

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 13nf cite this case as
Aqua Indiana, Inc., 2010 OEA 13nf.

TOPICS:

Stay Hearing	<i>e. coli</i> contamination
preponderance of evidence	failed septic system
sanitary sewer extension	delay cost recovery
8-inch diameter PVC pipe	complicate project management
15-inch main	irreparable harm
homeowner cost	prevail on the merits
funding	threatened injury
financial burden	public interest
affected property owner	preliminary injunction
commercial development	315 IAC 1-3-2.1(b)
additional properties	327 IAC 3

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM:	Julie E. Lang, Esq.
Pro se Petitioners:	Frank Revalee, Gary Hoagland
Respondent/Permittee:	Philip B. McKiernan, Esq., Joseph M. Hendel, Esq.;
	Hackerman Hulett & Cracraft, LLP

ORDER ISSUED:

December 15, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

Case in litigation during non-final order

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

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

IN THE MATTER OF:)	
)	
OBJECTION TO ISSUANCE OF)	
CONSTRUCTION PERMIT APPLICATION FOR)	
SANITARY SEWER PERMIT APPROVAL NO. 19694)	
AQUA INDIANA, INC.)	
FORT WAYNE, ALLEN COUNTY, INDIANA)	
_____)	CAUSE NO. 10-W-J-4380
Frank Revalee, Gary Hoagland,)	
Petitioners,)	
Aqua Indiana, Inc.,)	
Permittee/Respondent,)	
Indiana Department of Environmental Management,)	
Respondent)	

FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER on STAY HEARING

This matter is before the Office of Environmental Adjudication (“OEA” or “Court”) following a stay hearing, held on August 31, 2010, and on the parties’ later submission of proposed findings, on Petitioners Frank Revalee and Gary Hoagland’s (“Petitioners”) Petition for Review of the Indiana Department of Environmental Management’s June 1, 2010 Decision of Approval Permit No. 19694 issued to Utility Center, Inc., d/b/a Aqua Indiana, Inc., for the construction of a sanitary sewer system extension in Fort Wayne, Allen County, Indiana. The Chief Environmental Law Judge (“ELJ”) having considered the petition, record of the proceeding, evidence, and proposed findings of fact, conclusions of law and orders now finds that judgment may be made upon the record as to whether Permit No. 19693 should be stayed pending a final order in this cause. The ELJ, by a preponderance of the evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following non-final Order:

FINDINGS OF FACT

1. Permittee/Respondent Utility Center, Inc., d/b/a Aqua Indiana, Inc. (“Respondent” or “Aqua”) operates a sanitary sewer system in Fort Wayne, Allen County, Indiana. On June 1, 2010, the Indiana Department of Environmental Management (“IDEM”) issued Permit No. 19694 (“Permit”), approving Aqua’s application to extend the existing sanitary sewer system in the Cadillac Drive area.

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

2. The Permit specifications authorize Aqua to install approximately 2,890 feet of 8-inch PVC pipe (SDR 35) and 361 feet of 8-inch diameter PVC (SDR 21) ASTM D2241 (“Project”) in order to provide sanitary sewer service to 31 single-family homes along Cadillac Drive and Dicke Road, Fort Wayne, Allen County, Indiana (“Site”).
3. In addition to imposing specific and general conditions, the Permit requires the Project to conform to all provisions of 327 IAC 3.
4. Petitioners are property owners in the Cadillac Drive area. Petitioners submitted letters objecting to the Permit on June 14, 2010 and June 15, 2010, respectively, OEA deemed Petitioners’ letters to be Petitions for Administrative Review (“Petition”), and assigned the above-captioned cause number. After filing her Petition, Ms. Kimberly Snyder-Quinn’s did not participate in these proceedings; thus, her Petition was dismissed per Court Order issued on August 6, 2010.
5. In their Petitions, Petitioners requested that the Permit be stayed. OEA set a stay hearing on July 22, 2010, continued at the parties’ request until August 31, 2010.
6. At the August 31, 2010 Stay Hearing, Petitioner Revalee did not attend in person or by counsel, nor did he seek leave from attending. Petitioner Hoagland attended in person and represented himself. Aqua appeared by legal counsel, and its witness, project manager Mr. Patrick Callahan, P.E. IDEM appeared by legal counsel and by witness Mr. Dale Schnaith.
7. In his Petition, during the stay hearing, and in his September 13, 2010 Closing Comments letter, Petitioner Hoagland presented testimony on following issues:
 - a. The home owner cost of the proposed project is over \$20,000 per property. The project does not include all of the total properties in the area, only 70%.
 - b. To support the Project, each home owner would experience a \$320 per month cost increase, placing a sizeable financial burden on the property owners.
 - c. The project will be funded totally by the property owners, without contribution from Aqua or the City of Ft. Wayne.
 - d. A nearby area east of Lutheran Hospital has been designated for future commercial development by the Ft. Wayne Planning Commission. The proposed 8-inch sewer lines lack capacity sufficient to support future commercial development, therefore new, larger sewer lines would be required in the future.
 - e. The proposed 8-inch sewer line (serving 31 properties) will connect to the existing 8-inch line which already services several commercial businesses located on Jefferson Boulevard. Therefore, it is questionable as to whether the current line will support the additional properties.
 - f. Mr. Hoagland noted that local health officials were involved in the project area, due to *e. coli* contamination and runoff.

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

- g. In response to circumstances presented by Aqua that one of the properties which would be served by this project has a septic tank which overflows sewage onto the ground unless it is emptied monthly, Mr. Hoagland testified that the properties are adequately and safely served by existing means.
 - h. At the stay hearing, Mr. Hoagland confirmed his testimony on cross examination, that he was not aware of any laws or rules that were violated by IDEM's issuance of Permit 19694.
8. Aqua is responsible to serve an area of Allen County which includes the project area. *See Testimony of Patrick Callahan.* Requests from area residents led Aqua to pursue the project. *Id.*
9. Project plans incorporated into the Permit show that 31 homes¹ will connect to the sanitary sewer plant. The Project will connect to Aqua's existing sanitary sewer system at the intersection of Scottwood Drive and Cadillac Drive. *Testimony of Patrick Callahan.* From the interconnection point at Scottwood Drive and Cadillac Drive, the wastewater generated in the project area will flow to an existing wastewater treatment facility through existing 8-inch and 15-inch mains. The current 15-inch main currently operates at less than half of its planned capacity. *Id.* When completed, the 8-inch mains will have a service capacity of 400 homes, but will serve 31 homes. *Id.* The 15-inch mains will have a service capacity of 1300 homes when completed, but will serve the equivalent of 64 homes. *Id.*
10. Mr. Hoagland cross-examined Mr. Callahan about approximately 12 lots north and east of the project area, which Mr. Hoagland stated might be subject to commercial development in the future. Due to the topography of the project area, and the 12 lots to the north and east, the area to the north and east of the project area would not be served by the facilities installed in the project area. *Testimony of Patrick Callahan.*
11. Aqua presented information to residents for financing their share of the project costs. *Id.*
12. Mr. Callahan presented evidence that if the project was stayed, Aqua would suffer a hardship of complicating its ability to manage the project and delay the recovery of costs already invested in the project. *Testimony of Patrick Callahan.* A delay in the project might cause hardship to some residents within the project area now experiencing septic system failures. *Id.*
13. At the stay hearing, IDEM presented evidence that the rules governing issuance of sewer construction permits do not have any provisions, requirements, or limitations related to the financial burden placed on affected property owners by such construction. *See Testimony of IDEM Office of Water Quality Facility Construction and Support Section Chief Dale Schnaith.*

¹Capacity estimates were stated in units of a residence's average and expected output.

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

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 IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a non-final Order issued pursuant to I.C. § 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 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), *Jennings Water, Inc. v. Office of Envntl. Adjudication*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “The ELJ . . . serves as the trier of fact in an administrative hearing and a *de novo* review at that level is necessary. *Indiana Department of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100, 103 (Ind. 1993). The ELJ does not give deference to the initial determination of the agency.” *Indiana-Kentucky Elec. Corp v. Comm’r, Ind. Dep’t of Envntl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. 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.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. Per 315 IAC 1-3-2.1(b), a party requesting a stay of effectiveness has the burden of demonstrating, by a preponderance of the evidence, that:
 - (a) The person will suffer irreparable harm pending the resolution of the case on the merits because its remedies at law are inadequate;
 - (b) The person is likely to prevail on the merits;
 - (c) The threatened injury to the person requesting the stay outweighs the threatened harm that the grant of the stay may inflict on the other party; and
 - (d) The public interest will be served by the grant of a stay.
5. In order to grant a stay in this cause, OEA must find that Petitioner Hoagland presented evidence of all four elements stated in 315 IAC 1-3-2.1(b). Thus, Petitioner Hoagland must have presented evidence of irreparable harm in the event that a stay is not granted; that he is likely to prevail on the merits of this case; that if a stay is not granted, the threatened injury to Petitioner Hoagland will outweigh the threatened harm to Aqua if a stay is granted; and that the public interest will be served by the grant of a stay.

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

6. A stay is equivalent to a preliminary injunction. A party seeking a preliminary injunction must show injury to be imminent, certain and irreparable, in order to show a prima facie case for relief. Courts are limited to issuing injunctive relief sparingly, only in rare circumstances where the law and facts are clearly within the favor of the party seeking the injunction. *In the Matter of Southern Indiana Gas and Electric Company v. Commissioner of the Indiana Department of Environmental Management*, OEA Cause No. 98-A-J-2129, 1999 WL 202455 (March 24, 1000); *Doe v. O'Connor*, 781 N.E.2d 672, 674 (Ind. 2003); *Indiana Family and Social Services Administration v. Walgreen Co.*, 769 N.E.2d 158 (Ind. 2002); *Scales v. Hospitality House of Bedford*, 593 N.E.2d 1283 (Ind. Ct. App. 1992).
7. Petitioners failed to present evidence that they will suffer irreparable harm, or that they lack adequate legal remedies if the Permit is not stayed and construction of the Project begins during administrative review before OEA. Should OEA determine that IDEM should not have issued the Permit, Aqua will not be able to use the Project. Depending on the type of harm suffered, Petitioners would be able to seek redress through a court with jurisdiction over the type of harm averred. Should the Project be stayed, Aqua and the local citizens will suffer irreparable harm of increased costs and harm incidental to insufficient sewer facilities, such as *e. coli* contamination and failed septic systems.
8. Petitioners did not present a preponderance of evidence that they will suffer irreparable harm pending the resolution of the case on the merits because its remedies at law are inadequate, as required in 315 IAC 1-3-2.1(a). Nor did Petitioners present a preponderance of evidence that the threatened harm to them outweighs the threatened harm that the grant of a stay would inflict on Aqua, as required in 315 IAC 1-3-2.1(c). For lack of a preponderance of evidence on two of the four required elements for a stay, Petitioners' request for a stay must be denied.
9. To prevail on the merits of this case, Petitioner Hoagland must show that the applicable regulations for construction of sanitary sewers stated in 327 IAC 3 were not met in the Permit issued to Aqua. OEA reviews IDEM's decisions to determine whether IDEM acted in conformity with controlling statutes and regulations. *See, g.g, In re: Objection to Issuance of Section 401 Water Quality Certification COE ID No. 198800247 Conagra Soybean Processing Co.*, 1998 WL 918585, at *3, OEA Cause No. 98-W-J-2052 (Nov. 12, 1988). Allegations that fail to raise any issue concerning compliance with controlling legal requirements fail to state a valid claim. *In re: Objections to Issuance of Public Water Supply Construction Permit No. WS-2924 Issued to the City of Mishawaka, Indiana*, 1989 W: 436899, at *6, OEA Cause No. 89-W-J-241 (IDEM, Sept. 1, 1989). IDEM is prohibited from expanding its requirements for such a Permit beyond those specified in 327 IAC 3.

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

10. Mr. Hoagland's testimony and pleadings show that Petitioners oppose the Project based on the costs they may incur if they are required to connect to the completed Project. Determination of the appropriate cost is allocated to other governmental entities, not OEA or IDEM. Neither OEA nor IDEM may consider cost in determining whether a project was properly approved, in compliance with 327 IAC 3. *See In Re: Wastewater Treatment Plant and Sanitary Sewer Construction Approval No. 16684, Sidney, Indiana, 2004 OEA 99, 102.*
11. Mr. Hoagland's claim that the Project will not sufficiently accommodate future commercial development, and will require replacement after it is paid for by the residents does not raise an issue within IDEM or OEA's authority to review under 327 IAC 3. OEA cannot base its decision to grant a stay or to deem the Permit invalid based upon pecuniary or economic impact, or upon speculations about possible future impact. *In re: Objection to the Denial of Water Quality Certification 2005-576-RDC-A, 2007 OEA 82, 91.* In this case, a preponderance of the evidence supported the opposite conclusion, that the Project will be able to accommodate additional usage, but that commercial development anticipated by Mr. Hoagland would not involve the Project facilities.
12. Mr. Hoagland confirmed his testimony on cross examination, that he was not aware of any laws or rules that were violated by IDEM's issuance of Permit 19694.
13. Conversely, IDEM and Aqua each presented evidence that Petitioner would not prevail on the merits in this case. Aqua presented evidence that the capacity of the proposed sewer lines would support projected volumes in the Cadillac Drive area. Testimony by IDEM concurred, and further provided a preponderance of evidence that the Permit complies with requirements stated in 327 IAC 3. IDEM was not authorized to review the financial impact a project might have of property owners. IDEM further provided a preponderance of evidence that its review, although excluding review of the financial impact on property owners, complied with the authority conveyed to IDEM by the Indiana Legislature and the Water Pollution Control Board. Petitioner Hoagland did not present evidence to refute testimony that the Permit complied with 327 IAC 3, as stated by IDEM and Aqua.
14. Petitioners did not present a preponderance of evidence that they are likely to prevail on the merits, as required in 315 IAC 1-3-2.1(b). For lack of a preponderance of evidence of one of the four required elements for a stay, Petitioners' request for a stay must be denied.
15. Petitioners did not present a preponderance of evidence that the public interest would be served by the grant of a stay in this case, as required in 315 IAC 1-3-2.1(d). The Project Area is experiencing *e. coli* contamination. Its septic systems are failing. For these reasons, other residents in the Project Area requested Aqua's development of sanitary sewer service. A preponderance of evidence showed that the public interest would be served by denying a stay of the Permit.

**Objection to Issuance of Construction Permit Application for Sanitary Sewer
Permit Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2010 OEA 13nf, (10-W-J-4380)**

16. Petitioners did not present a preponderance of evidence to meet their burden of persuasion that a stay should be issued per 315 IAC 1-3-2.1. Petitioners failed to show that they will suffer irreparable harm pending the resolution of the case on the merits because its remedies at law are inadequate, as required in 315 IAC 1-3-2.1(a). Petitioners failed to show that they are likely to prevail on the merits of their case, as required in 315 IAC 1-3-2.1(b). Petitioners failed to show that that the threatened injury to them outweighs the threatened harm that the grant of a stay might inflict on Aqua, as required in 315 IAC 1-3-2.1(c). Petitioners failed to show that the public interest would be served by granting their request for stay, as required in 315 IAC 1-3-2.1(d). OEA has no authority to issue a stay of construction permit number 19694 issued to Aqua.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioners Frank Revalee and Gary Hoagland's request to stay the effectiveness of Permit No. 19694, issued to Utility Center, Inc., d/b/a Aqua Indiana, Inc., for a sanitary sewer extension is **DENIED**. The parties are ordered to confer and to submit a joint proposed case management order by **January 10, 2011**. If the parties cannot agree upon a joint submission, then individual submissions are to be submitted by January 10, 2011.

You are further advised that, pursuant to I.C. § 4-21.5-5, *et seq.*, this non-final Order is subject to judicial review if so provided under I.C. § 4-21.5-5, *et seq.*, and only if it is timely filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 15th day of December, 2010 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge