

**Objection to Issuance of Construction Permit Approval No. L-0366**  
**Luce Township Regional Sewer District**  
**Richland City, Spencer County, Indiana**  
**2011 OEA 141, (10-W-J-4440)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2011 OEA 141 cite this case as  
*Luce Township Regional Sewer District, 2011 OEA 141.*

**TOPICS:**

327 IAC 3 Construction Permit Application Plans and Specifications  
sanitary sewer system  
construction  
wastewater collection system  
single family homes  
proposed homeowners/users  
school  
expected average daily wastewater flow  
Department of Natural Resources  
Construction in a Floodway  
Stay Hearing  
Summary Judgment  
future possible users  
design flow  
rural community  
gallons per day (GPD)  
financial information  
rates  
327 IAC 3  
*Steven Buse et al v. Trustees, Luce Township Regional Sewer District,*  
953 N.E.2d 519 (Ind. Ct. App. 2011)

**PRESIDING JUDGE:**

Mary L. Davidsen

**PARTY REPRESENTATIVES:**

IDEM: Sierra L. Alberts, Esq.  
Petitioner: Leslie C. Shively, Esq.; Shively & Associates, PC  
Permittee: Jefferson A. Lindsey, Esq.; Lindsey & Lindsey

**ORDER ISSUED:**

October 21, 2011

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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

OBJECTION TO THE ISSUANCE OF CONSTRUCTION )  
PERMIT APPROVAL NO. L-0366                    )  
LUCE TOWNSHIP REGIONAL SEWER DISTRICT        )  
RICHLAND CITY, SPENCER COUNTY, INDIANA        )  
\_\_\_\_\_)                    CAUSE NO. 10-W-J-4440  
Mary Ann Hardy, Larry W. Blair, Steven Buse, *et. al.*, )  
    Petitioners,                                        )  
Luce Township Regional Sewer District,         )  
    Permittee/Respondent,                         )  
Indiana Department of Environmental Management, )  
    Respondent                                        )

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

This matter is before the Office of Environmental Adjudication (“OEA” or “Court”) on summary judgment following a January 21, 2011 Stay Hearing, on the Petitioners’ Petitions for Administrative Review and Stay of the Indiana Department of Environmental Management’s (“IDEM”) November 17, 2010 Decision of Approval Permit No. L-0366 issued to Luce Township Regional Sewer District for construction of a sanitary sewer system in Spencer County, Indiana.

The Chief Environmental Law Judge (“ELJ”), having considered the petitions, record of the proceeding, and summary judgment briefing, now finds that judgment may be made upon the record as to whether IDEM, as a matter of law, properly issued Permit No. L-0366. The ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following final order:

**FINDINGS OF FACT**

1. The Indiana Department of Environmental Management (“IDEM”) issued 327 IAC 3 Construction Permit Application Plans and Specifications for Luce Township Regional Sewer District, Division A and Division B, Permit Approval No. L-0366 (the “Permit”) to the Luce Township Regional Sewer District (“Permittee”) on November 17, 2010. The Permit authorized the construction of a sanitary sewer system (the “Project”). The Division A wastewater collection system project will be located in the Town of Richland City and along SR 161 from the Town of Richland City to the intersection with CR 200 North. The Division B wastewater collection system project will be located in the town of Hatfield, the Town of Eureka and the French Island Boat Club located along the Ohio River approximately 0.75 miles south of the intersection of CR 850 West with CR 200 South. The Project will be located in Richland City, Spencer County, Indiana (the “Site”).

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2. The Division A project will provide wastewater collection service to 245 single family homes with an expected average daily wastewater flow of 51,450 GPD based on 210 GPD per home.
3. The Division B project will provide wastewater collection services to 553 single family homes with an expected average daily wastewater flow of 116,130 GPD based on 210 GPD per home. The Division B project will also provide service to the Luce Elementary School with an expected average daily wastewater flow of 1,330 GPD when school is in session. The total expected average daily wastewater flow in the Division B project area is 117,460 GPD.
4. The total expected average daily wastewater flow from the combined Division A and Division B project areas is 168,910 GPD.
5. In addition to imposing specific and general conditions, the Permit requires the Project to conform to all provisions of 327 IAC 3. The Permit specifically requires:

If construction is located within a floodway, a permit may also be required from the Department of Natural Resources prior to the start of construction. It is the permittee's responsibility to coordinate with that agency and obtain any required approvals as applicable . . .

Nothing herein shall be construed as guaranteeing that the proposed sanitary sewer system shall meet the standards, limitations or requirements of this or any other agency of the state or federal government, as this agency has no direct control over the actual construction and/or operation of the proposed project.

*Permit, p. 7, 9.*

6. On or about December 2, 2010, Petitions for Administrative Review and Stay were filed by Petitioner Steven Buse, and by Petitioners Mary Ann Hardy and Larry W. Blair filed a Petition for Administrative Review and Request for an Administrative Hearing.
7. At the January 21, 2011 Stay Hearing, Petitioners Mary Ann Hardy and Larry W. Blair did not attend in person or by counsel, nor did they seek leave from attending. Petitioner Steven Buse did not attend in person but was represented by counsel. The Permittee appeared by counsel, and its witness, Nora Yeager. IDEM appeared by legal counsel and by witness Dale Schnaith.
8. In his Petition, during the stay hearing, and as referenced in his responsive pleading on summary judgment, Petitioner Steven Buse presented testimony on the following issues:
  - a. The construction permit is based upon 778 homes to be serviced by the proposed sanitary sewer service. The actual number of proposed homeowners/users is 479.

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- b. The application submitted indicated 210 GPD of wastewater flow per day per household. Financial information submitted for purpose of determining the rate to users was based on a different figure.
  - c. Petitioner previously filed a Complaint against the Permittee in the Spencer County Circuit Court. At this time, there is an interlocutory appeal pending in the Indiana Court of Appeals regarding that matter.
9. During the stay hearing, and referenced in summary judgment briefing, Dale Schnaith, Section Chief of IDEM's Facility Construction and Engineering Support Section of the Office of Water Quality presented testimony that if the actual number of users was significantly lower, then the user number could relate to design flow because it is sized for a specific number of users. However, Mr. Schnaith stated that IDEM prefers and most projects use design flows for all future users even though the initial number of actual connections may be less and that it is in the best interest of the community to look at future projections. It is customary and appropriate for the IDEM to approve designs that include projections for future use. The IDEM approved projections for this project of 778 homes, which include future possible users.
  10. The use of 210 GPD per household to project the total wastewater flow used for the design is reasonable for a rural community.
  11. On January 24, 2011, this Court issued a Notice of Proposed Order of Dismissal of Petitioners Mary Ann Hardy and Larry W. Blair's Petition for Administrative Review for failing to attend the January 21, 2011 Stay Hearing without leave of Court as ordered in the January 4, 2011 Report of Prehearing Conference, Order Continuing Stay Hearing and Case Management Order. A Final Order of Dismissal was issued by this Court on February 17, 2011, dismissing the Petition for Administrative Review filed by Petitioners Mary Ann Hardy and Larry W. Blair pursuant to I.C. § 4-21-.5-3-24 and 315 IAC C1-3-8.
  12. On January 24, 2011, this Court issued an Order Denying Stay of Permit Approval No. L-0366, issued to Luce Township Regional Sewer District effective January 21, 2011. The Court's February 11, 2011 Findings of Fact, Conclusions of Law and Order Denying Stay are a part of the Court's record and are incorporated herein.
  13. Respondent, IDEM filed its Motion for Summary Judgment and Memorandum of Law in Support of its Motion on July 29, 2011. Permittee/Respondent filed its concurrence with IDEM. Petitioner, Steven Buse filed his opposition on August 29, 2011 to the Motion for Summary Judgment. IDEM filed its reply on September 9, 2011. No Proposed Findings of Fact, Conclusions of Law and Orders were filed.

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**CONCLUSIONS OF LAW**

1. 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 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 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. Respondents seek summary judgment, based on Petitioner Steven Buse’s failure to raise any valid reason as to why IDEM should not have issued the Permit. 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. 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). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). “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). 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

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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).” 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. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

5. To prevail on the merits of this case, Petitioner must show that the applicable regulations for construction of sanitary sewers stated in 327 IAC 3 were not met in the Permit issued to Permittee. OEA reviews IDEM’s decisions to determine whether IDEM acted in conformity with controlling statutes and regulations. *See, e.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. Petitioner’s timely-filed opposition to the Project is based on the fact that the actual number of homes to be connected is less than the number of homes cited by the Permittee in its application. The evidence submitted in this case is that most applications before IDEM cite projected numbers of connection and this practice is reasonable for a rural community. Therefore, substantial evidence supports the legal conclusion that using the projected capacity of approximately 778 residential units is appropriate. As a matter of law, no genuine issue of material fact exists that the permitted residential capacity complied with 327 IAC 3; thus Respondents are entitled to summary judgment.
7. Petitioner further opposes the Project based on the fact that the number of gallons per day used by the Permittee in its application is less than the number of gallons per day cited in a financial report submitted to IDEM. Evidence submitted in this cause provides substantial evidence that estimated gallons per day used in the application is projected use per household and is reasonable for a rural community. No genuine issue of material fact exists that the permitted gallon per day capacity complied with 327 IAC 3; thus, Respondents are entitled to summary judgment.
8. Petitioner’s opposition to the Project, based on the financial information submitted for purpose of determining the rate to users was based on a different figure, is not supported by Indiana law as a basis to invalidate IDEM’s issuance of this Permit. OEA may only consider whether IDEM’s decision was in compliance with the applicable statutes, regulations and policies. The applicable statutes in this matter do not require IDEM to consider rates to users. Therefore; neither IDEM nor OEA may consider the rate to users 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*,

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2004 OEA 99, 102. No genuine issue of material fact exists that lack of considering user rates does not bar OEA's determination that the Project as permitted complied with 327 IAC 3; thus, Respondents are entitled to summary judgment.

9. Petitioner's opposition to the Permit, based on the Permittee's requirements to obtain approvals, including a Construction in a Floodway Permit from the Indiana Department of Natural Resources ("DNR"), is not supported by Indiana law as a basis to invalidate IDEM's issuance of this Permit. The Permit contains a specific statement of applicable law that it is the Permittee's responsibility to obtain all appropriate permits. Lack of required permits prevents construction of the facility, but does not stop IDEM's authority to issue such a permit. *See In Re: Wastewater Treatment Plant and Sanitary Sewer Construction Approval No. 16684, Sidney, Indiana*, 2004 OEA 99, 102. No genuine issue of material fact exists that lack of a DNR Construction in a Floodway Permit, or noncompliance with any other governmental body's regulations, does not bar a determination that the Project as permitted complied with 327 IAC 3; thus, Respondents are entitled to summary judgment.
10. Petitioner's testimony and pleadings show that Petitioner also opposes the Project based on the matter of *Steven Buse et al. v. Trustees, Luce Township Regional Sewer District* pending before the Spencer Circuit Court under Cause No. 74C01-1004-PL-0220 and the interlocutory appeal of that matter currently pending before the Indiana Court of Appeals under Cause No. 74A05-1009-PL-590. The Indiana Court of Appeals' August 9, 2011 decision reversed and remanded the trial court's decision, focusing primarily on whether petitioners' claims against the sewer district concerning property rights, easements and fees was a public lawsuit. 953 N.E.2d 519 (Ind. Ct. App. 2011). As stated in this Court's February 11, 2011 Order Denying Stay, "[U]nless there is a binding order for OEA to consider, basing a stay on that pending litigation is not warranted at this time." The pending litigation between Petitioner Buse and Respondent Luce Township has yet to develop an order binding upon OEA. No genuine issue of material fact exists that pending litigation cited by Petitioner does not bar OEA's determination that the Project as permitted complied with 327 IAC 3; thus, Respondents are entitled to summary judgment.
11. As a matter of law, no genuine issue of material fact exists, by substantial evidence, that the claims stated by Petitioner Steven Buse do not authorize this Court of invalidate IDEM's issuance of the Permit to Permittee/Respondent. Petitioner's request to invalidate construction permit number L-0366 issued to Permittee should be and is denied.

**FINAL ORDER**

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Respondent, Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED**. Petitioner Steven Buse's Petition for Administrative Review of Permit No. L-0366, issued to Luce Township Regional Sewer District., for a sanitary sewer extension is **DENIED**.

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You are further advised that, pursuant to I.C. § 4-21.5-5, *et seq.*, this 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 21st day of October, 2011 in Indianapolis, IN.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge