OBJECTION TO THE ISSUANCE OF
FINAL OPERATION PERMIT NO. INJ060801
TOWN OF BURNS HARBOR
ISG BURNS HARBOR, LLC
2007-OEA-174, OEA CAUSE NO.: 05-W-J-3645

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OEA Cause No.:	05-W-J-3645
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	327 IAC 5-2-14
	327 IAC 5-2-13
	327 IAC 3-4-2
	315 IAC 1-3-1(b)(11), (13) and (20)
	significant threat to the environment
	IDEM Commissioner discretion
Presiding ELJ:	Catherine Gibbs
Party Representatives:	Sierra Cutts, Esq.
	Mark Shere, Esq.
Order Issued:	4/23/2007
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Further Case Activity:	

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO ISSUANCE OF	)	
FINAL OPERATIONAL PERMIT	)	CAUSE NO. 05-W-J-3645
NO. INJ060801	)	
TOWN OF BURNS HARBOR	)	
ISG BURNS HARBOR LLC	)	
PORTER COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court for the final hearing, and the presiding Environmental Law Judge (the "ELJ"), being duly advised and having heard the evidence and having read and considered the petitions, motions, and briefs of the parties, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Order.

Statement of the Case

1. On December 16, 2006, the Town of Burns Harbor and ISG Burns Harbor LLC, (the "Petitioners") filed its Petition for Review and Petitioners' Request for Clarification re Stay Requirements and (to the Extent Necessary) Request for Stay.

2. On January 24, 2006, the ELJ issued an Order Denying Petitioner's Request for Automatic Stay.

3. A hearing was held on February 1, 2006 on Petitioners' request for a stay of effectiveness of the permit. The ELJ denied Petitioners' request for a stay on February 23, 2006.

4. On June 1, 2006, the Petitioners filed a Motion for Summary Decision. On June 20, 2006, the Indiana Department of Environmental Management (the IDEM") filed its Cross Motion for Summary Judgment and Memorandum of Law in Support of its Cross Motion for Summary Judgment and Response to Petitioners' Motion for Summary Decision. The Petitioners filed their Reply in Support to Petitioners' Motion for Summary Decision (and Response to IDEM's Cross Motion) on July 7, 2006.

5. The ELJ issued the Findings of Fact, Conclusions of Law and Order Denying Motions for Summary Judgment on August 29, 2006.

6. An evidentiary hearing on this cause was held on October 4, 2006. The Petitioners filed their Post-Hearing Brief and Notice of Filing Transcript on November 18, 2006. The IDEM filed its Closing Arguments on November 20, 2006.

7. The ELJ issued Findings of Fact, Conclusions of Law and Order on December 15, 2006. As part of this Order, the ELJ ordered the parties to appear on February 2, 2007 to present further evidence on the issue of the parameters and frequency of sampling to be conducted.

8. On January 26, 2007, the Petitioners filed Burns Harbor's Objection to Re-Opened Hearing and Request for Entry of Final Agency Order.

9. The ELJ issued an Order Continuing Hearing, in which the hearing was continued until March 14, 2007. Further, February 12, 2007 was set as the deadline for any responsive pleadings that IDEM wished to file.

10. On February 6, 2007, the IDEM filed its Motion for Final Order and Response to burns Harbor's Objection to Re-Opened Hearing and Request for Entry of Final Agency Order.

11. The hearing scheduled for March 14, 2007 was continued indefinitely pending issuance of this final order.

Findings of Fact

1. On November 29, 2005, the Indiana Department of Environmental Management (the "IDEM") issued a renewal of Final Operational Permit #INJ060801 (the "Permit") to the Petitioners, Town of Burns Harbor and ISG Burns Harbor LLC, as co-permittees. The original permit was issued to the Petitioners in June of 2000 as permit no. INU060801.

2. The Permit is for the operation of the wastewater treatment plant ("WWTP") owned by the Town of Burns Harbor. ISG Burns Harbor LLC is the operator of the WWTP.

3. Sewage from the town of Burns Harbor and from the Burns Harbor steel mill are combined and treated at the WWTP. Once treated, this waste water discharges to the ISG Burns Harbor LLC facility, where it combines with industrial waste water from the steel mill. This waste stream is then combined with non-contact cooling water. This is discharged to waters of the state (the Little Calumet River). ISG Burns Harbor LLC has a NPDES permit for this discharge. The discharge from the WWTP amounts to less than 1% of the total discharge from the ISG Burns Harbor facility to the Little Calumet River.

4. The Permit, issued in 2005, requires the Petitioners to sample and analyze the raw influent, intermediate unit treatment process and final effluent for the pollutants and

operational parameters specified in the Monthly Report of Operation Form (MRO).[1] The permit issued in 2000 required only sampling and analysis of the final effluent.

5. In addition to the sampling and analysis required by the Permit, the Petitioners take and analyze samples for settleable solids twenty-one (21) times per week. Samples are sent to a laboratory five (5) times per week for analysis of settleable solids and total suspended solids. The Petitioners do not report this information to the IDEM.

6. Both the sampling and analysis conducted under the Permit and voluntarily conducted by the Petitioners provide useful information regarding the operation of the WWTP.

7. The WWTP does not have any bypass or overflow points.

8. The frequency of the monitoring required by the Permit is based upon the WWTP's design flow. The design flow is 1.06 million gallons per day (mgd). It is IDEM's standard practice to require a plant with greater than 1 mgd to conduct sampling and analysis five (5) times per week. William Stenner, the IDEM permit writer, chose to require this WWTP to sample only three (3) times per week.

9. This WWTP does not discharge directly to waters of the state.

10. The IDEM has not developed written guidance, such as a template, for operational permits issued to publicly owned treatment plants, such as this, because this situation arises so infrequently.

11. The addition of sampling and analysis of raw influent and intermediate treatment units costs approximately $2,000 per month.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.

2. 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. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.;* I.C. 4-21.5-3-27(d). "*De novo* review" means that:

[1] This form is used to report the monitoring data to the IDEM. This information must be submitted to the IDEM every month.

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.
Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

Under *de novo* review, the ELJ must make findings of fact based upon evidence that is "substantial and reliable". Ind. Code § 4-21.5-3-27(d).

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004) (appeal of OEA review of NPDES permit); *see also* Ind. Code § 4-21.5-3-27(d). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind.Ct.App. 1993). *GasAmerica #47*, 2004 OEA at 129. *See also Blue River Valley*, 2005 OEA at 11, 12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.

5. The first question that must be answered is whether an operational permit should be required for this WWTP at all. 327 IAC 3-4-2 states: "(a) Any person who owns or operates a water pollution treatment/control facility which is not subject to the NPDES permit program (327 IAC 5-1 through 327 IAC 5-10) or the industrial waste pretreatment permit program (327 IAC 5-15) may be required, at the commissioner's discretion, to obtain a permit to operate the water pollution control facility. Generally, such permits will be required only where the operation of the facility is considered by the commissioner to pose a significant threat to the environment." This WWTP is not subject to the NPDES program or the industrial waste pretreatment permit program so it is within the Commissioner's discretion to require it to obtain an operational permit.

6. The evidence presented at the stay hearing held on February 1, 2006 and the final hearing held on October 4, 2006 show that this WWTP does not present a "significant threat to the environment"[2] as it is being operated currently. This WWTP does not present a significant threat to the environment because (1) it does not discharge directly to waters of the state; (2) the waste water discharged from the WWTP is tested at least 2 more times before being discharged to waters of the state; (3) the discharge from the WWTP accounts for less than 1% of the total discharge from the ISG Burns Harbor facility to the Little Calumet River; and, (4) there are no overflow or bypass points in the WWTP.

7. The Commissioner of the IDEM has the discretion to require a permit under 327 IAC 3-4-2 even if a water pollution treatment/control facility does not present a "significant threat to the environment".[3]

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[2] 327 IAC 3-4-2.
[3] This ELJ made this conclusion in a previous order issued in this matter (referred to as the "August 29, 2006 Order).

8. The Petitioners have the burden to present "substantial and reliable" evidence that the Commissioner abused his discretion in requiring them to obtain an operational permit. The Petitioners did not present sufficient evidence to prove such an abuse. This WWTP presents a rare situation, which may not be duplicated elsewhere in the state of Indiana. The purpose of issuing an operational permit is to ensure that the WWTP is functioning properly and that waste water is being adequately treated before being discharged. The Petitioners presented sufficient facts to prove that this WWTP does not present a significant threat to the environment. However, they did not present sufficient evidence to show that the main purpose of issuing operational permits will be met. The fact that the Petitioners conduct sampling that is not required by the Permit is not persuasive as the Petitioners could stop this sampling at any time. In addition, none of this data is sent to IDEM for review. The fact that the waste water from the WWTP is mixed with other waste water from the steel mill and sampled prior to discharge to the waters of the state is also not persuasive as the steel mill could shut down[4] leaving no additional treatment of the waste water prior to discharge. The Commissioner did not abuse his discretion in requiring a permit for this facility.

9. The next question is whether this WWTP is a publicly owned treatment plant (POTW). This WWTP is owned by the Town of Burns Harbor. A publicly owned treatment plant, as defined by 327 IAC 5-1.5-48, means a treatment plant owned by a municipality. Neither of the parties has argued that the Town of Burns Harbor does not fit this definition. This WWTP is a POTW. This POTW is regulated under 327 IAC 3-4 because the discharge from the POTW does not occur directly to waters of the state. An operational permit issued under 327 IAC 3-4-2 must include the monitoring and reporting requirements of 327 IAC 5-2-13, 327 IAC 5-2-14 and 327 IAC 5-2-15.[5]

10. The final question then is whether the frequency of sampling is appropriate. The permit requires the sampling and analysis of the raw influent, wastewater from the intermediate unit treatment processes and final effluent, three (3) times per week, for the pollutants and operational parameters specified by the applicable Monthly Report of Operation Form. The pertinent portions of the rule (327 IAC 5-2-13) state:

> (b) A POTW shall monitor the mass, concentration, or other units of specified pollutants in the raw influent, in the discharge from intermediate unit treatment processes as specified in the permit or the applicable report of operation form, and in the final effluent, and the volume of effluent flow. For purposes of this section and sections 14 through 15 of this rule, a POTW includes a municipality or other political subdivision, such as a regional sewer district, that owns or operates a wastewater treatment plant or a water treatment plant, as defined in IC 13-11-2, or a private utility of a quasi-public nature that owns or operates a treatment plant from which a permitted discharge occurs, including a mobile home park or a residential development.

[4] This is a possibility, however unlikely.
[5] This conclusion (Conclusion of Law #18) was also made in the August 29, 2006 Order.

(c) For purposes of subsections (a) and (b), the commissioner shall specify the following monitoring requirements in the permit:
(1) Requirements concerning proper installation, use, and maintenance of monitoring equipment or methods (including biological monitoring methods where appropriate).
(2) Monitoring frequency, type, and intervals sufficient to yield continuing data representative of the volume of effluent flow and the quantity of pollutants discharged based on the impact of the waste stream on the receiving water, in accordance with 40 CFR 122.44.
(3) Test procedures for the analysis of pollutants meeting the requirements of subsection (d).
. . .
(e) The sampling frequency and other monitoring requirements specified by the commissioner under subsection (c) shall, to the extent applicable, be consistent with monitoring requirements specified in a standard or effluent limitations guideline on which the effluent limitations in the permit are based. In no case shall the sampling frequency be less than once per calendar year.

11. IDEM asserts that the frequency of sampling (3 times per week) is proper, based on the application of its standard practice. The Petitioners do not believe any sampling is necessary as they do not believe that a permit is necessary. Neither party in this case presented evidence regarding alternative sampling frequencies. [6]

12. The IDEM presented evidence that it based its decision on standard practice. The policy was not introduced into evidence.[7] It is well established that an agency has the authority to promulgate rules in order to implement its statutory responsibilities and that these rules must be promulgated in accordance with Ind. Code § 4-22-2. *Indiana Dep't of Envtl. Mgmt. v. Twin Eagle LLC,* 798 N.E.2d 839, 847 (Ind. 2003). *Indiana-Kentucky Electric Corp. v. Indiana Dep't of Envtl. Mgmt.* 820 N.E.2d 771, 780 (Ind. App. 2005).

13. Does IDEM's standard practice constitute a rule? A "rule" is defined in Ind. Code § 4-22-2-3(b) as:

> The whole or any part of an agency statement of general applicability that:
> (1) has or is designed to have the effect of law; and
> (2) implements, interprets, or prescribes:
> (A) law or policy; or
> (B) the organization, procedure, or practice requirements of an agency.

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[6] The Petitioner asserts in Burns Harbor's Post-Hearing Brief that it proposed a sampling program composed of three types of sampling. However, this ELJ does not recall any testimony about this three-part program. On the contrary, this ELJ asked the Petitioners to clarify which portions of the sampling they opposed and the Petitioners responded that they opposed the requirement of a permit and did not specify which sampling they would be willing to undertake.

[7] A copy of the policy was attached to a Motion in Limine filed the day before the hearing by the Petitioners. The IDEM did not attempt to introduce this policy into evidence therefore, no ruling was made on the Motion in Limine.

14. It is clear that this practice is meant to be a rule. It is intended to have the effect of law and implements the requirements of the applicable statutes in Title 13. It does not relate solely to IDEM's internal procedures or organization.

15. Ind. Code § 13-14-1-11.5 allows the IDEM to use policies if they have been published in accordance with the procedures set out in this statute. IDEM presented no evidence that the standard practice that it used in this case was either promulgated as a rule or published as a non rule policy document.

16. Therefore, as this policy has not been promulgated as a rule, IDEM's policy does not have the effect of law and, as it was not published in accordance with Ind. Code § 13-14-1-11.5, the IDEM erred in applying this policy against the Petitioners.[8]

17. The testimony regarding the costs of the sampling is irrelevant in that IDEM does not have to perform any cost/benefit analysis in deciding the appropriate sampling frequency.

18. The December 15, 2006 Findings of Fact, Conclusions of Law and Order ordered the parties to appear and present additional evidence regarding the appropriate monitoring. The parties have declined to do so. Further, the Petitioners, in their January 26, 2007 Objection to Re-Opened Hearing and Request for Entry of Final Agency Order assert that this ELJ does not have the authority to leave this hearing open for additional evidence. The ELJ disagrees with the Petitioners. Ind. Code § 4-21.5-3-25(c) states, "To the extent necessary for full disclosure of all relevant facts and issues, the administrative law judge shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limitation under subsection (d) or by the prehearing order." In addition, under the OEA's procedural rules, the ELJ may:

> (a) "Solicit testimony in appropriate cases" (315 IAC 1-3-1(b)(11));
> (b) "For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce: (A) testimony; (B) documents; or (C) other nonprivileged evidence; and failing the production thereof without good cause being shown, draw an adverse inference against that party (315 IAC 13-1-(b)(13));
> (c) "Do all other acts and take all measures necessary for the: (A) maintenance of order; and (B) for the efficient, fair, and impartial adjudication of issues arising; in proceedings governed by this article (315 IAC 1-3-1(b)(20)).

Until a *final* order is issued, the ELJ can order the parties to appear in order to ensure the "full disclosure of all relevant facts and issues."

19. As the parties have waived their right to appear and present further evidence, the ELJ must enter an order based upon the evidence presented thus far. The Petitioners chose not to appeal that provision in the 2000 permit which required sampling of the final

[8] It is clear from the Mr. Stenner's testimony (when he stated that he chose to require sampling 3 times per week rather than 5 times based on design flow) that he has some discretion in deciding sampling frequency.

effluent three times a week and further acquiesced to the imposition of this sampling in their post-hearing brief. Therefore, the provision in the Permit requiring that the effluent be monitored three times a week is upheld.

20. The applicable rule, 327 IAC 5-2-13, requires that the raw influent and intermediate processes be monitored at least once a year. The presumption is that this provides the minimal protection of human health and the environment. The Petitioners presented substantial evidence that this monitoring is sufficient, including; (1) the WWTP does not discharge directly to waters of the state; (2) the waste water discharged from the WWTP is tested three (3) times before being discharged to waters of the state; (3) the discharge from the WWTP accounts for less than 1% of the total discharge from the ISG Burns Harbor facility to the Little Calumet River; and, (4) there are no overflow or bypass points in the WWTP. This WWTP should only be required to monitor the raw influent and intermediate processes once a year.

21. It has been determined that monitoring is necessary; it is the frequency of monitoring that the IDEM failed to support. While the IDEM did present evidence that monitoring of any discharge to waters of the state is critical to the protection of human health and the environment, it failed to present sufficient evidence regarding why this WWTP needed to monitor the influent and intermediate processes three (3) times a week.

22. The Petitioners are required to comply with the reporting requirements of 327 IAC 5-2-15, which state, "If the permittee monitors any pollutant more frequently than required by the permit, using approved analytical methods, the results of this monitoring shall be reported in the DMR. Other monitoring data not specifically required in the permit (such as internal process or internal wastestream data) that is collected by or for the permittee need not be submitted unless requested by the commissioner. Any such additional monitoring data that indicates a violation of a permit limitation shall be followed up by the permittee, whenever feasible, with a monitoring sample obtained and analyzed pursuant to approved analytical methods. The results of the analysis of the follow-up sample shall be reported to the commissioner in the permittee's DMR."

Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that this matter is remanded to the IDEM to revise the terms and conditions of the Final Operational Permit #INJ060801 issued to the Town of Burns Harbor and ISG Burns Harbor, LLC, consistent with the Findings of Fact and Conclusions of Law as set forth above.

IT IS SO ORDERED THIS 23rd day of April, 2007.

Hon. Catherine Gibbs
Environmental Law Judge

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