

**Objection to Issuance of NPDES Permit No. IN0025640,  
City of Mishawaka, St. Joseph County, Indiana.  
2008 OEA 70 (06-W-J-3801)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2008 OEA 70 cite this case as  
*City of Mishawaka, 2008 OEA 70.*

**TOPICS:**

summary judgment  
NPDES  
*E. coli*  
effluent  
disinfection  
Michigan  
St. Joseph River  
recreational  
non-recreational  
water quality standards  
40 C.F.R. §122.4  
TMDL  
TMDL study  
327 IAC 5-2-11.5(a)  
WQBEL

**PRESIDING JUDGE:**

Gibbs

**PARTY REPRESENTATIVES:**

Respondent: Frederic P. Andes, Esq., Erika Powers, Esq., David Ballard, Esq.  
IDEM: Sierra Cutts, Esq.

**ORDER ISSUED:**

July 9, 2008

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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6. The Petition set out six (6) proposed issues for hearing.
7. The parties have entered into an Agreed Order which resolves five (5) issues. This Agreed Order was approved by this Court on January 16, 2008.
8. The sole remaining issue is the subject of the motions for summary judgment filed by the parties. That issue is whether the IDEM has a basis for requiring year-round disinfection of the effluent.
9. The IDEM bases its determination that the year-round disinfection is necessary on two (2) grounds: (1) 40 C.F.R. §122.4 of the Clean Water Act (“CWA”) and (2) the joint MDEQ<sup>1</sup>/IDEM TMDL<sup>2</sup> study.
10. The St. Joseph River flows into Michigan. The river has been designated as impaired for recreational uses due to the presence of elevated levels of *E. coli* in both Indiana<sup>3</sup> and Michigan.<sup>4</sup>
11. Indiana does not have water quality standards for *E. coli* during the non-recreational months. Michigan has a water quality standard for *E. coli* that applies year-round.
12. The Joint MDEQ/IDEM TMDL study included data collected by the IDEM and by Indiana cities that discharge to the St. Joseph River. Of the twenty-seven sites sampled in the St. Joseph TMDL Watershed, seventeen sites were sampled during Michigan’s non-recreational season. Of these seventeen sites, six of the sites would have violated Michigan’s non-recreational season *E. coli* water quality standards.<sup>5</sup>
13. The disinfection is necessary to ensure that the City’s discharge does not contribute to or cause a violation of Michigan’s water quality standards.

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<sup>1</sup> Michigan Department of Environmental Quality

<sup>2</sup> Total maximum daily load

<sup>3</sup> Page 1 of 13, Indiana Department of Environmental Management Total Maximum Daily Load for Escherichia coli (*E. coli*) in St. Joseph River, St. Joseph and Elkhart Counties, Indiana, February 28, 2004, Exhibit D to the City’s Motion for Summary Judgment.

<sup>4</sup> Page 1, Michigan Department of Environmental Quality, Total Maximum Daily Load for Escherichia coli for the St. Joseph River Berrien County, September 2003, Exhibit C to the City’s Motion for Summary Judgment.

<sup>5</sup> Page 2 of 14, Indiana Department of Environmental Management Total Maximum Daily Load for Escherichia coli (*E. coli*) in St. Joseph River, St. Joseph and Elkhart Counties, Indiana, February 28, 2004, Exhibit D to the City’s Motion for Summary Judgment.

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2008 OEA 70 (06-W-J-3801)**

**Conclusions of Law**

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) and the parties to this controversy pursuant to IC 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to IC 4-21.4-3-27. 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. This Court 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, IC 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.*; “*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).
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. The moving party bears the burden of establishing that summary judgment is appropriate. 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). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).”
5. 40 C.F.R. §122.4 provides, in pertinent part, that no NPDES permit may be issued “When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States”.
6. It is reasonable for the IDEM to impose this condition of year-round disinfection upon the City given the circumstances, that is, (1) that the City’s discharge is to a river that flows into another state (Michigan); (2) that the river is impaired for *E. coli*; (3) that the affected state (Michigan) has water quality limitations for *E. coli* that apply year-round; and (4) that the MDEQ/IDEM TMDL study showed that Michigan’s non-recreational season water quality standards have been exceeded.

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2008 OEA 70 (06-W-J-3801)**

7. The City argues that 327 IAC 5-2-11.5(a) requires the Commissioner to make a determination that the City's discharge has a "reasonable potential to cause or contribute to an excursion above any applicable narrative criterion or numeric water quality-based effluent limitation" and that the IDEM has no data that supports a determination that there is a reasonable potential to exceed the water quality standards of Indiana or Michigan during the non-recreational season.
8. 327 5-2-11.5(a) states:
  - (a) If the commissioner determines that a pollutant or pollutant parameter (either conventional, nonconventional, a toxic substance, or whole effluent toxicity (WET)) is or may be discharged into the Great Lakes system at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any applicable narrative criterion or numeric water quality criterion or value under 327 IAC 2-1.5, the commissioner shall incorporate water quality-based effluent limitations (WQBELs) in an NPDES permit that will ensure compliance with the criterion or value. The commissioner shall exercise best professional judgment, taking into account the:
    - (1) source and nature of the discharge;
    - (2) existing controls on point and nonpoint sources of pollution;
    - (3) variability of the pollutant or pollutant parameter in the effluent; and
    - (4) where appropriate, dilution of the effluent in the receiving water.

In all cases, the commissioner shall use any valid, relevant, representative information pertaining to the discharge of the pollutant.
9. Under the plain language of 327 IAC 5-2-11.5, the commissioner may establish a WQBEL for a pollutant if he determines that there is a reasonable potential to cause or contribute to an excursion. This does not require the commissioner to make that determination for every individual entity that may discharge to the affected waters. It is logical that the IDEM would look to the cumulative affect of all discharges in determining whether a reasonable potential exists within a watershed such as the St. Joseph Watershed, rather than looking at each individual discharge.
10. No argument has been made that the IDEM has singled out the City for special treatment or that the IDEM does not require every entity that discharges to the St. Joseph River to comply with the same or similar condition.
11. Because IDEM must ensure that NPDES permits comply with standards in affected states and because the IDEM had a reasonable basis for requiring year-round disinfection, this condition is proper.
12. There is no genuine issue as to any material fact and summary judgment is appropriate.

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**Final Order**

**AND THE COURT**, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED**. The City of Mishawaka's Motion for Summary Judgment is **DENIED**. The Petition for Administrative Review is **DISMISSED**.

You are hereby further notified that pursuant to provisions of IC 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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. 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 9th day of July, 2008 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge