

**Objection to Issuance of Construction Permit Application for
Waste Water Treatment Plant Permit Approval No. 19656
Koontz Lake Regional Sewer District
Walkerton, Starke County, Indiana
2010 OEA 172, (10-W-J-4368)**

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 172 cite this case as
Koontz Lake Regional Sewer District, 2010 OEA 172.

TOPICS:

stay
District Plan
327 IAC 3 Construction Permit Application Plans and Specifications
Summary Judgment
U.S. Fish and Wildlife Service
Preponderance of the evidence
District modification plan
Regional sewer district
I.C. § 13-15, *et seq.*
I.C. § 13-26-2-10(b)(4)
I.C. § 13-26-6, *et seq.*
315 IAC 1-3-2.1
327 IAC 3

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Sierra L. Alberts, Esq.
Petitioners: Mark E. Shere, Esq.
Permittee: James N. Clevenger, Esq.; Wyland, Humphrey, Wagner & Clevenger, LLP

ORDER ISSUED:

October 20, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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3. IDEM issued a First Modification Order at the request of the District to extend the time frame for the submittal of the district plan to December 11, 2008.
4. On April 30, 2010, IDEM issued a Second Order Modifying the Order Forming the Koontz Lake Regional Sewer District at the request of the District to extend the time to file the district plan to October 1, 2010.
5. On April 16, 2010, IDEM issued 327 IAC 3 Construction Permit Application Plans and Specifications for Koontz Lake Wastewater Treatment Plant and Wastewater Collection System Permit Approval No. 19656 (the "Permit") to the District.
6. The Permit authorized the construction of a water pollution treatment/collection facility (the "Project") to be located on the west side of C.R. 1175 E. approximately 950 feet south from the intersection of C.R. 1175 E. and South Street (in Starke County) (the "Site"). The proposed wastewater collection system will be located throughout the community of Koontz Lake, Indiana.
7. The Permit states that "in accordance with the provisions of I.C. § 13-15, and 327 IAC 3 the Project is permitted". As a General Condition, the Permit states:

Nothing herein shall be construed as guaranteeing that the proposed water pollution treatment/control facility shall meet the standards, limitations or requirements of this or any other agency of state or federal government, as this agency has no direct control over the actual construction and/or operation of the proposed project.
8. On April 28, 2010, Petitioners Mark and Sandra Beaubien filed a Petition of Administrative Review of the Permit.
9. On April 30, 2010, Petitioners Thomas and Frances Raycroft, Theresa Orozco, Carl Raycroft, Loretta Bock, Daniel Raycroft, Bridget Baeza, and Colleen Raycroft filed a Petition for Administrative Review and Request for a Stay Until Further Consideration of Project is Done ("Petition").
10. On April 30, 2010, Petitioners Michael and Donna Owens filed an appeal of the Permit.
11. On April 30, 2010, Petitioner Patricia Ann Markle filed an appeal of the Permit.
12. On May 28, 2010, Petitioner Michael Owens filed to withdraw his request for an appeal.
13. On June 7, 2010, Petitioner Suzanne Pearse filed a Petition for Administrative Review.

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14. On June 14, 2010, Chief Environmental Law Judge (“ELJ”) Mary Davidsen entered a Notice of Proposed Order of Default of Sandra and Mark Beaubien and Donna Owens for failure to appear at the June 7, 2010 Prehearing Conference.
15. On June 14, 2010, the ELJ entered a Final Order Granting Dismissal of Petitioner Michael Owens.
16. On June 21, 2010, Petitioner Patricia Ann Markle filed a letter with the ELJ requesting voluntary withdrawal of her Petition for Administrative Review.
17. On June 23, 2010, the ELJ entered a Final Order Granting Dismissal of Petitioner Patricia A. Markle.
18. On June 23, 2010, an evidentiary hearing was held on Petitioners’ request to stay the Permit. Petitioners Thomas A. Raycroft, Frances L. Raycroft and Loretta Bock attended in person, with three of their children and grandchildren, Maury Raycroft, Cecilia Bock and Johnny Bock. Legal counsel Mark E. Shere, Esq. entered his appearance as Petitioners’ representative by attending to represent Petitioners at the evidentiary hearing. Permittee/Respondent Koontz Lake Regional Sewer District attended in person by Joshua Weaver, Stephen Carter, Stephen Fralish, Ken Jones, Sr., and Kenneth Jones, Jr. and by legal counsel James N. Clevenger, Esq. The Indiana Department of Environmental Management attended by legal counsel Sierra L. Alberts, Esq., joined by observing legal interns Michael Rea and Andy Williams.
19. No other Petitioners attended the stay hearing in person, nor sought leave from attending. Petitioners’ counsel stated to the Court and parties that he represented “all” petitioners to this cause. During the evidentiary hearing on stay, Petitioners’ counsel presented legal argument that this cause should be dismissed, asserting that IDEM acted in contravention of law by issuing the construction permit before receiving and approving the district plan. The Court instructed the parties to address the legal issues of dismissal in briefing to be set after the stay hearing.
20. Petitioners presented testimony that “[t]he woodland area where the WWTP is proposed is a high quality upland and wetland habitat . . . among the rarest ecosystems on earth” and a “globally imperiled ecosystem.” *Petitioners’ Ex. 3 and Petition, Appendix 2, October 21, 2009 letter from Supervisor Scott E. Pruitt, U.S. Department of Fish and Wildlife*. Mr. Pruitt further described the Site as a “high quality savanna and wetland complex, which is a very rare habitat supporting a variety of uncommon plant and wildlife species.” *Id.* Mr. Pruitt further stated:

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The U.S. Fish and Wildlife Service recognizes the difficulty the Koontz Lake RSD has had in finding a suitable location for their WWTP because we have been involved in the NEPA process associated with their proposal. Although we continue to prefer that a less ecologically significant site be used, apparently no such site has been found/is available. It appears that the KLSRD has made great efforts to reduce the footprint of the WWTP in order to lessen the adverse impacts to this savanna/wetland complex.

21. Mr. Raycroft testified that he had a long use, regard and appreciation for the Site, located next to undeveloped property he owns. Mr. Raycroft and his family confirmed their multigenerational use and high regard for their property's natural resources. Mr. Raycroft stated that he planned to retire to his property, which plans would be impeded by odors, lights, noise and traffic resulting from the Site's development in accord with the construction permit.
22. Site representatives testified that a buffer strip had been developed between the Raycroft property and the Site, along with screening plantings and elevated earth to minimize impact to the Raycrofts.
23. On June 28, 2010, this Court issued a Post-Hearing Scheduling Order ordering Petitioners to submit their dispositive motion by July 15, 2010.
24. On July 15, 2010, Petitioners filed their Post-Hearing Brief and Dispositive Motion of Petitioners. The Petitioners are seeking summary judgment on the merits of this case. The Petitioners claim that "[t]he ultimate merits are thus fully presented, and the issue of the interim 'stay' is moot."
25. On August 4, 2010, the District filed its Response to Petitioners' Post-Hearing Brief and Dispositive Motion.
26. On August 5, 2010, IDEM filed its Memorandum of Law in Opposition to Petitioners' Motion for Summary Judgment.
27. On August 19, 2010, Petitioners filed their Reply in Support of the Post-Hearing Brief and Dispositive Motion of Petitioners. Per the Court's Post-Hearing Case Management Order, final briefing and Proposed Findings of Fact, Conclusions of Law and Orders were due by September 10, 2010. After the parties presented further argument to the Court in a series of emails, the Court closed the record on September 14, 2010. No further motions to open the record were filed.
28. Pending issues raised by the Petitioners include their request for a stay and summary judgment concerning IDEM's issuance of the construction permit before the District filed a separate document containing its District plan.

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CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-27. 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. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Jennings Water, Inc. v. Office of Env'tl. Adjudication*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “The ELJ . . . serves as the trier of fact in an administrative hearing and a *de novo* review at that level is necessary. *Indiana Department of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100, 103 (Ind. 1993). The ELJ does not give deference to the initial determination of the agency.” *Indiana-Kentucky Elec. Corp v. Comm’r, Ind. Dep’t of Env’tl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). “*De novo* review” means that “all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. The party requesting a stay must show by a preponderance of the evidence that the requirements have been met. 315 IAC 1-3-2.1(b). The requirements for a stay include that the person will suffer irreparable harm pending the resolution of the case on the merits because its remedies at law are inadequate; the person is likely to prevail on the merits; the threatened injury to the person requesting the stay outweighs the threatened harm that the grant of the stay may inflict on the other party; and the public interest will be served by the grant of the stay.
5. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Bldg Comm’n, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d

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- 1, (Ind. 2005) (*citing Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996)). “A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703 - 704 (Ind. Ct. App. 1992). The moving party bears the burden of establishing that summary judgment is appropriate. When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue.
6. Petitioner’s mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan v. Snap-On Tool Corp.*, 478 N.E.2d 116, 122 (Ind. Ct. App. 1985).
 7. In their timely-filed Petition for Administrative Review, Petitioners limited the issues on review to whether IDEM properly issued the 327 IAC 3 Construction Permit Application Plans and Specifications for Koontz Lake Wastewater Treatment Plant and Wastewater Collection System Permit Approval No. 19656 to the District. The issue raised by Petitioners concerning this District’s Plan is before this Court only to determine whether IDEM is required to approve a district plan, separate and apart from a construction permit, before IDEM is authorized to issue a Construction Permit. Otherwise, the issue of whether IDEM and/or the District have complied with rules and regulations for the establishment of a regional district, I.C. § 13-26, *et seq.*, is not before this Court and has no bearing on the District’s ability to obtain a construction permit pursuant to I.C. § 13-15, *et seq.* and 327 IAC 3.
 8. It is the District’s responsibility pursuant to the General Condition to ensure that “actual construction” meets the “standards, limitations or requirements of this or any other agency of state or federal government”.
 9. Pursuant to I.C. § 13-26-2-10(b)(4), an order establishing the district must “[d]irect the district to file a detailed plan for the initial project of the district not later than nine (9) months after the date of the preliminary order or within a further time that the department from time to time orders.”
 10. Petitioners argue that I.C. § 13-26-2-10(b)(4) states that the district plan must be submitted before IDEM can legally issue the District a permit. The plain, unambiguous language of I.C. § 13-26-2-10(b)(4) contains no such requirement. I.C. § 13-26-2-10(b)(4) states that a district plan must be filed in nine (9) months after the date of the preliminary order or a further time established by IDEM. The Second Order Modifying the Order Forming the Koontz Lake Regional Sewer District orders the district plan to be submitted by October 1, 2010. However, a requirement that the district plan must be submitted before the District can obtain a construction permit for the Project is absent from I.C. § 13-26-2-10(b)(4).

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11. Petitioners rely on I.C. § 13-26-6-2, which states that if IDEM approves the district plan, IDEM “shall authorize the district to proceed”. Petitioners argue this means the district plan must be submitted for IDEM to authorize “the district to proceed with its ‘initial project’”. However, the law does not state that the department shall authorize the district to proceed with its initial project. It states that “the department shall authorize the district to proceed.” I.C. § 13-26-6-2. This means to proceed with the formation and the operation of a regional district under I.C. § 13-26 *et seq.*
12. I.C. § 13-26, *et seq.* does not limit the District from proceeding in the form of seeking a construction permit. Pursuant to I.C. § 13-26-6-1, a district plan must include engineering reports; plans and specifications; and a feasibility study.
13. IDEM staff testified that in most cases a district plan is not submitted prior to a construction plan being submitted because the district plan consists of the same items required in a construction permit application. The employee responsible for receiving the district plan is not an engineer; testimony revealed that if the district plan was submitted prior to obtaining a construction permit, the plans would have to be reviewed by an IDEM engineer. Therefore, since the construction permit and district plan are essentially the same plan, IDEM generally receives the district plan once the construction section has reviewed the plans and issued a permit indicating that the plan is acceptable.
14. As the district plan must include engineering reports, plans and specifications and the IDEM employee who reviews the district plan is not an engineer, once the plans have been approved through the construction permitting process, the IDEM employee who reviews the district plan will know that the plans and specifications are acceptable to IDEM engineers. *See* I.C. § 13-26-6-1. The District can then submit those plans as a part of the district plan in accordance with I.C. § 13-26-2-10 and I.C. §§ 13-26-6-1 and 2.
15. Petitioners rely on *Clay Township v. Clay Township Regional Waste District*, 838 N.E.2d 1054 (Ind. Ct. App. 2005) (“*Clay Township*”) to support their argument that the district plan must be approved before a construction permit may be approved. *Clay Township* case is distinguishable from this case.
16. In *Clay Township*, a regional waste district was established in Clay Township in June of 1975. *Clay Township*, 838 N.E.2d at 1057. Almost thirty (30) years later, on December 27, 2004, the District attempted to modify the District’s organizational plan without seeking approval from IDEM first. *Id.* at 1058. The Indiana Court of Appeals held that the “relevant statutes do not permit a district’s board to reshuffle itself.” *Id.* at 1067. More specifically, the Court held that “[j]ust as a district board must petition IDEM to increase the number of its trustees, *see* I.C. § 13-26-1-2(a)(3), so must it petition IDEM to reallocate the appointment of its trustees.” *Id.*

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17. *Clay Township* is not applicable to this case because *Clay Township* only deals with the laws and rules regulating the formation of a regional sewer district and not the issuance of a 327 IAC 3 construction permit.
18. Even if this Court were to consider Petitioners' argument that the Permit is contrary to I.C. § 13-26, *et seq.*, *Clay Township* does not apply in this case because the Koontz Lake District is not seeking to modify any of the requirements of I.C. § 13-26 without IDEM's approval. In *Clay Township*, the regional district was established thirty (30) years prior to the District attempting to modify the organizational plan without IDEM's approval. *Clay Township*, 838 N.E.2d at 1058. In the matter at hand, to date the Koontz Lake District is in compliance with I.C. § 13-26, *et seq.*, having received an extension until October 1, 2010 to file the district plan and obtain authorization to proceed. Therefore, the Court's analysis and holding in *Clay Township* is not relevant as to whether IDEM legally or properly issued the Permit to the District pursuant to I.C. § 13-15 and 327 IAC 3.
19. The Petitioners also challenge the substance of IDEM's review of the construction permit application. Petitioners assert that IDEM should have considered whether the proposed project is "economically feasible, fair, or reasonable". Petitioners rely on I.C. § 13-26-6-4(1) to support this argument.
20. Whether the Project is "economically feasible, fair, or reasonable" under I.C. § 13-26-6-4(1) has no bearing on a 327 IAC 3 construction permit. Petitioners have raised no legal provision in 327 IAC 3 that would require IDEM to determine whether the Project is "economically feasible, fair, or reasonable" because there is no such provision in the only applicable laws and regulations to this matter, I.C. §13-15, *et seq.*, and 327 IAC 3.
21. Petitioners argue that the United States Fish and Wildlife Service (the "Department") is against the Project. Petitioners submitted a portion of a letter from the Department regarding this matter. A review of the entire letter, offered by Respondents, resolves the Department's issues.
22. In the November 13, 2009 letter from the Department to the District's consultant, which is attached to the Petitioners' Petition, the Department stated:

The U.S. Fish and Wildlife Service recognizes the difficulty the Koontz Lake RSD has had in finding a suitable location for their WWTP because we have been involved in the NEPA process associated with their proposal. Although we continue to prefer that a less ecologically significant site be used, apparently no such site has been found/is available. It appears that the KLSRD has made great efforts to reduce the footprint of the WWTP in order to lessen the adverse impacts to this savanna/wetland complex.

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23. The November 13, 2009 letter also discusses items or steps that can be taken by the District during the Project to protect the ecosystem.
24. Further, the Department has not filed any objection to the District proceeding with the Project.
25. Petitioners have presented no evidence justifying the issuance of a stay. Petitioners have presented no evidence that IDEM's issuance of the Permit is in violation of Ind. Code § 13-15 or 327 IAC 3.
26. The only applicable laws and regulations in this matter are Ind. Code § 13-15 *et seq.* or 327 IAC 3. Pursuant to those laws and regulations, IDEM properly and legally issued the Permit to the District because there is no requirement in Ind. Code § 13-15 or 327 IAC 3 that a district plan pursuant to I.C. § 13-26-2-10 must be filed before IDEM can issue a 327 IAC 3 permit.
27. The District and IDEM have demonstrated that there is no genuine issue of fact in dispute. The Petitioners have not demonstrated there is a genuine issue of fact in dispute. Accordingly, the District and IDEM are entitled to summary judgment as a matter of law.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioners' Sandra and Mark Beaubien, Donna Owens, Thomas and Frances Raycroft, Theresa Orozco, Carl Raycroft, Loretta Bock, Daniel Raycroft, Bridget Baeza, and Colleen Raycroft's Petition for Stay is **DENIED**. Summary Judgment for is **DENIED** as to Petitioners Sandra and Mark Beaubien, Donna Owens, Thomas and Frances Raycroft, Theresa Orozco, Carl Raycroft, Loretta Bock, Daniel Raycroft, Bridget Baeza, and Colleen Raycroft and **GRANTED** as to the Koontz Lake Regional Sewer District and the Indiana Department of Environmental Management. Waste Water Treatment Plant Permit Approval No. 19565 issued to Koontz Lake Regional Sewer District was properly approved by the Indiana Department of Environmental Management, and should not be stayed.

This cause is **DISMISSED**, all pending proceedings in this cause are **VACATED**.

You are further notified that pursuant to provisions of I.C. § 4-21-.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. A party is eligible to seek Judicial Review of this Order as stated in applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this 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 service.

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IT IS SO ORDERED this 20th day of October, 2010 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge