

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. F12
CAUSE NO. 49F12-0808-MI-035852

CITY OF MISHAWAKA,)
)
Petitioner-Plaintiff,)

v.)

INDIANA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,)
)
Respondent-Defendant.)

FILED

(189) APR 09 2009

Elizabeth A. White
CLERK OF THE MARION SUPERIOR COURT

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

This matter is before the Court on the City of Mishawaka's ("City") Verified Petition for Judicial Review of the July 9, 2008 Order of the Indiana Office of Environmental Adjudication ("OEA") in the case of In the Matter of Objections to Issuance of NPDES Permit Approval No. IN0025640, City of Mishawaka, St. Joseph County, Indiana, cause number 06-W-J-3801. Having read the parties' briefs, heard oral argument, and considered the record, the Court now enters the following findings of fact, conclusions of law, and judgment:

FINDINGS OF FACT

1. Respondent-Defendant, the Indiana Department of Environmental Management ("IDEM") is charged with the implementation and enforcement of the environmental laws, and rules promulgated thereunder, for the State of Indiana. Ind. Code § 13-13-1-1 *et seq.*
2. On September 18, 2006, IDEM issued National Pollutant Discharge Elimination System Permit No. IN0025640 ("NPDES Permit") to the City.

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3. The City's NPDES Permit authorizes discharges from its wastewater treatment plant into the St. Joseph River in accordance with the effluent limitations and conditions contained in the NPDES Permit.

4. The NPDES Permit contains a requirement to disinfect the effluent on a year-round basis.

5. In the Fact Sheet, IDEM stated that "[t]he requirement is in response to a joint State of Michigan and State of Indiana Total Daily Maximum Load (TMDL) study completed for the St. Joseph River," which flows through Indiana to Michigan. The TMDL study revealed "elevated levels of *E. coli* bacteria downstream of Elkhart, Mishawaka, and South Bend." The TMDL studies documented water quality standard exceedances near the Indiana/Michigan state line during the recreational season (May – October) and the nonrecreational season (November – April) for Michigan.

6. The St. Joseph River is impaired due to the presence of elevated levels of *E. coli*. Specifically, the St. Joseph River is "... impaired in Elkhart and St. Joseph counties."

7. The City is located in St. Joseph County. The City is a known contributing source of *E. coli*. The City's discharge flows downstream and mixes with the discharges from other known sources of *E. coli*.

8. Indiana does not have water quality standards for *E. coli* during the non-recreational months. Michigan has a water quality standard for *E. coli* that applies year-round.

9. To comply with federal law, IDEM included a requirement to disinfect for *E. coli* on a continuous basis year-round in the City's NPDES Permit to ensure that the City's discharge does not contribute to or cause a violation of Michigan's water quality standards.

10. On October 6, 2006, pursuant to Indiana Code § 4-21.5-3-7, the City filed a Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness seeking administrative review of the City's NPDES Permit before the OEA.

11. On January 16, 2008, the parties entered into an Agreed Order resolving all issues except the application of the year-round disinfection requirement.

12. Both parties filed motions for summary judgment. The motions were fully briefed.

13. On July 9, 2008, the Environmental Law Judge ("ELJ") entered a Findings of Fact, Conclusions of Law and Final Order ("Final Order") granting IDEM's Motion for Summary Judgment and denying the City's Motion for Summary Judgment.

14. On August 8, 2008, the City filed a Verified Petition for Judicial Review ("Petition") of the ELJ's Final Order.

15. The issues on judicial review were fully briefed by the parties. Oral arguments were heard on February 23, 2009.

16. To the extent any of these findings of fact are construed to be conclusions of law, they are hereby included as additional conclusions of law. To the extent that the conclusions of law are construed to be findings of fact, they are hereby included as additional findings of fact.

CONCLUSIONS OF LAW

1. This case involves judicial review of an agency determination under the Administrative Orders and Procedures Act ("AOPA"). Ind. Code 4-21.5-5-1 *et seq.*

2. As the party seeking review, the City carries "the burden of demonstrating the invalidity of agency action." Indiana Code § 4-21.5-5-14(a).

3. In a manner consistent with courts of review, this Court’s judicial review must be confined to the agency record. Ind. Code § 4-21.5-5-11.

4. A reviewing court may neither try the case de novo nor substitute its judgment for that of the agency. Ind. Code § 4-21.5-5-11; *Indiana Dept. of Environmental Management v. Schnippel Const., Inc.*, 778 N.E.2d 407 (Ind. Ct. App. 2002).

5. The validity of the agency action “shall be determined in accordance with the standards of review” provided in Ind. Code § 4-21.5-5-14(d). When judicial review is properly invoked, a trial court “shall” uphold the decision unless the administrative decision violates one of the five standards specified. *Id.*

6. By statute, this Court may only overturn a finding of fact if it is “unsupported by substantial evidence.” Ind. Code § 4-21.5-5-14(d)(5). The Court of Appeals has stated that when reviewing an agency decision, “the court is bound by the findings of fact made by the agency if those findings are supported by substantial evidence.” *Hamilton County Department of Public Welfare v. Smith*, 567 N.E.2d 165, 167-168 (Ind. Ct. App. 1991).

7. The Supreme Court set forth the standard of review under AOPA in *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000): A court may only set aside agency action that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Id.*

8. Questions of law are reviewed *de novo*, while deference is given to findings of fact so long as they are supported by substantial evidence. *Board of Commissioners of LaPorte County v. Great Lakes Transfer, LLC*, 888 N.E.2d 784, 789 (Ind. Ct. App. 2008).

9. A reviewing court should pay great deference to an agency's reasonable interpretation of a silent or ambiguous statute if that agency has been charged with the statute's administration. *Indiana Dept. of Public Welfare v. Hupp*, 605 N.E.2d 768, (Ind. Ct. App. 1992), *trans. denied*. If there are multiple interpretations, the court should defer to the agency's interpretation. *Indiana Wholesaler Wine & Liquor Company, Inc.*, 695 N.E.2d at 103-04. If the agency's actions are based on a reasonable consideration of its governing statutes and regulations, then the court should defer to the agency's interpretation. *Peabody Coal Co.*, 629 N.E.2d at 930.

10. The federal laws and regulations relevant to this matter are found in the Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.* ("CWA"). Section 402 of the CWA authorizes IDEM, as the agency that has been delegated authority by United States Environmental Protection Agency ("EPA") to administer the NPDES program, to issue NPDES permits for the discharge of pollutants for the State of Indiana. *See* 33 U.S.C. § 1342.

11. Pursuant to 40 C.F.R § 122.4(d) of the CWA, no permit may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." If IDEM does not comply with the federal law and the EPA objects to an NPDES permit, IDEM is prevented by federal law from issuing the permit. *See* 33 U.S.C. § 1342(a)(5) (§ 402 of the CWA).

12. Pursuant to Michigan Standard R 323.1062 (Microorganisms), Michigan has water quality criteria that apply year-round to all waters of the State (Michigan), which includes the St. Joseph River. Pursuant to R 323.1062(3), Michigan's criteria apply to treated or untreated dischargers of human sewage. Pursuant to R 323.1062(4), the requirements can be

suspended back to only partial body contact from November 1 to April 30. Therefore, in Michigan, the St. Joseph River is designated for partial body contact from November 1 to April 30.

13. To comply with federal law, IDEM must ensure compliance with Michigan's partial body contact water quality criteria from November 1 to April 30. *See* 40 C.F.R. § 122.4(d)

14. The ELJ reasonably concluded that IDEM can require year-round disinfection given the following circumstances: (1) the City discharges to the St. Joseph River, which flows into Michigan; (2) the St. Joseph River is impaired for *E. coli*; (3) Michigan has year-round water quality limitations for *E. coli*; and (4) an Indiana/Michigan study showed that Michigan's water quality standards for the non-recreational season have been exceeded near the Indiana/Michigan state line.

15. Pursuant to 327 IAC 5-2-11.5(a),

(a) If the commissioner determines that a pollutant or pollutant parameter (either conventional, nonconventional, a toxic substance, or whole effluent toxicity (WET)) is or may be discharged into the Great Lakes system at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any applicable narrative criterion or numeric water quality criterion or value under 327 IAC 2-1.5, the commissioner shall incorporate water quality-based effluent limitations (WQBELs) in an NPDES permit that will ensure compliance with the criterion value. The commissioner shall exercise best professional judgment, taking into account the:

- (1) source and nature of the discharge;
- (2) existing controls on point and nonpoint sources of pollution;
- (3) variability of the pollutant or pollutant parameter in the effluent; and
- (4) where appropriate, dilution of the effluent in the receiving water.

In all cases, the commissioner shall use any valid, relevant, representative information pertaining to the discharge of the pollutant.

16. 327 IAC 5-2-11.5(a) also gives the commissioner discretion to consider other criteria, including "the source and nature of the discharge." 327 IAC 5-2-11.5(a)(1). Since

sanitary sewage inherently contains microorganisms like *E. coli* as a component of human wastes, the wastewater treatment plants need to effectively disinfect the effluent to protect water quality and designated uses. Further, Michigan's rule clearly places emphasis on controlling discharges containing human waste. *See* R. 323.1062(3).

17. 327 IAC 5-2-11.5(a)(3), allows IDEM to consider the "variability of the pollutant or pollutant parameter in the effluent." It is a fact that *E. coli* levels tend to be highly variable, which would support the inclusion of a permit condition to disinfect for *E. coli*.

18. The ELJ properly concluded that under the plain language of 327 IAC 5-2-11.5, IDEM may look at whether a discharger has "the reasonable potential to cause, or contribute to an excursion above any applicable narrative criterion or numeric water quality criterion or value under 327 IAC 2-1.5"; therefore, it is "logical that the IDEM would look at the cumulative affect of all dischargers in determining whether a reasonable potential exists" that a discharger will "contribute to" an excursion.

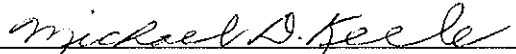
19. The Final Order proffers reasonable interpretations of 327 IAC 5-2-11.5(a). IDEM is the agency charged with implementation of 327 IAC 5-2-11.5(a). Since the City has not shown that IDEM and the ELJ's interpretation of the law is unreasonable, the Final Order must be affirmed. *See Indiana Department of Environmental Management v. Boone County Resource Recovery Systems, Inc.*, 803 N.E.2d at 267, 273 (Ind. Ct. App. 2004), *trans. denied*.

20. The ELJ's issuance of the Final Order is not (1) arbitrary, capricious, an abuse of discretion; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

JUDGMENT

Based on the forgoing Findings of Fact, Conclusions of Law and legal precedent, the Final Order of the OEA is AFFIRMED, and the Verified Petition for Judicial Review is hereby DENIED.

Dated: 4-09-09


Judge, Marion Superior Court
Civil Division, Room No. F12

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