

**In re: Objection to the Issuance of 327 IAC 3 Permit Application Plans & Specifications  
for Sanitary Sewer Eastside Sewer Expansion Permit Approval No. 16536  
Franklin, Johnson County, Indiana, Petitioner Ruth S. Brown, Trustee  
2004 OEA 134 (04-W-J-3354)**

---

**TOPICS:**

sewer expansion  
12(B)(6)  
construction permit  
jurisdiction  
post-construction  
stones in backfill.  
field tile material  
grade of replacement plastic.  
tile length distances  
support soil type  
soil restoration  
compaction  
mounding  
subsidence

**PRESIDING JUDGE:**

Daidsen

**PARTY REPRESENTATIVES:**

Permittee: Robert H. Schafstall, Esq., Cutsinger & Schafstall  
Petitioner: Jack Rogers, Esq., Rogers & Gesse  
IDEM: Nancy Holloran, Esq.

**ORDER ISSUED:**

December 1, 2004

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

---



**In re: Objection to the Issuance of 327 IAC 3 Permit Application Plans & Specifications  
for Sanitary Sewer Eastside Sewer Expansion Permit Approval No. 16536  
Franklin, Johnson County, Indiana, Petitioner Ruth S. Brown, Trustee  
2004 OEA 134 (04-W-J-3354)**

3. A summary of the contentions stated in Petitioner's May 22 Petition is:
  - a. Petitioner is burdened with man holes that run 12 to 18 inches above ground across the field. Petitioner is required to farm around the man holes, and children from a nearby trailer park remove the lids and often leave the lids off, endangering the lives of the children and others.
  - b. The pipe has very little cover, and Petitioner's crops close to the pipe suffer; after installation, removed topsoil was not removed, causing fertility problems.
  - c. The proposed sewer project would cut the existing field tile, adversely affecting drainage;
  - d. As the proposed sewer would contain "human waste, grease, and whatever someone might put down the drain", a leak in the flow across the field would cause the crops to be the first to suffer. Food-grade crops would be contaminated.
4. This Court's May 27, 2004 Order set this matter for Prehearing Conference on June 17, 2004, 9:00 AM, EST. Respondent Indiana Department of Environmental Management ("IDEM")'s counsel, Nancy A. Holloran, Esq., entered her appearance on June 2, 2004. Permittee's Counsel, Robert H. Schafstall, Esq., entered his Appearance on June 4, 2004. Counsel for Permittee's June 16, 2004 Motion for Continuance of the Prehearing Conference, based on a need to prepare and to initiate settlement, was granted; the Prehearing Conference was reset for August 12, 2004, 2:00 PM. At the August 12, 2004 Prehearing Conference, Respondent Indiana Department of Environmental Management ("IDEM"), attended by staff and counsel; Respondent City of Franklin ("Permittee" or "City") attended by counsel. Petitioners did not attend. After finding that Petitioners had notice, and after convening the Prehearing Conference at 2:30 PM, the Court issued an August 13, 2004 Notice of Proposed Order of Default to Petitioners. Petitioner Ruth Brown called the Court on August 16, 2004, followed by her August 17, 2004 letter, and informed Court staff that Fred Brown was deceased. She requested that the Proposed Order of Default not be entered because she had no notice of the Prehearing Conference from her attorney, Roy L. Dickinson.. The Court's August 18, 2004, Order vacated the Proposed Order of Default, reset the Prehearing Conference on September 16, 2004, 1:30 PM, and ordered Petitioner's counsel to file and appearance and an amended Petition for Administrative Review by September 9, 2004, in compliance with the statutory standards enumerated in the August 18, 2004 Order (and in the May 27, 2004 Order).
5. On September 8, 2004, Petitioner's Counsel, Jack Rogers, Esq., entered his Appearance and a Petition for Extension of Time in which to File an Amended Request for Administrative Review, as he had just been retained, and which was unopposed by IDEM's counsel. The Court's September 9, 2004 Order granted an extension for filing an amended petition for administrative review until September 23, 2004.
6. Petitioner's September 17, 2004 "Petition for Administrative Review" contended:
  - a. Perpetual danger of personal injury to those owning and using the land.
  - b. Perpetual damage to equipment owned by those using the land.
  - c. Perpetual danger of sewage overflow onto agricultural crops growing or to be grown on the land due to:
    - i. Electrical failure supplying energy to operate the sewage system.
    - ii. Overload on the proposed sewage system.

**In re: Objection to the Issuance of 327 IAC 3 Permit Application Plans & Specifications  
for Sanitary Sewer Eastside Sewer Expansion Permit Approval No. 16536  
Franklin, Johnson County, Indiana, Petitioner Ruth S. Brown, Trustee  
2004 OEA 134 (04-W-J-3354)**

- iii. Leakage and seepage of toxic materials from the proposed sewage system.
- iv. Damage to existing drainage system
  - v. Perpetual soil damage to lateral subsurface drainage from agricultural fields to natural water way because of trench backfill composition.
  - vi. Refusal of the City of Franklin, Indiana to use its existing sanitary sewer easement across the Brown property (Exhibit referenced but not attached).
- 7. The Court's October 2004 Case Management Order set this matter for Final Prehearing Conference on December 1, 2004 and for Final Hearing on December 9, 2004. On November 30, 2004, Petitioner's counsel spoke briefly with the Court to confirm that the activities scheduled for December 1, 2004 were aimed at prehearing preparation.
- 8. The December 1, 2004, 10:00 AM Final Prehearing Conference was held as scheduled, with the parties attending by their counsel of record, along with IDEM's permit writer. Counsels for Petitioner and Permittee tendered Final Exhibit and Witness Lists; IDEM's counsel identified her witnesses to the other counsel after indicating that the written version would be filed later in the day. The Court convened the conference at approximately 10:05 AM, with Petitioner's counsel identifying issues of concern. The Court left the parties to confer about disputed facts and hearing organization. At approximately 10:50 AM, counsel requested the Court to return. On return, Permittee's counsel tendered an oral motion for dismissal for lack of subject matter jurisdiction, based upon the contention that Permittee was seeking remedy for post-construction concerns of soil condition and drainage, or that Permittee was intending to prove elements of damage concerning a pending eminent domain action in Johnson County Superior Court 3. IDEM's counsel concurred in Permittee's motion to dismiss for lack of subject matter jurisdiction. Petitioner opposed the motion.
- 9. In opposition to the motion to dismiss for lack of subject matter jurisdiction, Petitioner stated that not all of her contentions concerned post-construction matters; specifically contending that Contract documents between the Permittee and its contractor for construction of the permitted activity lacked requisite specificity, particularly concerning:
  - a. Improperly authorizing or limiting the use of stones in backfill.
  - b. Specifications concerning old clay field tile which would be cut during the construction process required replacement with existing material or with plastic, erring in failing to specify the grade of replacement plastic.
  - c. Tile length distances and support soil type.
  - d. Soil restoration for damage done during construction, such as compaction, mounding and subsidence.
- 10. As the oral Motion to Dismiss was presented during a Final Prehearing Conference, the Court requested the parties to indicate if they wanted to proceed, as no court reporter was present to generate a transcript or other record. All of parties waived recording or transcription, indicating that the Court's notes and recall would suffice to memorialize the proceeding. Nor did the parties request the opportunity to submit the Motion to Dismiss and objections in written form.
- 11. At the request of the parties, the Court proceeded with argument from the parties on the Permittee's Motion to Dismiss for Lack of Subject Matter Jurisdiction. On query from the Court, Petitioner's counsel indicated that he neither had nor wanted a copy of the

**In re: Objection to the Issuance of 327 IAC 3 Permit Application Plans & Specifications  
for Sanitary Sewer Eastside Sewer Expansion Permit Approval No. 16536  
Franklin, Johnson County, Indiana, Petitioner Ruth S. Brown, Trustee  
2004 OEA 134 (04-W-J-3354)**

permit for review, but had discussed it sufficiently with those present at the Final Prehearing Conference. Petitioner's counsel indicated that as the project did not involve a lift station, that Petitioner no longer wanted to proceed on the following issues raised in her September 17, 2004 Petition for Administrative Review:

- a. Perpetual danger of sewage overflow onto agricultural crops growing or to be grown on the land due to:
  - i. Electrical failure supplying energy to operate the sewage system.
  - ii. Overload on the proposed sewage system.
  - iii. Leakage and seepage of toxic materials from the proposed sewage system.

Petitioner's counsel stated that the remaining issues identified in Petitioner's May 22, 2004 and September 17, 2004 Petitions for Administrative Review were included in and presented as the objections presented by Petitioner's counsel contained in this Order's para. 9, above.

12. Counsel for IDEM argued that even if a contract, to which IDEM was not a party, and which had not been reviewed by IDEM's counsel, contained construction standards, that Permit 16536 contained terms addressing Petitioner's issues with as much specificity and regulatory stringency as allowed by Indiana law. Any lack of specificity in the permit was due to the lack of regulatory authority for that particular level of specificity. And, the Permittee would be required to meet the specifications stated in the permit, not in its construction contracts. Therefore, the Petition for Administrative Review should be dismissed as neither IDEM nor the Court had subject matter jurisdiction over the issues raised by Petitioner. Permittee's counsel concurred with IDEM's argument; Petitioner's counsel had no further matters for the Court's consideration.

**Conclusions of Law**

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.
2. This is a Final Order issued pursuant to Ind. Code § 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. OEA is authorized to rule upon Respondent/Permittee's Motion to Dismiss for Lack of Subject Matter Jurisdiction, per Ind. Tr. R. 12(b)(6), Ind. Code § 4-21-5-3, et seq., and 315 IAC 1. *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 813 (Ind. 2004). None of the issues raised by Petitioner in this matter in response to the Motion to Dismiss for Lack of Subject Matter Jurisdiction are subject to IDEM's jurisdiction in the issuance of a construction permit under 327 IAC 3 or other applicable Indiana law. The Petitioner has failed to state any claim upon which relief may be granted by the OEA and her Petition must therefore be dismissed.

**In re: Objection to the Issuance of 327 IAC 3 Permit Application Plans & Specifications  
for Sanitary Sewer Eastside Sewer Expansion Permit Approval No. 16536  
Franklin, Johnson County, Indiana, Petitioner Ruth S. Brown, Trustee  
2004 OEA 134 (04-W-J-3354)**

**Final Order**

IT IS THEREFORE ORDERED that the Petition for Administrative Review filed by Petitioner Ruth S. Brown, Trustee, and David H. Brown on May 22, 2004 and September 17, 2004 is hereby dismissed for failure to state a claim upon which relief can be granted by the Office of Environmental Adjudication.

IT IS FURTHER ORDERED that the Final Hearing set for December 9, 2004, 1:00 PM, EST, is 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 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 this 1st day of December, 2004 in Indianapolis, IN.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge