

**Objection to the Issuance of NPDES Permit No. IN0022373  
Town of Bloomfield Wastewater Treatment Plant, Bloomfield, Boone County, Indiana  
2009 OEA 16, (07-W-J-3983)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2009 OEA 16, cite this case as  
*Town of Bloomfield Wastewater Treatment Plant, 2009 OEA 16.*

**TOPICS:**

Final hearing  
NPDES  
waters of the state  
oxbow lake  
lake  
waste stabilization pond  
phosphorus  
exemption  
built for reduction or control of pollution  
I.C. § 13-11-2-265(b)(3)

**PRESIDING ENVIRONMENTAL LAW JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: Nancy Holloran, Esq.  
Petitioner: S. Curtis DeVoe, Esq., Amy E. Romig, Esq.;  
Plews, Shadley, Racher & Braun, LLP

**ORDER ISSUED:**

March 20, 2009

**INDEX CATEGORY:**

Land

**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 ISSUANCE OF NPDES	)	
PERMIT NO. IN0022373	)	
TOWN OF BLOOMFIELD	)	CAUSE NO. 07-W-J-3983
WASTEWATER TREATMENT PLANT	)	
BLOOMFIELD, GREENE COUNTY	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER  
DENYING PETITIONER’S PETITION FOR ADMINISTRATIVE REVIEW**

This matter comes before the Office of Environmental Adjudication (“OEA”) on the Petition for Administrative Review and Request for Stay filed by Petitioner, Town of Bloomfield (“Bloomfield”), on September 10, 2007. The presiding Environmental Law Judge (“ELJ”) has reviewed the record in this matter and conducted a final hearing where both parties presented witness testimony and evidence. Being duly advised, the ELJ now makes the following findings of fact and conclusions of law and enters the following Final Order with respect to Bloomfield’s Petition:

**FINDINGS OF FACT**

1. Bloomfield discharged its sewage into a waste stabilization pond from 1959 until 2004.
2. The waste stabilization pond is an “oxbow lake” to the West Fork of the White River.
3. Sometime in the late 1980’s or early 1990’s, Bloomfield dug out the lake to expand its size from roughly twenty (20) acres to roughly twenty-seven (27) acres.
4. Bloomfield also made improvements to the lake by adding and/or strengthening the retaining wall on the south end of the lake.
5. In 2002, Bloomfield began construction on a new wastewater treatment facility (“WWTP”). Construction was completed and Bloomfield began using the new WWTP in 2004.
6. The Indiana Department of Environmental Management (“IDEM”) issued a new NPDES permit for Bloomfield on September 23, 2002 (“2002 Permit”). The 2002 Permit expired on August 31, 2007.
7. Between 2002 and 2004, Bloomfield continued to use the waste stabilization pond until construction of the new WWTP was complete. The 2002 Permit did not contain any effluent limitations or monitoring requirements for phosphorous for these years.

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8. Upon the completion of the new WWTP, the 2002 Permit required monitoring for phosphorus and established effluent limitations for phosphorous at 1.0 mg/L.
9. On August 22, 2007, IDEM issued a renewal NPDES permit for Bloomfield (“2007 Permit”) which contained the same effluent limitation and monitoring requirements for phosphorous as the 2002 Permit.
10. Both the 2002 and 2007 Permits noted the receiving water of the outfall consists of an “unnamed tributary to an oxbow lake to the West Fork of the White River.” The oxbow lake is less than 2 miles from the new WWTP.
11. On September 10, 2007, Bloomfield filed a Petition for Administrative Review and Request for Stay.
12. A final hearing was held on March 10, 2009.

**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. This is a Final Order issued pursuant to I.C. § 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). 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:

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).

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envntl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES Permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-32.5-3-27(d). OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” I.C. § 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

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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 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. 327 IAC 5-10-4 addresses effluent limitations applying “to all POTWs [publicly owned treatment works] or other sanitary discharges directly to lakes or reservoirs” and contains a phosphorous limit not to exceed one (1.0) milligram per liter. 327 IAC 5-10-4(a)(4).
6. “Waters of the state of Indiana’ or ‘waters of the state’ has the meaning set forth in IC 13-11-2-265” 327 IAC 5-1.5-72.
7. “Waters’, for purposes of water pollution control laws and environmental management laws, means:
  - (1) the accumulations of water, surface and underground, natural and artificial, public and private; or
  - (2) a part of the accumulations of water; that are wholly or partially within, flow through, or border upon Indiana.
    - (b) The term “waters” does not include:
      - (1) an exempt isolated wetland;
      - (2) a private pond; or
      - (3) an off-stream pond, reservoir, wetland, or other facility built for reduction or control of pollution or cooling of water before discharge. I.C. § 13-11-2-265.
8. The terms “lake” and “reservoir” are not defined in 327 IAC 5 or I.C. § 13-11-2.
9. The NPDES permit system is a national permit program for the discharge of pollutants and imposing and enforcing pretreatment requirements by the EPA and authorized states under the Clean Water Act. EPA decisions provide persuasive authority useful for defining terms undefined by Indiana statute or regulation.
10. The EPA has dealt with the definition of “lake”. In *In the Matter of: Mr. C.W. Smith, Mr. Grady Smith, & Smith’s Lake Corporation*, 2004 EPA ALJ LEXIS 128 (United States Environmental Protection Agency, Office of Administrative Law Judges, July 15, 2004), the decision states “However, neither the term "lake" nor "pond" is defined in the EPA's regulations. The Corps of Engineers has defined the term "lake" in its regulations governing Section 404 permits, at 33 C.F.R. Part 323. The term lake means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream,

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or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.” 33 C.F.R. 323.2(b).

11. Under the definition of lake as set out in 33 C.F.R. 323.2(b), the oxbow lake is a standing body of water that occurred due to the natural cutoff of the West Fork of the White River.
12. Further, the oxbow lake does not fall within an exemption under I.C. § 13-11-2-265(b). The oxbow lake was and is a naturally occurring lake that Bloomfield was approved to use as a treatment facility in 1959; and, while the lake was used for the reduction of pollution and modified to make it more effective in that capacity, it was not built expressly for the purpose of reducing or controlling pollution. The waste stabilization pond started as a natural lake and reverted to that purpose once the new WWTP was built.
13. The phosphorous limitation contained in 327 IAC 5-10-4(a)(4) applies to Bloomfield’s WWTP’s discharge into the oxbow lake.

**FINAL ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Petitioner, Town of Bloomfield’s Objection to Issuance of NPDES Permit No. IN0022373 containing phosphorous effluent limitations is hereby **DENIED**.

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 20th day of March, 2009 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge