

**In re: Objection to the Issuance of Public Water Supply
Construction Permit No. WS9313 Huntington, Indiana, John Stephens, Petitioner
2004 OEA 104 (04-W-J-3433**

TOPICS:

stay
dismissal
12(B)(6)
construction permit
jurisdiction
landowner permission
contract

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Permittee: Theodore L. Bendall, Esq., Bendall DeLaney Hartburg McNeely & Roth
Petitioner: Mark C. Guenin, Esq., Guenin Law Office
IDEM: Nancy Holloran, Esq.

ORDER ISSUED:

November 9, 2004

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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

IN THE MATTER OF:)	
)	
OBJECTION TO THE ISSUANCE OF)	
PUBLIC WATER SUPPLY)	
CONSTRUCTION PERMIT NO. WS9313)	CAUSE NO. 04-W-J-3433
HUNTINGTON, INDIANA)	
JOHN STEPHENS, Petitioner)	

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

This constitutes notice of a Final Order. This matter having come before the Court on the Stay Hearing requested by the Petitioner, John Stephens, on November 3, 2004; the Indiana Department of Environmental Management (the "IDEM") having moved for the dismissal of this matter; and the Environmental Law Judge having considered the evidence presented at the hearing and being duly advised in the premises, now makes the following findings of fact, conclusions of law and Order:

Findings of Fact

1. On August 13, 2004, the IDEM issued Construction Permit No. WS-9313 (the "Permit") to the City of Huntington, Indiana for the construction of one new well.
2. On August 31, 2004, John Stephens (the "Petitioner"), by counsel, sent a letter purporting to object to the issuance of the Permit to the Commissioner of the IDEM. This letter was not sent to the Indiana Office of Environmental Adjudication (the "OEA"). The Commissioner forwarded the letter of objection to the OEA. The OEA subsequently opened a file for this matter and assigned a cause number.
3. The Petitioner requested a stay of the Permit. This Court scheduled a hearing regarding the request for a stay on October 19, 2004. The IDEM requested a continuance of that stay hearing. The Court granted the motion and continued the stay hearing until November 3, 2004.
4. The stay hearing was conducted on November 3, 2004. The City of Huntington (the "City") appeared by counsel, Theodore L. Bendall; the IDEM appeared by counsel, Nancy Holloran; and the Petitioner appeared by counsel, Mark Guenin. The Petitioner did not appear in person.

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5. Petitioner's counsel indicated that he was not aware that the hearing was to hear evidence of whether a stay should be entered in this matter, but elected to proceed with the stay hearing and did not request a continuance.
6. The parties stipulated to the admission of Petitioner's Exhibits A, B, C and D.
7. The IDEM verbally moved to dismiss this case on the basis that the Petitioner had failed to state a claim upon which relief could be granted. None of the parties requested an opportunity to submit written briefs regarding the Motion.
8. The parties proceeded to present evidence and arguments regarding the stay and the motion to dismiss.
9. The Petitioner's evidence consisted of Exhibits A, B, C and D.
10. The Petitioner owns property located in Huntington County (the "Property"). Currently, the City operates 2 wells on this Property pursuant to a contract between the City and the Petitioner. The Permit authorizes the City to construct a new well. This new well will be located on the Property.
11. The City and the Petitioner disagree whether the City has the authority to install the new well on the Property.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") pursuant to Ind. Code § 4-21.5-7, et seq.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. In order for this Court to issue a stay of effectiveness, the Petitioner has the burden of proving, by a preponderance of the evidence:
 - (A) The person will suffer irreparable harm pending the resolution of the case on the merits because its remedies at law are inadequate;
 - (B) The person is likely to prevail on the merits;
 - (C) The threatened injury to the person requesting the stay outweighs the threatened harm that the grant of the stay may inflict on the other party; and
 - (D) The public interest will be served by the grant of the stay.

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4. The Petitioner has failed to meet his burden of proof in that he has not presented sufficient evidence that:
 - (A) The remedies of law available to him are inadequate. The Petitioner may file suit in the county court requesting an injunction based on the contract.
 - (B) He is likely to prevail on the merits. As discussed below, the Petitioner has failed to show that the IDEM made any error in issuing the Permit.
 - (C) The injury suffered by the Petitioner outweighs the harm to the City. As indicated, the Petitioner has adequate remedies at law. The City could incur significant costs if a stay were entered in this matter.
 - (D) The public interest will be served by a stay of the Permit.
5. This Court may treat a Motion to Dismiss as a motion to dismiss for failure to state a claim under Ind. Trial Rule 12(B)(6). “In a 12(B)(6) motion, the court is required to take as true all allegations upon the face of the complaint, and may only dismiss if plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint.” *Dixon v. Siwy*, 661 N.E.2d 600, 603 (Ind.Ct.App. 1996). 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). The Court must view the pleadings in a light most favorable to the non-moving party and must draw every reasonable inference in favor of that party. *Lattimore v. Amsler*, 758 N.E.2d 568 (Ind.Ct.App. 2001).
6. The Petitioner argues that the IDEM does not have the authority to issue a permit unless the permit applicant can prove it has obtained the necessary permission from the landowner to conduct the permitted activities on the land. The Petitioner cites to no regulations or statutes or policies that require the permit applicant to provide this information.
7. This Court is unable to find any regulations, statutes or policies that require the permit applicant to provide proof that the landowner has agreed to the proposed activity. This is a contractual issue that concerns only the landowner and the permittee. The Court concludes that there is no legal basis for Petitioner’s allegations. The Petitioner has failed to state a claim upon which this Court can grant relief.
8. Pursuant to IC 4-21.5-7, this Court has jurisdiction to review the decisions of the Indiana Department of Environmental Management. Under this statute, this Court has limited jurisdiction and may only determine whether the IDEM complied with applicable statutes, regulations and policies in issuing its decisions. This Court does not have the statutory authority to hear or decide questions of contract interpretation.¹

¹ This refers only to contracts between a regulated party and a third party. The Court may interpret contracts (e.g. settlement agreements) between the IDEM and parties regulated by IC 13.

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9. IDEM's Motion to Dismiss must be granted because (1) the Petitioner has failed to cite to any statute, regulation or policy with which the IDEM failed to comply in issuing this Permit and (2) this Court does not have the authority to determine contractual issues.

Order

IT IS THEREFORE ORDERED that (1) the Petitioner's Request for a Stay is **DENIED**; (2) the Petition for Administrative Review filed by the Petitioner, John Stephens is **DISMISSED**, and Permit No. WS-9319 issued by IDEM on August 13, 2004 is **AFFIRMED**.

You are further advised that, pursuant to Indiana Code §4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code §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.

IT IS SO ORDERED in Indianapolis, Indiana this 9th day of November, 2004.

Hon. Catherine Gibbs
Environmental Law Judge