

**OBJECTION TO THE ISSUANCE OF  
SECTION 401 WATER QUALITY CERTIFICATION  
COE ID NO.: 198800247  
CONAGRA SOYBEAN PROCESSING CO.  
POSEY COUNTY, INDIANA  
1998 OEA 053, OEA CAUSE NO. 98-W-J-2052**

<b>Official Short Cite Name:</b>	Conagra Soybean Processing Co., 1998 OEA 053
<b>OEA Cause No.</b>	98-W-J-2052
<b>Topics/Keywords:</b>	Section 401 Water Quality Cert
	IC § 4-21.5
	IC § 4-21.5-3-7
	IC § 4-21.5-5-5
	IC § 4-21.5-7
	IC § 4-21.5-7-5
	IC § 13-15-6-2
	IC § 13-18-3-6
	IC § 13-30-3-1
	IDEM ID No. 98-65-00053-A
<b>Presiding ELJ:</b>	WAYNE E. PENROD
<b>Party Representatives:</b>	S. ANDREW BOWMAN, ESQ.
	STACY L. PRALL, ESQ.
	JENNIFER K. THOMPSON, ESQ.
	DON MOTTLEY
	MARGARET FELTON, ESQ.
	JOHN A. ANDREASEN, ESQ.
<b>Order Issued:</b>	NOVEMBER 12, 1998
<b>Index Category:</b>	WATER QUALITY
<b>Further Case Activity:</b>	

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# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod  
Chief Administrative Law Judge

150 West Market Street  
Suite 618  
Indianapolis, IN 46204  
Telephone 317-232-8591  
Fax 317-233-0851

STATE OF INDIANA     )  
                                  )  
COUNTY OF MARION    )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:                    )  
  )  
OBJECTION TO ISSUANCE OF SECTION    )  
401 WATER QUALITY CERTIFICATION    )  
COE ID NO. 198800247                    )  
CONAGRA SOYBEAN PROCESSING CO.        )

CAUSE NO. 98-W-J-2052

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter is before the Office of Environmental Adjudication ("OEA") upon a Motion to Dismiss filed August 27, 1998, by ConAgra Soybean Processing Company ("ConAgra") and upon the prehearing submissions listed below. The OEA has been presented with written briefs on the Motion to Dismiss from both ConAgra and Petitioners, Don Mottley, pro se, Save Our Rivers, by spokesperson Don Mottley, and Save Our Land and Environment, by spokesperson Don Mottley (collectively, "Mottley"). Further, the parties have filed a Joint Stipulation of Dismissal in Part and the Chief Administrative Law Judge, Wayne E. Penrod, has issued a Final Order on Joint Stipulation of Dismissal on October 14, 1998, granting the Joint Stipulation of Dismissal, which

dismissed all issues for appeal, but for those set forth in paragraphs a, c, d, e, g, h and w of the Amended Petition.

Also before the OEA are the following prehearing submissions which, in addition to ConAgra's Motion to Dismiss, were considered in issuing these Findings of Fact, Conclusions of Law and Final Order:

(1) Petitioners' Witness List filed of September 17, 1998; (2) Petitioners' Amended Witness List also filed on September 17, 1998; (3) ConAgra's Motion for a Prehearing Ruling on the Admissibility of Certain Evidence filed on October 19, 1998; and (4) ConAgra's Amended Submission of Findings of Fact, Conclusions of Law and Final Order.

Chief Administrative Law Judge, Wayne E. Penrod, having held a prehearing telephone conference on October 20, 1998, at 3:00 p.m. with all parties present, IDEM by Margaret Felton in person, and by telephone, Petitioners by Don Mottley, and ConAgra by John A. Andreasen and Stacy L. Prall, to discuss the outstanding Motions and issues raised by the parties.

Based upon the foregoing, Chief Administrative Law Judge, Wayne E. Penrod, issues the following:

### **FINDINGS OF FACT**

To the extent that any of the following Findings of Fact should be properly deemed Conclusions of Law or any Conclusions of Law should be properly deemed Findings of Fact, they shall be treated as such.

#### **Background**

1. The OEA has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy

pursuant to Indiana Code 4-21.5-7.

2. This is a Final Order issued pursuant to Indiana Code § 4-21.5-3-27.

3. ConAgra sought a Section 401 Water Quality Certification from the IDEM Office of Water Management as part of its plan to construct and operate an integrated soybean processing operation in Posey County, Indiana. The ConAgra operation will crush soybeans into soybean meal and will produce soybean oil and other soybean related products. A grain elevator associated with the processing operations will receive grain from local farmers and other area elevators.

4. The planned activities which were reviewed by the IDEM as part of this Water Quality Certification ("WQC") include, but are not limited to, the filling of portions of the project site to suitable elevations above the 100-year flood plain. Portions of two unnamed tributaries of the Ohio River will be relocated on the property to accommodate the soybean processing facility. Barge loading and unloading cells will be constructed on the Ohio River for shipping and receiving product and raw materials. Some maintenance dredging in the barge cells area may also be necessary.

5. On June 9, 1998, the IDEM Office of Water Management issued to ConAgra the Section 401 Water Quality Certification, IDEM ID No. 98-65-AJP-00053-A, COE ID No. 199800247.

6. On or about June 27, 1998, Mottley filed with the OEA, pursuant to Indiana Code § 4-21.5-3-7, a petition for administrative review ("Original Petition"). The OEA received by facsimile only amendments to the Original Petition on or about July 20, 1998 ("Amendments"). On or about August 7, 1998, Mottley filed a document entitled Amended Petition with the OEA

("Amended Petition").

7. On September 17, 1998, Mottley submitted a Witness List and an Amended Witness List, listing as his only witness, William D. Pearson ("Professor Pearson").

8. On October 8, 1998, ConAgra deposed Professor Pearson to determine his opinions and identify the bases for those opinions that he would be offering at the hearing on this matter.

9. Professor Pearson has testified that he is not a malacologist and further stated "...as I told you, I don't consider myself to have expertise in any area."

10. Six (6) of the seven (7) issues remaining for consideration at the October 21, 1998 hearing involve issues concerning mussels. The final issue is one of notice and Professor Pearson admitted he will not be offering testimony on this issue.

11. Mottley does not contend that ConAgra will take a species illegally.

#### **Statutory Procedural Requirements**

12. Indiana Code §4-21.5-3-7 of the Administrative Orders and Procedures Act ("AOPA") requires that to qualify for review of the issuance of a Section 401 WQC by the IDEM, a person must petition for review in writing stating facts which demonstrate that:

- (A) the petitioner is a person to whom the order is specifically directed;
- (B) the petitioner is aggrieved or adversely affected by the order; or
- (C) the petitioner is entitled to review under any law.

13. Pursuant to Indiana Code § 13-15-6-2, the petition must "state with particularity the issues proposed for consideration at the hearing" and also "identify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the

case in question to satisfy the requirements of the law governing permits of the type granted or denied.” Failure to satisfy the requirements of Indiana Code § 13-15-6-2 constitutes grounds for dismissal for lack of jurisdiction.

14. Statutory requirements are jurisdictional and failure to comply with procedural prerequisites deprives the OEA of jurisdiction.

15. The procedural duties imposed by AOPA may not be waived.

#### **Standard of Review**

16. A state’s role under Section 401 of the CWA is limited to determining whether applicable effluent limitations and water quality standards will be met. The OEA’s review of the IDEM’s determination is limited to considering whether the IDEM complied with its statutory and regulatory duties in issuing a Section 401 WQC.

17. Mottley bears the burden to persuade the OEA that the WQC was issued contrary to law, that the WQC was deficient as a matter of law, that there were not facts to support IDEM’s finding, that IDEM’s action was arbitrary and capricious or outside the jurisdiction or authority of the agency.

18. Issues involving enforcement of future speculative violations, which have not yet occurred, fail to state a claim upon which relief can be granted by the OEA. Actions for enforcement are brought pursuant to Indiana Code § 13-18-3-6 and Indiana Code § 13-30-3-1.

19. The OEA has jurisdiction in a WQC appeal over matters addressed by laws related to Section 401.

#### **CONCLUSIONS OF LAW**

1. The following issues raised in the Original Petition, at paragraphs 2.a, 2.c, 2.d, 2.e,

2.g, and 2.h, must be dismissed for the reasons set forth below:

- ¶2.a. raises enforcement issues outside the jurisdiction of the OEA and fails to state a claim for which relief can be granted because there is no assertion that any alleged degradation will interfere with or become injurious to the State's water quality;
- ¶2.c. raises enforcement issues outside the jurisdiction of the OEA and fails to state a claim for which relief can be granted because the IDEM has no duty to perform or require mussel studies to be performed as part of issuing a WQC.
- ¶2.d. raises enforcement issues outside the jurisdiction of the OEA and fails to state a claim for which relief can be granted because the public notice requirements on which Mottley relies do not require a description of the quality of the materials to be disposed;
- ¶2.e. raises enforcement issues outside the jurisdiction of the OEA and fails to state a claim for which relief can be granted because the IDEM has no duty to perform or require mussel studies to be performed as part of issuing a WQC;
- ¶2.g. raises enforcement issues outside the jurisdiction of the OEA and fails to state a claim for which relief can be granted because the IDEM has no duty to perform or require mussel studies to be performed as part of issuing a WQC;
- ¶2.h. raises enforcement issues and issues covered by other substantive laws which are outside the jurisdiction of the OEA and fails to state a claim for which relief can be granted because Mottley admitted that he makes no contention that ConAgra will take a species illegally;

2. The following issue, raised only in the Amended Petition and not in the Original Petition, must be dismissed for the following reason:

- ¶2.w. fails to state a claim for which relief can be granted because Mottley cannot raise a claim on behalf of third-parties he does not represent.

3. Professor Pearson, the only witness to be offered by Mottley to present testimony during the hearing, by his own admission concluded that he does not qualify as an expert on the

very matters upon which he was scheduled to testify. Therefore, the Chief Administrative Law Judge concludes that because Professor Pearson cannot qualify as an expert, his testimony on these issues would not be compellingly credible and should not be permitted as expert testimony.

4. Because Professor Pearson is not an expert witness concerning the remaining mussel issues and because Mottley offered no other witnesses who could testify concerning these issues, Mottley cannot bear his burden of proof on these remaining issues. That is, Mottley cannot establish that there were not facts to support IDEM's grant of the WQC.

#### FINAL ORDER

IT IS THEREBY ORDERED that all issues remaining, including paragraphs a, c, d, e, g, h and w of the Petition, the Amendments and/or the Amended Petition, are dismissed and ConAgra Soybean Processing Company's Section 401 Water Quality Certification is hereby UPHELD.

You are further notified that pursuant to the provisions of Indiana Code § 4-21.5-7-5, the Chief Administrative Law Judge, Wayne E. Penrod, of the Office of Environmental Adjudication serves as the ultimate authority in administrative reviews of decisions of the Commissioner of the Indiana Department of Environment Management. This is a Final Order subject to judicial review consistent with the applicable provisions of Indiana Code 4-21.5. Pursuant to Indiana Code § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with the civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

DATED: November 12,  
1998

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Wayne E Penrod, Chief  
Administrative Law Judge



cc: Matthew C. Rueff, Assistant Commissioner  
Office of Water Management