

**Objection to the Denial of Permit Approval Sunman Waterworks
1999 OEA 45 (98-W-J-2177)**

OFFICIAL SHORT CITATION NAME: When referring to 1999 OEA 45, cite this case as
Sunman Waterworks, 1999 OEA 45.

TOPICS:

water main exemptions
repeal by implication
permit by rule
summary judgment

PRESIDING JUDGES:

Penrod, Lasley

PARTY REPRESENTATIVES:

Petitioner: John L. Kellerman, Esq.: Greenman, Kellerman & Koepcke
IDEM: Janice Lengel, Esq.

ORDER ISSUED:

September 28, 1999

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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5. In addition, repeal by implication is not favored in the law. Osborne v. State, 439, N.E.2d 677, 682 (Ind.Ct.App. 1982), citing Mims v. Commercial Credit Corporation, 307 N.E.2d 867, 868 (Ind. 1974). This is especially true when the statute and the rule can be read in harmony so as to give effect to each. Thus, the AU correctly concluded that the Indiana Legislature is presumed to have knowledge of the laws in effect when it passes or amends a statute. If the legislature meant to repeal the exemptions in the rule, it could have easily and explicitly done so.
6. Furthermore, the instant case appears to be an isolated one. Now that IDEM has promulgated its permit-by-rule, there is little reason to believe the flood gates would be opened and copious numbers of water main extensions would go unregulated.

The Chief Administrative Law Judge finds that the Recommended Order should be and hereby is **AFFIRMED** and is incorporated herein by reference.

You are 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 28th day of September 1999.

Wayne E. Penrod,
Chief Administrative Law Judge

**Objection to the Denial of Permit Approval Sunman Waterworks
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**RECOMMENDED ORDER GRANTING PETITIONER'S MOTION
FOR SUMMARY JUDGMENT**

I. Statement of the Case

On December 22, 1998, Petitioner, the Town of Sunman, filed a Petition for Administrative Review of the Indiana Department of Environmental Management's (IDEM) denial of a water main extension permit. On April 9, 1999 a pre-hearing conference was held wherein the parties were ordered to file dispositive motions. On May 26, 1999, IDEM filed a dispositive motion and on May 28, 1999 Petitioner filed a dispositive motion. IDEM filed a Response on June 25, 1999 and Petitioner filed a Reply on July 12, 1999. On July 23, 1999, IDEM filed a Motion for Default alleging, among other things, that Petitioner failed to abide by the April 9, 1999 Order Regarding Scheduling. On July 29, 1999, IDEM filed a Motion to Strike Petitioner's Reply because it was, in effect, a Response to IDEM's Motion for Summary Judgment, and on July 30, 1999, IDEM filed a Motion for Leave to File Reply to Town of Sunman's Reply to IDEM's Motion for Summary Judgment.

II. Issue

The issue in this case is whether the Town of Sunman was required to obtain a construction permit for its water main extension.

III. Undisputed Facts

The Administrative Law Judge finds that the parties have stipulated there are no genuine issues of material fact in dispute.

IV. Discussion

The Town of Sunman (the Town) contends that it does not have to obtain a construction permit for its water main extension. The Town asserts that its water main extension was less than 2,500 feet and resulted in less than a 5% increase in users, and, therefore, qualified for an exemption under 327 IAC 8-3-2. Furthermore, nothing in the statute requires the Town to obtain a permit before construction was completed.

IDEM argues, on the other hand, that when the statute was recodified and amended, the Indiana legislature intended that the exemptions would no longer apply. Thus, the Town was under a duty to receive a permit before beginning construction. In addition, when a rule conflicts with a statute, then the statutory provision must prevail and the rule is, in effect, repealed.

For the following reasons, the Town's Motion for Summary Judgment must be granted because the statute specifically did not repeal the exemptions pertaining to water main extensions and, thus, it remained in effect until IDEM promulgated new rules for water main extensions.

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A. Applicable Statutes

The Environmental Management Act underwent simultaneous repeal and recodification in 1996. The applicable statutory provision in this case is Indiana Code §13-18-6-1. In 1996, after repeal and recodification, Ind. Code § 13-18-1 6-1 provided:

- (a) Plans and specifications for the construction, installation, or modification pertaining to:
 - (1) sources;
 - (2) treatment;
 - (3) disinfection;
 - (4) storage; or
 - (5) major distribution mains;of a public water supply must be submitted to the commissioner for approval. . . .
- (b) For the purposes of this chapter, a water main extension that:
 - (1) constitutes an increase of less than five percent (5%) in the number of customers;
 - or
 - (2) is less than two thousand five hundred (2,500) feet in length;is not considered a major distribution main under subsection (a) and does not require a permit from the commissioner.
- (c) Construction, installation, or modification of a public water supply may not begin until the commissioner has approved plans and specifications submitted to the commissioner under subsection (a).

In 1997, the legislature changed the 1996 version to:

- (a) A permit is required for the construction, installation, or modification of:
 - (1) sources;
 - (2) facilities;
 - (3) equipment; or
 - (4) devices;of a public water supply, including water distribution systems.
- (b) Plans and specifications for the construction, installation, or modification of sources, facilities, equipment, or devices of a public water supply must be submitted to the commissioner with a permit application.
- (c) Unless otherwise provided in rules adopted under section 8(b) of this chapter, plans and specifications must be submitted to the commissioner with the permit application for water distribution systems.
- (d) Construction, installation, or modification of a public water supply may not begin until the commissioner has issued a permit under subsection (a).

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The 1997 version of Ind. Code § 13-18-16-1 is the version of the law today. Section 8 of Ind. Code § 13-18-16 states in relevant part:

- (a) The board shall adopt rules under IC 4-22-2 and IC 13-14-9 establishing requirements for the issuance of permits to control public water supplies, including the following:
 - (1) Permits for the construction, installation, or modification of facilities, equipment, or devices for any public water supply.
 - (2) Permits for the operation of sources, facilities, equipment, or devices for any public water supply.
- (b) The board shall adopt a permit by rule for water main extensions (as defined in 327 IAC 8-3-1) to satisfy the permit requirement in section 1(a) of this chapter.

As of the time the Town constructed its water main extension, the following rule was in effect:

- (a) No person shall cause or allow the construction, installation, or modification of any facility, equipment, or device for any public water supply without having a valid construction permit issued therefore by the commissioner, except as allowed in subsection (b).
- (b) Construction permits shall not be required for the following:
 - (1) Water main extensions of less than two thousand five hundred (2,500) feet in length.
 - (2) Water main extensions which constitute an increase of less than five percent (5%) of the number of existing customers.
 - (3) Noncommunities and nontransient noncommunities with water supply service populations under five hundred (500) persons.
 - (4) Replacement of equipment of similar design and capacity, none of which will change adversely the plant operation, its hydraulic design or waste products, or the distribution system design, operation, or capacity.

327 IAC 8-3-2.

IDEM correctly points out that in the event of a conflict between a statute and a rule, the statute prevails.¹ What must be determined first, however, is whether the statute and rule in this case are in conflict. Generally speaking, when two statutes cover the same subject matter, they are to be read *in pari materia* – construed together so as to produce a harmonious system.² While this case does not concern two statutes, the concept of *in pari materia* is still instructive.

¹ IDEM's Motion for Summary Judgment, p. 3.

² Medical Disposal Services, Inc. v. Indiana Department of Environmental Management, 669 N.E.2d 1054, 1059 (Ind.Ct.App. 1996).

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B. Exemptions Remained in Effect

In 1996, the legislature repealed Ind. Code § 13-7 and enacted provisions like Ind. Code § 13-18-16 *et seq.* The 1996 version of 13-18-16-1 provided for an exemption to obtaining a permit for a water main extension. At the same time, 326 IAC 8-3-2 also had an exemption for obtaining a permit for a water main extension. In 1997, the legislature removed the statutory exemptions and required IDEM to promulgate a permit-by-rule for water main extensions. IDEM's permit-by-rule for water main extensions became effective June 1, 1999. The Town, however, began its water main construction in September 1998. The rule in effect at that time provided a permit exemption for water main extensions less than 2,500 feet and resulting in less than a 5% increase in customers. IDEM does not argue the fact that the Town would meet the exemption but asserts the exemptions were repealed when the statute was amended in 1997. If true, it would mean water main extensions would be treated like any other water distribution system, which runs counter to the legislature's intent in past and current laws. "Where legislative intent requires that prior legislation remain in force until the administrative body has enacted substitute regulations, a repeal of the old rules and regulations takes place only at the time the new administrative regulations go into effect."³ Thus, the exemptions in 326 IAC 8-3-2 remained in effect for water main extensions until IDEM promulgated a new rule. Since the legislature is presumed to have knowledge of other laws when it enacts a statute, it could have easily repealed 326 IAC 8-3-2 if it wished to do so. By not expressly repealing the exemptions contained in the rule, the legislature intended that the exemptions continue until IDEM promulgated its permit-by-rule for water main extensions.

V. Conclusions of Law

The Administrative Law Judge concludes as a matter of law, based on the foregoing Undisputed Facts and Discussion, that the exemption for obtaining a water main extension permit was in effect at the time the Town of Sunman completed its water main extension.

VI. Recommended Order

The Administrative Law Judge recommends that the Town of Sunman's Motion for Summary Judgment be **GRANTED**, that IDEM's Motion for Summary Judgment be **DENIED** and that no permit be required for the Town of Sunman's water main extension.

³ Van Allen v. State, 467 N.E.2d 1210, 1214 (Ind.Ct.App. 1984).

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VII. Appeal Rights

You are hereby notified that pursuant to §4-21.5-3-29, you have the right to appeal the Recommended Order of the Administrative Law Judge. In order to do so, you must object in a writing that does the following:

- (1) specifies which portions of the Recommended Order you object to;
- (2) specifies which portions of the administrative record supports the objection(s); and
- (3) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days. Objections should be sent to:

Wayne E. Penrod, Chief Administrative Law Judge
Office of Environmental Adjudication
150 West Market Street, Suite 618
Indianapolis, IN 46204

A final order disposing of the case or an order remanding the case to the administrative law judge for further proceedings shall be issued within sixty (60) days after the latter of:

- (1) the date that the order was issued under §4-21.5-3-27;
- (2) the receipt of briefs; or
- (3) the close of oral argument;

unless the period is waived or extended with the written consent of all parties or for good cause shown.

IT IS SO ORDERED in Indianapolis, Indiana this day 16th day of August, 1999.

Linda C. Lasley,
Administrative Law Judge