

**Objection to Issuance of Sanitary Sewer Construction Permit No. 19038,
Underwood Plaza, Hobart, Lake County, Indiana.
2008 OEA 76 (08-W-J-4091)**

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 76 cite this case as
Underwood Plaza, 2008 OEA 76.

TOPICS:

dismissal
sanitary sewer
collection system
Independence Hill Conservancy District
Merrillville Conservancy District
Gary Sanitary District
capacity certifications
downstream
aggrieved
adversely affected
Huffman
jurisdiction

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Respondent: Angelo Sabato, Esq. for Christopher M. Troy
Petitioner: Thomas A. Greenburg, Esq. for Independence Hill Conservancy District
Intervenor: David L. Gilyan, Esq. for Gary Sanitary District
Intervenor: William Touchette, Esq. for Merrillville Conservancy District
IDEM: Denise A. Walker, Esq.

ORDER ISSUED:

July 22, 2008

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	

IN THE MATTER OF:)	
)	
OBJECTION TO THE ISSUANCE OF)	
SANITARY SEWER CONSTRUCTION)	
PERMIT NO. 19038, UNDERWOOD PLAZA)	
HOBART, LAKE COUNTY, INDIANA)	
_____)	CAUSE NO. 08-W-J-4091
)	
Independence Hill Conservancy District)	
Petitioner)	
Underwood Plaza, Christopher M. Troy)	
Permittee/Respondent)	
Merrillville Conservancy District, Gary)	
Sanitary District)	
Intervenors)	
Indiana Department of Environmental Management)	
Respondent)	

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER**

This matter having come before the Court on Christopher M. Troy’s Motion to Deny Request for Review for Failure to Meet the Requirements of IC 4-21.5-3-7(1), which pleading is a part of the Court’s record; and the Court, being duly advised and having read the record, motion, responses, supplements, replies and all other pleadings, now enters these findings of fact, conclusions of law and final order:

Findings of Fact

1. On March 20, 2008, the Indiana Department of Environmental Management (IDEM) issued a construction permit (Permit Approval No. 19038) to Christopher M. Troy (hereinafter referred to as “Troy”) for the construction of a sanitary sewer system to be located on the north side of U.S. Highway 30. Troy proposes to build Underwood Plaza; the sanitary sewer would connect Underwood Plaza to Merrillville Conservancy District’s sanitary sewer system.
2. Independence Hill Conservancy District (IHCD) filed its Petition for Administrative Review with this Office on April 1, 2008.
3. On April 22, 2008, Troy filed his Motion to Deny Request for Review for Failure to Meet the Requirements of IC 4-21.5-3-7(1).

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4. Merrillville Conservancy District (MCD) and Gary Sanitary District (GSD) filed their Verified Joint Motion to Intervene on May 5, 2008, which was granted on May 8, 2008.
5. In accordance with the Case Management Order dated May 8, 2008, Troy filed his "Supplement to Motion to Deny Request for Review for Failure to Meet the Requirements of IC 4-21.5-3-7(1)"; thereafter, on May 16, 2008, MCD and GSD filed "Merrillville Conservancy District's and City of Gary, Indiana, Sanitary District's Submission of "Affidavit of Phillip E. Gralik, P.E." In Support of Dismissing IHCD's Petition for Administrative Review."; IHCD filed "IHCD's Response in Opposition to Troy's Motion to Dismiss" on June 3, 2008; and Troy filed his "Reply to IHCD's Response in Opposition to Troy's Motion to Dismiss" on June 13, 2008.
6. IHCD collects sewage from its exclusive sanitary sewer service district and discharges into MCD's collection system. MCD then discharges the sewage into GSD's collection system. The sewage flows to GSD's treatment plant and the effluent is discharged into Lake Michigan. GSD owns the treatment plant and operates it pursuant to a NPDES permit.
7. MCD has two discharge points into GSD's system. IHCD's sewage flows through MCD's collection system and is discharged into GSD via GSD Discharge Point No. 2. Troy's sewage would flow through and be discharged from GSD Discharge Point No. 1. At no point does the sewage from Underwood Plaza and sewage from IHCD intermingle within MCD's collection system.
8. IHCD has a contract with MCD in which IHCD purchased and reserved peak and average daily wastewater capacity from MCD in the separate and segregated portion of MCD's collection system connected to MCD's GSD Discharge Point No. 2.
9. Troy obtained capacity certifications from MCD and GSD and submitted those certifications as part of his permit application.

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 IC 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to IC 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.

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3. IC 4-21.5-3-7(a) states:
 - (a) To qualify for review of a personnel action to which IC 4-15-2 applies, a person must comply with IC 4-15-2-35 or IC 4-15-2-35.5. To qualify for review of any other order described in section 4, 5, or 6 of this chapter, a person must petition for review in a writing that does the following:
 - (1) 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.

4. The Indiana Supreme Court recently held, in *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806 (Ind. 2004) that “whether a person is entitled to seek administrative review depends upon whether the person is “aggrieved or adversely affected” . . . and that the rules for determining whether the person has “standing” to file a lawsuit do not apply”. *Id.* 807. The Court went on to say that 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.* 810. The Court further interpreted the language of IC 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public. 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 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. The Court states “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.* 815.

5. IHCD argues that it is aggrieved or adversely affected by the issuance of the permit because Troy should have obtained a capacity certification from IHCD pursuant to 327 IAC 3-6-4. This regulation states:
 - (a) Certifications complying with the required statements as set forth in subsections (b) and (c) shall be submitted with an application, plan, or specification for construction permit approval under this rule.

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- (b) A professional engineer or a registered land surveyor, in conformance with IC 25-31-1 and 327 IAC 3-2.1-3(a), must sign, seal, and date the application making the following certification: "I certify under penalty of law that the design of this project will be performed under my direction or supervision to assure conformance with 327 IAC 3 and that the plans and specifications will require the construction of said project to be performed in conformance with 327 IAC 3-6. I certify that the peak daily flow rates, in accordance with 327 IAC 3-6-11 generated in the area that will be collected by the proposed collection system that is the subject of the application, plans, and specifications, will not cause overflowing or bypassing in the same subject proposed collection system from locations other than NPDES authorized discharge points. I certify that the proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers. I certify that the ability for this collection system to comply with 327 IAC 3 is not contingent on water pollution treatment/control facility construction that has not been completed and put into operation. I certify that the design of the proposed project will meet all local rules, laws, regulations, and ordinances. The information submitted is true, accurate, and complete to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."
- (c) The authorized representative of the town, city, sanitary district, or any entity that has jurisdiction over the proposed collection system must sign and date the application and issue the following certification: "I certify that I have reviewed and understand the requirements of 327 IAC 3 and that the sanitary collection system proposed, with the submission of this application, plans, and specifications, meets all requirements of 327 IAC 3. I certify that the daily flow generated in the area that will be collected by the project system will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points and that there is sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and remain in compliance with applicable NPDES permit effluent limitations. I certify that the proposed average flow will not result in hydraulic or organic overload. I certify that the proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers. I certify that the ability for this collection system to comply with 327 IAC 3 is not contingent on water pollution/control facility construction that has not been completed and put into operation. I certify that the project meets all local rules, laws, regulations, and ordinances. The information submitted is true, accurate, and complete to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

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6. The Office of Environmental Adjudication has previously addressed this issue in a final order issued by Chief Environmental Law Judge Mary Davidsen, *Independence Hill Conservancy District*, 2007 OEA 164. In this case, IDEM issued a sanitary sewer construction permit to IHCD without capacity certifications from MCD and GSD. Chief ELJ Davidsen held that 327 IAC 3-6-4 required an applicant for a sanitary sewer construction permit obtain capacity certifications, verified by an authorized representative, from any town, city, sanitary district or any entity that has jurisdiction over the proposed collection system. Chief ELJ Davidsen determined that IHCD must get certifications from MCD and GSD, as the entities with jurisdiction over the downstream portion of the collection system.
7. The previous case only addressed whether capacity certifications were required from downstream jurisdictions. IHCD argues, in the current matter, that 327 IAC 3-6-4 requires capacity certifications from all upstream districts in addition to downstream districts.
8. The Court finds no support for this proposition in the statutes and regulations. The ELJ agrees with Chief ELJ Davidsen's statement that "The determination of the extent of a collection system depends on the path for wastewater collection and discharge sought in a particular application." *Independence Hill Conservancy District*, 2007 OEA 164, 172. In this case, the path for Troy's sewage and for IHCD's do not intermingle at all until combined in GSD's collection system.
9. The regulation requires a capacity certification from any sanitary district (amongst other entities) that has jurisdiction over the proposed collection system. IHCD does not own, operate, maintain or otherwise have any authority over MCD's or GSD's collection systems. Therefore, IHCD has no jurisdiction over the collection systems into which Underwood Plaza will discharge. Troy was not required to obtain capacity certification from IHCD.
10. IHCD is not aggrieved or adversely affected by the issuance of this permit and its Petition for Administrative Review should be dismissed.

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Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Troy's Motion to Deny Request for Review for Failure to Meet the Requirements of IC 4-21.5-3-7(1) is **GRANTED** and the Petition for Administrative Review filed by Independence Hill Conservancy District is hereby **DISMISSED**.

You are hereby further notified that pursuant to provisions of IC 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 22nd day of July, 2008 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge