

STATE OF INDIANA )  
 )  
LAPORTE COUNTY )

THE LAPORTE SUPERIOR COURT No. 2  
  
CAUSE NO. 46D02-2006-MI-000838

IN THE MATTER OF:

CONSTRUCTION PERMIT APPLICATION )  
SANITARY SEWER SRF APPROVAL NO. L-0557 )  
ROLLING PRAIRIE WASTEWATER COLLECTION )  
OBJECTION TO THE APPROVAL OF 327 IAC 3 )  
SYSTEM, PHASE II )  
ROLLING PRAIRIE, LaPORTE COUNTY, INDIANA )  
\_\_\_\_\_)  
Cherill Spaeth by Cindy Spaeth, POA, )  
Petitioner, )  
Rolling Prairie Wastewater Collection System, Phase II, )  
Permittee/Respondent. )  
Indiana Department of Environmental Management, )  
Respondent. )

**FILED**  
June 2, 2021  
*Leathu Owens*  
LAPORTE CIRCUIT & SUPERIOR COURTS  
LD

**ORDER AFFIRMING ENVIRONMENTAL LAW JUDGE RULING AGAINST PLAINTIFF'S  
CLAIM FOR FOURTEENTH AMENDMENT INFRINGEMENT**

This suit came before this Court on behalf of the Petitioner who objects to the construction and extension of the wastewater collection system in Rolling Prairie due to a violation of her due process right. The present case was appealed to this Court after it was previously dismissed by the Environmental Law Judge (ELJ) under the Office of Environmental Adjudication (OEA). This Court, having considered the evidence and arguments of the parties involved, now issues and files its findings and conclusions of law:

**FINDINGS OF FACT & PROCEDURAL HISTORY**

1. Respondent, LaPorte County Regional Sewer and Water District (the District), intended to extend a wastewater collection system in Rolling Prairie, Indiana. (Rcrd. Item 1 including IDEM Decision of Approval). This wastewater collection system was designed to become Phase II of an existing system and would serve more residential properties within Rolling Prairie. (Rcrd. Item 1; Item 25).
2. Before proceeding with a sewer extension project, the state of Indiana requires that the District provide residents within the affected area with written mail notice and publication notice in two (2)

newspapers in the county for three (3) consecutive weeks within sixty (60) days from the date of the decision to extend service. *See* I.C. 13-26-5-1 et seq.; *See* I.C. 13-26-5-6.5. The notice in question has to be both by publication and "United States mail, postage prepaid, mailed to each freeholder with the territory to which the district proposes to extend service." I.C. § 13-26-5-6.5(2). The District failed to provide the affected property owners with the mailed notices. (Rcrd. Item 25).

3. The Indiana Department of Environmental Management (IDEM) issued a permit (Approval No. L-0057) for Phase II of the Wastewater Collection system. (Rcrd. Item 1). Cherill Spaeth (Petitioner), a resident whose home would be connected to the Phase II extension, by her daughter and power of attorney, Cindy Spaeth, filed a timely letter seeking administrative review by the OEA. (Rcrd. Item 1). The Petitioner opposed the approval of the system on multiple bases, however, only one issue is relevant to this appeal; the failure of the District to provide her and the other affected property owners with the statutorily required written and publication notices of the District's wastewater project. (Rcrd. Item 1).
4. The District filed for dismissal of the petition for administrative review. (Rcrd. Item 15). On May 15, 2020, the ELJ of the OEA entered an order concluding that IDEM lacked the regulatory authority to address the issues proposed by the petitioner and that the OEA lacks the authority to withdraw a permit on the basis that IDEM failed to consider those issues. (Rcrd. Item 28). Additionally, the ELJ concluded that the OEA lacked the authority to decide the constitutionality of the District's approval of a regional sewer system. *Id.* The petitioner does not appeal those determinations.
5. The Administrative Procedures Act provides that appeals from a decision by the OEA are directed to a Circuit or Superior Court in the county. The petitioner appeals to this Court from the ELJ's determination that her filing of an appeal with the OEA cured her denial of due process claim which resulted from the District's failure to provide the statutorily required notices. In turn, the respondent and permittee, Rolling Prairie Wastewater Collection System, prays that this Court deny the petitioner's requests.

## CONCLUSIONS OF LAW

### Relevant Rules

1. The OEA maintains jurisdiction over the IDEM. I.C. 4-21.5-7-3(a). This authority allows the OEA to hold adjudicatory hearings necessary to implement "agency action of the [IDEM]." I.C. 4-21.5-7-3(b)(1)(C). *See Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 808 (Ind. 2004) ("The OEA was established in 1995 to review decisions made by the commissioner of IDEM").
2. Findings of Fact that can be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed. *In the Matter of: Objection to the Approval of 327 IAC 3*, OEA No. 18-W-J-5042 (2020)
3. A motion to dismiss according to Ind. Trial Rule 12(B)(6) for failure to assert a claim for which relief may be awarded examines the legal adequacy of a claim rather than the facts backing it. *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind. Ct. App. 2003). In evaluating a motion to dismiss a court must accept all allegations as accurate upon the face of the complaint and may only dismiss said allegations if the plaintiff would not be entitled to recovery under any admissible facts following the allegations in the complaint. Furthermore, the Court views the pleadings in a light most favorable to the non-moving party and makes all reasonable inferences favoring that party. *Huffman v. Office of Environmental Adjudication*, 811 NE.2d 806, 814 (Ind. 2004).
4. The OEA and IDEM, being Indiana agencies, only have the authority to take lawful actions. *See In Re: Cooper Farms*, 2018 OEA 24; *In Re: Twin Lakes Regional Sewer District*, 2007 OEA 53, 61. However, an agency could be prohibited by its own rules and regulations from extending or detracting from the law(s) enacted, or may be prohibited from extending its authority beyond that which was conferred upon it lawfully. *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003); *Dep't of Pub. Welfare v. St. Joseph's Med. Ctr.*, 455 N.E.2d 981, 983 (Ind.Ct.App.1983).

5. The IDEM is only allowed to determine whether a permit should be assigned by utilizing the appropriate statutes and regulations. Furthermore, the agency is allowed to only consider factors specified in the relevant regulations while determining whether to assign a permit. Practically all of IDEM's regulatory authority centers on the implementation, regulation, and enforcement of environmental laws, including those related to permit issuance. *See* I.C. 13-15-2, *et seq*; 327 IAC 3-1-1. As the ultimate authority for the IDEM, the OEA's authority is limited by statute, I.C. § 4-215-7-3, in determining whether an IDEM decision is in compliance with the appropriate or relevant statutes and regulations.
6. A petition challenging the construction permit of a sanitary sewer assigned by the IDEM must allege environmental interests or matters or technical deficiencies related to the action of the commissioner of the IDEM that is the subject of the petition. 315 IAC 1-3-2(b)(4)(A)(i). Consequently, in a case where a party challenges all aspects of a project permitted by the IDEM, a petition for administrative review may reasonably exclude terms and conditions that the petitioner argues to be relevant to follow the appropriate law to challenge the permit. 315 IAC 1-3-2(b)(4)(A)(ii).
7. Where the IDEM lacks regulatory authority to approach an issue, the OEA would lack the authority to deny a permit because IDEM declined to consider the issue. *In the Matter of: Objection to the Approval of 327 IAC 3*, OEA No. 18-W-J-5042 (2020).
8. Furthermore, the OEA is required to consider the impact on the specific petitioner's aggrieved or adverse status, not on that of the general public. *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 810 (Ind. 2004).
9. I.C. § 13-26-5-6.5 provides:

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 the 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.

10. The Due Process Clause of the Fourteenth Amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

11. The Fourteenth Amendment does not prohibit the states from giving judicial functions to non-judicial bodies or bestowing powers to its court(s) that are legislative in character. *See Ohio v. Akron Park Dist.*, 281 U.S. 74, 79 (1930). States could determine the extent that their legislative, executive, and judicial branches should be kept distinct and separate. *Carfer v. Caldwell*, 200 U.S. 293, 297 (1906).
12. An essential and basic provision of the Due Process Clause of the Fourteenth Amendment in any proceeding which is given finality is notice reasonably calculated, under all the circumstances, to inform interested parties of the pendency of the action and allow them to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Due process may include a responsibility, upon discovering that an effort to provide notice has failed, to take possible “reasonable follow-up measures.” *Jones v. Flowers*, 547 U.S. 220, 235 (2006). The notice needs to be adequate to enable the recipient to determine its proposal and instruct the recipient on how to protect against the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). *See generally* Justia US Law Internet Article on “Procedural Due Process Civil.”
13. According to *In Re: Fall Creek Regional Waste District*, a violation of due process may be cured by a government agency in the state of Indiana if the petitioner received notice in time to timely appeal the issue. *In Re: Fall Creek Regional Waste District*, 2007 OEA 64.

### **Analysis**

***Dismissal for lack of Jurisdiction***

1. The ELJ concluded that the IDEM was required to base its permitting judgment upon IDEM's review of the District's application in conjunction with its project plans and specifications. In addition, the IDEM had to make said review within the scope of relevant policies, procedures, and technical requirements enumerated in 327 IAC 3-1-1. According to I.C. 13-15-2, *et seq.*, and as stated above, the IDEM may only consider factors specified in the relevant regulations while determining whether to assign a permit. In fact, most of the IDEM's regulatory authority centers on the implementation, regulation, and enforcement of environmental laws, including those related to permit issuance. Moreover, it is the duty of the OEA to decide whether the IDEM has complied with the authorizing statute. Here, the ELJ, being part of the OEA, has deemed the IDEM actions to be compliant with the relevant rules.
2. Furthermore, Indiana statute, 315 IAC 1-3-2(b)(4)(A)(i), requires that a petition challenging a construction permit for a sanitary sewer approved by IDEM must identify environmental interests or matters or technical deficiencies related to the action of the commissioner of the IDEM that is the subject of the petition. Here, the petitioner must identify environmental interests or matters or technical deficiencies related to this action. Rather, Petitioner focuses her claims on the lack of constitutionality of the District's approval of a regional sewer system and the constitutionality of a District Board of Trustee member appointment. However, both areas are not within OEA's jurisdiction because those are not within the IDEM's authority and, thus, those arguments fail to persuade this Court that the claims presented are environmental interests or matters or technical deficiencies related to this action.
3. The IDEM is only allowed to determine whether a permit should be assigned by utilizing the appropriate statutes and regulations while considering environmental factor considerations, including a technical review of a projects plans and specifications. *See* 327 IAC 9, *et seq.* *See also* I.C. 13-15-6-2(6). Consequently, because these issues contested by the Petitioner are not under the

IDEM's regulatory authority, the OEA lacks the authority to revoke a permit on the grounds that IDEM failed to consider said issues.

4. This Court agrees with the ELJ that the Petitioner was only objecting the District's actions carried under I.C. § 13-266, *et seq.* ("Powers and Duties of Regional Districts", 1996). The OEA is not recognized as the appropriate forum to address the District's failure to comply with Indiana statute since the IDEM lacks the authority to consider or make permitting decisions grounded on alleged or actual noncompliance with I.C. § 13-26-5, *et seq.*, nor does the statute designate penalties. Since the Petitioner's assertions 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 outside the OEA's jurisdiction, this Court affirms the ELJ's ruling in granting the District's Motion to Dismiss these issues.
5. Petitioner's objections grounded upon economic repercussions are not properly before the OEA since the Petitioner failed to cite any regulations supporting her objection to the permit's revocation. There are no regulations that require IDEM to consider the effect the approval will have on these matters. Thus, this Court affirms the ELJ's decision to grant the Permittee's Motion to Dismiss.

#### ***Cure of Due Process Violation***

1. This Court also affirms the ELJ's ruling that the agency's violation of Petitioner's due process had been cured.
2. Petitioner claims that the District's failure to comply with the statutory notice requirements has infringed her due process right of notice and her opportunity to be heard. However, as held within *In Re: Fall Creek Regional Waste District*, a violation of due process may be cured by a government agency in the state of Indiana if the petitioner received notice in time to timely appeal the issue. Petitioner's timely appeal to the OEA cures any potential violation of due process.
3. Furthermore, *Huffman* requires OEA to consider the impact on the specific petitioner's aggrieved or adverse status, rather than that of the public in general. Here, since the Petitioner received notice

in time to timely appeal the permit, the administrative adjudicatory review process before OEA cured any due process violation raised by the Petitioner. This Court affirms the ELJ's decision to grant the Permittee's Motion to Dismiss.

4. In conclusion, this Court affirms the decision of the Environmental Law Judge and dismisses the Petitioner's claims for lack of OEA jurisdiction and a violation of due process.

The court hereby affirms the decision of the Environmental Law Judge and dismisses the Petitioner's issue for lack of OEA jurisdiction and cure of a due process violation.

**SO ORDERED THIS 2<sup>nd</sup> day of June, 2021.**

A handwritten signature in black ink, appearing to read "R. Stalbrink, Jr.", written over a horizontal line.

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**RICHARD R. STALBRINK, JR., JUDGE  
LAPORTE SUPERIOR COURT NO. 2**