

**OBJECTION TO THE ISSUANCE OF
SECTION 401 WATER QUALITY CERTIFICATION
CITY OF NOBLESVILLE
2001 OEA 106, OEA CAUSE NO.: 00-W-J-2599**

Official Short Cite Name:	City of Noblesville, 2001 OEA 106
OEA Cause No.:	00-W-J-2599
Topics/Keywords:	327 IAC 2-1-1.5
	327 IAC 2-1-2
	327 IAC 5
	327 IAC 2-1-11
	327 IAC 2-1-3(6)
	327 IAC 15-5
	I.C. § 4-21.5-3-27
	33 U.S.C. § 1341 Section 401 Water Quality Certification
	Antidegradation
	Exceptional use stream
	Mitigation
Presiding ELJ:	Wayne E. Penrod
Party Representatives:	Janice E.S. Lengel
	David L. Hatchett
	Will A. Bishop
	Cherry Lyngaas
	Perry M. Nicholas and Sherilynn Nicholas
	Timothy J. Meyerrose and Catherine A. Meyerrose
	Jeffrey R. Swenson and Jill W. Swenson
	Gail Kahl and Dan Kahl
Date of Order:	June 21, 2001
Index Category:	Water
Further Case Activity:	

No. 1999-334-29-RRJ-A ("Certification") to Noblesville for its planned Hague Road Extension Project ("Project"). (Transcript, p. 8 & Ex. U.)

3. The Certification requires, among other things, that Noblesville construct and monitor compensatory mitigation pursuant to a mitigation plan, that certain measures be implemented to minimize or eliminate any impact to water quality from stormwater and other potential sources, and that any planned impacts beyond those authorized by the Certification must be approved by IDEM beforehand. (Transcript Exs. J & U.)

4. On or about November 6, 2000, OEA received Petitions for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness from the following Petitioners: Will Bishop; Gail and Dan Kahl; Cherry Lyngaas; Timothy and Catherine Meyerrose; Jeffrey and Jill Swenson; and Perry and Sherilynn Nicholas. (Transcript, p. 8.)

5. Pursuant to OEA's December 1, 2000 Order Granting Request for Amendments and Continuance of Prehearing Conference and Stay Hearing, the Petitioners each filed Amended Petitions, which OEA received on or about December 18, 2000. (Transcript, pp. 8-9.)

6. The Petitions and Amended Petitions all contained the same or substantially similar assertions challenging the propriety of the Certification. The Petitioners alleged a number of issues, including the following: (1) the Certification violates 327 IAC 2-1-1.5 and 327 IAC 2-1-2; (2) IDEM did not adequately consider alternative road improvements which would alleviate traffic congestion; (3) the compensatory mitigation required by the Certification is not adequate for the impacts, which will be greater than those authorized by the Certification; and (4) impacts from stormwater have not been adequately considered. (Petitions, p. 2; Amended Petitions, pp. 2-4.)

7. On January 30, 2001, a stay hearing was held in the OEA Conference Room, 150 West Market Street, Suite 618, Indianapolis, Indiana 46204. Counsel for IDEM and counsel for Noblesville appeared at the stay hearing. Jeff Swenson, Perry Nicholas and Will Bishop attended the hearing on behalf of the Petitioners. IDEM presented Randy R. Jones as an expert witness. (Transcript, pp. 140-65). Noblesville presented Robert E. Hittle as an expert witness. (Transcript, pp. 86-139). Petitioners called two of the Petitioners, Perry Nicholas and Will Bishop, as lay witnesses. (Transcript, pp. 30-86).

8. The Chief Administrative Law Judge ("CALJ") Wayne E. Penrod announced the burden of proof which Petitioners must meet in order to satisfy their request for a stay. (Transcript, p. 11.) The parties proffered Exhibits A-U and, with some qualifications, stipulated as to their admissibility. (Transcript, pp. 5-7, 63-64). All parties had a sufficient opportunity to put on their evidence, question all witnesses and present a closing statement. (*See generally* Transcript & Exs.)

9. During the stay hearing, Petitioners argued the four points listed in Paragraph 6 above and also asserted that: (1) a bog and exceptional use stream would be impacted by the Project (related to Petitioners' first argument — compliance with 327 IAC 2-1-1.5 and 327 IAC 2-1-2) (Transcript, pp. 149-151, 158-60); (2) the Project is merely a segment of a larger plan and is impermissible "piecemealing" (related to Petitioners' second argument — consideration of alternative roadways) (Transcript, pp. 106-09, 131-34); and (3) the bridge designs will be modified, thus preventing IDEM from fully evaluating water quality impacts (new argument not raised in the Petitions or Amended Petitions) (Transcript, pp. 57-59).

10. At the close of the stay hearing, Noblesville moved to combine the stay hearing and hearing on the merits into this one hearing. Based on that motion, the CALJ instructed the Petitioners to submit any additional evidence they wished to offer in support of their case. (Transcript, pp. 173-76.) Consistent with their testimony at the stay hearing (Transcript, p. 81), in which the Petitioners indicated they would only submit additional evidence in the event that Noblesville modified its Project plans and bridge design, the Petitioners did not submit any additional evidence in support of the merits of their claims.

Conclusions of Law

1. The Certification was issued by IDEM to Noblesville pursuant to Section 401 of the Clean Water Act ("CWA"), codified at 33 USC § 1341.

Antidegradation, Water Quality and Endangered Species Concerns

2. 327 IAC 2-1-1.5 sets out general goals for the State of Indiana's water quality. 327 IAC 2-1-1.5 does not describe enforceable requirements or detail how any deviations from those goals could be remedied, instead laying out policy directives for Indiana's regulation of water quality in other administrative code sections. *See, e.g.*, 327 IAC Article 5 (NPDES program, designed to implement Indiana's water quality goals).

3. 327 IAC 2-1-2 contains antidegradation provisions which protect the waters of the State. Petitioners did not offer specific reasons why they believe that 327 IAC 2-1-2 would be violated. However, on page 5 of their Amended Petitions, Petitioners argue that "there are no known conditions under which the proposed project can be designed to cross Cicero Creek/Sly Run, and the associated wetlands without incurring the violations noted above." (Amended Petitions, pp. 4-5). Petitioners made a similar argument at the hearing. (Transcript, p. 83). Taken literally, Petitioners' argument would prohibit any impact to a regulated waterbody. Congress enacted Sections 401 and 404 of the CWA to authorize certain discharges of dredged or fill materials. Indeed, Petitioners acknowledged that each of the alternative route road improvement plans had some water quality impacts. (Transcript, pp. 75, 77).

4. Petitioners also alleged that J.F. New & Associates' ("J.F. New") comments to the Indiana Department of Natural Resources ("IDNR") showed wetland impacts and water quality degradation beyond what the Certification authorizes. (Transcript, pp. 21-22; Ex. C). IDNR matters are not within OEA's jurisdiction and must be challenged, if at all, in the proper forum.. See *In Re Objection to Issuance of Alternate Disposal, Inc., Lake County*, OEA, Cause No. 96-S-J-1674, 1997 WL 297843, *3 (May 5, 1997). In any event, IDEM considered J.F. New's comments, which predated the final mitigation plan required under the Certification, and required conditions protective of water quality. (Transcript, pp. 69-71, 157-58, 161-63).

5. Petitioners alleged that mussels and fish should be studied further and that a bog and exceptional stream would be harmed. (Transcript, pp. 28-29, 35). No evidence was provided specifying such need for additional study or supporting the alleged harm, though. (Transcript, pp. 33-35, 108-11, 147-49, 160-61). There is no requirement to conduct a mussel or fish study before issuing a Certification. See *In Re Objection to Issuance of Section 401 Water Quality Certification COE ID: 199600554, RDI/Caesars Riverboat Casino, LLC*, OEA, Cause No. 97-W-J-1824, 1998 WL 768493, *4 (Jan. 5, 1998). In any event, IDEM provided information showing that protected mussels were not present. (Transcript Ex. R). Further, the Project will not impact an exceptional use stream. 327 IAC 2-1-11. Exceptional use streams are designated by the Water Pollution Control Board, and not by OEA. 327 IAC 2-1-3(6). Finally, IDEM sampled the soil in the alleged bog and determined that the area was not a bog. (Transcript, pp. 149-51, 158-60).

6. Petitioners admittedly offered no expert testimony and have presented no persuasive evidence that 327 IAC 2-1-1.5, 327 IAC 2-1-2 or any water quality standard would be violated by issuance of this Certification. (See generally Transcript). As the Indiana Court of Appeals has recently held, the Petitioners in such a case must carry the burden of persuasion and production of evidence. Naked assertions of disagreement on technical matters of agency discretion will not carry the day in the absence of persuasive evidence. See *Family Development Limited v. Steuben County Waste Watchers, Inc.* 2001 WL 633515, *13 (Ind. App.)

7. IDEM asserts that sufficient mitigation requirements were included to ensure that 327 IAC 2-1-1.5 and 327 IAC 2-1-2 are not violated. (Transcript, pp. 69-71, 152-53; Exs. J&U). Likewise, IDEM asserts that the Certification comports with the requirements of CWA § 401 and also ensures that no specially-protected species or waterbody will be harmed by the Certification. In both instances the Petitioners did not provide sufficient evidence to overcome these discretionary findings by IDEM.

Alternative Road Improvements

8. Petitioners alleged that IDEM should have chosen a different roadway alignment and/or required improvements to existing roads in lieu of the Project. (Transcript, pp. 37-42). IDEM's § 401 authority does not include the ability to choose a roadway alignment among potential alternatives. Local planning such as transportation decisions falls outside of

IDEM's jurisdiction. *See RDI/Caesars*, 1998 WL 768493, *10; *Alternate Disposal*, 1997 WL 297843, *3; *In Re Objections to Construction and Operation Permit No. IMPA CP (89) 1842 & OP 4440-0040*, Office of Hearings, Cause No. 90-A-J-382, 1990 WL 517036, *5 (Dec. 3, 1990). Thus, Petitioners' arguments regarding other possible roadway improvements are not claims upon which OEA may grant relief.

9. Assuming arguendo IDEM were authorized to consider alternative roadway alignments, IDEM and Noblesville demonstrated that the Project alignment as proposed in the application and the Feasibility Study had the least environmental impact of the viable alternatives and supported IDEM's decision to issue the Certification. (Transcript, pp. 87; Exs. K & Q). Indeed, IDEM specifically asked Noblesville to discuss alternatives and Petitioners' related argument on piecemealing, demonstrating that IDEM did not ignore this concern. (Transcript, pp. 102-08; Ex. F). Noblesville fully responded to IDEM's questions. (Ex. G). Petitioners have shown no error in IDEM's handling of alternatives. (*See generally* Transcript).

Adequacy of Mitigation

10. Petitioners alleged that the mitigation required under the Certification will not be successful because the mitigation wetlands are isolated and because Noblesville may not comply with the Certification's terms. (Transcript, pp. 26, 53, 80). Noblesville rebutted Petitioners' claim that the wetlands would be isolated by noting that connector pipes will feed flood waters into the mitigation areas. (Transcript, p. 54). Regarding Noblesville's duty to comply with its Certification, any noncompliance is subject to an enforcement action separate from this Certification appeal. *See Alternate Disposal*, 1997 WL 297843, *3; *Family Development Limited v. Steuben County Waste Watchers, Inc.* 2001 WL 633515, *13 (Ind. App.). The Certification also requires monitoring to ensure compliance. (Transcript, p. 100; Ex. U).

11. It should be noted that Petitioners, in attacking the adequacy of the mitigation plan, relied upon an earlier version of the plan which was later supplemented and incorporated into the Certification. (Transcript, pp. 47-51, 68-69).

12. Finally, Petitioners admittedly offered no expert testimony that the mitigation was somehow inadequate. (*See generally* Transcript). IDEM reviewed all of the information and determined that the mitigation and Project were permissible under Section 401 and issued the Certification. (Transcript, pp. 69-71, 152-53). Petitioners have not met the necessary burden of proof to overcome the discretionary technical determination of IDEM. *See Family Development Limited v. Steuben County Waste Watchers, Inc.* 2001 WL 633515, *12-13 (Ind. App.).

Stormwater Impacts

13. Petitioners alleged that stormwater from the Project would impact the water quality of the streams and wetlands. (Transcript, pp. 36-37). However, any stormwater regulated under Rule 5 (327 IAC 15-5) is the subject of a separate permit action and cannot be reviewed here. *See RDI/Caesars*, 1997 WL 768493, *6.

14. Any other stormwater impacts were directly considered in Noblesville's design of the Project. (Transcript, pp. 111-13). Likewise, IDEM evaluated any impacts from stormwater runoff and added Certification conditions to address those concerns. (Transcript, pp. 152-53; Ex. U). Petitioners point to no error in IDEM's regulation of stormwater. (*See generally* Transcript).

Modifications to Bridge Design

15. Petitioners offered no evidence that a bridge design change would indeed occur or that any change would cause substantially different water quality impacts. (Transcript, p. 81). Petitioners' sole basis for claiming that the design may change is that IDNR had not yet issued its construction-in-a-floodway approval, a matter clearly outside of OEA's jurisdiction. *See Alternate Disposal*, 1997 WL 297843, *4. Such a claim is also too speculative to allow review by OEA. *See In Re Objection to Issuance of Approval No. AW 4504, Mr. Gettelfinger, Washington*, OEA, Cause No. 98-S-J-1958, *2-4 (Dec. 8, 1998). Any bridge design modifications which would go beyond the impacts authorized by the Certification would need a separate water quality certification or a modification of the existing Certification. (Transcript, pp. 85, 155-57).

Conclusion

16. In sum, IDEM followed the applicable procedure for reviewing the application and supporting materials, adequately addressed all public comments, and properly exercised its discretion in issuing the Certification. (Transcript, pp. 141-58, 161-63). Petitioners have not carried the burden of proof to justify a stay of the Certification or to grant the relief sought for by the Petitions and Amended Petitions on the merits. *See Family Development Limited v. Steuben County-Waste Watchers, Inc.* 2001 WL 633515, *13 (Ind. App.).

Final Order Denying Stay and Granting Judgment in Favor of Respondents

After considering all of the evidence and motions by the parties and based on the foregoing Findings of Fact and Conclusions of Law, the CALJ hereby **GRANTS** Noblesville's motion to combine the stay hearing and hearing on the merits. The CALJ **DENIES** Petitioners' petitions for a stay of effectiveness of the Certification. The CALJ also **GRANTS** judgment in favor of Respondents IDEM and Noblesville as to all issues raised on the merits of Petitioners' petitions for administrative review. It is further **ORDERED** that all of the petitions for a stay of effectiveness and petitions for administrative review are hereby dismissed.

You are further notified that, pursuant to Indiana Code 4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana 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.

IT IS SO ORDERED in Indianapolis, Indiana, this 21st day of June, 2001.

Wayne E. Penrod
Environmental Law Judge