OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 125, cite this case as ***Flint Lake*, 2008 OEA 125.**

TOPICS:

wetlands
jurisdictional wetlands
isolated wetlands
Section 401 Water Quality Certification
forested
palustrine
reasonable alternative
reasonably necessary
erosion control
runoff
mitigation
storm water basins
Rule 5
Amended Petition
leave of court
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I.C. § 4-21.5-3-7
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I.C. § 13-13, *et seq*.
I.C. § 13-18-22-5
I.C. § 13-18-22-6
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I.C. § 13-23-9-4
315 I.A.C. 1-3-2
327 I.A.C. 15-5-5
327 I.A.C. 17-1-5
327 I.A.C. 17-4-8
327 I.A.C. 17-4-9
Ind. Trial Rule 12(B)(6)
Ind. Trial Rule 56

PRESIDING JUDGE:
Davidsen

PARTY REPRESENTATIVES:

Petitioners:	Kim E. Ferraro, Esq.
Permittee/Respondent:	Ron Fisher, *pro se*
IDEM:	Sierra L. Cutts, Esq.

ORDER ISSUED:
August 27, 2008

INDEX CATEGORY:
Water

FURTHER CASE ACTIVITY:
[none]

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

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF	)	
ISOLATED WETLAND INDIVIDUAL PERMIT	)	
NO. IWIP 2006-102-64-MTM-A	)	
RON FISHER, FLINT LAKE COMMERCIAL LLC,	)	
FLINT LAKE RESIDENTIAL LLC,	)	
VALPARAISO, PORTER COUNTY, INDIANA.	)	
_____	)	CAUSE No. 06-W-J-3754
	)	
Tom Banaszak,	)	
Petitioner,	)	
Eric C. Kepler,	)	
Petitioner,	)	
Ron Fisher, Flint Lake Commercial, LLC,	)	
Flint Lake Residential, LLC,	)	
Permittee/Respondent,	)	
Indiana Department of Environmental Management,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Court on Respondent, Indiana Department of Environmental Management's ("IDEM") Motion to Dismiss Petitioner George E. Smolka, filed pursuant to Ind. Trial Rule 12(B)(6) and IDEM's Motion for Summary Judgment filed pursuant to Ind. Code § 4-21.5-3-23 and Ind. Trial Rule 56. In summary, the parties seek a determination as to whether IDEM properly issued isolated wetland permit 2006-102-64-MTM-A. The issues having been heard before the Court, the Court now enters its Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. Permittees/Respondents Ron Fisher, Flint Lake Commercial, LLC and Flint Lake Residential, LLC (hereinafter, the "Permittees") own a residential and commercial development in Valparaiso, Porter County, Indiana. The development contains a 0.46 acre jurisdictional wetland ("Wetland A"), subject to a Section 401 Water Quality Certification, and a 0.33 acre isolated wetland ("Wetland B"); Wetland B is at controversy in this cause.[1] Per IDEM's March 23, 2006 Joint Public Notice on Permittees' application, Permittees sought to contour and fill the 0.46 acre jurisdictional wetland to create a detention basin to support residential and commercial development, and to place fill in the 0.33 acre forested wetland to facilitate residential development. The 0.33 acre isolated wetland is sited generally in the center of an area which is or would be developed.

2. On June 27, 2006, IDEM issued Isolated Wetland Individual Permit #2006-102-64-MTM-A (the "Permit") to Permittees, allowing the discharge of clean earthen fill material into Wetland B, a 0.33 acre Class II Isolated Forested Wetland, located in Porter County and in the Kankakee watershed (8-digit watershed 07120001).

3. On June 27, 2006, IDEM issued a Section 401 Water Quality Certification ("Certification") for the 0.46 acre jurisdictional wetland, a review of which is not before this Court. Since the Certification was not appealed, Permittees were able to rely upon the Certification to obtain a permit from the U.S. Army, Corps of Engineers. On February 26, 2007, the United States Army Corps of Engineers ("Army Corps") issued Permit #LRE-2003-164049 for the jurisdictional wetland (Wetland A) "for the discharge of fill material in association with residential and commercial development in wetlands adjacent to Flint Lake, located at the south side of Calumet Avenue in Valparaiso, Indiana." This permit was not appealed and is currently effective. Permittees then completed excavating and contouring the jurisdictional wetland to create the project's third detention basin.

4. When reviewing the Permittees' application for an isolated wetland permit for Wetland B, IDEM presented evidence that it evaluated the physical location of the wetland to determine whether reasonable alternatives were present. The isolated wetland is physically located near the center of the development. Due to its location, IDEM determined that there is no reasonable alternative that would allow for the wetland to remain unaltered. If the isolated wetland were to remain undeveloped, the development would continue around the wetland which would ultimately cause the wetland to be heavily degraded due to runoff from roads, parking lots, driveways, housing additions, etc.

[1] Petitioners asserted that IDEM did not issue public notice of its decision to issue the §401 Water Quality Certification, thus precluding Petitioners' opportunity to seek administrative review. As the parties presented no further challenge to IDEM's public notice of, and issuance of, the §401 Water Quality Certification, legal issues concerning the §401 Water Quality Certification are waived and not before this Court.

5. The Permittees' plans include the construction of storm water basins on the site to handle the modified hydrology and retain the surface runoff from the development. The newly constructed storm water basins will assume the function of controlling the on-site surface run off and any associated pollutants and/or contaminants from reaching Flint Lake.

6. The compensatory mitigation site is located at "SE ¼, Section 25, Township 33 North, Range 7 West Porter County" on the "North side of the Kankakee River, between Breyfolgel Ditch and the Kankakee River, approximately 1.2 miles upstream of where CR625W crosses the Kankakee River." The proposed mitigation is located in the Kankakee watershed (07120001), which spans across several counties including Porter County, Jasper County, Newton County, and/or Starke County.

7. The Permittees are the individuals to whom both permits are specifically directed.

8. Petitions for Administrative Review of Wetland Individual Permit #2006-102-64-MTM-A (Wetland B) were filed on July 14, 2006 by Petitioner and adjacent landowner Eric C. Kepler; on July 15, 2006 by Petitioner Tom Banaszak, who owns property and resides on the shore of Flint Lake; and on July 17, 2006, by Lake County resident George E. Smolka. None of the Petitions sought declaratory or equitable relief. None of the Petitioners are Permittees in this matter; therefore, the Permit is not specifically directed to any Petitioner.

9. On July 20, 2006, this Court issued a Notice of Incomplete Filing and Order to Supplement Petition to all three (3) Petitioners.

10. On August 21, 2006, Petitioner Smolka filed a Supplement to his Original Petition. In Paragraph 4 of his Supplement Petitioner Smolka addressed whether he was aggrieved or adversely affected by IDEM's action of issuing the isolated wetland permit to Permittees:

> This Petitioner, a resident of LAKE COUNTY, INDIANA, is aggrieved, vexed and harassed by the injustice of allowing Ron Fisher to continue to despoil the resource waters of of (sic) the people of Indiana, when it has been clearly shown that (*q.e.d.* in the original petition) that (sic) he has not met the requirements of his earlier permits for the construction site known as North Hampstead by allowing, through error or neglect, silt and other debris to leave the construction site and affect other downstream areas; including but not limited to Flint Lake. The PETITIONER'S scientific training and acumen allow him to see more clearly, and feel more directly the potential for damage and mischief, to the STATE of INDIANA, and the people that unrestricted and unmonitored permitting represents.

11. On June 29, 2007, IDEM filed a Motion to Dismiss asking this Court to dismiss Petitioner Smolka's Petition and Supplement pursuant to T.R. 12(B)(6) due to his lack of standing in this matter.

12. Amended Petitions for Administrative Review were filed on July 5, 2007 by Petitioner Tom Banaszak, and on July 21, 2007 by Petitioner Eric Kepler.

13. On July 27, 2007, Petitioner Smolka filed a Second Amended Petition of George E. Smolka for Administrative Review, without seeking or obtaining leave of Court. Paragraph 3 stated:

> Pursuant to 315 IAC 1-3-2(b)(3)(C) Petitioner, as a citizen of Indiana, is entitled to administrative review under I.C. § 13-30-1-1(3) for the protection of the environment of the State of Indiana from significant pollution, impairment and destruction caused by the construction/development/wetland activities undertaken by Permittees at the North Hampstead project site situated approximately .5 miles south of Flint Lake on the east side of Calumet Avenue in City of Valparaiso, County of Porter, State of Indiana ("project site").

14. Petitioner Smolka did not provide notice of his claim under Ind. Code § 13-30-1, et seq., to the Indiana Department of Natural Resources, IDEM, and/or the Attorney General's Office, nor did he provide proof that his claim under I.C. § 13-30-1, *et seq*. was filed in a circuit or superior court.

15. All Amended Petitions alleged the following "acts and/or omissions in violation of 327 IAC 17-4:"
    (a) Permittees obtained the document from the City of Valparaiso ("the City") that stated the wetland activity was "without reasonable alternative" in violation of 327 IAC 17-4-8 because of the conflict of interest that exists by one of the Permittees being the Mayor of the City;
    (b) IDEM approved the wetland activity even thought there are reasonable alternatives;
    (c) Permittees obtained the document from the City that stated the wetland activity was "reasonably necessary or appropriate" in violation of 327 IAC 17-4-9 because of the conflict of interest that exists by one of the Permittees being the Mayor of the City;
    (d) IDEM approved the wetland activity as "reasonably necessary or appropriate" without determining if it was actually "reasonably necessary or appropriate";
    (e) Permittees "unreasonably, unnecessarily and inappropriately destroyed two isolated wetlands on the project site";
    (f) IDEM allowed this destruction;
    (g) Permittees destroyed the two isolated wetlands without adequate compensatory mitigation as required by Indiana Code § 13-18-22-6;
    (h) IDEM failed to require adequate compensatory mitigation; and
    (i) otherwise failed to comply with 327 IAC 17-4.

16. All Amended Petitions also alleged the following "acts and/or omissions in violation of 327 IAC 15-5:" (a) failed to ensure storm water quality measures included in construction plan complied with requirements of 327 IAC 15-5-6.5, 7, and 7.5; (b) failed to ensure that the storm water pollution prevention plan complied with all applicable requirements; (c) failed to ensure that measures required by 327 IAC 15-5-7 were implemented; (d) failed to ensure that storm water quality measures would be inspected; and (e) otherwise failed to comply with 327 IAC 15-5.

17. The Petitioners further argue that the compensatory mitigation site is "far from and of no use to Flint Lake watershed."

18. On August 1, 2007, Petitioner Smolka filed his Response of Petitioner, George E. Smolka, to the Indiana Department of Environmental Management's Motion to Dismiss and a Petitioner Smolka's Memorandum of Law in Opposition to the Indiana Department of Environmental Management's Motion to Dismiss.

19. On August 22, 2007, IDEM filed a Reply Memorandum of Law in Support of the Indiana Department of Environmental Management's Motion to Dismiss.

20. Oral arguments on the Motion to Dismiss were heard on September 17, 2007. At oral argument, Petitioner Smolka conceded that his Second Amended Petition was not timely filed. Legal counsel Kim E. Ferraro, Esq., entered her appearance for Petitioners on November 5, 2007.

21. On April 14, 2008, IDEM filed a Motion for Summary Judgment and Memorandum of Law in Support of Its Motion for Summary Judgment.

22. On June 5, 2008, Petitioners filed Petitioners' Designation and Memorandum of Law in Opposition to the Indiana Department of Environmental Management's Motion for Summary Judgment. In summary, Petitioners relied upon the following facts[2] to oppose IDEM's Motion for Summary Judgment:

    a. prior to IDEM's March 23, 2006 issuance of Joint Public Notice of Permittee's application, Permittees had constructed two storm water detention basins and a part of a third basin adjacent to Calumet Avenue, but considerable amounts of sediment discharged from the site into several small lagoons south of Flint Lake;
    b. a March 21, 2006 newspaper article, provided to IDEM, stated that silt erosion killed carp and other creatures in ponds feeding into Flint Lake;
    c. Porter County Surveyor, Keven Breitzke, observed that some of the project site's vegetation should have been retained and all attempts at erosion control had failed;
    d. IDEM's Office of Water Quality ("OWQ") assessed the site after receiving complaints and photos of silt-laden lagoons next to Flint Lake, and found several deficiencies which required corrective action to comply with 327 IAC 15-5;
    e. During a public comment period, U.S. Fish and Wildlife Service ("FWS") biologist Nancy McClosky submitted comments recommending denial of both permits as destruction of both wetlands was not justified;
    f. FWS noted significant adverse impacts on water quality and fish and wildlife resources from "considerable polluted runoff" from the development site, which flows through the detention basins down the tributary stream and into lagoons/wetlands on the south side of Flint Lake;

[2] Most of the designated evidence appears to be gleaned from public comments submitted in the spring of 2006, prior to further site development.

g. FWS noted that the 0.33 acre Palustrine forested isolated wetland had higher botanical and wildlife value, and functioned as a water detention, water purification and ground water recharge area, which functions would be lost if filled;
h. FWS noted that fill of the .033 wetland was not necessary for the project's development, that the project could proceed with minor changes to avoid the wetland and with redesign of existing stormwater basins so they would actually work, and that avoidance of the two wetlands was the only viable action to safeguard Flint Lake;
i. FWS found that the compensatory mitigation site was unacceptable because the water quality damages which would occur and which had already occurred were to Flint Lake, not the Kankakee River;
j. several citizens, including Walt Breitinger, President, Valparaiso Chain of Lakes Watershed Group, submitted comments urging that the two applications be denied, and Petitioner Smolka, a zoologist and biochemist, submitted comments on April 12, 2006 describing March 23, 2006 water sampling and investigation revealed significant adverse impacts to Flint Lake's water quality and fish and wildlife resources caused by site runoff;
k. Peter J. Wilken, Associate Professor of Biology, Purdue University North Central, commented that "filling in of the wetlands will exacerbate the sediment, runoff, and turbidity problems already caused by [Permitees'] irresponsible clearing of vegetation from their site last fall;
l. Sandy O'Brien, Biologist and Chair of the Dunelands Group of the Hoosier Chapter of Sierra Club, submitted April 13, 2006 comments to IDEM noting soil erosion visible from the air which had entered Flint Lake, and stating that the isolated wetland (B) "is an important habitat for birds, odonates, and amphibians," that mitigation on the Kankakee River would not help Flint Lake, and that there was no reason to destroy the isolated wetland;
m. IDEM Project Manager Marty Maupin stated that "the applicant has had problems with erosion control".

23. On June 25, 2008, IDEM filed a Reply Memorandum of Law in Support of Its Motion for Summary Judgment and Request for a Final Order of Dismissal against Petitioner George E. Smolka.

24. Through briefing, the parties agreed that the ultimate issue before this Court is whether IDEM properly issued Individual Permit #2006-102-64-MTM-A. Resolution of this ultimate issue depends upon (a) Whether the wetland activity at issue is "without reasonable alternative" as contemplated by 327 Ind. Admin. Code 17-4-8; (b) Whether the wetland activity at issue is "reasonably necessary and appropriate" as contemplated by 327 I.A.C. 17-4-9; and (c) Whether the compensatory mitigation plan approved by IDEM comports with 327 IAC 17-1-5.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized with the implementation and enforcement of specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq*. The Office of Environmental Adjudication ("OEA") has jurisdiction over decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-7-3. I.C. § 4-21.5-3, *et seq*., and I.C. § 4-21.5-7, *et seq*., allow the OEA to promulgate rules and standards in order to allow it to conduct its duties.

2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27, and 315 Ind. Admin. Code 1-2-1(9). Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of face are so deemed.

3. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. I.C. § 4-21.5-3-27(d)**;** *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "*De novo* review" means that:

   > all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

   Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also*, I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM properly issued the isolated wetland permit, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also, Blue River Valley*, 2005 OEA 1, 11-12. *Marathon Point Service and Winimac Service*, 2005 OEA 26, 41.

Respondent IDEM's Motion to Dismiss Petitioner Smolka

5. Respondent IDEM's Motion to Dismiss Petitioner Smolka is based upon allegations that Petitioner Smolka does not qualify to seek administrative review of the Permit under I.C. § 4-21.5-3-7(a)(1). In reviewing a Trial Rule 12(B)(6) motion, a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party. *Huffman v. Indiana Office of Environmental Adjudication*, et al. 811 N.E.2d 806, 814 (Ind. 2004); *see also, Dixon v. Siwy* 661 N.E.2d 600, 603 (Ind. Ct. App. 1996); *Grahn*, 2004 OEA 40, 42; *Sidney WTPSS*, 2004 OEA 99, 102; *Lattimore v. Amsler*, 758 N.E.2d 568 (Ind. Ct. App. 2001). A 12(B)(6) motion is "made to test the legal sufficiency of the claim, not the supporting facts." *Blanck v. Indiana Department of Corrections*, 806 N.E.2d 788, 790 (Ind. Ct. App. 2004).

   In *Huffman*, "the judge looked beyond the face of the petition and considered additional evidence provided by both sides in ruling on the motion to dismiss." 811 N.E.d 806, 813. "Trial Rule 12(B) also states that if, on a 12(B)(6) motion, '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.' The standard of T.R. 56 is that '[t]he judgment sought shall be rendered forthwith if the designated evidentiary material shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." T.R. 56(C); *Huffman, Id.*

6. I.C. § 4-21.5-3-7(a)(1)[3] provides that to qualify for administrative review of an agency order, a person must state facts demonstrating that:

   (A) the petitioner is a person to whom the order is specifically directed;
   (B) the petitioner is aggrieved or adversely affected by the order; or
   (C) the petitioner is entitled to review under any law.

   Petitioner Smolka is not the person to whom the order is specifically directed, as contemplated in I.C. § 4-21.5-3-7(a)(1)(A). Petitioner Smolka's eligibility to seek administrative review in this matter requires that he demonstrate that he is aggrieved or adversely affected as stated in I.C. § 4-21.5-3-7(a)(1)(B) by IDEM's issuance of the Permit, or is entitled to its review under any law as provided in I.C. § 4-21.5-3-7(a)(1)(C). Failure to satisfy the statutory requirements of I.C. § 4-21.5-3-7 is a jurisdictional defect which denies OEA the right to review the defective claim.

[3] *See also*, 315 I.A.C. 1-3-2(b)(3).

7. The Indiana Supreme Court held, in *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806 (Ind. 2004) that "whether a person is entitled to seek administrative review depends upon whether the person is "aggrieved or adversely affected" . . . and that the rules for determining whether the person has "standing" to file a lawsuit do not apply". *Id.* at 807. To be "aggrieved or adversely affected", a person "must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or personal interest." *Id.* at 810. The Court further interpreted the language of I.C. § 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public. *Id.* at 812.

8. Huffman had challenged the issuance of a permit to Eli Lilly and Company to discharge pollutants into Indiana's waters. *Id.* at 806. Huffman owned one unit and was the managing member of the corporation that owned a property adjacent to the property from which the discharge would occur. *Id.* The lower courts dismissed Huffman's objection. *Id.* Huffman alleged that her management duties of the neighboring property required her to be present on the property with frequency, and thus she might be exposed to health risks. *Id.* In response, the permittee alleged that the Huffman property was upstream of the discharge point, and therefore, no impact to Huffman was possible. *Id.* The Indiana Supreme Court ruled that Huffman's dismissal by the lower courts was not supported by substantial evidence. *Id.* The single allegation made by Lilly that the property was located upstream was not sufficient to support the dismissal. *Id.* The Court remanded Huffman's case back to OEA to provide Huffman with an opportunity to present additional evidence of her health concerns. *Id.* The Court stated "Particularly because the OEA never gave Huffman an opportunity to provide additional evidence or to develop the argument more fully, it was impossible for the OEA to tell what Huffman's personal health claim was and whether it had any merit. Dismissing the claim was therefore premature." *Id.* at 815.

9. In *Huffman*, the Indiana Supreme Court specifically rejected the argument that administrative review could be obtained by a petitioner asserting a *public* harm, stating: "the language of AOPA does not allow for administrative review based on a generalized concern as a member of the public. The statute says 'aggrieved or adversely affected' and this contemplates some sort of personalized harm." *Id*. at 812. The common law doctrine of public standing is not applicable to administrative review under AOPA. *Id.* at 812. "[AOPA,] and only [AOPA], defines the class of persons who can seek administrative review of an agency action." *Id.* at 813.

10. Motions to dismiss for lack of aggrieved or adversely affected status are properly brought under T.R. 12(B)(6), for failure to state a claim. *Huffman,* 811 N.E.2d at 813.

11. The complaint will be dismissed under T.R. 12(B)(6) if the facts alleged, even if true, do not support the relief requested. *Minks v. Pina*, 709 N.E.2d 379, 381 (Ind. App. 1999); *Davidson v. Crossmann Communities, Inc.*, 699 N.E.2d 789, 791 (Ind. App. 1998). A complaint must include factual allegations respecting all material elements of all claims asserted. *Papapetropoulous v. Milwaukee Transport Services*, 795 F.2d 591, 594 (7th Cir. 1986). The Court is not required to accept bare legal conclusions attached to narrated facts that fail to outline the basis of the claims. *Kyle v. Morton High School*, 144 F.3d 448, 454-55 (7th Cir. 1998); *Vaden v. Maywood*, 809 F.2d 361 (7th Cir.), *cert. denied*, 482 U.S. 908 (1987); *Strauss v. City of Chicago*, 760 F.2d 765, 767-68 (7th Cir. 1985); *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984).

12. Petitioner Smolka's Petition and Supplement contain no factual allegations demonstrating how he qualifies for administrative review pursuant to I.C. § 4-21.5-3-7(a)(1)(B). Petitioner states no facts demonstrating that any personal or individual legal interest of his is affected. The facts stated in the Petition demonstrate nothing more than a generalized concern as a member of the public.

13. The facts alleged in Petitioner Smolka's Petition, even if true, fail to demonstrate how he is aggrieved or adversely affected by the discharge of clean earthen fill material into .33 acres of Class II wetland in Porter County; therefore, Petitioner Smolka has failed to qualify for administrative review pursuant to I.C..§ 4-21.5-3-7(a)(1)(B). Petitioner Smolka's Petition and supplemental pleadings do not provide sufficient evidence Petitioner Smolka is likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or personal, and are therefore aggrieved or adversely affected by IDEM's decision to issue a permit to Permittees.

14. If Petitioner Smolka qualified to file for administrative review pursuant to I.C. § 4-21.5-3-7(a)(1)(C), he would be allowed to proceed as entitled to review under any law. In his July 27, 2007 Second Petition, Petitioner Smolka pled entitlement to review under any law by stating that as a citizen of Indiana, he was entitled to administrative review under I.C. § 13-30-1-1(3), in order to protect the state's environment from Permittees' activities at the site.

15. While 315 Ind. Admin. Code 1-3-2(b)(3)(C) reiterates the terms of I.C. § 4-21.5-3-7(a)(1)(C), 315 Ind. Admin. Code 1-3-2(d) requires that a petition for administrative review may be amended, without leave of court, by the earlier of either thirty (30) days of the initial prehearing conference or the filing of a motion to dismiss. Petitioner Smolka neither sought nor obtained leave of court to file his July 27, 2007 Second Petition.

16. If a petition is not timely filed, a petitioner cannot move to amend and file a petition after the time for filing expires. *Hoosier Environmental Council v. Department of Natural Resources*, 673 N.E.2d 811, 815-816 (Ind. Ct. App. 1996). Petitioner Smolka's July 27, 2007 Second Petition was filed in excess of thirty (30) days after the June 11, 2007 Prehearing Conference and the June 29, 2007 Motion to Dismiss. Petitioner Smolka did not seek leave of Court to file his Second Amended Petition after the deadlines provided in 315 I.A.C. 1-3-2(d). As Petitioner Smolka's July 27, 2007 Second Petition is untimely, this Court lacks jurisdiction to consider the Second Petition. Therefore, Petitioner Smolka is not entitled to review under I.C. § 4-21.5-3-7(a)(1)(C) and 315 I.A.C. 1-3-2(b)(3)(C).

17. Even if Petitioner Smolka's Second Petition had been timely filed, I.C. § 13-30-1, *et seq.*, does not provide support for Petitioner Smolka's entitlement to proceed before this administrative adjudicatory forum.

18. I.C. § 13-30-1-1 allows a citizen to sue for declaratory and equitable relief in the name of the State.

19. As a condition precedent to acting under I.C. § 13-30-1, *et seq.*, I.C. § 13-30-1-2 requires that the citizen must give notice to the Department of Natural Resources, IDEM, and the Attorney General's Office. Pursuant to I.C. § 13-30-1-3, the citizen must then wait ninety (90) days following the notice given to the proper agency to maintain an action under I.C. § 13-30-1-1.

    This matter cannot be maintained under I.C. § 13-30-1-3 for failure of the required condition precedent: no notice was provided and this matter is seeking administrative review not declaratory or equitable relief.

20. Further, the phrase "under any law" in I.C. § 4-21.5-3-7(a)(1)(C) actually states that "the petitioner is entitled to review under any law." I.C. § 13-30-1-1 does not entitle a person to "review" of an agency decision. It only allows a citizen to sue for declaratory and equitable relief in the name of the State after certain actions are met. And, I.C. § 13-30-1-9 restricts appropriate venue for such actions to county civil or superior courts, not to an administrative adjudicatory agency such as OEA.

21. Since Petitioner Smolka is not eligible to rely on I.C. § 13-30-1-1 before the OEA, he has failed to qualify for administrative review pursuant to I.C. § 4-21.5-3-7(a)(1)(C).

22. Petitioner Smolka has failed to qualify for administrative review pursuant to I.C. § 4-21.5-3-7(a)(1)(A), (B), or (C); therefore, Petitioner Smolka's Petition and Supplement must be dismissed pursuant to T.R. 12(B)(6) for failure to state a claim due to his failure to qualify for administrative review.

Respondent IDEM's Motion for Summary Judgment

23. In this case, Respondent IDEM sought summary judgment in its favor, as to whether IDEM properly issued Individual Permit #2006-102-64-MTM-A. Resolution of this ultimate issue depends upon:

    (a) Whether the wetland activity at issue is "without reasonable alternative" as contemplated by 327 IAC 17-4-8;
    (b) Whether the wetland activity at issue is "reasonably necessary and appropriate" as contemplated by 327 IAC 17-4-9; and
    (c) Whether the compensatory mitigation plan approved by IDEM comports with 327 IAC 17-1-5.

24. The OEA may enter judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." I.C. § 4-21.5-3-23; *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App 1998); T.R. 56(C). .

25. The moving party bears the burden of establishing that summary judgment is appropriate. When the moving party sets out a *prima facie* case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. "A factual issue is said to be "genuine" if a trier of fact is required to resolve the opposing parties differing versions of the underlying facts." *York v. Union Carbide Corp.*, 586 N.E.2d 861, 864 (Ind. Ct. App. 1992). "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. of Voters Registration,* 585 N.E.2d 700, 703-04 (Ind. Ct. App. 1992). All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.,* 725 N.E.2d 949 (Ind. Ct. App. 2000). In this case, Respondent IDEM has the burden of showing whether the permit IDEM issued either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *AquaSource Services and Technology,* 2002 OEA 41, 44. As movant, IDEM has the burden of proof, persuasion and of going forward on its motion for summary judgment. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23. All facts and inferences to be drawn therefrom are viewed in a light most favorable to the non-moving party. *State v. Livengood,* 688 N.E.2d 189, 192 (Ind. Ct. App. 1997).

26. Summary judgment is appropriate if the designated evidentiary matter shows that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. Ind. T.R. 56(C); *Wade v. Norfolk & Western Ry. Co.,* 694 N.E.2d 298, 301 (Ind. Ct. App. 1998). The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which can be determined as a matter of law. *Id*.

27. Generally, the moving party bears the burden of establishing the propriety of summary judgment. If a movant establishes a lack of any genuine issue of material fact, the responding party must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospital of Indianapolis,* 567 N.E.2d 842, 843 (Ind. Ct. App. 1991) [citing *Elkhart Community School Corp. v. Mills,* 546 N.E.2d 854 (Ind. Ct. App. 1989)].

28. A responding party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara,* 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan v. Snap-On Tool Corp.,* 478 N.E.2d 116, 122 (Ind. Ct. App. 1985).

29. 327 Ind. Admin. Code 15-5, commonly referred to as Rule 5, relates to storm water run-off associated with construction activity. Pursuant to 327 I.A.C. 15-5-1, Rule 5 "establishes requirements for storm water dischargers from construction activities of one (1) acre or more so that the public health, existing water uses, and aquatic biota are protected." Rule 5 does not apply until construction begins or is about to begin on a project.

30. There is no legal requirement in 327 I.A.C. 17-4 that Rule 5 matters are to be reviewed or considered during the review of an application for an isolated wetland permit. The only mention of Rule 5 is in the actual permit to remind the permittee to contact IDEM stormwater permits section about the "possible" need for 327 I.A.C. 15-5 (Rule 5) permits if the permittee plans to disturb more than one (1) acre.

31. All mention of storm water runoff and all allegations regarding violations concerning 327 I.A.C. 15-5 have no bearing on an administrative review of the issuance of the Permit to Permittees. The matter of storm water erosion or runoff has no bearing on whether the proposed project is "without reasonable alternative", "reasonably necessary and appropriate", or if the compensatory mitigation plan complies with the applicable rules. This Court is required to exert *de novo* review to determine whether a genuine issue of material fact precludes the application of these regulations, as a matter of law. The use of the term "reasonable", while indicative of a question of fact, does not preclude summary judgment as a matter of law, as urged by Petitioners. *See Lean v. Reed,* 876 N.E.2d 1104, 1113 (Ind. 2007); *Franklin College v. Turner,* 844 N.E.2d 99, 105 (Ind. Ct. App. 2006); *Rogier v. American Testing and Engineering Corp.*, 734 N.E.2d 606, 617 (Ind. Ct. App. 2000); *In re: Estate of Moore*, 714 N.E.2d 675, 677 (Ind. Ct. App. 1999); *Indianapolis Osteopathic Hosp., Inc. v. Jones,* 669 N.E.2d 431, 435 (Ind. Ct. App. 1996); *Tippecanoe Sanitary Landfill, Inc. v. Bd. Of County Comm'rs of Tippecanoe Co.,* 455 N.E.2d 971, 980)(Ind. Ct. App. 1983). Nor is IDEM's discretion immune from review.

32. Pursuant to 327 I.A.C. 17-4-8(3), "[a] wetland activity is considered to be without reasonable alternative if: … the department, in the absence of a local determination under this section, determines the wetland activity is without reasonable alternative to achieve a legitimate use proposed by the applicant on the property on which the wetland is located."

33. Pursuant to 327 I.A.C. 17-4-9(3), "[a] wetland activity is considered to be reasonably necessary or appropriate if: … the department, in the absence of a local determination under this section, makes a determination that the wetland activity is reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located."

34. The Indiana environmental rules leave the determination of what is "without reasonable alternative" or what is "reasonably necessary or appropriate" to the discretion of IDEM, the agency charged with the implementation and enforcement of the environmental laws, and rules promulgated thereunder, for the State of Indiana (I.C. § 13-13-1-1 *et seq.*), and the best professional judgment of its employees. 327 I.A.C. 17-4-8(3) and 327 I.A.C. 17-4-9(3) both state that in the absence of an execute resolution or a local government entity granting a permit or other approval, IDEM can make the determination that "the wetland activity is without reasonable alternative [or reasonably necessary or appropriate] to achieve a legitimate use proposed by the applicant on the property on which the wetland is located."

35. Other than 327 I.A.C. 17-4-8(3) and 327 I.A.C. 17-4-9(3), there is no law, rule, non-rule policy document, or guidance document stating what information IDEM must look to ascertain the reasonableness of any alternative or if the activity is reasonable or appropriate. IDEM is subject to this forum's *de novo* review to determine whether IDEM's actions were appropriate under the specific statutes and rules. Substantial evidence supports the lack of genuine issue of material fact, as a matter of law, that the evidence as submitted by IDEM was appropriate to use to make the necessary determinations in this matter.

36. The Petitioners have argued that an issue of material fact exists precluding the Court from resolving the ultimate issue of whether IDEM properly issued the Permit on summary judgment. However, the Petitioners provided no evidence supporting this allegation. The Petitioners merely state that they "rely on specific facts" without providing any of those "specific facts" or the evidence supporting them. Petitioners submitted letters and emails as evidence of the "specific facts", but the letters and emails are mere assertions regarding the allegations. Many of these comments were elicited prior to Permittees' construction of the third basin at Wetland A, as authorized by Permittees' permit issued by the U.S. Army, Corps of Engineers. No comment provided substantial evidence as to how the isolated wetland would function if it were left undeveloped after project completion. Petitioners' mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez*, 534 N.E.2d 756, 758; *McMahan*, 478 N.E.2d 116, 122. IDEM provided affidavits, maps, etc. to support its conclusions regarding the issues "without reasonable alternative" and/or "reasonably necessary or appropriate." Substantial evidence shows that leaving the isolated wetland in the center of the developmental activity would lead to the wetland's significant degradation, while compensatory mitigation would allow the watershed to maintain functioning wetlands in an amount at least equivalent to that lost through the development of isolated Wetland B.

37. Ind. Code § 13-18-22-5 states that the rules adopted regarding state regulated wetlands must require the compensatory mitigation to reasonably offset the loss of the wetlands.

38. Ind. Code § 13-18-22-6(d) states,

> The off-site location of compensatory mitigation must be within:
> (1) the same eight (8) digit U.S. Geological Service hydrologic unit code; or
> (2) the same county;
> as the isolated wetlands subject to the authorized wetland activity.

39. 327 I.A.C. 17-4-4 states that IDEM shall condition an approval to include "compensatory mitigation to reasonably offset the loss of wetlands allowed by the permits except as provided in 327 IAC 17-1-6."

40. 327 Ind. Admin. Code 17-1-5(c) establishes the appropriate location for the off-site location of the compensatory mitigation. Pursuant to 327 I.A.C. 17-1-5(c),

> The off-site location of compensatory mitigation must be within the same:
> (1) eight (8) digit U.S. Geological Service hydrologic unit code; or
> (2) county;
> as the isolated wetlands subject to the authorized wetland activity.

41. The laws and rules state that the proposed off-site mitigation is to be in the same hydrologic unit code or the same county as the isolated wetland subject to the proposed activity.

42. The compensatory mitigation site and the isolated wetland subject to the proposed activity are both located in Porter County and/or the Kankakee watershed. Therefore, the compensatory mitigation site complies with the environmental laws and rules of the State of Indiana, which OEA is not authorized to contravene.

43. IDEM has demonstrated, by substantial evidence, that there is no genuine issue of fact in dispute and that it is entitled to summary judgment as a matter of law. Petitioners did not present substantial evidence of specific facts demonstrating a genuine issue for trial.

FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that Respondent, Indiana Department of Environmental Management's Motion to Dismiss Petitioner George E. Smolka is **GRANTED,** and Respondent, Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED.** Judgment is entered in favor of the Indiana Department of Environmental Management and against Petitioners. Petitioners' Petition for Review is therefore **DISMISSED.** All further proceedings before the Office of Environmental Adjudication are hereby **VACATED.**

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

IT IS SO ORDERED this 27th day of August, 2008 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge