

**Objection to the Issuance of Municipal Separate
Storm Sewers Systems Permit No. INRA0583 by
IDEM Notice of Sufficiency Letter July 17, 2020
2021 OEA 1**

OFFICIAL SHORT CITATION NAME: When referring to 2021 OEA 1, cite this case as *D&M, 2021 OEA 1*.

Topics:

Summary judgment
NPDES General Permit
Rule 5
MS4
Municipal Separate Storm Sewers Systems
Notice of Intent
Notice of Sufficiency
NOI
NOS
Public notice
327 IAC 15-5-5(a)
327 IAC 15-5-6

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

IDEM:	Susanna Bingman
Petitioners:	Keith Beall, Shaw Friedman
Permittee:	Andrew Voeltz
Intervenors:	Ryan Beall

Order issued: February 9, 2021

Index category: Water

Further case activity:

Objection to the Issuance of Municipal Separate
Storm Sewer Systems Permit No. INRA05834
By IDEM Notice of Sufficiency Letter Date July 17, 2020

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
MUNCIPAL SEPARATE STORM SEWER) CAUSE NO. 20-W-J-5117
SYSTEMS PERMIT #INRA05834 BY IDEM)
NOTICE OF SUFFICIENCY LETTER)
DATE JULY 17, 2020)
MICHIGAN CITY, LAPORTE COUNTY, INDIANA)
)

Board of Commissioners, LaPorte County)
Petitioner)
D & M Excavating)
Permittee/Respondent)
Indiana Department of Environmental Management)
Respondent)
Concerned Citizens Group)
Intervenors)

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

The Petitioner, LaPorte County Board of Commissioners, filed a Motion for Summary Judgment on December 11, 2020. The Indiana Department of Environmental Management (IDEM) filed its response on January 11, 2021. Petitioner filed a reply on January 26, 2021. The presiding Environmental Law Judge (the ELJ), having read the motion, response and reply and examined the evidence, now enters the following findings of fact, conclusions of law and order:

Findings of Fact

1. D&M Excavating (D&M) owns property located at 3761 N. 400 West, LaPorte, LaPorte County, Indiana (the Site).
2. The LaPorte County MS4¹ (the MS4) area is the reviewing agency for this Site. The LaPorte County MS4 is regulated by the MS4 General Permit No. INR040107.
3. The LaPorte County MS4 approved the construction plan in late May 2020.
4. D&M submitted a Notice of Intent Form 47487 (“NOI”) to IDEM on July 2, 2020.

¹ Municipal separate storm sewer system

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5. On July 17, 2020, pursuant to 327 IAC 15-5 *et seq.*, IDEM issued National Pollutant Discharge Elimination System (“NPDES”) Notice of Sufficiency Letter (“NOS”) and Permit # INRA05834 (“Permit”) to D&M for storm water discharges from the Site.
6. D&M submitted a NOI for this Site in 2015. IDEM issued a NOS for this property (designated as Permit No. INR10K529) on August 7, 2015. The Notice of Termination (NOT) for Permit No. INR10K529 was submitted on Jun 29, 2020. IDEM determined the NOT was sufficient on July 18, 2020.
7. On or about July 27, 2020, Randy Veatch² forwarded an email to IDEM in which Petitioner listed alleged deficiencies in the NOI.
8. On or about July 30, 2020, the Petitioner notified IDEM that there were several deficiencies in the NOI. First, the notice of publication failed to identify the name of the company. Second, the Petitioner disputed whether the newspaper in which the notice was published was a newspaper of general circulation in the affected area. Third, the project description incorrectly identified the project Site as “commercial” rather than “residential”. Last, Petitioner contends that the local requirement for a bond should not have been waived.
9. Petitioner further notified IDEM that “the consent/technical plan review approval which was previously provided to you by our local MS4 coordinator is hereby withdrawn and we request you notify Mr. Ryan Miller of D&M Excavating instanter that the NOS granted to D&M on July 17, 2020 is null and void for the following procedural and substantive deficiencies . . .”³
10. IDEM notified D&M of the deficiency regarding the newspaper notice on July 28, 2020.
11. On July 31, 2020, D&M caused another notice to be published which corrected the error and notified IDEM on August 3, 2020.
12. A stop work order was issued by the LaPorte County MS4 on July 31, 2020. IDEM was informed of this action. IDEM denies receiving notice that LaPorte County MS4 had revoked its approval of the construction plans.⁴
13. Petitioner, LaPorte County Board of Commissioners, filed a petition for review on August 3, 2020.
14. On August 11, 2020, certain individuals⁵ designated as the Concerned Citizens Group filed a Petition for Joinder and Support of Administrative Review and Request for Stay. The petition for joinder was granted on October 8, 2020.

² One of the Concerned Citizens Group.

³ IDEM’s Response to Motion for Summary Judgment, Exhibits 10 and 11.

⁴ Petitioner’s Exhibit SJ-18, Request #9.

⁵ Including Randall Veatch, John S. Ginther, Patrick D. Meany.

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15. The Petitioner filed a Motion for Summary Judgment on December 11, 2020. The Indiana Department of Environmental Management (IDEM) filed its response on January 11, 2021. Petitioner filed a reply on January 26, 2021. Neither D&M nor the Concerned Citizens Group filed a response to the motion.

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 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.
5. 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 the IDEM decision complies 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. OEA is an impartial litigation forum, not a body which formulates or advises as to public policy or regulatory content.
6. 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

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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). In accordance with T.R. 56(b), "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party."

7. The General Permit is authorized by 327 IAC 15-5 *et seq.* (Rule 5). This rule establishes "requirements for storm water discharges from construction activities of one (1) acre or more to protect the public health, existing water uses, and aquatic biota." 327 IAC 15-5-1.
8. 327 IAC 15-5-5(a) specifies the information that must be included in the NOI, including, but not limited to:

...

(4) A brief description of the construction project, including a statement of the total acreage of the project site. Total acreage claimed in the NOI letter shall be consistent with the acreage covered in the construction plan.

...

(9) Proof of publication in a newspaper of general circulation in the affected area that notified the public that a construction activity is to commence, that states, "(Company name, address) is submitting an NOI letter to notify the Indiana Department of Environmental Management of our intent to comply with the requirements under 327 IAC 15-5 to discharge storm water from construction activities for the following project: (name of the construction project, address of the location of the construction project). Run-off from the project site will discharge to (stream(s) receiving the discharge(s)).

...

(14) A notification from the SWCD, or other entity designated by the department as the reviewing agency indicating that the constructions plans 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).

...

There is no question that this information must be provided. The question is how deficiencies are addressed.

9. Pursuant to 327 IAC 15-5-6:
 - (a) After the project site owner has received notification from the reviewing agency that the construction plans meet the requirements of the rule or the review period outlined in subsection (b)(3) has expired,

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all NOI letter information required under section 5 of this rule shall be submitted to the commissioner at least forty-eight (48) hours prior to the initiation of land disturbing activities at the site. A copy of the completed NOI letter must also be submitted to all SWCDs, or other entity designated by the department, where the land disturbing activities are to occur. If the NOI letter is determined to be deficient, the project site owner must address the deficient items and submit an amended NOI letter to the commissioner at the address specified in section 5 of this rule.

(b) For a project site where the proposed land disturbance is one (1) acre or more as determined under section 2 of this rule, the following requirements must be met:

(1) A construction plan must be submitted according to the following:

(A) Prior to the initiation of any land disturbing activities.

(B) Sent to the appropriate SWCD or other entity designated by the department for:

(i) review and verification that the plan meets the requirements of the rule; or

(ii) . . .

(2) If the construction plan required by subdivision (1) is determined to be deficient, the SWCD, or other entity designated by the department as the reviewing agency may require modifications, terms, and conditions as necessary to meet the requirements of the rule. The initiation of construction activity following notification by the reviewing agency that the plan does not meet the requirements of the rule is a violation and subject to enforcement action. If notification of a deficient plan is received after the review period outlined in subdivision (3) and following commencement of construction activities, the plans must be modified to meet the requirements of the rule and resubmitted within fourteen (14) days of receipt of the notification of deficient plans.

10. Further, 327 IAC 15-5-6(c) requires “(c) The following apply for a project where construction activity occurs inside a single MS4 area regulated under 327 IAC 15-13:

(1) A copy of the completed NOI letter must be submitted to the appropriate MS4 operators.

(2) The project site owner must comply with all appropriate ordinances and regulations within the MS4 area related to storm water discharges. The MS4 operator ordinance as required by 327 IAC 15-13-15(b) and 327 IAC 15-13-16(b) will be considered to have the same authority as this rule within the regulated MS4 area.

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11. Petitioner alleges several deficiencies in the NOI. These deficiencies are (1) the public notice; (2) the designation of the property as commercial; (3) the designation of the NOI as “initial”; and (4) and the withdrawal of the MS4 approval and the stop work order (based in part on the waiver of the local bond requirement).
12. Relevant to this case, proof of publication of a notice is required under 327 IAC 15-5-5(a)(9). The initial NOI was deficient because the public notice did not identify D&M as the applicant. This deficiency was corrected by publication on July 31, 2020.
13. The deficiency regarding the public notice is the only one which was corrected. Petitioner complains about IDEM informing D&M about the defective public notice and allowing corrections. However, this action is clearly contemplated by 327 IAC 15-5-6(a). Petitioner’s argument that IDEM acted improperly by allowing D&M to correct the deficiency is not supported by the regulation which specifically allows for the applicant to submit an amended NOI.
14. The NOI must be submitted to IDEM at least 48 hours prior to beginning operations. It is clear from the regulation the applicant can begin operations before receiving IDEM approval. This further supports the conclusion that IDEM acted within its authority when it permitted D&M to correct the errors in the public notice.
15. D&M had a previous general permit under Rule 5. This permit was terminated at about the same time as the new NOI was sent to IDEM. There were differences between the terminated and the new NOI, therefore, it was reasonable to consider the new NOI as an initial application. The designation of the NOI as “initial” is not an error.
16. The NOI requests a description of the project. The NOI does not specify that this must be a verification of how the property is zoned. D&M designated this as “commercial”. IDEM did not consider this to be a fatal error and one that could be easily changed if necessary. This is a reasonable interpretation. Therefore, the designation was not an error.
17. While most of the deficiencies listed above can be addressed by IDEM pursuant to 327 IAC 15-5-6(a), 327 IAC 15-5-6(b) controls when the reviewing agency determines that there are deficiencies in the construction plans. As indicated in 327 IAC 15-5-6(c)(2), the permittee is required to comply with all local ordinances and regulations. It is incumbent upon the local authority to take the appropriate measures to ensure compliance. The stop work order, in and of itself, has no effect on the validity of the Approval. Likewise, the Approval has no effect upon the local authority’s power to require compliance with all local regulations. Whether the deficiencies listed are sufficient reasons for LaPorte County MS4 to withdraw its approval is not a question that the OEA is authorized to answer.
16. There is no question that LaPorte County MS4 withdrew its approval. The email sent to IDEM specifically says “the consent/technical plan review approval which was

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previously provided to you by our local MS4 coordinator is hereby withdrawn”⁶ Further, the stop work order is additional evidence that LaPorte County MS4 had withdrawn its approval. The fact that IDEM seemed to want more does not negate the statement made above.

18. The reviewing agency in this case is the LaPorte County MS4. It must review the construction plans and approve of such plans before the NOI may be submitted to IDEM (327 IAC 15-5-6(a)). The NOI must include proof that the reviewing agency approved the construction plans. 327 IAC 1-5-5(a)(14). The LaPorte County MS4 initially reviewed and approved the construction plans provided by D&M. IDEM informed Petitioner that when or if the MS4 withdrew its approval, D&M would be required to resubmit the NOI once the construction plans were reapproved. IDEM concedes in its Response to the Motion for Summary Judgment that the MS4 approval is a prerequisite and IDEM would have to reconsider the NOS if approval was withdrawn⁷. 327 IAC 1-5-6(b) requires:

The initiation of construction activity following notification by the reviewing agency that the plan does not meet the requirements of the rule is a violation and subject to enforcement action. If notification of a deficient plan is received after the review period outlined in subdivision (3) and following commencement of construction activities, the plans must be modified to meet the requirements of the rule and resubmitted within fourteen (14) days of receipt of the notification of deficient plan.

Both IDEM’s statement and the logical implications of the regulatory language that the plan must be resubmitted is that the permit is revoked and loses its effectiveness. There is little to no logic in concluding that the permittee can continue to operate under a deficient permit which cannot be easily and quickly amended by IDEM. When Petitioner notified IDEM that approval had been withdrawn, the July 17, 2020 NOS should have been revoked.

19. The regulatory language clearly allows for the correction of deficiencies. The public notice was easily and quickly corrected with IDEM’s approval. On the other hand, the withdrawal of the construction plans approval presents a more complex problem which must be resolved by the reviewing agency. IDEM has no role in this. In this case, the deficiencies have not been corrected. To allow a deficient permit to remain in effect while the deficiencies are being corrected over a long period of time goes against the purpose of the rule, which is to regulate this activity. Once the deficiencies have been corrected, D&M may resubmit the NOI as allowed by the rules.
20. There are no genuine issues of material fact in this case. Summary judgment in Petitioner’s favor is appropriate.

Final Order

⁶ IDEM’s Response to Motion for Summary Judgment, Exhibits 10 and 11.

⁷ IDEM’s Response to Petitioner’s Motion for Summary Judgment, filed on January 11, 2021, pg. 2.

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is entered in favor of Petitioner, LaPorte County Commissioners. 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. § 4-21.5-5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of a Final Order is timely only if filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 9th day of February 2021 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge