

**OBJECTION TO THE ISSUANCE OF PERMIT NO. WS-10027,  
INDIANA AMERICAN WATER COMPANY, NOBLESVILLE, HAMILTON COUNTY, INDIANA.**

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**Earl E. Jr. and Norma Horsman, *et al.*: Petitioners,  
Indiana American Water Company: Permittee/Respondent,  
Indiana Department of Environmental Management: Respondent,  
2008 OEA 21 (07-W-J-3993)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2008 OEA 21, cite this case as  
*Indiana American Water Co., 2008 OEA 21.*

**TOPICS:**

summary judgment  
admissions  
deemed admitted  
notice  
trial rules

**PRESIDING JUDGE:**

Gibbs

**PARTY REPRESENTATIVES:**

Petitioner: Frank Hogan, Esq.  
Voyles Zahn Paul Hogan & Merriman  
Permittee/Respondent: Micael T. Scanlon, Esq.  
Barnes & Thornburg  
IDEM: Sierra Cutts, Esq.

**ORDER ISSUED:**

March 7, 2008

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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4. Thereafter, on October 9, 2007, the following Petitioners, by counsel, filed a Petition for Administrative Review and for Related Relief: Earl E. Jr. and Norma Horsman, Richard and Maria McNeely, Jeffrey and Terry Biggs, Arlen Lehman, Darlene Musselman, Chad Schlotter and Roger Neil.<sup>1</sup>
5. The Petitioners objected to the issuance of the Permit and complained that issuance was improper because (1) insufficient notice of the Permit was given to the Petitioners; (2) activities authorized by the Permit will adversely affect surface water drainage; and (3) Mr. McNeely complains that activities authorized by the Permit will alter the current direction of surface water drainage and adversely affect the property value of the McNeely residence.
6. A prehearing conference was held on October 30, 2007. A Case Management Order was issued on October 31, 2007 setting out a schedule for completing discovery and filing dispositive motions. Discovery was to be complete by December 14, 2007 and dispositive motions were to be filed by January 14, 2008. Responses to the dispositive motions were due January 29, 2008.
7. On November 21, 2007, IAW served its First Set of Requests for Admission, Interrogatories and Requests for Production of Documents. IAW requested that the Petitioners respond to its Discovery Requests within 14 days in order to comply with the discovery deadline set out in OEA's October 31, 2007 Case Management Order.<sup>2</sup>
8. Between November 29, 2007 and December 3, 2007, counsel for IAW and the Petitioners reached an agreement that the Petitioners would have 30 days to respond to the discovery requests. The response to discovery was therefore due on December 21, 2007.
9. On December 12, 2007, IAW requested revisions to the Case Management Order, which request was granted on December 13, 2007. The parties were granted an extension of time until December 28, 2008 to complete discovery.
10. As of January 14, 2008, counsel for IAW had not received any response to the discovery requests.
11. IAW filed its Motion for Summary Judgment on January 14, 2008.

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<sup>1</sup> Mr. McNeely filed a petition for review as an individual and as part of the group. His individual objections were incorporated into this action.

<sup>2</sup> Only the ELJ has the authority to shorten the time in which responses to discovery requests are due. The proper procedure here would have been to request permission of the Court to expedite discovery or to request an extension to the case management order. This point is moot, however, because the parties did eventually request an extension of time and the Petitioners, in the end, had 30 days in which to respond.

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12. The Petitioners failed to file a response to the Motion for Summary Judgment on or before January 29, 2008, as ordered in the October 31, 2007 Case Management Order.
13. By operation of law, the following facts are admitted:
- a. The sole basis for Petitioners' allegation that they were not provided notice of IAW's application for the Permit is Petitioners' purported failure to receive a notice required pursuant to a local requirement and not a notification required pursuant to a federal or state environmental statutory or regulatory requirement.
  - b. The sole basis for Petitioners' allegation that they were not provide notice of IAW's application for the Permit is Petitioners' purported failure to receive a notice from a local governmental entity and not a notification required to be provided by IDEM or IAW.
  - c. IDEM provided the Petitioners' with notification of the issuance of the Permit.
  - d. The Petitioners did not submit any comments to IDEM concerning the Permit.
  - e. The sole allegation raised by Richard and Maria McNeely related to the Permit concern the notice identified in Request for Admission No. 1 and Request for Admission No. 2, drainage concerns and potential adverse impacts to the value of their property.
  - f. The Petitioners do not challenge the terms and conditions of the Permit.
  - g. The Petitioners do not contend that additional terms and conditions must be included in the Permit to comply with legal requirements that apply to the Permit.
  - h. IDEM's final action in issuing the Permit was not arbitrary and capricious.
  - i. IDEM's final action in issuing the Permit was not an abuse of discretion.
  - j. IDEM's final action in issuing the Permit was not contrary to law.

**Conclusions of Law**

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to Ind. Code § 4-21.4-3-27. 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. Pursuant to 315 IAC 1-3-1(b)(18), the presiding Environmental Law Judge (the "ELJ") may apply the Indiana Rules of Trial Evidence, including those rules dealing with discovery, when it would not be inconsistent with the Administrative Orders and Procedures Act ("AOPA") (Ind. Code §4-21.5-3) or with the remaining rules in Title 315 of the Indiana Administrative Code.

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4. Indiana Rule of Trial Procedure 36 deals with Requests for Admissions. A request for admission is deemed admitted if not answered within thirty (30) days under Trial Rule 36(A), which states: "The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney."
5. Indiana Rule of Trial Procedure 36(B) states: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."
6. The Petitioners have failed to respond to the requests for admission. The request for admissions are deemed admitted in accordance with Indiana Trial Rule 36.
7. The facts in Finding of Fact #12 (a), (b), (c) and (d) prove that there was no defect in the notice required to be given to the Petitioners by the IDEM or IAW. There is no genuine issue of material fact and summary judgment is appropriate on this issue.
8. The remaining facts establish that the Permit was properly issued. There is no genuine issue as to any material fact and summary judgment in favor of IAW and IDEM is appropriate.
9. Judgment should be entered in favor of the Permittee/Respondent, Indiana American Water Company.

**Order**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Indiana American Water Company's Motion for Summary Judgment is **GRANTED**. All further proceedings scheduled in this matter are **VACATED**.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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 IC 4-21.5. Pursuant to IC 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 7th day of March, 2008 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge