

**Objection to the Issuance of Construction Permit
No. 22977, Carriage Estates III Wastewater Treatment
Plant, American Suburban Utilities
Cause No. 18-W-J-5021**

OFFICIAL SHORT CITATION NAME: When referring to 2019 OEA 48, cite this case as **American Suburban Utilities 2019 OEA 48.**

Case name: Objection to the Issuance of Construction Permit No. 22977, Carriage Estates III Wastewater Treatment Plant, American Suburban Utilities

Cause No. 19-W-J-5052

Topics:

Summary judgment

Hughley v. State, 15 N.E.3d 1000 (Ind. 2014)

Construction permit

Wastewater treatment plant

Phosphorus

Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003).

I.C. §4-21.5-3-7 (1986)

Due process

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:

Sierra Alberts

Petitioners:

Sharon Fitzpatrick, Kurt Brock (pro se)

Permittee:

Christopher D. Shelmon, Joseph R. Delehanty, (Gutwein Law)

Order issued: September 10, 2019

Index category: Water

Further case activity: none

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)

OBJECTION TO THE ISSUANCE OF)
CONSTRUCTION PERMIT NO. 22977)
CARRIAGE ESTATES III WASTEWATER)
TREATMENT PLANT)
AMERICAN SUBURBAN UTILITIES)
WEST LAFAYETTE, TIPPECANOE COUNTY)
INDIANA)

CAUSE NO. 19-W-J-5052

_____)
Sharon Fitzpatrick, Kurt Brock)
Petitioners)
American Suburban Utilities)
Permittee/Respondent)
Indiana Department of Environmental Management)
Respondent)

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER GRANTING SUMMARY JUDGMENT**

American Suburban Utilities (ASU) and the Indiana Department of Environmental Management (IDEM) filed Motions for Summary Judgment. The presiding Environmental Law Judge (the ELJ), having read the motions, response and replies, now enters the following findings of fact, conclusions of law and final order.

Findings of Fact

1. The IDEM issued Construction Permit No. 20788 (the Construction Permit) to ASU on February 21, 2014. The Construction Permit approved ASU's application to expand the existing waste water pollution treatment plant (the WWTP) located at 4100 Bridgeway Drive, West Lafayette, Indiana. On January 28, 2016, IDEM issued NPDES Permit No. IN0043273 (the NPDES Permit) to ASU. The NPDES Permit permits ASU to discharge treated water from the WWTP to Indian Creek. Kurt Brock and Sharon Fitzpatrick filed petitions for review in each instance. On November 1, 2017, the OEA entered findings of fact, conclusions of law and a final order in favor of IDEM and ASU¹.
2. On or about October 30, 2017, ASU submitted an application to install a chemical phosphorus removal system as a standby to the Continuous Sequencing Batch Reactor

¹ *Carriage Estates III*, 2017 OEA 94.

organic phosphorus removal process approved in the Construction Permit.²

3. On February 21, 2019, IDEM issued 327 IAC 3 Construction Permit Application Carriage Estates III Wastewater Treatment Plant Improvements, Phosphorus Removal, Permit Approval No. 22977 (the 2019 Approval) to ASU.
4. The following individuals filed petitions for review: Lisa Ariano, Clint Baugh, Bernadette Baugh, Dana Beck, Kurt Brock, Nicholas Carpita, Chad Claussen, Jennifer Claussen, Amy Damitz, Sue Damitz, Tom Fackelman, Kathy Fackelman, Sharon Fitzpatrick, Robert Geswein, Cindy Geswein, Robert Graham, Tracy Graham, Emmeline Hansen, William Harper, Salman Husain, Saina Husain, Sean Kelly, Amber Kelly, Cheryl Maier, David Miatke, Marilyn Miatke, Linda Miller, Dennis Miller, Maurice Mogridge, Bette Carson Mogridge, Pascal Nguyen, Dr. Jon Rienstra-Kiracofe, Dr. Christine Rienstra-Kiracofe, Louis Sherman, Debra Sherman, Kevin & Janet E. Wiley, John Yaninek, and Janet Yaninek. Petitioners were unrepresented by counsel.
5. An Order Scheduling Prehearing Conference was issued on March 18, 2019.
6. A Final Order of Voluntary Dismissal of Tracy and Robert Graham was issued on April 2, 2019.
7. The parties appeared for the prehearing conference held on April 10, 2019. The following Petitioners appeared in person: Debra Sherman, Janet Yaninek, Cheryl Maier, Kevin Wiley and Dennis Miller. The following Petitioners designated Debra Sherman and Janet Yaninek as their representatives for purposes of appearing at the prehearing conference: Dana S. Beck, Kurt Brock, Sharon Fitzpatrick, Nicholas Carpita, Maureen McCann, Chad Claussen, Jennifer Claussen, William Harper, Sean Kelly, Amber Kelly, Jon Rienstra-Kiracofe, Christine Rienstra-Kiracofe, David Miatke, Marilyn Miatke, Louis Sherman, Janet Wiley, Lisa Ariano, John Yaninek, Maurice Mogridge, Bette Carsen Mogridge.
8. A Final Order of Default was issued on April 24, 2019 to Clint Baugh, Bernadette Baugh, Amy Damitz, Sue Damitz, Tom Fackelman, Kathy Fackelman, Robert Geswein, Cindy Geswein, Emmeline Hansen, Salman Husain, Saina Husain, and Pascal Nguyen for failure to appear at the prehearing conference.
9. A Final Order of Dismissal of Certain Petitions and Order to Submit Status Report was issued on April 30, 2019. The following Petitioners voluntarily dismissed their petitions: Lisa Ariano, Dana Beck, Chad Claussen, Jennifer Claussen, Robert Geswein, William Harper, Sean Kelly, Amber Kelly, Cheryl Maier, David Miatke, Marilyn Miatke, Linda Miller, Dennis Miller, Maurice Mogridge, Bette Carson Mogridge, Dr. Jon Rienstra-Kiracofe, Dr. Christine Rienstra-Kiracofe, Louis Sherman, Debra Sherman, Kevin & Janet E. Wiley, John Yaninek, and Janet Yaninek.

² American Suburban Utilities, Inc.'s Motion for Summary Judgment, Exhibit 1, Permit Application – Permit for the Carriage Estates III Wastewater Treatment Plant Improvements, Phosphorus Removal (Permit Approval No. 22977), page 1-2.

10. A Final Order of Dismissal of Certain Petitions was issued on May 10, 2019 to Nicholas Carpita. Kurt Brock and Sharon Fitzpatrick were the only remaining Petitioners.
11. Kurt Brock and Sharon Fitzpatrick (the Petitioners) reside at 4088 Ridgefield Court, West Lafayette Indiana. Sharon Fitzpatrick timely filed her petition for review on March 11, 2019. Kurt Brock timely filed his Petition for Review on March 11, 2019.
12. Mr. Brock and Ms. Fitzpatrick filed Supplemental Petitions on April 1, 2019.
13. The Petitioners, in their original petitions and supplemental petitions allege each of the following as legal and technical issues proposed for review of the 2019 Approval:
 - a. Petitioners complain about the hardship imposed by the construction of the WWTP, specifically relating to the noise generated by and the potential length of time necessary to construct the improvements.
 - b. Petitioners express doubts as to the efficacy of the proposed phosphorus removal. They further allege that the new system will not be cost effective and that those costs will be passed on to the WWTP's customers.
 - c. Petitioners object to the use of chemicals which are designated as hazardous under the Federal Water Pollution Control Act and the Clean Water Act.
 - d. Petitioners object to the time deadlines for filing a petition for review.
 - e. Petitioners allege that not all of potentially affected individuals were notified.
 - f. Petitioners allege that neither the Permittee nor IDEM are providing sufficient oversight of the construction of the WWTP.
 - g. Petitioners seek assurance that the Approval does not authorize an increase in the flow from the WWTP.
 - h. Petitioners contend that there will be possible releases of pollutants into the air, ground water or Indian Creek.
 - i. Petitioners allege that their rights have been violated by IDEM counsel's directive that the Petitioners may not communicate directly with IDEM staff, but must only communicate with counsel.
14. The 2019 Approval authorizes ASU to do the following:
 - Installation of an 8-inch replacement influent magnetic flow meter to measure and record influent wastewater flows from the existing lift station.
 - Installation of two 6-inch influent magnetic flow meters to measure and record influent wastewater flows from the recently constructed new lift station.
 - Construction of a new Plant Control, Laboratory and Chemical Feed Building which will contain a separate, heated room for the bulk chemical storage tank (e.g. one 5,000 gallon high-density linear polyethylene chemical storage tank, emergency eyewash etc.) and a room for the chemical feed system (e.g. two 70 gpm @27' TDH each centrifugal chemical transfer pumps, a 315 gallon chemical day tank, a wall mounted metering pump skid with two 127 gph each chemical metering pumps, emergency eyewash etc.) required for phosphorus removal via chemical precipitation using Sodium Aluminate.

- Site work, electrical and mechanical work, instrumentation and control work associated with the proposed project.

15. ASU and IDEM each filed a Motion for Summary Judgment on July 16, 2019.

16. Kurt Brock filed his Response to the motion for summary judgment on August 15, 2019. His response consists only of the following statement:

I believe Petitioner’s Petitions for Appeal were more than adequate to merit the opportunity to participate in the full Appeals process and that granting any of these Motions for Summary Judgment would be a denial of due process and a denial of my reasonable right to this appeal.

17. Sharon Fitzpatrick filed her Response to the motion for summary judgment on August 15, 2019. Her response consists only of the following statement:

I disagree with the objections presented by both IDEM and ASU, as I believe that the criteria for a Request for Administrative Review was met in my prior documents. While it was made clear at the June 25, 2019 status meeting, that the administrative law judge has limited jurisdiction, I believe that it is within her jurisdiction to determine whether my requests for administrative review met the criteria required.

18. IDEM and ASU filed their Notice to the Court on August 27, 2019.

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 Ind. Code (I.C.) § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
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. This office 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 ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. §4-21.5-3-27(d). “*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. 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. Trial Rule 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.” The Indiana Supreme Court in *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014) said:

Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate ‘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 judgment as a matter of law.’” *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)).

...

The initial burden is on the summary-judgment movant to “demonstrate [] the absence of any genuine issue of fact as to a determinative issue,” at which point the burden shifts to the non-movant to “come forward with contrary evidence” showing an issue for the trier of fact. *Id.* at 761–62.

...

We have therefore cautioned that summary judgment “is not a summary trial,” *id.* (internal quotation marks omitted); and the Court of Appeals has often rightly observed that it “is not appropriate merely because the non-movant appears unlikely to prevail at trial.” *Tucher v. Brothers Auto Salvage Yard, Inc.*, 564 N.E.2d 560, 564 (Ind. Ct. App. 1991), *trans. denied*; see also *LaCava v. LaCava*, 907 N.E.2d 154, 166 n.9 (Ind. Ct. App. 2009) (recognizing that the decedent’s “claim should withstand summary judgment” despite counsel’s “conce[ssion] . . . that he will be unlikely to prevail” at trial). In essence, Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.

...

But the prima facie case is only the beginning of the story—it merely shifts the burden to Defendant, as the non-movant, to raise a “genuine issue of material fact.” *Williams*, 914 N.E.2d at 761–62. To do so, he “may not rest upon the mere allegations or denials of his pleading.” T.R. 56(E) (emphasis added). Rather, “his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *Id.* (emphasis added). . .

at 1003-1004.

5. The OEA and IDEM, as state agencies, only have the authority to take those actions that are granted by the law. “An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.” *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003). IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations and may only consider those factors specified in the applicable regulations in deciding whether to issue a permit. As the

ultimate authority for the IDEM, the OEA's authority is limited by statute (I.C. §4-21.5-7-3) to determining whether IDEM complied with the applicable statutes and regulations. If the IDEM does not have the regulatory authority to address certain issues, the OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues.

6. The 2019 Approval was issued in accordance with I.C. §13-15 and 327 IAC 3. These laws and rules provide the parameters for the administrative review of the 2019 Approval.
7. The Petitioners have appealed the issuance of the 2019 Approval. No other IDEM decision is being appealed in this case. Therefore, Petitioners may only object to the terms and conditions of the 2019 Approval. Objections to terms and conditions contained in either the Construction Permit or the NPDES permit are an improper collateral attack and beyond OEA's authority to redress in this case.
8. Petitioners have made several objections regarding issues that IDEM does not regulate and therefore, are not within OEA's jurisdiction to hear. OEA does not have the authority to address any objections relating to the actual construction of the WWTP, including, but not limited to, noise, hours of the day or the length of time during which construction takes place. The Petitioners do not cite to, and the ELJ is not aware of any regulations that require IDEM to consider these issues when determining whether to issue the 2019 Approval.
9. Petitioners' objections relating to dangerous or hazardous chemicals appear to center on the storage of such chemicals. The 2019 Approval authorizes the use of sodium aluminate and requires certain safety equipment. However, Petitioners do not point to any regulations in 327 IAC 3³ that regulate how or where such chemicals should be stored. Without such regulations, IDEM, and therefore, OEA,
10. Allegations that neighbors did not receive notice may only be brought by those persons who were prejudiced by IDEM's failure to properly notify them. Neither of the Petitioners allege that they did not receive notice. Therefore, the Petitioners do not have standing to raise these objections before the OEA.
11. The Indiana legislature passed the law regarding the deadline for filing petitions for review (I.C. §4-21.5-3-7 (1986)). Neither IDEM nor the OEA have any authority to modify these laws. Thus, OEA does not have the jurisdiction to address Petitioners' objections to this law.
12. Petitioners also complain that the ongoing construction is a violation of the permit issued in 2014 and that IDEM is not providing sufficient oversight of the construction. IDEM, of course, has the authority to provide oversight to ensure that the construction complies with the permit. If a violation is observed, IDEM may bring an enforcement action. But it is within IDEM's discretion whether or not to bring an enforcement action and the OEA has

³ Ms. Fitzpatrick references section 311(6)(2)(A) of the Federal Water Pollution Control Act as an authority, but this does not appear to be an accurate citation.

no authority to force IDEM to do so. The presiding ELJ has not been informed of any such enforcement action pending at this time. The Petitioners have not pointed out any regulation which requires IDEM to consider violations of the Construction Permit in its decision to issue the 2019 Approval.

13. Further, IDEM presumes that any person that receives a permit will comply with the applicable regulations and with future permits. OEA will not vacate an IDEM approval based on speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana*, 1998 WL 918589 (Ind. Off. Env. Adjud.); *Grahn, Id.*; *Sidney, Id.*; *In Re: Sanitary Sewer Construction Permit, Lafollette Station Towne Centre, US 150 and Lawrence Banet Road*, 2004 OEA 67, 70 (03-W-J-3263).
14. IDEM is represented by counsel. Counsel has instructed Petitioners that all communication with any IDEM staff relating to this matter must be made through her. Whether Petitioners' rights have been infringed upon is not an issue that is properly before the OEA as it does not directly relate to whether the 2019 Approval was issued in compliance with 327 IAC 3.
15. The 2019 Approval authorizes the construction of modifications to the WWTP, specifically relating to phosphorus treatment. The 2019 Approval does not authorize the discharge of any pollutants. The discharge of pollutants from the WWTP is authorized and permitted under the NPDES Permit pursuant to 327 IAC 3. The 2019 Approval does not modify the terms and conditions of the NPDES permit, particularly relating to an increase in discharge. The Petitioners failed to provide any evidence, other than speculation, that the 2019 Approval will result in the discharge or release of any pollutants to the air, water or land.
16. Petitioners complain about the phosphorus treatment system. They assert that the new system is not cost effective and that the costs will be passed on to the WWTP's customers. However, OEA does not have the authority to address any complaints regarding the rates that ASU charges its customers.
17. Summary judgment is appropriate as to the allegations discussed above.
18. The only issue that Petitioners raise that might support vacating the 2019 Approval relates to whether the phosphorus treatment system will be effective. They allege the treatment system is redundant as the WWTP has an organic removal system. They further allege that the chemical phosphorus treatment will not achieve the desired results. These contentions fall within OEA's jurisdiction.
19. In the motion for summary judgment, Permittee designates the approval application and the information submitted in support of the application as evidence that the 2019 Approval was properly issued. This is sufficient to shift the burden of proof to the Petitioners. In their responses, though, the Petitioners failed to provide any evidence in support of their contention that the chemical system will not work. The Petitioners must produce sufficient evidence to show that a genuine issue of material fact exists in order to prevail in summary

judgment.

20. The Petitioners contend that their due process rights will be infringed upon if they are not allowed to have a hearing on this matter. In *Murphy v. Terrell*, 938 N.E.2d 823, 827 (Ind. Ct. App. 2010), the Indiana Court of Appeals held that due process required certain minimum procedures. The United States Supreme Court, in *Goldberg v. Kelly*, 397 U.S. 254, 267-268, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), held “[t]he fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.” The 9th Circuit Court in *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir. 1972) held “[a]ctual litigation is often referred to in support of a holding that a party was not prejudiced by initially inadequate pleadings.” Summary judgment motions provide an opportunity to be heard in a meaningful manner. Respondents set out their proof that the phosphorus treatment will be effective. Petitioners must respond with enough evidence to create a genuine issue of material fact. This summary judgment process is Petitioners’ opportunity to be heard by responding to the motion for summary judgment. The Petitioners have not been denied due process by being required to participate in summary judgment.
21. There are no genuine disputes as to any material facts. Summary judgment is appropriate.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Indiana Department of Environmental Management and American Suburban Utilities, Inc.’s motions for summary judgment are GRANTED. Judgment is entered in favor of the Indiana Department of Environmental Management and American Suburban Utilities, Inc.

The Petitioners are hereby further notified that pursuant to provisions of Indiana Code § 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 IC 4-21.5. Pursuant to IC 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.

Information concerning hearing schedules and procedures may be obtained by calling the Office of Environmental Adjudication at (317) 233-0850.

IT IS SO ORDERED this 10th day of September, 2019 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge