

**Objection to the Issuance of NPDES Permit No. IN00062367,
Rattlesnake Creek WWTP Plant and Sanitary Sewer System, White County, Indiana**

**Don Long, Sherry Long, Richard Roach, Rick Roach, Terry Dill: Petitioners;
Twin Lakes Regional Sewer District: Permittee/Respondent;
Indiana Department of Environmental Management: Respondent.
2007 OEA 77 (06-W-J-3817)**

OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 77, cite this case as
Rattlesnake Creek WWTP, 2007 OEA 77.

TOPICS:

water
summary judgment
notice
Ind. Code § 4-21.5-3-7(a)(3)
Ind. Code § 13-15-6-1
Ind. Code § 4-21.5-3-2(e)
Ind. Code § 13-15-6-7(d)
Ind. Code § 13-15-5-3
Ind. Code § 13-15-8-2
comments
actual notice
timely filing
request for admission
sanctions

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner: Deborah Albright, Esq.;
Monday Rodeheffer Jones & Albright
Permittee/Respondent: Donald J. Tribbett, Esq.
IDEM: Nancy Holloran, Esq.

ORDER ISSUED:

June 7, 2007

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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3. The IDEM caused a public notice requesting comments on the proposed issuance of the Permit to be published in the Monticello Herald Journal on August 29, 2005. The Monticello Herald Journal serves White County, Indiana, the county where the treatment plant will be located.
4. None of the Petitioners submitted comments to the IDEM regarding the draft NPDES permit.
5. None of the Petitioners were notified of the issuance of the Permit. The Petitioners learned of the Permit on or before May 30, 2006.
6. None of the Petitioners own or reside on real estate adjacent to the property where the Rattlesnake Creek treatment plant will be located.
7. As established by his May 16, 2007 admission to Permittee/Respondent's Request for Admission¹, on April 7, 2006, Terry Dill, a Petitioner in this matter, received notice of the date on which the Permit was issued.

Conclusions of Law

8. 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.
9. 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.
10. 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). 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 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).

¹ See the Permittee/Respondent's Motion (1) to Deem Request for Admission Admitted (2) For Leave to Designate Admission as Additional Evidence in Support of Summary Judgment Motion and (3) to Assess Costs, filed May 25, 2007; and the Petitioners' Response to Motion (1) to Deem Request for Admission Admitted (2) For Leave to Designate Admission as Additional Evidence in Support of Summary Judgment Motion and (3) to Assess Costs filed May 30, 2007.

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11. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” IC 4-21.5-3-23. 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. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind.Ct.App. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *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).”
12. Ind. Code § 4-21.5-3-7(a)(3) and Ind. Code § 13-15-6-1 require that a petition for review must be filed within fifteen (15) days after a person is given notice of the issuance of a NPDES permit. Ind. Code § 4-21.5-3-2(e) and Ind. Code § 13-15-6-7(d) provide that three (3) days shall be added to this time if the notice is served by mail.
13. Ind. Code § 13-15-5-3 requires the Commissioner of the IDEM to give notice of the issuance of a permit to any person who submitted comments on the draft or who requested notice.
14. Ind. Code § 13-15-8-2 requires that a permit applicant give notice to all adjacent landowners or the occupants of adjacent land if the permit is for undeveloped property or property for which a valid permit has not been previously issued. However, the Petitioners are not adjacent landowners. In addition, there is no right to notice under this statute for those Petitioners whose only claim is that they use Rattlesnake Creek.
15. The Petitioners allege that they should have received individual notice because they live on the creek or use the creek. These facts might have been sufficient to show that the Petitioners were aggrieved or adversely affected if the Petitioners had filed a timely petition for review, but this is not sufficient to establish that the Petitioners were entitled to notice.
16. The Petitioners have not provided any evidence that they (1) submitted comments in response to the notice regarding the draft permit; (2) requested notice of the permit action; or (3) were entitled to notice under any other statutory or regulatory provision. The Petitioners were not entitled to notice.
17. In addition, one of the Petitioners, Terry Dill, had actual notice that the Permit had been issued.² The Petitioner learned of this on April 7, 2006. As the Permit was issued on April 6, 2006, this Petitioner had sufficient time to file a timely petition for review of the Permit.

² Counsel’s attempt to qualify its admission that this does not constitute notice has no affect. It is this ELJ’s duty to determine the legal affect of the admission.

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18. If the Petitioners had been entitled to notice and did not receive it, this fact *might* have altered the outcome of this issue. However, as the Petitioners were not entitled to notice, they must comply with the time deadlines set out in Ind. Code § 4-21.5-3-7(a)(3) and Ind. Code § 13-15-6-1.
19. Any petition for review should have been filed no later than April 24, 2006³. The Petitioners' petition for review in this matter was not timely filed.
20. There is no genuine issue as to a material fact and summary judgment is appropriate.
21. As this conclusion disposes of this matter, no other issues will be addressed.
22. The Permittee/Respondent's motion to deem request for admission admitted is **DENIED**. The Petitioners admitted that Terry Dill received the designated e-mails. As noted above, the Petitioners' attempt to qualify this admission has no effect.
23. The Permittee/Respondent's motion for leave to designate admission as additional evidence in support of its Motion for Summary Judgment is **GRANTED**.
24. The Permittee/Respondent's motion for sanctions and/or costs is **DENIED**.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that Twin Lakes Regional Sewer District's Motion for Summary Judgment is **GRANTED**. The Petition for Administrative Review is **DISMISSED**. The hearing scheduled for June 27, 2007 is **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 7th day of June, 2007 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

³ The ELJ assumes that the permit notice was sent by mail and that the time for filing a petition was eighteen (18) days.