

**In the Matter Of Objection to the Issuance of Permit Approval No. IN0061042
AquaSource Services and Technology, Floyd County, Indiana.
2002 OEA 41 (01-W-J-2770)**

OFFICIAL SHORT CITATION NAME: When referring to 2002 OEA 41, cite this case as
AquaSource Services and Technology, 2002 OEA 41.

TOPICS:

wastewater treatment plant (WWTP)
new point source discharge
pollutant
Clean Water Act (CWA)
administrative review
33 U.S.C. § 1342(a)(1)
IC 4-21.5-3-24
315 IAC 1-3-7
327 IAC 5-1.5-35
327 IAC 5-2-8
327 IAC 5-2-16
327 IAC 5-3-3
misrepresentation
NPDES
point source
floodway
effluent
public hearing
public comment
noncompliance
enforcement
age of equipment

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

David Hatchett, Esq.

ORDER ISSUED:

December 18, 2002

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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4. On November 20, 2000, IDEM issued for public review and comment Draft NPDES Permit No. IN0061042 ("Draft NPDES Permit"). Although not required, IDEM also held a public hearing in this matter. See Draft NPDES Permit, Public Notice; see also 327 IAC 5-3-9 (hearing is at IDEM'S discretion).
5. The following people commented on the Draft NPDES Permit: George Mouser, Robert Oster, Phil Scharf, Tim Fentress, Robert Boyd, and Pete Miller. IDEM summarized and responded to each of these comments in its April 11, 2001 Post Public Notice Addendum.
6. On July 23 2001, IDEM issued AquaSource the final NPDES Permit for the WWTP ("NPDES Permit"). In its cover letter, IDEM noted that it had considered the public comments. See NPDES Permit, Cover Letter.
7. In early August 2001, petitions for administrative review were filed by the following citizens: Pete Miller, Darryll R. Jones, Steven Kerr, C.O. Sterling, Tim Fentress, Robert Scharf, Philip Scharf, Jacquelyn S. Mensing, Yvonne M. Fentress, Robert Oster, John Vellinger, and George Mouser. During the same period, AquaSource filed a petition for administrative review of the Permit, raising issues that do not overlap with issues raised in any of the citizen petitions.
8. On September 17, 2001, a prehearing conference was held at OEA. Counsel for IDEM, counsel for AquaSource and most of the citizen petitioners appeared at the prehearing conference. However, two petitioners, C.O. Sterling and John Vellinger, did not attend and have since failed to participate in any stage of this administrative proceeding. At the prehearing conference, OEA deferred review of AquaSource's petition pending resolution of the citizen petitions. In addition, OEA ordered that any amendments to the citizens' petitions needed to be filed by October 17, 2001. The parties agreed that Philip Scharf would serve as designated spokesperson and point of contact for the participating citizen petitioners ("Scharf Petitioners").
9. On October 15, 2001, the Scharf Petitioners filed their Amended Petition. The Amended Petition consolidated the various petitions' issued into one document but did not raise any additional issues challenging IDEM's issuance of the NPDES Permit. The citizen petitioners raised the following issues: (1) whether the WWTP must be built completely with all new components; (2) whether any permit noncompliance by AquaSource would cause further pollution in the receiving stream; (3) whether IDEM must alter permit terms in response to public comments; (4) whether the Construction Permit, which was unsuccessfully appealed by the Citizen Petitioners last year, can be challenged based on issues raised in this current appeal; and (5) whether floodway concerns, also addressed in the Construction Permit appeal, require the WWTP to be moved.

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10. On November 7, 2001, the OEA granted an enlargement of time for all parties to file dispositive motions and responses. The Scharf Petitioners filed a dispositive motion on November 19, 2001, to which AquaSource responded on December 7, 2001. AquaSource filed its Motion to Dismiss and/or for Summary Judgment on November 20, 2001. The Scharf Petitioners responded on November 27, 2001, and George Mouser filed a separate response on December 6, 2001. IDEM filed its concurrence in AquaSource's Motion to Dismiss and/or for Summary Judgment, and its concurrence in AquaSource's Response to the Scharf Petitioners' dispositive motion.
11. On January 14, 2002, a telephonic status conference was held in which AquaSource, IDEM and the Scharf Petitioners participated. George Mouser, C.O. Sterling and John Vellinger did not participate. During the status conference, OEA scheduled oral argument to be held on February 14, 2002, in the event OEA determined that oral argument was necessary to supplement its review of the citizens' petitions.
12. On January 18, 2002, AquaSource filed its Motion to Dismiss Designated Individuals, in which AquaSource requested that OEA dismiss at least two petitioners for failure to participate in the proceeding. On January 25 and January 30, 2002, OEA issued Proposed Orders of Default to C.O. Sterling and George Mouser. Mr. Mouser responded to the Proposed Order of Default by letter dated January 28, 2002.
13. All parties have had a sufficient opportunity to present arguments and fully brief OEA on the issues raised in the citizen petitions and the motions of the parties.

Conclusions of Law

Burden of Proof

1. It is the citizen petitioners' burden to persuade OEA that the NPDES Permit was issued contrary to law or that the NPDES Permit was somehow deficient as a matter of law. *See In Re Objections to Issuance of NPDES Permit No. IN57151, Spring Creek Travel Plaza, IDEM Office of Hearings, Cause No. 93-W-J-895, 1994 WL 233940, *1 (Feb. 25, 1994).* Notwithstanding this burden, the citizen petitioners have not offered legal support for their positions. Because the citizens' contentions are not grounded in the law (Ind. Code Article 13-18 and 327 IAC 5) governing NPDES permits, OEA has no basis to grant any relief sought by the citizen petitions.

Age of WWTP equipment

2. The Citizen petitioners allege that some of the equipment used in the WWTP is not brand new and that a new point source discharge must be built completely with new equipment. Amended Petition, P4. However, even if some components of the WWTP are not brand new, OEA cannot grant any relief to the citizen petitioners because the age of the WWTP's components is irrelevant to whether the NPDES Permit was properly issued. 327 IAC 5-3-2(b)(1) provides:

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A Person proposing a *new discharge of pollutants* shall submit an application at least one hundred eighty (180) days before the date on which the *discharge* is to commence, unless a later date is allowed by the commissioner (emphasis added).

The language of the regulation plainly focuses on a new "discharge," and not on whether the facility is new.

3. The need for a NPDES permit under the Clean Water Act ("CWA") is triggered by a new discharge, and does not consider the age of the facility from which the discharge emanates. *See* 33 USC § 1342(a)(1) (authorizing U.S. EPA or a state to "issue a permit for the discharge of any pollutant, or combination of pollutants"). *See also Rybachek v. U.S. EPA*, 904 F.2d 1276, 1293 (9th Cir, 1990) (U.S. EPA can determine that a mine is a "new source," even if that mine reused the same wastewater treatment plant equipment and had a NPDES permit previously, when the mine discharges from or into a new location); 327 IAC 5-1.5-35 (definition of "new discharge" focuses on whether the source commenced "the discharge of pollutants at a *particular site*" (emphasis added)).
4. As required by the CWA and 327 IAC 5, the NPDES Permit issued to AquaSource ensures that any "discharge of a pollutant" from the WWTP meets all applicable effluent limitations. Part I of the NPDES Permit includes numerous effluent limitations and monitoring requirements for pollutants. *See* NPDES Permit, pp. 2-9. As Part II of the NPDES Permit provides, "any person who violates a permit condition" is subject to enforcement. *See* NPDES Permit, p. 12. In short, the effluent limitations in the NPDES Permit must be met, regardless of the age of the facility or any of its components. *See also* NPDES Permit, p. 14 (equipment must be maintained to ensure compliance with effluent limitations).
5. The citizen petitioners fail to point to any actual misrepresentation by AquaSource to IDEM.
6. If the age of the WWTP were relevant OEA cannot grant the relief sought by the citizen petitioners. The citizen petitioners ask that OEA revoke the permit for misrepresentation under 327 IAC 5-2-8. That regulation provides, in relevant part:

The following conditions apply to all NPDES permits and shall be incorporated into the permits either expressly or by reference...(4)(a) Permits may be modified, revoked and reissued, or terminated for cause.

This regulation merely speaks to the various conditions that IDEM must include in a NPDES permit.

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7. Two other regulations explain who actually holds the authority to revoke a permit for misrepresentation. 327 IAC 5-2-16 and 327 IAC 5-3-3 confer that power to the Commissioner of IDEM. Only after IDEM takes action pursuant to these regulations, such as by revising or terminating the permit, can any opportunity arise for permit review before OEA. OEA lacks the authority to provide the relief sought under the citizen petitions.
8. The citizen petitioners also note that the President of the Floyd County Commissioners now believes that the WWTP should be constructed with all new equipment. Taken as true, this allegation still does not provide a basis for OEA to grant review of the NPDES Permit. Local issues are not within OEA's jurisdiction. *See In Re Objections to Renewal of Operating Permit for T.H. Landfill Miami County, IDEM Office of Hearings, Cause No. 89-S-J-264, 1991 WL 540843, *1 (Feb. 15, 1991).*
9. The argument that all of the WWTP's equipment must be brand new fails to state a claim upon which relief can be granted Ind TR 12 (B)(6) and must be dismissed.

Ability of WWTP to meet compliance criteria

10. The citizen petitioners argue that the NPDES Permit must be overturned because previous wastewater treatment facilities in Floyd County have contributed to water pollution and have failed to meet compliance criteria. Amended Petition, P2. This argument raises issues which are unrelated to the instant case and over which OEA has no review authority.
11. The citizen petitioners have not shown that the WWTP will not be able to meet its compliance criteria. Allegations of potential harms from future management of a facility do not challenge the permit's terms and are not reviewable by OEA in a permit appeal. *See In Re Objection to Issuance of Approval No. A W 4504, Mr. Gettelfinger, Washington, Indiana, OEA, Cause No. 98-S-J-1958 1998 WL 918589, *2 (Dec. 8, 1998).*
12. Even if noncompliance can be shown in the future, it will be subject to a separate enforcement action, one that cannot be raised in this permit appeal. *See In Re Objection to Issuance of Section 401 WQC COE ID: 199600554, RDI/Caesars Riverboat Casino, LLC, OEA, Cause No. 97-W-J-1824, 1998 WL 768493, *2 (Jan. 5, 1998) enforcement matters cannot be appealed in a permit action).*
13. If AquaSource were to violate its NPDES Permit, IDEM has sufficient authority to bring an enforcement action. In the meantime, OEA has no authority to review speculative claims regarding harms that are expressly reserved to IDEM's enforcement jurisdiction. The citizen petitioners' "noncompliance" argument fails to state a claim upon which relief may be granted and must be dismissed.

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IDEM's responses to public comments

14. The citizen petitioners argue that IDEM was required to hold a public hearing and that IDEM ignored public comments. These assertions are without merit.
15. Although IDEM elected to hold a public hearing in this case, it was not required to do so. *See* 327 IAC 5-3-9. More importantly, IDEM is under no obligation to change a permit simply because it receives public comments. *See In Re Objections to Issuance of NPDES Permit IN 54429, Chemical Waste Management, Inc.*, IDEM Office of Hearings, Cause No. 91-W-J-462, 1993 WL 588733, *4 (Jan. 6, 1993) (IDEM does not have to respond to all public comments and does not need to make a change to the NPDES permit in response to comments). The citizen petitioners' claim regarding IDEM's failure to modify the NPDES Permit in response to comments is without basis and must be dismissed.

Review of construction permit

16. The citizen petitioners argue that OEA should review the Construction Permit to determine if misrepresentation played a factor in its issuance. Any issues related to the Construction Permit were heard over a year ago and dismissed in an earlier OEA cause. *See In Re Objection to Issuance of Permit Approval No. 13814, Reynolds Group Clark County*, OEA, Cause No. 00-W-J-2536 (Jan. 3, 2001 Final Order Granting Motion to Dismiss). The citizen petitioners cannot challenge a permit that is not the subject of this appeal. Further, the doctrine of *res judicata* prevents the citizen petitioners from relitigating any Construction Permit issues.
17. In any event, the citizens' claims of misrepresentation rely solely on their irrelevant issue of the age of the WWTP's equipment. As explained above, the components of the WWTP do not need to be brand new, and regulations governing the termination of the NPDES Permit grant such termination powers to IDEM, not OEA. The citizen petitioners' request for review of the Construction Permit must be dismissed.

Floodplain and floodway concerns

18. Lastly, the citizen petitioners argue that the WWTP needs to be moved out of the floodplain and floodway. This identical argument was made during an unsuccessful appeal of the Construction Permit. *See In Re Objection to Issuance of Permit Approval No. 13814, Reynolds Group, Clark County*, OEA, Cause No. 00-W-J-2536 (Jan. 3, 2001 Final Order Granting Motion to Dismiss).
19. Moreover, floodway issues fall within the province of the Indiana Department of Natural Resources and cannot be reviewed by OEA. *In Re Objection to Issuance of Solid Waste Facility Permit, Alternate Disposal, Inc., Lake County*, OEA, Cause No. 96-S-J-1674, 1997 WL 297843, *4 (May 5, 1997). Because OEA lacks jurisdiction over this issue, it must be dismissed.

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Dismissal for failure to participate

20. C.O. Sterling and John Vellinger, despite petitioning for OEA review of the NPDES Permit in August 2001, have since not participated in this administrative proceeding. George Mouser submitted a short response to AquaSource's dispositive motion but has failed to participate in many stages of this proceeding.
21. Indiana Code § 4-21.5-3-24 and 315 IAC 1-3-7(b) authorize OEA to dismiss any party who fails to file a responsive pleading or who otherwise fails to participate in the proceeding. Each of OEA's orders advised all parties that a failure to participate in any stage of the proceeding would provide grounds for default or dismissal. Because these petitioners declined to follow OEA's deadlines and orders to appear in this matter, their petitions will be dismissed. Further, the substantive issues raised in the petitions are addressed above.

Order Granting AquaSource's Motions and Denying the Citizens Motion

After consideration of the citizen petitions and all of the arguments and evidence presented by the parties, and based upon the foregoing Findings of Fact and Conclusions of Law, the Chief Administrative Law Judge ("CALJ") hereby GRANTS AquaSource's Motion to Dismiss and/or for Summary Judgment and DENIES the citizens' dispositive motion. The CALJ also GRANTS AquaSource's Motion to Dismiss Designated Individuals. It is further ORDERED that each of the citizens' petitions is dismissed with prejudice.

This Order does not address the petition for administrative review filed by AquaSource, the review of which OEA deferred pending consideration of the citizen petitions.

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 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 in Indianapolis, Indiana this 18th day of December, 2002.

Wayne E. Penrod,
Chief Administrative Law Judge