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**OFFICIAL SHORT CITATION NAME:** When referring to 1999 OEA 18, cite this case as ***Greenwood General Cinema*, 1999 OEA 18.**

**TOPICS:**
discharge
401 certification
water quality
grease
oil
parking lot
creek
stream
Clean Water Act
notice
traps
federally permitted activity
ascertainable standards
PUD #1

**PRESIDING JUDGES:**
Penrod, Lasley

**PARTY REPRESENTATIVES:**
Petitioner: Larry Kane, Esq.; Katherine Shelby, Esq.
Bingham Summers Welch & Spilman
IDEM: Barbara Lollar, Esq.; Loraine Seyfried, Esq.

**ORDER ISSUED:**
Final Order Affirming in Part & Reversing in Part the Administrative Law Judge's Recommended Order May 13, 1999.

Recommended Order Granting Simon DeBartolo's Motion for Summary Judgment & Denying IDEM's Motion for Summary Judgment April 20, 1999.

**INDEX CATEGORY:**
Water

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**FURTHER CASE ACTIVITY:** [none]

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| STATE OF INDIANA | ) | BEFORE THE INDIANA OFFICE OF |
| | ) SS: | ENVIRONMENTAL ADJUDICATION |
| COUNTY OF MARION | ) | |
| | | |
| IN THE MATER OF: | ) | |
| | ) | |
| OBJECTIONS OF SIMON DeBARTOLO | ) | |
| GROUP TO SECTION 401 WATER | ) | CAUSE NO. 98-W-J-2101 |
| QUALITY CERTIFICATION FOR | ) | |
| GREENWOOD GENERAL CINEMA | ) | |

## FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED ORDER

This constitutes notice that on April 20, 1999, the Administrative Law Judge (AU) issued a Recommended Order in the above-captioned matter. On May 5, 1999, the Indiana Department of Environmental Management (IDEM), by counsel, and Simon DeBartolo Group (Simon), by counsel, each filed objections to the AU's Recommended Order. The Chief Administrative Law Judge, as the Ultimate Authority in this matter, hereby affirms in part and reverses in part the Recommended Order as follows:

1. The Undisputed Facts in the Recommended Order are hereby incorporated by reference with the following changes:

   A. Undisputed Fact #7 is hereby deleted.

   B. New Undisputed Fact #7 shall read as follows: "IDEM intends that Project Specific Condition No. 3 is to apply to storm water runoff that will occur from the paved parking lot that Simon plans to construct at the location after the stream relocation project involving a portion of the existing channel of Pleasant Run Creek is completed."

2. The Recommended Order is **AFFIRMED** in regards to IDEM's authority to condition §401 Water Quality Certifications. The PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1995) decision is certainly instructive on that issue. That case specifically addressed the issue of a State's authority to condition §401 certifications and whether a particular condition was permissible under §401 authority:

   > The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a §401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under §40 1. We must then determine whether the limitation at issue here, the requirement that petitioners maintain minimum stream flows, falls within the scope of that authority.

*Id.* at 710.

The Court went on to conclude that a state's certification is not limited to just certifying that a "discharge" will comply with the Clean Water Act. Rather, a state may impose conditions in the certification to ensure the applicant's compliance. Simon's attempt to narrow IDEM's broad authority to condition its certifications down to "activity for which a federal permit is required" is without merit. And Simon concedes as much when it stated that 401 certification is not limited to "just those aspects of the permitted activity that could give rise to a discharge." Simon's Objections to Recommended Order, p. 6. Further, this fact is underscored by Debra Donahue's article, which Simon indeed relies upon. Ms. Donahue concludes that the PUD No. 1 decision "implicitly gave states the nod to exercise their 401 authority to respond to any pollution—point source or nonpoint source-related—that might result from federally permitted activity." Debra L. Donahue, *The Untapped Power of Clean Water Act Section 410*, 23 Ecology L.Q. 201, 244 (1996). In this case, IDEM determined that oil and grease pollution might result from the federally permitted activity. If the activity could not result in a discharge to the creek, then Simon would be correct that any conditions would not be authorized. The act of paving over the land and introducing some 700 cars, however, is an activity that will likely result in a discharge to the creek and, therefore, pursuant to §401(a) and (d), IDEM is authorized to condition its certification to prevent polluting Pleasant Run Creek. The Environmental Protection Agency (EPA) expects as much when it stated that "all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be a part of a State's certification review." Office of Water, EPA, WETLANDS AND 401 CERTIFICATION—OPPORTUNITIES AND GUIDELINES FOR STATES AND ELIGIBLE INDIAN TRIBES 10 (Apr. 1989). Thus, the relocation of the creek and the likelihood of a discharge are coincidental and inseparable.

3. The Recommended Order is **REVERSED** in regards to its conclusion that IDEM failed to provide rational and ascertainable standards for requiring Condition 3 in Simon's §401 certification. Section 401(a) and (d) unequivocally require a proactive approach by the regulating agency. IDEM is correct when it asserts that it cannot certify activity that will not comply with Indiana's water quality laws. Based on the Affidavit of Megan Fisher, IDEM relying on its expertise, has correctly concluded that the parking lot will not comply with water quality standards if built without oil and grease traps. Condition 3 is rationally related to the activity proposed by Simon, which could result in a discharge, and, therefore, must be limited so as to protect water quality.[1] Moreover, Simon has offered no evidence refuting IDEM' s claim that the discharge will violate water quality standards. See 40 C.F.R. §124.85(a)(1) (1995) ('The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift."). And, Condition 3 is the type of condition used by other states

[1] IDEM's argument in its Objections to The Recommended Order that the documents relied upon in making its decision are not required to be published because they were not used to interpret or enforce a rule is not credible. All of IDEM's previous pleadings were replete with citations to regulations it believed it was enforcing by requiring Simon to install oil and grease traps. This issue, however, is rendered moot by the earlier conclusion that §401 is broad enough to authorize Condition 3.

and approved of by the EPA. *See* WETLANDS AND 401 CERTIFICATION at 23-27 ("few of these conditions are based directly on traditional water quality standards, [but] all are valid and relate to the maintenance of water quality or the designated use of the waters in some way"). Once again, moving Pleasant Run Creek is coincidental to building the 700-car parking lot, as evidenced by Simon's §404 and §401 applications, the Army Corps of Engineers analysis and IDEM's understanding.

**FINAL ORDER:**

The Recommended Order is **AFFIRMED** in part and **REVERSED** in part. IDEM's Motion for Summary Judgment is hereby GRANTED and Simon's Motion for Summary Judgment is hereby **DENIED**. Project Specific Condition No. 3 is **UPHELD**.

You are further notified that pursuant to IC 4-21.5-7-3, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This Final Order is subject to Judicial Review consistent with applicable provisions of IC 4-2 1.5. 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.

**IT IS SO ORDERED** in Indianapolis, Indiana this 13th day of May, 1999.

Wayne E. Penrod,
Chief Administrative Law Judge

**Objections of Simon DeBartolo Group to Section 401**
**Water Quality Certification for Greenwood General Cinema**
**1999 OEA 18 (98-W-J-2101)**

## RECOMMENDED ORDER GRANTING SIMON DeBARTOLO'S MOTION FOR SUMMARY JUDGMENT AND DENYING IDEM'S MOTION FOR SUMMARY JUDGMENT

### I. Statement of the Case:

On September 8, 1998, Simon DeBartolo Group (Simon) submitted a Petition for Administrative Review of the Section 401 Water Quality Certification for Greenwood General Cinema. Simon filed a Motion for Summary Judgment on November 25, 1998, by counsel Larry Kane and Katherine Shelby. On January 22, 1999, the Indiana Department of Environmental Management (IDEM) filed its brief in response and in opposition to the Motion for Summary Judgment and in support of Summary Judgment for IDEM, by counsel Barbara Lollar and Loraine Seyfried. Simon filed its Reply Brief on February 16, 1999 and IDEM filed its Reply on February 26, 1999. Simon later moved to strike the affidavit of Megan Fisher attached to IDEM's Reply Brief. The Administrative Law Judge held oral argument on the motions on March 5, 1999. After the oral argument, the Administrative Law Judge denied Simon's Motion to Strike and granted leave for Simon to file a Surreply, which it did on March 12, 1999. Both parties filed proposed findings of fact and conclusions of law on March 12, 1999.

### II. Issue:

The issue in this case is whether IDEM, in its Section 401 Water Quality Certification for Greenwood General Cinema, has the authority to require Simon to install oil and grease traps to filter parking lot runoff.

### III. Undisputed Facts:

The Administrative Law Judge finds that the following present no genuine issue of material fact:

1. Simon owns a parcel of property adjacent to the Greenwood Park Mall located in Johnson County, Indiana. The property is dissected by Pleasant Run Creek.

2. Simon intends to build a multi-screen movie theater and a 760-car parking lot on the property. In order to do that, however, a portion of Pleasant Run Creek must be relocated.

3. Simon, through its consultant, submitted a Section 404 and Section 401 permit application on May 11, 1998.

4. Simon described the activity in the section 404 and 401 permit applications as:

> The project proposes to relocate approximately 838' of existing creek channel to create an undivided commercial parcel. The project will include construction of a new multi-screen theater building containing approximately 57,900 square feet, [and] approximately 760 new parking spaces.

5. The Department of the Army issued the Section 404 Permit to Simon on September 22, 1998. It described the project as "relocat[ing] a portion of the creek for the construction of multiple screen movie theater in accordance the attached plans."

6. IDEM issued a 401 Water Quality Certification to Simon on August 20, 1998. The approval was subject to several conditions, one being:

    3. Oil and grease traps will be installed to filter runoff from the site before it enters Pleasant Run Creek. These traps will be regularly maintained and replaced when necessary.

7. The 401 certification provided no scientific or technical basis for requiring Simon to install oil and grease traps.

8. Simon's consultant wrote to IDEM on August 20, 1998 asking several questions about the oil and grease traps.

9. IDEM responded to Simon's questions on October 1, 1998.

10. Simon timely appealed Project Specific Condition No. 3 (Condition 3) on September 8, 1998.

## IV. Discussion:

Simon argues that Condition 3 in its 401 Water Quality Certification is invalid because IDEM does not have the authority to regulate activity after the 404 permitted activity is completed. Essentially, Simon views Condition 3 as an attempt by IDEM to regulate activity on the property after Simon relocates the creek. Simon contends an NPDES permit is the appropriate way to regulate such activity, not 401 certification. Furthermore, Simon also complains that Condition 3 is vague because it does not state where the oil and grease traps are to be installed, how the traps are to be operated or what the traps are to filter.

IDEM asserts that it does have the authority to impose Condition 3 because it is charged with the duty of ensuring that the applicant complies with all applicable water quality standards. In addition, IDEM states it is illogical to view the 401 certification only in terms of moving Pleasant Run Creek. The purpose of moving the creek in the first place is to build a movie theater parking lot, and, thus, it is appropriate to consider the parking lot's impact on the creek. Without Condition 3, IDEM believes several water quality rules will be violated if parking lot runoff is left unchecked. In regards to the operation of the oil and grease traps, IDEM left it up to Simon's engineer to decide which traps and where to place them. IDEM further suggested that the traps be maintained according to the manufacturer's instructions.

### A. Standard of Review

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[2] A fact is "material" if its existence facilitates the resolution of any issues involved in the lawsuit.[3] Further, a claim must have legal probative force in order to be a "genuine issue of material fact" under Indiana Trial Rule 56.[4] In construing a motion for summary judgment, a court will consider all pleadings, affidavits and testimony in a light most favorable to the non-moving party.[5] Overall, the purpose of summary judgment is to terminate litigation where there is no factual dispute and a determination may be made as a matter of law.[6]

Here, each party has moved for summary judgment in their favor. For the following reasons, summary judgment in favor of Simon is appropriate because Condition 3 is an unsupported assumption that Simon will violate the environmental laws if the parking lot is built.

### B. IDEM has authority to condition 401 certifications

The parties have cited several cases discussing a state's authority to condition 401 Water Quality Certifications. Of those cited, PUD No. 1 of Jefferson County v. Washington Department of Ecology is most persuasive.[7] In that case, the United States Supreme Court set out, in very broad terms, a state's authority to condition 401 certification. It concluded that "States may condition certification upon any limitations necessary to ensure compliance with State water quality standards or any other 'appropriate requirement of State law' . . ."[8] That conclusion is contrary to Simon's assertion that the certification only applies to "the specific activity for which Simon applied for a Section 404 permit. . . ."[9] Moreover, the Court went on to note that §303 should be read to require that a "project be consistent with both components, namely, the designated use and the water quality criteria."[10] In fact, Justice Stevens, in his concurring opinion, stated that "not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint

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[2] Havens v. Richey, 582 N.E.2d 792, 795 (Ind. 1991) and Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630, 633 (Ind. 1991).

[3] Funk v. Funk, 563 N.E.2d 127, 130 (Ind.Ct.App. 1990).

[4] Raymundo v. Hammond Clinic Association, 449 N.E.2d 276, 280 (Ind. 1983).

[5] Greathouse v. Armstrong, 616 N.E.2d 364, 366 (Ind. 1993).

[6] Beradi v. Hardware Wholesalers, Inc., 625 N.E.2d 1259, 1261 (Ind.Ct.App. 1993) *citing* Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 614 (Ind.Ct.App. 1991) *trans. denied*.

[7] 511 U.S. 700, 114 S.Ct. 1900.

[8] *Id.* at 713.

[9] Simon's Motion for Summary Judgment, p. 5.

[10] PUD No. 1 of Jefferson County v. Washing Department of Ecology, 511 U.S. at 715.

on a State's power to regulate the quality of its own waters more stringently than federal law might require."[11] Thus, it is clear IDEM has the authority to include conditions in its 401 certifications. Condition 3, however, does not have a scientific or technical basis, and it represents an assumption that Simon will violate water quality standards.

### 1. Condition 3 lacks a scientific or technical basis

IDEM points to three regulations in support of Condition 3. Just as in the PUD No. 1 case, all are narratives regarding nondegradation, water uses, and water quality. Unlike the PUD No. 1 case, however, IDEM has not conducted a study to determine the effects of oil and grease on surface water quality in Indiana.[12] Rather, IDEM relied upon unpublished guidance documents to support Condition 3. That approach is wrong for two reasons. First, according to Ind. Code §4-22-7-7(5)(B) and Ind. Code §13-14-1-11.5, the guidances relied upon should have been published in the Indiana Register. Otherwise, the public has no way of knowing the standards by which their conduct is being evaluated. Second, even if the guidances had been published, their application in Indiana is questionable. None of the guidances mention Indiana surface waters or studies performed on Indiana surface waters. Thus, IDEM has failed to provide a rational and ascertainable basis for requiring Simon to install oil and grease traps.

### 2. IDEM may not assume Simon will violate water quality standards

By including Condition 3 in Simon's 401 certification, IDEM assumes that if Simon builds the parking lot, the runoff will violate water quality standards. But none of the affidavits in support of its Motion for Summary Judgment validates that assumption. Besides, that argument contradicts recent decisions by this office holding that a failure to comply with the law is an enforcement issue rather than a permit issue.[13] Additionally, IDEM has at least three other tools to regulate the runoff from Simon's parking lot without providing a scientific or technical basis. First, the runoff could be regulated under an NPDES permit, as Simon concedes. Second, IDEM could require that Simon monitor the runoff and submit reports to IDEM pursuant to Ind. Code §13-14-1-3 (under this scenario IDEM would still have to establish limits for the amount of oil and grease in water). Third, there is always the option of taking enforcement action against Simon if the regulations are violated. Since statutory language exists to prohibit the conduct IDEM foresees, it is up to Simon to take the necessary steps to ensure compliance with the regulations.

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[11] *Id.* at723.

[12] *Id.* at 709 ("Respondent undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach").

[13] *See* "Objection to the Issuance of Approval No. AW 4505, Stephen Gettelfinger, Washington. Indiana," December 8, 1998; p. 3 and "Objection to the Issuance of Section 401 Water Quality Certification COE Id No. 198800247. Conagra Soybean Processing Co.," November 12, 1998; p. 5

## V. Conclusions of Law:

Based on the foregoing undisputed facts and the above discussion, the Administrative Law Judge concludes, as a matter of law, that IDEM failed to provide rational and ascertainable standards for requiring oil and grease traps in Simon's 401 Water Quality Certification.

## VI. Recommended Order:

The Administrative Law Judge recommends that Simon's Motion for Summary Judgment be **GRANTED**, that IDEM's Motion for Summary Judgment be **DENIED** and that Project Specific Condition No. 3 of the 401 Certification is null and void, has no force or effect, and shall be deemed as deleted from the 401 Certification issued to Simon on August 20, 1998.

## VII. Appeal Rights:

You are hereby notified that pursuant to §4-21.5-3-29, you have the right to appeal the Recommended Order of the Administrative Law Judge. In order to do so, you must object in a writing that does the following:

(1) specifies which portions of the Recommended Order you object to;
(2) specifies which portions of the administrative record supports the objection(s); and
(3) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days. Objections should be sent to:

Wayne E. Penrod, Chief Administrative Law Judge
Office of Environmental Adjudication
150 West Market Street, Suite 618
Indianapolis, IN 46204

A final order disposing of the case or an order remanding the case to the administrative law judge for further proceedings shall be issued within sixty (60) days after the latter of:

(1) the date that the order was issued under §4-21.5-3-27;
(2) the receipt of briefs; or
(3) the close of oral argument

unless the period is waived or extended with the written consent of all parties or for good cause shown.

**IT IS SO ORDERED** in Indianapolis, Indiana this 20th day of April 1999.

Linda C. Lasley
Administrative Law Judge