

Objection to the Issuance of
Construction Permit Application
Sanitary Sewer
CWA Authority, Inc.
72nd Street – Westfield Boulevard STEP
Permit Approval No. 23718
2021 OEA 57

OFFICIAL SHORT CITATION NAME: When referring to 2021 OEA 57, cite this case as CWA Authority, 2021 OEA 57.

Topics:

Summary judgment
Sanitary sewer
Grinder pumps
Gravity fed
I.C. § 13-15, et seq.
327 IAC 3
Notice
327 IAC 3-2-2(e)(6)

Presiding Environmental Law Judge: Mary Davidsen

Party representatives:

IDEM: Sierra Alberts
Petitioners: Christopher D. Welsh & Andrea T. Thompson-Welsh
Permittee: Alejandro Valle

Order issued: June 4, 2021

Index category: Water

Further case activity:

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF OBJECTION TO ISSUANCE OF) CAUSE NO. 20-W-J-5128
CONSTRUCTION PERMIT APPLICATION)
SANITARY SEWER)
CWA AUTHORITY, INC.)
72nd STREET – WESTFIELD BOULEVARD STEP)
PERMIT APPROVAL NO. 23718)
INDIANAPOLIS, MARION COUNTY, INDIANA.)
_____)
Christopher D. Welsh & Andrea T. Thompson-Welsh,)
 Petitioners,)
CWA Authority, Inc.,)
 Permittee/Respondent,)
Indiana Department of Environmental Management,)
 Respondent.)

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

Self-represented Petitioners, Christopher D. Welsh and Andrea T. Thompson-Welsh, complain of harms suffered from IDEM’s permitting decision to require homes currently served by septic systems to be served by a sanitary sewer system. This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on January 12, 2021, on a Motion for Summary Judgment filed by Respondent Indiana Department of Environmental Management, and joined and supported on supplemental brief by Permittee/Respondent CWA Authority, Inc., both represented by legal counsel. The OEA’s Chief Environmental Law Judge (“ELJ”), having read the motion and subsequent filings, now enters the following findings of fact, conclusions of law and order.

Findings of Fact

1. Petitioners Christopher D. Welsh and Andrea T. Thompson-Welsh (“Welsh family”) own ten of 62 homes¹ in an Indianapolis, Marion County, Indiana neighborhood. Septic tanks provide sanitary sewer service to the Welsh-owned homes.
2. During the summer of 2019, a Health and Hospital Corporation representative responded to Petitioner Christopher Welsh’s inquiries and requests to be part of sewer planning and design that the area was not even on the radar for sewers.
3. In CWA’s permit application, the Welsh family was identified as potentially affected

¹ 7161, 7166, 7215, 7220, 7221 Edgewater Place; 1330, 1334, 1346, 1347, 1350 East 72nd Street.

Persons to be mailed a copy of the approved permit. The Welsh family was mailed a copy of the Permit.²

4. On November 10, 2020, IDEM approved 327 IAC 3 Construction Permit Application for a Sanitary Sewer for 72nd Street- Westfield Boulevard STEP (septic tank elimination project), Permit Approval No. 23718, Indianapolis, Marion County, Indiana to CWA Authority, Inc. (“Permit”). The Permit authorizes CWA Authority, Inc. (“CWA”) to construct a low-gravity system with grinder pumps. Per the Permit, “[t]he individual property owners will be responsible for maintaining the grinder pump stations and associated service lines up to the connection with the public sewer main . . . with specified simplex grinder pumps”.³

5. On November 19, 2020, Petitioner the Welsh family timely filed a letter deemed by OEA to serve as their Petition for Administrative Review and Request for Stay (“Petition”). In sum, the Welsh family’s basis for administrative review is:

- No public input was allowed before IDEM’s decision to issue the Permit.
- The Permit should be changed to eliminate the low-gravity system with grinder pumps. Instead, a gravity system should be required. The homes are up a hill, at a higher elevation than the sewer main. A gravity system already serves some homes at the south end of the neighborhood, and functions well. Grinder pumps have mechanical systems, which are more subject to failure than a non-mechanized, gravity-fed system. The Permitted grinder pump system is more expensive for the homeowners, both for installation and ongoing operations and maintenance.

6. On January 4, 2021, a telephonic prehearing conference was held. The parties agreed to submit a proposed briefing schedule for dispositive motions.

7. The Court’s January 11, 2021 Case Management Order set a dispositive briefing schedule. On January 12, 2021, Respondent IDEM timely filed its summary judgment motion, with a supporting memorandum (“Memo”), and designated evidence. Permittee/Respondent CWA filed its January 15, 2021 Supplemental Brief Regarding Summary Judgment, Pursuant to Rule 56(B).

8. On February 1, 2021, the Welsh family emailed the Court and parties:

Good afternoon, Judge Davidsen,

We first want to thank you for your time regarding this matter of the inferior septic system being forced on our little neighborhood at 72nd at Westfield. Blvd. We appreciate your willingness to hear our case. It has been explained to us that the cost to continue this fight to get the proper sewer system will be an incredible expense and financial burden to our family. It was made clear to us that the giant monopoly Citizens has nearly unlimited funds to fight this objection and that there is no way we

² IDEM’s Memorandum in Support of its Motion for Summary Judgment (“Memo”), Ex. A, Permit.

³ *Id.*, p. 2.

could afford to match the funds that they could apply to this case to get what they desire. It is a sad fact that these monopolies have so much power. Our neighborhood has somehow survived without their water or sewer for over 100 years. Knowing that IDEM also has unlimited funds (tax dollars) to get what they want makes it clear to us that we could spend all of our family savings and kids college fund and still lose this case. It was also made clear to us that if by some miracle we win this fight Citizens then would make the process of a gravity system very difficult and expensive for the homeowners. They would do this to vilify us to the neighbors. They would explain that we were the ones who caused the additional expense Citizens would levy on the neighbors unwilling to fight for the proper system. We never opposed the introduction of sewers in our neighborhood. We just believe that if Citizens wants us to be payers into their system they should budget properly to make use of a gravity system which is being used in most of Indianapolis. If they want us as payers to the utility then provide us with the best system. It was stated by Citizens they have a 30 inch main gravity line at the south end of our neighborhood at the bottom of the hill. Gravity has been working here on earth for nearly 4 billion years. These mechanical pumps do not last long and Citizens wants us to pay to repair them, the electricity to run them and pay monthly forever. The Welsh family believes in doing what is right. We also know that monopolies and government entities know most people will just “do what they are told.” We gave it our best. We will explain to our kids someday when they inherit these homes that we tried to get a proper system but were forced into accepting and paying for an inferior product we did not want or need because of the power of monopolies and government.

9. In response, on February 1, 2021, via email, IDEM queried whether the Welsh family was responding or were withdrawing their petition for administrative review. The Court responded:

To the Welsh’s, if your intent is to withdraw your petition, please send that in writing with your signature. Because that decision is very serious, the record in this case needs that final step. This could be as simple as adding a clarifying sentence to the content of today’s email, printing it out, signing it, and sending it to the parties and Court.

10. The parties next communicated with the Court via February 25, 2021 emails. IDEM’s 7:55 am email noted that, other than the Welsh family’s February 1, 2021 email, the Welsh family submitted no further response or filings. Therefore, IDEM would not be filing a reply, and requested a ruling on the pleadings. In addition to restoring issues raised in their February 1, 2021 email, the Welsh family’s February 25, 9:01 am email complained of site construction activities, despite a Court ruling, and the additional adverse effect that had on the Welsh family’s reputation as a property manager. IDEM’s 9:19 am email responded to the Welsh family that no stay had been issued.

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 § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA” or “Court”) 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.* In the exercise of its jurisdiction, OEA is governed by the Administrative Orders and Procedures Act (“AOPA”), stated in I.C. § 4-21.5, *et seq.*, and OEA-specific rules stated in 315 IAC 1, *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. In this case, the Welsh’s are challenging IDEM’s approval of a low pressure sanitary sewer system with grinder pumps, issued per I.C. § 13-15, *et seq.*, and 327 IAC 3, for lack of public input, and for failure to approve an alternative, gravity-fed system.

4. Respondent IDEM’s summary judgment, supported by Permittee/Respondent CWA’s supplement, seeks dismissal of the Welsh’s petition for administrative review and stay, arguing that IDEM complied with regulatory requirements in the form of notice provided to Petitioners and in the type of approved sanitary system.

5. 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).

6. 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.

7. 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. OEA is an impartial litigation forum, not a body which formulates or advises as to public policy or regulatory content.

8. 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).

9. Applicable regulations did not require CWA to provide the Welsh family with prior public input or notice of CWA's permit application. The Welsh family is a "potentially affected person" under 327 IAC 3, *et seq.* A permit application must identify potentially affected persons who will be mailed a notice once IDEM issues the permit. 327 IAC 3-2-2(e)(6). 327 IAC 3, *et seq.*, has no other notice requirements on applicants or on IDEM for those in the same position as the Welsh family. The Welsh family received notice once IDEM issued the Permit to CWA. There is no genuine issue of material fact that IDEM and CWA complied with notice requirements due the Welsh family in this case. As a matter of law, the Welsh family received notice required under 327 IAC 3, *et seq.*

10. The Permitted system complies with the requirements of 327 IAC 3, *et seq.* The approved low pressure grinder pump system is one of the types of systems an applicant is allowed to choose under 327 IAC 3, *et seq.*, along with other system types. IDEM's review is limited to review 327 IAC 3 applications to determine that the proposed system satisfies the stated technical guidelines. IDEM is not authorized under 327 IAC 3, *et seq.*, to require an applicant to select a particular acceptable system type among suitable options. OEA must limit its review of an IDEM approval to whether IDEM complied with applicable regulations. There is no genuine issue of material fact, as a matter of law, that IDEM's approval of the low pressure grinder pump system selected by CWA complied with 327 IAC 3, *et seq.*

11. There is no genuine issue of material fact that the Permit issued to CWA by IDEM complied with notice and system type requirements stated in 327 IAC 3, as a matter of law. For all of the foregoing reasons, IDEM's Motion for Summary Judgment, joined by CWA, should be granted.

Final Order

AND THE COURT, being duly advised, **FINDS and ORDERS** that Respondent Indiana Department of Environmental Management's Motions for Summary Judgment, joined by Permittee/Respondent CWA, Authority, Inc., to dismiss the petition for administrative review, filed by Petitioners Christopher D. Welsh and Andrea T. Thompson-Welsh, should be granted.

IT IS ORDERED, ADJUDGED AND DECREED that the Respondents' Motion for Summary Judgment is **GRANTED**. Petitioners Christopher D. Welsh and Andrea T. Thompson-Welsh' Petition for Administrative Review is **DISMISSED**, with prejudice.

You are further notified that pursuant to provisions of IC §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 an order subject to further review consistent with applicable provisions of IC §4-21.5 *et seq* and other applicable rules and statutes.

IT IS SO ORDERED this 4th day of June, 2021 in Indianapolis, IN, via email.

Hon. Mary L. Davidsen
Chief Environmental Law Judge