

**OBJECTION TO THE ISSUANCE OF
327 IAC 3 CONSTRUCTION PERMIT APPLICATION
PERMIT APPROVAL NO. 25375
GUILFORD LOW PRESSURE SEWER
DEARBORN COUNTY REGIONAL SEWER DISTRICT
2024 OALP 043, CAUSE NO.: IDEM-2405-001197**

Official Short Cite Name:	Dearborn Guilford, 2024 OALP 043
Cause Nos.:	IDEM-2405-001197 (24-W-J-5291)
Topics/Keywords:	327 IAC 3 315 IAC 1-3-2(b)(4)(A) wastewater construction permit motion for summary judgment
Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Freedom N. Smith, Esq. - US Steel Susanna A. Bingman, Esq. - IDEM
Order Issued:	October 15, 2024
Index Category:	Water
Further Case Activity:	



ISSUED:
October 15, 2024

STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS

Joshua Davis,
Petitioner(s),

Dearborn County Regional Sewer
District,

Permittee(s)/Respondent(s),

Indiana Dept of Environmental
Management

Respondent(s).

Administrative Case Number: IDEM-2405-001197
OEA 24-W-J-5291

Agency Number: 327 IAC 3 CONSTRUCTION
PERMIT APPLICATION, PERMIT APPROVAL NO.
25375, GUILFORD LOW PRESSURE SEWER

**FINDINGS OF FACT, CONCLUSIONS OF LAW and
FINAL ORDER**

This matter came before the Office of Administrative Law Proceedings (OALP or Court) via the Motion for Summary Judgment filed by counsel for the Indiana Department of Environmental Management (IDEM). The Administrative Law Judge (ALJ) having considered the pleadings now issues this Order addressing IDEM's issuance of Guilford Low Pressure Sanitary Sewer Permit Approval No. 25375 (Permit) to the Dearborn Regional Sewer District (DRSD).

Jurisdiction

The ALJ assigned to this matter by the Director of the Office of Administrative Law Proceedings (OALP), *see* Ind. Code § 4-15-10.5-13, has jurisdiction over this case pursuant to IC § 4-15-10.5-12, which gives OALP jurisdiction over agency administrative actions subject to the Indiana Administrative Orders and Procedures Act, IC § 4-21.5 or any other statute or regulation that requires or allows the office to take action.

Findings of Fact

1. IDEM issued the Permit on May 1, 2024, which authorized the construction of a sanitary sewer system to serve 59 existing single-family homes, a fire station, and a picnic area in the Town of Guilford along State Road 1 (Project). Permit, p. 2.

2. The Permit requires RSD to comply with all requirements under 327 IAC 3.
3. On May 11, 2024, Petitioner Joshua Davis (Petitioner), *pro se*, timely filed a Petition for Administrative Review, Adjudicatory Hearing and Stay (Original Petition).
4. On May 14, 2024, the Administrative Law Judge issued a Notice of Incomplete Filing Order to supplement the Petition and Notice of Proposed Order of Default.
5. On June 1, 2024, Petitioner filed an Amended Petition (Second Petition).
6. On August 5, 2024, following the prehearing conference, the Court issued a Report of Prehearing Conference and Case Management Order that gave Petitioner a second opportunity to amend his Petition (Third Petition).
7. Petitioner filed his Third Petition on September 3, 2024.
8. On September 17, 2024, IDEM filed a Motion for Summary Judgment. Neither Petitioner nor DRSD filed a Motion or otherwise responded to IDEM's Motion.

Conclusions of Law

1. This is a Final Order issued under IC § 4-21.5-3-23. 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.
2. IDEM is authorized to determine whether an Approval should be issued by applying the relevant statutes and regulations and can only consider the relevant statutes and regulations when deciding whether to issue the Approval. *Page Road*, 2022 OEA 150, 152; *Wolf Lake*, 2023 OEA 001, 006. *See also* IC § 13-13 *et seq.* and IC § 13-14-1-11.5.
3. OALP has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC § 4-21.5-7-3.
4. As state agencies, IDEM and OALP only have the authority to take those actions granted by law. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding whether to issue the permit. *American Suburban Utilities*, 2019 OEA 48, 53. Here, OALP's review is limited to determining

whether IDEM complied with those applicable statutes and regulations. *Berkshire Pointe WWTP, 2023 OEA 105, 110*. OALP does not have authority to address any other issues.

5. OALP must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ALJ, and deference to the agency's initial factual determination is not allowed. *Id.*; IC § 4-21.5-3-27(d).
6. OALP may enter summary judgment for a party if it finds that "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." Ind. Tr. R 56(C); IC § 4-21.5-3-23. "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth . . . or if the undisputed material facts support conflicting reasonable inferences." *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014).
7. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant, and all doubts as to the existence of a material issue must be resolved against the moving party. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000); *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005); *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).
8. A party opposing summary judgment must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991). When a motion for summary judgment is made, an adverse party may not rest upon mere allegations or denials but must set forth specific facts showing that there is a genuine issue for trial. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009). "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." Ind. Tr. R. 56.
9. Whenever a permit is required by any rule of the Environmental Rules Board under IC § 13-15-1 for the construction, installation, operation, or modification of any facility, equipment, or device, the permit may be issued only after the department staff has: (1) approved the plans and specifications; and (2) determined that the facility, equipment or device meets the requirements of the governing rule. IC § 13-15-3-5. The Permit here

was issued under 327 IAC 3; IDEM's decision to issue the collection system Permit is limited to the definitions, policies, procedures and technical criteria found in 327 IAC 3.1.

10. 315 IAC 1-3-2(b)(4)(A) requires a petitioner in a case involving an appeal of a permit to state with particularity and identify:

(i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.

(ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

11. To prevail on his appeal of the issuance of the 327 IAC 3 construction permit, Petitioner must show that IDEM did not meet the requirements of 327 IAC 3. *Wadesville/ Blairsville WWTP, 2022 OEA 1, 5* (citing *Blue River Valley, 2005 OEA 1, 11*). The Court does not have authority to address any other issues.

12. In the 3 Petitions, Petitioner raised the following issues: (1) the location of the wastewater treatment plant (WWTP) stating its smells would cause lowering of property values, unhealthy environment and loss of enjoyment of the property; (2) the WWTP imposes unnecessary costs and creates a financial burden; (3) only 59 homes cannot support a sewer district; (4) odor from the WWTP will cause loss of full use and enjoyment of properties; (5) the lack of a crock does not provide access for the check valves on the system when on customers' property; (6) the low height of the vents at the lift station are barely above flood waters; (7) the lack of secure fencing will not keep people away from the lift station lids, vents, and control panel as provided at the treatment facility. Original Petition, pp. 1 – 2, Second Petition, pp. 1 – 2 and Third Petition, pp. 1, 3 – 4.

The Permit appealed here pertains to the construction of the collection system, not the construction of the WWTP. IDEM issued the WWTP construction Permit Approval No. 25462 on July 10, 2024, and no petitions for administrative review were filed regarding that Approval. Thus, the Court cannot rule on issues regarding the WWTP here.

13. Petitioner's objections regarding the Wastewater Treatment Plant (WWTP) include (1) the location of the WWTP being in a flood plain; (2) the odor emanating from the WWTP would cause a loss of full use and enjoyment of property; (3) its placement would lower property values; and (4) "I see no consideration that [COVID] could not be spread by the wind from the [WWTP] during times the sludge is allowed to settle, and the bacterial and viral smell allowed to be carried by the wind to the surrounding homes." Original Petition,

p. 1; Second Petition p. 2.; Third Petition, p. 2. Again, the Permit pertains to the construction of the collection system, not the construction of the WWTP. IDEM issued the WWTP construction Permit Approval No. 25462 on July 10, 2024, and no petitions for administrative review were filed regarding that Approval.


14. Petitioner contends that 59 homes cannot support the DRSD. Second Petition, p. 1. Whether 59 homes can support a sewer district was an issue that could have been raised at the time DRSD was formed but has no relationship to whether IDEM properly issued the Permit under 327 IAC 3.
15. Petitioner contends the Permit “lack[s] secure fencing to keep people away from the lift station lids, vents and control panel as provided at the treatment facility.” Third Petition, p. 2. Petitioner did not identify environmental concerns or technical deficiencies related to the Permit or proffer permit terms and conditions that the Petitioner contends would be appropriate to comply with the law applicable to the contested permit as required by 315 IAC 1-3-2(b)(4)(A). Further, secure fencing is not a design or technical issue of the construction of a sanitary collection system permit; thus, the Court cannot deny a permit on this basis. *Wadesville/Blairsville WWTP, supra*.
16. Petitioner contends the permit lacks a requirement for a crock or way to access the check valves for testing, inspection or maintenance and cites [EPA’s Wastewater Technology Fact Sheet](#) in support.¹ Second Petition, pp. 1, 3. The information contained in EPA’s Fact Sheet was not promulgated under Indiana’s Administrative Orders and Procedures Act, IC § 4-22-2 *et seq.* or incorporated into 327 IAC; thus, IDEM is not authorized to incorporate the information contained in EPA’s Fact Sheet in issuing a 327 IAC 3 construction permit. Moreover, 327 IAC 3 does not require the placement of a check valve in a crock or accessibility to the check valve; thus, the Court cannot overturn the Permit on this basis. *Id.*
17. Petitioner contends the lines are in a flood plain and “the low height of the vents at the lift station [are] barely above flood waters.” Second Petition, pp. 2 – 3. While the 327 IAC 3-6 Technical Standards” requires that ventilation for all pump stations, it does not prescribe at what elevation level the vent must be. 327 IAC 3-6-22; *Wadesville/Blairsville infra*.

¹ EPA’s Wastewater Technology Fact Sheet (EPA’s Fact Sheet) was not promulgated as a rule under the Administrative Procedure Act (APA), 5 USC § 551 *et seq.* Only a rule issued in compliance with the APA and falls within the scope of authority delegated to the agency by Congress to issue the rule, have the force and effect of Federal law. Rules not promulgated under the APA, such as interpretive rules and policy statements, lack the force and effect of law. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, (D.C. Cir. 2000).

Final Order

IDEM's Motion for Summary Judgement is **GRANTED**. Guilford Low Pressure Sanitary Sewer Permit Approval No. 25375 is **UPHELD**.

You are further notified that, pursuant to IC § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to IC § 4-21.5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.



Administrative Law Judge
Hon. Lori Kyle Endris

Distribution

(Sent via the email address on file with the Indiana Role of Attorneys, unless otherwise noted):

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