Objection to the Issuance of 327 IAC Article 3
Construction Permit Application Plans & Specifications
for Blue River Valley Area Sanitary Sewer & Water Projects
Permit Approval No. 16689 New Castle, Henry County, Indiana
2005 OEA 1 (04-W-J-3414)

OFFICIAL SHORT CITATION NAME: When referring to 2005 OEA 1, cite this case as ***Blue River Valley*, 2005 OEA 1.**

TOPICS:

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need
cost
location
default
recall
materials
water line profile
hydrants
fill
subject matter jurisdiction
erosion
modification
plan revision
substantial evidence
motion to dismiss
Trial Rule 41(B)
aggrieved or adversely affected
Huffman

PRESIDING JUDGE:
Davidsen

PARTY REPRESENTATIVES:

Petitioners:	Martin Shields, Esq.
Permittee/Respondent:	David L. Copenhaver, Esq.
IDEM:	Nancy Holloran, Esq.

ORDER ISSUED:
February 21, 2005

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	)	CAUSE NO. 04-W-J-3414
327 IAC ARTICLE 3 CONSTRUCTION PERMIT	)	
APPLICATION PLANS & SPECIFICATIONS FOR	)	
BLUE RIVER VALLEY AREA SANITARY	)	
SEWER & WATER PROJECTS PERMIT	)	
APPROVAL NO. 16689	)	
NEW CASTLE, HENRY COUNTY, INDIANA.	)	
_____	)	
Allan J. McAllister, James H. Ferrell, Gordon Clouse	)	
and Bruce Aaron,	)	
Petitioners,	)	
City of New Castle, Hon. Tom Nipp, Mayor,	)	
Permittee/Respondent,	)	
Indiana Department of Environmental Management,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

This constitutes notice of a Final Order. This matter came before the Court on the evidence presented at the evidentiary hearing held on December 3, 2004, on the Motion to Dismiss filed by the Permittee/Respondent, City of New Castle, Tom Nipp, Mayor, by counsel, and concurred to by the Indiana Department of Environmental Management (IDEM) and objected to by Petitioners, by counsel, which pleadings are a part of the Court's record; and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, and the briefs, responses, and replies of the parties, now finds that judgment may be made upon the record; and the ELJ, being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

Findings of Fact

1. On July 22, 2004, IDEM approved the issuance of construction permit approval #16689 ("permit" or "project") to the City of New Castle, authorizing the construction of an eight-inch diameter sanitary sewer line and six-inch diameter water line, per Ind. Code § 13-15, et seq., and 327 IAC 3, et seq. While the sewer and water lines will be constructed within the same easement, they will be separated both horizontally and vertically. (Plan and Profile Sheets dated August 2, 2004 and August 27, 2004 were submitted to IDEM by the City's professional engineering and architecture consultants, but are not at issue in this case.)

2. On August 6, 2004, Dr. Allan J. McAllister, James H. Ferrell, Gordon Clouse, and Bruce Aaron (the "Petitioners"), by counsel, filed a Petition for Administrative Review ("Petition") of the Permit. In their Petition, the Petitioners alleged that they owned an interest in real estate upon which the project would be constructed. The permitted project would traverse Petitioners' property. In summary, Petitioners based their August 6, 2004 Petition upon the following objections:
    a. the estimated cost of $700,000 for a gravity sewer and water main which would serve only nine (9) parcels of real estate; and
    b. the lack of present need for the sanitary sewers, as the parcels have adequate water supplies and other forms of sanitary sewer service, that the stated reasons given for the project's installation was annexation of the real estate parcels by the City of New Castle; and
    c. installation of the gravity flow sewer system would require a cut in a permanent easement, which would adversely impact the present use, concerning business parking, on two parcels owned by Petitioner McAllister. Further, required trenching techniques, necessitated by soil conditions, will eliminate almost all parking on Petitioner McAllister's real estate.

    Petitioners stated that appropriate permit terms and conditions would include the type of sanitary sewer (gravity vs. low pressure or force line) and the lines' location, with consideration given to they present and future use of the parcels, and including the actual and residual damage to the parcels.

3. A prehearing conference was held, as scheduled, on September 9, 2004. All parties were present by counsel; Permittee/Respondent was also present by consulting engineers Don Robin and Keith Bryant. Petitioners, by counsel, requested leave to file an amended Petition for Administrative Review ("Amended Petition"). A Case Management schedule was discussed and confirmed in writing in the Court's September 10, 2004 Case Management Order. The Case Management Order established a deadline for submission of the Amended Petition, set a Final Prehearing Conference on November 18, 2004, 3:00 PM, and a Final Hearing on December 3, 2004. After seeking and receiving two extensions for filing, Petitioners' Amended Petition was filed on October 15, 2004.

4. In summary, the Amended Petition incorporated objections stated in the September 6, 2004 Petition, and included the following additional averments:
    a. the type of and the material proposed for the sanitary sewer line could prevent future use of the properties by the Petitioners; and
    b. construction would be permitted which would materially impact and affect property not under the control of the Permittee; and
    c. the plans do not properly show the water line profile, including fire hydrants and taps; and

d. the proposed construction materially burdens the properties of the [Petitioners] when other better and more feasible alternatives are available to the Permittee, when considering soil types and makeup, including the significant fill material located on a portion of the real estate to be used for the project.

Petitioners stated the following issues for consideration at a hearing:

a. Correction of the plans as it relates to known storm sewers.
b. Review of, and where necessary, a correction or modification to the type of material used for the sanitary sewer line.
c. The correction of the plans as it relates to the profile of the water line and the proper placement of taps and fire hydrants.
d. Alternatives to the proposed construction of both the sanitary sewer and water line when considering the burden to the Petitioners, when considering the soil types and makeup, including the areas of fill.

Petitioners stated the following appropriate permit terms and conditions:

a. The correction to the plans to show the location of the storm sewers.
b. The correction to the plans to show the profile of the water line, along with the proposed taps and fire hydrants.
c. The Permit be conditioned upon the ability of the Applicant to possess the necessary property interest in the real estate proposed for the water and sanitary sewer lines.
d. The Permit be conditioned upon the Applicant constructing the water and sanitary sewer lines using methods and materials that do not adversely impact the property when considering the soil types and make up, including the fill material located in the area of the proposed construction.

Counsel for Petitioners indicated that there were no other amendments or revisions to Petitioner's Petition and Amended Petition for Administrative Review at the evidentiary hearing on December 3, 2004. Tr. p. 8.

5. The November 18, 2004 Final Prehearing Conference was attended by counsel for Permittee and for IDEM, along with their engineers. Petitioners neither attended, nor had leave been granted for nonattendance. The Court granted the Permittee's Motion to Dismiss Petitioners for failure to attend, and issued a Report of Final Prehearing Conference so indicating on November 19, 2004. The November 19, 2004 Order confirmed the December 3, 2004 Final Hearing setting.

6. Petitioners' November 29, 2004 Motion to set Aside Proposed Order of Default, based upon a calendaring error, was granted on November 30, 2004.

7. The Final Hearing was held as scheduled on December 3, 2004, 1:00 PM, EST. Petitioner Dr. McAllister attended and was represented by counsel; Permittee attended by its consulting engineers Don Robin and Keith Bryant, and was represented by counsel; Respondent IDEM attended by its staff engineer Sheri Jordan. Witnesses were sworn and evidence heard and concluded. Proposed Findings of Fact, Conclusions of Law, and Proposed Orders were submitted by Petitioners and Permittee on December 17, 2004, (Permittee's submission included its Motion to Dismiss), and by IDEM on December 20, 2004. Permittee forwarded a copy of the hearing transcript of January 13, 2005.

8. At the December 3, 2004 evidentiary hearing, Petitioners attended by counsel of record and by Dr. Allan J. McAllister. At the evidentiary hearing held on December 3, 2004, Petitioners' counsel indicated that "Dr. McAllister is here today" when asked if there was "any change to the individuals named, the scope of those individuals, or just Dr. McAllister is here today?" Tr. p. 5.

9. Permittee's counsel's opening argument stated that Petitioners' objections were outside the scope and purview of the permit process, and stated issues to be raised in another forum. Tr. p. 9. The Court interpreted Permittee's counsel's opening argument as raising a threshold issue of subject matter jurisdiction; the parties agreed to proceed with the final hearing with the Court taking the issue of subject matter jurisdiction under advisement. Tr. p. 10. Petitioners' counsel stated a stipulation that easement and condemnation issues were outside the jurisdiction of OEA. *Id*.

10. Dr. McAllister's uncontroverted testimony indicated that he was a property owner of three of the seven lots addressed by the Petitioners in their initial and Amended Petitions, as depicted on an aerial map admitted into evidence as Petitioners' Exhibit 1. Tr. p. 14. Dr. McAllister stated that he purchased the northernmost parcel fifteen to twenty years ago as an empty, wooded lot with a dilapidated and condemned home. Tr. p. 14, 15. With the help of local contractor Kevin Tagg, the home was removed, along with about ten large cottonwood trees, and fill was placed on the property. The trees were approximately 60 to 75 feet tall, about 4 feet in diameter, and were cut up, and limbs removed, and were used as fill on the property. Fill occurred over time, with a height at the tallest portion on the west end of the property, from 18 to 22 feet in height, and approximately 15 feet at the east and south ends of the property, which is traversed by a stream bank. Tr. p. 16. Dr. McAllister further testified that the fill height and composition was not actually determined, and included municipal fill of concrete pieces from six foot square in dimension, to six feet by four feet, to nine inch to six inch deep road fill. Tr. p. 17. The fill included problem junk fill dropped off without permission by local citizens, including junk, wood, old appliances and Christmas trees. *Id*.

11. While the fill was covered by dirt, Dr. McAllister testified that he believed that the fill was unstable, due to the lack of crushing concrete to a recommended 16 by 16 dimension, that voids were likely and were only filled in by rainfall and erosion, and that organic material was present. Tr. p. 18.

12. Dr. McAllister further stated that the depths of the project extended to the bottom of where the fill began, or less. Tr. p. 22.

13. Dr. McAllister testified that the issue for OEA was the stability of the permitted area, since he could not guarantee the precise location of the things that he knew were below the surface. Tr. p. 19. He stated that he was concerned that the water and sewer lines would be stable and not be broken apart, that the lines remain functional. Tr. p. 21. As for the integrity of the water and sewer lines, Dr. McAllister testified that they would just be shifting, due to the materials underground, which included organic material from the trees, which would decompose and shift. Tr. p. 22. The water lines which were extended to a temporary structure on the property by tapping off of Dr. McAllister's well were on the surface, maintained virtually in dirt. Tr. p. 21. When asked if he believed that the plan as submitted did not comply with state regulations or design regulations, Dr. McAllister did not respond, but his counsel referred to his opening argument of the type and instability of fill being noncompliant with 327 IAC 12 et seq.. Tr. p. 27.

14. Dr. McAllister further raised the issue of erosion, that he believed that by constructing the project within easements used by other utilities on the property, that erosion would not be a problem. Tr. p. 23.

15. Dr. McAllister also raised the issue that the property value is ruined by the lines' proceeding through the center of the property, then indicated that such issue was an issue subject to the jurisdiction of another court, and not OEA. Tr. p. 19.

16. Dr. McAllister further testified that he leased the ground to Petitioner Bruce Aaron, a contractor who has constructed a temporary model home on the property. Tr. p. 20. Dr. McAllister stated that the permanent easement sought by Permittee actually touches the corner of the temporary home. *Id.* Since the home is on a very minimal foundation, Dr. McAllister stated that anything coming close to the foundation, and movement, would cause damage to the inside of the building. Tr. p. 21. The home's current sewer service is a holding tank. Tr. p. 25. Prior to Dr. McAllister's awareness of the project, he installed over a thousand feet of 36-inch drain tile to the temporary structure, based upon Petitioner Bruce Aaron's expressed interest in extending the current two-year lease, due to expire in December, 2005, for five years or longer, for an amount higher than the current $250 per month. Tr. p. 27, 28.

17. IDEM's project engineer, Sheri Jordan, testified that she worked in the facility construction section of IDEM's Office of Water Quality. Tr. p. 29. Her duties included review of plans and specifications for sewer systems, wastewater treatment plants, in order to determine whether submitted plans and specifications met the requirements of 327 IAC 3, and if so, to draft construction permits. *Id*. Ms. Jordan was assigned to review the permit in controversy. Tr. p. 30. Her review indicated no deficiencies, so she drafted a permit per form. *Id*. Ms. Jordan described the project in detail, and indicated that in drafting the permit terms for

further internal approval, that she utilized a check list to avoid error or omission. Tr. p. 31, 32. Ms. Jordan testified that the project used PVC sewer piping, and was approved for PVC standard ASTM D23-21, as required by applicable regulations, which also extended to the installation method, type of bedding, type of backfill, the depth of both the backfill and bedding, and how the remainder of the trench should be filled, depending on the surface material. Tr. p. 34. The ASTM standards are a required standard, and are included in the permit requirements by reference to 327 IAC 3. Tr. p. 45. ASTM requirements, including ASTM D23-21-89, are incorporated into 327 IAC 3. Tr. p. 38. For this project, the sewer piping size, fill type, bedding type and design (as demonstrated in either external specifications or a detailed drawing, Tr. p. 38) and plans and specifications met ASTM D23-21 requirements. Tr. p. 35, 36.

18. Ms. Jordan further testified that regulations binding on IDEM do not require plans and specifications to address stability of outside buildings, easements, and that the plans and specifications were submitted in compliance with the applicable requirements. Tr. p. 36, 37.

19. Ms. Jordan stated that she could not speculate on what a good alternative location might have been, nor was it within her job duties or requirements to conduct a site visit. Tr. p. 37. Regulations applicable to IDEM prohibited such consideration. Tr. p. 43.

20. Ms. Jordan testified that she had no concerns concerning the four inches of bedding under the pipe as related to IDEM and her required review, as regulations prohibit the use of debris, organic or unstable material, or rocks over a certain size, as bedding. Tr. p. 39. As for this project review, Ms. Jordan stated that she had no job or review responsibility for what may be underneath the bedding material. Tr. p. 39. However, from the engineering standpoint of cost concerns for the City of New Castle, who has maintenance responsibility for the project after it is constructed, she would hope that professionals on behalf of the City of New Castle would look underneath to determine how the underfill to address settling, because a situation may be created where the pipes could sink, causing maintenance for damaged pipes requiring replacement. Tr. p. 40. Ms. Jordan further stated that such concern did not fall within the parameters of the permit. *Id.* From a city planning perspective, but not within the scope of Ms. Jordan's job, she would probably do soil borings to evaluate the best place to locate the sewer, determine clearing costs, and to determine the long-term success of the project, she would consider these factors for cost. Tr. p. 41. Soil borings were not required by IDEM. Tr. p. 46. However, regulations applicable to IDEM prohibited evaluation of project cost. Tr. p. 43. Ms. Jordan further testified that since IDEM did not regulate other requirements concerning deeper land prior to laying pipe, such as soil borings, that she was not familiar with aspects of ASTM 23-21 (standard practice for underground installation) which might apply to this project. Tr. p. 42. However, the pipe had to demonstrate a maximum five percent deflection, tested after the fill has been in place thirty days. *Id.*

21. Ms. Jordan testified that she heard no testimony at the evidentiary hearing on December 3, 2004 which would cause her to doubt her decision on behalf of IDEM to issue the permit as stated. Tr. p. 44. She concluded that the permit was issued properly. *Id.* She further testified that if cost or construction problems occurred, that was the Permittee's obstacle, and that if the Permittee has to alter its plans and specifications, then it will have to seek a revision of the permit. *Id.*

22. The permittee's consulting engineer, Keith Bryant, testified that he was a professional engineer licensed in Indiana, Ohio, and Illinois, employed as vice president of environmental engineering with United Consulting Engineers and Architects, Indianapolis, and that he primarily did civil engineering, including wastewater and water design. Tr. p. 47, 48. Mr. Bryant testified that he was familiar with the plans, specifications and permit issued to the City of New Castle. Tr. p. 48. Mr. Bryant further stated that the plans as submitted met IDEM's applicable standards, rules, regulations and statutes, and that the permit was properly issued. *Id.* After considering the testimony offered on December 3, 2004, Mr. Bryant had no concern or doubt about the issuance of the permit. *Id*.

23. As for the erosion concerns raised by Dr. McAllister, Mr. Bryant stated that an erosion control permit, per Rule 5 of the state requirements, has been obtained. *Id*.

24. Mr. Bryant testified that if construction difficulties necessitate a design alteration, that a plan revision would need to be obtained. Tr. p. 49. Contractors bidding on the project, and awarded the bid, will have to comply with the plans and specifications as approved in the permit. Tr. p. 49.

25. Mr. Bryant further testified that soil boring had not been conducted because the permittee and United Consulting was aware of the fill, that bidding contractors are going to be warned and advised to assume a worst-case scenario. Tr. p. 50. And, boring would probably be stopped by the concrete debris described by Dr. McAllister, so no further information would be gained from soil boring. *Id*.

26. Mr. Bryant further testified that while modifications had been obtained, none were presently contemplated, although negotiation with property owners may result in seeking future modifications. None were contemplated concerning property owned by Dr. McAllister. Tr. p. 51.

27. Mr. Bryant testified that he had heard Ms. Jordan's testimony, and as concerned the affect of the project's integrity from underlying materials, stated that the steps the engineering firm would take concerning such issues included the presence, as usual, of an on-site inspector. Tr. p. 51. Debris usually do not appear in sharp transition, as exemplified by the example of a six foot piece of concrete, which would likely stick out of some portion of a trench, if the concrete piece was located primarily within four inches below the trench bottom. Tr. p. 51, 52. The presence of such debris would be known, as required by the plan's specifications. Tr. p. 52. Then, the material is undercut and suitable material is placed until fill is suitably stable to support the pipe, per normal procedure. *Id*.

28. Mr. Bryant testified that he had visited the project site several times. Tr. p. 52. While it data was not available to provide an exact dimension of the fill, Mr. Bryant testified that the trench on Dr. McAllister's property varied from sixteen to seventeen feet deep, depending on the fill level areas. *Id*. Mr. Bryant estimated that the sewer project would be located in the fill area near the fourteen to fifteen foot depth. Tr. p. 52, 53. Mr. Bryant testified that his estimates were closer than the twenty-six foot depths testified to earlier, but if the unsuitable fill was at twenty-six feet, then it was pretty unlikely that the project would reach that depth, as estimated from surrounding contours. Tr. p. 53. Mr. Bryant also relied on surveys conducted between two and three years ago, with updates, and the fill has been climbing since the survey data was gathered. *Id*.

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. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-27. 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. 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).

4. As the issue of Petitioners' standing is being resolved at the close of evidence, it is a Motion for Judgment on the Evidence to be treated as a Motion for Involuntary Dismissal under Trial Rule 41(B). *Michael v. Wolfe*, 737 N.E.2d 820, 822 (Ind. App. 2002), and the court may weigh evidence, judge witness credibility, and determine whether the party seeking a right to relief has met its burden of proof. *Wolfe, citing Plesha v. Edmonds ex rel. Edmonds*, 717 N.E.2d 981, 985 (Ind. App. 1999). The court is not limited to basing its ruling on an evaluation of the Petition for Administrative Review or Amended Petition's degree of compliance with Ind. Code § 13-15-6-2. *See also, Indiana Office of Environmental Adjudication v. Kunz,* 714 N.E.2d 1190 (Ind.Ct.App. 1999).

5. Ind. Code § 4-21.5-3-7(a)(1) (1998) provides that to qualify for administrative review of an agency order, a person must:
   State facts demonstrating that:
   (A) the petition 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.
   Huffman v. Office of Environmental Adjudication, 811 N.E.2d 806, 810 (Ind. 2004). While *Huffman* distinguishes this standard from "standing," the statute illuminates a similar legal concept, therefore any references to standing in Indiana proceedings before OEA reference the statutory standard.

6. "AOPA [Ind. Code § 4-21.5, et seq.] defines who can get administrative review. When a statute is clear, we [the court] do not impose other constructions upon it. *Ind. Bell tel. Co. v. Ind. Util. Regulatory Comm'n*, 715 N.E.2d 351, 354 (Ind.1999)…." *Huffman*, 811 N.E.2d at 812. "We hold that the statute, and only the statute, defines the class of persons who can seek administrative review of agency action." *Id*. at 813.

7. Petitioners are not the persons to whom the order is specifically directed, nor has there has been a demonstration or allegation that Petitioners seek review under Ind. Code § 4-21.5-3-7((a)(1)(C). (*Huffman* specifically prohibited review of "public harm", versus personalized harm. *Id.* at 812. Therefore OEA cannot analyze Petitioners' pled harms as providing them with a right to review under a public harm theory.) Petitioners' eligibility to seek administrative review in this matter requires that they demonstrate that they are aggrieved or adversely affected as stated in Ind. Code § 4-21.5-3-7((a)(1)(B) by IDEM's order issuing construction permit approval No. 16689.

8. The Court in *Huffman* defined "aggrieved or adversely affected" as "[e]ssentially, 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 legal interest." *Id*. at 810. "[T]he concept of "aggrieved" is more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm." *Id.* at 812.

9. In *Huffman*, the Supreme Court analyzed whether a private citizen/corporation owner was entitled to seek review of an NPDES permit for a source downstream from the corporation's property. 810 N.E.2d at 806. Ms. Huffman supported her aggrieved or adversely affected status by asserting, that while she did not reside on the corporate property, she had managed it and entered it since 1987. *Id*. at 815. Ms. Huffman asserted that "IDEM failed to address health risks to the residential use of contiguous property from toxicology research and other . . . activities involving discharge of water." The *Huffman* court held that OEA "never gave the parties an opportunity to provide additional evidence or to develop the arguments more fully, such as through a hearing." *Id*. at 814. Therefore because, OEA's decision on Ms. Huffman's aggrieved or adversely affected status was not supported by substantial evidence, the case was remanded to OEA for further proceedings as related to Ms. Huffman's health problems. *Id*. at 816.

10. In this case, Petitioners sought review for harm alleged to their property interests. This Court is therefore limited to analyzing the effect of the permitted activity on the Petitioners' property pecuniary interests.

11. Petitioners presented evidence, via Dr. McAllister's sworn testimony, alleging that the permit did not provide the water and sewer lines running under their property with the fill and fill stability required in 327 IAC 12, et seq., so as to remain intact and functional. Therefore, Petitioners would suffer or be likely to suffer harm to their legal interests. Petitioners have sufficiently alleged that they have suffered or be likely to suffer in the immediate future, personalized harm to a legal interest. Petitioners have demonstrated that they are aggrieved or adversely affected by IDEM's issuance of the permit.

12. In determining whether Petitioners may prevail in this matter, OEA may only consider whether IDEM's decision was in compliance with the applicable statutes, regulations and policies. This Court does not have the authority to address any other issues.

13. In this matter, the applicable regulations in this matter do not require the IDEM to consider either the potential costs to the residents or whether the selected location is not most accommodating to the surface usage and economic value of the property, in determining whether the proposed construction complies with 327 IAC 3.

14. This Court 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 ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*, I.C. 4-21.5-3-27(d). "*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), *In re: Objection to Denial of Excess Liability Trust Fund Claim No. 200203501, GasAmerica #47, Greenfield, Hancock County, Indiana,* (02-F-J-2954) 2004 OEA 123, 126.

15. OEA is required to base its factual findings on substantial evidence. *Huffman*, 811 N.E.2d 806, 809 (Ind., June 30, 2004) (appeal of OEA review of NPDES permit); *see also,* Ind. Code § 4-21.5-3-27(d). While the parties' evidence disputed whether the fill type and stability complied with 327 IAC, et seq., OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." Ind. Code § 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 at 129.

16. In this matter, substantial evidence supports the conclusion that the fill type and stability complies with the applicable regulatory requirements stated in 327 IAC, et seq., and in permit 16689. To the extent available at law, Petitioners' legal interests were properly addressed by the Permittee and IDEM in its issuance of permit 16689.

17. IDEM regulatory authority includes the presumption that any person that receives a permit will comply with the applicable regulations. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana,* 1998 WL 918589 (Ind. Off .Env. Adjud.).

18. Petitioners have alleged that they are sufficiently aggrieved and adversely affected, and have raised sufficient issues upon which relief might be granted. Therefore, Permittee/Respondent's Motion to Dismiss should be denied. Petitioners have failed to present sufficient evidence that permit 16689 was improperly issued. Therefore, the substantial evidence presented by the parties to this cause supports entry of a Final Order.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition a and Amended Petition for Administrative Review filed by Petitioners Allan J. McAllister, James H. Ferrell, Gordon Clouse and Bruce Aaron is DENIED and DISMISSED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss filed by Permittee/Respondent City of New Castle is DENIED.

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 21st day of February, 2005.

_____
Hon. Mary L. Davidsen
Chief Environmental Law Judge