

**Objection to Issuance of Construction Application for Wastewater Collection
Permit Approval No. 19800
Big Monon Bay Wastewater Treatment Plant
Monticello, White County, Indiana
2011 OEA 58, (10-W-J-4438)**

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 58 cite this case as
Twin Lakes Regional Sewer District, 2011 OEA 58.

TOPICS:

wastewater collection system	failure to comply with court orders
upgrade wastewater treatment plant	dismissal
Construction Application	I.C. § 4-21.5-3-1(f)
septic system	I.C. § 4-21.5-3-7(a)
cost	I.C. § 4-21.5-3-23
afforded	I.C. § 4-21.5-3-24
permit approval letter	I.C. § 13-15-6, <i>et seq.</i>
postmark	315 IAC 1-3-2(b)
date	327 IAC 3
Prehearing Conference	Ind. Tr. R. 56
complete copy of agency action	<i>La Oasis</i> , 2009 OEA 1
aggrieved or adversely affected	<i>West Boggs</i> , 2008 OEA 142
copy of petition sent to all parties	<i>Herring</i> , 2008 OEA 7
portions of permit to which objecting	<i>Murphy Oil</i> , 2004 OEA 51
Motion for Summary Judgment	<i>Suverkup</i> , 2004 OEA 48
Motion to Dismiss	<i>Grahn</i> , 2004 OEA 40
untimely filed	<i>Highway 6</i> , 2004 OEA 1
incomplete petition	

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Sierra L. Alberts, Esq.
Petitioners: Woodrow Smith, pro se; (Elson's Land Corp., LLC); Timothy L. Elson &
Nicholas K. Kile, Esq.; Barnes & Thornburg LLP
Permittee: Donald J. Tribbett, Esq.; Tribbett Law Office
L. Dowal Dellinger, Esq.; Dellinger, Dellinger & Smith

ORDER ISSUED:

April 18, 2011

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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3. On December 10, 2010, the Court issued an Order Scheduling Prehearing Conference (for January 3, 2011, 1:00 PM, E.S.T.) and Stay Hearing (January 20, 2011, 9:00 AM, E.S.T.).
4. After issuing the December 10, 2010 Order, the Court received a letter from Woodrow Smith, postmarked and dated December 9, 2010.¹ Woodrow Smith's December 9, 2010 letter stated,

This information I received 12-1-10 means nothing (letter dated 11-10-10). What Twin Lakes Regional Sewer District is trying to do is a bunch of crap. What kind of pay-off is your department receiving from Twin Lakes?

Why is the runoff from the farmers up the Tippecanoe River not being controlled? There has not been one septic system tested. This is a joke and needs to be stopped.

Don't you people realize that we are still in a recession and the cost passed on to the residents is out of line and cannot be afforded by a lot of the residents?

Woodrow Smith's December 9, 2010 letter included a copy of the first page of the seven-page permit approval letter sent from IDEM to the Permittee, which letter references the Permittee's name, address, and the Permit number. Woodrow Smith's December 9, 2010 letter contained no information indicating it was sent to anyone other than the Court.

5. On December 16, 2010, the Court issued a Notice of Incomplete Filing and Order to Supplement Petition ("Order to Supplement"), addressed to all parties and to Woodrow Smith², referencing Woodrow Smith's December 9, 2010 letter. Although the remainder of the December 16, 2010 Order to Supplement erroneously referred to Mr. Wilson, the Order to Supplement advised,

This matter is set for Prehearing Conference on the Petition for Administrative Review filed by Petitioner Elson Land Corp., LLC, to be held on **January 3, 2011, 1:00 PM, EST** at the Office of Environmental Adjudication, 100 North Senate Avenue, Room N501, Indiana Government Center North, Indianapolis, Indiana. Should Petitioner Wilson (sic) desire to participate in the January 3, 2011, 1:00 PM, EST Prehearing Conference, then the below-listed information must be filed by **December 27, 2010**.

Petitioner Wilson (sic) is **ORDERED** to file the following information within thirty (30) days of the date this order was issued.

¹ As will be discussed further, a document filed with OEA is dated as of its postmark date, I.C. § 4-21.5-3-1(f)(2), or if the postmark canNot be read, as of its receipt by OEA. I.C. § 4-21.5-3-1(f)(1).

² Envelopes from Woodrow Smith had a return address in Florida, but he consistently listed an Indiana address. Therefore all Court orders were sent to Woodrow Smith at the Indiana address.

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The Order to Supplement specified the following information to be supplied:

- Petitioner must attach a complete copy of the . . . IDEM action to which the Petitioner objects. Petitioner Wilson (sic) may elect to notify the Court and other parties that he is relying on the copy of the IDEM action filed with Elson Land Corp.'s petition.
- The Petitioner must state how s/he is aggrieved or adversely affected by IDEM's action.
- A copy of the Petition must be sent to all parties, including the IDEM and the Permittee.
- The Petitioner must provide his/her complete address and telephone number.
- The Petitioner must identify which portions of the permit to which s/he is objecting.

The Order to Supplement further provided,

If the Petitioner fails to provide the requested information, his Petition will be dismissed and closed. A party must file all documents and pleadings with this office and all parties identified on the distribution list. Failure to do so may result in the judge not considering your document or pleading.

6. On December 27, 2010, the Court received a letter from Woodrow Smith, with an illegible envelope postmark date, but with a letter date of December 21, 2010. The letter stated, "How is Mr. Wilson?????" Woodrow Smith's December 27, 2010 letter contained no information indicating that it was sent to anyone other than the Court.
7. On December 27, 2010, the Court issued a Corrected Notice of Incomplete Filing and Order to Supplement Petition, noting that the Court inferred that Mr. Smith's December 27, 2010 letter was meant to point out that the Court had erred in referring to Mr. Smith as Wilson. The Court ordered that references to Wilson were in error and should refer to Woodrow Smith. The Court further provided that it had misunderstood the meaning of Woodrow Smith's December 27, 2010 letter, the Court had no information as to "how" Mr. Wilson was. The Court repeated the terms of the December 16 Order to Supplement in its December 27 Corrected Notice of Incomplete Filing and Order to Supplement Petition.
8. On December 28, 2010, Permittee, by legal counsel, filed a Motion for Summary Judgment challenging Petitioner Elson's Petition for Administrative Review. The Motion for Summary Judgment was served on all parties and on Woodrow Smith.

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9. On January 3, 2011, 1:00 PM, EST, a Prehearing Conference was held, and attended by legal counsel Nicholas K. Kile, Esq. for Petitioner Elson, by legal counsel Donald J. Tribbett, Esq. for Permittee Twin Lakes, and by legal counsel Sierra L. Alberts, Esq. for IDEM. As noted in the Court's January 4, 2011 Report of Prehearing Conference, Order Continuing Stay Hearing, and Case Management Order, "Mr. Smith did not attend nor did he contact the Court seeking leave from attending."
10. At the Prehearing Conference, the attending parties had an opportunity to inspect Woodrow Smith's December 9, 2010 letter. IDEM's counsel orally moved to dismiss Woodrow Smith's correspondence as an untimely petition. The Court's January 4, 2011 Order set a schedule for response to the Permittee's Motion for Summary Judgment.
11. The Court received a letter from Woodrow Smith, postmarked and dated January 4, 2011. Woodrow Smith's January 4, 2011 letter stated,

Page 7 of Permit Approval 19800

1. (Woodrow Smith's Monticello, IN address, phone number and email address)
2. Homeowner
3. Woodrow E. Smith
4. These homes have poorly functioning septic systems. Not one of these systems has been tested per the White County Health Department. If they have on one seems to have any records.
5. These hearings need to be in the when residents can attend.
6. Read #4.
7. Letter Dated 12-27-2010.

As Woodrow Smith's January 4, 2011 letter listed, attached to the letter was a copy of page 7 of 7 of Permit Approval. Page 7 stated Appeals Procedures for filing with the OEA. Woodrow Smith's January 4, 2011 letter contained no information indicating that it was sent to anyone other than the Court.

12. The Court received a letter from Woodrow Smith, postmarked January 4, 2011, letter dated January 3, 2011. Attached to Woodrow Smith's January 4, 2011 letter was a copy of the Court's corrected Order to Supplement, with the second page containing handwritten circled numbers, corresponding to the numbers on the items stated in Woodrow Smith's letter. Woodrow Smith's January 4, 2011 letter stated,

Here is a copy of the letter dated December 27, 2010, that I received January 3, 2011. And the answers to your letter.

1. Page 2-top of page-poorly functioning septic systems (Permit # 19800). The septic systems have not been tested. If they have no one can find the records. (a handwritten number 1 was written on a copy of the Court's corrected Order to Supplement, which stated "Petitioner must attach a complete copy of the . . . IDEM action to which the Petitioner objects. Petitioner Woodrow Smith may

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elect to notify the Court and other parties that he is relying on the copy of the IDEM action filed with Elson Land Corp.'s petition.”)

2. Don't have the income to justify cost of something that is not needed or proven that it is needed.
(a handwritten number 2 was written on a copy of the Court's corrected Order to Supplement, which stated, "The Petitioner must state how s/he is aggrieved or adversely affected by IDEM's action.")
3. You send the copies. Why should I pay?
(a handwritten number 3 was written on a copy of the Court's corrected Order to Supplement, which stated, "A copy of the Petition must be sent to all parties, including the IDEM and the permittee.")
4. (Mr. Smith's Monticello, IN address, phone number and email address)
(a handwritten number 4 was written on a copy of the Court's corrected Order to Supplement, which stated, "The Petitioner must provide his/her complete address and telephone number.")
5. See top of page 2, poorly functioning septic systems. Not proven. Permit Approval #: 19800.
(a handwritten number 5 was written on a copy of the Court's corrected Order to Supplement, which stated, "The Petitioner must identify which portions of the permit to which s/he is objecting.")

Page 2 of 7 of the Permit, "Water Pollution Treatment/Control Facility Description" was also included. Mr. Smith's January 4, 2011 letter contained no information indicating that it was sent to anyone other than the Court.

13. On January 13, 2011, the Court issued an Order Placing Woodrow E. Smith's January 4, 2011 Letters on Record and Order to Parties to Serve Documents Submitted to the Court to all Parties, per I.C. § 4-21.5-3-11(e) and 315 IAC 1-3-3(b)(4) (both quoted in the Order). In a footnote to the fact that Woodrow Smith was not represented by legal counsel, the Order provided, "While a party may decide to proceed without legal representation, "[i]t is well established that pro se litigants are held to the same standard as are licensed lawyers. *Goosens v. Goosens*, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005).
14. On January 18, 2011, Permittee filed a Motion to Dismiss Woodrow Smith's Petition for Administrative Review. The Motion to Dismiss contended that Woodrow Smith's petition for review was subject to dismissal as untimely filed, and as insufficient. In its Motion to Dismiss, Permittee's counsel avers that IDEM served the permit on Woodrow Smith. A copy of the Permit in the Court's record attached to Elson's Petition for Administrative Review lists some of those to whom the Permit was sent, and further provides that "Approximately 888 carbon copies of this letter were sent to residents and businesses in the project area. A complete list of cc: recipients are available at (a mailing address for IDEM)."

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Woodrow Smith was not listed on the documents presented to the Court.

15. The Court's January 20, 2011 Case Management Order Concerning Permittee/Respondent's Motion to Dismiss Woodrow Smith's Petition for Administrative Review scheduled due dates of February 18, 2011 for Responses, March 4, 2011 for Replies. The Order provided until March 11, 2011, if parties elected to file proposed findings of fact, conclusions of law and orders. The January 20, 2011 Order further provided,

A party who fails to comply with this Court's orders or who fails to participate in any stage of this proceeding may be held in default or may have the proceedings dismissed.

16. The Court received a letter from Woodrow Smith, postmarked and dated January 21, 2011. Mr. Smith's January 21, 2011 letter stated,

Copies of been sent to everyone on this sheet. Wish my postage was only 35.7 cents per letter. I like the way your office puts codes in the letters, which only a lawyer would understand. I guess you're not in your position to service the people, just big business.

Attached to Woodrow Smith's January 21, 2011 letter was a copy of Page 2 of 7 of the Permit, "Water Pollution Treatment/Control Facility Description". Woodrow Smith also included the Court's corrected Order to Supplement, with the second page containing handwritten circled numbers, corresponding to the numbers on the items stated in Woodrow Smith's January 4, 2011 letter. A copy of Woodrow Smith's January 4, 2011 letter was included, with a handwritten circle around "3. You send the copies. Why should I pay?" Woodrow Smith's January 21, 2011 letter contained no information "on this sheet" or elsewhere indicating that it was sent to anyone other than the Court.

17. Court Legal Assistant India Davidson contacted all the parties by email, seeking confirmation as to whether they received Woodrow Smith's January 21, 2011 correspondence. Responses from the other parties confirmed that they had received Woodrow Smith's January 21, 2011 correspondence.
18. On February 10, 2011, Elson's Land Corp, LLC, by Manager Timothy L. Elson, filed a Motion to Withdraw Petition for Administrative Review, granted in the Court's February 18, 2011 Final Order Granting Dismissal of Elson's Land Corp., LLC's Petition for Review.
19. On March 2, 2011, Permittee timely filed its Reply to Woodrow Smith's "Response" to Motion to Dismiss, and its Proposed Findings of Fact, Conclusions of Law, and Order.
20. No further contact was received from Woodrow Smith, nor did he seek leave from complying with deadlines set by the Court.

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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” or “Court”) 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. § 4-21.4-3-27. 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. Both Respondent IDEM and Permittee Twin Lakes dispute whether Woodrow Smith’s documents were timely filed in this forum. Permittee further challenges whether Woodrow Smith’s filed documents meet the requirements to be regarded as a Petition for Administrative Review. A person who is “aggrieved or adversely affected” by, and wants to challenge, an agency action or order, seeks administrative review by filing a written petition for administrative review in compliance with I.C. § 4-21.5-3-7(a). Petitions for review of IDEM agency actions are filed with OEA, I.C. § 4-21.5-7, *et seq.*
4. In this case, IDEM and Permittee Twin Lakes seek dismissal, asserting that OEA lacks subject matter jurisdiction over Woodrow Smith’s December 9, 2010 letter, arguing that the letter is untimely-filed, if otherwise deemed a petition for administrative review. Motions to dismiss generally test 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). When ruling on 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.” *Huffman v. Office of Env’tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). Determinations considering facts beyond the complaint are treated by the court as a motion for summary judgment. *Id.* Whether on a motion to dismiss or on summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007).
5. 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 ELJ. I.C. § 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.* “*De novo* review” means that “all issues 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, 253 (Ind. Ct. App. 1981).

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6. 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. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). "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 123, 129. *See also Blue River Valley*, 2005 OEA 1, 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.
7. Concerning administrative agencies such as OEA, I.C. § 4-21.5-3-7(a)(3) requires that a petition for administrative review must be filed within fifteen (15) days after the person is given notice of the order or any longer period set by statute. Concerning OEA's review of IDEM decisions, I.C. § 13-15-6-1(a) requires that a petition for administrative review must be filed by a person aggrieved by the IDEM commissioner's action no later than fifteen (15) days after being served the Notice provided by IDEM. OEA does not have, and has no discretion to acquire, subject matter jurisdiction of a petition for administrative review filed after the deadlines mandated by statute. *Chas. A. Beard Class Room Teacher's Assn. V. Bd. Of Trustees of Chas. A. Beard Memorial School Corp.*, 668 N.E.2d 1222, 1224 (Ind. 1996); *Walker Mfg. Co v. Dep't of Local Gov't Finance*, 772 N.E.2d 1, 4-6 (Ind. Tax 2002); *In re: Objection to the Issuance of Notice of Decision, Murphy Oil USA, Inc., Seymour, Jackson County, Indiana*, 2004 OEA 51, 55; *Variance for Open Burning, Herring*, 2008 OEA 7; *In re: Objection to Denial of Excess Liability Trust Fund Claim, Frank Suverkup, Benzol Cleaning Co., Inc.*, 2004 OEA 48; *Comm'r, Indiana Dep't of Environmental Management v. Harry Randhawa, La Oasis, Inc*, 2009 OEA 1. For OEA to have jurisdiction over Woodrow Smith's petition for administrative review, it had to be filed within fifteen days after he received notice of the Permit.
8. I.C. § 4-21.5-3-1 and -2 direct how to determine when a document is filed. A document sent in a postmarked envelope is considered served and filed on its postmark date. I.C. § 4-21.5-3-1(f)(2). If the postmark is illegible or otherwise not present, OEA applies the service and filing date for when the document is received by OEA. I.C. § 4-21.5-3-1(f)(1). OEA has applied these statutory requirements to the filing dates applied to the parties' filings in this cause.
9. Woodrow Smith's first filing with the Court on December 9, 2010 states "This information I received 12-1-10 means nothing (letter dated 11-10-10)." IDEM issued the Permit on November 10, 2010. Permittee's legal counsel states as argument in its January 18, 2011

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Motion to Dismiss Petition for Review, that IDEM served the permit on Woodrow Smith on November 10, 2010. A review beyond the Woodrow Smith's written filings and in to the Permit in the Court's record (attached to Elson's Petition for Administrative Review) shows that the document has a partial list of some of those to whom the Permit was sent, but the partial list does not include Woodrow Smith. While the Court does not doubt that Permittee's counsel argues in good faith that a copy of the Permit was sent to Woodrow Smith on November 10, 2010, counsel's argument cannot be relied upon by the Court as substantial evidence. And, the Court's role as fact-finder excludes its ability to serve as investigator to determine when the Permit was sent to Woodrow Smith. The Court was presented with no further evidence as to the date when Woodrow Smith received notice of the IDEM action he challenged. This Court is required to take as true all allegations on the face of the complaint, and draw all reasonable inferences in favor of the non-moving party, Woodrow Smith. Thus, Woodrow Smith's December 9, 2010 letter provides substantial evidence that he received notice of the IDEM action, the Permit, on December 1, 2010. Woodrow Smith first filed a letter protesting IDEM's issuance of the Permit on December 9, 2010, less than 15 days after receiving notice. Woodrow Smith's December 9, 2010 letter was timely filed.

10. Permittee Twin Lakes seeks dismissal of this cause on the basis that Woodrow Smith did not file a sufficient petition for administrative review. In its Motion to Dismiss, Permittee Twin Lakes seeks summary judgment against Woodrow Smith if the Court did not grant dismissal. 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; *See also* Ind. Tr. R. 56.
11. The moving party bears the burden of establishing that summary judgment is appropriate. When the moving party (here, Permittee Twin Lakes) sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant (here, Woodrow Smith) to establish a factual issue. "A factual issue is said to be 'genuine' if a trier of fact is required to resolve the opposing parties differing versions of the underlying facts." *York v. Union Carbide Corp.*, 586 N.E.2d 861, 864 (Ind. Ct. App. 1992). "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). 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). *See In Re: Objection to Construction Permit Application, Plans and Specifications for Thompson/Emerson Barrett Law Sewer, Petitioner Raymond Grahn*, 2004 OEA 40 (03-W-J-3225); *See In Re: Objection to Issuance of Sanitary Sewer Construction Permit Approval No. 17305R, West Boggs Sewer District, Inc., Loogootee, Martin and Daviess Counties, Indiana*, 2008 OEA 142 (07-W-J-3898).

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12. In responding to a motion for summary judgment, mere assertions, opinions, or conclusions of law asserted by the non-movant 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). *See also West Boggs, Id.* “Summary judgment may not be granted as a matter of course because the opposing party fails to offer opposing affidavits or evidence, but the administrative law judge shall make a determination from the affidavits and testimony offered upon the matters placed in issue by the pleadings or the evidence.” I.C. § 4-21.5-2-23(b). Woodrow Smith’s lack of response to Permittee’s dismissal motion does not result in a grant of Permittee’s dispositive motion as a matter of course, but does place in issue facts to be gleaned from the pleadings or evidence.
13. I.C. § 4-21.5-3-7(1) mandates that “[t]o qualify for review of [an agency order], a person must petition for review in a writing that . . . states facts demonstrating that:
 - (A) the petitioner is a person to whom the order is specifically directed;
 - (B) the petitioner is aggrieved or adversely affected by the order; or
 - (C) the petitioner is entitled to review under any law.
14. Woodrow Smith’s written filings do not qualify as a petition for review of the Permit under I.C. § 4-21.5-3-7(1)(A), as the Permit was specifically directed to Twin Lakes, not Woodrow Smith. Woodrow Smith’s written filings do not qualify as a petition for review of the Permit under I.C. § 4-21.5-3-7(1)(C), as Woodrow Smith has not provided legal authority establishing that he is entitled to review under any law. Therefore, Woodrow Smith’s written filings must qualify as a petition for review under I.C. § 4-21.5-3-7(1)(B). Woodrow Smith must establish that he is aggrieved or adversely affected by the Permit for his written filings to qualify as a petition for review.
15. “[W]hether a person is entitled to seek administrative review depends upon whether the person is “aggrieved or adversely affected”. *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806, 807 (Ind. 2004). Per *Huffman*, in order for a person to be “aggrieved or adversely affected”, they “must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it pecuniary, property or personal interest.” *Id* at 810. *Huffman* interpreted the language of I.C. § 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public. *Id.* *Huffman* had challenged the issuance of a permit to Eli Lilly and Company to discharge pollutants into Indiana's waters. *Huffman* owns the corporation that had one unit of and was the managing member of the corporation that owned a property adjacent to the property from which the discharge would occur. The lower courts dismissed *Huffman's* objection to the issuance of the permit because of a lack of factual support for the allegations that *Huffman* or the property might be harmed. *Huffman* had alleged that her management duties of the neighboring property required her to be present on the property with frequency, and thus she might be exposed to health risks not addressed by the permit issued by IDEM. In response, the permittee alleged that due to the downstream location of the discharge point, no impact to

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Huffman was possible. Huffman's petition was challenged by a motion to dismiss supported by facts outside Huffman's pleadings, and thus was required to be treated by the Court as a Motion for Summary Judgment. The Indiana Supreme Court ruled that Huffman's dismissal by the lower courts was not supported by substantial evidence. The Court remanded Huffman's case back to OEA to provide Huffman with an opportunity to present additional evidence of her health concerns (settled prior to OEA decision on remand). "Particularly because the OEA never gave Huffman an opportunity to provide additional evidence or to develop the argument more fully, it was impossible for the OEA to tell what Huffman's personal health claim was and whether it had any merit. Dismissing the claim was therefore premature." *Id* at 815.

16. Whether Woodrow Smith is aggrieved or adversely affected by the Permit is a factual issue dispositive of this litigation. Woodrow Smith had three opportunities to meet the statutory requirement to prove that he was aggrieved or adversely affected: one, his petition for review; two, by responding to the Order to Supplement; three, by responding to Permittee's Motion to Dismiss. Woodrow Smith's responses in two December 4, 2010 letters were "Homeowner" and "Don't have the income to justify cost of something that is not needed or proven that it is needed." This statement constitutes an assertion that Woodrow Smith is likely to suffer immediate future harm to a pecuniary legal interest.
17. The Court must next determine whether Woodrow Smith's assertion provides substantial evidence as to whether he is aggrieved or adversely affected. On a summary judgment challenge, a conflicting inference of fact is to be construed in favor of non-movant Woodrow Smith. Woodrow Smith did not respond to Permittee's dispositive motion. The Court's Order to Supplement specifically ordered that Woodrow Smith must state how s/he is aggrieved or adversely affected by IDEM's action. Woodrow Smith's responses in two December 4, 2010 letters were "Homeowner" and "Don't have the income to justify cost of something that is not needed or proven that it is needed." This assertion demonstrates that Woodrow Smith is likely to suffer harm to a pecuniary legal interest in the immediate future. The inference that Woodrow Smith is aggrieved or adversely affected is drawn from his assertion that he is "Homeowner". Woodrow Smith's assertion that he is "Homeowner" gives rise to a reasonable inference that the Permit directly affects Woodrow Smith. Woodrow Smith may be required to pay rates for the permitted project and thus suffer harm to a pecuniary legal interest in the immediate future.
18. Woodrow Smith's written statements, and the inferences to be drawn from them, provide a sufficient factual basis for Woodrow Smith to provide substantial evidence that Woodrow Smith was aggrieved or adversely affected by the Permit under I.C. § 4-21.5-3-7(1).

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19. Woodrow Smith also has the burden of proving that his written statements must meet other statutory requirements in order to qualify as a petition for review. I.C. § 13-15-6-2 sets out the requirements for appealing a permit issued by IDEM as follows:

A written request for an adjudicatory hearing under section 1 of this chapter must do the following:

- (1) State the name and address of the person making the request.
- (2) Identify the interest of the person making the request.
- (3) Identify any persons represented by the person making the request.
- (4) State with particularity the reasons for the request.
- (5) State with particularity the issues proposed for consideration at the hearing.
- (6) Identify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

20. Additionally, the Indiana Administrative Code contains the following requirements related to the initiation of a proceeding for administrative review with the Office of Environmental Adjudication:

(b) The petition for administrative review shall contain the following information:

...

(4) State with particularity the legal issues proposed for consideration in the proceedings as follows:

(A) In a case involving an appeal of a permit, identify the following:

- (i) *Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.*
- (ii) 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) (emphasis added).

21. The Order to Supplement gave Woodrow Smith notice as to how his written filings did not comply with the minimum legal requirements stated in I.C. § 13-15-5-2 and 315 IAC 1-3-2(b). The Order to Supplement gave Woodrow Smith at least 30 days to cure the deficiencies in his petition for review. The Order to Supplement also gave Woodrow Smith notice that the consequence for not complying with the Order to Supplement was dismissal, per I.C. § 4-21.5-3-24; 315 IAC 1-3-7.

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22. By providing information about his identify and address, by noting that he is “Homeowner”, and enclosing incomplete portions of the Permit which identified the permitted project³, Woodrow Smith’s written filings provide substantial evidence of compliance with subparts (1), (2) and (3) of I.C. § 13-15-6-2 . Woodrow Smith’s contentions that the permitted facilities are not needed and will be too costly for the residents provides substantial evidence of the basis for requesting review, but does not provide the particularity required by subpart (4). By substantial evidence, as a matter of law, Woodrow Smith’s written filings did not comply with I.C. § 13-15-6-2, subpart (4). Woodrow Smith’s written filings did not comply with the Order to Supplement’s requirement that “the Petitioner must identify which portions of the permit to which s/he is objecting.” The content of Woodrow Smith’s written filings is insufficient as a petition for administrative review of the Permit and should be dismissed.
23. Although not cited by Woodrow Smith, the majority of technical environmental requirements relevant to the Permit are stated in 327 IAC 3, *et seq.* A review of 327 IAC 3, *et seq.*, shows that the Permit, as issued, complies with applicable regulations. No regulations relevant to IDEM’s jurisdiction require either an applicant or IDEM to consider the concerns stated by Woodrow Smith. Woodrow Smith’s factually-unsupported assertions that the facilities are not needed, or that septic tanks may not have been tested, do not provide sufficient evidence that his petition complied with requirements stated in I.C. § 13-15-6-2 subpart (5), (6) and 315 IAC 1-3-2(b)(4), or the Order to Supplement. As for the burden of resulting costs, OEA is not authorized to address cost in determining the Permit’s validity. *See In re: Objection to the Issuance of 327 Article 3 Construction Permit Application Plans and Specifications for U.S. Highway 6 Sanitary Sewer Relocation Permit Approval No. 16219 Portage, Porter County, Indiana*; 2004 OEA 1 (03-W-J-3235); *See also Raymond Grahn, Id., West Boggs, Id.* By failing to provide sufficient information about the legal basis for his petition, or corrective provisions for the permit as terms which would , Woodrow Smith did not comply with I.C. § 13-15-6-2 subpart (5), (6) and 315 IAC 1-3-2(b)(4), or the Order to Supplement and is subject to dismissal per I.C. § 4-21.5-3-23 and -24.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Permittee/Respondent Twin Lakes Regional Sewer District’s and Indiana Department of Environmental Management’s Motion to Dismiss Woodrow Smith’s Petition for Administrative Review for timely filing is **DENIED**, and Permittee/Respondent Twin Lakes Regional Sewer District’s Motion to Dismiss, treated in part as a Motion for Summary Judgment is **GRANTED** in part such that Woodrow Smith’s Petition for Administrative Review is **DISMISSED** with prejudice. Permit 19800 issued to Twin Lakes Regional Sewer District by the Indiana Department of Environmental Management is **AFFIRMED**. All further proceedings are **VACATED**.

³ Contrary to Permittee’s argument, Woodrow Smith did identify the project with particularity; the information was stated on the first page of the Permit attached as a copy to Woodrow Smith’s December 9, 2010 letter.

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You are hereby 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 the 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 I.C. § 4-21.5. Pursuant to I.C. § 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 15th day of April, 2011 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge