

**OBJECTION TO THE NOTICE OF DECISION
PERMIT NUMBER WS-9251
UTILITY CENTER, INC. (PWSID 5202002)
2005 OEA 084, OEA CAUSE NO.: 04-W-J-3349**

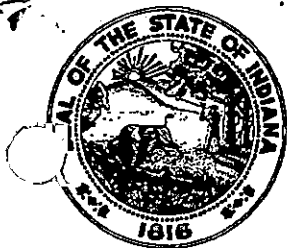
Official Short Cite Name:	Utility Center, 2005 OEA 084
OEA Cause No.:	04-W-J-3349
Topics/Keywords:	Public water supply construction permit IC 14-25-4-17 IC 13-15-6-2(5) and (6) IC 4-21.5-3-7(a)(1)
Presiding ELJ:	Catherine Gibbs
Party Representatives:	Nancy Holloran, Esq. Clifford A. Holleran, Esq. Philip B. McKiernan, Esq. Joseph M. Mendel, Esq.
Date of Order:	January 14, 2005
Index Category:	Water
Further Case Activity:	

JAN 14 2005

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE NOTICE OF DECISION)
PERMIT NUMBER WS-9251)
UTILITY CENTER, INC. (PWSID 5202002))

CAUSE NO. 04-W-J-3349

**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 Indiana Department of Environmental Management's ("IDEM") and Utility Center, Inc.'s Motions to Dismiss; and the Environmental Law Judge having considered the petitions, motions, briefs, responses and replies of the parties and being duly advised in the premises, now makes the following findings of fact, conclusions of law and Final Order:

STATEMENT OF THE CASE

1. The IDEM issued Permit for Public Water Supply Construction No. WS-9251 (the "Permit") to Utility Center, Inc. ("Utility Center") on April 30, 2004. This approval authorized Utility Center to construct a new water main that will provide water service to approximately 55 new customers in a residential subdivision.
2. Mr. Roland E. Weber (the Petitioner) filed his objections to the issuance of the Permit on May 13, 2004.
3. The parties attended a prehearing conference on June 23, 2004 with IDEM present by counsel; Utility Center was present by counsel; and the Petitioner was present in person and by counsel.
4. The parties participated in a status conference on October 5, 2004.
5. IDEM and Utility Center filed Motions to Dismiss on November 24, 2004. The Petitioner did not file a response to the Motion to Dismiss. Utility Center filed its Limited Response of Utility Center to Motion to Dismiss of IDEM on December 28, 2004. The Petitioner did not file a reply to the Motions to Dismiss.

FINDINGS OF FACT

1. The IDEM issued Permit for Public Water Supply Construction No. WS-9251 (the "Permit") to Utility Center, Inc. d/b/a Aqua Indiana ("Utility Center") on April 30, 2004. The Permit authorizes Utility Center to construct a new water supply line to supply water service to approximately 55 new customers located in a residential subdivision east of Scott Road and south of Bass Road in Allen County, Indiana.
2. The Petitioner received notice of the Permit as a "potentially affected person" as required by the permit application filed with the IDEM by Utility Center on or about April 13, 2004.
3. The Petitioner sent correspondence to the Office of Environmental Adjudication objecting to the issuance of the Permit based on his belief that the construction would interfere with the operation of his private drinking water well. The Petitioner states "Just how severely our water supply will be impacted is impossible to know at this point." The Petitioner also complains that the Permit will allow for the commercialization of the area surrounding his residence.
4. The Petitioner did not allege that the Permit would result in environmental or health problems nor did he identify any deficiencies in either the Permit or IDEM's decision-making process.

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. The Utility Center argues that the Petitioner did not state sufficient facts to show that he is aggrieved or adversely affected by the issuance of the Permit. Utility Center and IDEM have also alleged that the Petitioner failed to state a claim upon which relief can be granted.
4. IC 4-21.5-3-7(a)(1) states that in order to qualify for review, a person must state sufficient facts to demonstrate that the person is:
 - (A) a person to whom the order is specifically directed;
 - (B) aggrieved or adversely affected by the order; or
 - (C) entitled to review under any law.
5. The Petitioner is not the person to whom the order is specifically directed. In addition, the Petitioner has not identified any specific law that provides him with a right to review.

Therefore, the only question before the Court is whether the Petitioner has stated sufficient facts to demonstrate that he is aggrieved or adversely affected.

6. The Indiana Supreme Court recently 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”. 811 N.E. 2d at 807. The Court went on to say that in order for a person to be “aggrieved or adversely affected”, they “must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or personal interest.” at 810. The Court further interpreted the language of Ind. Code Sec. 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public. Huffman had challenged the issuance of a permit to discharge pollutants into Indiana's waters. The permit was issued to Eli Lilly and Company. 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. The lower courts dismissed Huffman's objection to the issuance of the permit because of a lack of factual support for the allegations that Huffman or the property might be harmed. Huffman had 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 not addressed by the permit issued by IDEM. In response, the permittee alleged that due to the downstream location of the discharge point, no impact to Huffman was possible. Huffman's petition was challenged by a motion to dismiss supported by facts outside Huffman's pleadings, and thus was required to be treated by the Court as a Motion for Summary Judgment. The Indiana Supreme Court ruled that Huffman's dismissal by the lower courts was not supported by substantial evidence. The Court remanded Huffman's case back to OEA to provide Huffman with an opportunity to present additional evidence of her health concerns. The Court states “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.” 811 N.E. 2d at 815.
7. Under the standard stated in *Huffman*, this Court concludes that the Petitioner has stated sufficient facts to show that he is aggrieved or adversely affected. He was identified by the Utility Center as a “potentially affected person”. In addition, he has stated that he is concerned that the construction of the new water main will adversely affect his drinking water well. This is sufficient to show that the Petitioner is likely to suffer “harm to a legal interest, be it pecuniary, property or personal interest.”
8. This is not the end of the analysis of whether the Petitioner's objections should be dismissed. In addition to proving that he is aggrieved or adversely affected, the Petitioner must also comply with the requirements of IC 13-15-6-2.
9. IC 13-15-6-2 requires that the written request for an adjudicatory hearing must contain the following information:

- (1) State the name and address of the person making the request.
- (2) Identify the interest of the person making the request.
- (3) Identify any persons represented by the person making the request.
- (4) State with particularity the reasons for the request.
- (5) State with particularity the issues proposed for consideration at the hearing.
- (6) Identify the permit terms and conditions that in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

10. Both IDEM and Utility Center argue that the Petitioner has failed to comply with IC 13-15-6-2(5) and (6). They essentially argue that the Petitioner has failed to state a claim upon which relief can be granted. "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).
11. This Court's authority to grant relief is restricted by IDEM's statutory authority. The Court may not grant relief if IDEM does not have the authority to carry out the requested relief. The Petitioner's complaints both fall outside of that authority. IDEM is not required to consider whether a request to construct new drinking water supply lines will impact other sources of drinking water. There are statutes that address this issue, but these statutes are not implemented or enforced by IDEM. Specifically, IC 14-25-4-17 provides for compensation in instances such as the Petitioner's. However, this statute is enforced by the Department of Natural Resources and is within the Natural Resource Commission's jurisdiction. OEA may not grant relief under this statute.
12. The Petitioner also complains that the Permit allows for the commercialization of the area surrounding his residence. This issue raised by Petitioner is not subject to IDEM's regulation, and is therefore not subject to OEA's jurisdiction, but seems to raise issues, such as zoning, which may be reviewed by state plenary courts. OEA does not have the authority to grant relief in this matter.
13. The Court concludes that the Petitioner has failed to state a claim upon which this Court may grant relief.

Final Order

IT IS THEREFORE ORDERED that the Office of Environmental Adjudication hereby **DISMISSES** the objections filed by the Petitioner.

You are 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 14th day of January 2005 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge