

**Objections to the Issuance of NPDES Permit No. 0022497
Water-Wastewater Utilities, City of Carmel, Indiana.
1999 OEA 13 (98-W-J-1976)**

OFFICIAL SHORT CITATION NAME: When referring to 1999 OEA 13, cite this case as
Carmel Water-Wastewater Utilities, 1999 OEA 13.

TOPICS:

municipal
NPDES
maximum daily effluent limit
daily limit
E. coli
water quality
mixing zone
receiving stream
effluent limit
water quality standards
point source
discharge
financial hardship

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Nicholas K. Kile, Esq.
IDEM: Ms. Hala Silvey, Esq.

ORDER ISSUED:

March 25, 1999

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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1999 OEA 13 (98-W-J-1976)

6. On March 20, 1998, Carmel timely appealed the Permit's Daily Limit requirement and also requested that the Chief Administrative Law Judge ("CALJ") stay the effectiveness of the Daily Limit. The CALJ held a prehearing conference and stay hearing on Carmel's appeal and request to stay imposition of the Daily Limit on July 23, 1998. On September 11, 1998, the CALJ issued an order denying Carmel's request to stay imposition of the Daily Limit.
7. On September 14, 1998, the CALJ held a hearing on the merits of Carmel's appeal ("Final Hearing").
8. At the Final Hearing, Carmel presented evidence that 327 I.A.C. 2-1-6(d) by its terms does not mandate imposition of the Daily Limit and that IDEM does not universally apply the water quality standards of this rule as effluent limits themselves. *See* Transcript of Stay Hearing, Gavin Cross-Examination, at p. 91; Petitioner's Exhibit 9, Deposition of Jay Hanco, at p. 32; Petitioner's Exhibit 8, "Procedure for Developing NPDES Permit Limits for Conventional Pollutants, Chlorine, Ammonia, and *E. coli* ("Non-Rule Policy Document"), at p. 4. Carmel also presented evidence that the water quality standards contained in 327 I.A.C. 2-1-6(d) are not, by their terms, effluent limits. *See* Transcript of Final Hearing, Petitioner's Case-in-Chief, at pp. 10-14, 15-6.
9. At the Final Hearing, IDEM offered evidence in an attempt to support its interpretation of 327 I.A.C. 2-1-6(d), relying on the personal opinion of one of the rule's drafters and a Non-Rule Policy Document. *See* Transcript of Final Hearing, Petitioner's Case-in-Chief, at Gavin Cross-Examination p. 30; Petitioner's Exhibit 8, Non-Rule Policy Document.

CONCLUSIONS OF LAW

1. 327 I.A.C. 2-1-6(d) does not mandate imposition of a maximum daily effluent limit for *E. coli* bacteria of 235 count per 100 milliliters in all cases.
2. The water quality standards contained in 327 I.A.C. 2-1-6(d) are not by themselves effluent limits.
3. 327 I.A.C. 5-2-11.1(a) mandates that the water quality standards set forth in 327 I.A.C. 2-1-6 are not enforceable against point source discharges "until translated into effluent limits." In performing this translation, 327 I.A.C. 5-2-11.1(g) requires that IDEM consider and "use the representative upstream concentration of a substance in determining the water quality-based effluent limitations for that substance." 327 I.A.C. 2-1-4(a) further requires IDEM to apply the water quality standards at a point outside the appropriate mixing zone.

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Water-Wastewater Utilities, City of Carmel, Indiana.
1999 OEA 13 (98-W-J-1976)

4. In an appropriate case and after considering the water quality of the receiving stream and the appropriate mixing zone, IDEM might properly translate the effluent limit for *E. coli* in a particular NPDES permit as being equal to the water quality standard set forth in 327 I.A.C. 2-1-6(d). Here, however, in establishing the effluent limit for *E. coli*, IDEM did not consider the upstream concentrations of *E. coli* in the receiving stream or apply the water quality standard for *E. coli* outside the appropriate mixing zone as required by the rules. Instead, IDEM established the Daily Limit based upon an incorrect legal interpretation of the applicable rule. Since IDEM failed to consider all of the relevant facts and information required to be considered by the rules, it did not give the adequate and full consideration to Carmel's Comments as required by 327 I.A.C. 5-3-9.
5. Furthermore, Brad Gavin's testimony concerning the intent of 327 I.A.C. 2-1-6(d), assuming it was ambiguous, would not be competent on the issue of intent. *See Boffo v. Boone County Board of Zoning Appeals*, 421 N.E.2d 1119, 1128 (Ind.Ct.App. 1981) (testimony of two board members is not credible evidence on the intentions of all board members). 327 I.A.C. 2-1-6(d) is not ambiguous on its face and a plain reading of the rule is not consistent with the interpretative testimony offered by IDEM.
6. Inclusion of the Daily Limit as a condition of Carmel's Permit without specifically considering the water quality of the receiving stream as required by 327 I.A.C. 5-2-11.1 violates the clear directive of the Rule. If there are no practical or technically feasible means of considering the water quality of the receiving stream and its impact on the determination of the appropriate Daily Limit, such facts must be clearly explained and justified. The agency must independently, by scientific analysis, justify a Daily Limit that it determines is appropriate in order to satisfy applicable statutory mandates, regulatory duties and programmatic objectives; or alternatively it must secure specific statutory authorization to include such alternate effluent limits.
7. The financial hardship argument raised by Carmel goes only to the reasonableness of the schedule of implementation and compliance under the Permit. Sufficient time has past since this dispute arose that Carmel could reasonably have been expected to fiscally budget and financially prepare for the anticipated expenditure necessary to comply with the *E. coli* limits if found appropriate. *See generally, City of Gary v Stream Pollution Control Board of the State of Indiana*, 422 N.E. 2nd 312, (Ind. Ct. App. 1981).

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ORDER

The CALJ, having reviewed the evidence and being duly advised in the premises, hereby **FINDS** that 327 I.A.C. 5-2-11.1 requires the use and consideration of the water quality of the receiving stream before translating the water quality standard for *E. coli* into a specific effluent limit. The CALJ therefore **ORDERS** that the Permit be **REMANDED** so that IDEM may satisfy its nondiscretionary duty to consider and apply this regulatory provision to Carmel's Permit. If upon proper consideration of the receiving stream's water quality, IDEM determines that the objected to maximum daily effluent limit for *E. coli* bacteria of 235 count per 100 milliliter is appropriate, then Carmel shall comply with that permit provision within ninety (90) days of notice of such determination.

You are further notified that pursuant to provisions of Indiana Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

Wayne E. Penrod, Chief
Chief Administrative Law Judge