

**Objection to Issuance of Water of the State Determination**  
**Project No. 2008-057-SSA-A to Mark Heller, Fort Wayne, Allen County, Indiana.**  
**2008 OEA 57 (08-W-J-4112)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2008 OEA 57 cite this case as  
*Heller Development, 2008 OEA 57.*

**TOPICS:**

Motion to Dismiss  
petition  
timeliness  
Water of the State Determination  
adjoining landowner  
mercy of the court  
attorney's fees  
18 days  
IC 4-21.5-3, *et seq.*  
IC 4-21.5-5, *et seq.*  
IC 13-15, *et seq.*  
IC 13-18-22, *et seq.*  
315 IAC 1-3-3  
327 IAC 17  
Ind. Trial Rule 4.6(A)

**PRESIDING JUDGE:**

Daidsen

**PARTY REPRESENTATIVES:**

Petitioners, <i>pro se</i> :	Beth A. Maine, Clayton Dull, Steve Shapuras, Jim Wilcox
Respondent/Permittee:	Mathew J. Elliott, Esq.
IDEM:	Steven D. Griffin, Esq.

**ORDER ISSUED:**

June 13, 2008

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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**Findings of Fact**

1. The Office of Environmental Adjudication (“OEA”) received a petition for review of the Indiana Department of Environmental Management’s (“IDEM”) February 14, 2008 Water of the State Determination 2008-057-02-SSA-A (“Determination”), issued to Respondent Mark Heller. The Determination concluded that the property is exempt, per. 327 IAC 17-1-3(7)(F) and not regulated under IC 13-18-22, *et seq.*
2. Pursuant to statements in the supplemented petition for review and Respondent’s Motion to Dismiss, IDEM’s notice of determination was dated February 14, 2008, and provided at p. 3., para. 3: “You must file the petition [for administrative review] within eighteen (18) days of the mailing date of this decision. If the eighteenth day falls on . . . [a] day that the OEA offices are closed during regular business hours, you may file the petition the next day that the OEA offices are open during regular business hours.” This provision summarizes statutory mandates applicable to OEA, as found in Indiana Trial Rule 4.6(A), IC 13-15, *et seq.*, and IC 4-21.5-3, *et seq.*
3. Pursuant to 315 IAC 1-3-3(c), the Petition was deemed to have been filed with the OEA on May 12, 2008.
4. Petitioners own land adjoining the land addressed by the Determination, and had been aware of Respondent/Permittee’s development intentions since February, 2008. They had been following the progress of this development, and opposed the development based on their belief that the development area is a wetland. Petitioners attended a meeting at a local public library in February, 2008, conducted by Respondent/Permittee Mark Heller. At the meeting, Petitioners formed the belief that Mr. Heller instructed them that per zoning, the matter was a “done deal” and they couldn’t appeal. Petitioner Beth Maine observed development on the site, a “couple of weeks ago”. Petitioners are taking legal action to oppose the development in other forums, based on regulations pertinent to those forums. Petitioners had retained counsel from the firm Van Gilder & Trzynka (Exhibit B, first page of April 23, 2008 letter to Petitioner Beth Maine)<sup>1</sup>. As part of their other opposing cases, Petitioners became aware of the Determination from conversations either through a consulting engineer, and/or a local zoning/development staff member, a representative of the U.S. Army, Corps. of Engineers or IDEM. They did not receive a copy of the Determination until early May. Exhibit B, states that the Determination had been made on February 14, 2008, had to be appealed to OEA by March 3, 2008, and counsel was not aware that any challenge had been filed in that time period. Petitioners relied on provisions of IC 4-21.5-5, *et seq.*, to avoid dismissal for timeliness. The Court suggested that IC 4-21.5-5, *et seq.*, addressed appeals from this forum, not to this forum, and directed Petitioners to consider IC 4-21.5.3, *et seq.*, as concerning petitions for review to this forum. Petitioners presented no legal authority to support their position. Petitioners noted that their case had merit, that valuable resources were at stake, and appealed to the mercy of the Court to allow them to proceed.

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<sup>1</sup> Andrew P. Simmons, Esq., of Van Gilder & Trzynka, entered a June 10, 2008 Notice of Limited Scope of Representation, indicating that his representation in this forum was limited to providing assistance in drafting Petitioner’s June 3, 2008 Motion for Immediate Stay Hearing.

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**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 and the parties to this controversy pursuant to IC 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to IC 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. IC 4-21.5-3-7(a)(3)(A) states that a Petition for Review must be filed within fifteen (15) days after the person is given notice of the order. IC 4-21.5-3-2(e) provides that three (3) days shall be added to this deadline if service is by mail.
4. Pursuant to IC 4-21.5-3-1(f)(2) and 315 IAC 1-3-3(c), the date of filing is the date of the postmark on the envelope containing the document.
5. Per 327 IAC 17, IC 13-15-1, *et seq.*, and IC 13-18-22, *et seq.*, IDEM is not required to provide notice of issuance of determinations such as this Water of the State Determination to adjoining landowners.
6. Petitioners’ testimony presents this Court with no legal authority to disregard the threshold legal requirement that they had eighteen (18) days from February 14, 2008, the date of the notice and the presumed date of mailing, until March 3, 2008 to file the petition for administrative review.
7. As indicated by its postmark, the petition for administrative review was filed on May 12, 2008 and was not timely filed in this matter.
8. OEA has jurisdiction over petitions for administrative review of determinations such as issued to Heller which are timely filed within eighteen (18) days of the date of the notice of decision as required in IC 4-21.5-3-2 and IC 4-21.5-3-7. Conversely, OEA is not authorized to assume jurisdiction over Petitions for Administrative Review which are filed after the deadline set by statute. In this case, there is no dispute that the Petitioners’ Petition for Administrative Review was filed more than eighteen (18) days after the February 14, 2008 Determination was issued to Heller. OEA has no authority to exercise over the Petition for Administrative Review or further proceedings in this cause, due to lack of jurisdiction.
9. Respondent’s Motion to Dismiss also sought imposition of reasonable attorney’s fees to defend the action, if required to proceed further. OEA has not been authorized by the legislature to impose legal fees for the expenses sought by Respondent.

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**Final Order**

**IT IS THEREFORE ORDERED** that the Petition for Administrative Review filed by Petitioners Beth A. Maine, Clayton Dull, Steve Shapuras and Jim Wilcox is hereby **DISMISSED**. All pending matters, including the June 13, 2008 Stay Hearing, and the June 23, 2008 Prehearing Conference, are hereby **VACATED**.

You are hereby further notified that pursuant to provisions of IC 4-21.5-7.5, *et seq.*, 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, *et seq.* 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 13th day of June, 2008.**

Honorable Mary L. Davidsen  
Chief Environmental Law Judge