

**Objection to the Issuance of Sewer Construction Permit Approval No. 20606 to
Lakeland Regional Sewer District
North Webster, Kosciusko County, Indiana
2013 OEA 23, (13-W-J-4647)**

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 23 cite this case as
Lakeland Regional Sewer District, 2013 OEA 23.

TOPICS:

summary judgment
dismissal
timely filing
sewer
approval
regional sewer district
construction
deficiencies
permit conditions
I.C. §4-21.5-3-2(a)
I.C. § 4-21.5-3-2(e)
I.C. § 4-21.5-3-7(a)(3)(A)
I.C. § 4-21.5-3-23
I.C. § 4-21.5-7
I.C. § 13-26-2
I.C. §13-26-8-4
T.R. 56

PRESIDING LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Sierra Alberts, Esq.
Petitioners: Terry and Debra Shumpert, Thomas R. and Carrie E. Hughes,
Mark E. and Laura J. Fishburn and Steve M. and Denise M. Yocom,
Sheryl W. Wallace, Robert W. Doehr
Permittee: Larry L. Barnard, Esq., Andrew D. Boxberger, Esq.;
Carson Boxberger

ORDER ISSUED:

August 1, 2013

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

**Objection to the Issuance of Sewer Construction Permit Approval No. 20606 to
Lakeland Regional Sewer District
North Webster, Kosciusko County, Indiana
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2. On April 2, 2013, Sheryl W. Wallace filed a petition for review; on April 15, 2013, Terry and Debra Shumpert, Thomas R. and Carrie E. Hughes, Mark E. and Laura J. Fishburn and Steve M. and Denise M. Yocom filed separate but identical petitions for review; on April 16, 2013, Robert Doerr filed his petition for review.
3. On her own motion, Sheryl W. Wallace was dismissed from this case on May 23, 2013.
4. The IDEM filed its Motion to Dismiss and Motion for Summary Judgment on May 30, 2013; the District filed its Motion for Summary Judgment on May 31, 2013; the Petitioners, by Mark Fishburn, filed their response on June 28, 2013. The District filed its reply on July 15, 2013; and the IDEM filed its reply on July 16, 2013.

FINDINGS OF FACT

1. On March 26, 2013, the IDEM issued Decision of Approval No. 20606 (the “Approval”) to the District to construct a sewer collection system “located within an area approximately bounded by County Road 500 North on the north, State Road 13 on the east, South Barbee Drive and McKenna Road on the south, and County Road 475 East on the west; as was as a water pollution control treatment/control facility to be located at 4670 East County Road 100 North between North County Road 400 East and North County 575 East in Kosciusko County.”¹
2. On April 2, 2013, Sheryl W. Wallace filed a petition for review; on April 15, 2013, Terry and Debra Shumpert, Thomas R. and Carrie E. Hughes, Mark E. and Laura J. Fishburn and Steve M. and Denise M. Yocom filed separate but identical petitions for review; on April 16, 2013, Robert Doerr filed his petition for review (collectively the “Petitioners”).
3. The petitions for administrative review cited the following reasons for objecting to the issuance of the Approval:
 - a. The Petitioners object to their properties being included in the District and in the construction area. They further protest that they were not given notice of their rights under I.C. § 13-26-2-7.
 - b. The Petitioners do not believe that the District has proven a need for the sewers, pursuant to I.C. § 13-26-2-3.
 - c. The Petitioners allege that the District was formed in violation of I.C. § 13-26-8-4.
 - d. The Petitioners object to being included in the “lake community” served by the District.

¹ Decision of Approval, dated March 26, 2013, page 1 of 6, Exhibit C of District’s Motion for Summary Judgment and Exhibit A of IDEM’s Motion to Dismiss and Motion for Summary Judgment.

**Objection to the Issuance of Sewer Construction Permit Approval No. 20606 to
Lakeland Regional Sewer District
North Webster, Kosciusko County, Indiana
2013 OEA 23, (13-W-J-4647)**

4. The District was formed on or about March 14, 2008 pursuant to the Order Adopting the Findings of Fact and Recommended Order of the Hearing Officer for the Organization of the Lakeland Regional Sewer District issued by IDEM Commissioner Thomas W. Easterly. No request for review of this Order was filed pursuant to I.C. § 13-26-2-11.
5. The territory to be served by the District includes²:
 - South of Armstrong Road and 500 N
 - West of Indiana Highway 13
 - North of South Barbee Road
 - East of County Road 650 E
 - North of McKenna Road and County Road 400 N
 - East of County Road 475 E
6. The Approval contains the following relevant terms:
 - a. Additional treatment facilities shall be installed if the proposed facilities prove to be inadequate or cannot meet applicable federal or state standards. (Part I, paragraph 1, page 3 of 6, Permit Approval No. 20606)
 - b. All local permits, including zoning, shall be obtained before construction is begun on this project. (Part I, paragraph 2, page 3 of 6, Permit Approval No. 20606)
 - c. If pollution or nuisance conditions are created, immediate corrective action will be taken by the permittee. (Part I, paragraph 6, page 4 of 6, Permit Approval No. 20606)
 - d. Nothing herein shall be construed as guaranteeing that the proposed water pollution treatment/control facility shall meet standards, limitations or requirements of this or any other agency of state or federal government, as this agency has no direct control over the actual construction and/or operation of this proposed project. (Part II, paragraph 3, page 5 of 6, Permit Approval No. 20606)

Applicable Law

The OEA 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). Further, the ELJ “performs a duty similar to that of a trial judge sitting without a jury.” *United Refuse*, 615 N.E.2d at 104. The ELJ’s requirement under I.C. § 4-21.5-3-27(d) is to independently evaluate evidence through the proceeding and make a judgment based only on the information presented. Therefore, in this situation, a *de novo* standard of review is proper. *Indiana-Kentucky Elec. Corp. v. Comm’r, Indiana Dep’t of Env’tl. Mgmt.*, 820 N.E.2d 771, 781 (Ind. Ct. App. 2005).

² Affidavit of James Haney, Exhibit A, Motion for Summary Judgment, filed by Lakeland Regional Sewer District on May 31, 2013.

**Objection to the Issuance of Sewer Construction Permit Approval No. 20606 to
Lakeland Regional Sewer District
North Webster, Kosciusko County, Indiana
2013 OEA 23, (13-W-J-4647)**

Motion to Dismiss

The IDEM has moved to dismiss Robert W. Doerr alleging that his petition for review was not timely filed. I.C. § 4-21.5-3-7(a)(3)(A) states that a Petition for Review must be filed within fifteen (15) days after the person is given notice of the order. I.C. § 4-21.5-3-2(e) provides that three (3) days shall be added to this deadline if service is by mail. I.C. § 4-21.5-3-2(a) provides that if the last day in the period in which to file a petition, falls on a Saturday, Sunday or holiday, then the deadline to file is extended to the end of the next day on which the office is open for business.

Motion for Summary Judgment

The IDEM and the District both move for summary judgment in this case. The OEA shall consider a motion for summary judgment “as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.” I.C. § 4-21.5-3-23. T.R. 56 states, “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A factual issue is material for the purposes of T.R. 56(C) if it “bears on the ultimate resolution of a relevant issue.” *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). An issue is “genuine” if the “trier of fact” must interpret the conflicting truths presented by the parties, or in situations of undisputed material facts giving rise to conflicting inferences. T.R. 56(C); *Amaya v. Brater*, 981 N.E.2d 1235 (Ind. Ct. App. 2013).

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. “The law is well settled, neither arguments of counsel nor allegations in memoranda qualify as evidentiary materials for purposes of a motion for summary judgment.” *Richards-Wilcox, Inc. v. Cummins*, 700 N.E.2d 496, 499 n.3 (Ind. Ct. App. 1998) (citing *J.A.W. v. Roberts*, 627 N.E.2d 802, 808 (Ind. Ct. App. 1994), rev’d on other grounds).

The OEA was established to review decisions made by the IDEM.³ Its authority is strictly limited by the statute to determining whether the IDEM’s decision was made in compliance with the laws and regulations applicable to the decision in review.

The moving party carries the burden of establishing summary judgment to be appropriate. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All facts and inferences must be construed and issues of doubt resolved by the court in the fashion most favorable to the non-moving party. *City of Indianapolis v. Buschman*, 988 N.E.2d 791 (Ind. 2013) *see also; Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 602 (Ind. 2011). After the burden of proof regarding summary judgment has been established by the moving party, the burden shifts to the non-moving party to demonstrate through specific

³ I.C. § 4-21.5-7-3.

**Objection to the Issuance of Sewer Construction Permit Approval No. 20606 to
Lakeland Regional Sewer District
North Webster, Kosciusko County, Indiana
2013 OEA 23, (13-W-J-4647)**

evidence that a genuine issue of material fact exists. *Bushong* at 474 (2003). “[I]t is well-settled that speculation may not be used to manufacture a genuine issue of fact.” *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001); *see also Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001) (“The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment . . . Speculation will not suffice.”).

Title 13, Article 26 of the Indiana Code covers the formation, duties and obligations of regional water, sewage and solid waste districts. I.C. § 13-26-2-11 provides that a petition for review objecting to the formation of the District must be filed in accordance with I.C. § 4-21.5-5. I.C. § 4-21.5-5 provides that a complaint for judicial review must be filed within thirty (30) days of a final decision in the appropriate judicial district.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (the “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 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. 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.

Motion to Dismiss

3. The Approval was issued on March 26, 2013. Pursuant to I.C. § 4-21.5-3-7(a)(3)(A) and I.C. § 4-21.5-3-2(e), the Petitioners had eighteen (18) days from March 26, 2013, the date of the notice and the presumed date of mailing, until April 13, 2013, to file the Petition for Review. As April 13 was a Saturday, the deadline for filing petitions was extended pursuant to I.C. §4-21.5-3-2 until April 15, 2013. Robert W. Doerr did not file his petition for review until April 16, 2013. Robert W. Doerr’s petition for review was not timely filed in this matter and should be dismissed. The petitions for review filed by Terry and Debra Shumpert, Thomas R. and Carrie E. Hughes, Mark E. and Laura J. Fishburn and Steve M. and Denise M. Yocom were timely filed.

Motion for Summary Judgment

4. The Petitioners, in their Petitions for Review and their response to the motions for summary judgment, raise several questions about the validity of the Approval. The only questions that may properly be raised before the OEA are those which relate to whether the IDEM properly applied the applicable regulations to *Approval No. 20606*. No other action by the IDEM is before the OEA.

**Objection to the Issuance of Sewer Construction Permit Approval No. 20606 to
Lakeland Regional Sewer District
North Webster, Kosciusko County, Indiana
2013 OEA 23, (13-W-J-4647)**

5. The Petitioners cannot challenge the formation of the District before the OEA. I.C. § 13-26-2-11 provides that a petition for review objecting to the formation of the District must be filed in accordance with I.C. § 4-21.5-5. Specific sections of I.C. § 4-21.5-5 provide that review must be filed within thirty (30) days⁴ in the local court.⁵ No petition for review was filed in the local court. The OEA does not have the jurisdiction to review questions relating to the formation of regional water, sewage and solid waste districts. Even if the OEA could address these issues, as the District was formed in 2008, any request for review is now too late. Therefore, the OEA does not have the jurisdiction to review whether (1) the Petitioners received proper notice of the formation of the District; (2) the Petitioners' properties should have been included in the District; (3) a need exists for sewers; or (4) the District was properly formed.
6. Once a district has been formed, the regulations do not require that the IDEM determine a need for a sewer in order for it to approve the construction application. The IDEM may only review the submitted plans to determine whether the plans meet the specifications spelled out in the regulations.
7. The Approval explicitly requires compliance with all applicable federal, state and local laws and regulations. The Petitioners, in their response, assert that the sewer will not function as designed. Items B, C, E, F and G raise questions about the design of the system. However, the Approval and the accompanying technical documents address these concerns and contain specific conditions that require the Permittee to ensure that all technical problems that may arise are adequately addressed.
8. Further, the IDEM is correct in stating that the Petitioners must do more than merely allege that there are flaws in the design. Mere allegations that the design was deficient, without any evidence of such deficiencies, are not enough to create an issue of fact. The response should have included evidentiary support for the allegations. The Petitioners supplied no such evidence. Further, under the terms of the Approval, the Permittee would be required to correct any design deficiencies.
9. The remaining issues raised by the Petitioners are outside of the IDEM's authority, including any questions about (1) the costs of the project; (2) whether the Petitioners reside within the boundaries of the District; or (3) the distance between the sewer lines and wells. There is nothing in the regulations which allow the IDEM to deny an approval or to even review the application for these reasons.
10. In conclusion, summary judgment in favor of the IDEM and the District is appropriate. The Petitioners have raised no issues that (1) the OEA has the jurisdiction to address; (2) the IDEM must consider in determining whether to approve the construction permit; or (3) the Petitioners have presented sufficient evidence on to create an issue of fact.

⁴ I.C. § 4-21.5-5-5

⁵ I.C. § 4-21.5-5-6.

**Objection to the Issuance of Sewer Construction Permit Approval No. 20606 to
Lakeland Regional Sewer District
North Webster, Kosciusko County, Indiana
2013 OEA 23, (13-W-J-4647)**

11. There are no genuine issues as to the material facts in the case. Summary judgment should be granted.

FINAL ORDER

The ELJ, being duly advised, **ORDERS** that Robert W. Doerr is **DISMISSED**. The ELJ **GRANTS** the IDEM's and the District's Motions for Summary Judgment. All further proceedings are **VACATED**.

You are 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 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 1st day of August 2013 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge