

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

OFFICIAL SHORT CITATION NAME: When referring to 2016 OEA 34 cite this case as
Northern Indiana Public Service Company, 2016 OEA 34.

TOPICS:

dismissal
aggrieved
adversely affected
amendment
water quality certification
wetland
US ACE
failure to state a claim
Huffman
Kunz
notice
comment
Motion to Strike
T.R. 12(B)
T.R. 12(B)(6)
I.C. §4-21.5-5(f)
3 USCS §1341(a)(1)

PRESIDING LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Elizabeth Admire, Esq.
Petitioner: Chou-il Lee, Esq.; Jeffrey D. Stemerick, Esq.; Taft Stettinius & Hollister
Permittee: Daniel Deeb, Esq.; Schiff Hardin

ORDER ISSUED:

October 4, 2016

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

4. The Project would “permanently convert a total of 13.29 acres of forested/scrub wetland to emergent wetland and temporary filling impact to 0.092 acres of scrub shrub wetland and 480 linear feet (0.07-acres) of stream. Temporary impacts were to consist of stream crossings and timber mat placement. No permanent fill was proposed throughout the project corridor.”¹
5. As mitigation, NIPSCO would compensate the Nature Conservancy of Indiana for the purchase, enhancement and protection in perpetuity of two tracts of land with a combined area of 253.9 acres. The conversions will be mitigated by the establishment of 22 acres of emergent and forested wetland on one tract and 91 acres of wetland and 140 acres of upland, consisting of various forms of wet/mesic prairie creation, pin oak flatwoods creation, emergent wetland creation, Oak barrens creation/restoration and dry prairie creation on both tracts.
6. Between September 24, 2015 and October 11, 2015, IDEM caused public notice to be given in local newspapers regarding a modification to the WQC. The Modification consisted of “a total of 12.817-acres of Forested/ScrubShrub wetland conversion to emergent wetland within the proposed right-of-way, a permanent culvert to be placed within 0.003-acres of scrub shrub wetland, temporary culvert placement within two (2) streams, and permanent culvert placement within 23 streams totaling 23 streams 500 linear feet of impact.” No changes were proposed to the mitigation. Interested persons were invited to comment on the proposed modification no later than October 15, 2015.
7. On October 15, 2015, the Petitioner, by his counsel, provided comments to IDEM. In his comments, the Petitioner requested that IDEM review specific parcels of land for the presence of wetlands. In addition, he complained that the comment period was not long enough for him to provide additional evidence that the Project would impact unidentified wetlands on his property. There is no evidence that the Petitioner provided this evidence before the WQC was issued.
8. On November 23, 2015, (“IDEM”) approved the modifications to the WQC (the “Modification”).
9. Counsel for the Petitioner requested notification of the issuance of the Modification. However, IDEM did not notify the Petitioner or his counsel. On January 22, 2016, the Petitioner’s counsel asked IDEM about the status of the modified WQC. IDEM responded on the same date with notice of the WQC. The Petitioner then filed his petition for review on February 8, 2016.

¹ Public Notice No. 2014-198-91-MBS-A, Exhibit D to Respondent NIPSCO’s Motion to Dismiss, filed on March 23, 2016.

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

10. The Petitioner claims to be aggrieved or adversely affected by the issuance of the WQC because he is the owner of property which “contains wetlands that are erroneously not identified in the Certification.”² He alleges that the WQC will authorize NIPSCO to fill in these wetlands without properly mitigating their loss resulting in harm to the aesthetic value of the property, installation of large electric transmission lines on the wetlands and will change migratory bird patterns over his property. He further alleges that IDEM erroneously issued the WQC without notifying him and without giving him an opportunity to comment.
11. NIPSCO filed its Motion to Dismiss on March 23, 2016. The Petitioner filed his response on May 2, 2016. NIPSCO then filed its reply on May 20, 2016. NIPSCO and the Petitioner filed proposed orders on June 3, 2016. This matter was transferred to Environmental Law Judge Catherine Gibbs on August 29, 2016.
12. In his response to the motion, the Petitioner moved to strike portions of NIPSCO’s brief and the attachments as “matters outside of the pleading.” In the alternative, the Petitioner requested an extension of time in which to conduct discovery.

CONCLUSIONS OF LAW

1. The OEA has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to Indiana Code (I.C.) § 4-21.5-7, *et seq.*
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. NIPSCO moves to dismiss this cause and alleges that (1) the Petitioner is not aggrieved or adversely affected and (2) the Petitioner has failed to state a claim upon which relief can be granted.
4. A motion to dismiss for lack of standing should be treated as a motion to dismiss for failure to state a claim under Ind. Rules of Trial Procedure 12(B)(6). *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806, 813 (Ind. 2004)

² William Babchuk’s Petition for Administrative Review and Adjudicatory Hearing, filed February 8, 2016, page 2, paragraph 1.

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

5. A T.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind. Ct. App. 2003). 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* at 814.

I. Is the Petitioner aggrieved or adversely affected?

6. The *Huffman* court addressed the definition of “aggrieved or adversely affected.” *Huffman* had challenged the issuance of a permit to Eli Lilly and Company to discharge pollutants into Indiana's waters. *Huffman* owned 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 lower courts dismissed *Huffman*'s objection to the issuance of the permit because of a lack of factual support for the allegations that *Huffman* or the property might be harmed. *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. In response, the permittee alleged that due to the downstream location of the discharge point, no impact to *Huffman* was possible. *Huffman*'s petition was challenged by a motion to dismiss supported by facts outside *Huffman*'s pleadings, and thus was required to be treated by the Court as a Motion for Summary Judgment. The Indiana Supreme Court ruled that *Huffman*'s dismissal by the lower courts was not supported by substantial evidence.
7. The Court held that “Essentially, to be “aggrieved or adversely affected,” a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest.” The Court defined “aggrieved” as “[A] substantial grievance, a denial of some personal or property right or the imposition upon a party of a burden or obligation. . . The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal.” *Huffman* at 810.
8. Under *Indiana Office of Environmental Adjudication, Department of Environmental Management v. Kunz*, 714 N.E.2d 1190, 1196 (Ind. Ct. App. 1999), the court addressed the issue of what level of specificity is required in a petition for review.

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

It is, of course, well settled that administrative pleadings are to be liberally construed and amended.” *Brock v. Dow Chemical U.S.A.*, 920 F.2d 1351, 1360 (7th Cir. 1990). A complaint in an administrative proceeding need not “enumerate precisely every event to which a hearing examiner may finally attach significance.” *L.G. Balfour Co. v. Federal Trade Comm’n*, 442 F.2d 1, 19 (7th Cir. 1971). Rather, the purpose of the administrative complaint is to give the responding party notice of the charges against him. *Id.* Reversal shall not occur absent evidence that a party is misled by an administrative complaint, resulting in prejudicial error. *Id.*

9. NIPSCO argues initially that the Petitioner has failed to show that he is aggrieved or adversely affected by the Modification. It is clear that if the IDEM decision in question is a Modification of the WQC, then the Petitioner may only seek review of the changes to the WQC made by the Modification. A petition for review of any other action occurring prior to the issuance of the Modification would be barred as untimely.
10. There are factual issues regarding the scope of the Modification. The Modification does not specify which property will be affected by the changes. The Petitioner argues that this is not a modification but is a whole new certification thereby allowing the Petitioner another chance to challenge whether all affected wetlands had been properly identified. IDEM and NIPSCO call this a modification. However, the parties have failed to provide sufficient evidence for the ELJ to determine whether it is a modification or a new certification. It is not possible to determine from the information provided whether the changes to the WQC either (1) affect the alleged unidentified parcels of wetlands or (2) are significant enough to require a new WQC. There are only the Petitioner’s allegations that he is aggrieved or adversely affected and NIPSCO’s representations that the Modification does not change the initial determination of how the Project affects the Petitioner.
11. It is clear from the face of the Petition and NIPSCO’s own admission, the Petitioner owns land which will be affected by the Project. Under the standard for dismissal as set out in *Huffman*, the Petition sets out sufficient detail to support Petitioner’s claim that he is aggrieved or adversely affected.
12. The Petitioner argues that NIPSCO’s motion contains matters outside of the pleading and should not be considered. In the alternative, the Petitioner seeks an extension of time in which to conduct discovery to rebut the factual material provided by NIPSCO. In reaching the conclusion regarding whether the Petitioner is aggrieved or adversely affected, the ELJ has not considered any material attached to the motion or outside of the petition for review and, therefore, denies the Petitioner’s motion to strike or for an extension of time regarding this issue.
13. The Motion to Dismiss should be denied as to whether the Petitioner is aggrieved or adversely affected.

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

II. Has the Petitioner stated a claim upon which relief can be granted?

14. NIPSCO further argues that the Petitioner has not stated a claim upon which relief can be granted. The standard for dismissal on this basis is stated above.

A. Was IDEM required to identify the alleged wetlands?

15. NIPSCO was required to obtain a Section 404 permit from the USACE for the activities proposed as part of Project. Prior to obtaining the permit, NIPSCO had to get certification from IDEM that the activities that NIPSCO proposed would comply with all requirements. Pursuant to 33 USCS § 1341(a)(1):

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act [33 USCS §§ 1311, 1312, 1313, 1316, 1317].

16. No statute authorizes IDEM to determine whether an area is “navigable water” or a wetland³. IDEM acknowledges their lack of authority and recognizes this division of labor. On its website, IDEM states “The U.S. Army Corps of Engineers has the responsibility of making wetland determinations and determining the limits of federal jurisdiction.”⁴

17. The WQC states “Based on the available information, it is the judgment of this office that the proposed project will comply with the applicable provision of 327 IAC 2 and Sections 301, 302, 303, 306, and 307 of the Clean Water Act if you comply with the conditions set forth below. Therefore, subject to the following conditions, the Indiana Department of Environmental Management (“IDEM”) hereby grants Section 401 Water Quality Certification for the project...”⁵ The WQC contains no language that indicates that IDEM made or could make any conclusions regarding the delineation of wetlands on the proposed project route.

18. As IDEM does not have the authority to take the actions that the Petitioner requests, the Motion to Dismiss should be granted.

³This applies to wetlands subject to federal jurisdiction.

⁴See <http://www.in.gov/idem/wetlands/2352.htm>

⁵Section 401 Water Quality Certification, page 2, Exhibit A, William Babchuk’s Petition for Administrative Review and Adjudicatory Hearing

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

B. Does IDEM's failure to provide the Petitioner with notice provide a basis for objecting to the Modification?

19. The Petitioner alleges that he did not receive notice of the Modification. However, this would only be grounds for relief if an opposing party asserts that the petition was not timely filed. Neither IDEM nor NIPSCO has moved to dismiss this case on the basis that the petition for review was not timely filed.

20. Further, I.C. § 4-21.5-5(f) states:

(f) If a petition for review and a petition for stay of effectiveness of an order described in subsection (a) has not been filed, the order is effective fifteen (15) days (or any longer period during which a person may, by statute, seek administrative review of the order) after the order is served. If both a petition for review and a petition for stay of effectiveness are filed before the order becomes effective, any part of the order that is within the scope of the petition for stay is stayed for an additional fifteen (15) days. Any part of the order that is not within the scope of the petition is not stayed. The order takes effect regardless of whether the persons described by subsection (b)(5) or (b)(6) have been served. An agency shall make a good faith effort to identify and notify these persons, and the agency has the burden of persuasion that it has done so. The agency may request that the applicant for the order assist in the identification of these persons. Failure to notify any of these persons is not grounds for invalidating an order, unless an unnotified person is substantially prejudiced by the lack of notice. The burden of persuasion as to substantial prejudice is on the unnotified person. (Emphasis added)

21. IDEM's failure to provide the Petitioner with notice of the issuance of the Modification is not grounds to invalidate the Modification or the WQC. As the ELJ did not rely on any matters outside of the petition for review, the Petitioner's motion to strike or for an extension of time is denied regarding this issue. The Motion to Dismiss should be granted on this issue.

C. Was the Petitioner provided with an opportunity to comment?

22. T.R. 12(B) states, "If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading 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. In such case, all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

23. In considering this particular issue, the ELJ must consider the materials attached to the Motion to Dismiss. Therefore, the standard for summary judgment will be employed for this issue. 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.” 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). 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).
24. The materials provided by NIPSCO clearly show that IDEM gave public notice of the proposed Modification and provided an opportunity to comment. In fact, the Petitioner provided comments in response to the public notice. The Petitioner was given the opportunity to present evidence to rebut these facts in his response to the Motion to Dismiss, but failed to do so. Instead he requested additional time to do discovery. However, the ELJ fails to see what information the Petitioner could discover relating to this issue that he did not already possess. The Petitioner’s motion to strike or for an extension of time is denied.
25. There is no issue of fact – the Petitioner was given the chance to comment and did, in fact, do so. The Petitioner has failed to state a claim upon which relief can be granted.

III. Should the Petitioner be allowed to amend the Petition?

26. The last question is whether the Petitioner should be allowed to amend his petition. In *Kunz*, 714 N.E.2d 1190, the Court of Appeals found that the OEA erred in not allowing the petitioners an opportunity to amend the petition for review. 315 IAC 1-3-2(d) allows the ELJ to grant leave to amend a petition for review. In addition, 315 IAC 1-3-1(b)(18) allows the ELJ to apply the Indiana Rules of Trial Procedure. T. R. 12(B) provides that a pleading may be amended by right within ten (10) days after service of the court’s order dismissing a matter under T.R. 12(B)(6). The Petitioner may amend his petition for review within ten (10) days of the effective date of this Order.

**Objection to the Issuance of Section 401 Water Quality Certification for
Reynolds Electric System Improvements
IDEM No. 2014-198-91-MBS-A
Northern Indiana Public Service Company
Valparaiso, Porter County, Indiana
2016 OEA 34, (16-W-J-4878)**

ORDER

1. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that William I. Babchuk's motion to strike portions of NIPSCO's motion to dismiss or, in the alternative, for an extension of time is **DENIED**.
2. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that William I. Babchuk is aggrieved or adversely affected. NIPSCO's Motion to Dismiss is **DENIED in part**.
3. **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that NIPSCO's Motion to Dismiss for Failure to State a Claim is **GRANTED**. Pursuant to T.R. 12(B), the Petitioner, William I. Babchuk, shall amend his petition for review within ten (10) days after service of this Order. His failure to do so shall result in the entry of a final order of dismissal of this matter.

You are 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 administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of I.C. § 4-21.5 *et seq.* and other applicable rules and statutes.

IT IS SO ORDERED this 15th day of September, 2016 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge