

**Objection to Issuance of NPDES Permit No. IN0062022
Steel Dynamics, Inc. – Engineered Bar Products Division
2019 OEA 61 (11-W-J-4470)**

OFFICIAL SHORT CITATION NAME: When referring to 2019 OEA 61, cite this case as **Steel Dynamics, Inc. 2019 OEA 61.**

Objection to Issuance of NPDES Permit No. IN0062022, Steel Dynamics, Inc. – Engineered Bar Products Division, Pittsboro, Hendricks County, Indiana

Cause No. 11-W-J-4470.

TOPICS:

Storm water discharges
Steel manufacturing facility
National Pollution Discharge Elimination System (NPDES)
Individual NPDES permit
Industrial activity
Part I.D.
Multi-Sector General Permit (MSGP)
Part I.E.
Storm Water Pollution Prevention Plan (SWPPP or SWP3)
Narrative, non-numerical requirements
Approved State NPDES program
Unpromulgated rule
Site inspection
Case-by-case analysis
Age of equipment, facilities
Cost
Process employed
Process changes
Engineering aspects of various types of control techniques
Non-water quality impacts
Reasonable potential for storm water to be exposed to pollutants
Conclusory statements
Specific details
Permit expiration period
Voided permit
Remanded to IDEM
Summary judgment
Cross motions
Motion to Reconsider final order
33 U.S.C. § 1343(b), (d)
33 U.S. C. § 1370
40 CFR 122.6(b)(14)

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40 CFR § 124.56(g)(1)(iv)
40 CFR § 125.3(c), (d)
I.C. § 4-21.5-3-5(g)
I.C. § 4-21.5-3-31(a), (b), (d)
I.C. § 4-21.5-3-34(d), (e)
I.C. § 13-14-6-2
327 IAC 5
327 IAC 5-2-2, 327 IAC 5-2-2(a)(1), (b), (h)
327 IAC 5-2-10
327 IAC 5-3-7
327 IAC 5-4-6(d)
327 IAC 5-5
327 IAC 5-6
327 IAC 5-9
327 IAC 5-13
327 IAC 15
327 IAC 15-2-2
327 IAC 15-6
327 IAC 15-6-7(b)(3), (5), (6)
Ind. Tr. R. 30(B)(6)

PRESIDING JUDGE:

Daidsen

PARTY REPRESENTATIVES:

Petitioner: David L. Hatchett, Esq., Thomas W. Baker, Esq.
Respondent IDEM: Sierra L. Alberts, Esq.

ORDER ISSUED:

August 5, 2019

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

October 21, 2019 Order Denying IDEM's Motion to Reconsider

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3. Through its October 18, 2012 partial summary judgment motion, SDI sought to delete Permit Part I.D. (“Part I.D.”) Multi-Sector General Permit (“MSGP”) provisions¹, and sought to modify portions of Permit Part I.E. (“Part I.E.”) concerning the Storm Water Pollution Prevention Plan (“SWP3”). The contested permit provisions contain narrative, non-numerical performance requirements relating to facility stormwater discharge.
4. The Court’s June 14, 2013 Findings of Fact, Conclusions of Law and Non-Final Orders on Partial Summary Judgment (“2013 Non-Final Order”) denied partial summary judgment as to Part I.E., and deleted Part I.D. on the basis that “IDEM erred in including the MSGP requirement in the . . . Permit because it constituted an ‘unpromulgated rule’” when applied to individual permits. *2013 Non-Final Order, Concl. of Law, ¶ 11, 12, Order, ¶ 1*. The Court’s November 18, 2013 Order on IDEM’s July 12, 2013 Motion for Reconsideration remanded the 2011 Permit to IDEM to conduct a case-by-case analysis as to whether any of the Part I.D. MSGP terms “are required to be in the Permit.” *Id.*
5. On April 10, 2014, IDEM conducted a storm water site inspection of the SDI Site in order to determine which terms of the MSGP applied to SDI. In its summary judgment briefing, IDEM did not designate further evidence; SDI designated the following evidence from a Sept. 1, 2015 Ind. Tr. R. 30(B)(6) deposition of IDEM:
 - a. IDEM did not consider the age of the equipment. *97:17-21*;
 - b. IDEM did not consider cost. *98:15-17*;
 - c. IDEM did not consider non-water quality impacts. *98:24 - 99:12*.
6. While these cases were pending before OEA, the parties engaged in settlement negotiations and the following permit approvals and petitions for administrative review were filed focusing on Parts I.D. and/or Part I.E, and consolidated under Cause No. 11-W-J-4470:
 - a. IDEM November 1, 2014 Final Permit Modification, SDI October 30, 2014 (“2014 Modified Permit”) Petition for Administrative Review assigned OEA cause number 14-W-J-4766. IDEM supported disputed terms of the 2014 Modified Permit by stating that the modification reflected the site-specific analysis. *2014 Modified Permit, Briefing Memo, p. 7*;
 - b. IDEM March 4, 2016, Final NPDES Permit renewal (“2016 Permit”), SDI March 18, 2016 Petition for Administrative Review assigned OEA cause number 16-W-J-4887;
 - c. IDEM April 30, 2018 Permit Modification (“2018 Modified Permit”), SDI May

¹ MSGP is an EPA document which functions as a federal general NPDES permit for discharges not requiring an individual permit and in areas not covered by an approved state NPDES program. *SDI Petition, p. 4; Exs. C. D.*

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15, 2018 Petition for Administrative Review assigned OEA cause number 18-W-J-5006. The 2018 Modified Permit specifically stated that its terms “updated Permit Part I.D. Storm Water Monitoring and Non-Numeric Effluent Limits and Permit Part I.E. [SWP3] to make the requirements consistent with other NPDES permits issued by IDEM”. *2018 Permit, Briefing Memo, p. 8.*

7. The 2018 Modified Permit presently applies to SDI’s permitted activity. By their standard terms, all of the Permits are effective for 5 years, and contain an expiration period. Per these standard permit terms, the parties agree that SDI’s 2011 Permit and 2014 Modified Permit have expired.
8. On October 9, 2015, the primary NPDES general permit rule, 327 IAC 15-2-2(a)(1), was modified to allow IDEM to regulate “[s]torm water discharges associated with industrial activity, as defined in 40 CFR 122.6(b)(14) consistent with EPA NPDES [MSGP] for Stormwater Discharges Associated with Industrial Activity, effective May 27, 2009.”
9. On February 25, 2019, the parties filed motions for summary judgment. IDEM also moved to dismiss Petitions under cause numbers 11-W-J-4470, 14-W-J-4766, and 16W-J-4887 (all but cause number 18-W-J-5006), as mooted by age/expiration. Per a scheduling order, the parties filed briefs in response, reply and submitted proposed findings of fact, conclusions of law and proposed orders.
10. The parties dispute the terms of Part I.D. In sum, SDI argues that part I.D. should be voided, as 327 IAC 15-2-2(a)(1) is applicable to general, not individual permits. IDEM argues that it developed Part I.D. of SDI’s Permit to be consistent with its actions on similar permits and with the EPA MSGP referenced in 327 IAC 15-2-2(a)(1). *2018 Modified Permit, Briefing Memo, p. 8.* On summary judgment, SDI further designated evidence that IDEM included elements of the MSGP it will “always” require, *30(B)(6) Dep. Tr. 57:5-23*, that “if industrial activity is indicated, then Part [I.]D. and [I.]E would apply”, *Id. at 70:13-14*, “if you have storm water associated with industrial activity and you have the potential for that storm water to move pollutants into the waters of the state, then you need to do the control measures and BMPs”, *Id. at 71:14-22*.
11. As for the SWP3 conditions in permit Part I.E., the parties dispute whether IDEM exceeded its authority stated in 327 IAC 15-6, *et seq.*, in Parts I.E.1, -1.c, 2.b, 2.b.2, 2.b.2.M., 2.b.2.T, 2.b.4, and 2.b.5. Petitioner seeks the Court’s intervention to identify and modify the limitation that the rule only covers stormwater discharges exposed to industrial activity and that ‘have a reasonable potential for storm water to be exposed to pollutants. *See e.g., 327 IAC 15-6-7(b); 327 IAC 15-6-7(c).*

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”)

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has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*

2. This is a Final Order issued pursuant to I.C. § 4-21-.5-3-27. Findings of Fact that may be construed as Conclusions of Law, or Conclusions of Law that may be construed as Findings of Fact, are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. 315 IAC 1-3-10(b); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993); *Jennings Water, Inc. v. Office of Envntl. Adjudication*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “The ELJ . . . serves as the trier of fact in an administrative hearing and a *de novo* review at that level is necessary. *United Refuse*, 615 N.E.2d 100, 103. The ELJ does not give deference to the initial determination of the agency.” *Indiana-Kentucky Elec. Corp v. Comm’r, Ind. Dep’t of Envntl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). “*De novo* review” means that “all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. The parties seek summary judgment as to whether IDEM’s properly included specific Permit conditions in Part I.D. and Part I.E., as a matter of law. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1 (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). “A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703 - 704 (Ind. Ct. App. 1992). Further, the Indiana Tax Court in *Allied Collection Service Inc. v. Ind. Dept. of State Revenue* (Cause No. 49T10-0608-TA-76, December 22, 2008) stated, “If there is any doubt when ruling on a motion (or motions) for summary judgment as to what conclusion the Court could reach, the Court will conclude that summary judgment is improper, given that it is neither a substitute for trial nor a means for resolving factual disputes or conflicting inferences following from undisputed facts. *See Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001) (citations omitted).” When the moving party sets out a *prima facie* case in support of the summary judgment, the burden shifts to the non-movant to

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establish a factual issue. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). “The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-04 (Ind. Ct. App. 1992).” *Objection to Denial of Excess Liability Trust Fund Claim No. 200202502-8, GasAmerica #45, New Palestine, Hancock County, Indiana (OEA Cause 03-F-J-3212)*, 2008 OEA 83, 87.

5. The parties’ disputes concerning Parts I.D. and I.E. are appropriate to resolve on summary judgment, as there are no genuine issues of material fact.
6. The United States Environmental Protection Agency’s (“EPA”) authority to administer the NPDES program is delegated to IDEM. *See* 33 U.S.C. § 1342(b). Section 402(b) of the federal Clean Water Act (“CWA”) specifies regulations for industrial stormwater discharges. *See* U.S.C. § 1342(d). The CWA requires that delegated state programs comply with the CWA, with no less stringency than the federal program. *See* 33 U.S.C § 1370. In Indiana, “[e]ach NPDES permit shall provide for and ensure compliance with applicable requirements of the [CWA]”. 327 IAC 5-2-10(a) (1987).
7. IDEM is authorized to issue site-specific, individual NPDES permits (*see* 327 IAC 5, *et seq.*). Per 327 IAC 15, *et seq.*, IDEM may also issue general permits, or permits-by-rule².

Permit Part I.D

8. On summary judgment, Petitioner seeks to delete the individual NPDES Permits’ Part I.D. as containing impermissible general NPDES Multi-Sector General Permit (“MSGP”) stormwater provisions. IDEM neither appealed the Court’s 2013 Order, nor disputed in current briefing, the Court’s 2013 Conclusions that IDEM’s inclusion of MSGP terms in enforceable individual permits was an impermissible application of an unpromulgated rule³, a Conclusion of Law which remains law of the case.⁴

² In general, individual permits are required for facilities with larger or more complex stormwater management issues. However, some regulations applicable to one type of permit sometimes apply to the other type of permit.

³ 2013 Order, Concl. Of Law ¶ 11, 12.

⁴ SDI correctly argues that the Court’s previous 2013 Order found that the MSGP constitutes an unpromulgated rule that IDEM may not use to create individual NPDES permit terms unless IDEM has other legal authority to do so. This prior holding on this issue must be followed under the “law of the case” and collateral estoppel doctrines. “Once an issue is litigated and decided, that should be the end of the matter.” *Indiana-Kentucky Elec. Corp. v. Save The Valley*, 953 N.E.2d 511, 518 (Ind. Ct. App. 2011). “[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Id.* “Collateral estoppel operates to bar re-litigation of an issue where that issue was necessarily adjudicated in a former action and the same issue is presented in a subsequent action.” *Id.* at 516. “Indiana courts have held numerous times that the law of the case must be followed even when the earlier decision is deemed to be incorrect.” *Id.* at 518.

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9. Concerning individual NPDES permits issued by IDEM, “Any discharge of pollutants into waters of the state as a point source discharge, [exceptions omitted], is prohibited unless in conformity with a valid NPDES permit obtained prior to the discharge.” 327 IAC 5-2-2 (2017).
10. IDEM argues it is authorized to include general NPDES MSGP provisions to individual NPDES permits, due to modifications to general NPDES rule 327 IAC 15-2-2(a)(1) (2015), authorizing IDEM to regulate “[s]torm water discharges associated with industrial activity, as defined in 40 CFR 122.6(b)(14) consistent with EPA NPDES [MSGP] for Stormwater Discharges Associated with Industrial Activity, effective May 27, 2009.”
11. SDI’s individual NPDES permit concerns discharge of storm water associated with industrial activity, and is subject to:

327 IAC 5-4-6 (d) If an individual permit is required under 327 IAC 5-2-2 that includes discharge of commingled storm water associated industrial activity, [IDEM] may consider the following in determining the requirements to be contained in the permit:

(1) The provisions in the following:

(A) 327 IAC 15-5, 327 IAC 15-6, and 327 IAC 15-13, as appropriate to the type of storm water discharge.

(B) NPDES Pesticide General Permit for Point Source Discharges to Waters of the State from the Application of Pesticides, Permit Number ING870000, effective October 31, 2011, available at: http://www.in.gov/idem/files/npdes_permit_pesticide_final_permit.pdf or from the IDEM Office of Water Quality, Permits Branch, 100 North Senate Avenue, Indianapolis, IN 46204-2251.

(C) 327 IAC 5-2, 327 IAC 5-5, and 327 IAC 5-9 for establishing NPDES permit effluent limitations and conditions.

(2) “Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits”, EPA 833-D-96- 001, September 1, 1996, available from U.S. EPA/NSCEP, P.O. Box 42419, Cincinnati, Ohio 45242-0419 or from the department.

(3) The nature of the discharges and activities occurring at the site or facility.

(4) Other information relevant to the potential impact on water quality.

12. Thus, in adopting the NPDES standards for individual NPDES permits, the Environmental Rules Board authorized IDEM to use 327 IAC 5-2, 327 IAC 5-5, 327 IAC 5-9, and general NPDES regulations 327 IAC 15-5, 327 IAC 15-6 and 327 IAC 15-13. SDI correctly argues that general NPDES rule 327 IAC 15-2-2(a)(1), is not included in the list of authorities that

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may be considered for determining terms included in individual NPDES permits. By its plain language, 327 IAC 5-4-6(d) does not allow the use of 327 IAC 15-2-2 to impose MSGP terms in individual NPDES permits. Thus, IDEM cannot impose the MSGP terms in an individual permit. *See Indiana St. Dep’t of Pub. Welfare v. Cowdell*, 421 N.E.2d 667, 671 (Ind. Ct. App. 1981) (“rights created or benefits conferred by an administrative rule should not be extended by interpretation beyond the plain terms of the rule itself”). “When an agency promulgates rules and regulations, it is bound to follow them.” *Indiana Family & Soc. Servs. Admin. v. Methodist Hosp. of Ind.*, 669 N.E.2d 186, 190 (Ind. Ct. App. 1996).

13. Although plain language of the regulations lacks authority to apply 327 IAC 15-2-2 to impose MSGP terms on individual permits, IDEM argues that “327 IAC 15-2-2 authorizing IDEM to regulate storm water discharges associated with industrial activities consistent with the MSGP allows IDEM to regulate the same discharges in individual permits consistent with the MSGP through 327 IAC 15-6 and 327 IAC 5-4-6(d)(1)(A).” *IDEM Resp. to SDI Mot. for Summ. J. at 5*.
14. OEA would exceed its authority and the plain language of the regulations, which clearly state that the use of the MSGP is only authorized in the case of general permits, and omits 327 IAC 15-2 from the authorities that IDEM “may consider” in setting individual NPDES terms. To the extent that the plain language of the regulation is not clear, the common statutory interpretation maxim of *expressio unius* prevents “reading in” other authorities into the enumerated list provided in the regulation. *See Leslie v. State*, 755 N.E.2d 1147, 1150 (Ind. Ct. App. 2001) (“when certain items are specified or enumerated in the statute,⁵ then, by implication other items not so specified are excluded.”) SDI correctly argues that the exclusion of 327 IAC 15-2 from the list of regulations that IDEM “may consider” in setting individual NPDES terms means that IDEM may not use 327 IAC 15-2 to justify inclusion of the MSGP terms.
15. IDEM’s argument in support of applying the MSGP terms in Pat I.D. is based upon IDEM’s 2014 site specific analysis. IDEM contends that it conducted a site-specific analysis in 2014 in anticipation of issuing the 2014 Permit, and further asserts that it did not conduct subsequent analyses for subsequent Permit determinations, because its 2014 analysis “remained valid” for the 2016 Permit, and that the 2018 Permit was “only a modification” of the 2016 Permit. However, the 2018 Permit changed Part I.D. from the prior permit (*Compare 2018 Permit at 14 to 23 and 2016 Permit at 14 to 26*). *See IDEM Reply at 4*. Without site-specific analysis for the 2018 Permit, inclusion of the part I.D. MSGP terms lacks factual support.
16. IDEM’s argument of consistency, that it changed Part I.D. provisions and to include MSGP terms “to make the requirements consistent with other NPDES permits issued by IDEM”,

⁵ This maxim applies to both regulations and statutes. “The rules applicable to construction of statutes apply to construction of administrative regulations.” *Indiana Family & Soc. Servs. Admin. v. Methodist Hosp. of Ind.*, 669 N.E.2d 186, 190 n. 3 (Ind. Ct. App. 1996). *Leslie v. State* also applied this maxim to a regulation, interpreting Indiana Bureau of Motor Vehicle rules.

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2018 Briefing Memo, p. 8, infers that IDEM did not consider SDI's permit applications on a case-by-case basis. If IDEM uses a case-by-case basis to set permit terms, IDEM has a legal obligation to identify it in the Briefing Memo. 327 IAC 5-3-7; 40 CFR § 124.56(b)(1)(iv). IDEM's failure to identify any such basis further infers the lack of a case-by-case analysis for the 2018 Permit's Part I.D, which IDEM confirmed in its discovery responses (that it was always going to include the MSGP terms in SDI's Permit, *IDEM 30(B)(6) Dep. Tr. 57:5-:23*, listing elements of the MSGP that IDEM will "always" require "if industrial activity is indicated, then Part D and E would apply" *Id.*, 70:13-14).

17. Further, IDEM failed to designate any evidence that it met the requirements for a case-by-case development of Part I.D. permit terms. IDEM's sole designated evidence is as follows:

A storm water site inspection of the SDI Pittsboro property was conducted by IDEM personnel on April 10, 2014. A site specific analysis was completed based on observations made and information gathered during the site visit and IDEM was able to determine which MSGP components were appropriate for this site. The permit was modified to reflect the site specific analysis on October 16, 2014 (effective date November 1, 2014).

Briefing Memo at 7 (cited by IDEM's Motion at 9). SDI correctly argues that IDEM's failure to designate evidence on summary judgment defeats IDEM's claim for two reasons. First, IDEM needed to demonstrate that it applied the required factors necessary to include case-by-case permit terms. Second, IDEM needed to provide evidence sufficient to survive SDI's motion for summary judgment.

18. SDI correctly argues that 40 CFR § 125.3(c),(d) and 327 IAC 5-5-2(b),(h) require IDEM to consider specific factors with respect to the facility in developing any additional permit requirements. For example, "[i]n setting case-by-case limitations pursuant to subsection (b), the permit writer must consider the following factors [for best practicable technology]:

- (A) The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.
- (B) The age of equipment and facilities involved.
- (C) The process employed.
- (D) The engineering aspects of the application of various types of control techniques.
- (E) Process changes.
- (F) Nonwater quality environmental impact, including energy requirements.

327 IAC 5-5-2(h).

19. SDI further correctly argues that IDEM did not fulfill the requirement to identify the basis and rationale for permit terms in the Briefing Memo. *See* 327 IAC 5-3-7; 40 CFR § 124.56(b)(1)(iv). In fact, during its 30(B)(6) deposition, IDEM stated that it omitted these

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factors, that it did not consider the age of the equipment⁶, did not consider cost⁷, and did not consider non-water quality impacts⁸. SDI's Permit cannot include the MSGP terms found at Part I.D., if the requisite factors to establish a case-by-case analysis are not analyzed.

20. SDI correctly argues that IDEM failed to provide sufficient evidence for this Court to conclude that a requisite case-by-case analysis occurred. “[R]ather than merely setting forth conclusory statements, [non-movants] were required to give specific details which they perceived to be the basis for their conclusions.” *Whitlock v. Steel Dynamics, Inc.*, 35 N.E.3d 265, 273 (Ind. Ct. App. 2015) (granting SDI's motion for summary judgment because there was no evidence creating a genuine issue of material fact). “Conclusory statements [do] not constitute the type of factual showing necessary under T.R. 56(E) to avoid summary judgment.” *Otto v. Park Garden Associates*, 612 N.E.2d 135, 137-142 (Ind. Ct. App. 1993) (non-movants' self-serving assertion that they were not in default on a note was insufficient to avoid summary judgment; non-movants failed to “include cancelled checks or any other evidence which would have allowed the trial court to find that the issue of default should be decided at trial”).
21. Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *City of South Bend Wastewater Treatment Plant*, 2017 OEA 78 at 83 (Aug. 4, 2017). IDEM's conclusory statement that it performed a “site-specific analysis” without any description, affidavit testimony or other evidence, and application of the required factors, is insufficient to show that a valid case-by-case analysis justified inclusion of MSGP terms. Further, this lack of evidence is insufficient to form the basis for sustaining IDEM's motion for summary judgment or withstanding SDI's motion for summary judgment.
22. SDI's argument prevails, that IDEM has continued to impose the MSGP terms as an unpromulgated rule, and no regulatory provision (including the regulatory change cited by IDEM) supports inclusion of these terms. Further, IDEM did not undertake a valid, timely, or sufficiently documented case-by-case analysis to include the MSGP terms. Petitioner SDI has met its burden on its motion for summary judgment; Respondent Indiana Department of Environmental Management has not. As there is no issue of material fact, summary judgment in favor of SDI is appropriate on the validity of Part I.D; it is stricken from the Permit.

Disputed Portions of Permit Part I.E.

23. SDI also seeks to revise the following portions of Permit Conditions I.E. on the basis that the Permit terms exceed authority conferred on IDEM in 327 IAC 15-6 *et seq.*:
 - a. Permit Condition I.E.1.c.: The requirement that the SWPPP “assure compliance with the terms and conditions of this permit” deviates from 327 IAC 15-6-7(a)(3), which

⁶ IDEM 30(B)(6) Dep. Tr. 97:17-:21

⁷ *Id.* at 98:15-:17.

⁸ *Id.* at 98:24-99:12

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only requires that a SWPPP ensure compliance with the Storm Water Discharges Exposed to Industrial Activity Rule. IDEM seems to agree with SDI's interpretation of this language.

Petitioner seeks the following revision to Permit Condition I.E.1.c:

Assure compliance with ~~the terms and conditions~~ **Part I.E.** of this permit.

- b. Permit Condition I.E.2.b.: The second sentence of the first paragraph of this term is not required by applicable rule (327 IAC 15-6-7(a)) and the term "may potentially be significant pollutant sources" is overly broad and vague, as it is not limited to just pollutant sources for stormwater exposed to industrial activity.

Petitioner seeks the following revision to Permit Condition Part I.E.2.b:

Description of Potential Pollutant Sources – The plan shall provide a description of areas at the site exposed to industrial activity and have a reasonable potential for storm water to be exposed to pollutants. ~~The plan shall identify all activities and significant materials (defined in 40 CFR 122.26(b)), which may potentially be significant pollutant sources.~~ As a minimum, the plan shall contain the following:

- c. Permit Condition I.E.2.b.2.: 327 IAC 15-6-7(b)(3) expressly limits the scope of requirements (J) through (S) to "areas that generate storm water discharges exposed to industrial activity and have a reasonable potential for storm water exposure to pollutants," but the Permit omits this limitation. This could be read to require the SWPPP to identify areas that have no potential stormwater exposure, such as aboveground storage tank locations or material loading or unloading areas that are indoors.

Petitioner seeks to revise Permit Conditions I.E.2.B.2.(J) – (S) to limit each condition's application to areas that generate storm water discharges exposed to industrial activity and have a reasonable potential for storm water exposure to pollutants.

- d. Permit Condition I.E.2.b.2.(M): The last two sentences of this term unreasonably expand the scope of this requirement beyond that authorized in 327 IAC 15-6-7(b)(3)(M).

Petitioner seeks the following revision to I.E.2.b.2.(M):

All existing and historical outdoor storage areas for raw materials, intermediary products, final products, and waste materials. ~~Include materials handled at the site that potentially may be exposed to precipitation or runoff, areas where deposition of particulate matter from process air emissions or losses during material handling activities.~~

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- e. Permit Condition I.E.2.b.2.(T): The requirement to identify waste storage and disposal areas is not found in 327 IAC 15-6-7(b)(3), is not limited to outdoor areas that could reasonably have a stormwater exposure, and duplicates other provisions of Part I.E.2.b.2.

Petitioner seeks to delete Permit Condition I.E.b.2.(T).

- f. Permit Condition I.E.2.b.4.: The phrase “and have a reasonable potential for storm water exposure to pollutants” found in 327 IAC 15-6-7(b)(5) is missing after “exposed to industrial activity.” This language provides important clarifications to help the source focus on the relevant areas at the facility.

Petitioner seeks to the following revision to Permit Condition I.E.2.b.4.:

A narrative description of areas that generate storm water discharges exposed to industrial activity **and have a reasonable potential for storm water exposure to pollutants**, including descriptions for any existing or historical areas listed in subdivision 2.b.(2)(J) through (FS) of this Part, and any other areas thought to generate storm water discharges exposed to industrial activity. The narrative descriptions for each identified area must include the following:”

- g. Permit Condition I.E.2.b.5.: This term exceeds the scope of 327 IAC 15-6-7(b)(6) as it is not limited by potential sources of storm water exposure to pollutants.

Petitioner seeks the following revision to Permit Condition I.E.2.b.4.:

A narrative description of existing and planned management practices and measures to improve the quality of storm water run-off entering a water of the state. Descriptions must be created for existing or historical areas listed in subdivision 2.b.(2)(J) through (FS) and any other areas thought to generate storm water discharges exposed to industrial activity **and be a potential source of storm water exposure to pollutants**. The description must include the following:”

- h. Permit Condition I.E.2.c. This term does not deal with stormwater discharges and duplicates other sections of the SWPPP requirements that deal with the potential for spills. Petitioner seeks to delete Permit Condition I.E..c.

24. On summary judgment, SDI seeks a strict application of the specific text stated in SWP3 regulations stated in 327 IAC 15-6, *et seq.* As IDEM correctly argues, 327 IAC 15-6-7(b) provides that 327 IAC 15-6, *et seq.*, sets forth minimum, not maximum or absolute, SWP3 criteria to be applied by IDEM. SDI has not demonstrated that Permit Part I.E. should be modified to conform to the exact terms of authorizing regulations, as the regulations specifically state that they set forth minimum standards. Thus, IDEM did not abuse its discretion. The disputed provisions address circumstances which may directly or indirectly affect each facility’s SWP3 performance. IDEM did not exceed its statutory

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authority. IDEM's conditions stated in Permit Part I.E. are reasonable minimum requirements for the SWP3 in each Permit. As a matter of law, for lack of genuine issue of material fact on IDEM's summary judgment motion, IDEM is entitled to judgment as a matter of law on this issue.

IDEM's Motion to Dismiss

25. IDEM also moved to dismiss SDI's appeals of prior NPDES permits as moot, which appeals are consolidated with the present action..
26. The 2011 Permit was the subject of this Court's 2013 Order. OEA's order to remand the permit back to IDEM for reissuance led to the 2014 Permit and subsequent litigation. Although an examination of all of the prior permits is required to make a determination in this case, the 2018 Permit is the only current, applicable permit.
27. However, the 2016 Permit, which was effective at least until IDEM issued the 2018 Permit, could still be the subject of an IDEM enforcement action as IDEM's three-year statute of limitations has yet to run. I.C. § 13-14-6-2.
28. I.C. 4-21.5-3-.5(g) limits the expiration of certain NPDES permits until OEA "has disposed of a proceeding under [AOPA] concerning the renewal."
29. OEA declines to grant IDEM's motion to dismiss at this time, as its action on items in dispute with the 2018 Permit brings these matters to conclusion.

FINAL ORDER

AND THE COURT, being duly advised, **FINDS AND ORDERS** that in OEA Cause 11-W-J-4470, Petitioner Steel Dynamics, Inc. – Engineered Bar Products Division has provided substantial evidence required to meet its burden of showing that Permit Part I.D. of NPDES Permit No. IN0062022 did not comply with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Petitioner Steel Dynamics, Inc. – Engineered Bar Products Division is entitled to judgment as a matter of law that IDEM erred in including the MSGP requirement in the NPDES Permit Part I.D.

As for the SWP3 requirement in the NPDES Permit Part I.E., Respondent Indiana Department of Environmental Management has provided substantial evidence required to meet its burden of showing that Permit Part I.E. of NPDES Permit No. IN0062022 complied with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Respondent Indiana Department of Environmental Management is entitled to judgment as a matter of law that it did not err in including the SWP3 requirements in the NPDES Permit Part I.E.

As for IDEM's Motion to Dismiss specified permits, the Court's ruling on summary judgment concludes the issues in controversy without need for the Court's determination on dismissal.

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IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Petitioner Steel Dynamics, Inc. – Engineered Bar Products Division’s Partial Motion for Summary Judgment is **GRANTED** as to **Permit Part I.D**, and **DENIED** as to **Permit Part I.E**.

IT IS FURTHER ORDERED that NPDES Permit No. IN0062022 Permit Condition Part I.D. is void and of no effect, and Permit Condition Part I.E. is sustained.

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

IT IS SO ORDERED this 5th day of August, 2019 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge

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the basis that

- “IDEM erred in including the MSGP requirement in the . . . Permit because it constituted an ‘unpromulgated rule’” when applied to individual permits. *2013 Non-Final Order, Concl. of Law, ¶ 11, 12, Order, ¶ 1.* The Court’s November 18, 2013 Order on IDEM’s July 12, 2013 Motion for Reconsideration remanded the 2011 Permit to IDEM to conduct a case-by-case analysis as to whether any of the Part I.D. MSGP terms “are required to be in the Permit.” *Id.*
4. During the pendency of this litigation, the parties attempted resolution with some success, but subsequent permit modifications and renewals were subject to Petitions for Administrative Review before OEA. The Court’s Final Order encompassed the current Site Permit.
 5. On August 26, 2019, IDEM filed its Motion to Reconsider the Court’s August 5, 2019 Final Order, based upon procedural rules stated in the Administrative Orders and Procedures Act (“AOPA”), Ind. Code § 4-21.5, *et seq.* IDEM’s Motion to Reconsider did not contain a request for stay or rehearing of the August 5, 2019 Final Order.
 6. Without objection, the parties followed the Court’s September 10, 2019 Order Scheduling Response to Motion to Reconsider. SDI’s Response was timely filed on September 20, 2019. IDEM’s Reply was timely filed on September 30, 2019.
 7. In sum, through its Motion to Reconsider, IDEM asked OEA, “in lieu of voiding [Part I.D.] . . . [that] OEA remand the permit to [IDEM] to conduct a case-by-case analysis”. *Motion to Reconsider, p. 2, ¶ 6.* In seeking this relief, IDEM relied upon I.C. § 4-21.5-3-34(e):
 - (e) When the final order referred to in subsection (d) involves the modification of a permit issued under IC 13, the administrative law judge:
 - (1) shall remand the permit to the issuing agency with instructions to modify the permit in accordance with the final order; and
 - (2) retains jurisdiction over any appeals of the modified permit.Only those terms of the permit that are the subject of the final order shall be modified and subject to public notice and comment.
 8. Final Order procedure under I.C. § 4-21.5-3-34(e) applies to final orders arising from settlement, as described in relevant portions of I.C. § 4-21.5-3-34(d):

“When a matter is settled without the need for more elaborate proceedings under this section, the ultimate authority or its designee shall issue the order agreed to by the parties as a final order under this article.”

The August 5, 2019 Final Order is not a final order as contemplated in I.C. § 4-21.5-3-34(d). The Final Order resulted from summary judgment briefing, which reasonably could be interpreted to be the “more elaborate proceedings” described

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in I.C. § 4-21.5-3-34(d). The August 5, 2019 Final Order did not result from an order “agreed to by the parties as a final order”. Therefore, IDEM’s request for a remand is not supported by I.C. § 4-21.5-3-34(e).¹¹

9. Per I.C. § 4-21.5-3-31(a), as ultimate authority, OEA retains jurisdiction for modification of a final order for 30 days after its issuance, unless another agency or assumes jurisdiction. Another agency or court has not assumed jurisdiction over the August 5, 2019 Final Order. Per AOPA, the 30-day period in this case expired on or about September 7, 2019.
10. Per I.C. § 4-21.5-3-31(b), “[a] party may petition the ultimate authority . . . for a stay of effectiveness of a final order.” After examining all of IDEM’s filings on Reconsideration, the Court finds that IDEM did not request a stay of the Final Order.
11. Prior OEA precedent authorizes OEA to extend its jurisdiction over motions to reconsider by granting agreed extensions for filing responses a Motion to Reconsider. *See In Re: Scherb Dairy II*, 2007 OEA 16 (2007). The parties did not expressly agree to extend OEA’s jurisdiction, in contrast to the *Scherb* litigants. This case lacks the express agreement to extend OEA’s jurisdiction, as required in *Scherb*. Even if such an agreement can be implied from the parties’ consent to the Court’s September 10, 2019 responsive scheduling order, OEA lacks authority to extend its jurisdiction based on an implied agreement, nor do the parties raise such an argument.
12. Per I.C. § 4-21.5-3-31(d):

“Clerical mistakes and other errors resulting from oversight or omission in a final order or other part of the record of a proceeding may be corrected by an ultimate authority or its designee on the motion of any party or on the motion of the ultimate authority or its designee.”
13. IDEM argues that its request to remand Part I.D. should be allowed as is clerical mistake or other error resulting from oversight or omission. The August 5, 2019 Final Order gave significant analysis to the parties’ rigorous arguments concerning Part I.D.’s inclusion in the Permit. In its Motion to Reconsider and relating Reply, IDEM further asserts that the Court’s exclusion of Part I.D. results in significant effects. Thus, the remand IDEM seeks is beyond the scope of the “clerical mistakes and errors resulting from oversight or omission” contemplated in I.C. § 4-21.5-3-31(d).
14. By operation of law, OEA’s jurisdiction to modify this Final Order ended on or about

¹¹ On November 18, 2013, when the Court remanded the identical issue on IDEM’s Motion to Reconsider, the case was before the Court on partial motions for summary judgment, not on final disposition. Therefore the Court’s 2013 Order on IDEM’s 2013 Motion to Reconsider addressed a non-final order, which was not subject to the same procedural deadlines which apply to this case. By the time when the parties filed the current summary judgment motions addressed in the Court’s August 5, 2019 Final Order, the parties had resolved all other remaining issues in controversy.

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September 7, 2019.¹²

IT IS THEREFORE ORDERED that IDEM’s August 26, 2019 Motion to Reconsider is **DENIED**.

You are further notified that pursuant to provisions of I.C. § 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 I.C. § 4-21.5-5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of a Final Order is timely only if filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 21st day of October, 2019 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge

¹² The Court did not recognize the procedural issues affecting timing when it issued its September 10, 2019 scheduling order.