**Objection to the Issuance of Construction Permit Approval**
**53rd and Adams Sanitary Sewer Reconstruction**
**Merrillville, Lake County, Indiana**
**2009 OEA 90, (08-W-J-4125)**
**and 2009 OEA 172**

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**OFFICIAL SHORT CITATION NAME:** When referring to the cite, please reference Gary Sanitary District, **2009 OEA 90** and/or **2009 OEA 172**.

**TOPICS:**
Summary Judgment
material
genuine
relevance
authentication

**PRESIDING ENVIRONMENTAL LAW JUDGE:**
Catherine Gibbs

**PARTY REPRESENTATIVES:**

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| IDEM: | Nancy Holloran, Esq. |
| Petitioner: | Eli Gusan, pro se |
| Permittee: | Susan M. Severtson, Esq.; City of Gary |

**ORDER ISSUED**:
**2009 OEA 90** - Findings of Fact, Conclusions of Law & Final Order - July 27, 2009

**2009 OEA 172** - Findings of Fact, Conclusions of Law & Final Order and Order Denying Motion to Dismiss - December 10, 2008

**INDEX CATEGORY:**
Water

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**FURTHER CASE ACTIVITY:** [none]

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**53rd and Adams Sanitary Sewer Reconstruction**
**Merrillville, Lake County, Indiana**
**2009 OEA 90, (08-W-J-4125)**

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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 | ) | |
| CONSTRUCTION PERMIT APPROVAL | ) | |
| 53RD AND ADAMS SANITARY SEWER | ) | |
| RECONSTRUCTION | ) | |
| MERRILLVILLE, LAKE COUNTY, INDIANA | ) | |
| _____ | ) | CAUSE NO. 08-W-J-4125 |
| Eli Gusan, | ) | |
| Petitioner, | ) | |
| Gary Sanitary District, | ) | |
| Permittee/Respondent, | ) | |
| Indiana Department of Environmental Management, | ) | |
| Respondent | ) | |

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court on the Indiana Department of Environmental Management's Motion for Summary Judgment, which pleading is a part of the Court's record; and the Court, being duly advised and having read the pleadings, record, motion, brief and evidence now enters judgment and makes the following findings of fact, conclusions of law and final order:

## FINDINGS OF FACT

1. The Indiana Department of Environmental Management (the IDEM) issued Permit Approval No. 19115 (the Approval) to the Gary Sanitary District (the Permittee) on May 22, 2008 for construction of a sanitary sewer located northeast of West 53rd and Adams Street intersection in Gary, Indiana.

2. On May 27, 2008, Eli Gusan (the Petitioner) filed his Petition for Review stating that his objections were:

   - Flow rate of 2 ft/sec. can't be obtained on 7 homes.
   - Flow rate and back up problems also flooding at reference point (482) block to block
   - Standard 2 ft./sec. flow rate – health hazard

3. Further, in the same Petition, the Petitioner stated that the issues were:

    - Sanitary sewer to run down (482) I own all of the right side.
    - 3 homes for 241 ft. fail to produce a flow at all – on lot 002 going up.
    - Toilet paper in sanitary sewer pipe
    - Flooding down (482) storm water going into manhole of sanitary sewer
    - PE going into a 12" pipe that needs to be upgraded. Combination sewer - 15" pipe near by.
    - X (plat) (another owner) can't tap into sanitary sewer has to cross my property - etc.
    - Didn't specify class 1 bedding

4. On June 21, 2008, the Petitioner submitted an amendment to his Petition for Review in which he complained of the following:

    - Only 7 homes on sewer line. Greeley and Hansen Engineering didn't do their homework.
    - No future homes. Greeley and Hansen didn't do their homework.
    - Expected flow to high 4,650 gpd. Only 100 to 150 gallons of water per household.
    - Flow will not have a rate of 2 ft/sec with 7 homes at a distance of 642 feet Piping Handbook 7th Edition. No flow now at 241 feet for three homes.
    - No mention of Class IA bedding. Sherry Jordan (former IDEM engineer) stressed class IA bedding 5 years ago.
    - North Merrillville Sanitary sewer (Meadowland) belong to Gary Sanitary District. Tapped into Gary before Merrillville became a town.

5. The Permit specifies that the Permittee is authorized to install approximately 642 feet of 8-inch diameter (PVA, SDR 32, ASTM D3034) sanitary sewer to provide service for 13 existing and 2 future single-family homes in the reference project with an expected flow of 4,650 gpd (gallons per day).

6. The IDEM filed its Motion for Summary Judgment on May 1, 2009. The Petitioner did not file any response.

7. On July 3, 2009, the Petitioner informed the Court that he had not received the Motion for Summary Judgment. On July 8, 2009, the Court sent the Petitioner a copy of the Motion for Summary Judgment and granted an extension of time in which to file a Response.

8. The Petitioner timely filed his Response to the Motion for Summary Judgment on July 22, 2009.

## CONCLUSIONS OF LAW

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

2. 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 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).

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 . . . Summary judgment may not be granted as a matter of course because the opposing party fails to offer opposing affidavits or evidence, but the administrative law judge shall make a determination from the affidavits and testimony offered upon the matters placed in issue by the pleadings or the evidence." I.C. § 4-21.5-3-23(b).

5. I.C. § 4-21.5-3-23(f) further states: "If a motion for summary judgment is made and supported under this section, an adverse party may not rely upon the mere allegations or denials made in the adverse party's pleadings as a response to the motion. The adverse party shall respond to the motion with affidavits or other evidence permitted under this section and set forth specific facts showing that there is a genuine issue in dispute. If the adverse party does not respond as required by this subsection, the administrative law judge may enter summary judgment against the adverse party."

6. 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).

7. 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 (Ind. Ct. App. 1992) at 864. "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 (Ind. Ct. App. 1992) at 703-704. Further, the Indiana Tax Court in *Allied Collection Service Inc. v. Ind. Dept. of State Revenue* (Cause No. 49T10-0608-TA-76, December 22, 2008) stated, "If there is any doubt when ruling on a motion (or motions) for summary judgment as to what conclusion the Court could reach, the Court will conclude that summary judgment is improper, given that it is neither a substitute for trial nor a means for resolving factual disputes or conflicting inferences following from undisputed facts. *See Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001) (citations omitted)."

8. 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). The opposing party 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).

9. Several of the Petitioner's contentions, even if true, are not grounds for the revocation/modification of the Permit.[1] The applicable regulations for the construction of sanitary sewers found at 327 IAC 3 set out the limits for IDEM's review of a permit application. IDEM does not have the authority to require anything beyond that specified in these regulations. Therefore, the Petitioner's complaints about property ownership, bedding and toilet paper are irrelevant to this matter. Summary judgment is proper in regards to the Petitioner's allegations on these subjects.

10. In addition, to the extent that the Petitioner's complaints concern the legal or property rights of persons other than himself, the Petitioner fails to state a claim upon which this Court can grant him relief.

[1] This is assuming that this is the action that the Petitioner is requesting. The Petitioner fails to state what relief he is seeking in any of his pleadings. One letter sent to the Permittee/Respondent asks when city water will be provided to the Petitioner. It is clearly beyond OEA's authority to grant this relief.

11. The requirements for sanitary sewers can be found in 327 IAC 3. The Permit specifies that the Permittee is authorized to install approximately 642 feet of 8-inch diameter (PVA, SDR 32, ASTM D3034) sanitary sewer to provide service for 13 existing and 2 future single-family homes in the reference project with an expected flow of 4,650 gpd (gallons per day). 327 IAC 3-6-8(g) specifies that gravity sewers shall not be less than 8 inches in diameter. The Petitioner does not specify how the Permit fails to meet any of the requirements in 327 IAC 3.

12. The materials provided by the Petitioner are not sufficient to create a question of fact. The Petitioner provides no factual support for his contentions regarding the number of service connections or flow rates. The materials that were provided are not authenticated; the written statements from the Petitioner are not sworn under oath; the evidence is neither reliable nor admissible. Even if the material is considered, the Petitioner fails to explain how the materials he has presented support his contention that the Permit was improperly issued. The Petitioner cites to no statutory or regulatory support for his allegations.

13. The Petitioner provides no factual basis or cogent legal arguments for his contentions that the Permit is deficient. In light of this, the IDEM has presented sufficient evidence[2] to sustain summary judgment.

## FINAL ORDER

**AND THE COURT**, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the IDEM's motion for summary judgment is **GRANTED.** The Petition for Review is **DISMISSED.** All further proceedings are **VACATED.**

You are hereby further notified that pursuant to provisions of I.C. § 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. 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 27th day of July, 2009 in Indianapolis, IN.**

Hon. Catherine Gibbs
Environmental Law Judge

[2] The affidavit from Matthew Florczyk contains legal conclusions in addition to facts. These were not considered in the review of the motion for summary judgment.