OBJECTION TO THE ISSUANCE OF
PERMIT APPROVAL NO. 13904
CHESTNUT GROUP, INC.
ALLEN COUNTY, INDIANA
2001 OEA 034, OEA CAUSE NO.: 00-W-J-2562

Official Short Cite Name:	**Chestnut Group, Inc, 2001 OEA 034**
OEA Cause No.:	00-W-J-2562
Topics/Keywords:	IC 13-30-1-1
	IC 13-11-2-120.5
	327 IAC 3
	327 IAC 3-1-2
	327 IAC 3-2-3
	327 IAC 3-6-4
	327 IAC 3-6-11
	315 IAC 1-3-1
	327 IAC 1-3-3(a)(1)
	327 IAC 1-3-5
	Ind. Tr. R. 12(B)(1), (6) and (8)
	Ind. Tr. R. 12(C)
	Ind. Tr. R. 56(B), (C) and (E)
Presiding ELJ:	Wayne E. Penrod, CALJ
Party Representatives:	Janice E. S. Lengel, Esq. for IDEM
	Thomas G. Neltner, Esq. for Petitioner
	Peter M. Racher, Esq. for Petitioner
	John M. Ketcham, Esq. for Petitioner
	David C. Van Gilder, Esq. for Fort Wayne
Order Issued:	4-May-01
Index Category:	Water
Further Case Activity:	

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod
Chief Administrative Law Judge

150 West Market Street
Suite 618
Indianapolis, IN 46204
Telephone 317-232-8591
Fax 317-233-0851

STATE OF INDIANA)		BEFORE THE INDIANA OFFICE OF
)	SS:	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)		
IN THE MATTER OF:)		
)		
OBJECTION TO THE ISSUANCE OF)		
PERMIT APPROVAL NO. 13904)		CAUSE NO. 00-W-J-2562
CHESTNUT GROUP, INC.)		
ALLEN COUNTY)		

FINAL ORDER DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND FINAL ORDER GRANTING CHESTNUT GROUP, INC.'S MOTION FOR SUMMARY JUDGMENT

I. Statement of the Case

Note: Due to the length of this Final Order, an index has been provided at the end of the document.

On August 14, 2000 Petitioners timely filed (mailed on or about August 9, 2000) a Petition For Administrative Review with the Office of Environmental Adjudication (hereinafter "OEA") challenging the July 26, 2000 issuance by the Indiana Department of Environmental Management (hereinafter "IDEM") of Permit Approval No. 13904. Janice Lengel entered an Appearance on behalf of the IDEM on August 28, 2000. On September 8, 2000, John Ketcham of PLEWS SHADLEY RACHER & BRAUN informed Petitioners individually of its representation of the Chestnut Group, Inc. (hereinafter "Chestnut Group"). Peter Racher, Curtis DeVoe and John Ketcham entered an Appearance on behalf of Chestnut Group on September 12, 2000. Thomas Neltner entered an Appearance on behalf of Petitioners on September 14, 2000.

A Stay Hearing was held in this matter on September 19, 2000. Petitioners' request for a Stay was Denied. Following the Stay Hearing, a Prehearing Conference was held on September 19, 2000 wherein an expedited briefing and hearing schedule was established. By agreement of the parties, any dispositive motions were to be filed by October 19, 2000. On October 10, 2000, an Order Setting Final Hearing for 12/11/00 was entered by the Chief Administrative Law Judge (hereinafter "CALJ").

On October 19, 2000, Chestnut Group filed a Motion To Dismiss And For Summary Judgment. An Order granting continuance of Final Hearing to December 20, 2000 was entered by the CALJ on November 17, 2000. On November 20, 2000, Chestnut Group filed Respondent's Motion For Order Shortening Time Period In Which To Respond To Discovery Requests. Petitioners filed a Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment with OEA on November 22, 2000. On December 1, 2000, Chestnut Group withdrew its Motion requesting a shortened time period after resolving the issue with Petitioners' counsel. David Van Gilder entered an Appearance on behalf of Petitioners on December 4, 2000. On December 6, 2000, Chestnut Group's Reply In Support Of Its Motion To Dismiss And For Summary Judgment was filed with OEA.

On December 8, 2000 Petitioner's [sic] Motion For Summary Judgment was filed with OEA. Chestnut Group's Supplementary Exhibits To Respondent's Reply In Support Of Its Motion To Dismiss And For Summary Judgment was filed with OEA on December 13, 2000. On December 15, 2000, the CALJ *sua sponte* vacated the December 20, 2000 Final Hearing. On December 21, 2000, Chestnut Group filed Respondent's Objection To Petitioners' Motion For Summary Judgment.

Petitioner's [sic] Reply To Chestnut Group's Objection To Petitioner's [sic] Motion For Summary Judgment was filed January 4, 2001. The CALJ on January 8, 2001 Ordered the IDEM and Chestnut Group to respond to Petitioners' Reply of January 4, 2001 by January 26, 2001. The CALJ further ordered that all parties would have until February 9, 2001 to submit proposed findings of fact, conclusions of law and final orders on the respective outstanding motions for Summary Judgment. The Indiana Department Of Environmental Management's Response To The Petitioner's [sic] Reply To Chestnut Group's Objection To Petitioner's Motion For Summary Judgment was filed January 26, 2001. On January 26, 2001, Chestnut Group filed Respondent's Reply To Petitioners' Response To Objection to Petitioners' Motion For Summary Judgment.

On February 9, 2001, Petitioners filed Proposed Findings Of Fact, Conclusions Of Law And Final Orders. Chestnut Group, on February 9, 2001, filed Respondent's Proposed Findings Of Fact And Conclusions Of Law. At the request of the OEA, on March 1, 2001 the IDEM filed Proposed Findings of Fact Conclusions Of Law And Final Order.

II. Issues

A. At the time of the permit application, did Chestnut Group satisfy the regulatory requirements of 327 IAC 3-6-4 and 327 IAC 3-6-7 by certifying that the project system (1) "will not cause overflowing or bypassing," (2) "from locations other than NPDES [National Pollutant Discharge Elimination System] authorized discharge points"?

B. What is the legal effect of the IDEM's administrative extension, since 1990, of the 1985 National Pollutant Discharge Elimination System (hereinafter "NPDES") permit issued to the City of Fort Wayne (hereinafter the "City") on Permit Approval No. 13904 issued to Chestnut Group (hereinafter the "Permit") (i.e., as several of the newly identified CSO outfall points are not listed in the 1985 NPDES permit, does this provide evidence of a violation of 327 IAC 3-6-4 and 3-6-7)?

C. What is the legal effect of a federally issued administrative order on the actions of the IDEM (i.e., are the requirements imposed by U.S. EPA incorporated in the review of the Permit)? What effect do the City's draft plans submitted to the U.S. EPA have on this permit review (i.e., has the City exceeded the allowed number of Combined Sewer Overflow (hereinafter "CSO") outfall points)?

D. Was Petitioners' December 8, 2000 Motion For Summary Judgment timely? If so, does the December 1, 2000, deposition of Mr. Greg Meszaros indicate that the regulatory requirement of 327 IAC 3-6-4(c) was not met?

III. Undisputed Facts

The CALJ finds the following facts undisputed:

A. In accordance with the Clean Water Act, every entity wishing to discharge effluents into the State's water must hold an NPDES permit. The federal Environmental Protection Agency allowed Indiana the authority to issue such NPDES permits.[1]

B. On March 4, 1985, the Stream Pollution Control Board issued an NPDES permit to the City.

C. The conditions of the expired 1985 NPDES permit are still in effect as having been administratively extended by the IDEM since 1990.

D. On April 4, 2000, Chestnut Group, Inc. submitted an application, plans and specifications, and supporting documents to the IDEM under 327 IAC 3, Rule 6

[1] Meier v. American Maize-Products Co., Inc., 645 N.E.2d 662 (Ind.App. 2 Dist. 1995).

requesting a permit for constructing a sanitary sewer line to be located from Sunset Lane cove to Coldwater Road and then to Maple Creek Middle School. The sewer line would collect sanitary sewage from forty-five (45) single-family homes in the Canyon Run subdivision and nine (9) single-family homes in the Sunset Lake Estates subdivision with an expected total average flow of sixteen-thousand, seven-hundred forty (16,740) gallons per day. The plans and specifications were certified by Mr. Alex Cheng, P.E.

E. The City's sewer system was constructed as a combined sewer system. Combined sewer overflows are not caused by the input of sanitary sewage from any source but rather from the fact that during precipitation events combined overflows could be discharged into rivers and streams.[2] The City's municipal sewage collection system and wastewater treatment plant handles an average of forty-eight (48) to fifty (50) million gallons of sanitary and commercial/ industrial sewage on a daily basis. The collection system and treatment plant have a maximum design capacity of sixty (60) million gallons of sewage per day.

F. Following construction of the new sewer line (and its lift station) the operation and maintenance of the sewer and lift station will be transferred by agreement to the Allen County Regional Sewer District, which provides sanitary sewer collection services to residents of rural Allen County, Indiana.

G. On April 19, 2000, the IDEM issued a Deficiency Notice to Chestnut Group.

H. On May 2, 2000, in response to the IDEM's Deficiency Notice, Mr. Alex Cheng, P.E., certified in accordance with 327 IAC 3-6-11 on the state-provided form that the daily flow rates generated in the area to be collected by the proposed collection system would not cause overflowing or bypassing in the collection system other than NPDES-authorized discharge points.

I. On May 11, 2000, the Allen County Regional Water and Sewer District (signed by Mr. John Stafford) certified that: (a) the daily flow generated in the area that would be collected by the project system would not cause overflowing or bypassing in the collection system other than NPDES-authorized discharge points; (b) that there was sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and remain in compliance with applicable NPDES permit effluent limitations; and (c) the proposed average flow would not result in hydraulic or organic overload.

---

[2] In a combined sewer system, storm sewers and sanitary sewers are inter-connected during precipitation events. During these events, storm sewers can be taxed beyond their capacity, causing discharge into the sanitary system. In some instances, the sanitary system will thereby be taxed beyond its capacity, allowing discharges to occur into the City's rivers and streams.

J. On June 15, 2000, Chestnut Group submitted (by way of a letter from Mr. Alex Cheng, P.E.) additional information in support of its application for a construction permit for the sanitary sewer system.

K. On June 16, 2000, the City of Fort Wayne issued a Capacity Certification/ Allocation letter (signed by Mr. Greg Meszaros) regarding the proposed sewer system. The City certified that: (a) the daily flow generated in the area that would be collected by the project system would not cause overflowing or bypassing in the collection system other than NPDES-authorized discharge points; (b) that there was sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and remain in compliance with applicable NPDES permit effluent limitations; and (c) the proposed average flow would not result in hydraulic or organic overload.

L. On June 20, 2000, Mr. Alex Cheng was contacted by IDEM (through Mr. Don Worley), regarding the disposition of the package treatment plant and the source of additional homes on the system. In response to Mr. Worley's questions, Mr. Cheng supplied further information by letter dated June 28, 2000.

M. On July 26, 2000, the IDEM issued "Authorization for Construction of Sanitary Sewer System Under 327 IAC Article 3, Decision of Approval, Permit Approval No. 13904" to Chestnut Group for construction of a sanitary sewer system for Canyon Run and Sunset Lake Estates subdivisions. IDEM notified the potentially affected persons of the decision to grant this permit under 327 IAC Article 3. The potentially affected persons were given an opportunity to appeal.

N. On August 9, 2000, Petitioners mailed their timely Petition For Administrative Review And Stay Of Decision Of Approval, Permit Approval No. 13904 with the OEA. Petitioners raised ten objections to the Permit.

O. The OEA has subject matter jurisdiction, personal jurisdiction and jurisdiction over this particular case. See Ind.Code 4-21.5-2-1; 4-21.5-2-3; 4-21.5-3-7; 4-21.5-7-3; 4-21.5-7-5. Specifically, the OEA has subject matter jurisdiction over decisions of the commissioner of the IDEM; personal jurisdiction over Petitioners, Chestnut Group and the IDEM; and jurisdiction over the appeal of Permit Approval No. 13904.

P. On September 19, 2000, the CALJ held a hearing on Petitioners' request for a Stay, which was denied. At the hearing the parties discussed and agreed to an expedited schedule in this matter. The schedule called for dispositive motions to be filed by October 19, 2000, and a Final Hearing date of December 11, 2000[3] (which was later continued until December 20, 2000).

---

[3] Events of the September 19, 2000 Hearing memorialized in Respondent's Opposition To Petitioner's Request For Reconsideration And Motion To Set Response Date, filed November 13, 2000, at 1, ¶ 2.

Q. On October 19, 2000, Chestnut Group filed a Motion To Dismiss And For Summary Judgment.

R. On November 22, 2000, Petitioners filed a timely Response to Chestnut Group's Motion To Dismiss And For Summary Judgment. In its response, Petitioners withdrew its first nine objections. The remaining objection, alleging violation of regulations 327 IAC 3-6-4 and 3-6-7 were not withdrawn.[4] Petitioners used the occasion to elaborate and "amend" their remaining objection[5,6,7].

---

[4] From Petitioners' original Petition For Administrative Review, the remaining objection was stated as, "[t]his permit No. 13904 is in violation of regulations 327 IAC 3-6-4 and 3-6-7 and is further flawed as detailed in the attached discussion by Tom Neltner, Executive Director of Improving Kids' Environment as Page 3 & 4 of this petition."

In his letter of August 8, 2000, addressed to the Izaak Walton League of America - Indiana Division, Tom Neltner wrote,"[t]he addition of the wastewater from the Chestnut Group's new sanitary sewer system will have a direct and tangible increase in the quantity of sewage that overflows from the combined sewer system when it rains. . . . There is no way that the permit applicant can show that new construction will not cause overflows from the system without offering up enforceable offsets - offsets that will benefit the same sewers that will be impacted by the new discharge." Neltner points out that, "the permit application included no provisions to offset the overflows. This is in violation of 327 IAC 3-6-4 and 3-6-7 which require such a showing."

Neltner added that, "[t]he permit applicant may argue that any CSO discharge point is an NPDES authorized discharge points [sic]. Therefore, any quantity of sewage that overflows is acceptable. This argument is flawed on several counts by ignoring the fact that:" (1) The NPDES permit for the City of Fort Wayne expired January 12, 1990 and that "[a] new permit would require that the CSO discharge comply with water quality standards and would prohibit further degradation of the water body." (2) The NPDES permit "requires" the City to take reasonable measures to reduce discharge and "it is a reasonable measure to stop accepting new wastes which make the problem worse. IDEM should not be issuing one permit that is going to cause a violation of another. And neither should the City of Fort Wayne." (3) "it is unlikely that EPA Region 5 will approve the [City's CSO Long-Term Control] plan. . . . Without an approved plan, the City and IDEM must not make the overflows worse by accepting significant new quantities of wastewater from new developments. This permit violates the purpose of that order."

[5] Petitioners originally filed as *pro se*. On September 14, 2000, Tom Neltner filed an Appearance on behalf of Petitioners. On December 4, 2000, David Van Gilder filed an Appearance on behalf of Petitioners.

[6] In Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, of November 22, 2000, Petitioners withdrew all but one of their original objections,– that being that the proposed sewer system's average daily flows would cause overflow in the City's combined sewer system. Petitioners presented the following supporting arguments: (1) the IDEM has the authority to deny the permit on the basis of 327 IAC 3-6-7 even though Chestnut Group submitted the required evidence by obtaining the certifications from the Allen County Regional Water and Sewer District and from the City of Fort Wayne. Petitioners argued that IDEM was not foreclosed from considering contrary evidence and denying the permit based on that contrary evidence. Petitioners point to information contained in the City's Long-Term Control Plan as evidence of pollutants lowering the water quality of the St. Joseph, St. Marys and Maumee Rivers. (2) The IDEM was in possession of evidence that contradicted the Capacity Certification/Allocation Letter submitted by Greg Meszaros. That evidence included:

S. On December 4, 2000, Chestnut Group's Reply In Support Of Its Motion To Dismiss And For Summary Judgment was filed.

T. On December 8, 2000, Petitioner's [sic] Motion For Summary Judgment was filed.[8] This Motion was filed fifty days after the stipulated dispositive motion cutoff date. Petitioners did not file a Motion for Extension of Time to file a Motion for Summary Judgment, timely or otherwise, despite the fact that they knew on October 11, 2000, a week before the dispositive motion cut-off date, that Petitioners would not depose City personnel until after the cut-off date. Petitioners claimed their Motion For Summary Judgment was timely based on new information obtained during the December 1, 2000 depositions of Mr. Ted Rhinehart and Mr. Greg Meszaros.

U. On December 15, 2000, the CALJ vacated *sua sponte* the Final Hearing scheduled for December 20, 2000 to allow the court time to consider all submitted pleadings. No rescheduled date was set.

(a) IDEM knew that the City had unresolved permit violations; (b) IDEM had evidence that the City had twenty unauthorized discharge points; and (c) IDEM had evidence that the city understood the meaning of "hydraulic overload" contrary to the claim of IDEM that it had not developed any guidance documents or non-rule policy documents explaining, interpreting or clarifying the term.

(3) Overflows and bypasses will be caused by the proposed sewer system. Essentially, "if you put one more gallon of sewage into an overflowing system, you will cause one more gallon of sewage/rainfall/industrial wastewater to flow into the river." (4) While the old NPDES permit for the City does not specifically limit the quantity of sewage and other material from an authorized CSO, the "1995 draft permit by IDEM would have effectively prohibited the CSO discharges." (5) Contrary to the conclusion of Chestnut Group, a sewer connection ban is not a reasonable measure to comply with the NPDES permit requirement that the City take reasonable measures to reduce discharges impacting water quality standards. (6) Chestnut Group's argument that Petitioners have chosen the wrong forum is in error. "The public interest is served when the NPDES permit is followed and a problem is not made worse."

[7] The court takes notice of the fact that Petitioners' elaboration of their original objection likely exceeded a petitioner's general right to amend as contemplated by the Indiana Court of Appeals in OEA v. Kunz, 714 N.E.2d 1190 (Ind.App. 1999). However, as Chestnut Group did not object to this practice, and in fact responded to the modified objections of Petitioners (see Chestnut Group's Reply In Support Of Its Motion To Dismiss And For Summary Judgment, filed December 6, 2000), and in the interest of justice, this tribunal has not otherwise addressed this issue.

[8] Relying upon the December 1, 2000, deposition of Greg Meszaros, Petitioners contend the statements of Mr. Meszaros should lead this court to conclude that "his certification is not accurate or complete and cannot be used to support IDEM's decision [to grant the permit]." Specifically, Petitioners stated Mr. Meszaros: (1) limited "overflows" only to sewer overflows, illogically excluding combined sewers; (2) illogically assumed only wet weather impacts on the sanitary sewer system; (3) illogically interpreted "hydraulic overload" to exclude contributions provided by entering storm water; (4) "[i]gnored the standard conditions in NPDES permits of 1985 that require[d] the operator to minimize discharges of excessive pollutants"; and (5) "[o]verlooked the fact that there are unauthorized discharges on the combined sewer system that may be impacted by additional flow."

V. On December 21, 2000, Chestnut Group filed Respondent's Objection To Petitioners' Motion For Summary Judgment.

W. On January 4, 2001, Petitioner's [sic] Reply To Chestnut Group's Objection To Petitioner's [sic] Motion For summary Judgment was filed.

X. The OEA on January 8, 2001 Ordered that IDEM and Chestnut Group would have until January 26, 2001 to respond to Petitioners' Reply of January 4, 2001. Further, the OEA Ordered that all parties would have until February 9, 2001 to submit proposed findings of fact, conclusions of law and final orders on the respective outstanding motions for Summary Judgment.

Y. On January 26, 2001, Respondent's Reply To Petitioners' Response To Objection To Petitioners' Motion For Summary Judgment and Indiana Department Of Environmental Management's Response To The Petitioner's [sic] Reply To Chestnut Group's Objection To Petitioner's [sic] Motion For Summary Judgment were filed.

Z. On February 9, 2001, Petitioners filed Proposed Findings Of Fact, Conclusions Of Law And Final Orders. On that same date, Chestnut Group filed Respondent's Proposed Findings Of Fact And Conclusions Of Law.

AA. At the request of the OEA, on March 1, 2001 the IDEM filed Proposed Findings of Fact Conclusions Of Law And Final Order.

BB. The engineering drawings and sewer line dimensions clearly show sewage input from Sunset Lake Estates subdivision, and the capacity as certified includes that input.

CC. The proposed sewer line will not cross any wetlands; and even if they did, no Clean Water Act § 404 permit or Indiana § 401 permit is required.

DD. Notice to the local highway department of the permit application was not required, and even if notice had not been provided, the Permit required the Chestnut Group to obtain local permits.

EE. The proposed sewer system is not within the separation distance of any water mains or "public water system drinking water wells."

FF. Before the expiration of the City's 1985 re-issued NPDES Permit No. IN 0032191, the City timely submitted an application to the IDEM to renew the NPDES Permit No, IN

0032191, so that its terms and conditions are still in effect until such time as a new permit is issued and becomes effective.[9]

GG. The City's witnesses, Mr. William E. "Ted" Rhinehart, Director of Public Works and Utilities, and Mr. Greg Meszaros, Associate Director of Utility Engineering, testified that the 1985 permit lists "regulators" and that the draft 1995 application lists actual "outfalls," and that comparing the number of regulators to the number of outfalls would be misleading.

HH. The City currently meets the water-quality or effluent requirements of its NPDES Permit No. IN 0032191, with occasional excedences that it reports on its monthly discharge report.

IV. Petitioners' Motion For Summary Judgment

In its Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000, Petitioners recapitulated their original objections while withdrawing all save but one:

1) The IDEM abused its discretion in accepting Chestnut Group's response to the IDEM's April 19, 2000 Deficiency Notice. While Petitioners believed that the IDEM's deference to Chestnut Group was inappropriate, Petitioners withdrew this objection.

2) The applications for capacity certification as well as the engineering drawings and sewer line dimensions failed to show sewage input from Sunset Lake Estates subdivision. Petitioners withdrew this objection.

3) The sewer lines crossed wetlands and no Clean Water Act § 404 or Indiana § 401 permit was obtained. Petitioners withdrew this objection.

4) Notice was not provided to the local highway department regarding the Permit. Petitioners withdrew this objection.

5) The proposed sewer system failed to maintain the required separation distance from a private water well. Petitioners withdrew this objection.

---

[9] On January 17, 1996, the U.S. Environmental Protection Agency (U.S. EPA) issued an Administrative Order to the City citing many violations of the City's NPDES permit due to the inadequate operation of its sewer system. The Administrative Order required the City's submission of a Long-Term Control Plan. The requirements of the Administrative Order have not been satisfied and the Order is still outstanding. The State of Indiana is not a party to this Administrative Order between the U.S. EPA and the City.

6) The length of the proposed sewer system exceeded three-hundred (300) feet. While Petitioners remain concerned with this matter, Petitioners withdrew this objection.

7) The proposed sewer system's average daily flow would cause overflow in Fort Wayne's combined sewer system. This seventh concern, therefore, represented the sole remaining objection of Petitioners.

The original Petition For Administrative Review And Stay raised the objection that, "[t]his permit No. 13904 is in violation of regulations 327 IAC 3-6-4 and 3-6-7 and is further flawed as detailed in the attached discussion by Tom Neltner, Executive Director of Improving Kids' Environment as Page 3 & 4 of this petition."

As incorporated by reference, Petitioners contend that the proposed sewer system violates certification and technical regulations (i.e., 327 IAC 3-6-4[10] and 327 IAC 3-6-7[11]) because the

---

[10] 327 IAC 3-6-4 states that, "(a) Certifications complying with the required statements as set forth in subsections (b) and (c) shall be submitted with an application, plan, or specification for construction permit approval under this rule.

(b) A professional engineer or a registered land surveyor, in conformance with IC 25-31-1 and 327 IAC 3-2.1-3(a), must sign, seal, and date the application making the following certification: 'I certify under penalty of law that the design of this project will be performed under my direction or supervision to assure conformance with 327 IAC 3 and that the plans and specifications will require the construction of said project to be performed in conformance with 327 IAC 3-6. I certify that the peak daily flow rates, in accordance with 327 IAC 3-6-11 generated in the area that will be collected by the proposed collection system that is the subject of the application, plans, and specifications, will not cause overflowing or bypassing in the same subject proposed collection system from locations other than NPDES authorized discharge points. I certify that the proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers. I certify that the ability for this collection system to comply with 327 IAC 3 is not contingent on water pollution treatment/control facility construction that has not been completed and put into operation. I certify that the design of the proposed project will meet all local rules or laws, regulations, and ordinances. The information submitted is true, accurate, and complete to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.'.

(c) The authorized representative of the town, city, sanitary district, or any entity that has jurisdiction over the proposed collection system must sign and date the application and issue the following certification: 'I certify that I have reviewed and understand the requirements of 327 IAC 3 and that the sanitary collection system proposed, with the submission of this application, plans, and specifications, meets all requirements of 327 IAC 3. I certify that the daily flow generated in the area that will be collected by the project system will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points and that there is sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and remain in compliance with applicable NPDES permit effluent limitations. I certify that the proposed average flow will not result in hydraulic or organic overload. I certify that the proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers. I certify that the ability for this collection system to comply with 327 IAC 3 is not contingent on water pollution/control facility construction that has not been completed and put into operation. I certify that the project meets all local rules or laws, regulations, and ordinances. The information submitted is true, accurate, and complete to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fine and

system's average daily flow will cause overflow in Fort Wayne's combined sewer system (i.e., combined sewer overflows, or "CSOs"). Specifically, Petitioners claimed:[12]

> 327 IAC 3-6-7 requires that IDEM deny any construction permit for a new or modified sanitary sewer system unless the applicant has submitted evidence showing that the peak daily flow rate generated in the area that will be served by the proposed collection system will not cause overflowing or bypassing in the collections system from locations other than NPDES authorized discharge points.
>
> * * *
>
> With overflows occurring for more than 300 hours per year along the sewers that will be affected by the new development, the new connection is likely to result in the discharge of more than 5,000,000 gallons of untreated industrial wastewater, raw sewage, and storm water into the Maumee River.[13]
>
> * * *
>
> There is no way that the permit applicant can show that new construction will not cause overflows from the system without offering up enforceable offsets – offsets that will benefit the same sewers that will be impacted by the new discharge. Yet, the permit

---

imprisonment.'."

[11] 327 IAC 3-6-7 states that, "[t]he application for any construction permit required by this article shall be denied unless the applicant submits evidence of the following:

(1) The peak daily flow rate, in accordance with section 11 of this rule generated in the area that will be collected by the project system, will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points.

(2) Sufficient capacity exists in the receiving water pollution treatment/control facility to treat the additional daily flow.

(3) The receiving water pollution treatment/control facility will remain in compliance with applicable NPDES permit effluent limitations.

(4) The sanitary sewer or collection system that is the subject of the construction permit application is to connect to a water treatment/control facility that has been completed and put into operation.

(5) The proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers."

[12] Petition For Administrative Review And Stay, August 9, 2000, which incorporated by reference the memorandum by Tom Neltner, J.D., Executive Director, Improving Kids' Environment to Jane and Tom Dustin, Izaak Walton League of America – Indiana Division, regarding "IDEM Construction Permit to Chestnut Group," August 8, 2000.

[13] To achieve the 5,000,000 gallons per year of discharge claimed by Petitioners, the annual total of CSO events would need to equal 300 days, not 300 hours per year. 300 days of discharge per year x 16,740 gallons per day estimated total average flow from Canyon Run = 5,022,000 gallons. 300 hours = 12.5 days. By Petitioners' own measure: 12.5 days of discharge per year x 16,740 gallons per day = 209,250 gallons per year. This matter was not addressed by either party in subsequent pleadings.

application included no provisions to offset the overflows. This is in violation of 327 IAC 3-6-4 and 3-6-7 which require such a showing.[14]

Petitioners further argued the possibility that the CSO discharge was from a point unauthorized by NPDES. Petitioners wrote, "[t]he NPDES permit for the City of Fort Wayne expired on January 31, 1990 - over ten years ago - and has been administratively extended by IDEM. A new permit would require that the CSO discharge comply with water quality standards and would prohibit further degradation of the water body."[15] Additionally, Petitioners wrote:[16]

> The NPDES permit requires that the permittee take reasonable measures to reduce discharges which impact water quality standards. The City of Fort Wayne's draft Long-Term Control Plan makes it clear that CSO discharges violate the *E. Coli* water quality standard. Certainly, it is a reasonable measure to stop accepting new wastes which make the problem worse. IDEM should not be issuing one permit that is going to cause a violation of another. And neither should the City of Fort Wayne.

Petitioners contended that the Long-Term Control Plan being completed by the City of Fort Wayne, "varies significantly from the EPA Combined Sewer Overflow Guidance for Long-Term Control Plans (EPA 832B95002) . . . [and] it is unlikely that EPA Region 5 will approve the plan."[17] Petitioners further opine that it is "unlikely that IDEM will approve the plan since IC 13-11-2-120.5 incorporates that guidance into the definition of a Long-Term Control Plan." "Without an approved plan, the City and IDEM must not make the overflows worse by accepting new quantities of wastewater from new developments." Petitioners claimed this Permit violates the purpose of the order issued by U.S. EPA Region 5 directing the City of Fort Wayne to significantly improve their combined sewer system.

---

[14] The Court searched 327 IAC 3, *et seq* for the following terms: "offset," "offsets," "off," "exchange," "credit," "trade," and "trading." No requirement analogous to the offset requirement indicated by Petitioners was observed. (See, discussion herein regarding objection #10.02, p. 42 of 55.)

[15] Petition For Administrative Review And Stay, August 9, 2000, which incorporated by reference the memorandum by Tom Neltner, J.D., Executive Director, Improving Kids' Environment to Jane and Tom Dustin, Izaak Walton League of America – Indiana Division, regarding "IDEM Construction Permit to Chestnut Group," August 8, 2000.

[16] Id.

[17] Id.

In addressing the objections of Petitioners to the CSO potential of the proposed sewer system, Chestnut Group responded that Petitioners failed to state a claim upon which relief may be granted. Chestnut Group presented the following:[18]

1) Chestnut Group met the requirements of 327 IAC 3-6-4 and 3-6-7 when, "[b]oth Allen County and the City of Fort Wayne certified [under a substantial penalty of giving false information] that they had the capacity to accept the sewer system's input without causing overflows or bypasses in their systems."

2) Overflows will not be caused by the proposed sewer system. "By Petitioners' own allegations, overflows and bypasses already occur (indeed, they are permitted under Fort Wayne's NPDES Permit) . . ." Chestnut Group emphasized that "[t]he regulations prohibit approval of the sewer system only if the daily flow from the proposed system causes overflow or bypassing . . ."

3) Sufficient excess capacity exists. The City of Fort Wayne's sewer system handled a daily average of 50 million gallons of sanitary and commercial/industrial sewage. The treatment plant and collection system were rated as having a maximum daily design capacity of 60 million gallons. Canyon Run's daily average flow was estimated at 16,740 gallons.

4) Even if the additional inflow from the proposed sewer system becomes part of discharges, the NPDES certification is still valid. If the overflows are from discharge points authorized under the NPDES permit, the regulations are satisfied. "The Capacity Certification/Allocation Letters certify that the average daily flow will not cause overflows from other than authorized discharge points."

5) "IDEM has not issued the new NPDES permit, and the courts obviously cannot enforce the requirements of a non-existent future permit."

6) "If Petitioners genuinely believe that an overload condition exists in Fort Wayne that results in significant pollution, impairment, or destruction of the environment, they have a remedy. Petitioners may bring an action under IC 13-30-1-1 against the Commissioner of IDEM and the City of Fort Wayne seeking imposition of a sewer-connection ban. Petitioners have not done so, and IDEM has not placed Fort Wayne under a sewer-connection ban."[19]

---

[18] Brief In Support Of Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, October 19, 2000.

[19] In Chestnut Group's Reply In Support Of Its Motion To Dismiss And For Summary Judgment, December 6, 2000, Respondent repeated its claim that the OEA is not the proper forum for Petitioners' complaints concerning the City of Fort Wayne sewer system. Respondent's wrote, "[t]he purpose of 327 IAC 3-6-4 was to require that local authorities make the determination, subject to IDEM's review, that the treating system had

A. Was Petitioners' Motion Timely?

On September 19, 2000, the parties stipulated that all dispositive motions should be filed with this court no later than October 19, 2000. Petitioners filed their Motion For Summary Judgment on December 8, 2000. "The burden of proof for the timely filing of pleadings and documents with the [OEA] is on the person so filing." 315 IAC 1-3-3(a)(1).

Petitioners did not file a Motion for extension of time to file a Motion for Summary Judgment, timely or otherwise, despite the fact that they knew on October 11, 2000, a week before the dispositive motion cut-off date, that Petitioners would not depose City personnel until after the cut-off date. See 315 IAC 1-3-5 (Request for extension of time for filing pleading, document or motion).

Petitioners claimed their Motion For Summary Judgment filed December 8, 2000 was timely, "because of new evidence disclosed at the deposition of Mr. Meszaros on December 1, 2000."[20] Including reference to the contemporaneous deposition of Mr. Rhinehart, Respondents disagreed with this assertion of Petitioners:[21]

> These witnesses were not newly discovered. Greg Meszaros signed the Capacity Allocation/Certification letter on behalf of the City of Fort Wayne, and Petitioners and their counsel, Mr. Neltner, have been in frequent contact with Ted Rhinehart, director of Public Works and Utilities for the City of Fort Wayne, in the past. Respondents offer no evidence that the witnesses were not available to be interviewed or deposed before the October 19th deadline for dispositive motions, nor did Petitioners request an extension of the deadline.

As such, unless otherwise codified, 315 IAC 1-3-5(b) would prohibit the CALJ from granting an extension of time to Petitioners where Respondent opposes such an extension. A review of IC 4-

---

sufficient capacity to treat the waste. The local authority has made that determination, and IDEM has found that determination to be sufficient . . . If Petitioners have a legitimate complaint about Fort Wayne's operation of its sewer system, they should raise it (and in fact have done so) with City officials, or with IDEM's water pollution enforcement staff, or with the EPA, through the public-comment process provided for the LTCP [Long Term Control Plan], or through any other legal means provided by law."

Chestnut Group added, "[i]nterestingly, the attorney for Petitioners is an active participant in the public-comment process for the City's draft LTCP, and has met with the City in connection with his comments." [See Chestnut Group's FN2, at 3.]

[20] Petitioners' Proposed Findings Of Fact, Conclusions Of Law And Final Orders, at 7, ¶ 1, February 9, 2001.

[21] Respondent's Reply To Petitioners' Response To Objection To Petitioners' Motion For Summary Judgment, at 2, filed January 29, 2001.

21.5 does not reveal a statutory basis for the CALJ to grant Petitioners an extension where one had not been requested by Petitioners.

If, in the alternative, Petitioners' Motion For Summary Judgment were to be found timely, in the interest of justice and judicial economy, this tribunal would evaluate the Motion on its merits.

B. Standard for Summary Judgment

> The purpose of summary judgment is to provide a procedural device for the prompt disposition of cases in which there is no genuine issue as to material fact to be determined by the court or jury.[22]

Indiana Trial Rule 56(C) provides, in part:

> The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The standard of review of a summary judgment motion is well-settled.[23] As Indiana courts have recently restated, "[r]elying on specifically designated evidence, the moving party bears the burden of showing prima facie that there are no genuine issues of material fact *and* that the moving party is entitled to judgment as a matter of law."[24] [Emphasis added.]

If the facts are undisputed, the court applies the law to those facts and determines whether the moving party is entitled to judgment as a matter of law.[25] The disputed fact must be material, that is, the fact must facilitate resolution of any legal issues either for or against the party having the burden of proof on that issue.[26] Even if conflicting facts exist, summary judgment is proper if such facts are not dispositive of the action.[27]

---

[22] Doe v. Barnett, 251 N.E.2d 688, 695 (Ind. Ct. App. 1969).

[23] See also, IC 4-21.5-3-23 (Summary Judgment standard within the Indiana Administrative Orders and Procedures Act) and 315 IAC 1-3-1(b)(10) (the OEA has the authority to apply the Indiana Rules of Trial Procedure).

[24] Gilman v. Hohman, 725 N.E.2d 425, 428 (Ind.App. 2000) citing Estate of Pflanz v. Davis, 678 N.E.2d 1148, 1150 (Ind.Ct.App.1997).

[25] English Coal Co. v. Durcholz, 422 N.E.2d 302, 307 (Ind. Ct. App. 1981); Brandon v. State, 340 N.E.2d 756, 761 (Ind. Ct. App. 1976).

[26] Brandon, 340 N.E.2d at 758.

[27] Crull v. Platt, 471 N.E.2d 1211, 1214 (Ind. Ct. App. 1984).

The burden of establishing lack of material factual issue is initially on the party moving for summary judgment. But once the movant makes a *prima facie* showing that there are no genuine issues of material fact, the nonmovant must set forth specific facts indicating that there is a genuine issue in dispute. If the nonmovant fails to meet this burden, summary judgment in favor of movant is appropriate.[28]

C. Petitioners' Basis for Summary Judgment

Petitioners contend that the certification provided by Mr. Meszaros is "not accurate or complete and cannot be used to support IDEM's decision."[29] Specifically, Petitioners set forth in their Motion For Summary Judgment five "arguments":[30]

1) Mr. Meszaros limited the term "overflows" to mean only sanitary sewer overflows despite the fact that both sanitary sewers and combined sewers have overflows.

2) Mr. Meszaros considered wet weather impacts only in sanitary sewer systems where the impacts are less significant rather than in combined sewer systems where the wet weather impacts are more severe.

3) Mr. Meszaros interpreted the term "hydraulic overload" to exclude the contribution to the hydraulic flow provided by the storm water entering combined sewers despite the fact that combined sewer systems are designed to accept storm water and Mr. Meszaros acknowledged that the term should include all fluid flow.

4) Mr. Meszaros ignored the standard condition in NPDES permits of 1985 that require the operator to minimize discharges of excessive pollutants.

5) Mr. Meszaros overlooked the fact that are unauthorized discharges on the combined sewer system that may be impacted by the additional flow. In support of this point, Petitioners stated that "[t]he 1995 draft permit listed 20 additional combined sewer overflow points than the 1985 permit."[31]

---

[28] Schmidt v. American Trailer Court, Inc., 721 N.E.2d 1251, 1253 (Ind. Ct. App. 1999).

[29] Petitioner's [sic] Motion For Summary Judgment, at 4, ¶ 1, filed December 8, 2000.

[30] Id. at 4-9.

[31] Petitioners addressed the issue of regulators versus outfalls by stating, "Respondents latched onto the scenario that a regulator could have two or more outfall points. The more obvious scenario that the maps and drawings of sewers built more than 30 years ago are not perfect and that the city found some unintentionally omitted outfalls during its sewer characterization study was ignored." Id. at 6. Petitioners pointed to the following flaws in Respondent's logic regarding regulators: (1) the City's mistake in permitting does not authorize the discharge point; and (2) there are obvious contradictions in the City's listing of additional outfalls.

In Petitioner's [sic] Motion For Summary Judgment the following was designated in support of the Motion: (1) transcript of Greg Meszaros' Deposition of December 1, 2000; and (2) Petitioner's [sic] Response To Chestnut Group's Motion To Dismiss And For Summary Judgment and referenced documents thereto (filed November 22, 2000) (hereinafter "Petitioners' Response").

Our supreme court has stated that a party does not comply with T.R. 56(C) by merely designating entire portions of the record, such as depositions.[32] "[S]pecificity is the mandate. . . . As long as the trial court is apprised of the *specific material* upon which the parties rely in support of or in opposition to a motion for summary judgment, then the material may be considered."[33] Summary judgment should not be entered where material facts conflict or where conflicting inferences are possible.[34]

D. Discussion of Petitioners' Motion For Summary Judgment

Petitioners stated, "[t]he basis upon which Mr. Meszaros made his capacity certification directly contradicts the clear language of the certification. Therefore, his certification is not accurate or complete and cannot be used to support IDEM's decision. Specifically, Mr. Meszaros:"[35]

1. Limited the term "overflows" to mean only sanitary sewer overflows despite the fact that both sanitary sewers and combined sewers have overflows.

Petitioners contend, "[t]he certification does not differentiate between the two types of overflows. There is no logical reason to assume that the term was limited to only sanitary sewer overflows." Id. Petitioners specifically, and solely, cited 327 IAC 3-1-2(17) for the definition of "sanitary sewer" and 327 IAC 3-1-2(2) for the definition of "combined sewer." Even when the specific citations utilized by Petitioners in support of their "facts"[36] were included, this tribunal

---

[32] Dzvonar v. Interstate Glass Co., Inc., 631 N.E.2d 516, 518 (Ind.App. 4 Dist. 1994) citing Rosi v. Bussiness Furniture Corp., 615 N.E.2d 431, 434, n. 2 (Ind. 1993).

[33] National Bd. of Examiners for Osteopathic Physicians and Surgeons, Inc., v. American Osteopathic Ass'n, 645 N.E.2d 608, 615 (Ind.App. 4 Dist. 1994) citing, in part, Dzvonar [emphasis in original].

[34] J.C. Spence & Associates, Inc. v. Geary, 712 N.E.2d 1099, 1102 (Ind.App. 1999) citing Miller v. Monsanto Co., 626 N.E.2d 538 (Ind.Ct.App.1993).

[35] Petitioner's [sic] Motion For Summary Judgment, filed December 8, 2000, at 4 of 11.

[36] See: (1) Greg Meszaros Deposition Transcript of December 1, 2000: (a) at 20-25; (b) at 25, lines 13-14; (c) at 22, line 24 to 23, line 3; (d) at 50, lines 5- 7; (e) at 25, lines 7-8; and (2) Petitioners' Response: (a) IDEM's Response to the Petitioner's [sic] Request for Discovery; (b) City of Fort Wayne's NPDES Permit, at 10 of 13 in Meszaros Affidavit; and (c) at 7, and City of Fort Wayne's Preliminary Long-Term Control Plan, at 4-11and 4-14 in Meszaros Affidavit.

failed to find any statutory or case authority for this first contention, nor any argument that if such authority existed it would, as a matter of fact, lead to the conclusion that limiting "overflows" only to sanitary sewer overflows proves, as a matter of law, that Mr. Meszaros' certification was not accurate or complete.

Chestnut Group responded to Petitioners' Motion for Summary Judgment, in part, by stating:[37]

> [T]he City of Fort Wayne should measure capacity differently in a sanitary sewer system and a combined sewer system, because of the difference between the two systems. A sanitary sewer, by definition and construction, is designed so that no storm water intentionally enters. A combined sewer, by definition and construction, is designed to carry storm waters. Thus, a sanitary sewer must be tested for infiltration of storm water (ground water, to be more precise) to determine whether the sewer meets applicable requirements. 327 IAC 3-2-3(c) ("Sanitary sewers which have been issued construction permits shall be tested for infiltration/exfiltration in a method approved by the commissioner.") A storm sewer, on the other hand, is not tested for infiltration of storm water, because it is designed to carry storm water.
>
> Capacity in a sanitary sewer and a combined sewer system must be measured differently. Combined sewers have combined sewer overflows due to storm water, and would thus lack "capacity" under Petitioners' argument. But combined sewer overflows are permitted, and occur only with combined sewers, not sanitary sewers. An overflow from a sanitary sewer is not permitted. Thus, different calculations for the two systems recognize the differences in fact between them. That difference is also reflected in the law: overflows are permitted, and only permitted from *combined* sewer systems. Petitioners continue to overlook this fundamental legal principle: the City's NPDES permit *allows* wet-weather combined sewer overflows. This principle is fundamental and reflected throughout the EPA's and IDEM's guidance. (Respondent then specifically cited EPA's 1994 "Combined Sewer Overflow Policy," 59 Fed.Reg. 18688, 18689 (1994) and the IDEM's "Combined Sewer Overflow Strategy," II.B (1996) in support of its Objection.) [Emphasis in original, footnotes omitted.]

On this issue Petitioners failed to satisfy their burden under Indiana Trial Rule 56(C) to designate evidentiary matter that showed that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.

---

[37] Respondent's Objection To Petitioners' Motion For Summary Judgment, filed December 21, 2000, at 7-8.

2. Considered wet weather impacts only in sanitary sewers where the impacts are less significant rather than combined sewer systems where the wet weather impacts are more severe.

Petitioners contend, "[t]he certification makes no distinction between wet-weather and dry-weather flows. There is no logical reason to assume that the term was limited only to the best set of circumstances for combined sewers while doing the opposite on sanitary sewers."

Petitioners did not cite any case or statutory authority in support of this argument. Even when the specific citations utilized by Petitioners in support of their "facts"[38] were included, this tribunal failed to find any statutory or case authority for this second contention. Nor did this tribunal find any argument that if such authority existed it would, as a matter of fact, lead to the conclusion that any such distinction that may have been made by Mr. Meszaros proves, as a matter of law, that Mr. Meszaros' certification was not accurate or complete.

In fact, from the December 1, 2000, Deposition of Mr. Meszaros, he responded to Petitioners' question whether he based the determination of the capacity of the City's receiving sewers on dry weather flow or wet weather flow, as follows:[39]

A. – we base that on the modeling and our master plans and the indication of the capacity in our systems. Those would incorporate wet weather influences that happens on all separate sanitary systems, such as infiltration and inflow. We don't just simply assume that our separate sanitary systems are only composed of dry weather flows. When we evaluate capacity, we consider their capacity both during dry and wet weather.

Q. To make sure I understand, you do include infiltration and inflow, but does that include the wet – the storm water that comes in through the combined sewer system?

A. It – we – repeat your question.

Q. When you use the term that you consider the infiltration and inflow in evaluating the capacity, are you including the storm water that enters the system through the combined sewer sub-basins?

A. If I understand your correction – question, the answer would be no, I review it just in terms of certifying what is on my – my certification here.

Q. Why would you not include the storm water contribution?

Mr. Meszaros: In the combined sewer areas?

---

[38] See, (1) Greg Meszaros Deposition Transcript of December 1, 2000: (a) at 20-25; (b) at 25, lines 13-14; (c) at 22, line 24 to 23, line 3; (d) at 50, lines 5-7; (e) at 25, lines 7-8; and (2) Petitioners' Response: (a) IDEM's Response to the Petitioner's [sic] Request for Discovery; (b) City of Fort Wayne's NPDES Permit, at 10 of 13 in Meszaros Affidavit; and (c) at 7, and City of Fort Wayne's Preliminary Long-Term Control Plan, at 4-11 and 4-14 in Meszaros Affidavit.

[39] Deposition of Greg Meszaros, December 1, 2000, at 22, line 20 to 24, line 3.

Mr. Neltner: From the combined sewer areas.

A. To the best of my knowledge, I have seen no rules, regulations, engineering analysis, legal interpretations that have asked us to include a characterization of how separate sanitary flows affect the combined sewer system when it comes to capacity certifications.

Chestnut Group responded to Petitioners' Motion for Summary Judgment, in part, by stating:[40]

> Capacity in a sanitary sewer and a combined sewer system must be measured differently. Combined sewers have combined sewer overflows due to storm water, and would thus lack "capacity" under Petitioners' argument. But combined sewer overflows are permitted, and occur only with combined sewers, not sanitary sewers. An overflow from a sanitary sewer is not permitted. Thus, different calculations for the two systems recognize the differences in fact between them. That difference is also reflected in the law: overflows are permitted, and only permitted from *combined* sewer systems. Petitioners continue to overlook this fundamental legal principle: the City's NPDES permit *allows* wet-weather combined sewer overflows. This principle is fundamental and reflected throughout the EPA's and IDEM's guidance. (Respondent then specifically cited EPA's 1994 "Combined Sewer Overflow Policy," 59 Fed.Reg. 18688, 18689 (1994) and the IDEM's "Combined Sewer Overflow Strategy," II.B (1996) in support of its Objection.) [Emphasis in original, footnote omitted.]

On this issue Petitioners failed to satisfy their burden under Indiana Trial Rule 56(C) to designate evidentiary matter that showed that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.

3. Interpreted the term "hydraulic overload" to exclude the contribution to the hydraulic flow provided by the storm water entering combined sewers despite the fact that combined sewer systems are designed to accept stormwater and he acknowledged that the term should include all fluid flow.

Petitioners contend, "[t]he City of Fort Wayne repeatedly uses the term 'hydraulic' in its own documents to mean the entire flow including storm water. Mr. Meszaros confirmed this interpretation in his deposition. There is no logical reason to break from that common usage to use the term more narrowly in the capacity certification." In this third argument, Petitioners specifically cite to Petitioners' Response, at 13-16 and 25, lines 7-8; the latter of which stated:

---

[40] Respondent's Objection To Petitioners' Motion For Summary Judgment, filed December 21, 2000, at 7-8.

> The petitioners [sic] request does not preempt the development of the City's long-overdue Long-Term Control Plan. It is not a premature solution - only a common sense interim solution.

In the former citation Petitioners took issue with the interpretation of hydraulic capacity being narrowly based on wastewater flow.[41] Petitioners note:[42]

> Despite its apparent interpretation in the Capacity Certification/Allocation Letter, the City of Fort Wayne clearly understood that "hydraulic" means water and not just wastewater when it prepared its LTCP [Long-Term Control Plan]. In its LTCP, the City of Fort Wayne uses the term in its broadest sense - to include rainfall, groundwater infiltration, and wastewater. [FN 41. Meszaros Affidavit, Attached LTCP.][43]

Petitioners concluded, in part, "[c]learly the [Water Pollution Control P]lant is experiencing frequent hydraulic overloads under the current circumstances. Additional, [sic] flow, however small, will only exacerbate the situation."[44]

Assuming that Petitioners, in their Motion for Summary Judgment, could properly rely upon the preliminary LTCP document to conclude storm waters should be included in the calculation of hydraulic overload, this third argument nonetheless overlooked the following issues:

A) By definition, a "combined sewer" means "a sewer designed and employed to receive both water-carried and/or liquid wastes and *storm* and/or surface water." 327 IAC 3-1-2(a). [Emphasis added.]

B) 327 IAC 3-6-4(b) states, in part, that, "I certify that the peak daily flow rates, in accordance with 327 IAC 3-6-11 generated in the area that will be collected by the

---

[41] Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000, at 14.

[42] Id. at 15.

[43] This tribunal takes judicial notice of the lack of a more specific citation to the LTCP, a lengthy document which Petitioners provided only selected pages thereof (the document appears to be at least one-hundred and one pages in length, of which fifteen pages were submitted by Petitioners). "The law is well settled that if a document is relied upon to support a motion for summary judgment, it must be exhibited in full . . ." Marich v. Kragulac, 415 N.E.2d 91, 100 (Ind.App. 3 Dist. 1981) citing Lukacs v. Kluessner, 290 N.E.2d 125 (Ind.App. 1972).

Further, Petitioners failed to indicate the preliminary nature of the LTCP (although every page of the LTCP provided by Petitioners bears the statement, "Preliminary, Fort Wayne Water Utility, Engineering Dept.").

[44] Id. at 16.

proposed collection system that is the subject of the application, plans, and specifications, will not cause overflowing or bypassing in the same subject proposed collection system from locations *other than NPDES authorized discharge points*." [Emphasis added.]

C) 327 IAC 3-6-7(1) states, "[t]he peak daily flow rate, in accordance with section 11 of this rule generated in the area that will be collected by the project system, will not cause overflowing or bypassing in the collection system from locations *other than NPDES authorized discharge points*." [Emphasis added.]

It is difficult to conclude otherwise that: (a) the City's CSO system, by definition, is expected to *include* storm water entering combined sewers; and (b) that the rules of the State of Indiana contemplates the discharge of CSO overflows. Petitioners would have this tribunal accept their interpretation that storm waters which lead to CSO overflows as proof of hydraulic overloading. To do so would render ineffective 327 IAC 3-6-4(b) and 327 IAC 3-6-7(1).

> It is presumed that the Legislature does not intend an absurdity, and such result will be avoided if the terms of the act admit of it by a reasonable construction; and 'absurdity' meaning anything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion.[45]

A reasonable construction of these facts leads this tribunal to conclude that storm waters are not included in the term "hydraulic overload." CSO overflows caused by storm waters are contemplated and allowed within certain ascertained circumstances. On this issue Petitioners failed to satisfy their burden under Indiana Trial Rule 56(C) to designate evidentiary matter that showed that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.

4. Ignored the standard condition in NPDES permits of 1985 that require the operator to minimize discharges of excessive pollutants.

Petitioners contend that, "[t]he City of Fort Wayne's National Pollution Discharge Elimination System Permit required that all waste collection, control, treatment and disposal facilities *shall* be operated: a. As efficiently as possible and b. In a manner which will minimize upsets and discharges of excessive pollutants." (Petitioners' FN 7. "Petitioner's [sic] Response. See City of Fort Wayne NPDES Permit, at 10 of 13 in Meszaros Affidavit.") [Emphasis added.]

---

[45] Caldwell v. State, 453 N.E.2d 278, 279 (Ind. 1983) quoting Marks v. State, 40 N.E.2d 108, 111 (Ind. 1942).

Petitioners specific citation more accurately reads, in part (in enumerating the permits "management requirements"):

> 5. Facilities Operation and Quality Control
> All waste collection, control, treatment and disposal facilities *shall* be operated *in a manner consistent with* the following:
> a. at all times, all facilities shall be operated as efficiently as possible and in a manner which will minimize upsets and discharges of excessive pollutants.
>
> * * *
>
> 6. Adverse impact
> The permittee shall take all *reasonable steps* to minimize any adverse impact to navigable waters resulting from noncompliance with any effluent limitations specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.
> 7. Bypassing
> Any diversion or bypass of facilities necessary to maintain compliance with the terms and conditions of this permit is prohibited, except:
> a. where unavoidable to prevent loss of life, severe property damage, extended duration process upset, or
> b. where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of the permit.
>
> * * *
>
> 8. Solids Disposal
> Collected screenings, slurries, sludges, and other solids shall be disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into navigable waters or their tributaries . . . [Emphasis added.]

This tribunal is disturbed by Petitioners' characterization of the City's 1985 NPDES permit terms within their Motion for Summary Judgment. (In particular as Petitioners' counsel earlier acknowledged, "[t]he NPDES permit requires that the permittee take *reasonable measures* to reduce discharges which impact water quality standards."[46] [Emphasis added.]) While the term *shall* exists within the pertinent portion of the permit, it is significantly tempered by the phrase *in a manner consistent with.* Petitioners' representation of the City's 1985 NPDES permit omitting the phrase "in a manner consistent with" could, if intentional, represent a troubling lack of candor towards this tribunal.

---

[46] Petitioners' original Petition For Administrative Review, supporting memorandum to objection ten, Tom Neltner, J.D., Executive Director, Improving Kids' Environment, August 8, 2000, at 2.

In a manner consistent with the terms of the City's 1985 NPDES permit, Mr. Meszaros in his December 1, 2000, Deposition discussed the role of the City's overflow ponds with Petitioners:[47]

A. [A]ll flows that enter the ponds are discharged through the Maumee River.
Q. Excuse me for a second. That's all flows that enter the ponds go to the Maumee River?
A. That's the outlet of the ponds.
Q. There is no ability to take it from the ponds into the plant?
A. That's correct.
Q. So all flows to the ponds end up discharging to the Maumee River. What do you do when you have 150 million gallons setting there, do you pump it out – is it a pumped system?
A. It's pumped into the ponds and gravity flows out.
Q. So the ponds just gravity flow out. What is the purpose of the ponds?
A. The ponds were constructed with an EPA grant as CSO demonstration facilities to provide some basic preliminary treatment settling of combined sewer overflows.

The role of the settling ponds is evidence the City complied with the conditions of its 1985 NPDES permit requiring an operator to minimize discharges of excessive pollutants (i.e., Management Requirements 6, 7 and 8). On this issue Petitioners failed to satisfy their burden under Indiana Trial Rule 56(C) to designate evidentiary matter that showed that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.

5. Overlooked the fact that there are unauthorized discharges on the combined sewer system that may be impacted by the additional flow.

Petitioners contend that, "[t]he 1995 draft permit listed 20 additional combined sewer overflow points than the 1985 permit." Respondent's replied:[48]

> In their Motion for Summary Judgment, Petitioners state that Respondent has "latched onto the scenario that a regulator could have two or more outfall points" and that this explanation is "doubtful." Petitioners fail to note that the 1995 NPDES permit application – upon which they rely so heavily – conclusively proves this. As but one example, on the 1995 permit application outfall 005 is a 66" pipe from *Indian Village regulator*, and outfall 006 is a 6" pipe from *Indian Village regulator*. (Exhibit to

[47] Deposition of Greg Meszaros, December 1, 2000, at 17, lines 2-21.

[48] Respondent's Objection To Petitioners' Motion For Summary Judgment, filed December 21, 2000, at 4, ¶2.

Petitioners' Response, 1995 NPDES permit application at 42). The application contains numerous other such examples. [Emphasis in original.]

Apparently anticipating Chestnut Group's response, Petitioners stated:[49]

> The more obvious scenario that the maps and drawing of sewers built more than 30 years ago are not perfect and that the city found some unintentionally omitted outfalls during its sewer characterization study was ignored.
>
> Assuming the respondent's scenario is true, there are two flaws in that logic,
>
> A. **The City's mistake in permitting does not authorize the discharge point.**
>
> * * *
>
> If, back in the early 1980's, the City of Fort Wayne made a mistake and only listed enough one outfall for each regulator [sic], that does not make them authorized outfalls or point sources. Only a permit modification can do that. And in the intervening 15 years since the permit was issued, that modification was not made. While their mistake may have given IDEM a reason not to take an enforcement action, it does not make them authorized. Mr. Meszaros failure to consider potential impacts on unauthorized discharges or even confirm that their [sic] were unauthorized discharges makes his certification inaccurate and incomplete.
>
> B. **There are obvious contradictions in the listing of additional outfalls.** In the 1995 draft NPDES permit, outfalls numbered 056, 060, 063 and 064 discharge to an "Unnamed Ditch." There is no such receiving water identified in the 1985 permit. And in 1985, it would have been just as easy as 1995 [sic] to assign a name such as that one.
>
> * * *
>
> If there are multiple CSOs for each regulator, there is no reasonable reason that they would go to entirely different receiving waters. And if they did, it only demonstrates how serious the City of Fort Wayne's mistake was when the [sic] applied for the 1985 permit. Clearly, there are a few unauthorized discharges. And the potential impact on unauthorized discharges was never considered by Mr. Meszaros because he did not analyze the impact on the combined sewer system. Again, his certification is incomplete, at a minimum. [Footnote omitted.]

---

[49] Petitioner's [sic] Motion For Summary Judgment, filed December 8, 2000, at 6 of 11 to 8 of 11.

According to the Deposition of Greg Meszaros, the following exchange occurred with Petitioners:[50]

> Q. There were 45 – I can show you, the 1985 permit had 45 numbers that were assigned – the range of numbers for combined sewer overflow outfall points was four to 45 –
> A. I would correct you that as Ted [Rhinehart] had indicated in his testimony, those were regulator numbers not outfall points.
> Q. Regulator numbers. Thank you. And now there are upwards – there's additional numbers assigned from 46 to 65. Are all of those points part of just solely the result of switching from measuring regulators to measuring overflow points?
> A. I was not involved in that conversion and have no direct experience there, but that would be my supposition that that was the conversion and there was not a one-to-one correspondence.

Chestnut Group stated:[51]

> The City of Fort Wayne witnesses, Ted Rhinehart and Greg Meszaros, testified that the 1985 permit lists "regulators" and the 1995 application lists actual outfalls, and that comparing regulators to outfalls is comparing "apples to oranges." (Rhinehart Dep. Tr. at 46-50, and Meszaros Dep. Tr. at 31 (Exhibits "A" and "B" respectively to Respondent's Supplementary Exhibits.))

Petitioners' basis that the City made a "mistake" is unreasonable and not supported by any material evidence designated by Petitioners to this tribunal. At a minimum the aforementioned depositional statement of Mr. Meszaros could lead one to a inference other than that advanced by Petitioners.

On this issue Petitioners failed to satisfy their burden under Indiana Trial Rule 56(C) to designate evidentiary matter that showed that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.

E. Conclusion

Petitioners' Motion is untimely. Petitioners failed to file their Motion prior to the stipulated cutoff date for dispositive motions and did not request a time extension which could have been granted under 315 IAC 1-3-5(a).

---

[50] Deposition of Greg Meszaros, December 1, 2000, at 31, lines 9-24.

[51] Respondent's Objection To Petitioners' Motion For Summary Judgment, filed December 21, 2000, at 4, ¶ 1.

Notwithstanding the untimely nature of Petitioners' Motion, this court has considered the merits of the motion.

This court finds further, that Petitioners' Motion is substantively insufficient. Petitioners' sole surviving objection to Permit Approval No. 13904 alleges violation of 327 IAC 3-6-4 and 3-6-7. Petitioners' arguments are, at best, open to conflicting inferences. Summary judgment should not be entered where material facts conflict or where conflicting inferences are possible.[52]

The CALJ concludes as a matter of law, based on the foregoing facts and discussion that Petitioners' Motion for Summary Judgment should be DENIED.

V. Chestnut Group's Motion To Dismiss And For Summary Judgment

A. Motion for Summary Judgment

In response to the original ten (10) objections raised by Petitioners on August 9, 2000[53] Chestnut Group wrote:[54]

> Respondent, The Chestnut Group, Inc., moves the Environmental Law Judge under 315 IAC 1-3-1(b)(10) and Rules 12(B)(1) and 12(B)(6) of the Indiana Rules of Trial Procedure for an order dismissing paragraphs 1-4 and 7-10 of Petitioners' Petition for Administrative Review and Stay of Decision of Approval, Permit Approval No. 13904 ("Petition") on the ground that they do not state a claim upon which relief can be granted, and under IC 4-21.5-3-23 for summary judgment on paragraphs 5-6 and, in the alternative, paragraph 8 of the Petition, on the ground that there are no disputed material issues of fact and Chestnut Group is entitled to judgment as a matter of law, for the reasons stated in its Brief in support.

As stated herein, Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000, while recapitulating their objections to each of the original ten (10) objections, nonetheless, served to withdraw objections one (1) through nine (9). The only issue for adjudication is Respondent's Motion to Dismiss regarding objection ten (10).

---

[52] J.C. Spence & Associates, Inc. v. Geary, 712 N.E.2d 1099, 1102 (Ind.App. 1999) citing Miller v. Monsanto Co., 626 N.E.2d 538 (Ind.Ct.App.1993).

[53] Petition for Administrative Review filed with the OEA on August 14, 2000.

[54] Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed October 19, 2000, at 1.

B. Motion to Dismiss

The sole remaining objection raised by Petitioners regarded the alleged violation of regulations 327 IAC 3-6-4 and 3-6-7 and incorporation by reference a memorandum prepared by Mr. Tom Neltner, Executive Director of Improving Kids' Environment. Therein, Petitioners contended that the proposed sewer system violated certification and technical regulations (i.e., 327 IAC 3-6-4 and 327 IAC 3-6-7) because the system's average daily flow "will cause overflow" in Fort Wayne's combined sewer system (i.e., combined sewer overflows, or "CSOs").

Petitioners further argued the possibility that the CSO discharge was from a point unauthorized by NPDES. Petitioners contended that the Long-Term Control Plan being completed by the City of Fort Wayne, "varies significantly from the EPA Combined Sewer Overflow Guidance for Long-Term Control Plans (EPA 832B95002) . . . [and] it is unlikely that EPA Region 5 will approve the plan."[55] Petitioners further opined that it was "unlikely that IDEM will approve the plan since IC 13-11-2-120.5 incorporates that guidance into the definition of a Long-Term Control Plan."[56] "Without an approved plan, the City and IDEM must not make the overflows worse by accepting new quantities of wastewater from new developments."[57] Petitioners claimed this Permit violated the purpose of the order issued by U.S. EPA Region 5 directing the City of Fort Wayne to significantly improve their combined sewer system.

In addressing the objections of Petitioners to the CSO potential of the proposed sewer system, Chestnut Group responded that Petitioners failed to state a claim upon which relief may be granted. Chestnut Group presented the following:

1) Chestnut Group met the requirements of 327 IAC 3-6-4 and 3-6-7 when, "[b]oth Allen County and the City of Fort Wayne certified [under a substantial penalty of giving false information] that they had the capacity to accept the sewer system's input without causing overflows or bypasses in their systems."[58]

2) Overflows will not be caused by the proposed sewer system. "By Petitioners' own allegations, overflows and bypasses already occur (indeed, they are permitted under

---

[55] Petition For Administrative Review And Stay, August 9, 2000, which incorporated by reference the memorandum by Tom Neltner, J.D., Executive Director, Improving Kids' Environment to Jane and Tom Dustin, Izaak Walton League of America – Indiana Division, regarding "IDEM Construction Permit to Chestnut Group," August 8, 2000.

[56] Id.

[57] Id.

[58] Brief In Support Of Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed October 19, 2000, at 16-17.

Fort Wayne's NPDES Permit) . . ."[59] [Emphasis in original.] Chestnut Group emphasized that "[t]he regulations prohibit approval of the sewer system only if the daily flow from the proposed system causes overflow or bypassing . . ."[60] [Emphasis in original.]

3) Sufficient excess capacity exists. The City of Fort Wayne's sewer system handled a daily average of 50 million gallons of sanitary and commercial/industrial sewage. The treatment plant and collection system were rated as having a maximum daily design capacity of 60 million gallons. Canyon Run's daily average flow was estimated at 16,740 gallons.[61]

4) Even if the additional inflow from the proposed sewer system becomes part of discharges, the NPDES certification is still valid. If the overflows are from discharge points authorized under the NPDES permit, the regulations are satisfied. "The Capacity Certification/Allocation Letters certify that the average daily flow will not cause overflows from other than authorized discharge points."[62]

5) "IDEM has not issued the new NPDES permit, and the courts obviously cannot enforce the requirements of a non-existent future permit."[63] [Footnote omitted.]

6) "If Petitioners genuinely believe that an overload condition exists in Fort Wayne that results in significant pollution, impairment, or destruction of the environment, they have a remedy. Petitioners may bring an action under IC 13-30-1-1 against the Commissioner of IDEM and the City of Fort Wayne seeking imposition of a sewer-connection ban. Petitioners have not done so, and IDEM has not placed Fort Wayne under a sewer-connection ban."[64]

---

[59] Id. at 17.

[60] Id.

[61] Id. at 17-18.

[62] Id. at 18.

[63] Id. at 18-19.

[64] Id. at 20. In Chestnut Group's Reply In Support Of Its Motion To Dismiss And For Summary Judgment, December 6, 2000, Respondent repeated its claim that the OEA is not the proper forum for Petitioners' complaints concerning the City of Fort Wayne sewer system. Respondent's wrote, "[t]he purpose of 327 IAC 3-6-4 was to require that local authorities make the determination, subject to IDEM's review, that the treating system had sufficient capacity to treat the waste. The local authority has made that determination, and IDEM has found that determination to be sufficient . . . If Petitioners have a legitimate complaint about Fort Wayne's operation of its sewer system, they should raise it (and in fact have done so) with City officials, or with IDEM's water pollution enforcement staff, or with the EPA, through the public-comment process provided for the LTCP [Long Term Control Plan], or through any other legal means provided by law."

1) Effect of Matters Outside the Pleadings

Indiana Trial Rule 12(B)(8) states, in part:

> If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. In such case, all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Supporting materials for Chestnut Group included:[65] (a) affidavit of Alex H.K. Cheng, P.E.; (b) a copy of Permit Approval No. 13904 issued by the IDEM on July 26, 2000; (c) copies of materials submitted to the IDEM in support of Chestnut Group's request for permission to construct the sewer main extension; (d) an engineering drawing showing, for the Canyon Run and Sunset Lake Estates subdivisions, the location and route of the force main and sanitary sewer, as well as existing wetlands; (e) affidavit of Eric P. Ellingson, C.P.G., P.W.S., and (f) affidavit of Ted Rhinehart.

Supporting materials for Petitioners' Response included:[66] (a) affidavit of Richard M. Van Frank; (b) the IDEM's Response To The Petitioner's [sic] Request For Discovery; (c) affidavit of the Izaak Walton League League [sic] Of America, Fort Wayne Chapter, Inc.; (d) affidavit of Indiana Division of the Izaak Walton League of America; (e) affidavit of Ted Rhinehart; (f) affidavit of Thomas E. Dustin; (g) a copy of the federal EPA's Findings Of Violations And Order For Compliance, Docket No. V-W-96-AO-04; (h) affidavit of Alex H.K. Cheng, P.E.; (i) a copy of Permit Approval No. 13904 issued by the IDEM on July 26, 2000; (j) a copy of materials submitted to the IDEM in support of Chestnut Group's request for permission to construct the sewer main extension; (k) an engineering drawing showing, for the Canyon Run and Sunset Lake Estates subdivisions, the location and route of the force main and sanitary sewer, as well as existing wetlands; (l) affidavit of Gregory Allen Meszaros; (m) excerpts of a preliminary draft of the City's technical component of the Long-Term Control Plan, dated December 29, 1999; (n) various documents under the title, "Combined Sewer System Operation Plan, Water Pollution Control Utility, City of Fort Wayne, Indiana" as prepared by Rust Environmental & Infrastructure; and (o) various documents under the title, "Directory For Appendix A" which was represented to include: (1) Indiana water quality standards; (2) original

---

Chestnut Group added, "[i]nterestingly, the attorney for Petitioners is an active participant in the public-comment process for the City's draft LTCP, and has met with the City in connection with his comments." [see Chestnut Group's FN2, pg. 3.]

[65] Brief In Support Of Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed October 19, 2000.

[66] Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000.

NPDES permit for the City, dated March 1, 1985; (3) draft NPDES permit for the City, dated October 20, 1995; (4) the City's sewer use ordinance; (5) general rules and regulations for the management and operation of the City's sewer system; (6) 1994 federal EPA's Combined Sewer Overflow policy; (7) State of Indiana's Combined Sewer Overflow strategy, May 1996; (8) federal EPA's Administrative Order, dated February 15, 1995; (9) draft Agreed Order; (10) Great Lakes Water Quality Initiative; and (p) Table B-10, "Water Pollution Control Plant Design Capacity."

Both parties relied on materials, and this tribunal examined materials, outside the pleadings. In such an instance, as discussed by the Indiana Court of Appeals, the original Motion to Dismiss must be treated as a Motion for Summary Judgment:[67]

> A motion to dismiss tests the legal sufficiency of a complaint. When ruling on such a motion, the trial court must limit its review to the face of the pleadings. If the parties rely on or the court examines materials outside of the pleadings, the motion to dismiss *must* be treated as a motion for summary judgment under Ind. Trial Rule 56. T.R. 12(B)(8) [Additional references omitted, emphasis added.]

A similar analysis was recently applied by the Indiana Court of Appeals to the opposite outcome. The court wrote:[68]

> If, on either a Rule 12(B)(6) motion to dismiss or a Rule 12(C) motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment under Ind. Trial Rule 56. On the record before us, the trial judge expressly indicated that she was basing her decision solely on the pleadings, thus properly treating [the] motion as a Rule 12(C) motion for judgment on the pleadings. [References omitted.]

Thus, in disposing of an Ind. T.R. 12(B)(6) motion, if the Final Order issued by this tribunal were based on more than the pleadings, disposition would be required under the standards of Ind. T.R. 56.

---

[67] Schlosser v. Bank of Western Indiana, 589 N.E.2d 1176, 1178 (Ind.App. 1 Dist. 1992).

[68] Bledsoe v. Fleming, 712 N.E.2d 1067, 1070 (Ind.App. 1999).

2) Would either Party be Prejudiced by Treatment of the Motion to Dismiss as a Motion for Summary Judgment?

The Indiana Supreme Court has written:[69]

> [W]here a court treats a motion to dismiss under T.R. 12(B)(6) as a motion for summary judgment under T.R. 56 . . . a slightly different circumstance [than the ten day notice of hearing provision of T.R. 56(C)] is posed and a different rule is invoked. T.R. 12(B)(8) requires the court, in such circumstances, to grant the parties 'a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' Failure to do so is reversible error.

As Chestnut Group was the original movant for summary judgment, this tribunal focuses on any prejudice to Petitioners should a Final Order be rendered by operation of Ind. T.R. 12(B)(8). Have Petitioners been granted a reasonable opportunity to present all material made pertinent to such a motion by Ind. T.R. 56?

3) Petitioners had Ample Opportunities to Present New Points and Raise New Arguments.

Petitioners' original Petition for Administrative Review was a two (2) page document with a two (2) page attachment; the memorandum of Tom Neltner, Executive Director of Improving Kids' Environment. No affidavits or other supporting documents were submitted. Petitioners later withdrew original objections one through nine. One view of Petitioners' original objection number ten is that it actually represents five distinct objections due to the inclusion of concerns addressed by Mr. Neltner's memorandum. Petitioners' remaining original objections may, therefore, be enumerated as follows:

#10.01 – This permit No. 13904 is in violation of regulations 327 IAC 3-6-4 and 3-6-7;
#10.02 – 327 IAC 3-6-4 and 3-6-7 require a showing of offsets;
#10.03 – A new permit would require that the CSO discharge comply with water quality standards and would prohibit further degradation of the water body;
#10.04 – The NPDES permit requires that the City take "reasonable measures" to reduce discharges which impact water quality standards. It is a reasonable measure to stop accepting new wastes which make the problem worse; and
#10.05 – The issuance of Permit Approval No. 13904 "violates the purpose" of the Order For Compliance issued by the federal EPA against the City.

On October 19, 2000, the stipulated cut-off date for dispositive motions, Respondent filed their Motion to Dismiss. Petitioners filed a lengthy Response on November 22, 2000 that

---

[69] Ayres v. Indian Heights Volunteer Fire Dept., Inc., 493 N.E.2d 1229, 1232 (Ind. 1986) quoting Carrell v. Ellingwood, 423 N.E.2d 630, 634 (Ind.App. 1 Dist. 1981) which cited Foster v. Littell, 293 N.E.2d 790 (Ind.App. 1973).

included seven (7) affidavits and eighteen (18) supporting documents. Additionally, Petitioners "amended" their original objections to include six additional concerns:

#10.06 – The City's Long-Term Control Plan is evidence that the St. Joseph, St. Marys and Maumee Rivers are impaired due to discharges from the City's sewer collection systems for bacteria partially due to combined sewer overflows. "IDEM cannot ignore its obligation to ensure that the permit would not violate the Clean Water Act as well as state and federal regulations."[70];

#10.07 – The IDEM has compelling evidence regarding sufficient capacity in the City's collection and treatment system to handle the additional flow from Chestnut Group's project, evidence that the City has 20 combined sewer overflow points not covered by the NPDES permit issued in 1985, and the proposed average flow will result in hydraulic overload of the collection system and the treatment plant;

#10.08 – CSOs occur and the additional flow will only further degrade the rivers. It is time to stop the further degradation of the river due to combined sewer overflows;

#10.09 – Chestnut Group either failed to notice or to mention the fact that there are 20 unauthorized discharge points. Additionally, citizens of the City and downstream residents should not have to suffer additional sewage flows in their neighborhoods;

#10.10 – The project must not make the situation worse. There are many engineering alternatives such as holding back the flow during wet weather or offsetting the flow by removing other storm water or sewage inputs at other locations; and

#10.11 – The proposed sewer line provides no value to many of the residents near the sewer; will increase the likelihood or severity of sewer overflows; and the cumulative effect of overflows represents a serious degradation of the quality of Indiana's waters. There is a reasonable measure that the City is required to take pursuant to the existing permit – do not make the problem worse.

On December 8, 2000, Petitioners filed their own Motion for Summary Judgment. Materials specifically designated in support of Petitioners' Motion included the December 1, 2000 Deposition of Mr. Greg Meszaros and Petitioners' Response of November 22, 2000. Therein, Petitioners advanced five (5) arguments attacking the reliability of the Certification Letter of Mr. Meszaros, as supported by his statements during the deposition:

#10.12 – Mr. Meszaros limited the term "overflows" to mean only sanitary sewer overflows despite the fact that both sanitary sewers and combined sewers have overflows;

#10.13 – Mr. Meszaros considered wet weather impacts only in sanitary sewers where the impacts are less significant rather than combined sewer systems where the wet weather impacts are more severe;

#10.14 – Mr. Meszaros interpreted the term "hydraulic overload" to exclude the contribution to the hydraulic flow provided by the storm water entering combined sewers despite the fact

---

[70] Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000, at 5.

that combined sewer systems are designed to accept storm water and he acknowledged that the term should include all fluid flow;

#10.15 – Mr. Meszaros ignored the standard condition in NPDES permits of 1985 that require the operator to minimize discharges of excessive pollutants; and

#10.16 – Mr. Meszaros overlooked the fact that there are unauthorized discharges on the combined sewer system that may be impacted by the additional flow.

In finding no error where an Ind. T.R. 12(B)(6) motion was converted to an Ind. T.R. 56 motion without formal notice, the Indiana Court of Appeals wrote, in relevant part, when during the hearing on the motion to dismiss:[71]

> [Plaintiff] expressly raised new points and advanced new arguments not contained in her memorandum in opposition to the motion to dismiss. Thus, we are not persuaded that [plaintiff] was either unfairly surprised or that she was denied a reasonable opportunity to present the trial court with additional information.

Petitioners have filed a Response to the Motion raising new points and advancing new arguments not contained in their original Petition for Administrative Review. Further, Petitioners later filed their own Motion for Summary Judgment which further raised new points and advanced new arguments not contained in either their original Petition for Administrative Review or in their Response to the Motion to Dismiss. Significantly, no hearing was requested by either party concerning any of the aforementioned Motions presented to this tribunal.

The CALJ concludes, if Chestnut Group's Motion to Dismiss were to be treated as a Motion for Summary Judgment, Petitioners have been granted a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. As a consequence, no party would be prejudiced by such an action.

C. Does Permit Approval No. 13904 Meet The Requirements Of 327 IAC 3-6-4 And 3-6-7?

Rule 327 IAC 3-6-4 requires, in pertinent part, that (a) a professional engineer or registered land surveyor must: (i) certify under "significant penalties" that peak daily flow rates "will not cause overflowing or bypassing . . . from locations other than NPDES authorized discharge points"; and (ii) the existing water pollution treatment/control system has sufficient capacity to accept the peak daily flow rate; and (b) the authorized representative of the city must: (i) certify under "significant penalties" that the generated daily flow "will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points"; (ii) that there is sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and remain in compliance with applicable NPDES

---

[71] Duran v. Komyatte, 490 N.E.2d 388, 392 (Ind.App. 3 Dist. 1986).

permit effluent limitations; and (iii) that the proposed average flow "will not result in hydraulic or organic overload."[72]

Rule 327 IAC 3-6-7 requires, in pertinent part, that the applicant must submit evidence: (a) that the peak daily flow rate "will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points"; (b) sufficient capacity exists in the receiving water pollution/control facility to treat the additional flow; and (c) the receiving water pollution treatment/control facility will remain in compliance with applicable NPDES permit effluent limitations.[73]

1) Lack of jurisdiction over the subject matter – T.R. 12(B)(1).

The OEA has subject matter jurisdiction, personal jurisdiction and jurisdiction over this particular case.[74] Specifically, the OEA has subject matter jurisdiction over decisions of the commissioner of the IDEM; personal jurisdiction over Petitioners, Chestnut Group and the IDEM; and jurisdiction over the appeal of Permit Approval No. 13904. As such, Chestnut Group's Motion To Dismiss based on a jurisdictional challenge would not be granted.[75]

2) Failure to state a claim upon which relief can be granted – T.R. 12(B)(6).

The Indiana Court of Appeals has recently described the appropriate standard of review for a Motion to Dismiss:[76]

> A motion to dismiss under T.R. 12(B)(6) tests the legal sufficiency of the claim, not the facts which support it. . . . [W]e determine whether the complaint states any allegation upon which relief could be granted. . . . We evaluate the complaint in the light most favorable to the [non-movant] with every intent regarded in his favor. . . . A complaint cannot be dismissed under T.R. 12(B)(6) unless it appears to a certainty that the [non-

---

[72] Infra.

[73] Infra.

[74] See, Ind. Code 4-21.5-2-1; 4-21.5-2-3; 4-21.5-3-7; 4-21.5-7-3; 4-21.5-7-5.

[75] "Respondent, The Chestnut Group, Inc., moves the Environmental Law Judge under 315 IAC 1-3-1(b)(10) and Rules 12(B)(1) and 12(B)(6) of the Indiana Rules of Trial Procedure for an order dismissing paragraphs 1-4 and 7-10 of Petitioners' Petition for Administrative Review and Stay of Decision of Approval, Permit Approval No. 13902 ('Petition') on the ground that they do not state a claim upon which relief can be granted, and under IC 4-21.5-3-23 for summary judgment on paragraphs 5-6 and, in the alternative, paragraph 8 of the Petition, on the ground that there are no disputed material issues of fact and Chestnut Group is entitled to judgment as a matter of law . . ." (See, Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed October 19, 2000, at 1.)

[76] Goldsmith, In re, 686 N.E.2d 857, 859-860 (Ind.App. 1997).

> movant] would not be entitled to relief under any set of facts. . . . Thus, a complaint is sufficient if it states any set of allegations, no matter how inartfully pleaded, upon which the trial court could have granted relief.

Therefore, the generalized allegation contained within objection #10.01 (i.e., "permit No. 13904 is in violation of regulations 327 IAC 3-6-4 and 3-6-7 . . .") is sufficient, when viewed in the light most favorable to Petitioners, to potentially lead to relief for Petitioners. As a result Chestnut Group's Motion to Dismiss must be DENIED.

D. Discussion of Chestnut Group's Motion To Dismiss And For Summary Judgment

1) Effect of Petitioners' Withdrawal of Objections One through Nine.

A voluntary withdrawal without prejudice could have been sought by Petitioners before Chestnut Group moved for summary judgment.[77] However, as the adverse party filed a Motion for Summary Judgment before Petitioners' withdrawal, this tribunal rules that Petitioners' original objections one through nine be dismissed with prejudice. "An appeal or an issue becomes moot when . . . the principle questions in issue have ceased to be matters of real controversy between the parties."[78] Petitioners' withdrawal of objections 5 and 6 renders moot the basis upon which Chestnut Group seeks summary judgment. This tribunal thus considers Chestnut Group's Motion To Dismiss regarding Petitioners' objection ten.

2) Conversion of Motion to Dismiss to Motion for Summary Judgment.

Circumstances exist whereby a court may be required to convert a Motion to Dismiss into one for Summary Judgment. According to Ind. T.R. 56(B):

> When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.

From the Record, both parties have filed Motions for Summary Judgment. Therefore, simple operation of Ind. T.R. 56(B) would allow this tribunal to issue a Final Order based on summary judgment standards. However, in the present case, this tribunal also considers a situation where Respondent's Motion for Summary Judgment may be mooted by the withdrawal of the

---

[77] Indiana Trial Rule 41(A).

[78] Tina T., Matter of, 579 N.E.2d 48, 52 (Ind. 1991), citing Roark v. Roark, 551 N.E.2d 865, 867 (Ind.App. 1990).

underlying objections by Petitioners.[79] Further, while Petitioners filed a Motion for Summary Judgment, it may not have been timely filed.

As contained herein, both parties presented materials outside the pleadings in support of their motions for summary judgment. Operation of Ind. T.R. 12(B)(8) would require the Motion to Dismiss to be treated as one for summary judgment. The Indiana Court of Appeals has recently addressed a similar fact situation:[80]

> In the present case, the face of the complaint was sufficient to withstand a 12(B)(6) motion, and the supporting materials, namely [movant's] deposition, were intended to contradict the allegations of the facially sufficient complaint. Thus, the issue presented to the trial court was not the sufficiency of the complaint itself, but the veracity of the factual allegations contained therein, and the trial court should have converted the motion into one for summary judgment.

Therefore, by operation of Ind. T.R. 56(B) Respondent's Motion to Dismiss may be transformed into one for Summary Judgment, or in the alternative, by operation of Ind. T.R. 12(B)(8) Respondent's Motion to Dismiss must be transformed into one for Summary Judgment.

3) Does Permit Approval No. 13904 Violate 327 IAC 3-6-4 and 3-6-7?

Petitioners contend that the Permit granted to Chestnut Group was in violation of 327 IAC 3-6-4 and 3-6-7. Specifically, Petitioners claimed that: (1) the proposed collection system cannot cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points; (2) new construction that cause overflows must provide offsets for the overflows; (3) the overflows will make the existing situation worse; and (4) the Permit violates the purpose of the Administrative Order issued by U.S. EPA Region 5 directing Fort Wayne to significantly improve the CSO system.

Respondent argued that: (1) it has met the requirements of 327 IAC 3-6-4 and 3-6-7; (2) that as overflows and bypasses already occur, the proposed sewer system would not cause overflow or bypassing; (3) that sufficient additional design capacity exists in Fort Wayne to accommodate the daily average flow estimated from the Canyon Run development; (4) that even if additional inflow from the proposed sewer system becomes part of discharges, the overflows are from discharge points authorized under the NPDES permit; (5) that as the new NPDES permit has not been issued, courts cannot enforce the requirements of a non-existent future permit; and (6) that Petitioners should seek the remedy of sewer-connection ban.

---

[79] See, Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000.

[80] Dixon v. Siwy, 661 N.E.2d 600, 604 (Ind.App. 1996).

For the following reasons, Summary Judgment should be granted to Chestnut Group:

a) Summary Judgment – T.R. 56.

As Petitioners: (a) filed a claim for Summary Judgment;[81] and (b) have but a single remaining objection from their original Petition for Administrative Review,[82] the original objection *plus* any "amendments" to Petitioners' original objections may be adjudicated under the standard for Summary Judgment as all of Petitioners' objections fall under the penumbra of Petitioners' single remaining original objection that Permit Approval No. 13904 failed to comply with 327 IAC 3-6-4 and 3-6-7:[83]

> When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.

Should Petitioners' Motion for Summary Judgment be found untimely, operation of Ind. T.R. 12(B)(8) requires the conversion of the Motion to Dismiss into one for Summary Judgment.

b) The Permit is not in violation of 327 IAC 3-6-4 & 3-6-7.

Petitioners argued that any claim that CSO discharge points are authorized NPDES discharges would be flawed. Petitioners state that the facts would be ignored: (a) a new permit would require that the CSO discharge comply with water quality standards and would prohibit further degradation of the water body; (b) the NPDES permit requires that the permittee take reasonable measures to reduce discharges which impact water quality standards, and it is a reasonable measure to stop accepting new wastes which make the problem worse; and (c) without an approved Long-Term Control Plan, the City of Fort Wayne and the IDEM must not make the overflows worse by accepting significant new quantities of wastewater from new developments.

Chestnut Group provided a sworn certification by Alex Cheng, P.E., that the daily flow rates generated in the area to be collected by the proposed collection system would not cause overflowing or bypassing in the collection system other than NPDES-authorized discharge points. Further, the Allen County Regional Water and Sewer District and the City of Fort Wayne through their agents provided separately sworn Capacity Certification/ Allocation Letters that stated, in part, that: (a) the daily flow generated in the area that would be collected by the project system would not cause overflowing or bypassing in the collection system other than NPDES-

---

[81] Petitioner's [sic] Motion For Summary Judgment, filed December 8, 2000.

[82] Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000.

[83] Indiana Trial Rule 56(B).

authorized discharge points; (b) that there was sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and remain in compliance with applicable NPDES permit effluent limitations; and (c) the proposed average flow would not result in hydraulic or organic overload.[84]

As earlier stated herein, the burden of establishing lack of material factual issue is initially on the party moving for summary judgment. But once the movant makes a *prima facie* showing that there are no genuine issues of material fact, the nonmovant must set forth specific facts indicating that there is a genuine issue in dispute.[85] This Court finds the materials designated by Chestnut Group with its Motion To Dismiss And For Summary Judgment to provide a *prima facie* showing that any CSO discharge would be from NPDES-authorized discharge points.

Indiana Trial Rule 56(E) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Petitioners responded that there was "compelling evidence that contradicted the Capacity Certification/Allocation Letter made by Mr. Greg Meszaros on behalf of the City of Fort Wayne."[86] Petitioners based this statement on: (a) IDEM possessed information that the City of Fort Wayne had serious compliance problems with its sewer system. "At a minimum, the information raises serious questions about the capacity of Fort Wayne collection and treatment system to handle the additional flow from the Chestnut Group's project."[87] (b) The Meszaros Affidavit contained a copy of Fort Wayne's Combined Sewer System Operational Plan ("CSSOP"). "Pages 42 to 44 provide an updated list of authorized bypasses and overflows. The list includes combined sewer outfall points numbered 46 to 65 that are not listed in the 1985 permit. Since the draft permit was never issued and IDEM has not issued any other permit to cover these discharges, the City of Fort Wayne appears to have as 20 unauthorized discharges . . . This activity is a clear and direct violation of the 329 IAC 5-2-2 which prohibits point source discharges that are not covered by an NPDES permit."[88] [Footnotes omitted.] (c) Citing examples where Fort Wayne's treatment plant experienced frequent hydraulic overloads under

---

[84] See, exhibits B-5 and B-6, Affidavit Of Alex H.K. Cheng, P.E., October 19, 2000.

[85] Schmidt at 1253 (Ind. Ct. App. 1999).

[86] Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, November 22, 2000, at 8.

[87] Id.

[88] Id.

current circumstances, Petitioners wrote that Mr. Meszaros' certification that the proposed average flow would not result in hydraulic or organic overload was inaccurate.

Regarding Petitioners' charge that Fort Wayne's "serious compliance problems" should raise "serious questions about the capacity of Fort Wayne collection and treatment system to handle the additional flow from the Chestnut Group's project," Petitioners rely on the fact that the City of Fort Wayne was subject to "Findings of Violations and Order for Compliance" issued on January 17, 1996 by the U.S. EPA Region 5. Petitioners wrote:[89]

> The order cites many violations of the city's NPDES permit and requires several actions by the City of Fort Wayne. The order requires that the city "submit for approval to the USEPA and IDEM a completed LTCP [Long-Term Control Plan] as soon as practicable, but in no case later than May 31, 1997." While EPA granted an extension to the deadline, it is now more than four years and ten months later and the LTCP has not been completed. [Footnote omitted.]

Petitioners failed to provide evidence that Canyon Run's flow would cause overflows or that it would cause overflows from other than NPDES authorized discharge points. This Court finds that Petitioners' charge failed to rise above the level of a mere allegation, thereby failing to meet the pleading standard established by Indiana Trial Rule 56(E).

Regarding the Petitioners' second charge that 20 unauthorized discharge points exist, Chestnut Group replied:[90]

> Petitioners assert unauthorized discharge points exist based upon their comparison of the number of outfalls listed in the City of Fort Wayne's 1985 NPDES permit with the greater number of outfalls listed in the 1995 draft NPDES permit . . .
>
> * * *
>
> The City of Fort Wayne's Combined Sewer System Operational Plan, attached as an exhibit to Petitioners' Response, itself refutes Petitioners' assumption:
>
> > The City's expired NPDES permit . . . provides a listing of 42 overflow points from which the City was allowed to discharge. ***This listing was actually a listing of regulators and not outfalls. . . . The City's application for reissuance of the NPDES permit revised the list to actual CSO outfalls.*** [Emphasis added by Chestnut Group.]

---

[89] Id. at 8-9.

[90] Chestnut Group's Reply In Support Of Its Motion To Dismiss And For Summary Judgment, December 6, 2000, at 7.

Chestnut Group continued:[91]

> In the 1985 permit, the City listed – as Mr. Rhinehart testified the regulating authority required the City to do – "regulators." In the 1995 draft permit, the City listed – again as the regulating authority required it to do – "combined sewer overflows." Both Mr. Rhinehart and Mr. Meszaros testified that one regulator can have several CSOs. Thus, the two lists cannot be compared one-to-one. The upshot is that Petitioners' entire argument is based upon a false assumption.

This Court finds that Petitioners' claim of 20 unauthorized discharge points fails to "set forth specific facts showing there is a genuine issue for trial," thereby failing to meet the pleading standard established by Indiana Trial Rule 56(E).

Lastly, Petitioners claimed that Mr. Meszaros' certification that the proposed average flow would not result in hydraulic or organic overload was inaccurate. In support of this claim, Petitioners advanced the Affidavit of Richard M Van Frank:[92]

> 11. In situations where the hydraulic load on the plant or the interceptor is about to exceed the capacity of the plant or the interceptor, the additional hydraulic load from the Chestnut Group will cause a hydraulic overload on the Ft. Wayne treatment plant. An overload on the plant could disrupt plant operation and result in the increased release of untreated or partially treated sewage over a period of time until the plant operation is stabilized.
>
> * * *
>
> 13. A combined sewer system is an integrated system. An overload on the plant will result in overloads from the interceptors that flow to the plant. Since the Chestnut Group discharge has the potential to cause a hydraulic overload at the plant, many interceptors may be overloaded as a result. If an unauthorized discharge is on any one of these interceptors, the Chestnut Group will be causing or contributing to an overflow at an unauthorized discharge point.

Chestnut Group replied:[93]

> [T]he opinion is inadmissible because Mr. Van Frank is unqualified to offer this opinion. Whether Canyon Run's flow will cause discharges in Fort Wayne's system is not a matter of *a priori* knowledge: it is a matter of fact, requiring evidence. Mr. Van Frank's opinion

---

[91] Id. at 8.

[92] Affidavit dated November 16, 2000, as part of Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, November 22, 2000.

[93] Chestnut Group's Reply In Support Of Its Motion To Dismiss And For Summary Judgment, December 6, 2000, at 6.

regarding those facts concerns an engineering issue: how a complex sewer system will operate under certain conditions. Mr. Van Frank, however, has no engineering training (his education is in microbiology and molecular biology research). (Van Frank Aff. para. 1.) Mr. Van Frank nowhere states that he has any education or experience with engineering issues involving municipal sewer systems. Mr. Van Frank is simply unqualified to offer this opinion.

This Court agrees with this characterization of the level of expertise demonstrated in the Affidavit of Mr. Van Frank. However, even assuming Mr. Van Frank were properly qualified, his statements, couched with "could" and "has the potential to" failed to provide evidence that Canyon Run's flow would result in hydraulic or organic overload to contradict Mr. Meszaros' certification. This Court finds that Petitioners' charge failed to rise above the level of a mere allegation, thereby failing to meet the pleading standard established by Indiana Trial Rule 56(E).

c) Petitioners Failed to Satisfy their Burden of Establishing that a Genuine Issue of Material Fact Exists.

There is one surviving objection to Permit Approval No. 13904, the original objection ten:

Objection #10.01 – This permit No. 13904 is in violation of regulations 327 IAC 3-6-4 and 3-6-7 and is further flawed as detailed in the attached discussion by Tom Neltner, Executive Director of Improving Kids' Environment as Page 3 & 4 of this petition.[94]

Chestnut Group, as part of the permit application process, provided to the IDEM the certification letters required by 327 IAC 3-6-4. The letters also served to fulfill the requirements of 327 IAC 3-6-7.

Additionally, Petitioners in their original Petition For Administrative Review raised four additional objections as part of objection ten:

Objection #10.02 – 327 IAC 3-6-4 and 3-6-7 require a showing of offsets.

Petitioners appear to misstate the law when they originally indicated that 327 IAC 3-6-4 and 3-6-7 required a showing that the Permit application include a provision to offset the overflows. Petitioners' stated, in part:[95]

---

[94] Petitioners' original Petition For Administrative Review, filed August 14, 2000, objection number 10, at 2.

[95] Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000, at 24.

While no regulatory program for offsets has been established. None is needed. The test is simply whether the flow from the Chestnut Group project will increase or result in additional overflows.

This Court hereby relies upon Petitioners' own declaration that there is no regulatory requirement for offsets.

Objection #10.03 – A "new" permit would require that the CSO discharge comply with water quality standards and would prohibit further degradation of the water body.

The City's "current" NPDES, which expired January 31, 1990 and has been administratively extended by the IDEM, does not prohibit further degradation of the water body. While a future NPDES permit may so restrict the City, Petitioners' objection fails for a lack of ripeness.

Objection #10.04 – The NPDES permit requires that the City take "reasonable measures" to reduce discharges which impact water quality standards. It is a reasonable measure to stop accepting new wastes which make the problem worse.

From the record, as an example, the City is employing settling ponds that were constructed with a federal EPA grant as a CSO demonstration facility to provide basic preliminary treatment of combined sewer overflows.

Indiana T.R. 56(E) requires, in pertinent part, that:

When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

No evidence has been presented to this tribunal to suggest that settling ponds employed by the City are unreasonable measures to reduce discharges. The mere fact that alternative reasonable measures might exist is insufficient evidence to constitute a valid claim.

On this issue Petitioners failed to satisfy their Ind. T.R. 56(E) burden of establishing that a genuine issue of material fact exists as to objection #10.04 in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.05 – The issuance of Permit Approval No. 13904 "violates the purpose" of the Order For Compliance issued by the federal EPA against the City.

With no evidence in the record of the IDEM's consent or duty to be bound by the federal Order this tribunal has no basis upon which to utilize any terms of said federal Order upon its evaluation of Permit Approval No. 13904.

In their Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment (filed November 22, 2000), Petitioners designated seven (7) affidavits in support of their specific facts alleging genuine issues for trial. Therein, Petitioners advanced the following "amended" objections:

Objection #10.06 – The City's Long-Term Control Plan is evidence that the St. Joseph, St. Marys and Maumee Rivers are impaired due to discharges from the City's sewer collection systems for bacteria partially due to combined sewer overflows. "IDEM cannot ignore its obligation to ensure that the permit would not violate the Clean Water Act as well as state and federal regulations."[96]

There is no evidence that the IDEM has ignored its obligation to ensure that the permit would not violate the Clean Water Act as well as state and federal regulations. First, discharges are allowed by 327 IAC 3-6-4 and 3-6-7 as long as said discharges occur from NPDES authorized discharge points. Second, the Indiana Court of Appeals has recently written:[97]

> Deference is to be given by the reviewing court to the expertise of the administrative body, and the decision should be reversed only if it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantive evidence.

No evidence has been presented to this tribunal to suggest that deference should not be accorded the IDEM when it granted Permit Approval No. 13904. No evidence has been presented to this tribunal to demonstrate the existence of unauthorized discharges resulting from the permit. The mere fact that authorized discharges are impairing the quality of the streams is insufficient evidence to constitute a valid claim.

On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.06 in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.07 – The IDEM has compelling evidence regarding sufficient capacity in the City's collection and treatment system to handle the additional flow from Chestnut Group's project, evidence that the City has 20 combined sewer overflow points not

---

[96] Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000, at 5.

[97] Indiana Dept. of Environmental Management v. Adapto, Inc., 717 N.E.2d 646, 649 (Ind.App. 1999) citing Natural Resources Comm'n v. AMAX Coal Co., 638 N.E.2d 418, 423 (Ind. 1994).

covered by the NPDES permit issued in 1985, and the proposed average flow will result in hydraulic overload of the collection system and the treatment plant.

Objection #10.07a – There is insufficient capacity in the City's collection and treatment system to handle the additional flow from Chestnut Group's project.

Petitioners rely on the federal EPA's Findings Of Violations And Order For Compliance as evidence of unresolved permit violations.

> IDEM clearly possessed compelling information that the City of Fort Wayne had serious compliance problems with its sewer system. At a minimum, the information raises serious questions about the capacity of the City of Fort Wayne collection and treatment system to handle the additional flow from the Chestnut Group's project.[98]

Indiana T.R. 56(E) requires the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Here, Petitioners have failed to set forth specific facts indicating that there is a genuine issue for trial.

The only support Petitioners proffer is in the form of an opinion by Mr. Richard M. Van Frank.[99,100] In his Affidavit, Mr. Van Frank stated:[101]

> A combined sewer system is an integrated system. An overload on the plant will result in overloads from the interceptors that flow to the plant. Since the Chestnut Group discharge *has the potential to cause* a hydraulic overload at the plant, many interceptors *may be* overloaded as a result. *If* an *unauthorized* discharge is on any of these interceptors, the Chestnut Group will be causing or contributing to an overflow at an unauthorized discharge point. [Emphasis added.]

---

[98] Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000, at 9.

[99] Id., Affidavit Of Richard M [sic] Van Frank.

[100] From Mr. Van Frank's Affidavit, he was self-described as holding B.S. and M.S. degrees in microbiology and public health from Michigan State University; was a former scientist with Eli Lilly and Company from January, 1957 to December, 1990; served on the Indiana Air Pollution Control Board from 1986 to 1992; served on IDEM's Wet Weather Technical Advisory Group since its inception in 1999; served on the City of Indianapolis' Advanced Waste Water Technical Advisory Committee since its inception in 1992; and served on the City of Indianapolis' Wet Weather Technical Advisory Committee since its inception in 1997.

[101] Id., Affidavit Of Richard M [sic] Van Frank, ¶ 13.

Mr. Van Frank's affidavit is fatally flawed and does not raise a genuine issue of material fact as to the objection #10.07a.[102] The Indiana Supreme Court, in writing about the value of a medical doctor's expert testimony, stated:[103]

> The probative value of the testimony of an expert witness is such witness' opinion as an expert based on facts and circumstances given to him or shown to him subsequent to the occurrence of the event. A doctor's testimony can only be considered evidence when he states that the conclusions he gives is based on reasonable medical certainty that a fact is true or untrue. *A doctor's testimony that a certain thing is Possible is no evidence at all.* His opinion as to what is possible is no more valid than the jury's own speculation as to what is or is not possible. Almost anything is possible, and it is thus improper to allow a jury to consider and base a verdict upon a "possible" cause of death. [Emphasis added.]

More recently, Indiana courts have written, "[a] trial court enjoys broad discretion in ruling on a expert's qualifications and in admitting opinion evidence."[104] In addition, "[f]ollowing the decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) . . . we have recognized the function of the trial judge as a 'gatekeeper' in the admission of expert testimony."[105]

It is the opinion of this tribunal that the affidavit of Mr. Van Frank states mere speculation. Further, reliance solely on the credentials of any expert witness would be unwarranted:[106]

> Merely because an opinion of scientific causation comes from a person learned in medical science does not provide that opinion with a sufficient scientific basis. An expert cannot rely solely on his or her own stature, intellect or intuition to support an opinion admissible to aid the trier of fact. . . . *Although experts may provide opinions in the form of a hypothetical fact situation, the scientific foundation or reasoning process may not be bases on merely hypothetical causal relationships. Unsupported subjective opinion is unhelpful speculation and not admissible under Rule 702* . . . . [Emphasis in original.]

---

[102] While Mr. Van Frank's failure to state specific facts is in opposition to Ind. Rules of Evidence 702(b) (Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.), the deficiency can be cured (See, Ind. Rules of Evidence 705). This issue is not addressed herein.

[103] Palace Bar, Inc. v. Fearnot, 381 N.E.2d 858, 864 (Ind. 1978).

[104] INS Investigations Bureau, Inc. v. Lee, 709 N.E.2d 736, 744 (Ind.App. 1999).

[105] State Department of Transp. V. Hoffman, 721 N.E.2d 356, 359 (Ind.App. 1999).

[106] Indiana Michigan Power Co. v. Runge, 717 N.E.2d 216, 237 (Ind.App. 1999) quoting Porter v. Whitehall Laboratories, Inc., 791 F.Supp. 1335 (S.D.Ind.1992) (Porter I), *aff'd* 9 F.3d 607 (7th Cir.1993) (Porter II).

On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.07a in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.07b – There is evidence that the City has 20 combined sewer overflow points not covered by the NPDES permit issued in 1985.

Petitioners basis that unpermitted CSOs exist stems from a comparison of discharge points listed in the City's 1985 NPDES permit and their draft NPDES permit from 1995.[107] Chestnut Group responded:[108]

> The City of Fort Wayne witnesses, Ted Rhinehart and Greg Meszaros, testified that the 1985 permit lists "regulators" and the 1995 application lists actual outfalls, and that comparing regulators to outfalls is comparing "apples to oranges." (Rhinehart Dep. Tr. at 46-50, and Meszaros Dep. Tr. at 31 (Exhibits "A" and "B" respectively to Respondent's Supplementary Exhibits.))

Petitioners' argument is not credible for the following reasons: (a) Respondent presented un-refuted evidence that the 1985 NPDES permit listed "regulators" while the draft 1995 NPDES permit in question listed "outfalls,"and that more than one outfall can be associated with a single regulator; and (b) Petitioners failed to prove any unauthorized discharge points exist from which the proposed average daily flow in question would discharge therefrom.

Further, Petitioners' basis that the City made a "mistake" is unreasonable and not supported by any material evidence designated by Petitioners to this tribunal. At a minimum the aforementioned depositional statement of Mr. Meszaros could lead one to a inference other than that advanced by Petitioners.

On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.07b in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.07c – The proposed average flow will result in hydraulic overload of the collection system and the treatment plant.

Petitioners contend that because Mr. Meszaros limited his use of the term "overflows" to only sanitary sewer overflows, considered wet weather impacts only in sanitary sewer systems,

---

[107] See, Exhibit A-3 of the City's Combined Sewer System Operational Plan, Petitioners' Response To Chestnut Group, Inc.'s Motion To Dismiss And For Summary Judgment, filed November 22, 2000.

[108] Respondent's Objection To Petitioners' Motion For Summary Judgment, filed December 21, 2000, at 4, ¶ 1.

and interpreted the term "hydraulic overload" to exclude the contribution to the hydraulic flow provided by the storm waters enters the combined sewers, the Capacity Certification/Allocation Letter was incomplete and inaccurate.

Petitioners did not offer any evidence that the method utilized by the City in preparing the Capacity Certification/Allocation Letter was faulty or that it violated a state or federal regulation or statute. Petitioners did not offer any evidence that the proposed sewer system's peak average daily flow would cause any overflowing or bypassing. Petitioners did not offer any evidence that the proposed sewer system's peak average daily flow would cause overflowing or bypassing from other than NPDES authorized discharge points. Petitioners did not offer any evidence that unauthorized discharge points exist in the City's sewer system.

On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.07c in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.08 – CSOs occur and the additional flow will only further degrade the rivers. It is time to stop the further degradation of the river due to combined sewer overflows.

Petitioners basis this objection on their allegation that Permit Approval No. 13904 violates 327 IAC 3-6-4 and 3-6-7. Nevertheless, the regulations contemplates the further degradation of the river due to combined sewer overflows. Specifically, 327 IAC 3-6-4(b), 327 IAC 3-6-4(c) and 327 IAC 3-6-7(1) require assurances that overflows merely not occur from locations other than NPDES authorized discharge points.

Petitioners did not offer any evidence that the proposed sewer system's peak average daily flow would cause overflowing or bypassing from other than NPDES authorized discharge points. On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.08 in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.09 – Chestnut Group either failed to notice or to mention the fact that there are 20 unauthorized discharge points. Additionally, citizens of the City and downstream residents should not have to suffer additional sewage flows in their neighborhoods.

Objection #10.09a – Chestnut Group either failed to notice or to mention the fact that there are 20 unauthorized discharge points.

This objection was herein addressed under #10.07b.

Objection #10.09b – Citizens of the City and downstream residents should not have to suffer additional sewage flows in their neighborhoods.

This objection was herein addressed under #10.08.

On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.09 in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.10 – The project must not make the situation worse. There are many engineering alternatives such as holding back the flow during wet weather or offsetting the flow by removing other storm water or sewage inputs at other locations.

An objection based on a requirement that Permit Approval No. 13904 should not make the situation worse misreads the scope of 327 IAC 3-6-4 and 3-6-7. Petitioners attempt to seek engineering alternatives merely represents a collateral attack of the City's sewer system and its combined sewer overflow structure. Petitioners did not present any evidence of violation of 327 IAC 3-6-4 or 3-6-7.

On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.10 in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.11 – The proposed sewer line provides no value to many of the residents near the sewer; will increase the likelihood or severity of sewer overflows; and the cumulative effect of overflows represents a serious degradation of the quality of Indiana's waters. There is a reasonable measure that the City is required to take pursuant to the existing permit – do not make the problem worse.

Objection #10.11a – The proposed sewer line provides no value to many of the residents near the sewer.

The subject matter of this objection lies outside the jurisdiction of this tribunal.

Objection #10.11b – The proposed sewer line will increase the likelihood or severity of sewer overflows.

Petitioners did not present any evidence to support this allegation. On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.11b in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.11c – The cumulative effect of overflows from proposed sewer line represents a serious degradation of the quality of Indiana's waters.

Petitioners did not present any evidence of how this allegation would lead to a violation of 327 IAC 3-6-4 or 3-6-7. On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.11c in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

Objection #10.11d – There is a reasonable measure that the City is required to take pursuant to the existing permit – do not make the problem worse.

Petitioners' final objection is consistent with its interpretation of the City's NPDES permit, requiring Draconian measures to prevent further degradation of the environment. As already discussed herein, Petitioners' interpretation is unfounded. Further, Petitioners did not present any evidence of violation of 327 IAC 3-6-4 or 3-6-7.

On this issue Petitioners failed to satisfy their burden of establishing that a genuine issue of material fact exists as to objection #10.11d in response to Chestnut Group's Motion To Dismiss And For Summary Judgment.

VI. Conclusions Of Law

This is a Final Order issued pursuant to IC 4-21.5-3-27. 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.

We shall consider the objections raised and discussed in Petitioners' Petition For Administrative Review and subsequent pleadings in the order in which we think they merit consideration in relation to the result which we have reached, and not as they appear in such Petition.

A. Jurisdiction

The OEA has subject matter jurisdiction, personal jurisdiction and jurisdiction over this particular case. See Ind.Code 4-21.5-2-1; 4-21.5-2-3; 4-21.5-3-7; 4-21.5-7-3; 4-21.5-7-5. Specifically, the OEA has subject matter jurisdiction over decisions of the commissioner of the IDEM; personal jurisdiction over Petitioners, Chestnut Group and the IDEM; and jurisdiction over the appeal of Permit Approval No. 13904.

B. Objections Raised By Petitioners, Then Withdrawn

A voluntary withdrawal without prejudice could have been sought by Petitioners before Chestnut Group moved for summary judgment. However, as the adverse party filed a Motion for Summary Judgment before Petitioners' withdrawal, this tribunal rules that Petitioners' original objections one through nine be dismissed with prejudice.

C. Petitioners' Motion For Summary Judgment

Petitioners' Motion is untimely. Petitioners failed to file their Motion prior to the stipulated cutoff date for dispositive motions and did not request a time extension which could have been granted under 315 IAC 1-3-5(a).

However, in the alternative and in the interest of justice and for purposes of judicial economy, this forum has considered the merits of Petitioners' Motion For Summary Judgment. This tribunal finds that Petitioners' Motion is substantively insufficient. Petitioners' sole surviving objection to Permit Approval No. 13904 alleges violation of 327 IAC 3-6-4 and 3-6-7. Petitioners' arguments are, at best, open to conflicting inferences. Summary judgment should not be entered where material facts conflict or where conflicting inferences are possible.

The CALJ concludes as a matter of law, based on the foregoing facts and discussion that Petitioners' Motion for Summary Judgment should be, and is DENIED.

D. Chestnut Group's Motion To Dismiss And For Summary Judgment

Operation of Ind. T.R. 56(B) provides the basis for this tribunal's granting of summary judgment. In the alternative, if Respondent's Motion for Summary Judgment were to be rendered moot by Petitioners' withdrawal of a majority of their original objections and Petitioners' Motion for Summary Judgment were to be found untimely, operation of Ind. T.R. 12(B)(8) and the attendant facts would require treatment of Respondent's Motion to Dismiss as one for summary judgment.

Further, due to Petitioners' opportunity to raise new points and advance new arguments not contained in Petitioners' original Petition for Administrative Review, the conversion of an Ind. T.R. 12(B)(6) motion to T.R. 56 without formal notice will not have denied Petitioners a reasonable opportunity to present the trial court with additional material.[109]

The CALJ concludes as a matter of law, based on the foregoing facts and discussion that Chestnut Group's Motion for Summary Judgment should be, and is GRANTED.

---

[109] I.e., Petitioners' "amended" objections: 10.06, 10.07a, 10.07b, 10.07c, 10.08, 10.09a, 10.09b, 10.10a, 10.10b, 10.10c, 10.10d, 10.11, 10.12, 10.13, 10.14, 10.15, and 10.16.

E. Additional Conclusions

Respondent has designated materials that show there is no genuine issue of material fact as to the appropriateness of the Capacity Certification/Allocation Letter of Mr. Meszaros. The IDEM properly considered the Capacity Certification/Allocation Letter of Mr. Meszaros in its review of the project. The proposed project is not in violation of either 327 IAC 3-6-4 or 3-6-7.

The CALJ concludes as a matter of law, based on the forgoing Findings of Fact and Discussion that: (a) Petitioners at most raised allegations of potential future harm based on hypothetical speculation; (b) the Capacity Certification/Allocation Letter of Mr. Meszaros is neither incomplete or inaccurate; and (c) the IDEM appropriately issued Permit Approval No. 13904.

VII. Final Order

The Petitioners' Motion For Summary Judgment is hereby **DENIED** and the Respondent, Chestnut Group, Inc.'s, Motion for Summary Judgment is hereby **GRANTED**.

Furthermore, the CALJ finds that Permit Approval No. 13904 was properly issued and its issuance is hereby **UPHELD**.

VIII. Appeal Rights

You are hereby notified that pursuant to IC 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 IDEM. 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 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 4th day of May, 2001.

Wayne E. Penrod
Environmental Law Judge