**Objection to Issuance of NPDES General Permit No. ING490141 to
Americus Quarry
Lafayette, Tippecanoe County, Indiana
2015 OEA 12, (14-W-J-4746)**

OFFICIAL SHORT CITATION NAME: When referring to 2015 OEA 12 cite this case as ***Americus Quarry*, 2015 OEA 12.**

TOPICS:

wastewater discharge
sand
gravel
dimensional stone
crushed stone operations
NPDES (National Pollution Discharge Elimination System)
general permit
permit by rule
dewatering
process water
business
sulfur
Judgment on the Pleadings
pleadings deemed closed
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factual issue
assertions opinions, conclusions of law
corporate entity
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exceed regulatory requirements
future violations
flaws inherent in the facility plans
I.C. § 4-21.5-3-7(a)
315 IAC 1-3-2(e)
327 IAC 15-12
Ind. Trial Rule 12(C)
Huffman

PRESIDING JUDGE:
Mary L. Davidsen

PARTY REPRESENTATIVES:

Petitioner:	Rebecca R. Sargent, *pro se*
Permittee/Respondent:	Michael R. Hartman, Esq., Andrew S. Gutwein, Esq., Christopher D. Shelmon, Esq.
IDEM:	Sierra L. Alberts, Esq.

ORDER ISSUED:
May 19, 2015

INDEX CATEGORY:
Water

FURTHER CASE ACTIVITY:
[none]

Objection to Issuance of NPDES General Permit No. ING490141 to
Americus Quarry
Lafayette, Tippecanoe County, Indiana
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STATE OF INDIANA) BEFORE THE INDIANA OFFICE
) OF ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)

N THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
NPDES GENERAL PERMIT NO. ING490141 TO)
AMERICUS QUARRY)
LAFAYETTE, TIPPECANOE COUNTY, INDIANA)
____) CAUSE NO. 14-W-J-4746
Rebecca R. Sargent,)
Petitioner,)
Americus Quarry,)
Permittee/Respondent,)
Indiana Department of Environmental Management,)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Office of Environmental Adjudication ("OEA" or "Court") on Petitioner Rebecca R. Sargent's August 1, 2014 Petition for Administrative Review of a National Pollution Discharge Elimination System general permit ("Permit") issued on July 15, 2014 to Americus Quarry. In sum, the Permit authorizes Americus Quarry to discharge process wastewater from its quarry operation into the Wabash River, via two outfall structures. Americus Quarry seeks dismissal, initiated through its October 21, 2014 Motion for Judgment on the Pleadings.

The Chief Environmental Law Judge ("ELJ"), having considered the petition, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief 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 July 15, 2014, the Indiana Department of Environmental Management ("IDEM") approved Americus Quarry's June 3, 2014 application for a National Pollution Discharge Elimination System ("NDPES") general permit ING490141 ("Permit") for Americus Quarry to discharge process wastewater from its quarry operation into the Wabash River, via two specified outfall structures. *Permit, Ex. A, Rogers Group, Inc.'s October 28, 2014 Answer to Rebecca Sargent's Petition for Administrative Review; Application, Ex. B, Id.* In its application and in this litigation, Americus Quarry acted through its consultant, Rogers Group, Inc. ("Rogers") (collectively, Americus Quarry and Rogers will be referred to as

Permittee/Respondent in this Final Order). The permitted facility is at 8032 Old State Road 25, Lafayette, Tippecanoe County, Indiana. *Id*.

2. In sum, the Permit is a NPDES general permit, or "permit by rule". As permittee, Americus Quarry is required to comply with requirements stated in 327 IAC 15-12, *et seq.*, Wastewater Discharge Associated with Facilities engaged in Sand, Gravel, Dimensional Stone, or Crushed Stone Operations; these regulations are deemed to be terms of the Permit.

3. On August 1, 2014, Petitioner Rebecca Sargent ("Ms. Sargent"), representing herself without legal counsel, timely sought administrative review[1] of the Permit.

4. In her Petition, Ms. Sargent asserted (emphasis and highlighting omitted):

    - Effect of the IDEM action on me. I am part owner in Wolfe's Leisure Time Campground which is located south – downstream on the Wabash River – of the proposed quarry in Americus. We have 130 total camping sites, 96 of which we provide with water from our well.
    - The General Permit in question allows dewatering and process water removal from the proposed quarry site in order to dump it into the Wabash River. This will financially harm the campground in a number of ways. A study done by a local non-profit company states that the dewatering and removal processes could adversely affect my well. My water supply is very likely to be reduced, dry up, or smell of sulphur as a result of these operations. This permit places no restrictions on the amount of water Rogers can draw from the aquifer for dewatering and processing and no restrictions upon how much of it they dump into the Wabash.
    - We also run a boat launch on the Wabash River. We have no clear idea from Rogers about the volume of water to be pumped back into the Wabash. It is likely people may have trouble entering the river with their boats because dumping water into the Wabash will affect the current and will create eddies and turbulence in the river. Furthermore, silt will be stirred up and adversely affect the appearance of the river, which may cause them to seek a launch elsewhere. All of this is very likely to damage my business and cause me financial harm.
    - Reason IDEM was wrong issuing this permit – IDEM was wrong to issue this permit without considering the effects of the water drawdown on local residents and local businesses. They have also not considered the effect of the dumping of this quantity of water into the Wabash River.
    - Proposed Changes to the IDEM Permit – As previously stated, a local non-profit group ran a computer simulation which showed the effects of dewatering at various levels of water removal. It showed any removal for dewatering or processing of water at a level of over 300,000 gallons per day will result in drawdown to wells in the area. I feel the quarry should be limited to this value.

[1] Randall E. Deno's August 1, 2014 Petition for Administrative Review was voluntarily dismissed on October 1, 2014.

> Additionally, this computer simulation was conducted without knowing the specific hydraulic conductivity (permeability) and pumping rates on the proposed site. We believe the Rogers Group possesses this information and we are requesting said information to assure the accuracy of our model.

5. At the September 2, 2014 Prehearing Conference, the Court granted Petitioner Sargent 30 days to amend her Petition, and ordered the parties to file a Status Report by November 3, 2014. *September 3, 2014 Report of Prehearing Conference, Order Continuing Stay Hearing and Order to Submit Status Report*.

6. On October 21, 2014, Permittee/Respondent filed its Answer to Sargent's Petition, a Motion for Judgment on the Pleadings, and supporting brief.

7. The Court's October 27, 2014 Order Scheduling Briefing set forth the following deadlines for responses:

November 20, 2014:	Petitioner Sargent's Responses due
December 7, 2014:	Permittee/Respondent's Reply due; requests for oral argument due
December 20, 2014:	Proposed findings of fact, conclusions of law and order due; if oral argument is held, this date will be extended 15 days after oral argument is conducted.

8. Permittee/Respondent's November 3, 2014 Status Report, filed by legal counsel, stated, "On November 3, 2014, Petitioner informed Rogers Group that she intended to dismiss her petition sometime during the week of November 3, 2014."[2]

9. Ms. Sargent did not file an amended petition, nor any other filings in this cause. She did not seek an extension of time or leave from submitting further filings.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq*. Rebecca Sargent ("Sargent"), as Petitioner *pro se*, timely filed her petition for administrative review. The Office of Environmental Adjudication ("OEA" or "Court") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq*.

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[2] Per Ind. Tr. R 11(A), "[t]he signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay. . . For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action." Therefore, OEA may assume that the submitting attorney believes this statement to be true.

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. In its Motion for Judgment on the Pleadings, Permittee/Respondent Americus Quarry – Roger Group seeks to dismiss Petitioner Sargent's Petition for Administrative Review. Judgment on the pleadings, per Ind. Trial Rule 12(C), may be sought after the pleadings are closed. In this case, more than thirty days have passed since the time when Petitioner Sargent could amend her Petition as a matter of right. 315 IAC 1-3-2(e). Petitioner Sargent did not respond to the Court's September 3, 2014 Order for filing an amended petition, nor has she obtained leave of Court or the parties' written consent to amend her Petition. Per 315 IAC 1-3-2(e), the pleadings in this cause are deemed closed.

4. T.R. 12(C) provides:

   After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

   See In Re: Great Lakes Transfer Station, 2011 OEA 73, 77 – 78.

5. "A motion for judgment on the pleadings tests the sufficiency of the complaint to state a redressable claim, not the facts to support it. *Steele v. McDonald's Corp.*, 686 N.E.2d 137, 141 (Ind. Ct. App. 1997), trans. denied. The test to be applied is whether the allegations of the complaint, taken as true and in the light most favorable to the non-movant and with every intendment regarded in his favor, sufficiently state a redressable claim. *Id*. When the pleadings present no material issues of fact and the facts shown by the pleadings clearly entitle a party to judgment, the entry of judgment on the pleadings is appropriate. *Mirka v. Fairfield of America, Inc.*, 627 N.E.2d 449, 450 (Ind. Ct. App. 1994), trans. denied." *Book v. Hester*, 695 N.E.2d 597, 599 (Ind. Ct. App. 1998); *City of Indianapolis v. Kahlo*, 938 N.E.2d 734, 741 (Ind. Ct. App. 2010). *See also Cristiani v. Clark Co. Solid Waste Management Dist.,* 675 N.E.2d 715, 717 (Ind. Ct. App. 1996); *Davis ex rel. Dais v. Ford Motor Co.*, 747 N.E.2d 1146, 1149 (Ind. Ct. App 2001). Under Indiana's notice pleading rules, the petitioner does not need to file a complaint which states all elements of a cause of action. *Miller v. Mem'l Hosp. Of S. Bend, Inc.*, 679 N.E.2d 1329, 1332 (Ind. 1997)(*citing State v. Rankin,* 294 N.E.2d 604, 606 (1973)). But, the petitioner is required to plead the operative facts required to set forth an actionable claim. *State v. American Family Voices, Inc.,* 898 N.E.2d 293, 296 (Ind. 2008)(*citing Trail v. Boys and Girls Clubs of N.W. Ind.*, 845 N.E.2d 130, 135 (Ind. 2006)). Written documents attached to a complaint become part of the pleadings (*See Ind. Tr. R. 9.2)*, and are appropriate for a court to review in ruling on a T.R. 12(C) motion for judgment on the pleadings, without treating the motion as a motion for summary judgment. *Gregory & Appel, Inc. v. Duck*, 459 N.E.2d 46 (Ind. Ct. App. 1984).

6. In considering Permittee/Respondent's Motion for Judgments on the Pleadings, the Court will consider Petitioner Sargent's Petition (including the attached Permit), in addition to any further responses and filings. Although the Court's October 27, 2014 scheduling order provided the parties with a "reasonable opportunity to present all material made pertinent to such a motion", Petitioner Sargent did not elect to file further responses or filings, nor did she seek extensions of time to submit further filings.

7. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. 315 IAC 1-3-10(b); *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 Environmental Law Judge ("ELJ"), I.C. § 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, 253 (Ind. Ct. App. 1981). *See also City of Hobart*, 2010 OEA 220.

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* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM's issuance of the NPDES General Permit to Americus Quarry was proper, OEA is authorized to determine whether the facts shown by the pleadings clearly entitle the Permittee/Respondent to judgment on the evidence, per T.R. 12(C). "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,* 2005 OEA 26, 41.

9. The moving party bears the burden of establishing that judgment on the evidence is appropriate. When the moving party (here, Permittee/Respondent) sets out a prima facie case in support of judgment on the evidence, the burden shifts to the non-movant (here, Petitioner Sargent) 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, 703-704 (Ind. Ct. App. 1992). All facts and inferences must be construed in favor of the non-movant. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007); *Gibson v. Evansville*

Vanderburgh Building Commission, et al., 725 N.E.2d 949 (Ind. Ct. App. 2000). *See In Re: Grahn*, 2004 OEA 40 (03-W-J-3225); *In Re: West Boggs Sewer District, Inc., 2008 OEA 142 (07-W-J-3898).*

10. Responses which are mere assertions, opinions, or conclusions of law asserted by the non-movant will not suffice to create a genuine issue of material fact. *See Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan V. Snap-On Tool Corp.* 478 N.E.2d 116, 122 (Ind. Ct. App. 1985). *See also West Boggs*, *Id.*

11. Respondent/Permittee Rogers seeks a favorable judgment on the pleadings, for the reason that Petitioner Sargent's Petition for Administrative Review fails to state a claim upon which relief can be granted.

12. Permittee/Respondent challenges whether Petitioner Sargent is aggrieved or adversely affected, so as to qualify to invoke OEA's jurisdiction for administrative review. Per I. C. § 4-21.5-3-7(a), a petitioner can seek administrative review if the petitioner is the person to whom the order is specifically directed, if the petitioner demonstrates that they are entitled to review under any law, or if the petitioner is aggrieved or adversely affected. The IDEM Permit approval was not directed to Petitioner Sargent; it was directed to Americus Quarry. Petitioner Sargent did not demonstrate a right to administrative review under a particular law. Therefore, Petitioner Sargent's right to seek administrative review must arise from her being aggrieved or adversely affected.

13. In *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806 (Ind. 2004), the Indiana Supreme Court held that:

    > "whether a person is entitled to seek administrative review depends upon whether the person is "aggrieved or adversely affected". . . and that the rules for determining whether the person has "standing" to file a lawsuit do not apply". *Id. at* 807. The Court went on to say that in order for a person to be "aggrieved or adversely affected", they "must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or personal interest." *Id. at* 810.

14. "The concept of "aggrieved" is more than a feeling of concern or disagreement with a policy' rather it is a personalized harm." *Id. at* 812. The Court further interpreted the language of I. C. § 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public.

15. In *Huffman*, Ms. Huffman had challenged the issuance of a permit to Eli Lilly and Company to discharge pollutants into Indiana's waters. Huffman owns the corporation that had one unit of and was the managing member of the corporation that owned a property adjacent to the property from which the discharge would occur. The Indiana Supreme Court disqualified Ms. Huffman's ability to seek administrative review, based on alleged harm to the interests of the corporation in which she held an interest, if the corporate entity was not a party to the

petition for administrative review. *Id. at* 814. As Ms. Huffman had alleged that her management duties of the neighboring property required her to be present on the property with frequency, and thus she might be exposed to health risks not addressed by the permit issued by IDEM, the Indiana Supreme Court remanded Huffman's case back to OEA to provide Huffman with an opportunity to present additional evidence of her health concerns. *Id. at* 815.

16. In this case, Petitioner Sargent's petition asserts claims of potential harm to Wolfe's Leisure Time Campground, Inc., ("Wolfe's), a corporation in which she holds an ownership interest. However, Wolfe's is not a party to this cause. The bulk of Petitioner Sargent's Petition does not demonstrate a personalized harm, nor does it establish that she suffered or is likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or personal interest. Even if adverse affects suffered by Wolfe's would be inflicted on its part owner, Petitioner Sargent, *Huffman* specifically applied established corporate case law to instruct OEA that harm to the corporation did not constitute a sufficient personalized harm to the individual corporate member. In her Petition, Petitioner Sargent contends, "My water supply is very likely to be reduced, dry up, or smell of sulphur as a result of these operations." But, as this statement is included in a paragraph describing harms to the Wolfe's campground, it is reasonable to conclude that Petitioner Sargent is not describing a personalized harm to herself. As Petitioner Sargent has not demonstrated that she, not Wolfe's, is aggrieved or adversely affected, Petitioner Sargent has not invoked the right to seek administrative review of the Permit.

17. Assuming, for sake of argument, that Petitioner Sargent had established that she, not Wolfe's, was aggrieved and adversely affected so as to invoke the Court's jurisdiction, her Petition would have to raise redressable claims to survive Respondent/Permittee's dispositive motion. *See In Re: Elrod Water Co.*, 2009 OEA 43.

18. As Permittee/Respondent's T.R. 12(C) Motion notes, the permit must comply with 327 IAC 15-12, *et seq.*, which states requirements for discharges from sand, gravel, dimensional stone, and crushed stone operations which utilize sedimentation basin treatment for: (1) pit dewatering; (2) channel machines; (3) broaching; (4) jet piercing; (5) scrubber water from wet scrubbers used for air pollution control; (6) dust suppression spray water; (7) wash water from spray bars for final screening operations; and (8) noncontact cooling water from cooling of crusher bearings, drills, saws, dryers, pumps and air compressors. Per 327 IAC 15-12-7(a), the discharge shall not: (1) have a monthly average of Total Suspended Solids greater than 30 milligrams per liter, or (20 have a Daily Minimum pH less than 6.0 or a Daily Maximum pH greater than 9.0. Per 317 IAC 15-12-7(b), the discharge: (1) shall not cause excessive foam in the receiving waters, (2) shall be essentially free of floating and settleable solids, (3) shall not contain oil or other substances in amounts sufficient to create visible film or sheen on the receiving waters, an (4) shall be free of substances that are in amounts sufficient to be unsightly or deleterious or which produce color, odor, or other conditions in such a degree as to create a nuisance.

19. As Permittee/Respondent notes, Petitioner Sargent's Petition alleges concerns over water volume, potential drawdown and sulfur odor for Wolfe's and neighboring wells and water supply, and outfall turbulence impacting an access point (although their relative proximity is not disclosed). The petitioned issues exceed the Permit's regulatory requirements. Neither IDEM nor OEA may require an applicant to include information or perform actions in excess of those required by law. *See In Re: Elrod Water Co.*, 2009 OEA 43; *In Re: Lykins*, 2007 OEA 114. Petitioner Sargent's contentions that the Permit should exceed regulatory requirements do not state a redressable claim.

20. When her petitioned contentions are examined in a light most favorable to Petitioner Sargent, as non-movant, contentions such as "[m]y water supply is very likely to be reduced, dry up, or smell of sulphur as a result of these operations" provide only "mere assertions, opinions, or conclusions of law asserted by the non-movant" which "will not suffice to create a genuine issue of material fact." *See Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan V. Snap-On Tool Corp*. 478 N.E.2d 116, 122 (Ind. Ct. App. 1985). *See also West Boggs*, *Id.* For lack of evidence supporting a factual issue, the assertions, opinions and conclusions of law stated in the Petition remain unsupported, and do not state a redressable claim.

21. When her petitioned contentions are examined in a light most favorable to Petitioner Sargent, as non-movant, Petitioner Sargent may be alleging that Permittee/Respondent might not comply with Permit conditions or legal requirements. However, OEA is expressly prohibited from overturning an IDEM permit on the basis of alleged future violations. *See In Re: Illinois Mining Co.*, 2010 OEA 86. Petitioner Sargent does not state a claim redressable by OEA through her contentions that future violations of the Permit and incorporated standards in 327 IAC 15, *et seq*., may occur.

22. To the extent that Petitioner Sargent is inferring that flaws inherent in the facility plans prevent its lawful operation, she has failed to provide sufficient evidence in support of that inference. *See In Re: Illinois Mining Co.*, *Id*.

23. In its Motion for Judgment on the Pleadings, Permittee/Respondent has established a prima facie case that the allegations of the Petition, taken as true and in the light most favorable to the non-movant, Petitioner Sargent, and with every intendment regarded in her favor, fails to sufficiently state a redressable claim. Petitioner Sargent did not met her burden to establish a factual issue. When the pleadings present no material issues of fact and the facts shown by the pleadings clearly entitle a party to judgment, the entry of judgment on the pleadings is appropriate. Permittee/Respondent is entitled to judgment on the evidence.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Permittee/Respondent Americus Quarry, by its consultant Rogers Group, Inc.'s Motion for Judgment on the Evidence is **GRANTED**. Petitioner Rebecca R. Sargent's Petition for Administrative Review is **DISMISSED** with prejudice. NPDES General Permit No. ING490141 issued to Americus Quarry is **AFFIRMED.** All further proceedings are **VACATED.**

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 19th day of May, 2015 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge