

**In re: Objection to the Issuance of Notice of Decision I.C. 4-21.5-3-7  
FESOP No. 071-15227-00040, Murphy Oil USA, Inc., Seymour, Jackson County, Indiana  
2004 OEA 51 (03-A-J-3160)**

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**TOPICS:**

FESOP permit  
motion to dismiss  
timely filed  
eighteen days  
notice  
good faith effort to notify  
publication  
public inspection  
adjacent landowners or occupants

**PRESIDING JUDGE:**

Davidsen

**PARTY REPRESENTATIVES:**

Permittee: William B. Taylor IV, Esq., MacFarlane Ferguson & McMullen  
Petitioners: James A. and Jennifer L. Myers  
IDEM: April Schultheis, Esq.

**ORDER ISSUED:**

June 18, 2004

**INDEX CATEGORY:**

Air

**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 )  
 NOTICE OF DECISION IC 4-21.5-3-7 )  
 FESOP NO. 071-15227-00040 )  
 MURPHY OIL USA, INC. )  
 SEYMOUR, JACKSON COUNTY, IN. )

CAUSE NO. 03-A-J-3160

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 MURPHY OIL USA, INC., )  
 Permittee/Respondent; )  
 JAMES A. and JENNIFER L. MYERS, )  
 Petitioners; )  
 INDIANA DEPARTMENT OF )  
 ENVIRONMENTAL MANAGEMENT, )  
 Respondent. )

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING  
 MOTION TO DISMISS PETITION FOR ADMINISTRATIVE REVIEW**

This matter came before the Court on the Permittee/Respondent Murphy Oil USA, Inc.’s April 5, 2004 Motion for Summary Judgment, Motion to Strike Objection and Motion to Compel Discovery and on Indiana Department of Environmental Management’s (“IDEM”) April 15, 2004 Motion to Dismiss for Failure to Timely Appeal or in the Alternative, for Failure to State a Claim Upon Which Relief May Be Granted. And the Chief Environmental Law Judge (“ELJ”), having read and considered the petitions, motions, record of proceeding, evidence, and briefs and responses of the parties, now finds that IDEM met its required burden of proof to support its Motion to Dismiss the August 23, 2003 Petition for Administrative Review filed by Petitioners James A. and Jennifer L. Myers. Judgment may be made upon the record. The ELJ, by a preponderance of the evidence, now makes the following findings of fact and conclusions of law, and enters the following Order with respect to the Petition of James A. and Jennifer L. Myers.

Please be notified that the Office of Environmental Adjudication (“OEA” or “Court”) hereby **GRANTS** the Indiana Department of Environmental Adjudication’s Motion to Dismiss Cause No. 03-A-J-3160 under Ind. Tr. R. 4.6(A), Ind. Code § 13-15, et seq., and Ind. Code § 4-21.5-3, et seq., finding that Petitioner James A. and Jennifer L. Myers’ Petition for Administrative Review was not timely filed. The Environmental Law Judge hereby makes the following findings of fact and conclusions of law:

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**Findings of Fact**

1. No evidence was presented to dispute the asserted fact that on April 18, 2002, the Indiana Department of Environmental Management (“IDEM”) mailed Federally Enforceable State Operating Permit (FESOP) No. F071-15227-00040 (“FESOP” or “Permit”) and “Notice of Decision”, issued April 18, 2002, to permit applicant Murphy Oil USA, Inc. (“Murphy”) and interested parties, but was not mailed to Petitioners James A. and Jennifer L. Myers (“Myers”). The “Notice of Decision” stated that an appeal of the permit “must be submitted . . . within eighteen (18) calendar days of the mailing of this Notice.”
2. In their August 23, 2003 Petition for Administrative Review, the Myers stated that they were not served with Murphy’s April 18, 2002 permit nor the related Notice of Decision, but that a neighbor gave them a copy of a letter from Murphy dated November 27, 2001, attached to the Myers’ Petition for Administrative Review as “Attachment 1”. The Myers further supported their Petition for Administrative Review (“Petition”) with letters dated February 13, 2002 to Murphy, “Attachment 2”, and to IDEM, “Attachment 3”. Attachments 1 through 3 bear handwritten notations which the Myers describe in their Petition as documentation of attempts to contact Murphy and IDEM, to which the Myers did not receive responses. The Myers’ Petition further stated that “[t]he letter IDEM mailed us regarding this decision is the first contact we have had regarding Murphy”; no further information concerning the referenced letter was provided by the Myers.
3. In their Petition, the Myers quoted from Murphy’s November 27, 2001 letter in stating Murphy’s notice obligation: “Murphy must notify all land owners and occupants adjacent to the proposed construction site that an application for construction has been submitted.” The Myers claim in their Petition that Murphy failed to meet “the condition of notifying *all* landowners and occupants adjacent to the proposed construction site when they *failed* to notify” the Myers. (emphasis original).
4. In its Motion to Dismiss, p. 2, para. 5, IDEM stated, by counsel, that it provided notice of the draft permit in the Seymour Daily Tribune on March 12, 2003, and by making the permit available for public inspection at the Jackson County Public Library. None of the parties refuted or disputed IDEM’s statement concerning publication and inspection.
5. A telephonic prehearing conference was held as rescheduled on October 30, 2003; the Myers’ participated in person (and represented themselves throughout these proceedings), the remaining parties were represented by their legal counsel.

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6. On November 3, 2003, the OEA issued a Case Management Order which set a discovery schedule to begin on February 2, 2004, for dispositive motions to be filed by April 15, 2004, if not earlier, for responses to dispositive motions to be filed by May 17, 2004, and for replies to dispositive motions to be filed by June 1, 2004. A final prehearing conference and final hearing date were also included in the Case Management Order.
7. In compliance with the November 3, 2003 Case Management Order, Murphy filed its Motion for Summary Judgment, Motion to Strike Objection and Motion to Compel Discovery on April 5, 2004; IDEM filed its Motion to Dismiss for Failure to Timely Appeal or in the Alternative, for Failure to State a Claim Upon Which Relief May Be Granted on April 15, 2004, all of which were served upon the Myers, as was the November 3, 2003 Case Management Order.
8. The parties did not dispute that the April 18, 2002 Permit and Notice of Decision were not mailed directly to the Myers. And, the parties did not dispute that the Myers' Petition for Administrative Review was filed on August 23, 2003, more than eighteen (18) days after the April 18, 2002 Permit and Notice of Decision were served. In dispute is whether the Myers were "land owners and occupants adjacent to the proposed construction site", so that the April 18, 2002 Permit and Notice of Decision were required to be sent to the Myers, which the Myers claim would entitle them to file their Petition for Administrative Review over eighteen (18) calendar days after the April 18, 2002 Permit and Notice of Decision were issued.
9. The information presented by the Myers to support their contention that they are "land owners and occupants adjacent to the proposed construction site" was stated in their Petition for Administrative Review and Attachments:
  - a. the Myers stated their address as 10063 N. 1050 E, Seymour, IN 47274;
  - b. the copy of the Permit attached to the Petition listed Murphy's address as "Intersection of County Roads 975 and 1050, Seymour, Indiana 47274";
  - c. Murphy "proposed to build on a site 2/10ths of a mile south of our property line", Petition, page 1, para 4(i);
  - d. "no homes between our house and the proposed site on the east side of 1050 E", Petition, pages 1, 2, para 4(iv);
  - e. "The proposed facility will be located on the northeast corner of the intersection of County Road 975 North and County Road 1050 East", Petition Attachment 1, letter from Murphy;
  - f. "Murphy's . . . terminal to be located due south (approximately 600 yds.) of my property", Petition Attachment 2, letter from Myers to Murphy;
  - g. size of Myers' "home and property (6.5 acres)", Id.
  - h. Murphy's "[e]xact location would be at the northeast corner of CR 975 N and CR 1050 E. That would situate this terminal approximately 600 yards due south of [the Myers'] home", Petition Attachment 3, letter from Myers to IDEM;
  - i. "my home is located extremely close to the proposed site", Id.

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10. Murphy, by counsel in its April 5, 2004 Motion for Summary Judgment, Motion to Strike Objection and Motion to Compel Discovery, stated that the Myers “are not adjacent direct neighbors to the proposed permitted facility.” Motion, p. 1, para. 2.
11. The Myers’ Petition for Administrative Review was submitted in letter form and signed by James A. Myers; it was not presented in the form of an affidavit, nor did the Petition state that it was presented under oath. The Myers presented no other facts, did not amend their Petition for Administrative Review, and did not present any response or reply to the dispositive motions filed by IDEM and by Murphy, and did not refute Murphy’s assertion that the Myers were not adjoining landowners or occupants. No party requested an evidentiary hearing on the dispositive motions.

**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”) and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.
2. 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 considering IDEM’s Motion to Dismiss for the Myers’ failure to timely appeal, this Court must test the legal sufficiency of a Petition for Administrative Review, not the facts that support the Petition. As Petitioners, the Myers’ pleadings “must be considered in a light most favorable to them and every reasonable inference drawn in their favor.” *In the Matter of: Objection to the issuance of Permit No. CP 065-10469-00032 Cinergy Corporation Cause No. 99-A-J-2427*, 2000 IN ENV LEXIS 11 (March 8, 2000). This Court will therefore consider factual statements made in the Myers’ Petition for Administrative Review and its attachments, even though these facts were not verified or presented under oath.
4. The Office of Environmental Adjudication (“OEA”) has jurisdiction over petitions for administrative review of permits such as issued to Murphy which are timely filed within eighteen (18) days of the date of the notice of decision as required in Ind. Code § 4-21.5-3-2, Ind. Code § 4-21.5-3-7, and Ind. Code § 13-15-6-1. Conversely, OEA is not authorized to assume jurisdiction over Petitions for Administrative Review which are filed after the deadline set by statute. In this case, there is no dispute that the Myers Petition for Administrative Review was filed more than eighteen (18) days after the April 18, 2002 Notice of Decision was issued to Murphy. The Myers have asked this Court to assume jurisdiction over their Petition for Administrative Review for the reason that they were entitled to, but did not, receive notice as required by Indiana law.

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5. For FESOP permits, applicants such as Murphy must “make a reasonable effort to provide notice to owners or occupants of land adjoining the land which is the subject of the application.” 326 IAC 2-8-13(a). A landowner or occupant is entitled to notice of a FESOP construction permit if their land adjoins the proposed construction site. *Cinergy, Id.* To be able to prove that they were entitled to notice, the Myers must demonstrate, by a preponderance of the evidence, that the land they own or occupy adjoined Murphy’s construction site. This Court must review the facts presented by the Myers in a light most favorable to the Myers, and must draw every favorable inference in the Myers’ favor. The facts presented by the Myers, stated in para. 8, above, fail to present a preponderance of the evidence or to support an inference that the Myers owned or occupied land adjoining the land for which Murphy obtained a FESOP permit. The Myers have failed to prove that they were adjoining landowners or occupants to the permitted property. Murphy was not required to provide notice to the Myers.

6. Ind. Code § 4-21.5-3-5(f) provides:

**“the order takes effect regardless of whether the persons described by subsection (b)(5) or (b)(6) have been served. The agency shall make a good faith effort to identify and notify these persons, and the agency has the burden of persuasion that it has done so.”**

This Court in *Cinergy* found that IDEM’s actions of publishing the notice of the draft permit, sending copies of the draft permit to the public library and county health department and mailing notices to landowners identified by the applicant proved that IDEM carried its burden of proof that it had satisfied its statutory duties of notice and had made the requisite good faith effort.

In this case, the Myers have neither pleaded nor demonstrated that they were “persons described by subsection (b)(5) or (b)(6). However, assuming, for sake of argument, that the Myers may be so qualified, IDEM’s publication of the draft permit and making Murphy’s permit available for public inspection at the county public library is similar to its efforts in *Cinergy*. Even if IDEM had a duty to provide notice to the Myers, IDEM exercised good faith efforts to inform and notify the Myers and others so situated. IDEM fulfilled any duty it may have had to notify the Myers of issuance of Murphy’s FESOP permit and Notice of Decision.

7. As this matter is disposed of by considering the timeliness of the Myers’ Petition for Administrative Review, this Court will not rule upon the other Motions raised by IDEM or Murphy.

8. James A. and Jennifer L. Myers August 23, 2003 Petition for Administrative Review was filed more than eighteen (18) days after IDEM published or mailed the FESOP and Notice of Decision on April 18, 2002. This Court has no authority to exercise jurisdiction over the Myers’ Petition for Administrative Review. IDEM’s Motion to Dismiss the Myers’s Petition for Administrative Review must therefore be granted.

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**Final Order**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Indiana Department of Environmental Management's ("IDEM") April 15, 2004 Motion to Dismiss for Failure to Timely Appeal or in the Alternative, for Failure to State a Claim Upon Which Relief May Be Granted is **GRANTED**, the August 23, 2003 Petition for Administrative Review filed by Petitioners James A. and Jennifer L. Myers is **DISMISSED** as not timely filed. The June 24, 2004 Final Prehearing Conference and July 15, 2004 Final Hearing are **VACATED**.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED this 18th day of June, 2004 in Indianapolis, IN.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge