

Objection to Issuance of Construction Permit Application for Sanitary Sewer Permit
Approval No. 19694
Aqua Indiana, Inc.
Fort Wayne, Allen County, Indiana
2011 OEA 14, (10-W-J-4380)

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 14 cite this case as
Aqua Indiana, Inc., 2011 OEA 14.

TOPICS:

sanitary sewer extension	contribution
Permit	future commercial use
dismissed	insufficient capacity for future development
Stay Hearing	affordable financing options
Order Denying Stay	e. coli
stipulated stay hearing transcript	septic system failure
home owner cost per property	15-inch main
percentage of homes served	327 IAC 3
financial burden on homeowners	327 IAC 15-15-9
8-inch diameter PVC (SDR 35)	
8-inch diameter PVC (SDR 21, ASTM, D2241)	

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Julie E. Lang, Esq.
Petitioners: Frank Revalee, Gary Hoagland, Kimberly Snyder-Quinn; self- represented
Respondent: Philip B. McKiernan, Esq., Joseph M. Hendel, Esq.;
Hackman Hulett & Cracraft, LLP

ORDER ISSUED:

June 30, 2009

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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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. This cause was heard at a Stay Hearing conducted on 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, Philip B. McKiernan, Esq., and its witness, Project manager Mr. Patrick Callahan, P.E. IDEM appeared by legal counsel, Julie E. Lang, Esq., and by witness Mr. Dale Schnaith.
7. This Court denied a Stay in its December 15, 2010 Findings of Fact, Conclusions of Law and Order on Stay Hearing.
8. At the January 25, 2011 Final Hearing setting, Petitioner Gary Hoagland attended and represented himself. Petitioner Frank Revalee did not attend in person or by counsel, nor did he seek leave from attending. Permittee/Respondent Aqua Indiana, Inc. attended by utility engineer Pat Callaghan and by legal counsel Philip B. McKiernan, Esq. The Indiana Department of Environmental Management attended by legal counsel Julie E. Lang, Esq. At the January 25, 2011 Final Hearing setting, each of the parties stipulated to the admissibility of the Stay Hearing transcript, *Stipulated Ex. A*, and the Stay Hearing Exhibits, *Stipulated Ex. B*. Each of the parties sought judgment in their favor, based upon the record from the Stay Hearing. All of the below Findings are based upon these records.
9. In his Petition, during the stay hearing, in his September 13, 2010 Closing Comments letter, and in submission of the Stay Hearing transcript and exhibits at final hearing, 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%.

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- 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.
 - 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. 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.
10. 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.*
11. 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.*
12. At Stay Hearing, 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, the facilities installed in the Project area would not be able to serve the 12 lots to the north and east of the Project area. *Testimony of Patrick Callahan.*

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

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13. Aqua presented information to residents on how to obtain affordable financing options for their share of the Project costs. *Id.*
14. Mr. Callahan presented evidence that some residents within the Project area are now experiencing septic system failures. *Id.*
15. IDEM presented evidence that Aqua's Permit complies with the rules governing issuance of sewer construction permits. These rules do not have any provisions, requirements, or limitations related to the financial impact to affected property owners by such construction. *See Testimony of IDEM Office of Water Quality Facility Construction and Support Section Chief Dale Schnaith.*

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 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. 315 IAC 1-3-10(b); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Jennings Water, Inc. v. Office of Env'tl. 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 Env'tl. 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. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 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 disputed whether IDEM's issuance of the City of Hobart NPDES Permit was proper, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof

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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. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.

5. To prevail on the merits of this case, Petitioner Hoagland must show substantial evidence 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.
6. 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.
7. Mr. Hoagland's claim that the Project will not sufficiently accommodate future commercial development, and will require replacement after it is paid for the by the residents does not raise an issue within IDEM or OEA's authority for 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, substantial 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.

**Objection to Issuance of Construction Permit Application for Sanitary Sewer Permit
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8. 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.
9. Conversely, IDEM and Aqua each presented substantial evidence that IDEM properly issued Permit Approval No. 19694. The capacity of the proposed sewer lines would support projected volumes in the Cadillac Drive area. 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 substantial 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.

FINAL ORDER

AND THE COURT, being duly advised, **FINDS and ORDERS** that Petitioners Frank Revalee and Gary Hoagland did not meet their burden of showing, by substantial evidence, that Respondent/Permittee Utility Center, Inc., d/b/a Aqua Indiana, Inc. met their burden of showing, by substantial evidence, that Respondent, Indiana Department of Environmental Management properly issued Permit No. 19694 to Utility Center, Inc., d/b/a Aqua Indiana, Inc., and are not entitled to judgment. Respondents presented substantial evidence that Permit Approval No. 19694 was properly issued, and are entitled to judgment.

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioners Frank Revalee and Gary Hoagland's Petitions for Administrative Review of Permit No. 19694, issued to Utility Center, Inc., d/b/a Aqua Indiana, Inc., for a sanitary sewer extension is **DENIED**. Judgment is entered in favor of Permittee/Respondent, Utility Center, Inc., d/b/a Aqua Indiana, Inc. and Respondent, Indiana Department of Environmental Management. This cause 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. § 4-21.5-5, *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 27th day of January, 2011 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge