Objection to Issuance of Sanitary Sewer Construction Permit Approval No. 17305R, West Boggs Sewer District, Inc., Loogootee, Martin and Daviess Counties, Indiana. 2008 OEA 142 (07-W-J-3898)

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 142, cite this case as ***West Boggs*, 2008 OEA 142.**

TOPICS:

construction
sanitary sewer system
air relief valves
too close
buildings
lift station location
decrease property value
summary judgment
high points
air locking
potential aesthetic concerns
infiltration
inflow
erosion
I.C. § 13-13, *et seq.*
I.C. § 13-15-6-2
I.C. § 4-21.5-3, *et seq.*
I.C. § 4-21.5-5, *et seq.*
I.C. § 13-23-9-4
315 I.A.C. 1-2-1(9)
315 I.A.C. 1-3-3
327 I.A.C. 3, *et seq.*

PRESIDING JUDGE:
Davidsen

PARTY REPRESENTATIVES:

Petitioners:	Charles and Connie Ash, *pro se*
Permittee/Respondent:	Daniel P. McInerny, Esq: Bose McKinney & Evans, LLP.
IDEM:	Julie E. Lang, Esq.

ORDER ISSUED:
September 3, 2008

INDEX CATEGORY:
Water

FURTHER CASE ACTIVITY:
[none]

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

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE)
SANITARY SEWER CONSTRUCTION)
PERMIT APPROVAL NO. 17305R)
WEST BOGGS SEWER DISTRICT, INC)
LOOGOOTEE, MARTIN and)
DAVIESS COUNTIES, INDIANA)
____________________________________) CAUSE NO. 07-W-J-3898
)
Charles and Connie Ash,)
Petitioners,)
West Boggs Sewer District, Inc.,)
Permittee/Respondent)
Indiana Department of Environmental Management,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Court on Motions for Summary Judgment filed by West Boggs Sewer District, Inc. ("West Boggs") and the Indiana Department of Environmental Management ("IDEM"), and the response filed by Petitioners Charles and Connie Ash, which pleadings are part of the Court's record; and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, evidence, briefs, responses and replies of the parties; and being duly advised, now finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. On March 8, 2007, IDEM issued Permit Approval No. 17305R ("Permit") to West Boggs Sewer District, which authorized the construction of a sanitary sewer system in Daviess and Martin Counties near West Boggs Lake.

2. On March 23, 2007, Petitioners, owners of property upon which a part of Permitted activity will be constructed, timely appealed this decision to the Office of Environmental Adjudication ("OEA"). On March 27, 2007, the Chief Environmental Law Judge issued a Notice of Incomplete Filing and Order to Supplement Petition. Petitioners filed a revised petition for administrative review on April 25, 2007.

3. In their Request for Appeal, Petitioners raised these objections: 1) that two (2) air relief valves were currently located too close to buildings on their property and should be moved farther to the north; and 2) that the current location of Lift Station No. 2 "will decrease our property value considerably" and that moving the Station down gradient and closer to the roadway will "save considerable material and improve the value around our garage." *See* Petitioners' Request for Appeal at 1-2.

4. A Prehearing Conference was held on June 11, 2007. Petitioners attended in person and represented themselves. Permittee/Respondent attended by legal counsel Daniel P. McInerny, Esq. Respondent IDEM attended by legal counsel Julie E. Lang, Esq. and by engineer D.S. Patel.

5. Motions for Summary Judgment were later filed in opposition to Petitioners by Respondents West Boggs and IDEM on August 24, 2007. Petitioners filed a Response, entitled "Motion for Summary Judgment" on September 22, 2007. IDEM filed a Reply on October 5, 2007 and West Boggs filed its Reply October 9, 2007. IDEM filed Proposed Findings of Fact, Conclusions of Law and Order on June 13, 2008. The Court's June 17, 2008 scheduling Order allowed the parties until June 27, 2008 to file Proposed Findings of Fact, Conclusions of Law and Orders; no other parties filed, or requested additional time to file.

6. West Boggs supported its Motion for Summary Judgment by affidavit stating that air relief valves are required at high points to prevent air locking and that the optimal location for the air relief valves would have been about 35 feet from Petitioners' front door. *See* Affidavit of John W. Wetzel, P.E., at 2, ¶ 8. West Boggs agreed to move the valves around 200 feet farther north "in an effort to minimize any potential aesthetic concerns." *Id.* West Boggs also stated by affidavit that relocating the lift station could cause infiltration/inflow and erosion problems and would potentially increase costs due to purchase, operation and maintenance of the larger pumps required by the lower elevation. *See id.* at ¶ 6.

7. With its Motion for Summary Judgment, IDEM submitted the affidavit of IDEM employee D.S. Patel which provided that he reviewed West Boggs' application materials, including plans and specifications provided to IDEM. Mr. Patel stated that the current locations of both the air valves and the lift station complied with the pertinent rules. *See* Affidavit of D.S. Patel at 2, ¶ 5-6.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized with the implementation and enforcement of specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq*. The Office of Environmental Adjudication ("OEA" or "Court") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-7-3.

2. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-23, Ind. Code § 4-21.5-3-27, and 315 Ind. Admin. Code 1-2-1(9). 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. OEA 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. App. 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. App. 1981).

4. This was held to be directly applicable to the Office of Environmental Adjudication in *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management,* 820 N.E.2d 771, 781 (Ind. Ct. App. 2005). In this case, the ELJ specifically concluded that she must give deference to the agency's interpretation. The Appellate Court reversed OEA's decision because the ELJ used the wrong standard of review. The Court stated that the ELJ mistakenly applied the appellate standard of review rather than a *de novo* standard of review. *Id*. The OEA must apply a *de novo* standard of review when making findings of fact and conclusions of law and may not defer to IDEM's findings or conclusions.

5. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also,* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM properly issued the isolated wetland permit, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 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 123, 129. *See also, Blue River Valley*, 2005 OEA 1, 11-12. *Marathon Point Service and Winimac Service,* 2005 OEA 26, 41.

6. 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." I.C. § 4-21.5-3-23.

7. The moving party bears the burden of establishing that summary judgment is appropriate. In this case, both Permittee/Respondent West Boggs and Respondent IDEM sought summary judgment against Petitioners.[1] When the moving party sets out a *prima facie* case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. "A factual issue is said to be 'genuine' if a trier of fact is required to resolve the opposing parties differing versions of the underlying facts." *York v. Union Carbide Corp.*, 586 N.E.2d 861, 864 (Ind. Ct. App. 1992). "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. Of Voters Registration,* 585 N.E.2d 700, 703-704 (Ind. Ct. App. 1992). 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).

8. In responding to a motion for summary judgment, mere assertions, opinions, or conclusions of law asserted by the non-movant will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan V. Snap-On Tool Corp*. 478 N.E.2d 116, 122 (Ind. Ct. App. 1985).

9. Ind. Code § 13-15-6-2 sets out the requirements for appealing a permit issued by IDEM as follows:

    A written request for an adjudicatory hearing under section 1 of this chapter must do the following:
    (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. Additionally, the Indiana Administrative Code contains the following requirements related to the initiation of a proceeding for administrative review with the Office of Environmental Adjudication:

[1] As the summary judgment motions were based on similar grounds, and sought similar relief, the Court will refer to the two motions as one motion for summary judgment.

> (b) The petition for administrative review shall contain the following information:
>
> …
>
> (4) State with particularity the legal issues proposed for consideration in the proceedings as follows:
>
> (A) In a case involving an appeal of a permit, identify the following:
>
> (i) *Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.*
>
> (ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

315 Ind. Admin. Code 1-3-2(b) (emphasis added).

11. A review of 327 Ind. Admin. Code 3-6, *et seq*., and an unproductive search for other relevant regulations, shows that the Permit, as issued, complies with applicable regulations. No regulations relevant to IDEM's jurisdiction require either an applicant or IDEM to consider the concerns stated by Petitioners in their petition for administrative review. Petitioners' concerns with the location of the air relief valves are that the air relief valves are too close to their buildings. *See* Petitioners' Request for Appeal at 1. Petitioners request that these valves be moved farther to the north where there are no buildings. *Id.* Petitioners have not, however, identified any environmental concern or technical deficiency with the location of the valves as required by 315 I.A.C. 1-3-2(b). Petitioners have not alleged that the location of the valves is in violation of any permitting rule or any other requirement. Therefore, OEA lacks legal authority to grant the relief Petitioners seek. *See Portage U.S. Highway 6,* 2004 OEA 1; *Grahn,* 2004 OEA 40.

12. Petitioners have not alleged or stated sufficient facts or legal issues with which to support their appeal or to establish an issue of material fact; therefore, summary judgment for IDEM is appropriate regarding the location of the air relief valves.

13. In a similar manner, Petitioners' concerns with the location of Lift Station No. 2 are that their property value will decrease and that moving the lift station down-gradient and closer to the roadway "will save considerable material and improve the value around our garage." Petitioners' Request for Appeal at 2. Petitioners also hope to "not see, hear, or smell the lift station." *Id.* Again, these concerns are not related to any environmental concern nor any technical deficiency regarding the location of the lift station. Petitioners have not alleged that the location of the lift station is in violation of any rule or requirement, nor that there was any deficiency with the permitting process. Therefore, OEA lacks legal authority to grant the relief Petitioners seek. *See Portage U.S. Highway 6,* 2004 OEA 1; *Thompson/Emerson Barrett,* 2004 OEA 40.

14. Petitioners have not alleged or stated sufficient facts or legal issues with which to support their appeal or to establish an issue of material fact; therefore, summary judgment for IDEM is appropriate regarding the location of Lift Station No. 2 as well.

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FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that IDEM's Motion for Summary Judgment is **GRANTED.** All further proceedings scheduled in this matter are **VACATED.**

You are hereby further notified that pursuant to provisions of Ind. 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 I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 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 3rd day of September, 2008 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge