### Objection to the Issuance of Section 401 Water Quality Certification Cedar Creek Logjam Removal; Auburn, Dekalb County, Indiana. 2003 OEA 27 (02-W-J-2896)

### TOPICS:

Section 401 Water Quality logjam removal drag line bulldozer wetland motion to dismiss moot untimely filed public interest exception fundamental individual rights

#### **PRESIDING JUDGE**:

Biesecker

### PARTY REPRESENTATIVES:

Petitioner:Jane H. DustinPermittee:Derald D. KruseIDEM:Anne M. Patterson

#### **ORDER ISSUED:**

May 12, 2003

#### **INDEX CATEGORY:**

Water

# **FURTHER CASE HISTORY:**

[none]

### Objection to the Issuance of Section 401 Water Quality Certification Cedar Creek Logjam Removal; Auburn, Dekalb County, Indiana. 2003 OEA 27 (02-W-J-2896)

STATE OF INDIANA	) BEFORE THE INDIANA OFFICE OF		
	) E	ENVIRON	MENTAL ADJUDICATION
COUNTY OF MARION	)		
IN THE MATTER OF:		)	
		)	
<b>OBJECTION TO THE ISSUANCE</b>	OF	)	CAUSE NO. 02-W-J-2896
SECTION 401 WATER QUALITY		)	
CERTIFICATION CEDAR CREEK	LOGJAN	( N	
REMOVAL		)	
AUBURN, DeKALB COUNTY, IN	DIANA.	)	

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

### **Statement of the Case**

This case is before the Indiana Office of Environmental Adjudication ("OEA") upon objection to the approval by the Indiana Department of Environmental Management (IDEM) of Section 401 Water Quality Certification Project Number 2001-401-17-JSM-A, concerning a logjam removal project in Cedar Creek (the Project) by DeKalb County (DeKalb).

On May 21, 2002, IDEM approved DeKalb's application requesting Section 401 Water Quality Certification for its plan to remove two logjams located near Auburn, Indiana, DeKalb County.

On June 10, 2002, Jane Dustin (Petitioner) petitioned for review of the Project's certification, seeking an antidegradation demonstration before the commencement of the proposed work.

On July 25, 2002, DeKalb County<sup>1</sup>, by counsel, filed a Motion to Dismiss the Petition, on the grounds that the matter was moot and that that the Petition was untimely filed.

On April 8, 2003, DeKalb filed a legal memorandum in support of its motion to dismiss, along with supporting documentation and affidavits.

On April 24, 2003, Petitioner filed a Response to the DeKalb Motion to Dismiss, contending that the matter should not be dismissed on grounds of mootness because the case presents a matter of great public significance and should be treated as an exception to the general rule regarding mootness.

Having considered the testimony, evidence, motions and arguments made by the parties, the Acting Chief Environmental Law Judge makes the following Findings of Fact, Conclusions of Law and Order:

<sup>&</sup>lt;sup>1</sup> The motion was filed by the DeKalb County Surveyor, who we are treating as the representative of the county for purposes of this order.

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#### **Findings of Fact**

- 1. 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.
- 2. IDEM approved the application of the DeKaIb County Surveyor for a Section 401 Water Quality Certification on May 21, 2002. In its proposal, DeKalb would use a drag line and bulldozer to remove the logjams. The project would impact approximately 500 linear feet of Cedar Creek and .5 acres of wetland temporarily impacted.
- 3. The project has been completed. A photographic record shows that as of February 13, 2003, attested to by Bradley Blevins, the log jam had been removed. DeKalb's initial motion stated that as of July 2002, the logjam had been removed. Although this statement was not the subject of a sworn affidavit, it is not disputed by Petitioner that the project has been complete since that time.

### **Conclusions of Law**

- 1. Under Indiana law a case is deemed moot when there is no effective relief that can be rendered to the parties by the court. *See* <u>A.D. v. State of Indiana</u>, 736 N.E. 2d 1274 (Ind. App. 2000).
- The public interest exception to the mootness rule is a very narrow one, typically involving questions of fundamental individual rights. <u>In Re Lawrence</u>, 579 N.E.2d 32 (Ind. 1991); <u>R.A. v. State</u>, 770 N.E.2d 376 (Ind. App. 1994). Petitioner has alleged no facts that would place this case within that narrow exception. *See Stansberry v. Howard*, 775 N.E.2d 679 (Ind. 2002)

# **Order Granting DeKalb's Motion**

After consideration of the petitions and arguments and based upon the foregoing Findings of Fact and Conclusions of Law, the Acting Chief Administrative Law Judge hereby GRANTS DeKalb's Motion to Dismiss. It is further ORDERED that the Petitioner's petition is **DISMISSED** with prejudice.

You are hereby further notified that pursuant to provisions of Indiana Code § 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 a Final Order subject to Judicial Review consistent with applicable provisions of IC 4- 21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 12th day of May, 20, 2003.

Annette Biesecker, Acting Chief Environmental Law Judge