

STATE OF INDIANA) IN THE KOSCIUSKO SUPERIOR COURT
)SS:
 COUNTY OF KOSCIUSKO) CAUSE NO. 43d01-0710-PL-894

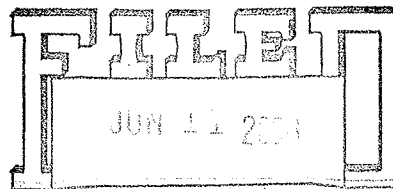
TERRY W. BLUE, NANCY L. BLUE,)
 DODGE R. ELKINS, KIMBERLY)
 ELKINS, LARRY E. DOWNS, LONDA)
 A. DOWNS, STEVEN PIPENGER,)
 ANGALINE PIPENGER, DONALD)
 FAAS, LINDA FAAS, CLAYTON R.)
 KREICKER, KATHY L. KREICKER,)
 MICHAEL A. SHEARER, SUSAN M.)
 SHEARER, CAMERON BAYNE,)
 KATHY BAYNE, and the CARL E.)
 ELLIS REVOCABLE TRUST,)

Petitioners,)

v.)

INDIANA NATURAL RESOURCES)
 COMMISSION, STEPHEN B.)
 RUFENBARGER, and CONSTANCE)
 A. RUFENBARGER,)

Respondents.)



Stephanie Clavin
 CLERK KOSCIUSKO SUPERIOR COURT NO. 1

ORDER

This cause came on for hearing on April 24, 2008, on Petitioners' Verified Petition for Judicial Review, Respondent Indiana Natural Resources Commission's Motion to Dismiss, and Petitioners' Motion to Modify the Caption and Clarify Parties. Petitioners appeared by their counsel, John H. Lloyd IV. Respondents Stephen Rufenbarger and Constance Rufenbarger appeared by their attorney, Stephen R. Snyder. Respondent Indiana Natural Resources Commission appeared by counsel, Steven D. Griffin, Deputy Attorney General. Arguments of counsel were heard. The court took the issues raised under advisement. Having considered the Record contained herein, the arguments of counsel, and being duly advised in the premises, the court now finds and concludes as follows.

1. This litigation arises from a dispute over the appropriate location for extending the

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common property lines between Respondents Rufenbargers' property (Lot 40) and Petitioners Blues' property (Lot 41) into the waters of Winona Lake in Kosciusko County, Indiana; and, the derivative and respective riparian uses and rights of the parties with respect to that line.

2. On January 26, 2007, the Indiana Department of Natural Resources denied an Application for a Group Pier Permit associated with the aforementioned properties.
3. On June 19, 2007, hearing was held in the above-captioned matter before Administrative Law Judge Stephen L. Lucas.
4. On September 18, 2007, the Indiana Natural Resources Commission adopted without modification the "Findings of Fact and Conclusions of Law of Administrative Law Judge, Stephen L. Lucas.
5. On September 25, 2007, Administrative Law Judge Stephen L. Lucas issued the "Notice of Final Order of the Indiana Natural Resources Commission. The Order imposes restrictions on the use and construction of a pier by the Faas Group that essentially prevents the Faas Group from using the riparian easement granted by Petitioners Terry W. Blue and Nancy L. Blue.
6. On October 24, 2007, Petitioners filed their Verified Petition for Judicial Review of the final agency action of the Indiana Natural Resource Commission, naming the Natural Resource Commission, Stephen B. Rufenbarger, and Constance A. Rufenbarger as Respondents. Petitioners contend that the restrictions imposed by the Order are not supported by law, are arbitrary and capricious, and must, therefore, be reversed.
7. On November 14, 2007, Respondent Indiana Natural Resource Commission filed its Motion to Dismiss.
8. On December 7, 2007, Petitioners filed their Motion to Amend Caption and Clarify Parties.
9. On December 20, 2007, Indiana Natural Resources Commission filed its Brief in

Opposition to Petitioners' Motion to Amend Caption and Clarify Parties.

10. On February 25, 2008, the Administrative Record was filed.
11. In this case, Petitioners seek judicial review of a final administrative order issued on September 25, 2007, by Stephen L. Lucas, Administrative Law Judge of the Indiana Natural Resource Commission. Indiana Natural Resource Commission contends that Petitioners should not be granted judicial review because it failed to comply with the requirements of the Administrative Orders and Procedures Act, (specifically, Indiana Code § 4-21.5-5-7), thus failed to invoke the trial court's jurisdiction. Accordingly, the preliminary issue is whether the Petition filed herein is sufficient pursuant to Indiana Code § 4-21.5-5-7 to invoke the jurisdiction of the trial court.
12. A party may file a petition for judicial review of a final administrative order after exhausting all available administrative remedies. However, a party who fails to file a *timely or sufficient petition for review waives the right to judicial review* (Emphasis added). See, Commissioner, Indiana Department of Environmental Management v. Bethlehem Steel, Corp., 703 N.E.2d 680, 682 (Ind. Ct. App. 1998). The jurisdiction of the trial court may not be invoked until the petitioners have complied with the statutorily provided procedures. Bethlehem Steel, at 682.
13. Here, Indiana Natural Resources Commission seeks dismissal on the basis that the Petition at issue is deficient under the Administrative Orders and Procedures Act.
14. Specifically, Indiana Natural Resources Commission avers that in accordance with Ind. Code § 4-21.5-5-6, it should not be a named party in this judicial review because, as the administrative tribunal in this matter, it was not a party below. Accordingly, it is improper and unnecessary to name it as a co-Respondent in this action. Additionally, because the Indiana Natural Resources Commission acted as a quasi-judicial decision maker in the administrative proceeding below, it is immune from suit. Further, Indiana Natural Resource Commission is specifically excluded as a party to judicial review

proceedings pursuant to 312 IAC 3-1-18(f) which provides that *neither the commission nor the administrative law judge is a party*. (Emphasis added).

15. The court is in agreement with the aforementioned analysis of the relevant statutes. Although the court recognizes that disposition of cases on their merits is strongly preferred, it is clear that the procedural mandates of the Administrative Orders and Procedures Act control judicial review of agency actions. Failure to satisfy the statutory requirements of Indiana Code section 4-21.5-5-7 is a jurisdictional defect. Bethlehem Steel, *supra*, 703 N.E.2d at 682 (citing Hoosier Env'tl. Council v. Department of Natural Resources, 673 N.E.2d 811, 814 (Ind. Ct. App. 1996)). Here, Petitioners failed to meet the statutory requirements for its initial petition for judicial review by failing to name the proper party, Indiana Department of Natural Resources, and incorrectly naming Indiana Natural Resources Commission which resulted in a failure to invoke jurisdiction of the trial court.
16. Petitioners have attempted to correct this defect by filing their Motion to Modify the Caption and Clarify Parties. Petitioners acknowledge they committed this error, however, allege it was merely a clerical mistake and that they did effectively serve the true party in interest, Indiana Department of Natural Resources sufficiently to bring that entity into the lawsuit.
17. The Administrative Orders and Procedures Act establishes the exclusive means for judicial review of an agency action. Specifically, the Act provides that a petition for judicial review must, among other things, identify the agency action at issue, together with a copy, summary, or description of the agency action; and, shall be served upon the ultimate authority issuing the order, the ultimate authority for each other agency exercising administrative review of the order, the Indiana Attorney General, and each party to the proceeding before an agency. In their Petition, Petitioners not only excluded Indiana Department of Natural Resources from the caption, the entire contents of the

petition fails to suggest or mention that Indiana Department of Natural Resources is a party to the judicial review proceeding. It is clearly established that a party's failure to comply with the statutory procedures for reviewing administrative orders results in the party's failure to invoke the jurisdiction of the reviewing court. Bethlehem Steel, Corp., *supra*, 703 N.E.2d at 682-83. Furthermore, a petitioner who files a non-compliant petition for judicial review may not amend the petition after the initial thirty (30) day filing period has elapsed because there is no valid original petition to relate back to. Here, because the original petition was statutorily defective, the trial court did not obtain jurisdiction over it and may not entertain the Motion to Amend to allow amendment relating back to the original day of filing. Petitioners may not subsequently, after the expiration of the 30-day period for seeking judicial review, file correction of omissions in its petition. The court has no jurisdiction to allow correction relating back to the original filing. *See*, Indiana Code § 4-21.5-5-7. *See also*, Bethlehem Steel, 703 N.E.2d at 683. Therefore, as a result of the aforementioned procedural and legal errors, Petitioners are not permitted to simply amend the caption of their petition in an effort to inadvertently bring the Indiana Department of Natural Resources into this lawsuit.

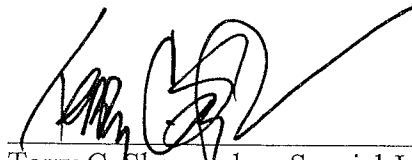
18. In this case, even if the jurisdiction of the court had been properly invoked, there is nothing to support that the decision of the administrative agency should be reversed.

In reviewing a decision of an administrative agency, the reviewing court does not try the case *de novo*, reweigh evidentiary findings, or substitute its judgment for that of the administrative agency. *See*, St. Charles Tower, Inc. v. Bd. of Zoning Appeals of Evansville-Vanderburgh County, 873 N.E.2d 598, 600 (Ind. 2007). Rather, deference is given to the interpretation of statutes and evidence by the administrative agency charged with enforcement in light of its expertise in its given area. State Employees' Appeals Comm'n v. Barclay, 695 N.E.2d 957, 959-60 (Ind. Ct. App. 1998). When an aggrieved party attacks the evidentiary support for an agency's finding, he bears the burden of demonstrating that the agency's conclusions were clearly erroneous. Yater v. Hancock

County Planning Comm'n, 614 N.E.2d 568, 570 (Ind. Ct. App. 1993). The agency's decision will be reversed only if it was arbitrary or capricious, was in violation of any constitutional, statutory, or legal principle, or was unsupported by the substantial evidence. A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency. Dep't of Env'tl. Mgmt v. Lake County Solid Waste Mgmt. Dist., 847 N.E.2d 974, 983 (Ind. Ct. App. 2006). Here, a review of the three extensive volumes comprising the administrative record supports that the administrative agency had before it and weighed substantial evidentiary materials in order to make its findings. There is nothing from which this court could conclude that Petitioners met their burden of demonstrating that the agency's conclusions were clearly erroneous, arbitrary or capricious, or unsupported by the substantial evidence.

IT IS THEREFORE, **ORDERED, ADJUDGED, and DECREED** that Respondent Indiana Natural Resources Commission's Motion to Dismiss is hereby granted and Indiana Natural Resources Commission is dismissed from this judicial review proceeding with prejudice. In addition, Petitioners' Motion to Amend Caption and Clarify Parties is herein denied.

DATED AT GOSHEN, INDIANA THIS 11TH DAY OF JUNE, 2008.



Terry C. Shewmaker, Special Judge
Kosciusko Superior Court

N O T I C E

TERRY W BLUE et al vs. INDIANA NATURAL RESOURCES et al

Case Number: 43D01 0710-PL-000894

KOSCIUSKO SUPERIOR COURT 1
121 NORTH LAKE STREET
JUSTICE BUILDING
WARSAW IN 46580

STEVEN DUANE GRIFFIN
OFFICE OF ATTORNEY GENERAL
IGCS/5TH FL/302 W WASHINGTON
INDIANAPOLIS IN 46204

Date: 06/12/08

Next Scheduled Event - 00/00/00

06/11/08

ORDER ENTERED

The Court having taken this cause under advisement, now enters ORDER; Respondent, Indiana Natural Resources Commission's Motion to Dismiss is granted and Indiana Natural Resources Commission is dismissed from this judicial review proceeding with prejudice. Petitioners' Motion to Amend Caption and Clarify Parties is herein denied, all per ORDER.

(Memo w/order: Lloyd/Plews/Romig, Griffin, Snyder)
(Memo: Judge Shewmaker)

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