

**Objection to the Denial of Application Voluntary Remediation Program for  
IDEM State Cleanup Site #201232030  
Plymate, Inc.  
Shelbyville, Shelby County, Indiana  
2014 OEA 24, (14-S-J-4696)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2014 OEA 24 cite this case as  
*Plymate, Inc., 2014 OEA 24.*

**TOPICS:**

EPA

moratorium

good faith offer

special notice letter

general notice letter

enforcement action

guidance document

Summary Judgment

hazardous substance

Voluntary Remediation (VRP)

42 U.S.C. 9622(e)

I.C. § 13-11-2-67(b)(2)(B)

I.C. §13-25-4

I.C. § 13-25-5-5

**PRESIDING JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: April Lashbrook, Esq.

Petitioners: Brent Huber, Esq., Nicholas B. Reuhs, Esq.; Ice Miller LLP

**ORDER ISSUED:**

October 30, 2014

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITIES:**

[none]

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Site. The IDEM informed Plymate that failure to provide the information within the specified time period could constitute a violation of the Indiana environmental management laws and could subject Plymate to civil penalties. In addition, the IDEM informed Plymate that it was a responsible party, as defined by CERCLA and I.C. § 13-25-4-8, and was responsible for financing or conducting investigations of the Site and/or cleaning up the Site and for reimbursing the IDEM for costs incurred by the IDEM in responding to the release. Plymate was also notified that it was required to undertake specified interim site response activities.

3. The November 21, 2012 Letter advised Plymate that if it was willing to conduct the response actions at the Site, that it “may be eligible to enter into an agreed order with the IDEM that specifies how and when remedial activities will be conducted.”<sup>2</sup> No draft of an agreed order was attached nor did the IDEM offer a moratorium on response activities until such time as an agreed order could be negotiated. Plymate was not given a deadline for making a good faith offer of settlement.
4. After receiving the November 21, 2012 Letter, Plymate’s consultant, EnviroForensics, conducted a preliminary subsurface investigation and vapor intrusion assessment activities.
5. In a June 12, 2013 letter, Plymate submitted these investigation results to IDEM, but noted that additional investigation of the Site was necessary.<sup>3</sup>
6. On December 10, 2013 Plymate submitted an application for entry into the Voluntary Remediation Program (“VRP”) for the Site.
7. In response, the IDEM sent an e-mail to Plymate on December 26, 2013 informing Plymate that further testing was required before IDEM could allow Plymate to participate in the VRP because the site was not adequately delineated. Specifically, IDEM expressed the need for vertical delineation within the source area; additional information to evaluate the potential for man-made preferential pathways along utility lines and maps that could be used by the Risk Services Section to determine if an unsuitable risk to human health exists; groundwater monitoring wells installed in accordance with 312 IAC 13-8-3 along with quarterly monitoring; and a second round of vapor intrusion monitoring.<sup>4</sup>

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<sup>2</sup> Petitioner Plymate’s May 22, 2014 Designation of Evidence in Support of its Motion for Summary Judgment, Exhibit B, p. 2.

<sup>3</sup> Petitioner Plymate’s May 22, 2014 Designation of Evidence in Support of its Motion for Summary Judgment, Exhibit C, p. 3.

<sup>4</sup> Respondent IDEM’s May 22, 2014 Motion for Summary Judgment, Exhibit 6.

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8. The IDEM officially rejected Plymate's VRP application on January 9, 2014 on the sole ground that an enforcement action was pending. Specifically, the IDEM stated that it considered the November 21, 2012 Letter to be substantially equivalent to a special notice letter issued under 42 U.S.C. 9622(e). No other enforcement action was noted. The IDEM did not cite to a failure to include the information requested in the December 26, 2013 email as a reason for the rejection.
9. Plymate timely submitted its Petition for Review and Adjudicatory Hearing on January 23, 2014.
10. The IDEM and Plymate submitted cross motions for summary judgment on May 22, 2014; responses were filed by both parties on June 23, 2014; replies were filed on July 18, 2014. Oral argument was held on August 21, 2014. By order of the ELJ, the IDEM filed its supplemental affidavit on August 29, 2014 and Plymate filed its response on September 5, 2014.

**Applicable Law**

The OEA 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 environmental law Judge (the "ELJ"), and deference to the IDEM's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). Rather, IDEM actions are to be reviewed using the standard set forth by I.C. § 4-21.5-5-14.

The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "**Summary Judgment** should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law." *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005). The moving party bears the burden of establishing that summary judgment is appropriate. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). 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. 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). "The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion*

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*County Bd. of Voters Registration*, 585 N.E.2d 700, 704, 1992 Ind. App. LEXIS 141 (Ind. Ct. App. 1992).

In *Dana Corp. v. IDEM*, No. 94-S-J-1142, 1997 WL 297777 (OEA May 9, 1997) the presiding ELJ concluded that the IDEM had the burden of proving a *prima facie* case concerning its denial of a VRP application. Specifically, the OEA noted that, “IDEM has the burden of demonstrating a *prima facie* case in support of its rejection of the VRP application. I.C. § 4-21.5-3-14(c).” I.C. § 4-21.5-3-27(c) requires the ELJ to consider prior final orders and must state the reasons for deviating from those orders.

For Plymate to prevail in this matter, it must be determined that the IDEM erroneously rejected Plymate’s VRP application. Therefore, the question of when the IDEM may reject an application becomes relevant. I.C. § 13-25-5-5 states, in relevant part, “(a) The department [IDEM] may reject an application submitted under section 2 of this chapter only for one (1) or more of the following reasons: (1) A state or federal enforcement action that concerns the remediation of the hazardous substance or petroleum described in the application is pending.”

An enforcement action, for purposes of I.C. § 13-25-5, includes a “written notice of violation that requires the removal or remediation of petroleum or hazardous substance and that is: (B) substantially equivalent to a special notice letter issued under 42 U.S.C. 9622(e).”<sup>5</sup>

The IDEM has argued that the November 21, 2012 Letter is substantially equivalent to a Special Notice Letter issued under 42 U.S.C. 9622(e) and therefore, Plymate’s application was properly denied because the Site was the subject of a pending enforcement action. 42 U.S.C. 9622 is part of CERCLA<sup>6</sup>, which, in part, authorizes the U.S. EPA to take action in response to the release of hazardous substances. Certain sections of CERCLA provide U.S. EPA with the authority take unilateral action to address a release of hazardous substance and to collect response costs. Section 9622 authorizes settlements between PRPs and the U.S. EPA, states when settlements are appropriate and the terms of such settlements. This law sets out the process for entering into settlements, including but not limited to, the effect and enforcement of such a settlement, the conditions necessary for a covenant not to sue, and provides for de minimis settlements. Subsection (e) sets out the process for issuing special notice letters (SNL), including, but not limited to, establishing a moratorium on unilateral action to allow the PRPs time to make a good faith offer and begin settlement negotiations with U.S. EPA. It is clear, then, that the main purpose behind Section 9622 is to facilitate agreements between the government and the PRPs.

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<sup>5</sup> I.C. § 13-11-2-67(b)(2)(B).

<sup>6</sup> Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, *et seq.*

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I.C. § 13-25-4 *et seq.* is the Indiana equivalent of CERCLA. Under this chapter, the IDEM is authorized to either issue an order<sup>7</sup> or ask a court for an order<sup>8</sup> compelling a responsible person to take appropriate actions in response to a release of hazardous substances. The IDEM can take the response actions if necessary.<sup>9</sup> Further, the IDEM can enter into an agreement with the responsible person concerning remedial action.<sup>10</sup>

**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 this controversy pursuant to I.C. § 4-21.5-7-3.
2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-27. 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. Trial Rule 56(C) provides in pertinent part that “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered upon less than all the issues or claims.”
4. The issue regarding who has the burden of proof must be addressed first. Plymate argues that the IDEM has the burden of presenting a *prima facie* case in support of its rejection of Plymate’s VRP application. Plymate cites to an OEA case, *Dana Corporation Wayne County, Indiana*, Cause No. 94-S-J-1142, 1997 WL 297777 (OEA, May 9, 1997). This case is before the ELJ on cross motions for summary judgment. It is clear from case law<sup>11</sup> that the party seeking summary judgment has the burden of proving that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. In this case, as both the IDEM and Plymate are seeking summary judgment, each must present sufficient evidence to prove that summary judgment in their favor is appropriate. So, it is correct that, as a movant, the IDEM has the burden to prove that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. But it is equally true that Plymate has the same burden as it too filed for summary judgment.

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<sup>7</sup> I.C. § 13-25-4-9(b)

<sup>8</sup> I.C. § 13-25-4-9(a)(1).

<sup>9</sup> I.C. § 13-25-4-9(a)(2).

<sup>10</sup> I.C. § 13-25-4-23.

<sup>11</sup> See cases cited above in Applicable Law.

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IDEM State Cleanup Site #201232030  
Plymate, Inc.  
Shelbyville, Shelby County, Indiana  
2014 OEA 24, (14-S-J-4696)**

5. The presiding ELJ ordered the IDEM to file a supplemental affidavit after oral argument that addressed the question of what level of priority this site was. In accordance with the IDEM's own policy<sup>12</sup>, if the site was low priority, then the Site should have been accepted in the Voluntary Remediation Program. However, if the Site was medium or high priority, then acceptance into the VRP would be within the IDEM's discretion. The IDEM's supplemental affidavit stated that this Site was medium priority. Therefore, the supplemental affidavit does not resolve the question of whether the IDEM erroneously determined that Plymate was not eligible for the VRP.
6. The IDEM argues that it is more appropriate to wait until the investigation at this Site has been completed before allowing Plymate to enter the VRP. However, the IDEM does not cite this as a reason for rejecting Plymate's application in its January 9, 2014 rejection notice. Instead, it relies solely on the assertion that Plymate is the subject of an enforcement action. Even though it is not cited as a reason for the rejection, the ELJ will briefly analyze the IDEM's argument. The IDEM's argument that further investigation is necessary before the Site is eligible for the VRP is not supported by either the statute or the guidance documents. Neither the EPA guidance nor the IDEM's Remediation Program Guide<sup>13</sup> state that SNLs cannot or should not be issued for the investigation into the nature and extent of the contamination or for the RI/FS. The VRP statute is clear that investigations may be conducted under the VRP.<sup>14</sup> The IDEM's argument that this Site is not eligible for VRP because further investigation is necessary is not supported by the law or guidance.
7. The Indiana legislature is clear that the IDEM may reject an application to the VRP if the applicant has received a letter that was "substantially equivalent to a special notice letter issued under 42 U.S.C. 9622(e)."<sup>15</sup> The first step, then, is to determine whether the November 21, 2012 letter is the substantial equivalent to a special notice letter under Section 9622(e). It is clear from the plain language of Section 9622 that its purpose is to facilitate agreements between U.S. EPA and the PRPs for the investigation and remediation of the release of hazardous substances.

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<sup>12</sup> Remediation Program Guide (February 2012 With Corrections Up to July 9, 2012), Policy Number WASTE-0600-NPD, attached as Exhibit 9, IDEM's Response to Plymate's Motion for Summary Judgment, filed June 23, 2014.

<sup>13</sup> Remediation Program Guide (February 2012 with Corrections Up to July 9, 2012), Policy Number WASTE-0600-NPD.

<sup>14</sup> See I.C. § 13-25-5-7.

<sup>15</sup> I.C. § 13-11-2-67(b)(2)(B).

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Plymate, Inc.  
Shelbyville, Shelby County, Indiana  
2014 OEA 24, (14-S-J-4696)**

8. Subsection (e) specifically provides for a moratorium on response actions and requires the PRPs to make a good faith offer of settlement. While the IDEM may enter into agreements with PRPs to undertake an investigation or remedial action, I.C. § 13-25-4-9 does not provide for a moratorium on action by the IDEM. However, the Indiana legislature specified that the letter that is the basis for the enforcement action must meet the requirements of 9622(e), not the requirements of I.C. § 13-25-4-9. The fact that the IDEM's statutory authority under I.C. § 13-25-4 does not specifically provide for a moratorium is not persuasive.
9. It is necessary to compare the November 21, 2012 Letter to the requirements for a special notice letter issued under Section 9622(e). First, it must be noted that the November 21, 2012 Letter is titled "Special Notice Letter". However, it is evident that this is insufficient to prove that it is substantially equivalent to a SNL.<sup>16</sup>
10. Both parties point to the U.S. EPA guidance document<sup>17</sup> which sets out the elements for a general notice letter and a SNL. Specifically, the guidance states the purpose of the general notice letter is "to inform PRPs of their potential liability for future response costs, to begin or continue the process of information exchange, and to initiate the process of informal negotiations."<sup>18</sup> The guidance lists the contents of a general notice letter<sup>19</sup> as:
  - a) A notification of potential liability for response costs;
  - b) A discussion about future notices and the possible future use of special notice procedures;
  - c) A general discussion about site response activities
  - d) A request for information about the site (if appropriate);
  - e) The release of certain site-specific information (where available)
  - f) A discussion about the merits of forming a PRP steering committee;
  - g) A notice regarding the development of an administrative record; and
  - h) A deadline for response to the letter and information on the EPA representative to contact.

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<sup>16</sup> "We have often indicated a preference of substance over form. See, e.g., *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998) [13] (holding that a motion should have been treated as a motion to correct error despite its caption as a motion to reconsider); *MDM Investments v. City of Carmel*, 740 N.E.2d 929, 933-934 (Ind. Ct. App. 2000) (treating a "Motion to Reopen Proceedings and Notice of Exceptions to Appraiser's Report" as a motion for relief from judgment under Ind. Trial Rule 60(B))." *Goodrich v. Dearborn County (In re Sale of Real Prop.)*, 822 N.E.2d 1063, 1069, 2005 Ind. App. LEXIS 277, 12-13 (Ind. Ct. App. 2005).

<sup>17</sup> Superfund Program; Notice Letters, Negotiations and Information Exchange, 53 FR 5298, February 23, 1988, attached as Exhibit 8, Transmittal of Notice Letter Guidance, IDEM's Response to Plymate's Motion for Summary Judgment, filed June 23, 2014.

<sup>18</sup> Exhibit 8, page 7, Transmittal of Notice Letter Guidance, IDEM's Response to Plymate's Motion for Summary Judgment, filed June 23, 2014.

<sup>19</sup> Exhibit 8, page 9, Transmittal of Notice Letter Guidance, IDEM's Response to Plymate's Motion for Summary Judgment, filed June 23, 2014.



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2014 OEA 24, (14-S-J-4696)**

11. The November 21, 2012 Letter includes the following elements of a general notice letter: (a) A notification of potential liability for response costs; (c) a general discussion about site response activities; (d) a request for information; and (h) a deadline for a response and information on the IDEM contact.
12. The same guidance states that the purpose of a SNL is to trigger a moratorium on U.S. EPA's unilateral performance of the RI/FS and remedial action. "The purpose of the moratorium is to provide for a formal period of negotiation between EPA and PRPs where the PRPs will be encouraged to conduct or finance response activities."<sup>20</sup> The guidance lists the contents of a special notice letter<sup>21</sup> as:
- a) A notification of potential liability;
  - b) A discussion about the special notice and subsequent negotiation moratorium;
  - c) A discussion about the response activities to be conducted;
  - d) A copy of a statement of work or workplan and a draft administrative order on consent for the RI/FS (remedial investigation/feasibility study);
  - e) A copy of the draft consent decree for the RD/RA (remedial design/remedial action);
  - f) A discussion of what constitutes a "good faith offer" for the RI/FS;
  - g) A discussion of what constitutes a "good faith offer" for the RD/RA;
  - h) A release of certain site-specific information (where available and appropriate);
  - i) A demand for payment of EPA costs incurred to date;
  - j) A notification about the administrative record;
  - k) A deadline for response to the letter and the name of the EPA representative to contact.
13. The November 21, 2012 Letter includes the following elements of a SNL: (a) a notification of potential liability; (c) a discussion about the response activities to be conducted; (i) a demand for payment of EPA costs incurred to date; and (k) a deadline for a response to the order to provide information relating to hazardous substances at the Site and information on the IDEM contact.
14. Both letters contain some of the same elements, but it is the statement of purpose that provides the most guidance. The purpose of the general notice letter is to inform responsible parties of their possible liability and to begin the exchange of information. A general notice letter, as contemplated by the EPA guidance, includes a request for information. Plymate is ordered to provide information relating to the hazardous substances at the Site the in the November 21, 2012 Letter. Failure to comply with this request for information can lead to an enforcement action including the assessment of penalties. But the November 21, 2012 Letter

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<sup>20</sup> Exhibit 8, page 11, Transmittal of Notice Letter Guidance, IDEM's Response to Plymate's Motion for Summary Judgment, filed June 23, 2014.

<sup>21</sup> Exhibit 8, page 19, Transmittal of Notice Letter Guidance, IDEM's Response to Plymate's Motion for Summary Judgment, filed June 23, 2014.

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IDEM State Cleanup Site #201232030  
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Shelbyville, Shelby County, Indiana  
2014 OEA 24, (14-S-J-4696)**

also asks for additional information and for Plymate to perform certain response actions. However, these are requests with no specified deadline. There is no threat of enforcement action in the event Plymate fails to perform these additional activities.

15. Further, while the EPA guidance makes the point that a general notice letter should be issued at the vast majority of sites<sup>22</sup>, the guidance goes into a lengthy discussion about if and when it is appropriate to issue the SNL. In this case, the November 21, 2012 Letter was issued within 27 days of the reported release. No significant work had been completed by this time. The IDEM did not have the information necessary to conduct the analysis, as contemplated by the EPA guidance, of whether a SNL was appropriate.
16. Most significantly, the November 21, 2012 Letter does not include an offer to enter into negotiations for an agreement relating to the response activities. The purpose of 9622(e) is to encourage settlements. It is not critical that the November 21, 2012 Letter does not offer a moratorium on IDEM action nor is it persuasive that IDEM's statutory authority does not mention a moratorium. Section 9622(e) sets out other procedures, such as the requirement of a good faith offer to settle, that the IDEM has the authority to act on. It is critical that the November 21, 2012 Letter does not include an offer to enter into negotiations for settlement. As this is the primary purpose of 9622(e), in order for any letter to be considered substantially equivalent, it must contain such an offer. While the November 21, 2012 Letter does mention that settlement may occur sometime in the future, there is no request for a good faith offer; no discussion of what constitutes a good faith offer; no deadline for entering into negotiations; nor is a draft agreement attached.
17. The November 21, 2012 is substantially similar to the general notice letter, but not the special notice letter described in 42 U.S.C. 9622(e). For any letter to be deemed substantially equivalent to a SNL, it must, at a minimum, offer the responsible party an opportunity to begin settlement negotiations and provide substantive guidance on how such negotiations should proceed.
18. The IDEM denied Plymate's application to the VRP for one reason: that there was a pending enforcement action. This was based on the November 21, 2012 Letter. As the November 21, 2012 Letter is not substantially equivalent to a special notice letter issued under 42 U.S.C. 9622(e), it does not qualify as an enforcement action. As this was the sole reason cited for rejecting Plymate's VRP application, the IDEM erred in rejecting Plymate's VRP application.

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<sup>22</sup> Transmittal of Notice Letter Guidance, October 19, 1987, 35 FR 5298, at 5301, Exhibit 8, Transmittal of Notice Letter Guidance, and IDEM's Response to Plymate's Motion for Summary Judgment, filed June 23, 2014.

**Objection to the Denial of Application Voluntary Remediation Program for  
IDEM State Cleanup Site #201232030  
Plymate, Inc.  
Shelbyville, Shelby County, Indiana  
2014 OEA 24, (14-S-J-4696)**

19. Plymate has presented sufficient evidence that there are no genuine issues of material fact and that Plymate is entitled to judgment as a matter of law. Summary judgment should be granted in favor of Plymate. Plymate is eligible to participate in the VRP under I.C. § 13-25-5 *et seq.*

**FINAL ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Plymate's Motion for Summary Judgment is **GRANTED**. Judgment is entered in Plymate's favor. The IDEM shall consider Plymate to be eligible to participate in the VRP under I.C. § 13-25-5 *et seq.*

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 30th day of October, 2014 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge