

**Objection to Denial of Section 401 Water Quality Certification
IDEM No. 2007-583-66-MTM-A, COE NO. LRL-2007-66-cmh
Relocation of Mill Creek, Mill Creek Conservancy District
Rochester, Pulaski County, Indiana
2009 OEA 150, 08-W-J-4194**

TOPICS:

Section 401 Water Quality Certification (WQC)
United States Army Corps of Engineers (the Corps)
Motion to Dismiss
Motion for Summary Judgment
stream relocation
after-the-fact authorization
regional general permit
denial
adequate application
plan
removal
fill material
restoration of Mill Creek
additional time to comply
restoration requirement
litigation in Pulaski County
fill characterization
pollutants
waiver

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Denise A. Walker, Esq.
Petitioner: Greg Heller, Esq.; Burke & Heller

ORDER ISSUED:

November 18, 2009

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	

IN THE MATTER OF:)	
)	
OBJECTION TO THE DENIAL OF)	
SECTION 401 WATER QUALITY CERTIFICATION)	
IDEM NO. 2007-583-66-MTM-A)	
COE NO. LRL-2007-66-cmh)	CAUSE NO. 08-W-J-4194
RELOCATION OF MILL CREEK)	
MILL CREEK CONSERVANCY DISTRICT)	
ROCHESTER, PULASKI COUNTY, INDIANA)	

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER**

This matter having come before the Court on the Indiana Department of Environmental Management’s Motion to Dismiss for Failure to State a Claim or, In the Alternative, Motion for Summary Judgment, which pleading is a part of the Court’s record; and the Court, being duly advised and having read the pleadings and motion, now enters the following findings of fact, conclusions of law and final order:

FINDINGS OF FACT

1. The Mill Creek Conservancy District (the District) sought after-the-fact authorization from the United States Army Corps of Engineers (the Corps) for the relocation of 200 linear feet of a portion of Mill Creek stream, located in the Southwest ¼ of Section 22, Township 30 North, Range 1 West, near Winamac, Pulaski County, Indiana. The Corps informed the District that this work was covered under the Regional General Permit, but that the District needed to obtain a Section 401 Water Quality Certification (Section 401 WQC) from the Indiana Department of Environmental Management (the IDEM).
2. The work was completed September 5-6, 2005 and included the removal of an oxbow, removal of a cottonwood tree, seeding the work area and establishing cover (the Project).
3. On July 21, 2007, the District applied for a Section 401 WQC for the Project from the IDEM.
4. The IDEM notified the District that the application was deficient on July 27, 2007. Between July 2007 and October 2008, the District and the IDEM communicated regarding the information needed by the IDEM in order to approve the Section 401 WQC.

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5. On October 23, 2008, the IDEM issued its Denial of the Section 401 WQC for the Project (the Denial). The Denial was based on the District's failure to submit an adequate application. The Denial requires the District to submit a plan for the removal of the fill material and restoration of Mill Creek within sixty (60) days of the date of the Denial.
6. The District filed its Petition for Review and Petition for Stay of the Denial on November 10, 2008.
7. The District's Petition for Review requests additional time to comply with the restoration requirement. The District states 2 reasons for this request: (1) the Project is the subject of litigation in Pulaski County and (2) the District needs additional time to characterize the fill to determine if pollutants are present.
8. The District presented the IDEM with the results of the fill material characterization in December 2008.
9. A prehearing conference was held on December 23, 2008, with both the IDEM and the District participating by counsel via telephone. The parties moved to submit a status report in sixty (60) days to allow them additional time to discuss settlement. The Court issued an order for a status report to be filed on or before February 26, 2009. No status report was filed.
10. A stay of the effectiveness of the Denial has not been ordered.
11. The IDEM filed its Motion to Dismiss for Failure to State a Claim or, In the Alternative, Motion for Summary Judgment on July 10, 2009. The Court issued an Order Scheduling Response on August 13, 2009. The District did not file a response.

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 I.C. § 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 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). 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:

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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. In reviewing a motion to dismiss, “a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party.” *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806, 814 (Ind. 2004).
5. 315 IAC 1-3-2(b)(4) states that a petition for review shall:
State with particularity the legal issues proposed for consideration in the proceedings as follows:
(A) In a case involving an appeal of a permit, identify the following:
 - (i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.
 - (ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.
6. The District does not contend that the Denial was improperly issued, rather the District requests additional time to comply with the terms of the Denial. As the District has not challenged the issuance of the Denial, this issue is waived. The Denial was properly issued.
7. The District challenges certain terms of the Denial, specifically, the time allowed for restoration of Mill Creek. The District alleges that the fact that litigation involving the Project is proceeding in another forum is sufficient cause for this Court to modify the terms of the Denial.
8. As IDEM correctly points out, the litigation in Pulaski County does not present a legal basis for the extension of time. The District would not prevail under any set of facts admissible under the Petition. Dismissal of the Petition for Review is proper in relation to this allegation.

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9. 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.” I.C. § 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).”
10. The District also requested additional time to perform an analysis of the fill material removed as part of the Project.
11. While the need for time in which to characterize the fill material may be sufficient reason to modify the terms of the Denial, this task has been completed. Therefore, this no longer serves as sufficient reason to modify the terms of the Denial. Summary judgment is proper as no genuine issue of fact exists relating to this allegation.

FINAL ORDER

AND THE COURT, being duly advised, **GRANTS** the IDEM’s Motion to Dismiss and Motion for Summary Judgment and **ORDERS, ADJUDGES AND DECREES** that this matter is **DISMISSED**.

You are hereby further notified that pursuant to provisions of I.C. § 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 I.C. § 4-21.5. Pursuant to I.C. § 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 18th day of November, 2009 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge