

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

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TOPICS:

Notice of Intent
Motion to Dismiss
point source discharge
wastewater
hydrostatic testing
commercial pipelines
NPDES
notice
construction
water quality
ground water
contamination
well field
petition
river
permit

PRESIDING ENVIRONMENTAL LAW JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Sierra L. Alberts, Esq., Eric L. Wyndham, Esq.
Petitioner: Peter Campbell King, Esq., Tamara B. Wilson, Esq.; Cline, King & King
Respondent: Philip B. McKiernan, Esq., Joseph M. Hendel, Esq.; Jackman, Hulett & Cracraft
Intervenor: Eugene A. Stewart, Esq.; Stewart Law Office

ORDER ISSUED:

June 23, 2009

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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2009 OEA 43, (08-W-J-4104)**

STATE OF INDIANA)
) SS: BEFORE THE INDIANA OFFICE OF
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO ISSUANCE OF)
NPDES PERMIT NO. ING670052)
ELROD WATER COMPANY d/b/a)
HOOSIER HILLS REGIONAL WATER DISTRICT)
FRANKLIN COUNTY, INDIANA)
_____) CAUSE NO. 08-W-J-4104
Elrod Water Company d/b/a)
Hoosier Hills Regional Water District,)
 Petitioner,)
Rockies Express Pipeline Co., LLC,)
 Respondent/Permittee,)
Franklin County Board of Commissioners,)
 Intervenor,)
Indiana Department of Environmental Management,)
 Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL ORDER

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on Respondent/Permittee’s June 27, 2008 Motion to Dismiss or, In the Alternative, For Summary Judgment (“Motion”). The parties fully briefed their positions and the Court heard oral arguments on the Motion. The Chief Environmental Law Judge (“ELJ”) having considered the petitions, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

- 1. On March 4, 2008, Rockies Express Pipeline LLC (“Rockies”) filed a “Notice of Intent (NOI) Letter Submittal Application” (“NOI”) with the Indiana Department of Environmental Management (“IDEM”). The NOI was submitted as required in 327 IAC 15-11 *et seq.*, which establishes the requirements for point source discharges of wastewater from the hydrostatic testing of commercial pipelines.

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

2. On April 15, 2008, IDEM's Office of Water Quality, NPDES Permit Section, issued a "Notice of Decision to Issue a General Permit" ("Notice"). The Notice stated that National Pollution Discharge Elimination System ("NPDES") general permit number ING670052 ("Permit") had been issued to Rockies. The Notice stated that the NOI complied with 327 IAC 15-11 *et seq.* and that the Permit allows Rockies to discharge non-process wastewater from hydrostatic testing of a commercial pipeline into the Whitewater River in, *inter alia*, Franklin County, Indiana.
3. The Permit allows wastewater discharges associated with a project referred to as "REX East" which involves the construction of a 638 mile long natural gas pipeline from Audrain County, Missouri to Monroe County, Ohio. The proposed pipeline will pass through the Indiana Counties of Vermillion, Parke, Putnam, Hendricks, Morgan, Johnson, Shelby, Decatur, and Franklin. In sum, Rockies will discharge water through the pipeline to test the pipeline's fitness to contain and transport natural gas.
4. On May 2, 2008, Elrod Water Company, d/b/a Hoosier Hills Regional Water District ("Hoosier Hills") timely filed its Petition for Administrative Review, Adjudicatory Hearing and Stay of Effectiveness ("Petition") pursuant to I.C. § 13-15-6-1 *et seq.*, I.C. § 4-21.5-3-1 *et seq.*, and 315 IAC 1-3-1 *et seq.* On June 10, 2008, the Franklin County Board of Commissioners' Petition to Intervene was granted.
5. The Petition identifies eight (8) proposed issues to be considered by this Court. *Petition*, pgs. 4-5. The issues identified are:
 - a. Whether IDEM criteria for evaluating the impact on water quality in relationship to public water supplies was arbitrary and capricious.
 - b. Whether IDEM's criteria for the activity sought by Rockies was arbitrary and technically deficient.
 - c. Whether IDEM's decision to allow Rockies to discharge the wastewater back into the river was arbitrary and capricious since the river is used as a public water supply.
 - d. Whether IDEM's decision was contrary to law since its Permit conflicts with internal agency guidelines and/or requirements for well field protection.
 - e. Whether IDEM provided sufficient findings of fact and conclusions of law when it issued the Permit.
 - f. Whether Rockies submitted all the information required by Indiana statutes and administrative code for a permit to discharge wastewater from hydrostatic testing of a commercial pipeline.
 - g. Whether IDEM should have denied the Permit due to Rockies' failure to provide complete information in the NOI or, in the alternative, required additional information.
 - h. Whether the probability of groundwater contamination from the construction activity associated with REX East should have caused IDEM to deny the Permit.

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

These issues allege that hydrostatic testing of REX East will adversely affect the water quality of the Whitewater River, will threaten economic development in Franklin County, Indiana, and will cause harm to Hoosier Hills by depleting or contaminating its well field, threaten the welfare of its customers, and cause economic harm to Hoosier Hills.

6. On June 27, 2008, Rockies filed its Motion, arguing that Hoosier Hills' Petition fails to state a claim upon which the Office of Environmental Adjudication ("OEA") can grant relief and that, even if the pleadings are viewed in a light most favorable to Hoosier Hills, Rockies is entitled to dismissal as a matter of law.
7. Hoosier Hills has not filed an amended petition for review, nor has it sought additional time to do so. Hoosier Hills did not object to Rockies' June 27, 2008 filing of *Affidavit of James D. Thompson*, nor did Hoosier Hills present subsequent evidence contesting information contained in the affidavit.
8. The parties have agreed to vacate the Case Management Orders related to discovery pending a ruling on the Motion before the Court.

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") 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. § 4-21.4-3-27. 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.
3. In this case, Respondent/Permittee Rockies' Motion challenges both the legal sufficiency of the claim, as a motion to dismiss, and alternatively challenges the sufficiency of the underlying facts, as a matter of law, as a motion to dismiss. Per Trial Rule 12(B)(6), a motion to dismiss tests the legal sufficiency of the claim, not the facts which support it. *Trail v. Boys and Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 134 (Ind. 2006). When ruling on a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). All reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007).

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

4. In determining the facts at issue on summary judgment, this Court must apply a *de novo* standard of review to this proceeding. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; “*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, 253 (Ind. Ct. App. 1981).

5. 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. 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). In this case, Rockies has the burden of showing whether the permit IDEM issued complied with statutory and regulatory requirements as a matter of law. *AquaSource Services and Technology*, 2002 OEA 41, 44. Rockies, as movant has the burden of proof, persuasion, and of going forward on its motion for summary judgment. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23. 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).” The moving party bears the burden of establishing that summary judgment is appropriate. When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to 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).

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

6. 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); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM's determination of Tanner's Creek's soil movement and site control was proper, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
7. In order to issue a NPDES general permit for wastewater discharge associated with hydrostatic testing of a commercial pipeline, IDEM is limited to consideration of three (3) issues. First, IDEM must determine whether the applicability requirements found in 327 IAC 15-11-3 and 327 IAC 15-2-3 are satisfied. Generally, these rules state the existence of NPDES general permits in Indiana, and state that NPDES general permittees are governed by more specific rules. Secondly, IDEM must determine whether the NOI requirements found in 327 IAC 15-11-5(a) are satisfied. Finally, IDEM must publish notice of the issuance of the general permit. 327 IAC 15-11-5(c).
8. Per 327 IAC 15-11-5(c), requirements for a NPDES general permit for wastewater discharge associated with hydrostatic testing of commercial pipelines are:
 - Following submittal of a NOI letter to IDEM and publication in the newspaper by the person requesting coverage under subsection (b), IDEM shall do the following:
 - (1) Review the NOI for applicability pursuant to section 3 of this rule and for compliance with the requirements of subsection (a).
 - (2) List this facility, the NPDES general permit tracking number, and the information contained in this notice in a monthly publication to be distributed by IDEM to all persons who have asked to receive NPDES general permit rule notification. This monthly publication shall be issued by IDEM on the fifteenth day of every month and shall identify all facilities which met both the NOI and newspaper publication requirements in the preceding month.

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

9. In its Petition, Hoosier Hills disputed the propriety of the criteria IDEM used in evaluating the impact on the river water quality in relationship to public water supplies. *Petition, p. 4.* However, the applicable regulations in this matter do not require IDEM to consider the impact on water quality. *See* 327 IAC 15-11-5(c). OEA may only review IDEM's decision to determine whether it conforms to the standards and requirements established by the Indiana General Assembly and the Water Pollution Control Board. "In determining whether the petition meets the statutory requirements and states a claim upon which relief can be granted, OEA may only consider whether IDEM's decision was in compliance with the applicable statutes, regulations and policies. This Court does not have the authority to address any other issues." *In the Matter of: Wastewater Treatment Plant and Sanitary Sewer Construction Approval No. 16684, Sidney, Indiana, 2004 OEA 99, 102* (hereinafter, "Sidney"); *see also In re: Objection to Amendment to Approval No. AW #5076/Farm ID #6165, Confined Feeding Operation, DeGroot Dairy, Huntington County, Indiana, 2006 OEA 1.* As a matter of law, no relief may be granted for Petitioner Hoosier Hills' claim that IDEM did not evaluate the project's impact on the river water quality in relation to public water supplies, as IDEM was not authorized to conduct this evaluation.

10. Hoosier Hills also disputed the propriety of criteria used by IDEM for the project, as arbitrary and technically deficient. *Petition, p. 4.* IDEM is required to consider only the criteria listed in 327 IAC 15-11-5(c). OEA may only review an IDEM decision to determine whether it conforms to the standards and requirements established by the Indiana General Assembly and the Water Pollution Control Board. *Sidney, supra.* As a matter of law, IDEM presented substantial evidence that its determination utilized criteria in compliance with those stated in 327 IAC 15-11-5(c), and was therefore not arbitrary and technically deficient.

11. Hoosier Hills disputed that a permit for hydrostatic testing of an industrial pipeline can be granted for discharge into a water body which serves as a public water supply source. *Petition, p. 4.* However, the applicable regulations in this matter do not require IDEM to consider the nature or function of the water body receiving discharge. *See* 327 IAC 15-11-5(c). OEA may only review an IDEM decision to determine whether it conforms to the standards and requirements established by the Indiana General Assembly and the Water Pollution Control Board. *Sidney, supra.* As a matter of law, no relief may be granted for Petitioner Hoosier Hills' claim that IDEM did not base its determination on the nature or function of the receiving water body, as regulatory guidance does not authorize IDEM to use such basis.

12. Hoosier Hills also questions whether the Permit approval was contrary to law since it conflicted with internal agency guidelines and requirements for well field protection. *Petition, p. 4.* However, the applicable regulations in this matter do not require IDEM to reconcile its own internal agency guidelines and requirements. *See* 327 IAC 15-11-5(c). Nor do internal agency guidelines and requirements supersede the standards and requirements established by the Indiana General Assembly and the Water Pollution Control Board. As a matter of law, IDEM complied with applicable regulatory guidance.

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

13. Hoosier Hills asserted that the Permit approval was deficient, for lack of including sufficient findings of fact and conclusions of law. *Petition, p. 4*. However, the applicable regulations in this matter do not require IDEM to provide findings of fact and conclusions of law with the Permit approval. *See* 327 IAC 15-11-5(c). OEA may only review an IDEM decision to determine whether it conforms to the standards and requirements established by the Indiana General Assembly and the Water Pollution Control Board. *Sidney, supra*. As a matter of law, no relief may be granted for Petitioner Hoosier Hills' claim that IDEM did not provide sufficient findings of fact and conclusions of law, as applicable regulations do not require such from IDEM.
14. In its Petition, Hoosier Hills requested review of IDEM's determination that Rockies submitted all information required by Indiana law and regulations for the Permit. *Petition, p. 4, 5 (Issues number 6 and 7)*. The permitting requirements for hydrostatic testing of an industrial pipeline are found in 327 IAC 15-11-5(a):

In addition to the NOI letter requirements contained in 327 IAC 15-3, a person regulated under this rule must identify in the NOI letter each point source discharge of wastewater associated with the hydrostatic testing of new or existing commercial pipelines. This identification of point source discharge shall include the following:

- (1) The discharge location of each outfall and its associated receiving stream.
- (2) The type of wastewater discharged through each outfall.
- (3) An identifying outfall number. The numbering shall start at 001 for the first outfall, 002 for the second outfall, and continue in that manner until all outfalls are numbered.

The additional NOI content requirements referred to are found in 327 IAC 15-3-2, which states:

Except for permittees covered under 327 IAC 15-5 and 327 IAC 15-13 and as provided in 327 IAC 15-14-4, the NOI letter shall include the following:

- (1) Name, mailing address, and location of the facility for which the notification is submitted.
- (2) Standard Industrial Classification (SIC) codes, as defined in 327 IAC 5, up to four (4) digits, that best represent the principal products or activities provided by the facility.
- (3) The person's name, address, telephone number, e-mail address (if available), ownership status, and status as federal, state, private, public, or other entity.
- (4) The latitude and longitude of the approximate center of the facility to the nearest fifteen (15) seconds, and, if the section, township, and range are provided, the nearest quarter section in which the facility is located.
- (5) The name of receiving water, or, if the discharge is to a municipal separate storm sewer, the name of the municipal operator of the storm sewer and the ultimate receiving water.
- (6) A description of how the facility complies with the applicability requirements of the general permit rule.
- (7) Any additional NOI letter information required by the applicable general permit rule.

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

- (8) The NOI letter must be signed by a person meeting the signatory requirements in 327 IAC 15-4-3(g).
15. As a matter of law, substantial evidence was presented that Rockies complied with all the NOI content requirements found in 327 IAC 15-3-2. A copy of the NOI was submitted to the Court as Exhibit A of the Affidavit of James D. Thompson (“Affidavit”). Exhibit A contains a cover letter followed by an IDEM NPDES General Permit NOI form completed and submitted by Rockies. Requirements 327 IAC 15-3-2(1) through (3) are satisfied on page two (2) of Exhibit A. Requirements 327 IAC 15-3-2(4) and (5) are satisfied by the table found on page four (4) of Exhibit A. Requirements 327 IAC 15-3-2(6) is satisfied on page three (3) of Exhibit A. Requirements 327 IAC 15-3-2(8) is satisfied on page sixteen (16) of Exhibit A. 327 IAC 15-3-2(7) requires NOI applicants also satisfy the requirements found in 327 IAC 15-11-5(a).
16. As a matter of law, substantial evidence shows that Rockies complied with all the permitting requirements found in 327 IAC 15-11-5(a). The requirements 327 IAC 15-11-5(a)(1) through (3) are all satisfied as stated on the table found on page four(4) of Exhibit A.
17. As a matter of law, Rockies provided substantial evidence that it submitted to IDEM all the information required by law to be issued the Permit. IDEM does not have to consider any information other than what is required under the applicable and regulations. Hoosier Hills failed to submit contrary evidence that establishes a disputed factual issue related to the legal sufficiency of the materials submitted in the NOI. Based on the evidence in the record, Rockies is entitled to summary judgment as a matter of law on the issue of whether the information submitted by Rockies to IDEM was sufficient to comply with the statutory and regulatory requirements.
18. In its Petition, Hoosier Hills requested review of whether the probability of groundwater contamination from the construction activity associated with REX East should have caused IDEM to deny the Permit. *Petition, p. 5*. However, the applicable regulations in this matter do not require IDEM to consider the possibility of groundwater contamination. *See 327 IAC 15-11-5(c)*. OEA may only review an IDEM decision to determine whether it conforms to the standards and requirements established by the Indiana General Assembly and the Water Pollution Control Board. *Sidney, supra*. As a matter of law, no relief may be granted for Petitioner Hoosier Hills’ claim that IDEM did not evaluate the probability of groundwater contamination from Rockies’ construction activity, as applicable regulations do not require such from IDEM.

**Objection to Issuance of NPDES Permit No. ING670052 Elrod Water Company d/b/a
Hoosier Hills Regional Water District Franklin County, Indiana
2009 OEA 43, (08-W-J-4104)**

19. In addition, the quality of wastewater discharges allowed by the Permit is controlled by 327 IAC 15-11-7(b) and other regulations¹. Hoosier Hills has offered no evidence that the wastewater discharges will fail to meet those water quality standards. IDEM presumes that any person that receives a permit will comply with the applicable regulations. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, Cause No. 98-S-J-1958 (Ind. Office of Env'tl. Adjudication, December 8, 1998).*
20. As a matter of law, no relief may be granted for Petitioner Hoosier Hills' claims of potential economic harm to itself, its customers or to Franklin County from the permit issued to Rockies, as applicable regulations do not authorize IDEM to consider these factors in making its determination for this type of permit. *See In the Matter of: Issuance of #AW5499/Farm ID #6370, NPDES CAFO ID #ING806370, Concentrated Animal Feeding Operation, Talara Lykins, Jackson County, Indiana, 2007 OEA 114, 126.*
21. To the extent that Hoosier Hills challenged the design or construction of the project permitted to Rockies, IDEM is not authorized to base its determination on these factors by the rules adopted by the Water Pollution Control Board.

FINAL ORDER

IT IS THEREFORE ORDERED that the Petition for Administrative Review, Adjudicatory Hearing and Stay of Effectiveness filed by Hoosier Hills is hereby DISMISSED, and the Permit approval issued by IDEM on April 15, 2008 is hereby AFFIRMED.

You are further advised that, pursuant to I.C. § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to I.C. § 4-21.5-5, 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 23rd day of June, 2009.

Hon. Mary L. Davidsen
Chief Environmental Law Judge

¹ 327 IAC 15-11-7(b)(2) provides discharge monitoring for pH levels. 327 IAC 15-11-7(b)(3) prohibits excessive foam from discharge in receiving waters. 327 IAC 15-11-7(b)(4) sets discharge standards to limit free and settleable solids and, along with 327 IAC 15-11-7-(b)(6), unsightly or deleterious substances.