

**OBJECTION TO THE ISSUANCE OF
327 IAC 3 CONSTRUCTION PERMIT APPLICATION
SRF PERMIT APPROVAL NO. L-0693
BERKSHIRE POINTE WASTEWATER TREATMENT PLANT
2023 OEA 105, OEA CAUSE NO.: 23-W-J-5240**

Official Short Cite Name:	BERKSHIRE POINTE WWTP, 2023 OEA 105
OEA Cause No.:	23-W-J-5240
Topics/Keywords:	Wastewater treatment plant
	327 IAC 3
	Notice of Incomplete Filing, Order to Supplement the Petition, and Notice of Proposed Order of Dismissal
	Mandatory statutory requirements
	Subject matter jurisdiction; Ind. Tr. R. 12(B)(1)
	Service on opposing party
	Failure to state a claim upon which relief can be granted
	Real estate access; easement
	Future facility move
	Local permits
	Revoke permit
	Assumed future permit violation
Presiding ELJ:	Mary Davidsen, Esq.
Party Representatives:	Clifford R. Whitehead, Esq., <i>Petitioners</i>
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Index Category:	Water
Further Case Activity:	



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 23-W-J-5240

OBJECTION TO THE ISSUANCE OF)
327 IAC 3 CONSTRUCTION PERMIT APPLICATION)
SRF PERMIT APPROVAL NO. L-0693)
WASTEWATER TREATMENT PLANT)
BERKSHIRE POINTE WWTP)
HARRISON COUNTY REGIONAL SEWER DISTRICT)
NEW SALISBURY, HARRISON COUNTY, INDIANA.)
_____)
Indiana MHC, LP and Ramsey, LP,)
Petitioners,)
Berkshire Pointe (New Salisbury) WWTP)
Permittee/Respondent,)
Indiana Dept of Environmental Management,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

PLEASE SUBMIT ALL FILINGS TO THE COURT VIA EMAIL AT frontdesk@oea.IN.gov.

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”), by legal counsel, on each Respondents’ Motions to Dismiss, and related responses and replies. Having read and considered the pleadings, the presiding Environmental Law Judge (ELJ) makes the following Findings of Fact, Conclusions of Law and enters the following Final Order:

FINDINGS OF FACT

1. On January 20, 2023, the Indiana Department of Environmental Management (“IDEM”) approved a 327 IAC 3 Construction Permit Application for Wastewater Treatment Plant (“WWTP”) Improvement Project, State Revolving Fund (“SRF”) Approval No. L-0693, (“Permit”) for Berkshire Pointe, New Salisbury, Harrison County, Indiana, to the Harrison County Regional Sewer District (“District”).

2. In addition to obtaining the Permit, the District is permitted to operate a current WWTP facility, a Class I, 0.06 MGD extended aeration type sanitary treatment facility (“Current Plant”). Petitioners’ February 7, 2023 Petition for Administrative Review and Stay of

Effectiveness of Permit (“Petition”) *Petition, Ex. A, Permit, p. 2 of 6*. The District’s independent contractor, Aqua Utility Services (“AUS”), assists with Current Plant operations and billing, but is not authorized to accept legal service on behalf of the District. *District’s April 13, 2023 Motion to Dismiss (“District Motion”), p. 2*. The Current Plant’s flows are approaching its permitted capacity, with hydraulic overloading occurring during wet weather events from excessive plant infiltration and inflow. *Id.* The Current Plant is subject to NPDES Permit No. IN0042005. *Petition, Ex. A, Wastewater Treatment Facility Design Summary, p. 1*.

3. The Permit in controversy approves construction adjacent to the Current Plant site. *Petition, Ex. A, Permit, p. 2 of 6*. The Permit authorizes construction of water pollution treatment and control facility improvements, including construction of a new Aeromod WWTP, installation of 183 feet of 10-inch gravity sewer, new blowers and air compressors, a new UV disinfection system, and fine bubble diffusers in the post aeration tanks. *Permit, p. 1, 2*. The Permit provides that it was issued per provisions of Ind. Code § 13-15, *et seq.*, and 327 IAC 3. *Id., p. 1*. The Permit imposes specific and general conditions and requires compliance with all relevant provisions of 327 IAC 3, and with all other applicable legal authority. *Id.*

4. Petitioners’ Indiana MHC, LP and Ramsey, LP (“Petitioners”) timely-filed February 7, 2023 Petition raised issues on real estate access and development rights. *Petition, pp. 1 -8*. The Petition did not raise legal arguments or facts as to whether the Permit complied with 327 IAC 3. *Id.* The facility has been operated by the District since 2008, per a Transfer Agreement, (amended in 2008) with a predecessor-in-interest to Petitioners. *Petition, p. 3; Pet. Ex. B*. The Transfer Agreement was amended in 2008. *Petition, p. 3; Pet. Ex. C*. The District was granted a Variable Sewer Easement (“Easement”) in 2010, by a predecessor-in-interest to Petitioners. *Petition, p. 4; Pet. Ex. D*. Surcharges assessed by the District are the subject of an ongoing legal dispute between the parties in federal district court. *Petition, p. 4*. The District initiated litigation against Petitioners concerning land rights and easements in Harrison County Circuit Court, Cause Number 31C01-2304-PL-10. *Petitioner’s May 5, 2023 Response in Opposition to IDEM’s Motion to Dismiss, p. 3*. The Petition notes that the parties exchanged correspondence concerning the terms of the Easement and Transfer Agreement. *Id., pp. 4, 5; Exs. E, F, G*. In sum, the Petition alleges that:

- The amended Transfer Agreement, does not convey legal authority for the District construct the Permitted project;
- After the Transfer Agreement terminates in April, 2038, the District will be required to move the Permitted facility;
- The Permitted construction does not comply with the Easement;
- The permit application did not state that the District did not own the real estate where the Current and Permitted Plant are sited;
- The District has not yet been issued local permits required for the Permitted construction.

Petition, pp. 5 – 8.

5. Petitioners' requested relief from the Court is for IDEM to "revoke the Permit and require the District to obtain all proper easements and local permits required to construct, maintain, and operate the [permitted construction]." *Id.*, p. 8.

6. In response to Petitioners' February 7, 2023 Petition, the Court issued a February 13, 2023 Notice of Incomplete Filing, Order to Supplement the Petition, and Notice of Proposed Order of Default ("Feb. 13 Order"), requiring Petitioners to send their Petition to all parties, including the District, by February 27, 2023. The Feb. 13 Order further stated, "If the Petitioner does not supplement the Petition for Review as required by February 27, 2023, the presiding Environmental Law Judge shall enter an Order dismissing this matter seven (7) days afterwards."

7. Petitioners filed a February 15, 2023 certified letter ("Letter") from its counsel to the District, documenting service. The Letter was addressed to the District at a New Albany, Floyd County, Indiana address. *Id.* The Permit, attached as required to the Petition, states that the District's mailing address is in Corydon, Harrison County, Indiana. *Petition, Ex. A.* The New Albany address to which the Letter was sent is the address for independent contractor, AUS. *District's Motion, p. 2.*

8. Communications between Petitioners and the District about this case began on March 6, 2023, with communications involving legal counsel for the parties. *Petitioners' May 5, 2023 Response in Opposition to the District's Motion to Dismiss.*

9. Following the March 13, 2023 Virtual Prehearing Conference, the Court issued a March 30, 2023 Case Management Order and set deadlines for jurisdictional dispositive motions, which Order the parties followed.

10. Petitioners' May 5, 2023 Response in Opposition to the District's Motion to Dismiss contained evidence beyond the Petition, in the form of Exs. A, B, C, D. Exhibits A, B, C and D are related to real estate and land use disputes among Petitioners and the District.

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. IDEM is authorized to implement and enforce Indiana's environmental statutes and rules. I.C. § 13-14-1-1. OEA has jurisdiction over challenges to IDEM's agency actions and over the parties to this controversy, per I.C. § 4-21.5-7-3(a) and § 4-21.5-3-7(a)(1)(A).

3. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of a permit); *see also* I.C. § 4-21.5-3-27(d). "The 'substantial evidence' standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test." *Burke v. City of*

Anderson, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas Am.* 347, 2004 OEA 123, 129. See also *Blue River Valley*, 2005 OEA 1, 11-12. *Marathon Point Serv. and Winamac Serv.*, 2005 OEA 26,41.4. Where a petitioner fails to comply with mandatory statutory requirements for bringing a petition for administrative review before the OEA, the OEA lacks jurisdiction to hear the petition. *Kaminsky v. Medical Licensing Bd. Of Ind.*, 511 N.E.2d 492, 497 (Ind. Ct. App. 1987); *Town of New Whiteland*, 2001 OEA 92; see also *Rose Acre Farms*, 2022 OEA 165, 171. For OEA to have subject matter jurisdiction, Petitioners must prove that IDEM's Permit Issuance is appealable under the Administrative Orders and Procedures Act (AOPA), I.C. § 4-21.5, *et seq.* A Petition is required to be served upon the opposing parties. See 315 IAC 1-3-2(g)(2); 315 IAC 1-3-3(b).

4. The District argues that the Petition should be dismissed, for Petitioners' failure to comply with the Feb. 13 Order that required Petitioners serve their Petition on the District by February 27, 2023. As the District states, the February 15 Letter was sent to the address for independent contractor AUS. Thus, Petitioners served "the wrong entity, in the wrong city, in the wrong county." *District's Motion*, p. 2. The District notes that Petitioners have followed a similar, incorrect mailing process in the past, despite admonitions from the District's counsel and despite Petitioners' access to the correct address: the Permit, containing the District's correct address, was included in the Petition. *Id.*, p. 3. The District seeks OEA's dismissal of the Petition as the Feb. 13 Order provides that the Court is required to dismiss Petitioners' Petition for failure to comply. *Leedy Family Pork LLC and Pine Ridge Pork*, 2017 OEA 1; *Adams County Regional Waste District*, 2023 OEA 22.

5. Petitioners did not comply with the Court's Feb. 3, 2023 Order by serving a copy of the Petition on the District by February 27, 2023. Petitioners thus failed to invoke the mandatory statutory requirements for bringing a petition before the OEA by failing to timely serve the District as ordered by OEA. The District did not receive notice of the Petition until informed by IDEM and after contacting Petitioners' legal counsel around March 6, 2023. For lack of compliance with the Court's Feb. 13 Order stating a jurisdictional requirement of service on all parties, Petitioners' Petition should be dismissed.

6. Although the Court has determined that the Petition should be dismissed for failure to comply with the Feb. 13 Order to provide service to the District, the Court elects to address IDEM's motion to dismiss per Ind. Trial Rule 12(B)(6) for the Petition's failure to state a claim upon which relief can be granted. An Ind. T.R. 12(B)(6) motion tests the legal sufficiency of a claim, not the facts supporting it. *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind. Ct. App. 2003). 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. OEA*, 811 N.E.2d 806, 814 (Ind. 2004). See also *Rippy Farms*, 2018 OEA 31, 34.

7. In its May 11, 2023 Reply, IDEM objected to and moved to strike Petitioners' evidence presented beyond the Petition, filed by Petitioners in their May 5, 2023 Response to IDEM's

Motion to Dismiss, Exs. A, B, C, D. Exhibits A, B, C and D concern disputes between Petitioners and the District about land use and easements and are not relevant to the Court's determination as to whether Petitioner's Petition failed to state a claim upon which relief can be granted. IDEM's objection is sustained and its motion to strike is granted as to consideration of Petitioners' Exhibits A, B, C, D in this Final Order.

8. As state agencies, OEA and IDEM only have the authority to take those actions that are granted by 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." *Troyers*, 2021 OEA 10, 16, citing *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. *Id.* IDEM is "prohibited from expanding its [permitting] requirements beyond those specified in 327 IAC 3." *Affordable Sewer Service, LLC*, 2014 OEA 1, 6.

9. As the ultimate authority for contests to IDEM's decisions, the OEA's authority is limited by statute (I.C. §4-21.5-7-3) to determining whether IDEM complied with applicable statutes and regulations. If the IDEM does not have the regulatory authority to address certain issues, then OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider those issues. See *Rippy Farms, supra*. IDEM is authorized to revoke a permit if its conditions are violated. I.C. § 13-15-7-1-(2).

10. Even if true, the allegations stated in Petitioners' Petition state no claims for relief which OEA can grant for IDEM's issuance of the construction Permit. Petitioners do not allege any failures of the Permit to comply with the regulations within IDEM's, and OEA's jurisdiction: 327 IAC 3, *et seq.* 327 IAC 3-6-6(b) requires that: "All required permits or exceptions from other federal, state, and local units must be obtained prior to the commencement of construction of any sanitary sewer covered by this rule." The Permit requires that "Any local permits required for this project, along with zoning or easement acquisition, shall be obtained before construction is initiated." *Petition, Ex. A, Permit p. 3 of 6.*

11. Contrary to Petitioners' contention, IDEM cannot deny a 327 IAC 3 construction permit on the basis of disputed real estate ownership or access, private contract terms, or lack of current local permits. A permittee is not required to disclose whether it has access or ownership rights to the real estate subject to the permit, as those rights are not subject to IDEM's, or OEA's, jurisdiction. Therefore, "[l]ack of required permits prevents construction of the facility but does not stop IDEM's authority to issue such a permit." *Luce Township Regional Sewer District*, 2011 OEA 141, 147. In *Affordable Sewer Service, supra*, OEA denied the petition from a group of property owners who argued that the permitted sewer construction conflicted with easement and restrictive covenants and lacked the property owners' consent. 2014 OEA 1, 3. Had IDEM conducted an evaluation as to whether restrictive covenants would be violated or whether landowners had granted access, IDEM would have exceeded its jurisdiction. *Id.* In this case, the Permit correctly states the law: the IDEM Permit does not authorize a permittee

to construct its permitted project until it obtains all other required authorizations from entities beyond IDEM and OEA.

12. Petitioners request for OEA to revoke the Permit on the basis that the facility will need to be moved in 2038 due to the expiration of the amended Transfer Agreement is beyond OEA's authority. Regulations in 327 IAC 3 neither require a Permittee to certify the duration of future operations. Nor does the Permit alter the Districts' or the Petitioners' future rights or any agreement terms they might achieve. IDEM correctly issued the Permit, without consideration of land access rights extending to 2038.

13. If Petitioners are asking OEA to revoke the Permit on the basis that Petitioners believe that the District will start construction without first obtaining other approvals, OEA lacks such authority. "OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law." *Talara Lykins CAFO*, 2007 OEA 114, 126, citing *DeGroot Dairy CFO*, 2006 OEA 1; see also *Blue River Valley*, 2005 OEA 1, 12, *Great Lakes Transfer Station*, 2006 OEA 24, 33. IDEM is authorized to revoke a permit if its conditions are violated. I.C. § 13-15-7-1-(2). Until the District violates the Permit, IDEM can neither revoke the Permit nor can OEA order the Permit revoked.

14. IDEM properly limited its evaluation of the Permit application to the engineering and design criteria stated in 327 IAC 3. Allegations stated in the Petition would require IDEM to exceed its authority by impermissibly determining property rights and construing private contracts. When IDEM "does not have the regulatory authority to address certain issues, the OEA does not have the authority to overturn a permit on the basis that IDEM failed to consider these issues." *Maya Energy*, 2023 OEA 87, 92. Assuming that all of the allegations in Petitioners' February 7, 2023 Petition for Administrative Review are true, the Petition fails to state a claim upon which relief can be granted under any set of admissible facts contained in the Petition per Ind. Tr. R. 12(B)(6). IDEM's April 13, 2023 Motion to Dismiss per Ind. Tr. R. 12(B)(6) should be granted.

15. When OEA grants a Ind. Tr. R 12(B)(6) motion to dismiss, the dismissed party is allowed to amend its Petition within 10 days of the effective date of the dismissal order. 315 IAC 1-3-1(b)(18) allows the ELJ to apply the Indiana Rules of Trial Procedure. Ind. T. R. 12(B) provides that a pleading may be amended by right within ten (10) days after service of the court's order dismissing a matter under T.R. 12(B)(6). See *Rippy Farms*, 2018 OEA 31, 35. In *Ind. Office of Env'tl. Adjud., Dept. of Env'tl. Mgt v. Kunz*, 714 N.E.2d 1190 (Ind. Ct. App. 1999), the Court of Appeals found that the OEA erred in not allowing the petitioners an opportunity to amend the petition for review. In this case, OEA has determined that the Petitioners should be dismissed for failing to invoke OEA's jurisdiction by fulfilling the mandatory statutory requirement to bring a Petition for Administrative Review --- service on an opposing party --- contrary to the Court's Feb. 13 Order. Therefore, Petitioners are not entitled to amend their Petition as a matter of right, as provided under Ind. Tr. R. 12(B).

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Harrison County Regional Sewer District's Motion to Dismiss is **GRANTED**; the Indiana Department of Environmental Management's Motion to Dismiss is **GRANTED**, and Petitioners' Indiana MHC, LP and Ramsey, LP's Petition for Administrative Review is **DENIED**. All further proceedings are **VACATED**.

This is a Final Order subject to judicial review consistent with applicable provisions of Ind. Code § 4-21.5, *et seq.* 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 8th day of June, 2023, in Indianapolis, IN.

Hon. Mary L. Davidsen, Esq.
Chief Environmental Law Judge
frontdesk@oea.IN.gov