

**OBJECTION TO THE ISSUANCE OF
 NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
 NPDES PERMIT NO. ING340058
 WOLF LAKE TERMINALS, INC.
 2023 OEA 001, OEA CAUSE NO.: 22-W-J-5187**

Official Short Cite Name:	Wolf Lake, 2023 OEA 001
OEA Cause No.:	22-W-J-5187
Topics/Keywords:	IC 4-21.5 IC 4-21.5-3-5(b) IC 4-21.5-3(f) IC 4-21.5-3-23 IC 4-21.5-3-23(b) IC 4-21.5-3-23(c) IC 4-21.5-3-27(d) IC 4-21.5-5-5 IC 4-21.5-7-3 IC 4-21.5-7-5 IC 13 IC 13-15-3-1 IC 13-15-3-1(a)(1 – 3) IC 13-18-20-12 IC 13-18-20-12(a)(4) IC 13-18-20-12(b) 33 U.S.C. § 124.10 33 U.S.C. 1251 et seq. 33 U.S.C. § 1342 33 U.S.C. § 1342(b)(3) 315 IAC 1 et seq 327 IAC 5 327 IAC 15 327 IAC 5-1.5-20 327 IAC 15-2-2 327 IAC 15-2-2(a) 327 IAC 15-2-2.3 327 IAC 5-2-3(c) Notice requirements for general permits Agency exceeding statutory authority 2020 Master General Permit - petroleum products terminals

See next page for additional details

Wolf Lake, 2023 OEA 001 - Continued

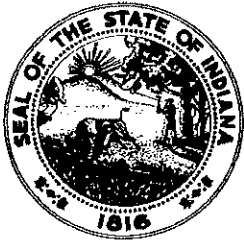
Presiding ELJ: LORI KYLE ENDRIS

Party Representatives: DAVID DABERTIN, PETITIONER
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Order Issued: JANUARY 9, 2023

Index Category: WATER

Further Case Activity:



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 22-W-J-5187

OBJECTION TO THE ISSUANCE OF)
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM)
NPDES PERMIT NO. ING340058)
WOLF LAKE TERMINALS, INC.)
HAMMOND, LAKE COUNTY, INDIANA.)

David Dabertin,)
 Petitioner,)
Wolf Lake Terminals, Inc.)
 Permittee/Respondent,)
Indiana Department of Environmental Management,)
 Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (Court or OEA) on Respondent, Indiana Department of Environmental Management’s (IDEM), Motion for Summary Judgment¹ and accompanying Memorandum of Law (Memorandum), filed on July 6, 2022, Petitioner’s, David Dabertin (Petitioner), Response to IDEM’s Motion for Summary Judgment (Response) filed November 10, 2022, and IDEM’s Reply in Support of its Motion for Summary Judgment (Reply) filed December 1, 2022, which pleadings are part of the Court’s record. Having read and considered the motion, reply, response and briefs, the presiding Environmental Law Judge makes the following Findings of Fact, Conclusions of Law and enters the Final Order:

FINDINGS OF FACT

1. On July 27, 2020 Wolf Lake Terminals, Inc. (Wolf Lake Terminals) published notice that it intended to file a Notice of Intent Letter (NOI) with IDEM indicating that it would comply with the requirements of National Pollution Discharge Elimination System (NPDES) Master General

¹ Permittee/Respondent did not file a Motion for Summary Judgment or Response to IDEM’s Motion for Summary Judgment.

Permit (2015 Master General Permit) ING340000 to discharge non-process wastewater from a petroleum products terminal. Memorandum Exhibit (Ex.) A, p. 10.

2. On August 5, 2020, Wolf Lake Terminals submitted to IDEM a NOI to renew its coverage under the 2015 Master General Permit. Memorandum Ex. A. In its NOI Wolf Lake Terminals identified potentially affected persons which included the U.S. Department of Defense, Lake County Board of Commissioners, Mayor's office – Hammond City Hall, Southeast Environmental Task Force, Michael Boos, and David Dabertin (Petitioner). Reply Ex. D.

3. On October 30, 2020, IDEM issued a Final Petroleum Products Terminals Master General Permit (2020 Master General Permit), ING340000, in compliance with 33 U.S.C. 1251 *et seq.*, Ind. Code § 13 (I.C.), and 327 Indiana Administrative Code (IAC) 5 and 15. Memorandum Ex. B. The Master General Permit contains effluent limitations that are established specific to petroleum products terminals' possible discharges. Memorandum Ex. B, pp. 7 – 15. The 2020 Master General Permit was not appealed.

4. On that same date, IDEM issued a Notice of IDEM Issuance of Renewal of NPDES General Permit ING340000 and Assurance of Continued NPDES Discharge Authorization to all NPDES General Permittees explaining that two (2) NOI forms would need to be submitted to reflect a company's compliance with the 2020 Master General Permit. Memorandum Ex. J.

5. On March 31, 2021, IDEM issued a Notice of Coverage Renewal of NPDES General Permit ING340058 (Notice of Coverage) to Wolf Lake Terminals under the 2020 Master General Permit. Memorandum Ex. C. In that Notice, IDEM waived the requirement of "the proof of publication, list of potentially affected persons, mailing labels, the \$50 fee, or the maps." Memorandum Ex. C. I.C. § 13-18-20-12(a)(4) requires a permit applicant to remit a \$50 fee. I.C. § 13-18-20-12(b) states, "[i]f a person does not remit an application fee to the department, the department shall deny the person's application."

6. On May 13, 2021, Wolf Lake Terminals submitted a second NOI to demonstrate its intent to comply with the 2020 Master General Permit. Memorandum Ex. D. Wolf Lake Terminals attached the list of potentially affected persons as it did in its August 5, 2020 NOI submission which included the U.S. Department of Defense, Lake County Board of Commissioners, Mayor's office – Hammond City Hall, Michael Boos, and David Dabertin (Petitioner). *Id.* at p. 5. Wolf Lake Terminals attached the public notice from its August 5, 2020 NOI submission. *Id.*

7. On February 15, 2022, IDEM issued a Notice of Sufficiency Completion of Renewal of NPDES General Permit Coverage No. ING 340058. Memorandum Ex. E. The Notice of Coverage and the Notice of Sufficiency collectively authorize Wolf Lake Terminals' coverage under the 2020 Master General Permit.

8. IDEM asserts that the potentially affected parties listed on the May 13, 2021 NOI were notified and cites Memorandum exhibits A (2020 NOI) and D (2021 NOV) in support of its assertion. Reply, p. 7. On February 17, 2022, IDEM sent notice of the Permit to the Illinois EPA via email. Reply Ex. F, pp. 1 and 7. "IDEM asserts that the proper parties pursuant to I.C. § 13-15-3-1 were notified." Reply, p. 7.

9. While Wolf Lake Terminals is located in Hammond, Indiana, the entirety of Wolf Lake is located in the City of Chicago, Lake County, Illinois.

10. On February 28, 2022, Petitioner timely filed a Petition for Administrative Review of General Permit ING 340058 (Petition). On March 3, 2022, OEA issued a Notice of Incomplete Filing, Order to Supplement the Petition and Notice of Proposed Order of Default for deficiencies with the Petition. Petitioner cured the defects with the amended Petition via email sent to OEA and IDEM on March 8, 2022.

11. The prehearing conference was held April 12, 2022.

12. On July 6, 2022, IDEM timely filed its Motion for Summary Judgment and Memorandum.

13. On November 10, 2022, Petitioner filed his timely Response. Attached as exhibits to his Response, Petitioner proffered uncontroverted affidavits from him and Mr. Boos in which they averred they did not receive notice because the addresses provided by Wolf Lake Terminals were inaccurate. Response, Exs. D and E. Petitioner further submitted an uncontroverted affidavit from the Director/record keeper of Southeast Environmental Task Force in which she averred the non-profit did not receive the 2021 NOI Wolf Lake Terminals submitted to IDEM. Response Ex. H. Petitioner submitted letters he received in response to public records requests from the City of Hammond Law Department and the Lake County Board of Commissioners both of which stated that after due diligence, they could not locate the 2021 NOI. Response Exs. F and G. Petitioner did not submit documentation from the Department of Defense.

14. IDEM concurred that Petitioner did not receive his notice because "Petitioner's address was correct in the 2020 NOI but mistyped on the 2020 address labels, the 2021 NOI and the 2021 address labels. Memorandum, p. 6; Ex. A, pp. 5 and 15; Ex. D, pp. 7 and 14.

15. On December 1, 2022, IDEM timely filed its Reply.

CONCLUSIONS OF LAW

1. This is a Final Order issued pursuant to I.C. § 4-21.5-3-23. 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. OEA has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. In addition, OEA is governed by the regulations found under 315 IAC 1 *et seq.* As state agencies, IDEM and OEA only have the authority to take those actions granted by law.

3. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding to issue a permit. *American Suburban Utilities*, 2019 OEA 48, 53. OEA's review is limited to determining whether IDEM complied with the applicable statutes and regulations. I.C. § 4-21.5-7-3; *Blue River Valley*, 2005 OEA 1, 11. OEA does not have authority to address any other issues.

4. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806 (Ind. 2004).

5. The OEA considers a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Ind. Trial Rule 56." I.C. § 4-21.5-3-23(b). Citing Ind. Tr. R. 56(C), the Indiana Supreme Court held, "[d]rawing all reasonable inference in favor of . . .the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Hughley v. State*, 15 N.E.3d 1000, 1003. "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.*

6. The moving party bears the initial burden to establish the absence of any genuine issue of material fact. *Id.* Once established, the burden shifts to the non-moving party to "'come forward with contrary evidence' showing an issue for the trier of fact." *Id.* Summary judgment is particularly appropriate where the relevant facts are undisputed and pure legal questions of statutory interpretation are presented. *Kluger v. J.J.P Enterprises, Inc.*, 159 N.E.3d 82, 87 (Ind. Ct. App. 2020). All rational assertions of fact and reasonable inferences are deemed to be true and are viewed in the nonmovant's favor. *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1256 (Ind. Ct. App. 2009).

7. When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of their pleading, but his response, by affidavits or as otherwise provided by Ind. Tr. Rule 56, must set forth specific facts showing that there is a genuine issue for trial. Ind. Tr. R. 56(E); I.C. § 4-21.5-3-23(c). The Court of Appeals has held that the affidavit requirements of Ind. Tr. R. 56(E) are mandatory and a court considering a summary

judgment motion should disregard inadmissible information. *Bar Plan Mut. Ins. Co. v. Likes Law Office LLC*, 44 N.E.3d 1279, 1289. (Ind. Ct. App. 2015).

IDEM did not act in conformity with I.C. § 13-18-20-12

8. I.C. § 13-18-20-12 states,

(a) When a person files an application with the department concerning a NPDES permit, including:

- (1) an application for an initial permit;
- (2) the renewal of a permit;
- (3) the modification of a permit; or
- (4) a variance from a permit;

the person must remit an application fee of fifty dollars (\$50) to the department.

(b) If a person does not remit an application fee to the department, the department shall deny the person's application.

Notwithstanding these requirements, in its Notice of Coverage IDEM waived the fifty-dollar (\$50.00) fee. Memorandum Ex. C, p. 1. OEA reviews IDEM's decisions to determine whether IDEM acted in conformity with controlling statutes and regulations. *Obj. to Sanitary Sewer Construction Permit Approval No. 20038*, 2011 OEA 152. By waiving the fee, IDEM did not act in conformity with I.C. § 13-18-20-12 because it waived Wolf Lake Terminals' fee and yet granted it coverage under the 2020 Master General Permit. I.C. § 13-18-20-12 has no language that permits IDEM to waive any portion of it; thus, IDEM's decision to waive the fee was arbitrary and capricious in that the agency failed to engage in "reasoned decision making" by granting the permit in the absence of authority to waive a statutory requirement. *Objection to the Denial of Excess Liability Trust Fund Claim No. 200011504/FID#10539*, 2002 OEA 21, 26 (citing *Stansberry v. Howard*, 758 N.E.2d 540, 543 (Ind. Ct. App. 2001)).

IDEM did not act in conformity with I.C. § 13-15-3-1

9. Petitioner contends that proper notice was not sent to the parties or entities affected by the permit. Petition, pp. 2 - 3; Response, pp. 6 - 7. Petitioner claims that neither he nor Michael Boos received notice because their addresses were listed incorrectly on the NOI. IDEM concurred. Memorandum, p. 6. Petitioner did not allege he was personally harmed by not receiving notice. This Court has held that a petitioner who did not receive notice but was able

to file a timely petition for review has not suffered injury and has thus failed to state a ground upon which relief may be granted. *Objection to the Issuance of Construction Application for Sanitary Sewer Approval No. 19508, Shipshewana Lake Collection System, Shipshewana, LaGrange County, Indiana*, 2010 OEA 55, 66. Petitioner provided an Affidavit from Michael Boos, who is not a party to this Cause, averring he did not receive notice. Response, Ex. E. Petitioner does not have standing to bring a claim of lack of notice on behalf of another person. *Objection to the Issuance of Permit Approval No. IN LA 000614*, 2002 OEA 33, 39; *see also, Huffman v. Office of Env'tl Adjudication*, 811 N.E.2d 806 (Ind. 2004).

10. Petitioner further contends proper notice was not given because the governmental executives IDEM claims to have sent notice in Indiana did not receive the notice. Response, p. 11. IDEM contends that proper notice was sent. Reply, p. 7. I.C. § 13-15-3-1 requires:

(a) Whenever the department receives a permit application, the department shall send notice that the permit application has been received by the department to the following:

(1) The county executive of a county that is affected by the permit application.

(2) The executive of a city that is affected by the permit application.

(3) The executive of a town council of a town that is affected by the permit application.

(b) The department may require a person who submits a permit application to the department to provide information on the application necessary for the department to implement subsection (a).

11. "The first and often the only step in resolving an issue of statutory interpretation is the language of the statute." *State v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 946 (Ind. 1999) (quoting *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 972 (Ind. 1998)). Nothing may be read into a statute which is not within the manifest intention of the legislature as ascertained from the plain and obvious meaning of the words of the statute." *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 715 N.E.2d 351, 354 (Ind. 1999) (quoting *Indiana Dep't of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870, 872 (Ind. 1994)).

"When the word 'shall' appears in a statute, it is construed as mandatory rather than directory unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning." *State v. Indianapolis Newspapers, supra*, at 947 (quoting *United Rural Elec. Membership Corp. v. Indiana & Michigan Elec. Co.*, 549 N.E.2d 1019, 1022 (Ind. 1990)). The Court concludes that the word "shall" in I.C. § 13-15-3-1 is mandatory.

12. In its Memorandum, IDEM asserts it provided notice to the parties listed in the NOI: the county executive (Lake County Commissioners), the city executive (the Mayor's Office of

Hammond), and the Southeast Environmental Task Force² and cites Memorandum Exs. A, p. 5 and D, p.7 in support of its assertion. Memorandum, p. 5. Exs. A and D are Wolf Lake Terminal's 2020 and 2021 NOIs which do not prove the notices were actually sent. Although a copy of the potentially affected parties was attached to Wolf Lake Terminals 2021 NOI, no notice was sent or published because IDEM waived its requirement. Memorandum, Ex. C, p. 1.

Petitioner attached uncontroverted responses to public records requests from Lake County and the City of Hammond neither of which were able to locate the NOI "after a diligent search." Response Exs. F and G. As exhibit H to his Response, Petitioner attached an affidavit from the Director/records keeper of Southeast Environmental Task Force which also indicated that organization did not receive the NOI. Response Ex. H. IDEM neither offered proof the notices were actually mailed nor contested the validity of Petitioner's exhibits.

13. Petitioner further contends IDEM did not comply with I.C. § 13-15-3-1 because the receiving waters are wholly within Illinois, the City of Chicago and Cook County, and IDEM did not notify any of those governmental executives. Response, p. 11. IDEM claims it emailed the notice to the Illinois EPA and sent notice to the Southeast Environmental Task Force thus complying with I.C. § 13-15-3-1. Memorandum, p. 5.

Here, IDEM was required to send notice to certain governmental executives affected by the permit for both the 2020 and 2021 NOIs. I.C. § 13-15-3-1 does not limit the agency's requirement to send notice only to Indiana governmental executives; it requires IDEM to send it to the listed governmental executives "affected by the permit." I.C. § 13-15-3-1(a)(1 – 3). IDEM referenced sending a notice to the Southeast Environmental Task Force,³ a non-profit organization located in Chicago, but this entity is not governmental or affiliated with the city or county. Response Ex. H, p. 2. Similarly, emailing the notice of the permit to the Illinois EPA is not sufficient to comply with the requirement of sending it to the executive of the city and county.

While IDEM relies upon the applicant to identify the correct potentially affected persons via Part J of the 2020 NOI and part K of the 2021 NOI,⁴ IDEM cannot delegate or relinquish its statutory duty to send notice to potentially affected parties required by I.C. § 4-21.5-3-5(b) or the governmental executives required by I.C. § 13-15-3-1. IDEM did not act in conformity with I.C. § 13-15-3-1.

IDEM did not act in conformity with 327 IAC 15-2-2 with respect to the 2021 NOI

14. On October 30, 2020, IDEM issued a new Final Petroleum Products Terminals Master General Permit ING340000. Memorandum, p. 2. On March 31, 2021, IDEM issued Wolf Lake Terminals its Notice of Coverage for No. ING340058 for coverage under the 2015 Master General Permit. The Notice of Coverage required the submission of a second NOI to

² IDEM did not reference the Southeast Environmental Task Force in its Reply. Reply, p. 7.

³ Memorandum Exs. A, p.5 and D, p. 7.

⁴ Memorandum Ex. As, p. 5 and D, p. 7; See I.C. § 4-21.5-3(f)

“demonstrate . . . intent to comply with the reissued master general permit.” Memorandum Ex. C, p. 1. In addition to the required fifty-dollar (\$50.00) fee, IDEM also waived Wolf Lake Terminals’ need to provide proof of publication, list of potentially affected persons, mailing labels, and maps. *Id.*

In its May 13, 2021 NOI, Wolf Lake Terminals resubmitted its list of potentially affected persons, mailing labels, maps, and the proof of publication it submitted with its 2020 NOI. Memorandum Ex. D, pp. 7, 9. It is unclear why IDEM waived notice requirements for the 2021 NOI when this NOI required notice and also contained additional requirements⁵ to the 2020 NOI:

- Part G of the 2021 NOI required an applicant to list the types of petroleum products required to be listed in proximity of each outfall was not required in the 2020 NOI. Memorandum Ex. D, p. 3.
- Part G in the 2020 NOI required an applicant to provide “effluent characteristics.” Part H in the 2021 NOI required an applicant to provide “effluent characteristics for all discharges to be covered under this permit,” “additional effluent characteristics for discharges of stormwater,” and “additional effluent characteristics for discharges of hydrostatic test water for existing tanks or pipelines or for discharges of tank bottom water.” Memorandum Ex. A, p. 3; Memorandum Ex. D, pp. 4 – 5.

The Clean Water Act’s National Pollutant Discharge Elimination System program requires Indiana “to insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.” 33 U.S.C. § 1342(b)(3). It also requires a copy of each permit application and permit issued to be available to the public.⁶ 33 U.S.C. § 1342(j). 327 IAC 15-2-2(a) authorizes IDEM to regulate certain discharges under a NPDES general permit, consistent with the federal NPDES permit program administered by the U.S. Environmental Protection Agency (EPA).

By waiving the 2021 NOI’s requirements to identify potentially affected persons and provide proof of publication, IDEM did not act consistent with EPA’s NPDES permit program. IDEM’s decision to waive the notice requirements was arbitrary and capricious in that the agency failed to engage in “reasoned decision making” by granting the permit in the absence of authority to waive a statutory requirement. *Objection to the Denial of Excess Liability Trust Fund Claim No. 200011504/FID#10539, supra.*

⁵ IDEM acknowledged in its March 13, 2021 Notice of Coverage that the 2021 NOI form had additional questions. Memorandum Ex. C, p. 1.

⁶ The statute also requires that “Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.” 33 USC § 1342(j).

IDEM did not act in conformity with the notice requirement in the 2020 Master General Permit

15. Because IDEM waived the proof of publication requirement from Wolf Lake Terminal's 2021 NOI, IDEM did not act in conformity with the 2020 Master General Permit.

IDEM acted in conformity with the notice requirement in the 2015 Master General Permit

16. Petitioner contends "IDEM failed to meet its obligation [with respect to the published notice] to the public in both a legal and meaningful manner," Response, p. 4. To support his contention the published notice was not meaningful, Petitioner cites 33 U.S.C. §§ 1251, 1342, 124.10, 327 IAC 15-2-2 and 327 IAC 15-2-2.3;⁷ however, none of the cited statutes or rules require the notice to be meaningful or even contain the word "meaningful." Further, Petitioner did not otherwise explain what he meant or define "meaningful" in his Response.

Wolf Lake Terminals completed the public notice for its NOI/application on July 28, 2020 for coverage under the 2015 Master General Permit. Memorandum Ex. A, p. 9. The public notice provided an address and telephone number by which to contact Wolf Lake Terminals for "[a]ny person wishing further information about this discharge." Response, Ex. A. It provided IDEM contact information for "[a]ny person who wants to be informed of IDEM's decision regarding granting or denying coverage to this facility under the NPDES permit, and who wants to be informed of procedures to appeal the decision." *Id.* All of the information required by the Master General Permit to be placed in the public notice was included. The information contained in the public notice for coverage under the 2015 Master General Permit provided the specificity to inform or otherwise fulfill the commonly understood definition⁸ of "meaningful.

IDEM acted in conformity with 327 IAC 15-2-2.3

17. Petitioner contends that the public notice issued prior to the submission of the NOI renders the notice ineffective because it was "somehow dated some nine months before the date of submission," and stated, "[c]learly this is in error." Petition, p. 3. 327 IAC 15-2-2.3 requires the commissioner to make draft general permits available for public comment for not less than thirty (30) days, consistent with Section 402 of the Clean Water Act (33 U.S.C. § 1342). The draft 2020 Master General Permit was on public notice from September 12, 2020 to October 14, 2020. Reply Exs. K and L. The final Master General Permit was issued October 30, 2020. IDEM complied with 327 IAC 15-2-2.3.

Wolf Lake Terminals meets the requirements for coverage under the Master General Permit

18. Petitioner contends Wolf Lake Terminals does not meet the requirements for coverage under the Master General Permit for Petroleum Products Terminals because the "NOI fail[ed]

⁷ Response, pp. 4 – 6.

⁸ If something is described as meaningful, it means that it is serious, important, or useful in some way. See <https://www.collinsdictionary.com/us/dictionary/english/meaningful>.

to identify the owners of the facility to discharge pollutants into Wolf Lake.” Petition, p. 3; Response, pp. 14 - 15. Petitioner cites 327 IAC 5-1.5-20, the definition of a Master General Permit, in support of his contention. Petition, p. 3; Response, p. 6. Specifically, he claims “the NOI identified only one of three owners of the facility covered by the NOI.” Response, p. 7. Petitioner identified the three (3)⁹ owners as Wolf Lake Terminals, Inc., Rapid Fluids, Incorporated¹⁰ and Long-Middendorf Corporation. Response, p. 7.

327 IAC 5-2-3(c) requires that a NOI be submitted by an owner or operator of the facility to obtain coverage under the Master General Permit. (Emphasis added). Here, the only facility covered under the Master General Permit is Wolf Lake Terminals. Reply Exs. C and E. In its 2020 NOI, “Wolf Lake Terminals, Inc.” was listed as the facility and Long Middendorf Corporation as the parent company/owner. Memorandum, Ex. A, pp. 1 – 2. In the 2021 NOI Wolf Lake Terminals was listed as both and facility and the parent company/owner. The fact that other corporations may own a part of the land on which Wolf Lake Terminals is situated or discharges from is not relevant. OEA’s review is limited to determining whether IDEM complied with applicable statutes and regulations, and there exists no statute or rule that require an operator to own the property from which it operates as a petroleum products terminal. Petitioner’s contention is without merit.

19. Petitioner states, “[t]he permitted facility *may* use water treatment additives which are then discharged to Wolf Lake” citing the 2020 Master General Permit Coverage, 1.3 Eligibility (b)(3) to support his contention. (Emphasis added). Petition, p. 4. The Master General Permit does not authorize discharges containing water treatment additives which have not received prior written approval from IDEM for the specific additive, use, and dosage at the facility for which the NOI is submitted. Memorandum, Ex. B, p. 22.

Petitioner contends because Wolf Lake Terminals admitted “it has used water treatment additives for 25 years,” and it “has never received prior written approval from IDEM for the specific additive, use, and dosage for its facility for any water treatment additive . . . [it] “cannot discharge pursuant to a general permit.” Response, p. 15; *see also* Response Ex. B, p. 4. Petitioner relies upon a February 23, 2011 letter Wolf Lake Terminals submitted to IDEM in response to a January 27, 2011 Violation Letter to support his contention that Wolf Lake Terminals is discharging water treatment additives without permission. *Id.*; Response Ex. J.

The eleven (11) year old letter in which Wolf Lake Terminals outlines its plans to evaluate “a control system to manage the boiler blow-down water pH levels” and increase “the holding time in our retention pond to determine if this will reduce the total suspended solids” is

⁹ Petitioner referred to “two owners” not identified in any permit who “may have been discharging without a valid National Pollution Discharge Elimination System permit.” Response, p. 9.

¹⁰ Rapid Fluids, Inc., an Indiana corporation, was administratively dissolved on May 5, 2018 and thus was not a part of Wolf Lake Terminals’ application in either 2020 or 2021 for its general NPDES Permit No. ING340058.

insufficient to prove that Wolf Lake Terminals is currently discharging water treatment additives through Outfall No. 001A. Moreover, in the same Interrogatories that Petitioner cites, Wolf Lake Terminals clearly states that it does not discharge the boiler blowdown or water treatment additives through Outfall No. 001A. Response Ex. B, p. 5. Petitioner’s reliance on an eleven (11) year old response to a Violation Letter to prove that Wolf Lake Terminals is discharging water treatment additives now is speculative at best, and OEA may not overturn an IDEM approval solely based upon speculation. *Jennings Water, Inc. v. Office of Env’tl. Adjudication*, 909 N.E.2d 1020 (Ind. Ct. App. 2009).

20. Petitioner states, “[t]he NOI references discharges for a petroleum product terminal, but the NOI states that no petroleum products are stored at the Site in proximity to the outfall.” Petition, p. 5; Response, p. 7. Petitioner claims “[t]he distance between the pollutants and the point of discharge is irrelevant to protecting the waters of Wolf Lake”¹¹ but does not provide support for this claim.

Part G of the 2021 NOI contains a table that asks the applicant to list the “TYPE(S) OF PETROLEUM PRODUCTS STORED AT THE SITE IN PROXIMITY OF EACH OUTFALL.” IDEM Ex. D, p. 3.

PART G: TYPE(S) OF PETROLEUM PRODUCTS STORED AT THE SITE IN PROXIMITY OF EACH OUTFALL									
22. For each outfall indicate the types of petroleum products which are typically stored at the site.									
OUTFALL NUMBER	GASOLINE	NUMBER 6 FUEL OIL	CRUDE OIL	NUMBER 2 FUEL OIL/DIESEL FUEL	LUBRICATING OILS	AVIATION GAS	JET FUEL (JP-4)	SOLVENTS	CLEANING/DISINFECTANT USES
001A	--	--	--	--	--	--	--	--	--

In Part G of the 2021 NOI Wolf Lakes Terminals indicated it does not store gasoline, number 6 fuel oil, crude oil, number 2 fuel oil/diesel fuel, lubricating oils, aviation gas, jet fuel, solvents or cleaning/disinfectant in proximity¹² of its sole Outfall No. 001A. *Id.* The fact that Wolf Lake Terminals does not store these types of petroleum products in proximity of its outfall does not mean that Wolf Lake Terminals does not handle or store petroleum products anywhere on its site. By submitting NOIs for coverage under a Master General Permit for petroleum products terminals, Wolf Lake Terminals stated that it is “a facility with an area where petroleum products are supplied by pipeline or barge; and where petroleum products are stored in above-ground tanks or are transferred to trucks for transport to other locations, or both.” Reply Ex. B, p. 4. Petitioner has erroneously relied upon Part G to argue that Wolf Lake Terminals applied for the wrong type of permit.

¹¹ Response, p. 8.

¹² Proximity is defined as “nearness in place, time, order, occurrence, or relation; closeness.” <https://www.dictionary.com/browse/proximity>.

21. Petitioner contends “[a] general permit is not applicable because the applicant *may* be a source of many actual and *potential* contaminants.” (Emphasis added). Petition, p. 6; Response, p. 16. With respect to the cleaning out/flushing of rail cars, Petitioner cites 1.3 Eligibility (b)(4) of the 2020 Master General Permit Coverage, which states that discharges resulting from the cleaning of tanks and/or pipelines is not authorized under the permit. Petition, p. 4. The exclusion does not encompass “the cleaning out/flushing of rail cars” in the absence of a discharge.

Petitioner also cites a September 14, 2010 Violation Letter issued to Rapid Rail Services that stated on August 25, 2010, IDEM staff observed the cleaning out and flushing of rail cars on the property where Wolf Lake Terminals sought to renew its general permit. Petition, pp. 3, 6; Response, Ex. C. Petitioner’s reliance upon a 2010 Violation Letter not issued to Wolf Lake Terminals is not relevant and does not create a genuine issue of material fact.

Petitioner stated in his Affidavit, that “[o]n or about February 2014, I personally observed rail cars being drained onto the ground . . . I photographed this incident.” Response Ex. D, p. 1. Petitioner’s observation in 2014 that rail cars were being drained onto the ground is not relevant because the 2020 General Master Permit prohibits certain discharges into Wolf Lake and the statements Petitioner made in his Affidavit do not concern a discharge into Wolf Lake. Petitioner’s contention is speculative, without merit and does not create a genuine issue of material fact.

22. Petitioner contends that based on historical evidence Wolf Lake Terminals’ discharge “*may* be commingled with hazardous waste or hazardous materials and *may* result from the cleaning of tanks.” (Emphasis added). Response, pp. 14 – 15. Citing 1.3 Eligibility (b)(7) of the Master General Permit which prohibits discharges that are commingled with hazardous wastes or hazardous materials, Petitioner states,

. . . Wolf Lake Terminals is located on industrial wastes dumped into Wolf Lake in the 1930s through the 1950s. The entire property is made of fill placed into the lake body with no environmental safeguards. Most of the fill in the area consists of steel mill slag and other industrial wastes. It is a safe *assumption* that the land beneath the applicant’s property consists of the same material. Studies done within the same watershed have indicated that this material contains high levels of metals and results in a marked elevation of the pH of waters that come into contact with such fill.

Wolf Lake Terminals has a long history of handling a variety of chemical products including solvents, plasticizers, naphthenic and paraffinic based oils, caustic soda, sulfonates, glycols, white oils, and sulfuric acid. The applicant reportedly offloads some 10,000 tank trailers annually. *If* even a small amount of product is lost . . . it would result in a significant release to the environment and eventually Wolf Lake.

(Emphasis added). Petition, p. 6. To support his contention, Petitioner relies upon a February 20, 2004 Environmental Notice and Covenant (ERC) recorded by Rapid Fluids. Petition, p. 3. The timeline of events leading up to the filing of the ERC:

- August 1994 - Wolf Lake Terminals entered into an Agreed Order (AO) with IDEM to address the area in and around Tank Nos 26 and 32 relating to past activities that included the blending of hazardous waste and fuel oil. IDEM Ex. H, p. 9.
- June 2000 - Following investigative activities conducted in 1996 as required by the AO with IDEM, Wolf Lake Terminals entered into an Administrative Order on Consent (AOC) with the Environmental Protection Agency (EPA) which required Wolf Lake Terminals to propose final corrective measures necessary to protect human health and the environment from all current and future unacceptable risks that potentially could result from contaminated soils underneath Tanks #32 and #26 at the Site. IDEM Ex. H, pp. 1, 9.
- June 2000 - Wolf Lake Terminals entered into an Administrative Order of Consent with the Environmental Protection Agency (EPA) to propose, among other requirements, final corrective measures necessary to protect human health and the environment from all current and future unacceptable risks that potentially could result from contaminated soils underneath Tanks #32 and #26 at the Site. *Id.* at p. 10.
- August 2003 - EPA issued a Statement of Basis, which among other requirements, required Wolf Lake Terminals to undertake a corrective measure that would “restrict the current and future use of its property to commercial and industrial land uses.” *Id.* p. 14. The measure to which EPA referred is commonly called an environmental restrictive covenant (ERC). *Id.* The Statement of Basis noted that the following corrective measures had already been completed:
 - Removal and off-site disposal of contaminated soils exhibiting a hazardous waste characteristic;
 - Removal and off-site disposal of additional contaminated soils that posed unacceptable risks; and
 - Groundwater Investigation.
- January 2004 – EPA issued a Final Decision and Response to Comments Selection of Final Remedial Alternative for Wolf Lake Terminals (Notice) where EPA “determined that the selected remedy for the Wolf Lake Terminals facility is appropriate and is protective of human health and the environment.” *Id.* at pp. 1, 14. The Statement of Basis was attached to this Final Decision. *Id.* at p. 6.
- January 2004 - the Notice ordered Wolf Lake Terminals to file the ERC with thirty (30) days of the receipt of the notice. *Id.* p 1.

- February 2004 – Rapid Fluids recorded the ERC.

Petitioner’s reliance upon documents dated August 1994 – February 2004 relating to contaminated soils does not support his contention that any current or future discharge is commingled with hazardous wastes or hazardous materials chemicals.

Petitioner also contends “[o]n June 23, 2022, IDEM issued a Referral to Enforcement to Wolf Lake Terminals . . . that found Wolf Lake Terminals mishandled 18,300 gallons of hazardous waste” to argue “[g]iven the vast amount of hazardous wastes located at this site . . . it is not speculation that stormwater collected from the subject site is contaminated with these wastes.” (Emphasis original). Response, pp. 16 – 17 (citing Response Ex. K).

Response Ex. K only consists of an unsigned proposed Agreed Order (not a Referral to Enforcement), was issued to Heritage-Crystal Clean, LLC (not Wolf Lake Terminals), and was based on an inspection and record review conducted August 22 and 25, 2014. The proposed Agreed Order does not state that Heritage-Crystal Clean still operates at Wolf Lake Terminals or that the hazardous waste was or is being discharged through Outfall 001A. Petitioner’s reliance upon an unsigned Proposed Agreed Order not issued to Wolf Lake Terminals does not create a genuine issue of material fact in this Cause.

FINAL ORDER

THE COURT, being duly advised hereby **ORDERS, ADJUDGES AND DECREES**, that IDEM did not comply with I.C. § 13-18-20-12 , I.C. § 13-15-3-1 or and **REMANDS** the Cause to IDEM to 327 IAC 15-2-2 to require Wolf Lake Terminals to resubmit a NOI to demonstrate its intent to comply with the 2020 Master General Permit.

With respect to the remaining issues raised by Petitioner, the COURT **FINDS** that Petitioner failed to show there exists a genuine issue of material fact and **GRANTS** IDEM summary judgment as to those issues. Petitioner’s Petition is hereby **DISMISSED** as to those issues.

You are further notified that pursuant to the provisions of I.C. § 4-21.5-7-5, OEA serves as the ultimately authority in the administrative review of the decisions of the Commissioner of the IDEM. This is a Final Order subject to judicial review consistent with the applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 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 this 9th day of January, 2023 in Indianapolis, IN.

Hon. Lori Kyle Endris
Environmental Law Judge

