

**Objection to the Issuance of Notice of Sufficiency for Notice of Intent General Permit No.
INR10H954
Keystone Square Seventh
Windshire Corporation
Goshen, Elkhart County, Indiana
2015 OEA 33, (14-W-J-4711)**

OFFICIAL SHORT CITATION NAME: When referring to 2015 OEA 22 cite this as
Windshire Corporation, 2015 OEA 33.

TOPICS:

MS4
acres
dry well
hearing
storm water
Class V injection wells
Notice of Sufficiency (NOS)
municipal separate storm sewer system
Storm water Pollution Prevention Plans (SWPPP)
Rule 5
Rule 13
327 IAC 15-5
327 IAC 15-5-1
327 IAC 15-5-4(35)
327 IAC 15-5-5(a)(11)
327 IAC 15-5-5(a)(14)
327 IAC 15-13-16(c)

PRESIDING LAW JUDGE: Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Sierra Alberts, Esq.
Respondent: Steven Turner, Esq.
Petitioner: Amy Romig, Esq.; Daniel P. Cory, Esq.; Jeffrey D. Claflin, Esq.
Plews, Shadley, Racher & Braun
Linda J. Clark, O.D.

ORDER ISSUED:

July 28, 2015

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)
)
)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
)
OBJECTION TO THE ISSUANCE OF NOTICE OF)
SUFFICIENCY FOR NOTICE OF INTENT)
GENERAL PERMIT NO. INR10H954)
KEYSTONE SQUARE SEVENTH)
WINDSHIRE CORPORATION)
GOSHEN, ELKHART COUNTY, INDIANA)
)
) CAUSE NO. 14-W-J-4711
)
_____)
Linda J. Clark, O.D.,)
Petitioner,)
Windshire Corporation,)
Permittee/Respondent,)
Indiana Department of Environmental Management,)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

The parties came before the Office of Environmental Adjudication (the OEA) for the final hearing held on March 13, 2015. The presiding Environmental Law Judge (the ELJ), being duly advised and having read the record and heard the evidence, enters the following findings of fact, conclusions of law and final order.

Findings of Fact

1. On March 4, 2014, Windshire Corporation (Windshire) submitted a Notice of Intent letter (the NOI) to the Indiana Department of Environmental Management (the IDEM) for the Keystone Square Seventh project (the Project) located at the northeast corner of the intersection of Dierdorff Road with Keystone Drive, on the south side of the City of Goshen Indiana. The NOI requested that the IDEM determine that the project was covered by the NPDES General Permit Rule for Storm Water Discharges Associated with Construction Activity, otherwise referred to as Rule 5 (327 IAC 15-5).
2. The City of Goshen (the City) has been designated a municipal separate storm sewer system (MS4) and is located in the area included in the Elkhart Soil and Water Conservation District

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(Elkhart County SWCD). Since February 12, 2004, in accordance with Rule 13 Permit #INR040137¹ (the Rule 13 Co-permit) and its local ordinances, the City has been authorized

by the IDEM to determine whether construction projects located in the City are in compliance with the requirements of Rule 5. Further, the City has an agreement with Elkhart County which in turn has an agreement with the Elkhart County Soil and Water Conservation District (Elkhart County SWCD) to review Storm water Pollution Prevention Plans (SWPPPs).

3. As part of the Rule 13 process, the City passed Ordinance 4328 that established the standards for construction site storm water run-off controls. This Ordinance also describes the appeal rights for interested persons who object to the approval of a storm water clearance.
4. In this matter, the Elkhart County SWCD reviewed the SWPPP; the City of Goshen reviewed the Site Plan Review, which included site drainage, post-construction, and site utilities plans.
5. On July 2, 2005, Windshire submitted its initial Rule 5 NOI for the Keystone Square Seventh project, consisting of 1.386 acres, to IDEM.
6. On July 25, 2005, Windshire received approval for its SWPPP from the Elkhart County Soil and Water Conservancy District (Elkhart County SWCD).
7. Thereafter, Windshire developed a portion of the Keystone Square Seventh project (known as Lot 12).
8. Dr. Linda J. Clark, O.D., (the Petitioner) owns a third of Lot 12 (1765 Stafford Ct.). At some point in time, before the building was constructed, but after the SWPPP approval, the Petitioner negotiated an agreement with Windshire regarding additional parking. Windshire developed Lot 13B in 2006 to provide this additional parking.
9. On October 30, 2008, the IDEM sent the Notice of Sufficiency (the NOS) to Eric Kurtz of Greater Elkhart County Storm water Partnership, informing him that the Renewal NOI and Part A of the Storm Water Quality Management Plan were sufficient to comply with NPDES general permit requirements for storm water discharges.
10. On June 17, 2010, Windshire submitted the Rule 5 NOI renewal for the Keystone Square Seventh with proposed land disturbance of 1.386 acres to IDEM. The renewal was approved.
11. In November of 2013, the Petitioner noticed construction activity in the area east of Lot 12 and 13A.

¹ This permit was issued as a co-permit to Elkhart County, City of Elkhart, City of Goshen and Town of Bristol and has been in effect continuously since February 12, 2004.

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12. As noted in the Site Plan Review², Windshire submitted the Site Plan to the City on October 30, 2013. Initially, the City determined that the site drainage, post-construction, and site utilities plan were insufficient. The City of Goshen Drainage Plan Review form asks “Are any Class V injection wells (Drywells) being proposed. If yes, drainage plan is automatically denied based upon the requirements established by 327 IAC 15-13-16-s and 327 IAC 2-11. Definition “Class V Injection Well”: means a type of well, which typically has a depth greater [sic] than its largest surface dimension, emplaces fluids into the subsurface, and does not meet the definition of Class I through Class IV wells as defined under 40 CFR 146.5.” The Site Plan Review noted that a dry well or Class V Injection Well was located on Lot 12, Tract 3 and that the dry well should be registered with the United States Environmental Protection Agency.
13. On November 14, 2013, the City approved Windshire’s plans.
14. Windshire did not propose a new Class V injection well (or drywell) for the construction on Lot 13. The existing drywell on Lot 12, Tract 3 was severed from Lot 13.³
15. On November 25, 2013, Windshire began construction on Lot 13A.
16. On December 2, 2013, the Elkhart County SWCD conducted an inspection. Specifically, the On-Site Evaluation for Erosion/Sediment Control notes that:
- a. The existing SWPPP did not reflect the work being done currently.
 - b. The Rule 5 Permit had expired.
17. Sometime after Dec. 10, 2013, the City of Goshen Dept. of Storm Water Management issued a Notice of Deficiency to Windshire.
18. On January 17, 2014, the Goshen Board of Public Works and Safety and Storm Water Board (the Board) approved Windshire’s application for a Storm Water Clearance (the Clearance). This approval was contingent upon the Elkhart County SWCD approval of SWPPP. The Petitioner appealed this decision to the Board on January 31, 2014.
19. On February 7, 2014, Windshire submitted its SWPPP to the Elkhart County SWCD. The SWPPP indicated that the proposed amount of land to be disturbed was 5.958 acres.
20. The Petitioner learned that the amount of acreage involved in the Site had increased from 1.386 to 5.958 acres on or about February 16, 2014.

² Petitioner’s Exhibit 6.

³ Transcript, page 125, lines 16-22.

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21. On February 17, 2014, the Board held a hearing on Petitioner's appeal. The Board affirmed the issuance of the storm water clearance. The Petitioner did not seek further review of this decision.
22. On March 4, 2014, Brads-Ko Engineering & Surveying, Inc., on behalf of site owner Windshire Corp, submitted the NOI for the Keystone Square Seventh project to the IDEM. Brads-Ko specifically notes in its cover letter⁴:
- The Storm Water Pollution Prevention Plan (SWPPP/SWP3) was submitted to and approved by the Elkhart County Soil and Water Conservation District in July of 2005. The project is covered by an active Notice of Intent at this time. It is my understanding that this Notice of Intent will be entered as an "Initial submittal" because my changes in area exceed an acre.
- The scope and overall layout of the project has not changed from the original submittal. The original Notice of Intent was not prepared by me and I am simply correcting the original Notice of Intent so that is an accurate representation of the project. Changes have been made to both the acreage and hard surface coverage. My submittal is a correct representation of the original Erosion Control Plan as it was reviewed in 2005.
23. On March 6, 2014, the Petitioner's counsel informed Heather Schuler of supposed Rule 5 deficiencies in the local permitting process via email. Ms. Schuler is an employee of IDEM.
24. Following the 2014 NOI being submitted to IDEM, Randy Braun, Section Chief of the Wetlands and Storm Water Section of the Surface Water, Operations, and Enforcement Branch of the Office of Water Quality at IDEM, and Ms. Schuler contacted Jason Kauffman, who was then an employee of the Elkhart County SWCD, regarding the SWPPP review submitted with the NOI. Because the SWPPP review was from 2005, IDEM requested the Elkhart County SWCD re-review the updated SWPPP and submit a new SWPPP review form.
25. On March 11, 2014, Ms. Schuler received via email the new SWPPP review form for the Keystone Square Seventh project contained in the March 4, 2014 NOI submittal. The form deemed the updated SWPPP as adequate.
26. On March 11, 2014, the Elkhart County SWCD approved the SWPPP.

⁴ Petition for Administrative Review, Exhibit A.

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27. On March 13, 2014, the IDEM issued the NOS to Windshire. The NOS stated that IDEM had determined that Windshire's NOI letter was sufficient to prove that the project was in compliance with the requirements of Rule 5. The general permit number assigned to the project is INR10H954.
28. The Petitioner filed her Petition for Administrative Review of the March 13, 2015 NOS with the OEA on March 13, 2014.
29. The IDEM and Windshire filed for Summary Judgment in April 2014. The motions were denied on July 18, 2014; the OEA found that there were genuine issues as to material facts. However, the OEA also determined that the Petitioner had not been denied her due process rights in the appeal to the Board.
30. The final hearing was held on March 13, 2015. The Petitioner; Dustin Sailor, the City Utility Engineer for the City of Goshen Engineering Department; Jason Kauffman, currently employed by the Storm water Coordinator for the City of Goshen Storm water Department and formally employed by the Elkhart County SWCD; and Randy Braun, an IDEM employee, testified.
31. Proposed findings of fact, conclusions of law and order were filed on May 19, 2015.

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). Findings of fact must be based exclusively on the evidence presented to the environmental law Judge (the "ELJ"), and deference to the IDEM's initial factual determination is not allowed. *Id.*; Ind. Code § 4-21.5-3-27(d).

The Petitioner contends that the IDEM erred when it determined that Windshire met the requirements of Rule 5 and issued the NOS. Rule 5 establishes requirements for storm water discharges from construction activities and requires the project site owner to submit a notice of intent letter to the IDEM. Pursuant to 327 IAC 15-13, the IDEM may delegate the authority to review construction plans to MS4 entities. If review authority has been delegated to an MS4, the project site owner shall submit a NOI to the MS4 for review and once it has approval from the MS4, must submit an NOI to the IDEM and attach a copy of the approval from the MS4.

327 IAC 15-5-1 states, "The purpose of this rule is to establish requirements for storm water discharges from construction activities of one (1) acre or more so that the public health, existing water uses, and aquatic biota are protected."

327 IAC 15-5-4(35) defines "Storm water pollution prevention plan" as "a plan developed to minimize the impact of storm water pollutants resulting from construction

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activities.” Further, 327 IAC 15-5-7(b)(8) states, “(8) The storm water pollution prevention plan shall serve as a guideline for storm water quality, but should not be interpreted to be the only basis for implementation of storm water quality measures for a project site. The project site owner is responsible for implementing, in accordance with this rule, all measures necessary to adequately prevent polluted storm water run-off.”

327 IAC 15-5-5 spells out the requirements for a NOI letter. The following sections of, 327 IAC 15-5-5 are of particular relevance to this case. 327 IAC 15-5-5(a)(11) requires:

- (11) A written certification by the operator that:
- (A) the storm water quality measures included in the construction plan comply with the requirements under sections 6.5, 7, and 7.5 of this rule and that the storm water pollution prevention plan complies with all applicable federal, state, and local storm water requirements;
 - (B) the measures required by section 7 of this rule will be implemented in accordance with the storm water pollution prevention plan;
 - (C) if the projected land disturbance is one (1) acre or more, the applicable soil and water conservation district or other entity designated by the department has been sent a copy of the construction plan for review;
 - (D) storm water quality measures beyond those specified in the storm water pollution prevention plan will be implemented during the life of the permit if necessary to comply with section 7 of this rule; and
 - (E) implementation of storm water quality measures will be inspected by trained individuals.

327 IAC 15-5-5(a)(14) requires that the NOI contain, “A notification from the SWCD, DNR-DSC, or other entity designated by the department as the reviewing agency indicating that the constructions plans are sufficient to comply with this rule. This requirement may be waived if the project site owner has not received notification from the reviewing agency within the time frame specified in 327 IAC 15-5-6(b)(3).” 327 IAC 15-5-4(5) defines “construction plan” as “a representation of a project site and all activities associated with the project. The plan includes the location of the project site, buildings and other infrastructure, grading activities, schedules for implementation, and other pertinent information related to the project site. A storm water pollution prevention plan is a part of the construction plan.” If the IDEM determines that the NOI meets the requirements, it may issue the NOS.

327 IAC 15-13-16(c) states:

Where appropriate, an MS4 operator shall use any combination of storage, infiltration, filtering, or vegetative practices to reduce the impact of pollutants in storm water run-off on receiving waters. In addition to the combination of practices, the following requirements shall be utilized:

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Any storm water practice that is a Class V injection well must ensure that the discharge from such practices meets Indiana ground water quality standards as referenced in 327 IAC 2-11.

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 Ind. Code § 13-13, *et seq.* The OEA has jurisdiction over and is the ultimate authority regarding the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*, and per I.C. § 4-21.5.3.7(a)(1)(A).
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. During the hearing, the IDEM objected to evidence regarding the Storm Water Clearance on the grounds that the Clearance was not relevant to the matter at hand as it is a form of local approval. The Clearance was issued by the Board after a determination that the plan submitted by Windshire met the requirements of the local ordinance. The ordinance required the submission of some information that was not required by Rule 5 and the IDEM. However, Rule 5 requires that the SWPPP plan comply “with all applicable federal, state, and local storm water requirements.” Evidence, including evidence regarding the Clearance, of whether the SWPPP meets the requirements of the ordinance is therefore relevant.
4. The OEA, in the Findings of Fact, Conclusions of Law and Order issued July 18, 2014, concluded that the Petitioner had not been denied her due process rights. That conclusion is incorporated herein.
5. In this case, the City of Goshen has been designated as a MS4 and was given the authority to review Windshire’s NOI. The Petitioner has argued that the IDEM merely “rubber-stamped” Windshire’s NOI based on a faulty review by the City. The OEA determined, in the July 18, 2014 Findings that the IDEM has a duty to independently verify that the Rule 5 requirements have been met, especially if presented with evidence that the MS4 did not properly review the NOI. The Petitioner complained to the IDEM regarding various issues she believed precluded issuance of the NOS. However, Mr. Braun testified that he and Heather Schuler requested confirmation from the City that the NOI complied with the Rule 5 requirements. The Petitioner failed to present any evidence that contradicts the fact that the IDEM requested additional information regarding the City’s review of the SWPPP and therefore met its statutory duties.

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6. As to the existence of dirt piles or the other drainage issues on the Project, the Petitioner failed to present any evidence that these were reasons to deny the NOS. Witnesses for Windshire and for the IDEM testified that these issues did not present conditions at the Project that were inconsistent with the rules.

7. Rule 5 applies to any construction activities of one (1) acre or more. The NOI for this project has been labeled as “initial” and “amended” because the acreage for the project was increased from 1.386 to 5.958 acres. The Petitioner argues that this is significant. However, the Petitioner fails to present any persuasive evidence or argument that this is inconsistent with the rules. The requirements of Rule 5 apply regardless of the increase in acreage.

8. The Petitioner points to the existence of the drywell on Lot 12 as proof that the IDEM erred in issuing the NOS. However, this argument fails for a number of reasons. First, while the City of Goshen Drainage Plan Review form indicates that a plan will be denied if a drywell is proposed, Windshire did not propose a new drywell; the drywell was in existence at the time Windshire submitted its NOI. Second, there was evidence that the drywell was severed from Lot 13, the lot on which construction would take place. Third, there is no statutory support for Petitioner’s argument that the drywell was prohibited. 327 IAC 15-13-16(c)(3) does not prohibit drywells and witnesses for the City merely expressed a preference that drywells not be used. Last, although there was no definitive proof whether Windshire registered the drywell, Windshire’s failure to do so is an enforcement issue, not proof that the NOS was improperly issued.

9. The Petitioner has failed to meet her burden of proof.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that judgment should be entered in favor of the IDEM and Windshire Corporation.

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

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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 28th day of July, 2015 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge