

**Objection to Denial of Sewer Modification Construction Permit to  
City of Gary  
Gary, Lake County, Indiana  
2010 OEA 69, (06-W-J-3706)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2010 OEA 69, cite this case as  
*City of Gary, 2010 OEA 69.*

**TOPICS:**

sewer modification  
construction permit  
denial  
incomplete application  
pipe  
Motion to Dismiss  
moot  
supersede  
stipulate  
*Adapto*  
statement  
conduct

**PRESIDING JUDGE:**

Mary L. Davidsen

**PARTY REPRESENTATIVES:**

IDEM: Sierra Alberts, Esq.  
Petitioners: Susan M. Severtson, Esq.

**ORDER ISSUED:**

May 14, 2010

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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STATE OF INDIANA )  
 )  
COUNTY OF MARION )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
OBJECTION TO THE DENIAL OF )  
SEWER MODIFICATION CONSTRUCTION PERMIT )  
TO CITY OF GARY )  
GARY, LAKE COUNTY, INDIANA )  
 )  
 ) CAUSE NO. 06-W-J-3706  
 )  
\_\_\_\_\_  
City of Gary, )  
Applicant/Petitioner, )  
Gary Sanitary District, )  
Owner/Petitioner, )  
Indiana Department of Environmental Management, )  
Respondent )

**FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER GRANTING  
IDEM'S SECOND MOTION TO DISMISS**

This matter came before the Court on Respondent, IDEM's, September 21, 2009 Second Motion to Dismiss as Moot, Petitioners' October 2, 2009 Response, and Respondent, IDEM's, October 7, 2009 Reply, which documents are a part of the Court record. Respondent, IDEM's Motion to Dismiss as Moot was based upon its issuance of Construction Permit Approval No. 19115, the previous denial of which had been the issue under review in this cause. The Court's June 19, 2009 Order Denying Motion to Dismiss as Moot is a part of the Court's record, and is incorporated herein by reference. The Chief Environmental Law Judge ("ELJ"), being duly advised and having read and considered the petitions, motions, evidence, and briefs, responses and replies of the parties, finds that judgment may be made on the record and makes the following Finding of Facts, Conclusions of Law, and Final Order:

**FINDINGS OF FACT**

1. On April 4, 2006, Petitioners, Applicant City of Gary ("Gary") and Owner Gary Sanitary District ("GSD") (collectively, "Petitioners"), appealed the Indiana Department of Environmental Management's ("IDEM") March 14, 2006 determination to deny Petitioners' application for a construction permit for sewer modification at 53<sup>rd</sup> Avenue and Adams Street, Gary, Lake County, Indiana. ("2006 application"). IDEM's denial was based upon its determination that Petitioners' 2006 application was incomplete, despite requests to provide specified information.
2. Petitioners' Petition for Administrative Review ("Petition") stated six enumerated "issues", and sought approval of the 2006 application per the submitted designs.

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3. As this cause proceeded through litigation, Petitioners requested additional time to attempt resolution in order to address project developments, such as negotiations among the parties, and terms of an Agreed Order which addressed possible service needs as noted in IDEM's violations 2005-15434-W and 2005-15462-W. *Petitioners' Verified Motion to Continue Hearing Date, May 14, 2007*. Subsequent status reports noted a dispute among the parties as to whether the line should be replaced with eight-inch pipe or twelve-inch pipe. *Status Report of the Parties, August 21, 2007, November 28, 2007*.
4. Petitioners submitted a subsequent May 22, 2008 application for permit 19115 for the Project appealed in this case. Petitioners did not appeal that permit issued by IDEM's determination. The parties, in IDEM's January 13, 2009 Motion to Dismiss as Moot, and in subsequent filings, referenced IDEM's May 22, 2008 issuance of 327 IAC 3 Construction Permit Approval #19115 ("2008 permit"), to the same parties, for the same project location, with a modified project design. A citizen, Eli Gusan, appealed the 2008 permit, which matter remained pending under OEA Cause 08-W-J-4125, at the time the Court issued its June 19, 2009 Order Denying Motion to Dismiss as Moot.
5. In their January 13, 2009 Response to IDEM's (First) Motion to Dismiss, Petitioners stated that this cause would be resolved once OEA Cause 08-W-J-4125 was resolved. Specifically, Petitioners stated:
  - a. "PETITIONERS requested, and relied on a consensus that IDEM did not object to this matter [06-W-J-3706] continuing subject to the resolution and implementation of Construction Permit No. [1]9115." *Petitioners' Response, p. 2, para. 2*.
  - b. "PETITIONERS request herein for a hearing, or in alternatively that this matter continue subject to the resolution and implementation of Construction Permit No., [1]9115, is not moot as argued by IDEM. The controversy at issue in this cause has not been settled or resolved and cannot be until such time as the objection in 08-W-J-4125 is finally determined." *Petitioners' Response, p. 2, para. 5*.
  - c. "WHEREFORE, CITY OF GARY and GARY SANITARY DISTRICT, request that this matter continue until 08-W-J-4125 is resolved or in the alternative that this matter be scheduled for a hearing in accordance with the Court's schedule." *Petitioners' Response, p. 2*.
6. In denying IDEM's Motion to Dismiss as Moot, the Court's June 19, 2009 Order stated that this cause was not moot so long as the 2008 permit was subject to administrative review, but that a decision sustaining the 2008 permit would supercede the 2006 permit application.
7. A review of the record in OEA Cause 08-W-J-4125, and the allegations of the parties in this cause, shows that the Petitioners to this cause did not oppose the 2008 permit. Mr. Gusan's Petition for Administrative Review was dismissed in the Court's July 27, 2009 order granting IDEM's Motion for Summary Judgment. *See* 2009 OEA 90. The Court's July 27, 2009 Final Order was not appealed.

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8. In sum, in its Second Motion to Dismiss as Moot, IDEM argues that this cause, Petitioners sought issuance of a construction permit, Petitioners' relief has been granted by issuance of the 2008 permit, such that no effective relief remains to be issued by this Court to Petitioners. In sum, Petitioners oppose dismissal because the 2006 "application of Petitioners to reconstruct the sewer line is legally sufficient, reasonable and less costly than those mandated by [the 2008] permit [19115]." *Petitioners' October 2, 2009 Response, p. 2, para. 5.*

**CONCLUSIONS OF LAW**

1. The Indiana Department of Environmental Management ("IDEM") is charged with implementation and enforcement of Indiana's environmental laws and rules. I.C. § 13-14-1-1, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction for administrative review of 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. 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"), 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).
4. 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). While the parties disputed whether IDEM's issuance of the City of Hobart NPDES Permit was proper, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 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 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial*

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*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., 2005 OEA 26, 41.*

5. Petitioners' timely filed their Petitions for Review objecting to the April 4, 2006 Construction Permit Denial. Petitioners' Petitions demonstrate that they are "aggrieved or adversely affected" by IDEM's determination, per I.C. § 4-21.5-3-7, and qualify to seek administrative review before the OEA.
6. In their January 13, 2009 Response, Petitioners stated the fact that this cause would be concluded once 2008 Permit 19115 was determined in OEA Cause 08-W-J-4125. These statements were supported by Petitioners' conduct in applying for the 2008 Permit, and in not appealing that permit.

“[A] stipulation is a confessory pleading negating the need to offer evidence to prove the fact, and the party is not permitted to later attempt to disprove the fact. *B-Dry Owners Ass'n v. B-Dry System, Inc.*, 636 N.E.2d 161, 165 (Ind. Ct. App. 1994), *trans. den.* A stipulation of fact is an express waiver by a party or his counsel of the intended issues. *Id.* Additionally, stipulations should receive a fair and liberal construction. *Marshall County Redi-Mix, Inc. v. Matthew*, 458 N.E.2d 219, 222 (Ind. 1984). Where the parties to a stipulation have given practical construction to it by their acts and conduct, such construction is entitled to great, if not controlling, weight in determining its proper meaning. *Id.*”

*IDEM v. Adapto*, 717 N.E.2d 646, 649-50 (Ind. Ct. App. 1999). In *Adapto*, in a joint status report filed with the Court, IDEM stated that the “parties have reached an agreement on all issues except with respect to the definition of ‘substantial compliance’ under 328 IAC 1-1-9 and its application in this matter.” *Id.* at 650. The Court of Appeals upheld the trial court’s ruling that IDEM was bound by that statement, and rejected IDEM’s argument that it did not waive its claim to other issues. *Id.* As IDEM was bound by stipulations in *Adapto*, Petitioners are bound by their statements in their Response to IDEM’s Motion to Dismiss as Moot. These statements were given practical construction by Petitioners’ acts and conduct. Petitioners applied for Permit 19115, a modification of their application in this cause. Petitioners participated in the litigation of Permit 19115 in Cause 08-W-J-4125, but did not appeal the permit.

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7. Petitioners' challenge IDEM's second dismissal for mootness of Petitioners' appeal of denial of the 2006 permit application as "legally sufficient, reasonable and less costly than those mandated by" 2008 Permit 19115. These factors were known to Petitioners, if not in their control, when they elected to apply for 2008 permit 19115, and when they elected not to appeal its issuance, and when they elected not to seek its appeal in its then-pending litigation after the Court ruled in this cause that the 2006 application would be superseded by issuance of the 2008 permit.
  
8. A case is deemed moot when no effective relief can be rendered to the parties by the Court. *See Matter of Lawrence*, 579 N.E.2d 32, 27 (Ind. 1991); *A.D. v. State*, 736 N.E.2d 1274, 1276 (Ind. Ct. App. 2000), *cited in Petition for Review of NPDES Permit No. IN0025607, City of Terre Haute, Wastewater Treatment Plant, Vigo County, Indiana*, 2007 OEA 1, 5. In this case, Petitioners requested relief in the form of an order for project approval. Petitioners have been issued a construction permit for the project previously denied. The pending litigation in OEA Cause 08-W-J-4125 regarding that issuance has been dismissed. Prior to dismissal of that litigation, Petitioners and this Court in this Cause stated that the 2006 denial would be superseded by the 2008 permit issuance. The sole issue on review in this cause is now moot. By substantial evidence, IDEM is entitled to its second motion to dismiss as moot.

**FINAL ORDER**

**AND THE COURT**, being duly advised, **GRANTS** the Respondent, Indiana Department of Environmental Management's Second Motion to Dismiss as Moot. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that this matter is **DISMISSED**.

You are hereby further notified that, pursuant to the provisions of I.C. § 4-21.5-7, *et seq.*, 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 the applicable provisions of I.C. § 4-21.5, *et seq.* 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 14th day of May, 2010 in Indianapolis, IN.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge