

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 1, cite this case as
City of Hobart, 2010 OEA 1.

TOPICS:

wastewater treatment plant (WWTP)	I.C. § 4-21.5
mercury	I.C. § 13-8-3-2
bio-accumulative chemical of concern (BCC)	I.C. § 13-11-2-24
Lake Michigan	I.C. § 13-14-1-11.5
Outstanding State Resource Water (OSRW)	327 IAC 2-1.5-4
tributary	327 IAC 5-2-8
Combined Sewer Outflow (CSO)	327 IAC 5-2-11.3
anti-degradation	327 IAC 5-2-11.5
Non-rule Policy Document Water-002-NPD	327 IAC 5-2-11.7
significant lowering of water quality	327 IAC 15-5
significant overall environmental benefit	327 IAC 15.6
end-of-pipe	40 CFR 122.41
ambient	
wildlife criteria	
Summary Judgment	
NPDES (National Pollution Discharge Elimination System)	

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

Petitioners:	Susan M. Severtson, Esq.; City of Gary Hamilton L. Carmouche, Esq.; City of Gary Law Department Frederic Andes, Esq., David Ballard, Esq.; Barnes & Thornburg Ray L. Szarmach, Esq.; Szarmach & Fernandez
Respondent/Permittee:	John P. Bushemi, Esq.; John P. Bushemi & Associates Joseph P. Allegretti, Esq.
IDEM:	Sierra L. Alberts, Esq.

ORDER ISSUED:

January 19, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

City of Gary v. IDEM, 49F12-1002-MI-007318 (Marion Sup. Ct. 2011) affirmed.

City of Gary and Gary Sanitation District v. IDEM and City of Hobart, 49A02-1106-MI-553 (Ind. Ct. App. 2012) Trial Court affirmed.

Objection to Issuance of Final NPDES Permit No. IN0061344

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Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
FINAL NPDES PERMIT NO. IN0061344)
ISSUED TO CITY OF HOBART)
HOBART, LAKE COUNTY, INDIANA)
)
) CAUSE NO. 04-W-J-3330

City of Gary, Gary Sanitary District,)
City of Lake Station,)
Lake Station Parks Department,)
James Busch, Dorothy Busch,)
William Mitchell, Patrick Strickland,)
James Boyd Sr.,)
 Petitioners,)
City of Hobart,)
 Permittee,)
Indiana Department of Environmental Management,))
 Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter is before the Court pursuant to Motions¹ for Summary Judgment filed by Petitioners the City of Gary and Gary Sanitary District (“Gary”) and filed in opposition by the Indiana Department of Environmental Management (“IDEM”) as to whether any genuine issues of material fact exist as to Respondent, IDEM’s, April 1, 2004 issuance of National Pollution Discharge Elimination System permit No. IN0061344 to the City of Hobart for a planned municipal wastewater treatment plant violated Indiana’s anti-degradation regulations. The parties fully briefed their positions on summary judgment, oral argument was conducted on March 17, 2009, and proposed findings of fact, conclusions of law and orders were submitted by Gary and IDEM on March 27, 2009. The Chief Environmental Law Judge (“ELJ”), having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief 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:

¹ IDEM’s November 17, 2007 Response concluded with a statement that IDEM was moving for summary judgment, as no genuine issue of material fact existed that its determination was correct. The Court will therefore treat IDEM’s November 17, 2007 Response as a motion for summary judgment.

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

FINDINGS OF FACT

1. On April 1, 2004, IDEM issued National Pollution Discharge Elimination System (“NPDES”) Permit No. IN0061344 to the City of Hobart (“Hobart NPDES Permit” or “Permit”), effective May 1, 2004. The Permit authorized the City of Hobart to construct and operate a new Class IV 4.8 million gallon per day (“MGD”) Wastewater Treatment Plant (“WWTP”), to be constructed by the Deep River. *Petitioners’ Motion for Summary Judgment (“Petitioners’ Motion”), Ex. 3.*
2. Hobart’s NPDES Permit will allow an additional discharge of mercury into Deep River. Mercury is a bio-accumulative chemical of concern (“BCC”), addressed in 327 IAC 2-1.5-6.
3. Deep River flows through the Burns Ditch, Burns Waterway, and in to Lake Michigan. *Petitioners’ Motion, Ex. 4.* The parties agree that Lake Michigan is an Outstanding State Resource Water (“OSRW”), per 327 IAC 2-1.5-19(b)(2). Deep River is impaired for mercury; the human health criterion of 1.8 ng/l concentration of mercury in Deep River is greater than the wildlife criterion of 1.3 ng/l. *Petitioners’ Motion, Ex. 4, Hobart NPDES Permit.*
4. Currently, Hobart’s wastewater is treated by Petitioner Gary Sanitary District (“GSD”) and at the Nob Hill WWTP (NPDES Permit No. IN0041891), which Hobart owns. *Petitioners’ Motion, Ex. 4.*
5. Nob Hill WWTP discharges into Spring Creek, a tributary of Deep River. *IDEM Response, Ex. B., IDEM and Hobart May 3, 2004 Agreed Order, Case No. 2003-13060-W.*
6. Nob Hill WWTP is an aging facility which has difficulty in consistently meeting its permit limits, resulting in IDEM taking enforcement action against Hobart. *Respondent IDEM’s Response (“IDEM Response”), Ex. A., January 14, 2004 faxed letter from architects, engineers HNTB to IDEM; IDEM Response, Ex. B., IDEM and Hobart May 3, 2004 Agreed Order, Case No. 2003-13060-W.*
7. Hobart’s NPDES Permit at issue in this cause would allow Hobart to shut down the Nob Hill WWTP, to disconnect from GSD, and to operate as a new discharger. *Petitioners’ Ex. 3; IDEM Response, Ex. A, B.* Without Hobart’s NPDES Permit, Hobart’s wastewater discharged through up to eight (8) CSO outfalls before reaching GSD’s WWTP for treatment. *Petitioners’ Motion, Ex. 4, Hobart NPDES Permit.*

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

8. GSD's NPDES Permit No. IN0022977 (effective November 1, 1994, and administratively extended) limits mercury discharge to a monthly average of 30 ppt (parts per trillion), 0.00065 pounds per day on a monthly average, and, as a daily maximum of 70 ppt, and 0.0016 pounds per day as a daily maximum discharge, and does not discharge into Deep River or its tributaries. *IDEM's Response, Ex. C, GSD NPDES Permit No. IN0022977*. The GSD NPDES permit uses a collection system including a reducing number of partially combined sewers which are designed with a number of combined sewer overflows ("CSOs"), which collect excess discharge, such as storm water, and release untreated excess discharge into the Grand Calumet and Little Calumet Rivers, both tributaries of Lake Michigan. *Id.*
9. Hobart's NPDES Permit has no CSOs; permit limits for mercury discharge are a monthly average of 1.3 ppt, 0.000052 pounds per day, and a daily maximum of 3.2 ppt, and 0.00013 pounds per day as daily maximum discharges. *Id.*
10. Prior to its April 1, 2004 issuance of the Hobart NPDES Permit, IDEM issued Non-rule Policy Document Water-002-NPD "Anti-degradation Requirements for Outstanding State Resource Waters Inside the Great Lakes Basin. *Petitioners' Motion, Ex. 5.* ("NPD").
11. Hobart's NPDES Permit fact sheet addressed IDEM's water quality anti-degradation analysis of the permissible amounts of mercury to be discharged into the OSRWs into which Hobart would discharge. *Id.*
12. In the Hobart NPDES Permit fact sheet, IDEM stated that pollutant discharges allowable under the Permit were proper under "IDEM non-rule policy document Water-002-NRD". *Id.* IDEM's anti-degradation analysis stated further:

According to the non-rule policy document, a new or increased discharge into a tributary of Lake Michigan will not cause a significant lowering of water quality in Lake Michigan if any of the following are met:

- (1) The new or increased discharge into a tributary of Lake Michigan is the result of an activity that will result in a significant overall environmental benefit to Lake Michigan.
- (2) The new or increase discharge into a tributary of Lake Michigan does not cause a significant lowering of water quality in the tributary, as determined under 327 IAC 5-2-11.3(b)(1)(A) or 327 IAC 5-2-11.3(b)(1)(B).
- (3) For non-bioaccumulative chemicals of concern, the new or increased discharge into a tributary of Lake Michigan uses less than 10% of the unused loading capacity of Lake Michigan.

IDEM then stated its determination that "the new discharge of mercury into the tributary of Lake Michigan is the result of an activity that will result in a significant overall environmental benefit to Lake Michigan." *Id.*

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

13. 327 IAC 5-2-11.7, concerning anti-degradation, was amended to add subsection 11.7(a)(2)(C) on November 1, 2000. *24 Ind. Reg. 284, 286.*
14. 327 IAC 5-2-11.7(a)(2)(C) contains several exceptions allowing discharge; those exceptions do not apply to Hobart's NPDES Permit:
 - a. Hobart's NPDES Permit does not involve discharges involving a bypass that is not prohibited at 40 CFR 122.41(m) or 327 IAC 5-2-8(11). *Petitioners' Motion, Ex. 3, Hobart NPDES Permit.*
 - b. Hobart's NPDES Permit does not involve discharges of storm water subject to a general permit under 327 IAC 15-5, *et seq.*, and 327 IAC 15.6, *et seq.* *Petitioners' Motion, Ex. 3, Hobart NPDES Permit.*
 - c. Hobart's NPDES Permit does not involve discharges involving short-term, temporary (weeks or months) lowering of water quality. *Petitioners' Motion, Ex. 3, Hobart NPDES Permit.*
 - d. Hobart's NPDES Permit does not involve discharges of a pollutant, when the facility withdraws intake water containing the pollutant from the same body of water, and the new or increased discharge of the pollutant is due solely to the presence of the pollutant in the intake. *Petitioners' Motion, Ex. 3, Hobart NPDES Permit.*
 - e. Hobart's NPDES Permit does not involve discharges of a pollutant or pollutant parameter due to response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (as defined in I.C. § 13-11-2-24), as amended, corrective actions pursuant to the Resource Conservation and Recovery Act, as amended, or similar federal or state authorities, undertaken to alleviate a release into the environment of hazardous substances, pollutants, or contaminants that may pose an imminent and substantial danger to public health or welfare. *Petitioners' Motion, Ex. 3, Hobart NPDES Permit.*
 - f. Hobart's NPDES Permit does not involve discharges of noncontact cooling water that will not increase the temperature of the receiving water body outside of the designated mixing zone, where applicable and will not require numeric WQBELs for toxic substances or WET as determined under 327 IAC 5-2-11.5 *Petitioners' Motion, Ex. 3, Hobart NPDES Permit.*
 - g. Hobart's NPDES Permit does not involve discharges of a substance used to treat zebra mussels in an intake water pipe or structure. *Petitioners' Motion, Ex. 3, Hobart NPDES Permit.*

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

15. Petitioners City of Lake Station, Lake Station Parks Department, located along Deep River, and James Busch and Dorothy Busch, property owners along Deep River, filed their Petition for Administrative Review on April 16, 2004. Petitioners, William Mitchell, Patrick Strickland, and James Boyd, Sr., property owners along Deep River, filed their Petitions for Review on April 19, 2004. Petitioners City of Gary and Gary Sanitary District filed their Petition for Review on April 15, 2004. Gary filed its Motion for Summary Judgment; IDEM and the City of Hobart filed Responses. In its November 14, 2007 Response, IDEM moved the Court to grant summary judgment to IDEM for lack of genuine issue of material. Gary filed a Reply. In footnote 1 of its Reply, Gary requested Oral Argument, conducted on March 17, 2009. The parties submitted Proposed Findings of Fact, Conclusions of Law and Order on March 27, 2009.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is charged with implementation and enforcement of Indiana’s environmental laws and rules. I.C. § 13-14-1-1, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction for administrative review of 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. This Court 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), *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 Environmental Law Judge (“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).
4. 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. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23; *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 &*

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

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). 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.

5. “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.” *Id.* In this case, each party has the burden of showing whether the IDEM’s anti-degradation analysis, which allowed new discharge of mercury into an Outstanding State Resource Water, were at mercury discharge levels which IDEM concluded would result in a significant overall environmental benefit to Lake Michigan, either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 OEA 41 (“*Aquasource*”). Each 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. In this case, Petitioners Gary have the burden of showing that IDEM’s anti-degradation analysis erroneously allowed new discharge of mercury into an Outstanding State Resource Water at levels which would result in a significant overall environmental benefit to Lake Michigan either was contrary to law or is somehow deficient so as to require revocation, as a matter of law; Respondents IDEM and City of Hobart bear a similar burden on the issue of whether there is no genuine issue of material fact that its determination to issue the Hobart NPDES permit met applicable legal standards as a matter of law.

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 issuance of the City of Hobart NPDES Permit 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.*, 2005 OEA 26, 41.

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

7. Petitioners' timely filed Petitions for Review objecting to the April 1, 2004 Hobart NPDES Permit are based on the assertion that IDEM's anti-degradation analysis erroneously allowed new discharge of mercury into an Outstanding State Resource Water at levels which would result in a significant overall environmental benefit to Lake Michigan. Petitioners are "aggrieved or adversely affected" by IDEM's determination, per I.C. § 4-21.5-3-7, and qualify to seek administrative review before the OEA.
8. On Summary Judgment, the parties contest IDEM's anti-degradation analysis for Hobart's NPDES permit concerning mercury, as a matter of law. IDEM utilized 327 IAC 5-2-11.7(a)(2)(A), (B), but did not conduct an analysis specifically focusing on 327 IAC 11.7(a)(2)(C). IDEM's anti-degradation analysis included consideration of the 1998 Non-rule Policy Document.
9. Hobart's NPDES Permit authorizes discharge into Deep River, a tributary of Lake Michigan, an Outstanding State Resource Water ("OSWR"), per 327 IAC 2-1.5-19(b)(2). Mercury is a bio-accumulative chemical of concern ("BCC"). 327 IAC 2-1.5-6.
10. 327 IAC 2-1.5.-4 provides, in relevant part:

For all surface waters of the state within the Great Lakes system . . . Where designated uses of the waterbody are impaired, there shall be no lowering of the water quality with respect to the pollutant or pollutants that are causing impairment.
11. By its terms, and by operation of law, the Non-rule Policy Document, adopted in 1998, is superseded as to the points upon which it conflicts with 327 IAC 5-2-11.7(a)(2)(C), adopted in 2000.
12. 327 IAC 5-2-11.7(a)(2) provides:
 - (a) In order to implement the anti-degradation standard in 327 IAC 2-1.5-4(c), the commissioner shall ensure that the water quality of a waterbody designated as an outstanding state resource water (OSRW) under 327 IAC 2-1.5-19(b) is maintained and protected in its present high quality without degradation by requiring the following: . . .
 - (2) For a new or increased discharge of a pollutant or pollutant parameter from a new or existing Great Lakes discharger into a tributary of an OSRW for which a new or increased permit would be required:
 - (A) section 11.3(a) and 11.3(b) of this rule (327 IAC 5-2-11.3) apply to new or increased discharge of a pollutant or pollutant parameter in the tributary; and
 - (B) the discharge shall not cause significant lowering of water quality in the OSRW.
 - (C) The requirements of this subdivision will be considered to have been met when:

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

- (i) one or more of the items listed in section 11.3(b)(1)(C)(i), 11.3(b)(1)(C)(ii), 11.3(b)(1)(C)(iii)(BB), 11.3(b)(1)(C)(iii)(FF), or 11.3(b)(1)(C)(iii)(II) of this rule (327 IAC 5-2-11.3) apply; or
 - (ii) all three (3) of the following are met:
 - (AA) one (1) or more of the subitems in section 11.3(b)(1)(C)(iii)(AA), 11.3(b)(1)(C)(iii)(CC), 11.3(b)(1)(C)(iii)(EE), 11.3(b)(1)(C)(iii)(GG); 11.3(b)(1)(C)(iii)(HH), or 11.3(b)(1)(C)(iii)(LL) of this rule (327 IAC 5-2-11.3) apply;
 - (BB) the applicant demonstrates that the increase is necessary; and
 - (CC) the public notice requirements subsection (C)(6) are met; or
 - (iii) all four (4) of the following are met:
 - (AA) one (1) or more of the subitems in section 11.3(b)(1)(C)(iii)(DD), 11.3(b)(1)(C)(iii)(JJ), or 11.3(b)(1)(C)(iii)(KK) of this rule (327 IAC 5-2-11.3) apply;
 - (BB) the applicant demonstrates that the increase is necessary;
 - (CC) the applicant demonstrates that it will result in a net environmental improvement; and
 - (DD) the public notice requirements in subsection (c)(6) are met.
13. 327 IAC 5-2-11.7(a)(2)(A) is connected to 327 IAC 5-2-11.7(a)(2)(B) by the term “and”, meaning that both (A) and (B) must be considered when relevant, as in this case. On Summary Judgment, the parties agree that IDEM conducted an analysis of both (A) and (B), correct steps by IDEM in conducting its anti-degradation analysis for Hobart’s NPDES Permit.
14. In summary, Petitioners Gary ask the Court to find that anti-degradation can only be established through the mandatory, exclusive defining factors for anti-degradation stated 327 IAC 5-2-11.7(a)(2)(C). IDEM contended that if anti-degradation analysis was completed after a finding that 327 IAC 5-2-11.7(a)(2)(A) and 327 IAC 5-2-11.7(a)(2)(B) were satisfied, that anti-degradation analysis did not require further review under 327 IAC 5-2-11.7(a)(2)(C). IDEM contended further that if anti-degradation analysis could not be completed through an analysis of 327 IAC 5-2-11.7(a)(2)(A) and 327 IAC 5-2-11.7(a)(2)(B), then the analysis could be conducted through 327 IAC 5-2-11.7(a)(2)(C), which IDEM contends primarily provided a list of exceptions/exemptions to 327 IAC 5-2-11.7(a)(2).

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

15. The intent of the legislature is to give effect to the ordinary and plain meaning of statutory language; unambiguous language requires no interpretation. *Burd Management LLC v. State of Indiana*, 831 N.E.2d 104 (Ind. 2005); see *In the Matter of: Commissioner, Indiana Department of Environmental Management v. Charles Hungler*, 2008 OEA 1, 5. Rules of statutory construction apply to rules, such as 327 IAC 5-2, *et seq.* *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996); see *In the Matter of Objection to Issuance of Part 70 Operating Permit No. T-137-6928-00011 for Joseph E. Seagrams & Sons, Inc.*, 2004 OEA 58, 61. And, if the agency's actions are based on a reasonable consideration of its governing statutes and regulations, then the court should defer to the interpretation given by the administrative agency charged with the duty of enforcing or administering the statute. *Peabody Coal Co. v. Ind. Dep't of Natural Resources*, 629 N.e.2d 925 (Ind. Ct. App. 1994).
16. The express language of 327 IAC 5-2-11.7(a)(2)(C) is determinative of the parties' conflicting interpretations. (C) states, "[t]he requirements of this subdivision [327 IAC 5-2-11.7(a)(2)] will be considered to have been met when:". The clear, unambiguous terms of this provision do not state that the provision is the exclusive means to determine whether subdivision 327 IAC 5-2-11.7(a)(2) is met. While IDEM is required to determine anti-degradation by considering the factors stated in 327 IAC 5-2-11.7(a)(2), it may turn to other interpretative resources which do not conflict with 327 IAC 5-2-11.7(a)(2)(C). 327 IAC 5-2-11.7(a)(2)(C), a regulation, was adopted after the Non-rule Policy Document. As legal precedent, a non-rule policy document has less authoritative value than a regulation. I.C. § 13-14-1-11.5. 327 IAC 5-2-11.7(a)(2)(C) supersedes the Non-rule Policy Documents on provisions which contradict 327 IAC 5-2-11.7(a)(2)(C).
17. An analysis of the relevant anti-degradation factors stated in 327 IAC 5-2-11.7(a)(2)(C) shows that they do not apply to the circumstances of Hobart NPDES Permit's mercury discharges, the purpose of which regulations is to promote anti-degradation to Deep River and Lake Michigan, as Outstanding State Resource Waters. Hobart's NPDES Permit does not involve discharges involving a bypass that is not prohibited at 40 CFR 122.41(m) or 327 IAC 5-2-8(11); see also 327 IAC 5-2-11.7(a)(2)(C)(i)'s citation to 327 IAC 5-2-11.3(b)(1)(C)(iii)(BB). Hobart's NPDES does not involve discharges of storm water subject to a general permit under 327 IAC 15-5, *et seq.*, and 327 IAC 15.6, *et seq.*; see also 327 IAC 5-2-11.7(a)(2)(C)(i)'s citation to 327 IAC 5-2-11.3(b)(1)(C)(iii)(II). Hobart's NPDES Permit does not involve discharges involving short-term, temporary (weeks or months) lowering of water quality. 327 IAC 5-2-11.7(a)(2)(C)(ii)(AA)'s citation to 327 IAC 5-2-11.3(b)(1)(C)(iii)(AA). Hobart's NPDES Permit does not involve discharges of a pollutant, when the facility withdraws intake water containing the pollutant from the same body of water, and the new or increased discharge of the pollutant is due solely to the presence of the pollutant in the intake. 327 IAC 5-2-11.7(a)(2)(C)(ii)(AA)'s citation to 327 IAC 5-2-11.3(b)(1)(C)(iii)(CC). Hobart's NPDES Permit does not involve discharges of a pollutant or pollutant parameter due to response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (as defined in I.C. § 13-11-2-24), as amended, corrective actions pursuant to the Resource Conservation and Recovery Act, as amended, or

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

similar federal or state authorities, undertaken to alleviate a release into the environment of hazardous substances, pollutants, or contaminants that may pose an imminent and substantial danger to public health or welfare. 327 IAC 5-2-11.7(a)(2)(C)(iii)(AA)'s citation to 327 IAC 5-2-11.3(b)(1)(C)(iii)(DD). Hobart's NPDES Permit does not involve discharges of noncontact cooling water that will not increase the temperature of the receiving water body outside of the designated mixing zone, where applicable and will not require numeric WQBELs for toxic substances or WET as determined under 327 IAC 5-2-11.5. 327 IAC 5-2-11.7(a)(2)(C)(ii)(AA)'s citation to 327 IAC 5-2-11.3(b)(1)(C)(iii)(HH). Hobart's NPDES Permit does not involve discharges of a substance used to treat zebra mussels in an intake water pipe or structure. 327 IAC 5-2-11.7(a)(2)(C)(iii)(AA)'s citation to 327 IAC 5-2-11.3(b)(1)(C)(iii)(LL).

18. Petitioners' interpretation of 327 IAC 5-2-11.7(a)(2) would require stricter requirements for discharge into an OSRW tributary than for discharge directly into an OSRW, contrary to the express, clear terms of the applicable regulations.

19. Further regulatory guidance on anti-degradation is provided in 327 IAC 5-2-11.3(a):

(a) For all waters within the Great Lakes system, the commissioner shall ensure that the level of water quality necessary to protect existing uses is maintained. In order to achieve this requirement, and consistent with 40 CFR 131.10, water quality standards use designations must include all existing uses. Controls shall be established as necessary on point and nonpoint sources of pollutants to ensure that the criteria applicable to the designated use are achieved in the water and that any designated use of a downstream water is protected. Where water quality does not support the designated uses of a waterbody or ambient pollutant concentrations are greater than water quality criteria applicable to that waterbody, the commissioner shall not allow a lowering of water quality for the pollutant or pollutants that prevents the attainment of such uses or the water quality criterion.

20. 327 IAC 5-2-11.3(a) implements a portion of Indiana's anti-degradation policy stated in 327 IAC 2-1.5-4(a):

For all surface waters within the Great Lakes system . . . Where designated uses of the waterbody are impaired, there shall be no lowering of the water quality with respect to the pollutant or pollutants that are causing the impairment.

21. 327 IAC 5-2-11.3(b) addresses new or increased loading of any bio-accumulative chemical of concern (BCC) proposed from any existing or new facility, either point source or nonpoint source, for which a new permit, permit modification, or other control document would be required, as a result of any activity, including construction of a new regulated facility or modification of an existing regulated facility such that a new or modified permit is required. However, 327 IAC 5-2-11.3(b) is applicable to high quality waters that are not designated as outstanding state resource water. Since the Hobart NPDES Permit concerns discharge into an OSRW, 327 IAC 5-2-11.3(b) does not apply.

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

22. In determining that Hobart's NPDES Permit met anti-degradation rules stated in 327 IAC 5-2-11.3(a) and specified in 327 IAC 5-2-11.7(A) and (B), and finding no further specificity in Indiana law or its own Non-rule Policy Document, IDEM was informed by rules and guidance by the United States Environmental Protection Agency ("EPA") for new discharges into an impaired water. 40 C.F.R. § 132; EPA-820-B-95-001 § VIII.E.2.h (Water Quality Guidance for the Great Lakes System: Supplementary Information Document (SID)). *IDEM's Response, Ex. E.* IDEM interpreted 327 IAC 5-2-11.3(a)'s "lowering of water quality" in conformation with EPA's view that a wasteload allocation set equal to the most stringent criterion applied "end-of-pipe" is permissible. "End-of-pipe" criteria provide no mixing zone for dilution, will contain a lower concentration of the pollutant than the receiving water, and will thus not increase a waterway's pollutant concentration, if not cause the concentration to decrease.
23. Hobart's NPDES Permit's effluent limits for mercury are lower than the ambient levels of mercury in the waterbody. By applying the more stringent wildlife criteria of 1.3 ppt, instead of the human health criterion of 1.8 ppt, the OSRWs will not be subject to a significant lowering of water quality, as required in 327 IAC 5-2-11.7(a)(2)(B).
24. IDEM's application of its Non-rule Policy Document, Water-002-NRD, provides further guidance as to what constitutes a "significant lowering of water quality". *Id.* The NPD, *Petitioners' Motion, Ex. 5*, provides further guidance as to when IDEM may allow a new or increased discharge into a Lake Michigan tributary such as Deep River, by allowing the discharge if the new or increased discharge will result in significant overall environmental benefit to Lake Michigan. *Id.*
25. Indiana's legislature has provided recognition for "overall environmental benefit" as a factor when determining whether to allow new or increased discharge into an OSRW, and does not limit its application, in these instances, as to whether the pollutant is a BCC or mercury.

I.C. § 13-11-2-50.5(2)(A)(i), (ii) provides, in relevant part:

"Degradation", for the purposes of IC 13-18-3, means with respect to a National Pollutant Discharge Elimination System permit, the following:

(2) With respect to an outstanding state resource water or an exceptional use water, any new or increased discharge of a pollutant or pollutant parameter that results in significant lowering of water quality for that pollutant or pollutant parameter, unless:

(A) the activity causing the increased discharge:

- (i) results in overall improvement in water quality in the outstanding state resource water or exceptional use water; and
- (ii) meets the applicable requirements of 327 IAC 2-1-2(1) and 327 IAC 2-1.5-4(a) and (b);

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

I.C. § 13-18-3-2(1)(1) and (2)(A)(B) state, in relevant part:

- (4) for a water body designated as an outstanding state resource water, the board shall provide by rule procedures that will:
 - (1) prevent degradation; and
 - (2) allow for increases and additions in pollutant loadings from an existing or new discharge if:
 - (A) there will be an overall improvement in water quality for the outstanding state resource water as described in this section; and
 - (B) the applicable requirements of 327 IAC 2-1-2(1) and 327 IAC 2-1-2(2) and 327 IAC 2-1.5-4(a) and 327 IAC 2-1.5-4(b) are met.

IDEM's determination that the Hobart NPDES' Permit's mercury discharge limits from the aspect of overall improvement in water quality is consistent with I.C. § 13-11-2-50.5 and I.C. § 13-18-3-2.

26. The Hobart NPDES Permit will result in significant overall environmental benefit to Lake Michigan. Hobart's new plant will treat mercury discharge significantly more effectively than it is currently being treated at Nob Hill WWTP or GSD WWTP. Hobart's sewage will no longer be directed to Nob Hill WWTP or GSD WWTP. While GSD's permitted capacity and discharge limits will not change, even if the mercury discharge at GSD is first reduced by the amount no longer received from Hobart, then that discharge amount is "caught up" as the capacity vacated by Hobart is filled, the incremental difference still results in a significant overall environmental benefit to Deep River and Lake Michigan. At oral argument, GSD noted that IDEM's lack of environmental stewardship was evidenced by IDEM's decision to issue the Hobart permit while GSD's capacity to discharge mercury was not decreased. IDEM clarified that it retained the authority to modify GSD's mercury discharge capacity. Hobart's WWTP will allow the closure of the Nob Hill WWTP, a facility that has not consistently met its permit obligations. Hobart's sewage will be diverted from GSD's CSOs, thus preventing the release of Hobart's share of the raw sewage that GSD currently discharges during wet weather and allowing previously untreated wet weather discharges to be treated immediately, in order to comply with water quality standards. Hobart's sewage will be treated at more stringent standards than those in effect in GSD's Permit.

Objection to Issuance of Final NPDES Permit No. IN0061344

City of Hobart

Hobart, Lake County, Indiana

2010 OEA 1, (04-W-J-3330)

27. As a matter of law, no substantial evidence of a genuine issue of material fact exists that in this case, Hobart's NPDES permits allow a new source for discharge of mercury, a bio-accumulative chemical of concern, into Deep River, an outstanding state resource water tributary, then into Lake Michigan, an outstanding state resource water. When compared to closure of Nob Hill WWTP and the diversion of Hobart wastewater treatment from GSD to Hobart, the mercury discharge from Hobart's NPDES Permit will result in a lowering of water quality, but will result in a significant environmental benefit to Lake Michigan. Substantial evidence supports denying Petitioners Gary's motion for summary judgment. Substantial evidence supports granting the Indiana Department of Environmental Management's motion for summary judgment.

FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Respondent, Indiana Department of Environmental Management, provided substantial evidence required to meet its burden of showing that it properly issued City of Hobart NPDES Permit No. IN0061344, as a matter of law, and that no genuine issue of material facts exist to the contrary. Petitioners, City of Gary and Gary Sanitary District, did not provide substantial evidence required to meet its burden of showing the lack of genuine issue of material fact that City of Hobart NPDES Permit No. IN 0061344 did not comply with applicable law, as a matter of law. Respondent, Indiana Department of Environmental Management, is entitled to judgment as a matter of law sustaining its issuance of City of Hobart NPDES Permit No. IN0061344.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Respondent, Indiana Department of Environmental Management's, Motion for Summary Judgment is **GRANTED**; Petitioners, City of Gary and Gary Sanitary District's Motion for Summary Judgment is **DENIED**. Judgment is entered in favor of Respondent, Indiana Department of Environmental Management. This cause is **DISMISSED**. All further proceedings are **VACATED**.

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, *et seq.* 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 19th day of January, 2010 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge