
OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 46 cite this case as ***Clinton Laboratories,* 2008 OEA 46.**

TOPICS:
summary judgment
water
NPDES
SWP3
Storm Water Pollution Prevention Plant
BMP, Best Management Practices
storm water
Request for Admission
unambiguous
327 IAC 5-9-3(b)
327 IAC 15-6

PRESIDING JUDGE:
Davidsen

PARTY REPRESENTATIVES:
Petitioner: Daniel McInerny, Esq.
IDEM: Nancy Holloran, Esq.

ORDER ISSUED:
May 23, 2008

INDEX CATEGORY:
Water

FURTHER CASE ACTIVITY:
[none]

Objection to Issuance of NPDES Permit No. IN0002852, Eli Lilly and Company, Clinton Laboratories, Clinton, Vermillion County, Indiana.
2008 OEA 46 (07-W-J-3938)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTIONS TO THE ISSUANCE	)	
OF NPDES PERMIT NO. IN0002852	)	
ELI LILLY AND COMPANY	)	CAUSE NO. 07-W-J-3938
CLINTON LABORATORIES	)	
CLINTON, VERMILLION COUNTY, INDIANA.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter is before the Court pursuant to a Motion for Summary Judgment filed by Petitioner, Eli Lilly and Company ("Lilly"), as to whether NPDES Permit No. IN0002852 required a Storm Water Pollution Prevention Plan. The parties fully briefed their positions on summary judgment, and did not request oral argument. The Chief Environmental Law Judge ("ELJ") having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. On June 21, 2007, the Indiana Department of Environmental Management ("IDEM") issued NPDES Permit No. IN0002852 ("Permit") to Eli Lilly and Company ("Lilly") for its Clinton Laboratories ("Clinton Lab") facility. Part I. E. of the Permit requires Lilly to develop a Best Management Practice ("BMP") in the form of a Storm Water Pollution Prevention Plan ("SWP3") for the permitted facility within twelve months of the Permit's effective date.
2. The Clinton Lab facilities have been subject to an IDEM NPDES permit issued on October 13, 1995, modified on November 7, 1997 and May 8, 2000, and administratively extended by a renewal application on March 29, 2000.
3. As part of Lilly's Permit renewal application process, Lilly submitted Form 2C, Application for Permit to Discharge Waste from Existing Manufacturing, Commercial, Mining and Silviculture Operations. Lilly also submitted Form 2F, Application for Permit to Discharge Storm Water Discharges Associated with Industrial Activity.
4. Lilly specifically listed "rainwater" in its application as part of the discharge.
5. During the application process, IDEM did not request further information concerning the characterization of the facility's stormwater. During the litigation of this case, in its Responses to Lilly's Interrogatories, IDEM first informed Lilly that Lilly did not submit enough information to IDEM so that a characterization of Clinton Labs' storm water discharge could be completed.

6. In IDEM's responses to Lilly's Requests for Admission, a part of the record in this cause, IDEM admitted the following:

   A. Part I.E. of the Permit requires Lilly to develop a Storm Water Pollution Prevent Plan ("SWP3") for the permitted facility within twelve (12) months of the effective date of the Permit.

   B. Clinton Laboratories does not have a discharge that is composed entirely of storm water from its sole outfall, Outfall 001.

   C. Clinton Laboratories has a combined discharge of process water and storm water from its sole outfall, Outfall 001.

   D. Lilly has obtained an individual NPDES for its combined discharge from the Clinton Laboratories.

   E. The provisions of 327 IAC 15-6 are inapplicable to the Clinton Laboratories' discharge.

   F. In establishing Best Management Practices ("BMPs") in an NPDES Permit, IDEM is required to consider the six (6) factors set forth at 327 IAC 5-9-3(b)(1-6).

   G. IDEM did not conduct the analysis required pursuant to 327 IAC 5-9-3(b) to support the establishment of BMP's in the Permit.

7. On July 9, 2007, Lilly timely filed its Petition for Administrative Review and Stay of Effectiveness ("Petition"). In its Petition, Lilly sought administrative review of the SWP3 requirements on the basis that IDEM lacks legal authority to impose the SWP3 requirement in the Permit, and has requested that the Permit's Part I.E. be deleted.
8. On December 6, 2007, Lilly filed a Motion for Summary Judgment and supporting brief; IDEM responded on January 7, 2008; Lilly replied on January 16, 2008, and the parties submitted Proposed Findings of Fact, Conclusions of Law and Orders on February 4, 2008.
9. In its briefs, IDEM averred that Lilly did not submit enough information so that characterization of Clinton Lab's storm water could be completed. IDEM further averred that numeric effluent limitations for Clinton Lab's storm water discharge were infeasible, due to lack of information available to characterize the storm water and the permittee's inability to separate its discharge into components for sampling purposes (process water and storm water discharge).

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3. IC 4 21.5-3, *et seq*. and IC 4-21.5-7 allow the OEA to promulgate rules and standards in order to allow it to conduct its duties.

2. This is a Final Order issued pursuant to IC 4-21.5-3-23, IC 4-21.5-3-27, and 315 IAC 1-21(9). Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of face are so deemed.

3. In this case, Petitioner Lilly sought summary judgment in its favor, as to whether IDEM lacks legal authority to impose the SWP3 requirement in the Permit, and has requested that the Permit's Part I.E. be deleted. IDEM sought a ruling in support of the Permit as issued as numeric effluent limitations were infeasible, and that Lilly's failure to provide sufficient information to characterize the outfall's discharge, as storm water and process water were combined.

4. The OEA may enter judgment for a party if it finds that "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 judgment as a matter of law." IC 4-21.5-3-23; *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App 1998); Ind. T.R. 56(c).

5. The moving party bears the burden of establishing that summary judgment is appropriate. When the moving party sets out a *prima facie* case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. A factual issue is said to be "genuine" if a trier of fact is required to resolve the opposing parties differing versions of the underlying facts. *York v. Union Carbide Corp.,* 586 N.E.2d 861, 864 (Ind. Ct. App. 1992). A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. *Laudig v. Marion County Bd. of Voters Registration,* 585 N.E.2d 700, 703-04 (Ind. Ct. App. 1992). All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.,* 725 N.E.2d 949 (Ind.Ct.App. 2000).

6. In this case, Lilly has the burden of showing whether the permit IDEM issued either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *AquaSource Services and Technology,* 2002 OEA 41, 44. Lilly, as movant, has the burden of proof, persuasion and of going forward on its motion for summary judgment. IC 4-21.5-3-14(c); IC 4-21.5-3-23.

7. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. IC 4-21.5-3-27(d)**;** *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "*De novo* review" means that "all issues 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).

8. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also*, IC 4-21.5-3-27(d). While the parties disputed whether IDEM lacked legal authority to impose the SWP3 requirement in the Permit, and has requested that the Permit's Part I.E. be deleted, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." IC 4-21.5-3-23(b). "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 "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). 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 123, 129. *See also*, *Blue River Valley*, 2005 OEA 1, 11-12; *Marathon Point Service and Winamac Service*, 2005 OEA 26, 41.

9. In both its responses to Lilly's Request for Admissions,[1] and in its Response to Lilly's Motion for Summary Judgment (Response, page 3), IDEM admitted that Lilly's discharge is not subject to the provisions of 327 IAC 15-6 regarding storm water discharges exposed to industrial activity. Therefore, 327 IAC 15-6 cannot form the legal basis for imposing the SWP3 requirement in the Permit.

10. In its Response, IDEM stated that it based its legal authority to impose the Permit's SWP3 as a Best Management Practice on 327 IAC 5-9-3(b), which allows IDEM to establish BMP requirements in an NPDES Permit only after considering certain factors:

> In establishing BMP requirements in an NPDES Permit on a case-by-case basis as the Commissioner determines to be necessary to carry out the provisions under 402(a)(1) of the CWA, the Commissioner shall consider the following factors:
>
> (1) toxicity of the pollutant(s);
> (2) quantity of the pollutant(s) used, produced, or discharged;
> (3) history of NPDES violations;
> (4) history of significant leaks or spills or toxic or hazardous pollutants;
> (5) potential for adverse impact on public health, e.g., proximity to a public water supply or the environment, e.g., proximity to a sport or commercial fishery; and
> (6) any other factors determined to be relevant to the control of toxic or hazardous pollutants.
>
> BMP requirements which may be imposed under this subsection include, without limitation, dikes and other containment structures, storm water diversion structures and similar measures, as well as operational practices, such as periodic plant inspections, preventive maintenance and plant housekeeping.

[1] *See* Ind. Tr. R. 36. "Thus, when an admission has been obtained pursuant to T.R. 36 and not properly modified or withdrawn, the issue of whether such admission may be used at trial is not within the trial court's 'discretion'; rather, the party obtaining the admission is entitled to have the fact deemed conclusively established, and a trial court ruling to the contrary is in error." *Corby v. Swank,* 670 N.E.2d 1322, 1325 (Ind. Ct. App. 1996).

11. In response to Lilly's Request for Admission, IDEM has admitted without modification or withdrawal, thus conclusively establishing as a matter of law, that in establishing BMPs in an NPDES permit, IDEM is required to consider the six factors set forth in 327 IAC 5-9-3(b)(1-6), and that IDEM did not conduct the analysis required pursuant to 327 IAC 5-9-3(b) to support the establishment of BMP's in the Clinton Lab Permit.

12. IDEM's contention that 327 IAC 5-9-3(b) should be interpreted to allow IDEM to impose the SWP3 in the Permit as a BMP, without conducting the requisite analysis contained in the rule, since Lilly did not provide the needed information, is contrary to the unambiguous terms of the rule. Not all of the rule-provided considerations depend upon information available to characterize the storm water and the permittee's inability to separate its discharge into components for sampling purposes (process water and storm water discharge).[2] Nor is 327 IAC 5-9-3(b) ambiguous; as such, it is not subject to judicial interpretation. *Blair v. Gettinger,* 105 N.E.2d 161, 168; 230 Ind. 588, 603 (1952).

13. 327 IAC 5-9-3(b) further requires IDEM to consider the factors stated within the rule, in order to impose BMP's in the Permit. As IDEM has established by Admission and Responsive argument, it did not do so. Therefore, IDEM lacked legal authority to include the SWP3 requirement in the Permit, Part I.E.

14. On Lilly's Motion for Summary Judgment, Lilly has provided substantial evidence required to meet its burden of showing that permit IDEM issued did not comply with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Lilly is entitled to judgment as a matter of law that IDEM err in including the SWP3 requirement in the NPDES Permit, Part I.E.

FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Petitioner Eli Lilly and Company has provided substantial evidence required to meet its burden of showing that NPDES Permit No. IN0002852 did not comply with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Lilly is entitled to judgment as a matter of law that IDEM err in including the SWP3 requirement in the NPDES Permit, Part I.E.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner Eli Lilly and Company's Motion for Summary Judgment is **GRANTED.** Judgment is entered in favor of Eli Lilly and Company and against Respondent Indiana Department of Environmental Management. Petitioners' Petition for Review is therefore **DISMISSED.** All further proceedings before the Office of Environmental Adjudication are hereby **VACATED.**

IT IS FURTHER ORDERED that this Final Order shall be made a permanent part of the IDEM file for NPDES Permit No. IN0002852, and that Permit Part I.E. is void and of no effect.

[2] While IDEM may have elected to request further information about Lilly's discharge of "rainwater" from combined storm water and process water, a determination of the disputed issues between the parties does not require that the Court interpret 327 IAC 5-9-3(b) to require IDEM to do so.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, 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 is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5, *et seq*. 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 THIS 23rd day of May, 2008.

Hon. Mary L. Davidsen
Chief Environmental Law Judge