to granting certification, the IDEM reviewed engineering overview drawings showing the collection points and infrastructure required to capture and route all storm water on the project's site. (Affidavit of Pelloso, ¶24). Condition No. 11 specifically addressed storm water runoff, Condition No. 21 addressed erosion control methods, and Condition No. 22 requires Caesars to comply with 327 IAC 15-5. The IDEM also was provided with drawings depicting the location of the gaming vessel pump-out, all forced main and sanitary lines, and the location of the on-site sewage treatment plant⁶. *Id.* Therefore, Caesars is entitled to summary judgment on this issue.

Construction issues

16. Objector SOR complains that Certification Condition No. 17, which requires Caesars to submit a construction timeline within ninety (90) days, does not acknowledge that all required permits may not be issued within ninety (90) days. Condition No. 17 does not limit Caesars' ability to use alternative dates or prohibit its use of dates from commencing with the dates of issuance of all or certain permits. Because there is no issue of material fact with respect to this issue, Caesars is entitled to summary judgment.

17. Objector SOR claims that the Certification failed to identify several structures in the project necessary to protect water quality. Objector HEC complains that water quality will be harmed by construction within and adjacent to the waterways. Neither SOR nor HEC identified which structures the IDEM failed to identify or how water quality will be harmed and thus Objectors have failed to meet their burden of proof. Ind.Code §4-21.5-5-14(c). Moreover,

⁶A separate permit has been issued to Caesars by the IDEM for the construction of the wastewater treatment plant; that permit is not within the purview of this appeal.

Ind.Code §4-21.5-3-7(a) requires that a person's petition for review must "state facts demonstrating that the petitioner is a person to whom the order is specifically directed, the petitioner is aggrieved or adversely affected by the order or the petitioner is entitled to review under any law." Objectors' lack of specificity in their petitions fail to meet the requirements of Ind.Code §4-21.5-3-7. Lastly, the IDEM considered all structures proposed and potentially considered for the project at the time of the Certification issuance and determined that none of the project's structures would adversely impact water quality if the Conditions of the Certification were met. (Affidavit of Pelloso, ¶19); *see also, City of Bloomington and Hamilton Cty. Dept, supra*. In sum, Caesars is entitled to judgment in its favor on this issue.

18. Objector SOR opines the IDEM failed to address the proposed realignment of Stuckey Road in granting the Certification. The IDEM reviewed the proposed road alignment, which will occur upland, away from waters of the State, and determined that it will have no impact on water quality. (Affidavit of Pelloso, ¶20). The realignment will require compliance with 327 IAC 15-5 which governs storm water run-off associated with construction activity of five acres or greater. A rule 5 general permit is separate from a §401 Certification and thus, is not at issue here. Even assuming *arguendo*, that Caesars violated rule 5, the matter would be one for an enforcement action pursuant to Ind.Code §13-30-3-1. Thus, a genuine issue as to a material fact does not exist and Caesars is entitled to judgment on this issue as a matter of law.

19. Objector SOR claims the IDEM's §401 Certification failed to require "studies." Objector POW claims the IDEM failed to issue an environmental impact statement. Condition No. 15 requires pre- and post-construction monitoring of the mussel community. Construction work may not proceed until Caesars demonstrates to the IDEM's satisfaction that the pre-construction survey was accurate and "provided no live Federal or State listed mussels...within the study area." (Certification Condition No. 15(a)). Caesars must remediate any problems that are attributable to riverboat operations, if such occur, and approval of future maintenance dredging will be dependent on the post-construction study results. Condition No. 16 (D) requires monitoring for five (5) years of the areas where mitigative plantings and amphibian breedings are created. Condition No. 16 (F) requires Caesars to monitor all plantings, wetland creations, and other mitigative measures on the golf course in Elizabeth, Harrison County.

Ind.Code §13-12-4-8 specifically states that an environmental impact statement is not required under state law for the issuance of a license or permit by any state agency⁷. If the Objector is referring to a federal environmental impact statement, the IDEM has no authority to require one. In sum, the Objectors have failed to meet their burden of proof, Ind.Code §4-21.5-5-14(c), and Caesars is entitled to judgment on this issue as a matter of law.

20. Objector SOR alleges that the IDEM's §401 Certification does not address storm water runoff. Objector HEC alleges that the project will cause harm to aquatic life and habitat by

⁷Accord Objection to the Issuance of Permit Approval No. ING 080072 Blue Chip Casino, Inc., Cause No. 96-W-J-1666 at 4 (1997).

increasing the run-off of chemicals and other non-point water pollution from the development and use of adjacent land areas, including the increase in risk of fuel spills. Certification Condition No. 11 addresses treatment of runoff from all parking areas and facilities. Condition No. 20 requires operations to be carried out so as to control and minimize soil erosion and sediment runoff to any nearby water body. Condition No. 21 also addressed erosion control methods. Lastly, Condition No. 22 requires Caesars to comply with 327 IAC 15-5. The Objector has failed to meet its burden of proof, Ind.Code §4-21.5-5-14(c), and Caesars is entitled to judgment on this issue as a matter of law.

Habitat, wilderness, lifestyle issues

21. Objector SOR contends the Certification is invalid because it failed to take into account species (trees) that are a known habitat for the Indiana Bat along the banks of Knob Creek and its tributaries. The IDEM was not required to protect trees that are known to be habitat for Indiana Bats because Indiana Bats are not an aquatic species, and their habitat is not related to water quality. Even though the U.S. Fish & Wildlife Service, which was consulted regarding the presence of Indiana Bats during the review process, advised the IDEM that there were no Indiana Bats in the area of the proposed project, the IDEM included conditions that will be protective of the habitat of the Indiana Bats. Affidavit of Pelloso, ¶12). Condition No. 9(B) prevents the clearing of woody vegetation except for the purpose of removing deadfall or pruning of dead or decayed trees posing an imminent hazard to persons or property. Condition No. 16 requires planting of 10.13 acres of native trees to mitigate for impacts to the riparian corridor of Knob Creek and the associated tributaries as well as the preserving of 18.75 acres of trees and wooded areas adjacent to and near Knob Creek and its tributaries. In sum, Caesars is entitled to summary judgment on this issue.

22. Objector POW generally contends the IDEM failed to consider all aspects of the project, specifically the golf course, the playing field, the maintenance building, the helicopter pad, and the nature center. Objector SOR more specifically raises contentions regarding the golf course and the playing field. SOR first contends that the Certification does not establish control of chemicals on the golf course academy. Condition No. 12 requires that a thirty (30) foot buffer zone of native vegetation be maintained around all wetland areas without the use of herbicides or pesticides. (*See also*, Affidavit of Pelloso, ¶13 in which he affirms the controls are sufficient to protect water quality).

Objector SOR next contends that the Certification fails to identify golf course controls. Condition No. 13 specifically addresses drainage into sinkholes and other protective measures. (*See also*, Affidavit of Pelloso, ¶15 in which he affirms the controls are sufficient to protect water quality). Objector SOR lastly contends the Certification does not address runoff from the golf course parking lot. Condition No. 11 requires all facility parking areas to treat runoff to remove grease, oil and other related chemicals.

Objector SOR contends the Certification is unlawful because it does not identify any treatment or chemicals for use on proposed playing fields adjacent to Knob Creek. The IDEM determined that no conditions specific to the playing fields were required and that the general Conditions in the Certification would be protective of adjacent water resources and prohibit development within vital buffer zones. (Affidavit of Pelloso, ¶14). Thus, the IDEM neither abused its discretion or acted contrary to law. Accordingly, because there is no genuine issue of material fact regarding the playing fields, Caesars is entitled to summary judgment on this issue.

POW did not state with specificity how the maintenance building, the helicopter pad, or the nature center would affect water quality and thus failed to meet its burden of proof. Ind.Code §4-21.5-5-14(c). Notwithstanding, in addition to those Conditions established for the golf course noted above, the IDEM considered all aspects of the project, including those that are only being considered but are not yet planned. (Affidavit of Pelloso, ¶24). Again, as Indiana Courts are governed by the presumption that an agency's decision is correct in view of its expertise if the agency's findings are supported by substantial evidence, Caesars is entitled to summary judgment on this issue. City of Bloomington and Hamilton Cty. Dept. Of Pub. Welfare, supra.

23. POW argues that "visual pollution" will lessen the "wilderness experience" and that lives and quiet lifestyle will be adversely affected by urbanization of the area in the project's surrounding area. HEC argues that aquatic life and habitat will be adversely affected by the land development and uses including secondary land development activities that will occur, such as additional commercial and retail development as well as new residential housing. As with #22 above, the IDEM's role is limited to determining whether the applicable effluent limitations and water quality standards will be met. PUD No. 1 of Jefferson County, supra. Moreover, secondary land development activities are outside the scope of this appeal. In sum, Caesars is entitled to summary judgment on these issues.

24. POW contends the overall size of the project will impact the environment. As POW neither averred with specificity how the size of the project would impact the environment nor indicated how the size would affect water quality, POW failed to meet its burden of proof, and Caesars is entitled to summary judgment on this issue. Ind.Code §4-21.5-5-14(c).

IDEM procedures, enforcement and process issues

25. Objector SOR further asserts that the "State has failed to show the capability to enforce the 401 WQC." Objector HEC asserts the project will not comply with the water quality standards of Indiana (327 IAC 2), and the CWA. Any failure on behalf of Caesars to comply with the conditions contained within the Certification is an enforcement issue; such an allegation does not address whether there are insubstantial facts to support the IDEM's decision or whether the IDEM's action was arbitrary and capricious. Thus, a genuine issue as to the material fact of enforcement does not exist and Caesars is entitled to judgment on this issue as a matter of law.

26. Objector HEC contends the Certification lacks sufficient requirements for corrective action if the project causes harm to water quality. Condition No. 15 requires Caesars to remediate any problems if monitoring reports or other information indicate a decline in the mussel community, including notification of the need to modify the cruise route. In addition, the IDEM may extend the monitoring period to assure the continued operation of the project will not adversely impact water quality and aquatic functions. Lastly, the Caesar would be subject to an enforcement action should it violate either the Conditions contained in its Certification or Indiana's water quality standards. Ind.Code §13-18-3-6 and Ind.Code §13-30-3-1. In sum, Caesars is entitled to summary judgment on this issue.

27. Objectors SOR, POW, and HEC opine the State of Indiana has failed to adopt procedures for 401 water qualifications and thus the Certification is invalid. The IDEM has been granted statutory authority to issue certifications. Ind.Code §13-13-5-1 (IDEM is designated as the water pollution agency for Indiana for all purposes of the Clean Water Act). This grant of authority includes the ability to grant or deny certification under §401 of the CWA.

While the Clean Water Act requires any applicant for a Federal permit to conduct an activity that may result in any discharge into navigable waters to obtain a certification from the State in which the discharge will originate, *see* 33 USC 1341(1), and requires a state "to establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications," *Id.*, it does not require a State to submit its procedures to U.S. EPA for approval or to mandate the form or content of those procedures. Moreover, Objectors have failed to show they have been harmed⁸ by the IDEM's procedures. Wine & Spirits Wholesalers of Indiana v. Indiana ABC, 556 N.E.2d 17, 19 (Ind. Ct. App. 1990), *trans. denied* (person must be aggrieved by issue in order to raise it). Even assuming *arguendo* Objectors were harmed, participation in this administrative appeal cured any harm. *See Methodist Hosp. V. Indiana Family & Soc. Serv.*, 860 F.Supp. 1309 (N.D. Ind. 1994) (AOPA procedures satisfy requirement of federal regulations that Medicaid agency have procedures in place even though procedures not explicitly in agency regulations). In sum, Objectors have failed to meet their burden of proof with respect to this issue, Ind.Code §4-21.5-5-14(c), and Caesars is entitled to judgment on this issue as a matter of law.

28. Objector SOR opines the IDEM's §401 Certification process is vague, arbitrary and capricious. It is unclear from the petition for administrative review which process, or part of the

⁸The Objector's cite to Community Care Centers, Inc. V. Ind. Dept. Of Pub. Welfare, 523 N.E.2d 448 (Ind.Ct.App. 1988), *trans. denied* to contend the IDEM's decision was arbitrary and capricious because it was not guided by well-stated and followed ascertainable standards. However, that case is distinguishable from the case here. The agency decision there was found to be arbitrary and capricious because the agency had no written policy on which to base substantive Medicaid rate decisions and the unwritten policy it applied was applied inconsistently, resulting in different, irrational results for the same or similar fact situations.

process, other than those specified above, is vague, arbitrary and capricious; therefore, SOR has failed to meet its burden of proof. Ind.Code §4-21.5-5-14(c). Moreover, Ind.Code §4-21.5-3-7(a) requires that a person's petition for review must "state facts demonstrating that the petitioner is a person to whom the order is specifically directed, the petitioner is aggrieved or adversely affected by the order or the petitioner is entitled to review under any law." Objector SOR's lack of specificity in its petition with respect to how the IDEM process is vague, arbitrary and capricious, fails to meet the requirements of Ind.Code §4-21.5-3-7.

Moreover, the COE's August 13, 1996 Public Notice⁹ 199600554 constituted application for the §401 Certification. Each of the Objectors in this case commented on Caesars' proposed Certification. (Affidavit of Pelloso, ¶6 and Attachment D thereto). The COE held a public hearing on October 23, 1996; the IDEM participated and Mr. Pelloso noted and considered the comments regarding water quality. (Affidavit of Pelloso, ¶6). Thereafter, on June 20, 1997, the IDEM issued Caesars the §401 Certification. In issuing the Certification, the IDEM reviewed Caesars proposed activities and determined that any associated discharges to navigable waters would comply with Indiana's applicable effluent limitations and water quality standards as long as the conditions specified in the Certification are met. (Affidavit of Pelloso, ¶¶3, 5, 6, 8, 9). Again, as Indiana Courts are governed by the presumption that an agency's decision is correct in view of its expertise if the agency's findings are supported by substantial evidence, Caesars is entitled to summary judgment on this issue. City of Bloomington, and Hamilton Cty. Dept. Of Pub. Welfare, *supra*.

Miscellaneous issues

29. POW contends that the Knobstone Escarpment and the adjacent flood plains qualifies for status as a National Natural Cultural Landmark. Section 401 of the CWA requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in a discharge into navigable waters. 33 USC 1341. As stated by the United States Supreme Court, section 401 requires an applicant "to obtain from the state a certification 'that any such discharge will comply with the applicable [CWA] provisions...[and a]ny certification...shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant...will comply with any applicable effluent limitations...and with any other appropriate requirement of State law set forth in such certification.' The limitations included in the certification become a condition on any Federal license." PUD No. 1 of Jefferson County v. Washington Dept of Ecology, 114 S.Ct. 1900, 1907 (1994). It is clear that the POW's intent to nominate the site for National Natural/Cultural Landmark is not included within the parameters of either the §404 COE permit or the §401 Water Quality Certification. Therefore, Caesars is entitled to summary judgment on this issue as a matter of law.

⁹The COE also issued Public Notices on October 18, 1996 and February 11, 1997 due to changes in Caesars' project design occurring after the initial public notice was given.

30. POW contends the project “will have strong indirect and regional exploitive effects” and will increase traffic, ozone, and air pollution. First, as stated directly above, the IDEM’s role is limited to determining whether the applicable effluent limitations and water quality standards will be met. PUD No. 1 of Jefferson County, supra. Secondly, to the extent that this contention raises issues concerning zoning, it falls outside of the OEA’s jurisdiction.

31. Objector POW argues that the Water Quality Certification “is flawed in that it assumes that a Department of Army 404 permit will be granted even before issued and assumes that its only option is to establish what it considers best management practices or conditions that will if complied with eliminate the adverse impacts of implementation of the Project.” A §404 Permit can not be granted until the COE receives a State’s water quality certification or a waiver. 33 USC 1341(a)(1). When the COE receives state certification, it is required to place any of the state’s conditions into the §404 permit. 33 USC 1341 (a)(2). If the imposition of the conditions cannot insure compliance with the applicable water quality requirements, the COE cannot issue the permit. Id. As the IDEM only has the authority to issue water quality certification and not the §404 permit, it is not in the position to assume that a permit will automatically be issued. (See Pelloso Affidavit, ¶22). Thus, Caesars is entitled to summary judgment on this issue.

32. Objector POW complains that Caesars cannot be trusted to comply with the §401 Certification requirements because it is acting as if obtaining all permits is a “given.” First, If the imposition of the conditions cannot insure compliance with the applicable water quality requirements, the COE cannot issue the permit. Id. 33 USC 1341(a)(2). Second, if Caesars fails to meet the conditions in the Certification, Caesars is subject to enforcement by the IDEM. Ind.Code §13-18-3-6 and Ind.Code §13-30-3-1. Thus, a genuine issue of whether Caesar may be trusted does not exist, and it is entitled to summary judgment as a matter of law.

IT IS THEREBY ORDERED that the RDI/Caesars Riverboat Casino, LLC Motion for Summary Judgment is hereby GRANTED and the Section 401 Water Quality Certification is hereby UPHeld.

You are further notified that pursuant to the provisions of Ind.Code §4-21.5-7, the Environmental Law Judge of the Office of Environmental Adjudication serves as the Ultimate Authority in administrative reviews of decisions of the commissioner of the Indiana Department

of Environmental Management. This is a Final Order subject to Judicial Review consistent with the applicable provisions of Ind.Code §4-21.5. Pursuant to Ind.Code §4-21.5-5, 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.

Dated this 5th day of January, 1998.

Lori Kyle Endris
Environmental Law Judge

cc: Matthew C. Rueff, Assistant Commissioner
Office of Water Management