

**OBJECTION TO THE ISSUANCE OF CONSTRUCTION PERMIT #22920
WALKER SANITARY SEWER EXTENSION
EVANSVILLE, VANDERBURGH COUNTY, INDIANA
2019 OEA 088**

Official Short Cite Name:	WALKER SANITARY SEWER EXTENSION, 2019 OEA 088
OEA Cause No.:	18-W-J-5044
Topics/Keywords:	Summary Judgment 327 IAC 3 IC 13-15 Failure to file Response to Motion for Summary Judgment
Presiding ELJ:	Mary Davidsen, Esq.
Party Representatives:	IDEM: Sierra Alberts, Esq. Permittee Stacy Walker Petitioner: G. Michael Schopmeyer, Esq., Ashley R. Hollen, Esq., Matt Malcolm, Esq.
Order Issued:	August 13, 2019
Index Category:	Water Quality
Further Case Activity:	

3. A prehearing conference was held on February 11, 2019.
4. The ELJ issued a Report of Prehearing Conference and Dispositive Motion Case Management Order (the Order).
5. Per the Order, any amendments to the petition were to be filed on or before March 12, 2019. No amendments were filed.
6. Per the Order, dispositive motions were to be filed by March 27, 2019, responses were to be filed by April 29, 2019 and replies were to be filed by May 14, 2019.
7. IDEM filed a Motion for Summary Judgment on March 20, 2019. The Petitioner did not file a response. IDEM filed Proposed Findings of Fact, Conclusions of Law and Final Order, in lieu of a reply, on May 14, 2019.

Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) and the parties to this controversy pursuant to Ind. Code § 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.
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. Ind. 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 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).
5. The Petitioner failed to file a response to the motion. However, “[T]he lack of opposition to another’s motion for summary judgment does not result in ‘an automatic summary judgment’ because the ‘moving party still bears the burden of showing the propriety of summary judgment.’” *Alexander v. Dowell*, 669 N.E.2d 436, 439 (Ind. Ct. App. 1996)

(quoting *Carroll v. Lordy*, 431 N.E.2d 118, 121 (Ind. Ct. App. 1982.) “Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court.” T.R. 56(C).

6. In order to prevail, Petitioner must present sufficient evidence to prove that IDEM failed to comply with the requirements of the applicable law and regulations, in this case, 327 IAC 3. OEA has consistently held that speculation that a permittee will not comply with the terms and conditions of the permit does not constitute sufficient evidence that the permit was improperly issued.¹ In addition, the Approval is clear that the permittee is responsible for obtaining any applicable local permits and that the approval does not guarantee that the plans and specifications will meet “standards, limitations or requirements of this or any other agency of state or federal government . . .”²
7. IDEM may only consider the applicable regulations in determining whether to issue a permit. In this case, IDEM does not regulate flood plains for the concerns raised by Petitioner; floodplain regulation may lie with the Indiana Department of Natural Resources or local authorities. Therefore, allegations regarding the location falling within a flood plain are beyond IDEM’s and OEA’s jurisdiction.
8. Petitioner has failed to present any evidence, other than speculation, in support of its allegations that the construction will either cause erosion or flooding.
9. No genuine issue of material fact exists and summary judgment should be entered in IDEM’s favor.

Final Order

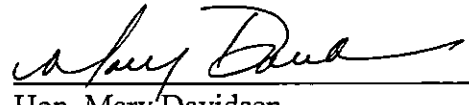
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED summary judgment is appropriate. Judgment is entered in favor of the Indiana Department of Environmental Management. All further proceedings are **VACATED**.

You are further notified that pursuant to provisions of Ind. Code (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.

¹ *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana*, 1998 WL 918589, at 17 (Ind. Off. Env’tl. Adjud.).

² Exhibit A, IDEM’s Motion for Summary Judgment, Permit Approval No. 22920, page 4 of 6, Part II General Provisions, paragraph #3

IT IS SO ORDERED this 13th day of August, 2019 in Indianapolis, IN.



Hon. Mary Davidsen
Chief Environmental Law Judge

DISTRIBUTION:

Counsel for Petitioner:

G. Michael Schopmeyer, Esq.
Ashley R. Hollen, Esq.
Matt Malcolm, Esq.
Kahn Dees Donovan & Kahn LLP
501 Main Street, Suite 305
Evansville IN 47708

Permittee/Respondent:

Stacy Walker
2005 North Villa Drive
Evansville IN 47711

Counsel for IDEM:

Sierra Alberts, Esq.
Office of Legal Counsel
Indiana Department of Environmental Management
Indiana Government Center North, Room 1307
100 North Senate Avenue
Indianapolis, IN 46204