

**Objection to Issuance of Sanitary Sewer Construction Permit No. 18509,
Independence Hill Conservancy District, Merrillville, Lake County, Indiana.**

**Merrillville Conservancy District, Gary Sanitary District: Petitioners;
Independence Hill Conservancy District: Respondent/Permittee;
Indiana Department of Environmental Management: Respondent.
2007 OEA 164 (07-W-J-3894)**

TOPICS:

conservancy district	contractual capacity
regional wastewater treatment system	retail service territories
sanitary sewer construction permit	aggrieved or adversely affected
NPDES	summary judgment
collect wastewater	motion to dismiss
discharge	Ind. Code § 14-33
collection system	IC § 4-21.5-3-23
water pollution treatment/control facility	327 IAC 3-6-4
Waters of the State	Tr. R. 12(B)(8)
outflow	suit pending
Capacity Certification/Allocation Letter	substantially the same issues
sewer ban early warning notification	

PRESIDING JUDGE:

Dauidsen

PARTY REPRESENTATIVES:

Petitioner: Merrillville Conservancy District: William L. Touchette, Esq.;
Gary Sanitary District: David N. Gilyan, Esq.
Respondent/Permittee Independence Hill Conservancy District: Thomas M. Greenberg, Esq.
Respondent IDEM: April D. Lashbrook, Esq.; Denise A. Walker, Esq.

ORDER ISSUED:

October 1, 2007

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

Prior related case assigned Lake County Superior Court 1
Cause No. 45D01-0111-CP-0540
Petition for Judicial Review assigned Lake County Circuit Court
Cause No. 45C01-0710-MI-00142

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- August 6, 2007 IHCD counsel Catheron A. Paras, Esq. and Michael A. Sarafin's Motion for Leave to Withdraw as Counsel for Respondent, and August 15, 2007 Order granting counsel's motion;
- August 10, 2007 IHCD's Motions for Case Management Conference, to Vacate Existing Case Management Order, and to Continue Oral Argument on Pending Motions;
- August 13, 2007 Report of Telephonic Scheduling Conference and Amended Case Management Order;
- August 17, 2007 IHCD's Motions for Continuance and for Leave to Withdraw and Re-File Motions for Summary Judgment and Response in Opposition to MCD/GSD's Joint Motion for Summary Judgment ("IHCD August 17, 2007 Motions Continue, Withdraw, Response");
- August 17, 2007 IHCD Exhibit 1, Wastewater Transportation and Treatment Agreement Between the Merrillville Conservancy District and the Independence Hill Conservancy District ("IHCD Exhibit 1");
- August 17, 2007 MCD's and GSD's Petitioners' Reply to IHCD's "Respondent IHCD's Response to Petitioner's Motion for Summary Judgment ("Petitioner's Reply");
- August 17, 2007 IHCD Summary Judgment Reply;
- August 22, 2007 IHCD Alternative Motions to Strike MCD Exhibit 23 and Parts of the MCD/GSD Joint Summary Judgment Reply, or For Continuance and Leave Either to File a Supplemental Summary Judgment Response or to Withdraw and Refile its Summary Judgment Response ("IHCD August 22 Alternate Motions");
- August 28, 2007 Petitioners MCD's and GSD's Joint Verified Motion in Opposition to IHCD's 8-10-07, 8-17-07 and 8-22-07 Motions for Continuance; and in Opposition to IHCD's Motion to Strike MCD Exhibit 23;
- August 29, 2007 10:30 AM, EDT Telephone Status Conference attended by Thomas M. Greenberg, Esq., and James Deshears, Chairman, for Independence Hill Conservancy District, by William L. Touchette, Esq., for Merrillville Conservancy District, by David N. Gilyan, Esq., for Gary Sanitary District. The Indiana Department of Environmental Management ("IDEM") was present by April D. Lashbrook, Esq., in substitution for Denise A. Walker, Esq.

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AND THE COURT, being duly advised and having considered the petitions, pleadings, motions, evidence and the briefs, responses and replies, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

Findings of Fact

1. The Indiana Department of Environmental Management (the "IDEM") issued Construction Permit Approval No. 18509 (the "Permit") to IHCD on March 1, 2007. The Petition for Administrative Review and Stay of IDEM Construction Permit (the "Petition") of this construction permit was filed on March 16, 2007 and was assigned Office of Environmental Adjudication ("OEA") Cause Number 07-W-J-3894.
2. The Petition was timely filed, per Ind. Code § 4-21.5-3, *et seq.*
3. Petitioners based their Petition upon contentions, supporting their aggrieved and adversely affected status as specified in p5 of 13 and following, as recipient of outflow from IHCD, including past capacity issues, a June 11, 2002 sewer ban early warning notification, September 13, 2006 engineering notification including rain event, and alleged instances of contractual capacity exceeded by IHCD.
4. Separate appearances as counsel of record for Respondent/Permittee IHCD were filed by Thomas M. Greenberg, Esq., on March 28, 2007, by Catheron A. Paras, Esq., on April 5, 2007, and by Michael A. Sarafin, Esq., on June 4, 2007. Until August, 2007, Ms. Paras asserted that she, or Michael A. Sarafin, Esq., were authorized to appear as IHCD's counsel, and, as referenced in the Court's April 17, 2007 Report of Prehearing Conference and Order to Attend Attorneys' Conference, that Mr. Greenberg was expected to withdraw his appearance and would not be participating. As Mr. Greenberg did not withdraw his appearance as indicated by Ms. Paras, Mr. Greenberg remained on the Court's distribution list throughout these proceedings, but did not participate in matters before the Court in this cause until August, 2007.
5. A Lake Superior Court suit is pending, under cause 45D01-0111-CP-540, involving MCD and IHCD as parties, with six (6) counts summarized without dispute on Response, p. 4:
 - Count 1 Breach of contract based on August 25, 1999 mutual letter of intent
 - Count 2 Specific performance of the letter of intent
 - Count 3 Permanent Injunction against. IHCD issuing letters of sewer availability for exhaustion of its capacity with MCD
 - Count 4 alternatively, a plea to enforce the mutual letter of intent in equity in quasi contract and for detrimental reliance
 - Count 5 if letter unenforceable for any reason, a plea for finding breach and damages

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- Count 6 a plea for additional pre- and post-judgment interest and damages allowed under specified federal and regulatory provisions.
6. Respondent/Permittee IHCD's Motion to Dismiss per Ind. Tr. R. 12(b)(8), based upon the existence of "substantially the same issues" currently pending before the Indiana Court of Appeals, was denied on June 7, 2007. The parties filed Motions for Summary Judgment on July 12, 2007, and subsequent pleadings as noted above. Through August 2, 2007, IHCD's motions and briefs were submitted either by Ms. Paras or Mr. Sarafin; thereafter, Mr. Greenberg provided IHCD's legal representation.
 7. IHCD's application for a sanitary sewer construction permit sought approval for "installation of approximately 4,850 L.F. of 8-inch diameter and 1,277 L.F. of 10-inch diameter sanitary gravity sewer to carry an average flow of 108,000 gpd from 156 2-bedroom, 116 single family homes and 25.24 acres of commercial development."
 8. GSD, MCD and IHCD are assigned mutually exclusive retail service territories. GSD, MCD and IHCD comprise a regional wastewater treatment system, with significant construction funding from federal Clean Water Act grants.
 9. IHCD is a conservancy district, operating per Ind. Code § 14-33, et seq., as a sanitary sewer service provider to an exclusive territory located in Lake County, Indiana. IHCD's address is 2193 West 84th Place, Merrillville, IN 46410-3996. IHCD's wastewater systems of gravity sewers, force mains and lift stations collect all of the wastewater generated within IHCD's exclusive sanitary sewer service territory, and transports it to IHCD's single discharge point to the collection point operated by MCD. IHCD's single discharge point into MCD's facility is at the connection of IHCD's 18-inch gravity sewer line and MCD's 24-inch gravity sewer line. A contractual relationship between MCD and IHCD addressed the amount reserved and paid for specified average daily and peak wastewater capacities in MCD's wastewater facilities in an amount sufficient to accommodate all of the wastewater generated within IHCD's service territory and transported into MCD's wastewater facilities. IHCD does not have a NPDES permit to discharge wastewater.
 10. MCD is a conservancy district, operating per IC § 14-33, et seq., as a sanitary sewer service provider to a specific territory located in Lake County, Indiana. MCD's address is 6250 Broadway, Merrillville, IN 46420. MCD's wastewater systems of gravity sewers, force mains and lift stations collects all of IHCD's wastewater with the wastewater generated within MCD's exclusive sanitary sewer service territory, and discharges all of the collected wastewater into the collection system operated by GSD. MCD's wastewater then merges with GSD's wastewater and is then transported to GSD's wastewater treatment plant for treatment and discharge into Lake Michigan. MCD does not have a NPDES permit to discharge wastewater.

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11. GSD has a NPDES permit to operate the wastewater treatment plant, which treats all of the wastewater generated and collected within the regional system. The treated water is then discharged into Lake Michigan. Additionally, GSD also serves an exclusive retail sanitary service territory, primarily located within the City of Gary, Indiana's municipal boundaries. GSD's wastewater treatment plant also treats all of the wastewater collected from the exclusive retail sanitary service territories for the sanitary districts of the City of Hobart, Indiana, and the City of Lake Station, Indiana.
12. The Permit authorized IHCD to collect additional wastewater, which would then be discharged to MCD's collection system, and then to GSD's collection system.
13. IDEM's application for Water Pollution Control Facility Construction Permit Required by 327 IAC Article 3 contained a fill-in-the-blank form entitled "CAPACITY CERTIFICATION/ALLOCATION LETTER (This Form Should be Filled Out in its Entirety)". The Capacity Certification/Allocation Letter is to be signed by an official on behalf of the operator(s) of the "water pollution treatment/control facility[ies]" which will be receiving and transporting the wastewater, and which will be providing pollution control treatment for the wastewater generated by the new sewer project.
14. IHCD's permit application, issued as Permit Approval No. 18509, did not include a capacity certification/allocation letter signed by MCD or GSD. Neither MCD nor GSD signed a capacity certification/allocation letter in support of IHCD's permit application.
15. GSD's and MCD's summary judgment motion and briefs sought invalidation of permit 18509, for reasons including the lack of a capacity certification/allocation letter signed by them. IHCD's summary judgment briefs opposed this position until its August 17, 2007 submissions.
16. IHCD's August 17, 2007 summary judgment reply stated that "IHCD agrees with the interpretation of 327 IAC 3-6-4 advanced by MCD/GSD in their pleadings, summary judgment motion, and response to IHCD summary judgment motion, and to the immediate granting of a summary judgment to MCD/GSD accordingly. If the Court so rules, the instant motions herein will be moot." "Although IHCD remains concerned about the burden of having to obtain approvals from MCD and GSD for all future sewer construction projects within the IHCD area, MCD and GSD should be applauded for their selflessness since they will share the same burden of having to obtain approvals from each other and from IHCD for all future sewer construction projects within their respective areas."
17. The August 29, 2007 telephone status conference, held in lieu of oral argument, was not held on the record. The parties agreed that they each sought the following relief, as stated by IHCD in its Summary Judgment Reply:

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- (3) Grant the MCD/GSD motion for summary judgment and void the sewer construction permit at issue herein, on the sole ground of noncompliance with 327 IAC 3-6-4 in that neither MCD nor GSD have signed the permit application and neither MCD nor GSD have provided the capacity certifications required by 327 IAC 3-6-4.

Reply, p. 4, 5. Instead of settling the case, the parties disputed whether 327 IAC 3-6-4 required all of the parties to obtain approvals from each other for all future sewer construction projects within their respective areas.

Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the agency actions of the Indiana Department of Environmental Management and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, *et seq.*, and 315 IAC 1, *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. 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). 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). “*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. This was held to be directly applicable to the Office of Environmental Adjudication in *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind.App. 2005). In this case, the ELJ specifically concluded that she must give deference to the agency’s interpretation. The Appellate Court reversed OEA’s decision because the ELJ used the wrong standard of review. The Court stated that the ELJ mistakenly applied the appellate standard of review rather than a *de novo* standard of review at 781. The OEA must apply a *de novo* standard of review when making findings of fact and conclusions of law and may not defer to IDEM’s findings or conclusions.

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5. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* IC§ 4-21.5-3-27(d). OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." IC § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind.Ct.App. 1993). *GasAmerica #47*, 2004 OEA at 129. *See also Blue River Valley*, 2005 OEA at 11, 12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
6. 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." IC 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 Building Commission, 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 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996)."
7. In sum, the issue in controversy in this cause is whether IDEM properly issued the construction permit to IHCD without a capacity certification letter/allocation letter from MCD or GSD.
8. 327 IAC 3-6-1(5) defines a "collection system" as "the composite network of gravity sewers, force mains, lift stations and other accessories used to receive and to transport sewage to a water pollution treatment/control facility."
9. 327 IAC 4-1-2(17) defines "water pollution treatment/control facility" as "any equipment, device, unit, structure, etc., that is used to control, prevent, pretreat, or treat any discharge or threatened discharge of pollutants into any waters of the state of Indiana, including surface and subsurface waters and public or private sewage systems. The term includes, but is not limited to, the following:

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- (A) Treatment facilities.
 - (B) Combined sewers. (not applicable in this cause)
 - (C) Sanitary Sewers.
 - (D) Lift (pumping) stations.
10. The wastewater collected by IHCD under permit 18509 would be discharged into MCD's system, then into GSD's system, then treated by GSD and discharged into Lake Michigan. Therefore, the wastewater collected by IHCD under permit 18509 would be subject to a collection system, as defined in 327 IAC 3-6-1(5). The collection system would involve IHCD, MCD and GSD.
11. 327 IAC 3-6-4 requires capacity certification to be verified by authorized representatives of any town, city, sanitary district, or any entity that has jurisdiction over the proposed collection system. In this case, the collection system proposed in IHCD's application included MCD and GSD. Therefore, IHCD's application required capacity certification/allocation letters from MCD and GSD.
12. The determination of the extent of a collection system depends on the path for wastewater collection and discharge sought in a particular application. The issue in controversy before the Court concerns IHCD's permit 18509. Future collection system configurations are not before the Court, therefore the Court may not issue a ruling applicable to such configurations. As the facts may vary for future applications submitted by an individual party, or more than one of the parties, this Court lacks jurisdiction to determine whether 327 IAC 3-6-4 requires all of the parties to obtain approvals from each other for all future sewer construction projects within their respective areas.¹
13. In construing all facts and inferences in favor of IHCD as the nonmoving party, MCD and GSD are entitled to summary judgment as a matter of law. As conceded by IHCD on and after September 17, 2007, the Court should grant the MCD/GSD motion for summary judgment and void the sewer construction permit at issue herein, on the sole ground of noncompliance with 327 IAC 3-6-4 in that neither MCD nor GSD have signed the permit application and neither MCD nor GSD have provided the capacity certifications required by 327 IAC 3-6-4.
14. Application of 327 IAC 3-6-4 to require all of the parties to obtain approvals from each other for all future sewer construction projects within their respective areas is beyond the case in controversy and the jurisdiction of this Court at this time. IHCD's motion to the contrary, and other pending motions, should be denied.

¹ The Court also declines to rule on counsel competency issues raised by the parties, as beyond the forum's jurisdiction.

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Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner Gary Sanitary District's and Merrillville Conservancy District's Motions for Summary Judgment, and Independence Hill Conservancy District's concession thereto, is **GRANTED**. Independence Hill's remaining Motions, including Motions to Continue, Motions for additional briefing, and Motions to strike exhibits, are **DENIED**.

IT IS FURTHER ORDERED that further proceedings before this Court are hereby **VACATED**.

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 the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This Nonfinal Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5 and 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 1st day of October, 2007 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge