

**OBJECTION TO THE ISSUANCE OF
 327 IAC 3 CONSTRUCTION PERMIT APPLICATION
 SRF PROJECT PERMIT APPROVAL NO. L-0659
 STABLE ACRES SERVICE AREA - SANITARY SEWER – SEPTIC ELIMINATION PROJECT
 2022 OEA 117, OEA CAUSE NO.: 22-W-J-5197**

Official Short Cite Name: Stable Acres, 2022 OEA 117

OEA Cause No.: 22-W-J -5197

Topics/Keywords: **Motion for Summary Judgment**
 IC 13-15-3-5
 IC 13-15-2-2
 IC 13-15-2-1
 IC 13-15-1
 IC 13-14-1-11.5
 IC 13-13 *et seq.*
 IC 5-14-3-3(a)(2)
 IC 4-21.5-7-5
 IC 4-21.5-7-3
 IC 4-21.5-3-27(d)
 IC 4-21.5-3-26(f)
 IC 4-21.5-3-23(b)
 IC 4-21.5-3-20(c)(5)
 IC 4-21.5-3-20(b)
 IC 4-21.5-3-18(d)(6)
 IC 4-21.5-3-2(a)
 IC 1-1-2-1
 327 IAC 3 sanitary sewer construction permit
 327 IAC 3-6-7
 327 IAC 3-6-4(b) and (c)
 327 IAC 3-2-2(e)(5) and (6)
 315 IAC 1-3-2(b)(4)(A)
Motion to Dismiss
 IC 4-21.5-3-7(a)(3)(A)
 mandatory timing requirements

Presiding ELJ: LORI KYLE ENDRIS

Party Representatives: Douglas Dyson, Petitioner - Pro Se
 Jesse Arntz, Petitioner - Pro Se
 Julie Beers, Petitioner - Pro Se
 Steven Beers, Petitioner - Pro Se

Caril Bernard, Petitioner - Pro Se
Johan Bernard, Petitioner - Pro Se
Erica Bower, Petitioner - Pro Se
Holly Patton Brinneman, Petitioner - Pro Se
Carl Broyles, Petitioner - Pro Se
Marsha Broyles, Petitioner - Pro Se
James A. Carnahan, Petitioner - Pro Se
Rita Dean, Petitioner - Pro Se
Chris Evans, Petitioner - Pro Se
Rozena Heintzelman, Petitioner - Pro Se
Shane Henry, Petitioner - Pro Se
Sheila Henry, Petitioner - Pro Se
Stan Hochstetler, Petitioner - Pro Se
Mitzi Huffman, Petitioner - Pro Se
Samuel Johnson, Petitioner - Pro Se
Jesse Jorgenson, Petitioner - Pro Se
Hannelore Kelley, Petitioner - Pro Se
Alexander Kellam, Petitioner - Pro Se
Joni Landers, Petitioner - Pro Se
Jerry Nicodemus, Petitioner - Pro Se
Brock Ormsby, Petitioner - Pro Se
Keith Parr, Petitioner - Pro Se
Thomas O. Plasterer, Petitioner - Pro Se
Deborah Reed, Petitioner - Pro Se
Ernest P. Thompson, Petitioner - Pro Se
Beth Turner, Petitioner - Pro Se
Scott Turner, Petitioner - Pro Se
Cheryl Wagers, Petitioner - Pro Se
Abby Ziko, Petitioner - Pro Se
Jeanette Zinn, Petitioner - Pro Se
NICHOLAS J. HURSH, ESQ., for PETITIONER - SUSAN VERVALIN
MATTHEW R SHIPMAN, ESQ., PERMITTEE
SIERRA L. ALBERTS, ESQ., IDEM
BROOKE WERSTLER, ESQ., IDEM

Order Issued:	September 27, 2022
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Index Category:	WATER
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Further Case Activity:	JUDICIAL REVIEW, Whitley Co. (92C01-2210-MI-844), 8/15/2023: Verified Petition for Judicial Review is DENIED in its entirety . COURT of APPEALS (23A-MI-02465), 3/26/2024: COA AFFIRMED Whitley Co. & OEA . INDIANA SUPREME COURT, 6/19/2024: DENIED TRANSFER .
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*
Lori Kyle Endris, *Environmental Law Judge*
Sara C. Blainbridge, *Legal Administrator*

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STATE OF INDIANA)
)
COUNTY OF MARION)
)
IN THE MATTER OF:)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 22-W-J-5197

OBJECTION TO ISSUANCE OF)
327 IAC 3 CONSTRUCTION PERMIT APPLICATION)
SRF PROJECT PERMIT APPROVAL NO. L-0659)
STABLE ACRES SERVICE AREA)
SANITARY SEWER – SEPTIC ELIMINATION PROJECT)
COLUMBIA CITY, WHITLEY COUNTY, INDIANA.)

Douglas Alan Dyson, et al.,)
Petitioners,)
Whitley Co. Regional Water & Sewer)
Permittee/Respondent,)
Indiana Dept. of Environmental Management,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Office of Environmental Adjudication (OEA or Court) on Respondent, Indiana Department of Environmental Management's (IDEM) and Permittee/Respondent Whitley Co. Regional Water & Sewer District's (Permittee or District) Motion for Summary Judgment, filed July 26, 2022, which pleadings are part of OEA's record. Having read and considered the motions and briefs, the presiding Environmental Law Judge makes the following Findings of Fact, Conclusions of Law and enters the Final Order:

FINDINGS OF FACT

1. On March 21, 2022, the Whitley County Regional Water & Sewer District (Permittee) submitted an Application for Sanitary Sewer Construction Permit, State Form 53159 (CR7 / 2-20). (Application). Attached to the Application was a list of potentially affected persons to be notified of the issuance of the Permit.

2. On April 27, 2022, IDEM issued the 327 IAC 3 Sanitary Sewer Construction SRF Project Permit Approval No. L-0659 (Permit) and granted Permittee's Variance request (Variance).

3. Between May 4, 2022 and June 6, 2022 thirty-eight (38) *pro se* individuals (Petitioners) filed with OEA identical Notices of Appeal, No Trespass and Notice to Cease and Desist to appeal IDEM's issuance of Permit Approval No. L-0659. OEA deemed the Notices complied with 315 IAC 1-3-2 (collectively Petition) and assigned Cause No. 22-W-J-5197.

4. On May 12, 2022, IDEM issued a 327 IAC 3 Construction Permit Application Sanitary Sewers and Lift Station Micro-Pulse Lift Station & Force Main Improvements Permit Approval No. 24519 to Aqua Indiana, Inc. IDEM Ex. E. This Permit Approval was not appealed.

5. On May 25, 2022, Sierra L. Alberts, Esq. entered her appearance on behalf of IDEM. On June 1, 2022, Brooke Werstler, Esq. entered her appearance on behalf of IDEM. On June 2, 2022, Matthew R. Shipman, Esq. entered his appearance on behalf of the Permittee. On June 20, 2022, Nicholas J. Hursh, Esq. entered his appearance on behalf of Petitioner, Susan Vervalin.

6. On June 20, 2022, the parties participated in a video/telephonic Prehearing Conference. Denita Patrick attended the Prehearing Conference but did not file a Petition for Administrative Review. Ms. Patrick was told she would be kept informed of the proceedings but could not participate as a petitioner because she did not file a timely petition for administrative review.

7. On July 18, 2022 Petitioner Dyson filed a Verified Protest with Motion to Amend and Mandate for Revocation of Variance (Amended Petition). On July 20, 2022, Petitioners Arntz, Beers, Bernard, Brinneman, Broyles, Carnahan, Dean, Evans, Heintzleman, Henry, Johnson, Jorgenson, Kelley, Nicodemus, Ormsby, Parr, Plasterer, Platt, Reed, Thompson, Vervalin, Wagers, Zinn, filed the same Motion as Petitioner Dyson. Petitioner Bernard signed the Amended Petition but raised three (3) additional issues (Bernard Amended Petition). In addition to signing the Amended Petition, Petitioner Vervalin, by counsel, filed a separate Amended Petition (Vervalin Amended Petition).

Although they did not file Petitions, Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, Denita Patrick and Zachary Crebb also signed the Amended Petition.

8. On July 26, 2022 IDEM filed its Joint Motion to Dismiss and Motion for Summary Judgment,¹ and Permittee filed its Motion to Join IDEM's Motions.

9. On August 8, 2022, the presiding Environmental Law Judge (ELJ) issued a Notice of Proposed Dismissal as to Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, Denita Patrick, David Platt, and Zachary Crebb for failing to comply with Ind. Code § 4-21.5-7(a)(3)(A) (I.C.) and I.C. § 4-21.5-3-2(a).

¹ The presiding ELJ addressed the Motion to Dismiss separately from the Motion for Summary Judgment.

10. On August 23, 2022, Petitioner Dyson filed a Praeipce with Supporting Facts and Law to Revoke (Response to IDEM’s Motion to Dismiss and Motion to Summary or Response). In this document, Petitioner Dyson cited I.C. § 1-1-2-1, the Confirmatio Cartarum, the Magna Carta, Affidavit of Citizenship Evidence Notice, the United States Constitution Article VI, and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 131 (1982) (Severance tax imposed on oil and gas removed from Indian reservation, authorized by Tribe's inherent authority to tax as part of its power of self-government, did not violate the commerce clause under Art I, § 8, cl 3) to argue OEA does not have jurisdiction over IDEM’s issuance of Permit Approval No. L-0659 under 327 IAC 3.

11. On August 24, 2022, via email on behalf of other Petitioners, Petitioner Dyson filed a Motion with Supporting Facts and Law to Revoke Permit NO. L-0659 which adopted Petitioner Dyson’s Response. The document stated *in toto*,

We, the undersigned aggrieved people of Stable Acres, hereby joins [sic] in the Praeipce with Supporting Facts and Law to Revoke filed by Douglas Alan Dyson, and request that the Court to Revoke permit NO. L-0659 for lack of subject matter, personal and In rem jurisdiction, for incorrect venue and failure to state a claim upon which relief can be lawfully granted.

I certify under the laws of the United States of America that this Motion with Supporting Facts and Law to Revoke Permit NO. L-0659 is true and correct under the pains and penalties for perjury to the best of my knowledge and belief.

This document neither addressed the Court’s Proposed Notice of Dismissal nor responded to IDEM’s Motion to Dismiss. Petitioners’ Motion did not proffer “Supporting Facts and Law.”

12. All seven (7) individuals² that were named in the August 8, 2022 Proposed Notice of Dismissal signed the Response and two (2) additional individuals³ who had not previously participated in any part of the appeal of the Permit also signed the Response. For clarity:

Petition Recv'd	Last Name	First Name	Amendment Recv'd	Praeipce to Revoke Recv'd	OEA Status
5.5.22	Dyson	Douglas	7.18.22	8.23.22	Active
5.5.22	Bernard	Caril	none	8.25.22	Active
5.5.22	Bernard	Johan	7.20.22	8.25.22	Active
5.6.22	Vervalin	Susan	7.20.22	8.25.22	Active
5.9.22	Beers	Steven	none	8.25.22	Active
5.13.22	Beers	Julie	7.20.22	none	Active
5.9.22	Henry	Shane	7.20.22	8.25.22	Active
5.9.22	Henry	Sheila	none	8.25.22	Active

² Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, Denita Patrick and Zachary Crebb.

³ Dave Huffman and Michael Reed.

Petition Recv'd	Last Name	First Name	Amendment Recv'd	Praecipe to Revoke Recv'd	OEA Status
5.9.22	Reed	Deborah	7.20.22	8.25.22	Active
5.10.22	Arntz	Jesse	7.20.22	8.25.22	Active
5.10.22	Heintzelman	Rozena	7.20.22	none	Active
5.10.22	Thompson	Ernest	7.20.22	8.25.22	Active
5.11.22	Bower	Erica	none	none	Active
5.11.22	Kelley	Hannelore	7.20.22	8.25.22	Active
5.11.22	Nicodemus	Jerry	7.20.22	8.25.22	Active
5.11.22	Wagers	Cheryl	7.20.22	8.25.22	Active
5.12.22	Brinneman	Holly Patton	7.20.22	none	Active
5.12.22	Broyles	Carl	7.20.22	8.25.22	Active
5.12.22	Broyles	Marsha	none	none	Active
5.12.22	Carnahan	James	7.20.22	none	Active
5.12.22	Dean	Rita	7.20.22	8.25.22	Active
5.12.22	Evans	Chris	7.20.22	none	Active
5.12.22	Hochstetler	Stan	none	none	Active
5.12.22	Huffman	Mitzi	none	8.25.22	Active
5.12.22	Johnson	Samuel	none	8.25.22	Active
5.12.22	Kellam	Alexander	none	none	Active
5.12.22	Landers	Joni	none	none	Active
5.12.22	Ormsby	Brock	7.20.22	none	Active
5.12.22	Parr	Keith	7.20.22	8.25.22	Active
5.12.22	Plasterer	Thomas	7.20.22	8.25.22	Active
5.12.22	Turner	Beth	none	8.25.22	Active
5.12.22	Turner	Scott	7.20.22	8.25.22	Active
5.12.22	Ziko	Abby	none	none	Active
5.12.22	Zinn	Jeanette	7.20.22	none	Active
5.12.22	Jorgenson	Jesse	7.20.22	8.25.22	Active
none	Bower	Chad	7.20.22	8.25.22	Dismissed 9/6/22
none	Carnahan	Virginia	7.20.22	8.25.22	Dismissed 9/6/22
none	Crebb	Zachary	7.20.22	none	Dismissed 9/6/22
none	Huffman	Dave	none	8.25.22	Dismissed 9/22/22
none	Johnson	Kaitlyn	7.20.22	none	Dismissed 9/6/22
none	Patrick	Denita	7.20.22	8.25.22	Dismissed 9/6/22
6.8.22	Platt	David	7.20.22	8.25.22	Dismissed 9/6/22
none	Reed	Michael	none	8.25.22	Dismissed 9/22/22
none	Ziko	Steven	7.20.22	8.25.22	Dismissed 9/6/22

13. On August 25, 2022, Petitioner Vervalin, by counsel, filed “Plaintiff Susan Vervalin’s, Memorandum In Opposition To Motion To Dismiss And Motion For Summary Judgment.”

14. On August 26, 2022, the presiding ELJ issued a Supplemental Notice of Proposed Dismissal as to Dave Huffman and Michael Reed.

15. On September 6, 2022, the Court issued Findings of Fact, Conclusions of Law and a Final Order of Dismissal as to Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, David Platt, Denita Patrick and Zachary Crebb for failing to comply with I.C. § 4-21.5-7(a)(3)(A) and I.C. § 4-21.5-3-2(a).

16. On September 8, 2022, Petitioner Douglas Alan Dyson filed a document titled “Judicial Notice.” The Court informed Petitioners that pursuant to I.C. § 4-21.5-3-26(f), an Environmental Law Judge may take “official notice” but not judicial notice. Official Notice may be taken once the record is opened and after a piece of evidence qualifies for admission. Petitioner Dyson’s eligibility to participate in this proceeding is not affected by his citizenship status. Petitioner Dyson’s Judicial Notice was file marked and placed in the case file for Cause No. 22-W-J-5197.

17. On the same date, IDEM filed a Reply Memorandum of Law in Support of It’s [sic] Motion to Dismiss and Motion for Summary Judgment.

18. On September 22, 2022, the Court issued Findings of Fact, Conclusions of Law and a Final Order of Dismissal as to Dave Huffman and Michael Reed for failing to comply with I.C. § 4-21.5-7(a)(3)(A) and I.C. § 4-21.5-3-2(a).

CONCLUSIONS OF LAW

1. This is a Final Order issued pursuant to I.C. § 4-21.5-3-23. 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.

2. IDEM is authorized to implement and enforce Indiana environmental statutes and rules promulgated relevant to those statutes. See I.C. § 13-13 et seq. and I.C. § 13-14-1-11.5. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding whether to issue the permit. *American Suburban Utilities*, 2019 OEA 48, 53.

3. OEA has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3(a). OEA’s jurisdiction is limited to and cannot be extended beyond those matters over which the General Assembly has determined that it may exert subject matter jurisdiction. *Alcoa, Inc.*, 2004 OEA 30, 33 (2004); *LTV Steel Company v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). In addition to I.C. §4-21.5, OEA is governed by 315 IAC 1 et seq.

4. The OEA must apply a de novo standard of review to this proceeding when determining the facts at issue. *Indiana Dep't 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). OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806 (Ind. 2004).

5. The OEA considers a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Ind. Trial Rule 56." Ind. Code § 4-21.5-3-23(b). Citing Ind. Tr. R. 56(C), the Indiana Supreme Court stated, "[d]rawing all reasonable inference 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.'" *Hughley v. State*, 15 N.E.3d 1000, 1003. "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.*

6. The moving party bears the initial burden to establish the absence of any genuine issue of material fact. *Hughley*, 15 N.E.3d at 1003. Once established, the burden shifts to the non-moving party to "come forward with contrary evidence' showing an issue for the trier of fact." *Id.* Summary judgment is particularly appropriate where the relevant facts are undisputed and pure legal questions of statutory interpretation are presented. *Kluger v. J.J.P Enterprises, Inc.*, 159 N.E.3d 82, 87 (Ind. Ct. App. 2020). All rational assertions of fact and reasonable inferences are deemed to be true and are viewed in the nonmovant's favor. *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1256 (Ind. Ct. App. 2009).

7. Whenever a permit is required by any rule of the Environmental Rules Board under I.C. § 13-15-1 for the construction, installation, operation, or modification of any facility, equipment, or device, the permit may be issued only after the department staff has: (1) approved the plans and specifications; and (2) determined that the facility, equipment or device meets the requirements of the rule. I.C. § 13-15-3-5.

8. 315 IAC 1-3-2(b)(4)(A) requires a petitioner in a case involving an appeal of a permit to state with particularity and identify:

(i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.

(ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

9. To prevail on their appeal of the issuance of the 327 IAC 3 construction permit, Petitioners must show that the Permittee did not meet the requirements of 327 IAC 3. OEA's review is limited to determining whether IDEM complied with applicable statutes and

regulations. I.C. § 4-21.5-7-3; *Blue River Valley*, 2005 OEA 1, 11. OEA does not have authority to address any other issues.

Issue raised only in the Petition:

10. Petitioners contend that the District’s Board of Trustees do not represent the Petitioners’ best interests. Under the Petition’s “Background and History” section, Petitioners reference in support of their contention:

A letter dated March 28, 2022 signed by Trustee/President Chad Nix was mailed to all property Owners of Stable Acres stating that we the people. . .have a legal obligation to connect to the new system. . .together with a signing a Right of Entry Agreement provided therein stating we the people of Stable Acres will provide electrical service to the grinder pump station, operate and maintain the grinder station lateral lines and pay the required inspection fees.

Petitioners filed a No Trespass and Notice to Cease and Desist with the Whitley County Recorder on April 13, 2022, number 2022040207, referencing the March 28, 2022 letter “was found to be threatening [sic] and intimidating, with fear of retaliation for not signing the “RIGHT OF ENTRY AGREEMENT” and for [the District] to cease and desist from making application. . .”

Petition, p. 6. Under the Petition’s “Reasons for Administrative Review” section, Petitioners state,

Indiana Constitution Article 1, section 1, it was declared that all power is inherent in the people; and that all free governments are, and of right out to be, founded on their authority and instituted for their peace, safety, and well-being. No one on the board represents the best interest of the people of Stable Acres. . .

Id., p. 7. Petitioners’ contention does not identify, with particularity, environmental concerns or technical deficiencies related to IDEM’s issuance of the Permit or provide permit terms and conditions that Petitioners contend would be appropriate to comply with 327 IAC 3 and thus does not meet the requirement of 315 IAC 1-3-2(b)(4)(A). IDEM has no regulatory authority to determine whether the District’s Board of Trustees represents owners’ best interests. OEA’s review is limited to determining whether IDEM complied with 327 IAC 3 to issue the Permit. I.C. § 4-21.5-7-3; *Blue River Valley*, 2005 OEA 1, 11.

Issues raised in both the Petition and Amended Petition:

11. Petitioners contend the sewer system is not feasible, wanted, affordable or acceptable. Under the Petition’s “Legal Issues Proposed” section, Petitioners state:

53⁴ of 79 homeowners in Stable Acres objected to the unfounded, baseless, and meritless statement made by Trustee/President Chad Nix that there was Not Sufficient Objection Not to Proceed on with the Sewer Project. The implied acceptance of this sewer project is not feasible, not wanted, not affordable and is not acceptable. This scam and sham perpetrated by [Permittee], JPR⁵ and Aqua of Indiana [sic] is by misrepresentation and failure to disclose the truth to not only we the people but permitting agencies, the State Revolving Fund, other government grants and funding agency(s) [sic] to cover their self-serving inconsistencies of government runaway waste spending. . .

Petition, p. 7. Under the Petition's "Technical Deficiencies of the Permit" section, Petitioners state

The majority of the people herein Stable Acres do not want and do not need the elimination of our septic systems for a bill that we are stressed to pay for the runaway spending [of the District]. . . [We] oppose the trading of [our] biological intellectual birth bond property to raise funding of this project.

Id. Petitioners further state that the issuance of the Permit "is against the majority of the will of the people." Amended Petition, p. 6. Petitioners' contentions neither constitute environmental/technical deficiencies nor provide permit terms and conditions that would be appropriate to comply with 327 IAC 3 as required by 315 IAC 1-3-2(b)(4)(A). Moreover, 327 IAC 3 does not authorize IDEM to consider whether the system is feasible, wanted, affordable, acceptable or against the will of the property owners before issuing a construction permit.

12. Petitioners contend "the mandatory signing of the Right of Entry Agreement breaches Article 1, Section 24 of the Indiana Constitution and Article 1 Section 10 of the U.S. Constitution, leaving the RDS⁶ [sic] in breach of 327 IAC 3-2-2(e) for compliance of ongoing maintenance." Amended Petition, p. 7.

Petitioners state that they do not want the system and will not consent to the "Right of Entry Agreement." Petition, pp. 6 – 8. Petitioners contend that because they will not accept the ongoing maintenance, Permittee has failed to comply with 327 IAC 3-2-2(e)(5). Petition, pp. 6 – 8; Amended Petition, p. 7. 327 IAC 3-2-2(e)(5) requires "construction applications proposing the installation of a grinder pump or pumps to be used on low pressure sanitary sewer collection systems [to] submit evidence of responsibility for ongoing maintenance."

Under 327 IAC 3, a permittee is not required to garner property owners' acceptance of ongoing maintenance *prior to IDEM's issuance* of a construction permit. Under the terms of the Permit, any consent required from a property owner has to be attained *prior to its construction*.

⁴ In the Petition's "Background and History" section, Petitioners claimed the No Trespass and Notice to Cease and Desist was "supported by 57 signatures with support that this proposed sewer project is not feasible, not wanted, not affordable and is not acceptable."

⁵"JPR" is Petitioners' acronym for Jones Petrie Rafinski Engineering.

⁶ "RDS" is one of the acronyms Petitioners used to identify the Whitley County Regional Water and Sewer District.

IDEM Ex. A, p. 3. (Emphasis added). Moreover, the application submitted by the Permittee contained the information regarding responsibility for ongoing maintenance to meet 327 IAC 3-2-2(e)(5). The Permittee identified that “[m]aintenance after completion will be provided by Grinder Stations – Property Owners.” IDEM Ex. B, p. 2. The Permittee clarified this identification in its April 8, 2022 response to IDEM’s Deficiency Notice for Construction Permit Application. IDEM Ex. C. The engineer consultant wrote, “[f]ollowing construction, the grinder pump stations will be turned over to the individual property owners to be privately owned and maintained.” *Id.*, p. 2.

Lastly, the Permit identifies the information submitted to meet 327 IAC 3-2-2(e)(5) and states, “[t]he individual property owners will be responsible for maintaining the simplex grinder pump stations and associated service lines up to the connection with the public sewer main at the right-of-way line after completion of construction.” IDEM Ex. A, p. 2.

Issues newly raised in the Amended Petition:

13. Petitioners contend “the Prehearing conference notice failed to provide compliance with IC 4-21.5-3-18(d)(6). . .” Amended Petition, p. 1. Petitioners are correct that the Order scheduling the Prehearing Conference did not contain a statement of the legal authority and jurisdiction under which the prehearing conference is held. Notwithstanding the omission, OEA has the authority and jurisdiction to hear an appeal of a 327 IAC 3 permit.⁷ I.C. § 4-21.5-7-3(a).

14. Petitioners claim that OEA failed to comply with I.C. § 4-21.5-3-20(c)(5). I.C. § 4-21.5-3-20 sets forth the requirements for “hearing; time and place; notice” which requires the notice for *the hearing* to “include a copy of any prehearing order rendered in the matter.” I.C. § 4-21.5-3-20(b). (Emphasis added). This notice for hearing, like the notice of prehearing conference, I.C. § 4-21.5-3-18(d)(6), requires “a statement of the legal authority and jurisdiction under which the hearing is to be held.” I.C. § 4-21.5-3-20(c)(5). Because no hearing has been set or scheduled for this Cause, I.C. § 4-21.5-3-20(c)(5) has not been violated.

15. Petitioners contend that the Permittee did not comply with 327 IAC 3-2-2(e)(5) because it did not provide evidence of ongoing maintenance for the pumps used on the low-pressure sanitary sewer collection system. The language necessary to comply with 327 IAC 3-2-2(e)(5) was provided to IDEM. IDEM Ex. B, p. 2; Ex. C, p. 2. The language then became part of the permit. IDEM Ex. A, p. 2.

Petitioners further argue that due to the Permittee’s noncompliance with 327 IAC 3-2-2(e)(5), the Permittee has provided false information in violation of the certifications required by 327 IAC 3-6-4. Amended Petition, pp. 5 - 6. Petitioners did not proffer any documentary evidence to support their argument. 327 IAC 3-6-4 requires certifications from a professional engineer or registered land surveyor and the authorized representative having jurisdiction over

⁷ The lack of the statement in the Prehearing Conference Order also has no bearing on whether IDEM properly issued the permit.

the proposed collection system and requires the professional to include the following language in his or her submission:

I certify under penalty of law that the design of this project will be performed under my direction or supervision to assure conformance with 327 IAC 3 and that the plans and specifications will require the construction of said project to be performed in conformance with 327 IAC 3-6. I certify that the peak daily flow rates, in accordance with 327 IAC 3-6-11 generated in the area that will be collected by the proposed collection system that is the subject of the application, plans, and specifications, will not cause overflowing or bypassing in the same subject proposed collection system from locations other than NPDES authorized discharge points. I certify that the proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers. I certify that the ability for this collection system to comply with 327 IAC 3 is not contingent on water pollution treatment/control facility construction that has not been completed and put into operation. I certify that the design of the proposed project will meet all local rules, laws, regulations, and ordinances. The information submitted is true, accurate, and complete to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

327 IAC 3-6-4(b) and (c). This language was included in the professional engineer's submission. IDEM Ex. B, p. 4.

In the absence of documentary evidence to support Petitioners' argument that any of the signatories provided false information, Petitioners' argument constitutes supposition and conjecture. "Guesses, supposition and conjecture are not sufficient to create a genuine issue of material fact to defeat summary judgment." *Beatty v. LaFontaine*, 896 N.E.2d 18, 20 (Ind. Ct. App. 2008) (citing *Midwestern Indem. Co. v. Sys. Builders, Inc.*, 801 N.E.2d 661, 666 (Ind. Ct. App. 2004)).

Issues newly raised in Petitioner Bernard's Amended Petition:

16. In his Amended Petition, Petitioner Bernard cites the July 1, 2019 Sewer Ban Early Warning issued to Aqua America, Inc. and contends,

[I]t is my belief that Chronic hydraulic and organic overload could exist causing a contribution to by[-]passing or the discharge of insufficiently treated sewage failing to meet the standards set out in 327 IAC, causing major problems in adjoining Whitley County for me herein Stable Acres when in fact my septic system is in good working condition.

Bernard Amended Petition, p. 6. In the absence of documentary evidence to support his "belief that Chronic hydraulic and organic overload could exist" Petitioner Bernard's belief is speculative. Assertions, beliefs, opinions or conclusions cannot create a genuine issue of

material fact to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 759 (Ind. Ct. App. 1989), *trans. denied*.

Moreover, on April 27, 2022, the potential issue raised by the Sewer Ban Early Warning was resolved when IDEM granted the Permittee's request for a Variance to approve the construction of the sewer project prior to the completion of downstream facilities. IDEM Ex. D, p. 1. Under the Variance a new sewer is being constructed downstream via a separate project. *Id.* The Variance specifically states, "no new connections will be made to the proposed system until all downstream utility improvements are permitted, constructed, tested and started up." *Id.*

The issued Variance was subject to administrative review under I.C. § 4-21.5-3-7 and 315 IAC 1-3-2. A petition seeking administrative review of the variance would have to have been filed on or before May 16, 2022.⁸ I.C. § 4-21.5-7(a)(3)(A); I.C. § 4-21.5-3-2(a). The timing requirements to file a petition for administrative review are mandatory for a court to acquire jurisdiction where the review is sought from an administrative determination. *State v. Van Ulzen*, 456 N.E.2d 459, 464 (Ind. Ct. App. 1983). *See also, City of North Vernon v. Funkhouser*, 725 N.E.2d 898, 904 (Ind. Ct. App. 2000) (Jurisdiction may not be invoked until the individual seeking review has complied with the statutorily prescribed procedures); *Wayne Metal Prods. Co. v. Indiana Dep't of Env'tl Mgmt.*, 721 N.E.2d 316, 319 (Ind. Ct. App. 1991) *trans. denied* (Ind. 2000). Because none of the Petitioners appealed the variance, OEA cannot acquire jurisdiction with respect to any perceived issue(s) with the Variance here.

17. Petitioner Bernard contends "[t]he best interests of the public will be served by denial of this permit, for lack of sufficient compliance with 327 IAC 3-6-7 and not being consistent with applicable law." Bernard Amended Petition, p. 7. 327 IAC 3-6-7 sets forth the issuance requirements for sanitary sewer construction permits including peak daily flow rate, sufficient capacity, compliance with applicable NPDES permit effluent limitations, and connection to a completed water treatment/control facility. In the absence of documentary evidence to support his contention that the Permittee did not comply with 327 IAC 3-6-7, Petitioner's contention is speculative and does not create a genuine issue of material fact to preclude summary judgment. *Beatty*, *supra* at 20; *Sanchez*, *supra*, at 759. Permittee's application identifies every requirement prescribed by 327 IAC 3-6-7.

18. Petitioner Bernard contends,

My septic system works just fine and the issuance of this permit is contrary to the New Green Deal⁹ because with this new proposed system, with the proposed grinder pumps, I HAVE TO PROVIDE ADDITIONAL ELECTRICITY TO POWER THE PUMPS FOR TREATMENT

⁸ The eighteenth day after issuance was technically May 15, 2022, but because it fell on a Sunday, the petition for administrative review needed to be filed on or before May 16, 2022.

⁹ The 2019 United States congressional resolution recognizing the duty of the federal government to create a Green New Deal was introduced by Rep. Alexandria Ocasio-Cortez and Sen. Ed Markey. The text of the resolution detailed how climate change affects the economy, the environment, and national security, and outlined goals and projects for a 10-year national mobilization. The resolution was not formally adopted in the United States.

AND THERE HAS BEEN NO OPTION TO POWER THE PUMPS WITH SOLAR OR WIND OR EVEN THE METHANE PRODUCED BY SEWAGE.

Bernard Amended Petition, p. 7. (Emphasis original). Petitioner Bernard's contention neither constitutes environmental/technical deficiencies nor provides permit terms and conditions that would be appropriate to comply with 327 IAC 3 as required by 315 IAC 1-3-2(b)(4)(A). Moreover, 327 IAC 3 does not authorize IDEM to consider whether the existing septic systems work or whether the issuance of the Permit is contrary to the New Green Deal.

Issues newly raised in Petitioner Vervalin's Amended Petition:

19. Petitioner Vervalin contends that the Permit failed to meet regulatory requirements in compliance with Indiana Law. Vervalin Amended Petition, p. 5. Petitioner's reliance upon I.C. § 13-15-2-1 and I.C. § 13-15-2-2 is misplaced as these statutes apply to IDEM's Environmental Board (the Board) duties in establishing rules for the issuance of permits. The Board adopted 327 IAC 3 as the rules applicable to the issuance of construction permits in compliance with I.C. § 13-15-2-1 and 2.

20. Petitioner contends she and the other property owners "did not receive information or adequate documentation as part of the Permit Application,"¹⁰ but the Petitions filed in this Cause belie this contention. Here, the signed Petitions reflect that the homeowners, including Petitioner Vervalin, have had detailed information of the District's Board of Trustee meetings discussing the District's Permit from April 16, 2019 to March 16, 2022. Petition, pp. 1 – 6. Petitioners also received a letter along with a March 28, 2022 Right of Entry Agreement which informed the property owners about their obligation to connect to the new system and explained it was the owner's responsibility to provide electrical service to the grinder pump station, operate and maintain the grinder station lateral lines, and pay the required inspection fees. *Id.* at p. 6. Lastly, Petitioners filed a No Trespass and Notice to Cease and Desist with the Whitley County Recorder on April 26, 2022 to prevent the project. *Id.* Petitioner Vervalin's contention regarding the inadequacy of the information and documentation is without merit.

21. Petitioner Vervalin contends the Permittee did not comply with 327 IAC 3-2-2(e)(6) which requires an application for a construction permit to include identification of affected persons, along with mailing labels, for affording notice of the permit once issued. Vervalin Amended Petition, p. 5. The Permittee included this required information in its Identification of Potentially Affected Persons and attached mailing labels. IDEM Ex. B, p. 8. Additionally, the required notice was sent to all of the Petitioners once the Permit was issued. The Permittee complied with 327 IAC 3-2-2(e)(6).

22. Petitioner Vervalin contends the Application "failed to produce sufficient information to support that the affordability of the permit or necessary financing being secured to meet all requirements of the permit and project for Stable Acres." Vervalin Amended Petition, p. 6. Petitioner Vervalin's contention neither constitutes environmental concerns nor technical

¹⁰ Vervalin Amended Petition, p. 6.

deficiencies or provides permit terms and conditions that the Petitioner Vervalin contends would be appropriate to comply with 327 IAC 3 as required by 315 IAC 1-3-2(b)(4)(A). Moreover, 327 IAC 3 does not authorize IDEM to consider the “affordability of the permit or necessary financing being secured to meet all requirements of the permit.”

23. Petitioner Vervalin contends

The Application submitted includes on page 2 of 6 ‘Grinder Stations – Property Owners; Pressure Sewers – Aqua Indiana,’ but on the first page of the Application identifies the Source of Funding to be ‘IFA’s Wastewater State Revolving Fund Loan Program’ without identifying or including Private Funds or Other. There has not been adequate or sufficient information. . .regarding this discrepancy in funding and obligations identified on the Permit submitted and approved.

Vervalin Amended Petition, p. 6.

The Application’s pages are not contradictory. Financing for the construction of the wastewater treatment plant, assuming approval from the Indiana Finance Authority (IFA), will be sourced from IFA’s Wastewater State Revolving Fund Loan program. The Inspection/Maintenance section accurately reflects what was stated by the Permittee’s engineer in response to IDEM’s Deficiency Notice for Construction Permit Application: *“Following construction, the grinder pump stations will be turned over to the individual property owners to be privately owned and maintained.”* IDEM Ex. C, p. 2. (Emphasis original). Petitioners will not be funding the construction.

Petitioners were provided information regarding their responsibilities. Each property owner’s Petition stated that prior to the issuance of the Permit,

[a] letter dated March 28, 2022 signed by Trustee/President Chad Nix was mailed to all property Owners of Stable Acres stating that we the people. . .have a legal obligation to connect to the new system. . .together with a signing a Right of Entry Agreement provided therein stating we the people of Stable Acres will provide electrical service to the grinder pump station, operate and maintain the grinder station lateral lines and pay the required inspection fees.

Petition, p. 6. Petitioner Vervalin’s contention is not supported by the documentary evidence.

24. Petitioner Vervalin contends

The Stable Acres Project Permit Application No. L-0659 failed to produce the necessary ground water testing requirements that is a required component of the purpose of the Indiana Department of Environmental Management with effectuating its purpose within Indiana.

Vervalin Amended Petition, p. 7. 327 IAC 3 does not require IDEM to conduct ground water testing for issuing a permit for the construction of a wastewater treatment facility.

Issues newly raised in Petitioners' Response

25. Petitioners seemingly contend that because the Court did not have “[a] statement of the legal authority and jurisdiction under which the prehearing conference. . .[is] to be held,”¹¹ that OEA has no jurisdiction over the subject matter. Citing *United States v. Will*, 449 U.S. 200, 216 (1980) and *Cohens v. Virginia*, 19 U.S. 264, 404 (1821),¹² Petitioners stated “[w]henver a judge acts where he/she does not have jurisdiction to act, the judge is engaged in an act or acts of treason.” The absence of a statement of the legal authority and jurisdiction under which the prehearing conference is held in an Order Scheduling Prehearing Conference does not void OEA’s jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. Petitioners’ contention is without merit.

26. Petitioners contend that Indiana Constitution¹³ art. 15, §4 was violated because OEA did not provide Petitioner Dyson a copy of the ELJ’s oath of office he sought through a request for public records under I.C. § 5-14-3-3(a)(2). Response, p. 3. OEA does not have a copy of the ELJ’s oath of office because the ELJ is neither elected nor appointed. As a state employee, she is not required to sign an oath. No such document exists.

Issues newly raised in Petitioner Vervalin’s Memorandum in Opposition to Motion to Dismiss and Motion for Summary Judgment

27. Petitioner Vervalin, by counsel, stated, “[t]his Court should deny the Motion to Dismiss and Motion for Summary Judgment as there are genuine issues of material fact that preclude judgment as a matter of law.” The Orders to Dismiss are independent of IDEM’s Motion for Summary Judgment because the dismissals were based on the fact that certain individuals were attempting to participate in the Cause as Petitioners without having filed a petition for administrative review, and for one, failure to file a timely petition for administrative review. All of the remaining averments in the Memorandum parroted Petitioner Vervalin’s Amended Petition and were discussed above.

¹¹ I.C. § 4-21.5-3-18(d)(6).

¹² *United States v. Will* raised the issue of whether under the Compensation Clause, Art. III, § 1, Congress may repeal or modify a statutorily defined formula for annual cost-of-living increases in the compensation of federal judges, and, if so, whether it must act before the particular increases take effect. *Cohens v. Virginia* raised the issue of whether a judgment of the Court of Hustings, Borough of Norfolk (Virginia) finding Virginia statute prohibiting sale of lottery tickets was valid despite statute passed by Congress authorizing the sale of lottery tickets in Washington, D.C.

¹³ Section 4. Every person elected or appointed to any office under this Constitution, shall, before entering on the duties thereof, take an oath or affirmation, to support the Constitution of this State, and of the United States, and also an oath of office.

FINAL ORDER

For all of the foregoing reasons, **IT IS ORDERED, ADJUDGED AND DECREED** that the Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED**. The Petitions for Administrative Review are **DISMISSED**.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, OEA 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.

IT IS SO ORDERED this 27th day of September, 2022, in Indianapolis, IN.

Hon. Lori Kyle Endris
Environmental Law Judge
frontdesk@oea.IN.gov



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*
Lori Kyle Endris, *Environmental Law Judge*
Sara C. Blainbridge, *Legal Administrator*

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(317) 233-0850

STATE OF INDIANA)
)
COUNTY OF MARION)
)
IN THE MATTER OF:)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 22-W-J-5197

OBJECTION TO ISSUANCE OF)
327 IAC 3 CONSTRUCTION PERMIT APPLICATION)
SRF PROJECT PERMIT APPROVAL NO. L-0659)
STABLE ACRES SERVICE AREA)
SANITARY SEWER – SEPTIC ELIMINATION PROJECT)
COLUMBIA CITY, WHITLEY COUNTY, INDIANA.)
_____)
Douglas Alan Dyson, et al.,)
Petitioners,)
Whitley Co. Regional Water & Sewer)
Permittee/Respondent,)
Indiana Dept. of Environmental Management,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER ON RESPONDENTS' MOTION TO DISMISS

This matter came before the Office of Environmental Adjudication (OEA or Court) on Respondent, Indiana Department of Environmental Management's (IDEM) and Permittee/Respondent Whitley Co. Regional Water & Sewer District's Motion to Dismiss¹ filed on July 26, 2022, which pleading part of OEA's record. Having read and considered the motion and brief, the presiding Environmental Law Judge makes the following Findings of Fact, Conclusions of Law and enters the Final Order:

FINDINGS OF FACT

1. On March 21, 2022, the Whitley County Regional Water & Sewer District (Permittee or District) submitted an Application for Sanitary Sewer Construction Permit, State Form 53159 (R7 / 2-20) (Application). Attached to the Application was a list of potentially affected persons to be notified of the issuance of the Permit.

2. On April 27, 2022, IDEM issued a 327 IAC 3 Sanitary Sewer Construction SRF Project Permit Approval No. L-0659 (Permit), to Stable Acres Service Area. Between May 4, 2022 and

¹ IDEM filed the Motion to Dismiss and a Motion for Summary Judgment as one document. The presiding ELJ is treating the two (2) Motions as if they were filed separately.

June 6, 2022 thirty-eight (38) Petitioners filed identical Notices of Appeal, No Trespass and Notice to Cease and Desist (Petition) with the OEA.

3. On July 18, 2022 Petitioner Dyson filed a Verified Protest with Motion to Amend and Mandate for Revocation of Variance (Amended Petition). On July 20, 2022, Petitioners Arntz, Beers, Bernard, Brinneman, Broyles, Carnahan, Dean, Evans, Heintzelman, Henry, Johnson, Jorgenson, Kelley, Nicodemus, Ormsby, Parr, Plasterer, Platt, Reed, Thompson, Wagers, Zinn, filed the same Motion as Petitioner Dyson. Petitioner Bernard signed the Amended Petition but raised three (3) additional issues. In addition to signing the Amended Petition, Petitioner Vervalin, by counsel filed a separate Amended Petition.

4. Although they did not file Petitions, Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, Denita Patrick and Zachary Crebb also signed the Amended Petition.

5. On July 26, 2022 IDEM filed its Joint Motion to Dismiss and Motion for Summary Judgment,² and Permittee filed its Motion to Join IDEM’s Motions.

6. On August 8, 2022, the presiding Environmental Law Judge (ELJ) issued a Notice of Proposed Dismissal as to Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, Denita Patrick and Zachary Crebb. Because none of the individuals responded to the Notice, the presiding ELJ issued Findings of Fact, Conclusions of Law and Final Order of Dismissal on September 6, 2022.

7. On August 23, 2022, Petitioner Dyson filed a Praecept with Supporting Facts and Law to Revoke (Response to IDEM Motion for Summary Judgment or Response).

8. On August 24, 2022, on behalf of other Petitioners, OEA received a filing that Petitioner Dyson represented was a Response to IDEM’s Motion to Dismiss, but the document was titled Motion with Supporting Facts and Law to Revoke Permit NO. L-0659 which adopted Petitioner Dyson’s Response (collectively Response). None of this information addressed the Court’s Proposed Notice of Dismissal. The Motion did not provide “Supporting Facts and Law.”

9. Two (2) individuals, David Huffman and Michael Reed, who had not filed Petitions signed the Response. The filings are as follows:

Petition Recv'd	Last Name	First Name	Amendment Recv'd	Praecept to Revoke Recv'd	Status
5.5.22	Dyson	Douglas	7.18.22	8.23.22	Active
5.5.22	Bernard	Caril	none	8.25.22	Active
5.5.22	Bernard	Johan	7.20.22	8.25.22	Active
5.6.22	Vervalin	Susan	7.20.22	8.25.22	Active

² The presiding ELJ is addressing the Motion to Dismiss separately from the Motion for Summary Judgment as they address completely separate issues.

Petition Recv'd	Last Name	First Name	Amendment Recv'd	Praecipe to Revoke Recv'd	Status
5.9.22	Beers	Steven	none	8.25.22	Active
5.13.22	Beers	Julie	7.20.22	none	Active
5.9.22	Henry	Shane	7.20.22	8.25.22	Active
5.9.22	Henry	Sheila	none	8.25.22	Active
5.9.22	Reed	Deborah	7.20.22	8.25.22	Active
5.10.22	Arntz	Jesse	7.20.22	8.25.22	Active
5.10.22	Heintzelman	Rozena	7.20.22	none	Active
5.10.22	Thompson	Ernest	7.20.22	8.25.22	Active
5.11.22	Bower	Erica	none	none	Active
none	Bower	Chad	7.20.22	8.25.22	Dismissed 9/6/22
5.11.22	Kelley	Hannelore	7.20.22	8.25.22	Active
5.11.22	Nicodemus	Jerry	7.20.22	8.25.22	Active
5.11.22	Wagers	Cheryl	7.20.22	8.25.22	Active
5.12.22	Brinneman	Holly Patton	7.20.22	none	Active
5.12.22	Broyles	Carl	7.20.22	8.25.22	Active
5.12.22	Broyles	Marsha	none	none	Active
5.12.22	Carnahan	James	7.20.22	none	Active
none	Carnahan	Virginia	7.20.22	8.25.22	Dismissed 9/6/22
5.12.22	Dean	Rita	7.20.22	8.25.22	Active
5.12.22	Evans	Chris	7.20.22	none	Active
5.12.22	Hochstetler	Stan	none	none	Active
5.12.22	Huffman	Mitzi	none	8.25.22	Active
5.12.22	Johnson	Samuel	none	8.25.22	Active
none	Johnson	Kaitlyn	7.20.22	none	Dismissed 9/6/22
5.12.22	Kellam	Alexander	none	none	Active
5.12.22	Landers	Joni	none	none	Active
5.12.22	Ormsby	Brock	7.20.22	none	Active
5.12.22	Parr	Keith	7.20.22	8.25.22	Active

Petition Recv'd	Last Name	First Name	Amendment Recv'd	Praecipe to Revoke Recv'd	Status
5.12.22	Plasterer	Thomas	7.20.22	8.25.22	Active
5.12.22	Turner	Beth	none	8.25.22	Active
5.12.22	Turner	Scott	7.20.22	8.25.22	Active
5.12.22	Ziko	Abby	none	none	Active
none	Ziko	Steven	7.20.22	8.25.22	Dismissed 9/6/22
5.12.22	Zinn	Jeanette	7.20.22	none	Active
5.12.22	Jorgenson	Jesse	7.20.22	8.25.22	Active
6.8.22	Platt	David	7.20.22	8.25.22	Dismissed 9/6/22
none	Patrick	Denita	7.20.22	8.25.22	Dismissed 9/6/22
none	Crebb	Zachary	7.20.22	none	Dismissed 9/6/22
none	Huffman	Dave	none	8.25.22	
none	Reed	Michael	none	8.25.22	

10. On August 26, 2022, the presiding ELJ issued a Notice of Proposed Dismissal as to David Huffman and Michael Reed. Huffman and Reed were ordered to respond on or before September 15; neither responded.

CONCLUSIONS OF LAW

1. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-23 (I.C.). 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.

2. 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.

3. In reviewing a motion to dismiss, “a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party.” *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806, 814 (Ind. 2004).

4. OEA may only assume jurisdiction over petitions for administrative review which are timely filed. Pursuant to I.C. § 4-21.5-7(a)(3)(A), a party has fifteen (15) days from the date a

permit is issued to file a petition for administrative review. I.C. § 4-21.5-3-2(a) requires three (3) days to be added for service by United States mail. Thus, a party has eighteen (18) days from the date a permit is issued to seek administrative review. Because the Permit was issued April 27, 2002, the petition for administrative review had to be filed on or before May 16, 2002.

5. The timing requirements to file a petition for administrative review are mandatory for a court to acquire jurisdiction where the review is sought from an administrative determination. *State v. Van Ulzen*, 456 N.E.2d 459, 464 (Ind. Ct. App. 1983). *See also, City of North Vernon v. Funkhouser*, 725 N.E.2d 898, 904 (Ind. Ct. App. 2000) (Jurisdiction may not be invoked until the individual seeking review has complied with the statutorily prescribed procedures); *Wayne Metal Prods. Co. v. Indiana Dep't of Env'tl Mgmt.*, 721 N.E.2d 316, 319 (Ind. Ct. App. 1991) *trans. denied* (Ind. 2000).³

6. Neither David Huffman nor Michael Reed filed a Petition. Being a spouse with someone who filed does not grant jurisdiction to the non-signing/filing spouse. Similarly, by filing a subsequent Response to IDEM's Motion for Summary Judgment without having first filed a Petition does not invoke the jurisdiction of this Court, David Huffman and Michael Reed waived their right to review.

FINAL ORDER

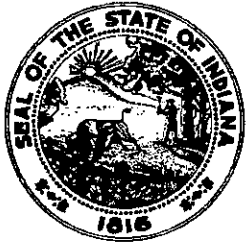
THE COURT, hereby **ORDERS, ADJUDGES AND DECREES**, that IDEM's Motion to Dismiss is hereby **GRANTED** as to David Huffman and Michael Reed.

You are further notified that pursuant to the provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of the decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to judicial review consistent with the 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.

IT IS SO ORDERED this 22nd day of September, 2022 in Indianapolis, IN.

Hon. Lori Kyle Endris
Environmental Law Judge

³ Wayne Metals involved a Commissioner's Order regarding an enforcement issue; thus, the timeframe for filing the petition for administrative review was twenty (20) days.



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*
Lori Kyle Endris, *Environmental Law Judge*
Sara C. Blainbridge, *Legal Administrator*

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(317) 233-0850

STATE OF INDIANA)
)
COUNTY OF MARION)
)
IN THE MATTER OF:)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 22-W-J-5197

OBJECTION TO ISSUANCE OF)
327 IAC 3 CONSTRUCTION PERMIT APPLICATION)
SRF PROJECT PERMIT APPROVAL NO. L-0659)
STABLE ACRES SERVICE AREA)
SANITARY SEWER – SEPTIC ELIMINATION PROJECT)
COLUMBIA CITY, WHITLEY COUNTY, INDIANA.)
_____)
Douglas Alan Dyson, et al.,)
Petitioners,)
Whitley Co. Regional Water & Sewer)
Permittee/Respondent,)
Indiana Dept. of Environmental Management,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER ON RESPONDENTS' MOTION TO DISMISS

This matter came before the Office of Environmental Adjudication (OEA or Court) on Respondent, Indiana Department of Environmental Management's (IDEM) and Permittee/Respondent Whitley Co. Regional Water & Sewer District's Motion to Dismiss¹ filed on July 26, 2022, which pleading part of OEA's record. Having read and considered the motion and brief, the presiding Environmental Law Judge makes the following Findings of Fact, Conclusions of Law and enters the Final Order:

FINDINGS OF FACT

1. On March 21, 2022, the Whitley County Regional Water & Sewer District (Permittee or District) submitted an Application for Sanitary Sewer Construction Permit, State Form 53159 (R7 / 2-20) (Application). Attached to the Application was a list of potentially affected persons to be notified of the issuance of the Permit.

¹ IDEM filed the Motion to Dismiss and a Motion for Summary Judgment as one document. The presiding ELJ is treating the two (2) Motions as if they were filed separately.

2. On April 27, 2022, IDEM issued a 327 IAC 3 Sanitary Sewer Construction SRF Project Permit Approval No. L-0659 (Permit), to Stable Acres Service Area. Between May 4, 2022 and June 6, 2022 thirty-eight (38) Petitioners filed identical Notices of Appeal, No Trespass and Notice to Cease and Desist (Petition) with the OEA.

3. On July 18, 2022 Petitioner Dyson filed a Verified Protest with Motion to Amend and Mandate for Revocation of Variance (Amended Petition). On July 20, 2022, Petitioners Arntz, Beers, Bernard, Brinneman, Broyles, Carnahan, Dean, Evans, Heintzelman, Henry, Johnson, Jorgenson, Kelley, Nicodemus, Ormsby, Parr, Plasterer, Platt, Reed, Thompson, Wagers, Zinn, filed the same Motion as Petitioner Dyson. Petitioner Bernard signed the Amended Petition but raised three (3) additional issues. In addition to signing the Amended Petition, Petitioner Vervalin, by counsel filed a separate Amended Petition.

4. Although they did not file Petitions, Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, Denita Patrick and Zachary Crebb also signed the Amended Petition. The filings are as follows:

Petition Rec'd	Last Name	First Name	Amendment Rec'd
5.5.2022	Dyson	Douglas	7.18.2022
5.5.2022	Bernard	Caril	none
5.5.2022	Bernard	Johan	7.20.2022
5.6.2022	Vervalin	Susan	7.20.2022
5.9.2022	Beers	Steven	none
5.13.2022	Beers	Julie	7.20.2022
5.9.2022	Henry	Shane	7.20.2022
5.9.2022	Henry	Sheila	none
5.9.2022	South	Deborah	none
5.9.2022	South	Michael	none
5.10.2022	Arntz	Jesse	7.20.2022
5.10.2022	Heintzelman	Rozena	7.20.2022
5.10.2022	Thompson	Ernest	7.20.2022
5.11.2022	Bower	Erica	none
none	Bower	Chad	7.20.2022
5.11.2022	Kelley	Hannelore	7.20.2022

5.11.2022	Nicodemus	Jerry	7.20.2022
5.11.2022	Wagers	Cheryl	7.20.2022
5.12.2022	Brinneman	Holly Patton	7.20.2022
5.12.2022	Broyles	Carl	7.20.2022
5.12.2022	Broyles	Marsha	none
5.12.2022	Carnahan	James	7.20.2022
none	Carnahan	Virginia	7.20.2022
5.12.2022	Dean	Rita	7.20.2022
5.12.2022	Evans	Chris	7.20.2022
5.12.2022	Hochstetler	Stan	none
5.12.2022	Huffman	Mitzi	none
5.12.2022	Johnson	Samuel	none
none	Johnson	Kaitlyn	7.20.2022
5.12.2022	Kellam	Alexander	none
5.12.2022	Landers	Joni	none
5.12.2022	Ormsby	Brock	7.20.2022
5.12.2022	Parr	Keith	7.20.2022
5.12.2022	Plasterer	Thomas	7.20.2022
5.12.2022	Turner	Beth	none
5.12.2022	Turner	Scott	7.20.2022
5.12.2022	Ziko	Abby	none
none	Ziko	Steven	7.20.2022
5.12.2022	Zinn	Jeanette	7.20.2022
5.12.2022	Jorgenson	Jesse	7.20.2022
5.9.2022	Reed	Deborah	7.20.2022
2206 08	Platt	David	7.20.2022
none	Patrick	Denita	7.20.2022
none	Crebb	Zachary	7.20.2022

5. On July 26, 2022 IDEM filed its Joint Motion to Dismiss and Motion for Summary Judgment,² and Permittee filed its Motion to Join IDEM's Motions.

6. On August 8, 2022, the presiding Environmental Law Judge (ELJ) issued a Notice of Proposed Dismissal as to Chad Bower, Virginia Carnahan, Kaitlyn Johnson, Steven Ziko, Denita Patrick and Zachary Crebb. These individuals were ordered to respond to the Notice of Proposed Dismissal on or before August 28, 2022. None of these individuals responded.

CONCLUSIONS OF LAW

1. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-23 (I.C.). 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.

2. 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.

3. In reviewing a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party." *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806, 814 (Ind. 2004).

4. OEA may only assume jurisdiction over petitions for administrative review which are timely filed. Pursuant to I.C. § 4-21.5-7(a)(3)(A), a party has fifteen (15) days from the date a permit is issued to file a petition for administrative review. I.C. § 4-21.5-3-2(a) requires three (3) days to be added for service by United States mail. Thus, a party has eighteen (18) days from the date a permit is issued to seek administrative review. Because the Permit was issued April 27, 2002, the petition for administrative review had to be filed on or before May 16, 2002.

5. The timing requirements to file a petition for administrative review are mandatory for a court to acquire jurisdiction where the review is sought from an administrative determination. *State v. Van Ulzen*, 456 N.E.2d 459, 464 (Ind. Ct. App. 1983). *See also, City of North Vernon v. Funkhouser*, 725 N.E.2d 898, 904 (Ind. Ct. App. 2000) (Jurisdiction may not be invoked until the individual seeking review has complied with the statutorily prescribed procedures); *Wayne Metal Prods. Co. v. Indiana Dep't of Env'tl Mgmt.*, 721 N.E.2d 316, 319 (Ind. Ct. App. 1991) *trans. denied* (Ind. 2000).³

6. None of the following individuals filed Petitions: Chad Bower, Virginia Carnahan, Zachary Crebb, Kaitlyn Johnson, Denita Patrick, and Steven Ziko. Being a spouse with someone

² The presiding ELJ is addressing the Motion to Dismiss separately from the Motion for Summary Judgment as they address completely separate issues.

³ Wayne Metals involved a Commissioner's Order regarding an enforcement issue; thus, the timeframe for filing the petition for administrative review was twenty (20) days.

who filed does not grant jurisdiction to the non-signing/filing spouse. Similarly, filing an Amendment without having first filed a Petition does not grant jurisdiction.

7. With respect to David Platt, OEA received his Petition June 8, 2022. Pursuant to 315 IAC 1-3-3(c) the filing of a document with OEA is complete on the earliest of the following:

- a. The date on which the document is delivered to the office.
- b. The date of the postmark on the envelope containing the document if the document is mailed to the office by United States mail.
- c. The date on which the document is deposited with a private carrier, as shown by a receipt issued by the carrier, if the document is sent to the office by private carrier.
- d. The date on which the document is received by the office if the date of deposit or postmark cannot be determined.

The postmark on the envelope used to send Mr. Platt's Petition is illegible; thus, the date of OEA's receipt constitutes the date of its filing. Because David Platt's was not received on or before May 16, 2022, he failed to comply with I.C. § 4-21.5-7(a) or follow the instructions contained in the cover letter and Notice of Right to Administrative in the Permit. Mr. Platt did not invoke the jurisdiction of this Court and waived his right to review.

FINAL ORDER

THE COURT, hereby **ORDERS, ADJUDGES AND DECREES**, that IDEM's Motion to Dismiss is hereby **GRANTED** as to Chad Bower, Virginia Carnahan, Zachary Crebb, Kaitlyn Johnson, Denita Patrick, Steven Ziko and David Platt.

You are further notified that pursuant to the provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of the decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to judicial review consistent with the 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.

IT IS SO ORDERED this 6th day of September, 2022 in Indianapolis, IN.

Hon. Lori Kyle Endris
Environmental Law Judge

