

COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

CASE NUMBER: 2013-22079-Q

v.

LARRY & CAROL YELEY FAMILY LIMITED PARTNERSHIP

2023 OEA 129, OEA CAUSE NO.: 18-W-E-5028

Official Short Cite Name:	Yeley Family Limited Partnership, 2023 OEA 129
OEA Cause No.:	18-W-E-5028
Topics/Keywords:	Wetland
	forested
	Deposit
	Clearing
	agricultural
	Permit
	Natural Resource Conservation Service; NRCS
	Food Security Act
	Clean Water Act
	United States Army Corps of Engineers: USACE
	IDEM determination
	wetland data point
	mechanical clearing
	US Fish & Wildlife National Wetlands Inventory
	1987 USACE Delineation Manual
	2010 Midwest Regional Supplement to the 1987 Manual's instructions
	Determination
	Delineation
	Wetlands indicators
	Hydric soils
	soil maps
	Hydrotrophic vegetation
	Hydrology
	Wetlands Delineation Data Sheet
	wetland classification
	Pella, Miami soils
	Data point
	Reconsideration
	Senate Enrolled Act 389 (2021); Public Law 160 (2021)
	Unpromulgated rule
	Legislative History
	Notice of Violation; NOV
	Commissioner's Order; CO
	Civil penalty
	Potential for harm

COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

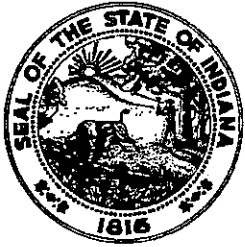
CASE NUMBER: 2013-22079-Q

v.

LARRY & CAROL YELEY FAMILY LIMITED PARTNERSHIP

2023 OEA 129, OEA CAUSE NO.: 18-W-E-5028

	Extent of deviation
	Restoration
	mitigation
	After-the-fact permit; ATF
	Burden of Proof
	I.C. § 13-11-2-25.8(b)
	I.C. § 13-11-2-265.6
	I.C. §13-11-2-265.7
	I.C. § 13-11-2-265.8
	I.C. § 13-14-1-11.5
	I.C. § 13-18, et seq.
	I.C. § 13-18-22-1(c)
	I.C. § 13-30-2-1
	I.C. § 13-30-3-9
	I.C. § 13-30-4-1
	327 IAC 2-1-6(a)(1)
	327 IAC 17-1, et seq.
	Boucher v. United States Dep't of Agriculture, 934 F.3d 530 (7th Cir. 2019).
Presiding ELJ:	Mary Davidsen, Esq.
Party Representatives:	Frank J. Deveau, Esq., Respondent/Petitioner
	Kimberly S. DalSanto, Esq., Respondent/Petitioner
	Peter H. Drumm, Esq., Respondent/Petitioner
	Sierra L. Alberts, Esq., Complainant/Respondent
Date of Order:	December 7, 2023, incorporating June 30, 2023 Order (2023 OEA 139)
Index Category:	Enforcement
Further Case Activity:	



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*
Lori Kyle Endris, *Environmental Law Judge*
Sara C. Blainbridge, *Legal Administrator*

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STATE OF INDIANA)
)
COUNTY OF MARION)
)
IN THE MATTER OF:)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 18-W-E-5028

COMMISSIONER, INDIANA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,)
Case No. 2013-22079-Q)
Complainant,)
v.)
LARRY & CAROL YELEY)
FAMILY LIMITED PARTNERSHIP,)
YORKTOWN, DELAWARE COUNTY, INDIANA,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”), by legal counsel, on pleadings addressing the Court’s June 30, 2023 Findings of Fact, Conclusions of Law and Order following a final hearing on Respondent’s Larry & Carol Yeley Family Limited Partnership’s Oct. 1, 2018 Petition for Administrative Review and Adjudicatory Hearing on the issuance of a Sept. 14, 2018 Notice and Order of the Commissioner of the Indiana Department of Environmental Management. In sum, the Court sustained the Indiana Department of Environmental Management’s allegations of unpermitted regulated wetland clearing, deposits and agricultural activity on a farm near Yorktown, Delaware County, Indiana.

The Chief Environmental Law Judge (“ELJ”), having considered the post-decision pleadings, the record of the proceedings, and prior filings, now finds that judgment may be made upon the record and testimony as to whether the Indiana Department of Environmental Management properly issued the Notice and Order of the Commissioner of the Indiana Department of Environmental Management to Larry & Carol Yeley Family Limited Partnership. The 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 as to the existence and extent of wetlands subject to IDEM regulation since May, 2011:

FINDINGS OF FACT

1. The Court’s June 30, 2023 Findings of Fact, Conclusions of Law and Order (“Order”)

issued after a final evidentiary hearing and incorporated herein by reference, sustained the Indiana Department of Environmental Management's ("IDEM") September 14, 2018 Commissioner's Order ("CO") should be affirmed, with the exception that the civil penalty was \$12,500. The CO alleged wetland is subject to enforcement for unpermitted regulated wetland clearing, deposits and agricultural activity since May, 2011, on 11.82 acres of 155.32 acre Farm #6190, Tract #578, located at S CR 600W, in Yorktown, Delaware County, Indiana ("Site"). The Larry & Carol Yeley Family Limited Partnership ("Yeley") owns an undivided half interest in the Site. (*Stipulations* ("*Stip.*"), ¶ 1.) The Site includes a 1.6-acre shallow pond, referred to by the parties as a "water feature"; its fringe has never been farmed. *Stip.* ¶ 3.

2. While this matter was pending, Indiana's legislature enacted wetland law Senate Enrolled Act 389 (2011) ("*Act*"). After the Act was adopted into law, the parties and Court discussed the Act's impact on this case, as argument was raised that portions of the Act may have retroactive application. Per agreement of the parties, the Court's Order specifically deferred issuance of a Final Order until the parties could brief the applicability of the Act, as codified, to the final determination in this case. Once administrative litigation and adjudication of the impact of the 2021 legislation concluded, then the Order provided that the Order would be incorporated into this Final Order.

3. The parties briefed the Act's applicability to the facts of this case, in compliance with the July 31, 2023 and Sept. 12, 2023 Case Management Orders. On September 1, 2023, Respondent Yeley filed its Brief on the Applicability of SEA 389 (Public Law 160) ("*Yeley's Brief*") and its Motion to Reconsider Portions of the June 30, 2023 Interim Order ("*Yeley's Motion to Reconsider*"). On Oct. 2, 2023, IDEM filed its response to both of Yeley's Sept. 1, 2023 filings. On Oct. 23, 2023, Yeley filed its reply and amended reply brief. This Final Order addresses both the applicability of SEA 389 and Yeley's Motion to Reconsider.

4. This Final Order is based upon the Findings of Fact stated in the Court's June 30, 2023 Order, The parties' subsequent issues raised in briefing are legal in nature, and will be addressed in this Final Order's Conclusions of Law.

5. Upon review of the Order, the following corrections are warranted:

- a. To p. 2, ¶ 2, referencing *Stip. Ex. 8*: the cited date of Oct. 2, 2008 should be changed to Dec. 20, 2008.
- b. To p. 6, ¶ 19: "The Delineation team observed hydrophilic vegetation and solids.", the word solids should be changed to the word soils.

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 Ind. Code § 13-13, *et seq.* 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.*

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, or Conclusions of Law that may be construed as Findings of Fact, are so deemed. This Final Order incorporates the Court's June 30, 2023 Findings of Fact, Conclusions of Law and Order. Additionally, this Final Order addresses the parties' arguments on Yeley's Motion to Reconsider and the parties' briefings as to wetlands law Senate Enrolled Act 389 (2021), as codified, applies to the final determination in this case.

3. 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); *Jennings Water, Inc. v. Office of Env'tl. Adjudication*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"), and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "The ELJ . . . serves as the trier of fact in an administrative hearing and a *de novo* review at that level is necessary. *United Refuse*, 615 N.E.2d 100, 103. The ELJ does not give deference to the initial determination of the agency." *Indiana-Kentucky Elec. Corp v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). "*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 (Ind. Ct. App. 1981).

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Ind. Office of Env'tl. Adjudication.*, 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). 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); *Gas America 347*, 2004 OEA 123, 129; *Blue River Valley Area Sanitary Sewer & Water Projects*, 2005 OEA 1, 11-12; *Marathon Point Service & Winimac Service*, 2005 OEA 26, 41.

Yeley's Reconsideration should be denied.

5. In its Sept. 1, 2023 Motion to Reconsider Portions of June 30, 2023 Interim Order, Respondent Yeley seeks the reconsideration of the Court's Order holding that Yeley waived its argument that IDEM's requirement that wetland delineations be done by the landowner, and not IDEM. Instead of waiving the issue, Yeley asks the Court to rule that IDEM's requirement is invalid as an unpromulgated rule. The 1987 Manual and 2010 Manual Supplement only describe the process for conducting a wetland delineation, not which entity is to conduct it. Respondent Yeley first raised this issue in his Sept. 1, 2022 Post-Hearing Brief and (proposed) Findings of Fact, Conclusions of Law and Judgment, and not in its unamended Petition for Administrative Review, contrary to 315 IAC 1-3-2(e). Therefore, OEA relied upon its past precedent to determine that Yeley waived this argument. *Great Lakes Transfer Station*, 2006 OEA 24, 28; *Wadesville/Blairsville WWTP*, 2022 OEA 1, 9.

6. The Court has reviewed Yeley's arguments on the issue, first raised in Yeley's Proposed Findings, etc., and argued post-hearing. Waiver notwithstanding, this Court rejected a similar argument in *Bankview Farm, II*, 2023 OEA 113, 123, 124. Specifically,

10. Bankview contends IDEM must undertake a delineation rather than make a determination regarding the presence of a wetland on the parcel. *Bankview's July 26, 2021 Post-Hearing Brief*, p. 20. In support of its argument, Bankview cites I.C. § 13-11-2-265.8 and *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 812 (Ind. 2004) (When a statute is clear, courts do not impose other constructions). Bankview states, "[h]ere the statute is clear; the presence of wetlands is determined by a wetland delineation in accordance with the Manual." *Bankview's Post-Hearing Brief*, p. 21.

11. The record in this cause does not contain a wetland delineation (unlike the JFNew Delineation in the Yeley case). I.C. § 13-11-2-265.8 defines "wetlands delineation" as follows: "wetlands delineation or delineation," means a technical assessment (1) of whether a wetland exists on an area of land; and (2) if so, of the type and quality of the wetland based on the presence or absence of wetlands characteristics, as determined consistently with the Wetlands Delineation Manual, Technical Report Y-87-1 of the United States Army Corps of Engineers." While a wetland delineation had been conducted by Bankview on its Site, Bankview successfully excluded the wetland delineation from evidence in this case.

12. Nothing in this statute requires IDEM to undertake a delineation to make its determination that a parcel is a wetland or that it must undertake a delineation before commencing an enforcement action. Bankview's belief that IDEM must conduct a full delineation to determine the presence of a wetland before it can commence an enforcement action for violations of State Regulated Wetlands Laws is not supported by the plain language of I.C. § 13-11-2-265.8.

13. Bankview contends "IDEM's unwritten policy [for determining whether a piece of land is a wetland] is an illegal rule."¹ *Bankview's Post-Hearing Brief*, p. 22. Further, "IDEM's procedure for inspecting a site for a wetland is a 'rule' because it implements or interprets Indiana law. It interprets Section 265.8 which requires a Manual delineation." *Id.* I.C. § 13-18-22-7 authorizes IDEM to create the permit application. 327 IAC 17-4-3 sets forth the permit application requirements. A person proposing to undertake wetland activities in a State Regulated Wetland is required to provide "a delineation of all wetlands on the tract" as part of the application process. 327 IAC 17-4-3(6)(B).

14. IDEM does not rely upon an unwritten policy. There exists no illegal rule that is contrary to law. IDEM employed its standard, historical practice of using the three wetland criteria used in both state and federal wetland programs to determine the presence of a wetland: hydrophytic vegetation, hydric soils, and wetland hydrology. See *U.S. Army Corps of Engineers Wetlands Delineation Manual*, pp. 6, 9 – 10.

7. Waiver notwithstanding, IDEM's requirement that wetland delineations be done by the landowner, and not IDEM, is valid and is not an unpromulgated rule. Yeley raises similar

¹Ind. Code § 4-22-2-3(b) defines a rule as "the whole or any part of an agency statement of general applicability that (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes (A) law or policy or (B) the organization, procedure, or practice requirements of an agency."

arguments to those raised in *Bankview Farm, II*. In applying those arguments to Yeley's contentions, the result is the same: IDEM applied valid regulations in requiring landowner Yeley, not IDEM, to conduct a wetlands delineation. The Court properly considered Yeley's argument waived. Even if reconsidered and not waived, Yeley's argument fails.

8. On reconsideration, Yeley disputes the Order's findings and conclusions that the wetlands in controversy were forested wetlands. Whether the wetlands qualified as forested was disputed, and on summary judgment, some arguments were based on the assumption that the wetlands so qualified. The Court's determinations on the parties' arguments and evidence was correctly stated in the Order. As will be discussed later, this Court's involvement now in determining the type or class of wetland present on the Yeley property is premature, and contrary to . Therefore, Yeley's Reconsideration should be denied.

9. On reconsideration, Yeley asks the Court to modify the Order's Finding of Fact 13, to clarify that a stipulation that the site was a forested wetland was made solely for purposes of summary judgment argument. Having reviewed the Finding 13 (which does not contain this terminology) and the Order as a whole, Finding 17 sufficiently qualifies that this fact is stated in the context of summary judgment argument. *See Finding 13, p.5; Finding 17, Id.* Yeley's Reconsideration should be denied.

10. On reconsideration, Yeley asks the Court to revise the Order to find that there was no USACE-verified delineation in this case, and to modify its Conclusions of Law and Order to delete reliance on a USACE-verified delineation. As noted in Finding 39, IDEM testimony indicated that IDEM relied upon the 2008 JFNew delineation for this Site, *see Stip. Ex. 6*, and believed that the USACE had verified the JFNew delineation. *Order, p. 9, 10, ¶ 39*. The Court agreed that the 2008 JFNew delineation was consistent with applicable regulatory manuals for the content of delineations, and with controlling case law defining wetlands characteristics. *Id., p. 13, ¶ 10*. The Record also contains a letter from USACE's Keller, which the Court found did not provide USACE verification of a wetland delineation. *Id., p. 7, ¶ 21. See Stip. Ex. 5* (USACE letter) *referencing, Stip. Ex. 6* (JFNew delineation). As the Court held, a USACE delineation verification expires after five years; here, in August, 2013. *Id., p. 14, ¶12*. A review of the record supports the Court's determination that while IDEM acted upon its belief that the Site determination was verified by USACE, but that the Record did not contain sufficient USACE verification (expired as of 2013). The Reconsideration which Yeley seeks is already a part of the Order, and should be denied.

11. For its final reconsideration request, Yeley asks the Court to specify that Yeley's expert witness Woernle disputed the presence of a wetland on-site in 2008 in the areas of the Site subject to IDEM's enforcement action. In support, Yeley draws attention to Finding of Fact 45, *Order, p. 11*, to Conclusion of Law 11, *Id., pp. 13, 14*. Yeley then asks that Conclusion of Law 11, and any other similar conclusions, should be modified to state that Woernle disputed the presence of an on-site wetland in 2008. Having reviewed the Order, and these Findings and Conclusions, the Court declines to grant reconsideration. Yeley's Reconsideration should be denied.

Statutory changes to prior law by SEA 389, Public Law 160 (2021) do not change the Court's determinations as stated in its June 30, 2023 Order.

12. Yeley's contention that SEA 389 was intended to apply retroactively to any action pending on Jan. 1, 2021, including this action, is contrary to the plain language of the relevant laws enacted to give effect to SEA 389. Specifically, I.C. § 13-18-22-1(b) and I.C. § 13-11-2-74.5(5,6) exempt Class I wetland and specified Class II wetlands from permitting and compensatory wetland mitigation, as sought here by IDEM. The plain language of these statutes does not contain reference to retroactive application of these statutes, nor does Yeley contend that they do. Instead, Yeley finds retroactivity from legislative intent. Yeley finds legislative intent from floor argument on a passed House amendment shifting the effective date from July 1, 2021 to January 1, 2021, so that "local industry" constituent of Rep. Dan Leonard (Huntington, Ind.) "would benefit from this change by avoiding mitigation costs". *Yeley's Oct. 23, Amended Brief on the Applicability of SEA 389*, p. 2, citing <https://iga.in.gov/session/2021/video/house>. Yeley notes that Rep. Leonard acknowledged that "the change in retroactivity would apply to anyone in the State, not just his constituent. *Id.* Yeley also relies upon a statement in SEA 389's Fiscal Impact Statement that "the bill will affect any judicial or administrative action not disposed before Jan. 1, 2021. *Id.*

13. The plain language of I.C. § 13-18-22-1(b), I.C. § 13-11-2-25.8 and I.C. § 13-11-2-74.5(5,6), amended by SEA 389, do not contain retroactive application which would end this cause as of Jan. 1, 2021, the statutes' effective date. When a statute is clear, courts do not impose other constructions. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 812 (Ind. 2004); *Faletti v. State*, 209 N.E.3d 456, 460, 461. Further, for purposes of statutory construction, resort to legislative history is "out of bounds". *McNeil v. Anonymous Hosp.*, 219 N.E.3d 789, 799, 800 (Ind.Ct.App. 2023).

"But our Supreme Court has said that, "[i]n interpreting statutes, we do not impute the opinions of one legislator, even a bill's sponsor, to the entire legislature unless those views find statutory expression." *Utility Center, Inc. v. City of Ft. Wayne*, 868 N.E.2d 453, 459 (Ind. 2007) (quoting *A Woman's Choice-East Side Women's Clinic v. Newman*, 671 N.E.2d 104, 110 (Ind. 1996)). In *Utility Center*, the trial court, the Court of Appeals, and our Supreme Court all declined to consider the author's intent as expressed in his affidavit, and the Supreme Court stated it was unable to conclude that the author's intent [to restrict the eminent domain powers of a municipal utility] was enacted into law. *Id.*

McNeil provided that statutory history may be applied by a Court construing an ambiguous statute. SEA 389's statutory history, as applied to this case, confirms that the legislation's effective date is January 1, 2021, instead of July 1, 2021, but does not provide that the statutes are to be applied retroactively to terminate administrative actions in progress. Had Indiana's legislature intended that laws arising from SEA 389 be applied retroactively so as to terminate pending administrative or judicial litigation, IDEM enforcement, or any other activity contemplated by the legislature, the resulting statute would need to so state to be so applied by this forum. Neither the plain language nor the Jan. 1, 2021 effective date of I.C. § 13-18-22-

1(b) and I.C. § 13-11-2-74.5(5,6) authorize retroactive application to this cause. Administrative adjudication of Yeley's case was not terminated by the January 1, 2021 effective date of statutory authority enacted via SEA 389 (2021).

14. The plain language of I.C. § 13-11-2-25.8, defining wetland classes, does express terms governing the time period concerning the statute's applicability. Specifically, "a wetland or setting is not considered undisturbed or affected as a result of an action taken after January 1, 2004 for which a permit is required under IC 13-18-22 but has not been obtained." I.C. § 13-11-2-25.8(b) (not modified by SEA 389). As this Court has held, Yeley's wetland disturbance activity resulted from action taken after Jan 1, 2004, and for which a permit was required.

15. The Commissioner's Order required Respondent to obtain an after-the-fact ("ATF") permit, or to restore the specified Site by removing all the discharged material from the wetlands and properly disposing of the fill. *Id.* at Order, ¶ 1. *See Fact.Stip.*, p. 3, ¶ 21.

- a. If the Respondent decides to restore the wetlands, a restoration plan and schedule must be submitted to IDEM. *Id.* at Order, ¶ 3.
- b. If the Respondent decides to submit an ATF permit, an application and mitigation plan must be submitted to IDEM. *Id.* at Order, ¶ 4. IDEM is requiring a 3.25:1 ratio and 10 years of monitoring at the mitigation site. *Id.*

16. As both parties have advocated, and as their witnesses have testified, the Yeley Site's specific wetland class, and the appropriate action to be taken to bring the Site into compliance are fully dependent upon the materials submitted by Yeley in support of its restoration plan or after-the-fact permit. *See* I.C. § 13-11-2-265.8; 327 IAC 17-4-3(6)(B). And, those materials, and their interpretation given by IDEM, will be subject to future administrative review. Classification by this Court is otherwise premature. Therefore, the Order provisions stating that the Site is a forested wetland will be given the professional, technical examination the Site deserves, so that the parties can determine how to proceed on-Site.

17. The Court has considered the parties' arguments on Reconsideration, and on how relevant statutes should be applied per SEA 389. Thus, the Court confirms its conclusion stated in its June 30, 2023 Order, that the Indiana Department of Environmental Management's September 14, 2018 Commissioner's Order should be affirmed, with the exception that the civil penalty is \$12,500. Larry & Carol Yeley Family Limited Partnership's October 1, 2018 Petition for Administrative Review and Adjudicatory Hearing should be denied.

FINAL ORDER

For all the forgoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Larry & Carol Yeley Family Limited Partnership's October 1, 2018 Petition for Administrative Review of the September 14, 2018 issuance of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management in Cause No. 2013-22079-Q should be **DENIED**. The Indiana Department of Environmental Management's September 14, 2018 Commissioner's Order is **AFFIRMED**, with the exception that the civil penalty assessment is

\$12,500.

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. Applicable provisions of I.C. § 4-21.5-5, et seq., state procedures available for judicial review of this Order.

IT IS SO ORDERED this 7th day of December, 2023 in Indianapolis, IN.

Hon. Mary Davidsen, Esq.
Chief Environmental Law Judge