

**OBJECTION TO THE APPROVAL OF  
CONSTRUCTION PERMIT APPLICATION  
SANITARY SEWER SRF APPROVAL NO. L-0557  
ROLLING PRAIRIE WASTEWATER COLLECTION SYSTEM, PHASE II  
2020 OEA 118, OEA CAUSE NO.: 18-W-J-5042**

Official Short Cite Name:	<b>ROLLING PRAIRIE, 2020 OEA 118</b>
OEA Cause No.:	20-W-J-5042
Topics/Keywords:	327 IAC 3-1-1 construction permit 327 IAC 9 315 IAC 1-3-2(b)(4)(A)(i) and (ii). Notice of Incomplete Filing, Order to Supplement the Petition, and Notice of Proposed Order of Default Final Order of Dismissal Ind. T.R. 12(B)(6) Failure to state a claim upon which relief can be granted IC 13-15-6-2(6) IC 13-26-5-6.5
Presiding ELJ:	Mary Davidsen
Date of Order:	June 16, 2020
Index Category:	Water
Further Case Activity:	Judicial Review, 46D02-2006-MI-000838 Order Affirming ELJ Ruling Against Plaintiff's Claim for 14th Amendment Infringement.



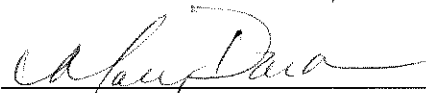
file an amended petition. **IT IS FURTHER ORDERED** that Petitione Cherill Spaeth, by her power of attorney, Cindy Spaeth's failure to amend the petition for review shall result in the entry of a final order of dismissal of this matter.

No further submissions have been made to the Court by Petitioner, nor was leave sought from complying with the Court's May 15, 2020 Order.

For failure to comply with the May 15, 2020 Order, the Petition for Administrative Review filed by Petitioner, Cherril Spaeth, by Cindy Spaeth, is **DISMISSED**.

*You are further advised that, pursuant to Ind. Code § 4-21.5-5, et seq., this Final Order is subject to judicial review. Pursuant to Ind. Code § 4-21.5-5, et seq., 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 16<sup>th</sup> day of June, 2020 in Indianapolis, IN.



Hon. Mary L. Davidsen  
Chief Environmental Law Judge

**DISTRIBUTION, via email, and via certified mail to Petitioner**

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March 13, 2019, per a February 24, 2020 Case Management Order.

3. The first prehearing conference was conducted on February 4, 2019, and reconvened so that Petitioner Spaeth could retain legal counsel, and so that the parties could conduct negotiations.

4. The Permittee filed a Motion to Dismiss on July 16, 2019. After noting a lack of further action, Permittee's legal counsel sought a status conference. Per a revised case management order, Petitioner filed her February 20, 2020 Response to Motion to Dismiss. Permittee replied on March 9, 2020.

5. Petitioner Spaeth is one of the citizens whose home will be connected to the approved sewer extension. In summary, Petitioner Spaeth requests that the Permit be set aside, and be considered of no legal force and effect for the following reasons:

- a. The District did not provide notice of extension of sewer service per Ind. Code § 13-26-5-6.5, thus denying Petitioner due process of law;
- b. The Project is not economically feasible, fair or reasonable to the affected citizens;
- c. The statutory system for the District's approval of a regional sewer system is unconstitutional;
- d. The appointment of a member to the District's Board of Trustees is unconstitutional.

### **Conclusions of Law**

1. The OEA has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") pursuant to Indiana Code (I.C.) § 4-21.5-7, et seq.

2. 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. The Permittee moves to dismiss this cause and alleges that the Petitioner has failed to state a claim upon which relief can be granted under Ind. Trial Rule 12(B)(6).

4. A motion to dismiss under Ind. Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted 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. Office of Environmental Adjud.*, 811 NE.2d 806, 814 (Ind. 2004). .

5. The OEA and IDEM, as state agencies, only have the authority to take those actions



which are granted by the law. *See In Re: Cooper Farms*, 2018 OEA 24; *In Re: Twin Lakes Regional Sewer District*, 2007 OEA 53, 61. “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.” *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. Virtually all of IDEM’s regulatory authority focuses on implementing, regulating and enforcing environmental laws, including those related to permit issuance. *See* I.C. § 13-15-2, *et seq.* In this case, IDEM was required to base its permitting decision upon IDEM’s review of the District’s application along with its Project plans and specifications, conducting its review within the scope of applicable policies, procedures and technical requirements stated in 327 IAC 3-1-1. As the ultimate authority for the IDEM, the OEA’s authority is limited by statute (I.C. §4-21.5-7-3) to determining whether an IDEM decision complies with the applicable statutes and regulations. A petition challenging a construction permit for a sanitary sewer approved by IDEM must allege “[e]nvironmental concerns or technical deficiencies related to the action of commissioner that is the subject of the petition.” 315 IAC 1-3-2(b)(4)(A)(i). (In a case where a party objects in total to all aspects of a project, a petition for administrative review understandably may exclude “Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.” 315 IAC 1-3-2(b)(4)(A)(ii)).

6. If the IDEM does not have the regulatory authority to address certain issues, the OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues.

7. Petitioner’s objections as to the constitutionality of the statutory system for the District’s approval of a regional sewer system, and the constitutionality of a District Board of Trustee member appointment, are not within OEA’s authority to determine. IDEM’s authority to regulate and issue construction permits to sanitary sewer systems is generally found in I. C. § 13-15, *et seq.* and 327 IAC 3-1-1. IDEM’s permitting authority is focused on environmental considerations, including a technical review of a projects plans and specifications. 327 IAC 9, *et seq.* See also I. C. § 13-15-6-2(6). District powers and duties are enumerated by statute and rule; Petitioner specifically challenges the District’s actions taken under I.C § 13-26-5, *et seq.* (“Powers and Duties of Regional Districts”, 1996). OEA is not specifically identified as the proper forum for a District’s failure to comply with I.C. § 13-26-5, *et seq.*; IDEM is not given authority to consider or make permitting determinations based on alleged or actual noncompliance with I.C. § 13-26-5, *et seq.*, nor does the statute specify penalties. Petitioner’s specific allegations that the statutory system for the District’s approval of a regional sewer system is unconstitutional, and that the appointment of a member to the District’s Board of Trustees is unconstitutional, are not subject to enforcement before OEA. The District’s Motion to Dismiss should be granted as to these issues.

8. Petitioner’s challenge to the District’s failure to provide required notice is based upon requirements stated in I.C. § 13-26-5-6.5 (2013):

A district that intends to extend service within its territory shall provide notice to all owners of property to be served by the proposed extension of



service in the following manner not later than sixty (60) days from the date of decision to extend service:

- (1) By publication of notice one (1) time each week for three (3) consecutive weeks in at least two (2) newspapers of general circulation in each of the counties, in whole or in part, of the district affected by the proposed extension of service. If there is only one (1) newspaper of general circulation in a county, a single publication each week for three (3) consecutive weeks satisfies the requirement of this subdivision.
- (2) By United States mail, postage prepaid, mailed to each freeholder within the territory to which the district proposes to extend service.

9. Petitioner claims that the District's failure to comply with I.C. § 13-26-5-6.5 deprived her of her due process notice and opportunity to be heard. *Huffman* requires OEA to examine the impact on the specific petitioner's aggrieved or adversely status, not on that of the general public. As Petitioner obtained notice in time to timely appeal the Permit, this current administrative adjudicatory review process before OEA cures any due process deprivation asserted by the Petitioner. *In Re: Fall Creek Regional Waste District*, 2007 OEA 64. And, as noted above, neither IDEM nor OEA are authorized to revoke the District's Permit for failure to comply with I.C. § 13-26-5, *et seq.* Permittee's Motion to Dismiss should be granted as to whether Petitioner was denied due process for lack of notice.

10. Petitioner's objections based upon economic impact are not properly before the OEA. The Petitioner does not cite to any regulations supporting her contentions that the Permit should be revoked because of these objections. In fact, there are no regulations which require IDEM to consider the affect the Approval will have on these matters. The Motion to Dismiss should be granted as to these issues.

11. The last question is whether the Petitioner should be allowed to amend her petition again. In *Office of Environmental Adjudication v. Kunz*, 714 N.E.2d 1190, the Court of Appeals found that the OEA erred in not allowing the petitioners an opportunity to amend the petition for review. 315 IAC 1-3-1(b)(18) allows the ELJ to apply the Indiana Rules of Trial Procedure. 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). The Petitioner may amend the amended petition for review within ten (10) days of the effective date of this Order.

### Order

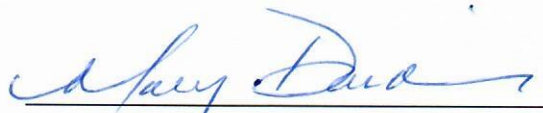
**AND THE COURT**, being duly advised, **FINDS and ORDERS** that Permittee LaPorte County Regional Sewer and Water District's Rolling Prairie Wastewater Collection System, Phase II's Motion to Dismiss the petition for administrative review, as amended, filed by Petitioner Cherill Spaeth, by her power of attorney, Cindy Spaeth, should be granted.

**IT IS ORDERED, ADJUDGED AND DECREED** that the Permittees' Motion to Dismiss is **GRANTED**. Pursuant to T.R. 12(B), Petitioner Cherill Spaeth, by her power of attorney, Cindy Spaeth, is given leave to amend her petition for review within ten (10) days after service of this Order.

Pursuant to Ind. Code § 4-21.5-3-24 and 315 IAC 1-3-7, this constitutes notice of a Proposed Order of Dismissal. It is proposed that this matter be dismissed if Petitioner fails to file an amended petition. **IT IS FURTHER ORDERED** that Petitioner Cherill Spaeth, by her power of attorney, Cindy Spaeth's failure to amend the petition for review shall result in the entry of a final order of dismissal of this matter.

You are further notified that pursuant to provisions of IC §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. This is an order subject to further review consistent with applicable provisions of IC §4-21.5 *et seq* and other applicable rules and statutes.

**IT IS SO ORDERED this 15<sup>th</sup> day of May, 2020 in Indianapolis, IN.**



Hon. Mary L. Davidsen  
Chief Environmental Law Judge

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