Objection to the Issuance of Construction Permit Approval No. 19077
State Road 46 and Hulman Street Sewer Expansion Terre Haute, Vigo County, Indiana
2009 OEA 118, (08-W-J-4124)

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 118, cite this case as ***Hulman Street Sewer Expansion*, 2009 OEA 118.**

TOPICS:
sewer
easement
summary judgment
underground storage tank
free product
excavation
reimbursement
costs
corrective action
initial site characterization
corrective action plan
tank removal
328 IAC 1-3-5(d)(14)
field screening
MNA
monitored natural attenuation,

PRESIDING ENVIRONMENTAL LAW JUDGE:
Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM:	Sierra L. Alberts, Esq.
Petitioners:	David P. Friedrich, Esq.; Wilkinson Goeller Modesitt Wilkinson & Drummy
Respondent/Permittee:	K. Robert Schalburg, Esq.; Modesitt Law Firm PC

ORDER ISSUED:
August 10, 2009

INDEX CATEGORY:
Water

FURTHER CASE ACTIVITY:
[none]

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State Road 46 and Hulman Street Sewer Expansion Terre Haute, Vigo County, Indiana
2009 OEA 118, (08-W-J-4124)

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

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF	)	
CONSTRUCTION PERMIT APPROVAL NO. 19077	)	
STATE ROAD 46 and	)	
HULMAN STREET SEWER EXPANSION	)	
TERRE HAUTE, VIGO COUNTY, INDIANA	)	
_____	)	CAUSE NO. 08-W-J-4124
Mark Haring and Leslie Haring,	)	
Petitioners,	)	
Terre Haute Sanitary District,	)	
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 Petitioners Mark and Leslie Haring's May 28, 2008 Petition for Administrative Review, by counsel, on Permittee/Respondent's Terre Haute Sanitary District's September 26, 2008 and Indiana Department of Environmental Management's (IDEM) September 30, 2008 respective Motions for Summary Judgment, by counsel, and on Permittee/Respondent's December 30, 2008 Motion to Dismiss, which pleadings are a part of the Court's record; and the Chief Environmental Law Judge ("ELJ") having read and considered the petitions, motions, and the briefs 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 Final Order:

FINDINGS OF FACT

1. On May 15, 2008, IDEM approved the issuance of construction permit approval #19077 ("permit" or "project") to the Terre Haute Sanitary District ("District"), authorizing the construction of an eight-inch diameter sanitary sewer line and extension of an existing thirty-inch diameter sanitary sewer, per I.C. § 13-15, *et seq*., and 327 IAC 3, *et seq*. The sewer is to be located along State Road 46 and Hulman Street and easements parallel to State Road 46, Terre Haute, Vigo County, Indiana.

2. On May 28, 2008, Petitioners Mark and Leslie Haring (the "Petitioners"), by counsel, filed a Petition for Administrative Review and Request for Administrative Hearing ("Petition") of the Permit. In their Petition, the Petitioners alleged that they owned real estate for Dr. Haring's dental practice bearing the easement where the project would be constructed. Petitioners stated that they opposed the project's construction because "[i]t is Dr. Haring's intention to build one or two buildings on the east side of his property. Dr. Haring will be unable to construct the buildings if the sewer lines run across Haring's property as set forth in the Construction Permit."

3. On May 30, 2008, the Court ordered Petitioners to supplement their petition by including a copy of the IDEM action they sought to appeal, and to copy the Petition on the other parties. Petitioners complied in their June 2, 2008 Amended Petition for Administrative Review and Request for an Administrative Hearing, but did not modify the substance of their grievance against IDEM's issuance of the Construction Permit.

4. A prehearing conference was held as scheduled on July 3, 2008, with all parties present by counsel. Counsel for Petitioners and Permittee/Respondent District requested additional time to pursue settlement, and requested submission of a Status Report. The District's August 18, 2008 Status Report and Petitioners' August 22, 2008 Status Report confirmed the substance of Petitioner's grievance, noted that settlement was not likely, and proposed that a schedule for final hearing be set. Petitioners did not request further opportunity to amend their Petition for Administrative Review.

5. The parties, by counsel, agreed on a schedule for dispositive motions during the September 8, 2008 Telephonic Status Conference. The September 9, 2009 Report of Telephonic Status Conference and Case Management Order set dispositive motions to be filed by September 30, 2008, responses to be filed by October 30, 2008, and replies and motions for oral argument to be filed by November 28, 2008. The District filed its Motion for Summary Judgment (and supporting brief) on September 26, 2008; IDEM filed its Motion and supporting brief on September 30, 2008. On October 31, 2008, Petitioners, by counsel, sought an unopposed thirty-day extension to file their responses, which extension was granted.

6. No further briefing on summary judgment was filed with the Court. On December 30, 2008, the District filed a Motion to Dismiss the Petition for Administrative Review, based on Petitioners' lack of response. On July 10, 2009, IDEM filed a Motion for Final Order of Default. No further filings were submitted by a party, in response to 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 I.C. § 4-21.5-7, *et seq*.

2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-27, and 315 IAC 1-2-1(9). Findings of fact they may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

3. In this case, the District and IDEM both moved for summary judgment in opposition to the Petition as to whether any genuine issues of material fact exist that the location of the project on Petitioners' property affects whether IDEM correctly issued Construction Permit 19077 to the District.

4. 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; *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App. 1998); *Ind. Trial Rule* 56(C).

5. The moving party bears the burden of establishing that summary judgment is appropriate. "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute of 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). A fact is "material" if it helps to prove or disprove an essential element of plaintiff's cause of action. *Weide v. Dowden*, 664 N.E.2d 742, 747 (Ind. Ct. App. 1996). 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); *State v. Livengood*, 688 N.E.2d 189, 192 (Ind. Ct. App. 1997).

6. In this case, Petitioners, as the parties opposing summary judgment, did not respond. Typically, a party opposing summary judgment must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991); *citing Elkhart Community School Corp. v. Mills*, 546 N.E.2d 854 (Ind. Ct. App. 1989). An opposing party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact as 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). Factual disputes that are irrelevant or unnecessary will not be considered. *Owen v. Vaughn*, 479 N.E.2d 83, 87 (Ind. Ct. App. 1985). Once each 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. Petitioners did not respond to the motions for summary judgment. As opponents to summary judgment are not required to respond, this Court will not default Petitioners for failing to meet a discretionary obligation. This Court may not craft Petitioners' responsive arguments. Instead, this Court must determine whether the District and IDEM, as movants for summary judgment, met the requisite burden of proof to be entitled to summary judgment.

7. The ELJ is not permitted to weigh the evidence or judge credibility when deciding whether to grant summary judgment. "Summary judgment must be denied if the resolution hinges upon state of mind, credibility of the witnesses, or the weight of the testimony. Mere improbability of recovery at trial does not justify the entry of summary judgment against" a party. *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706 (Ind. Ct. App. 1999).

8. The OEA's 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. I.C. § 4-21.5-3-27(d); *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, 781 (Ind. App. 2005). "*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." *Grissell v. Consl. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

9. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties dispute whether IDEM correctly issued Permit 19077 without regard to Petitioners' intended future construction articulated to IDEM in Petitioners' Petition for Administrative Review, 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 test '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 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.

10. I.C. § 4-21.5-3-7(a)(1) (1998) provides that to qualify for administrative review of an agency order, a person must:
    (1) 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 NE.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.

11. "AOPA [I.C. § 4-21.5, *et seq*.] defines who qualifies for administrative review. When a statute is clear, we 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) "(other cites omitted) *Huffman*, *Id*. 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.

12. Petitioners are not the persons to whom the order is specifically directed, nor has there been a demonstration or allegation that Petitioners seek review under I.C. § 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 I.C. § 4-21.5-3-7(a)(1)(B), by IDEM's order issuing construction permit approval No. 19077.

13. 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.

14. In *Huffman,* the Supreme Court 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 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." As 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, 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 impact. *Id*. at 816.

15. 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.

16. As Respondents IDEM and the District correctly argue, the OEA has considered several appeals of sewer construction permit approvals based upon impact to land use, and has established and published precedent rejecting land use as a dispositive factor, per I.C. § 4-21.5-3-27(c), including *In re: Wastewater Treatment Plant and Sanitary Sewer Construction Approval No. 16684, Sidney, Indiana*, 2004 OEA 99 ("Sidney WWTP") and *Objection to the Issuance of 327 IAC Article 3 Construction Permit Application Plans and Specifications for Blue River Valley Area Sanitary Sewer and Water Project Permit Approval No. 16689, New Castle, Henry County, Indiana*, 2005 OEA 1 ("Blue River Valley").

17. Petitioners presented evidence, in their Petition for Administrative Review, Amended Petition, and Status Report, that Petitioners believe that IDEM erred in issuing the Permit because "Dr. Haring will be unable to construct the buildings if the sewer lines run across Haring's property as set forth in the Construction Permit".

18. 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.

19. 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. *Blue River Valley*, 2004 OEA 1, 11; *Sidney WWTP*, 2004 OEA 99, 102.

20. In this matter, substantial evidence supports the conclusion that Construction Permit 19077 complies with the applicable regulatory requirements stated in 327 IAC, *et seq*. To the extent available at law, Petitioners' legal interests were properly addressed by the Permittee and IDEM in its issuance of permit 19077.

21. This Court must presume 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.). By its own terms, Construction Permit 19077 requires the District to "obtain all local permits before construction and/or operation of the proposed project." *Permit, p. 2 of 5*. In order for the District to construct per Permit 19077, the District will have to acquire legal access to the easement on Petitioners' property; if access remains disputed among the parties, then they may proceed at the proper time and in the appropriate forum.

22. Petitioners have alleged that they are sufficiently aggrieved and adversely affected. The District and IDEM have presented sufficient evidence that no genuine issue of material fact exists, as a matter of law, that permit 19077 was properly issued as a matter of law. Beyond the assertion stated in their Petition for Administrative Review and following pleadings, Petitioners have elected not to present evidence that Permit 19077 was improperly issued. Therefore, the substantial evidence presented by the parties to this cause supports entry of a Final Order granting the District's and IDEM's Motions for Summary Judgment.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition and Amended Petition for Administrative Review filed by Petitioners Mark Haring and Leslie Haring is **DENIED** and **DISMISSED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment filed by Permittee/Respondent Terre Haute Sanitary District and by the Indiana Department of Environmental Management are **GRANTED.** The Motion to Dismiss filed by Permittee/Respondent Terre Haute Sanitary District is **DENIED**.

You are further advised that, pursuant to I.C. § 4-21.5-5, *et seq*., this Final Order is subject to judicial review. Pursuant to I.C. § 4-21.5-5, *et seq*., 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 10th day of August, 2009.

Hon. Mary L. Davidsen
Chief Environmental Law Judge