

**Objection to the Issuance of Construction Permit Approval  
53rd and Adams Sanitary Sewer Reconstruction  
Merrillville, Lake County, Indiana  
2009 OEA 90, (08-W-J-4125)  
and 2009 OEA 172**

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**OFFICIAL SHORT CITATION NAME:** When referring to the cite, please reference Gary Sanitary District, **2009 OEA 90** and/or **2009 OEA 172**.

**TOPICS:**

Summary Judgment  
material  
genuine  
relevance  
authentication

**PRESIDING ENVIRONMENTAL LAW JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: Nancy Holloran, Esq.  
Petitioner: Eli Gusan, pro se  
Permittee: Susan M. Severtson, Esq.; City of Gary

**ORDER ISSUED:**

**2009 OEA 90** - Findings of Fact, Conclusions of Law & Final Order - July 27, 2009

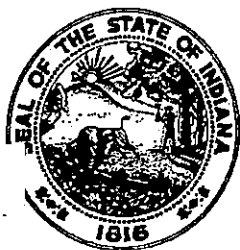
**2009 OEA 172** - Findings of Fact, Conclusions of Law & Final Order and Order Denying Motion to Dismiss - December 10, 2008

**INDEX CATEGORY:**

Water

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**FURTHER CASE ACTIVITY:** [none]



**INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION**

Mary Davidsen  
Chief Environmental Law Judge

INDIANA GOVERNMENT CENTER NORTH  
100 NORTH SENATE AVENUE  
SUITE N501  
INDIANAPOLIS, IN 46204-2211  
(317) 232-8591  
(317) 233-9372 FAX

STATE OF INDIANA )  
 )  
COUNTY OF MARION )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )

OBJECTION TO THE ISSUANCE OF )  
CONSTRUCTION PERMIT APPROVAL )  
NO. 19115, GARY SANITARY DISTRICT )  
53<sup>RD</sup> AND ADAMS SANITARY SEWER )  
RECONSTRUCTION )  
MERRILLVILLE, LAKE COUNTY, INDIANA )

CAUSE NO. 08-W-J-4125

\_\_\_\_\_  
Eli Gusan )  
Petitioner )  
Gary Sanitary District )  
Permittee/Respondent )  
Indiana Department of Environmental Management )  
Respondent )

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER DENYING  
MOTION TO DISMISS**

This matter having come before the Court on the Gary Sanitary District's, Permittee/Respondent, Motion to Dismiss Petitioner's Purported Appeal of Agency's Decision Authorizing Construction Pursuant to Permit No. 19115, which pleading is a part of the Court's record; and the Court, being duly advised and having read the record, pleadings, briefs and correspondence, now enters the following Findings of Fact, Conclusions of Law and Order:

Findings of Fact

1. On May 22, 2008, the Indiana Department of Environmental Management (the "IDEM") issued Permit No. 19115 (the "Permit") to the Gary Sanitary District (the "Permittee") for the reconstruction of a sanitary sewer system to be located northeast of West 53<sup>rd</sup> Avenue and Adams Street, Gary, Indiana.
2. Eli Gusan (the "Petitioner") filed a petition for review of the Permit on May 27, 2008. The petition, in part, stated as follows, "Sanitary sewer to run down (illegible) I own all of the right side" and that the sanitary sewer has to cross his property in order for another owner to connect. Further, the petition stated objections to the reconstruction based on

allegations that there is insufficient flow from certain properties, that flooding occurs, and other grounds.

3. This Court issued a Notice of Incomplete Filing and Order to Supplement Petition on May 30, 2008. This Order indicated that the Petitioner must supply a copy of the Permit and serve a copy of the Petition on all parties within thirty (30) days of the date of the Order.
4. The Petitioner submitted a supplement to his Petition on June 21, 2008. A copy of the Permit was included. There was no indication that the supplement or the original Petition had been served on the other parties, namely, the IDEM or the Permittee.
5. An Order Scheduling Prehearing Conference was issued to the IDEM, the Petitioner and the Permittee on June 24, 2008. A prehearing conference was held thereafter on July 22, 2008.
6. The Petitioner filed correspondence with the Court on June 27, 2008 indicating that copies of his Petition had been sent to the IDEM and Greeley and Hansen, the Permittee's consultant.
7. A Case Management Order was issued on July 22, 2008 setting a briefing schedule for a Motion to Dismiss. The Permittee filed a motion to dismiss on September 5, 2008; the Petitioner filed a response on September 30, 2008; the IDEM filed its Concurrence in Gary Sanitary District's Motion to Dismiss on October 6, 2008.

#### Conclusions of Law

1. The OEA has subject matter jurisdiction of this cause. The Petitioner has objected to IDEM's action of issuing the Permit to the Permittee. Pursuant to Ind. Code §4-21.5-7-3, "The office of environmental adjudication is established to review . . . decisions of the commissioner of the department of environmental management." IC § 4-21.5-7-3. An ELJ, as an employee of OEA, "is the ultimate authority under this article for reviews of decisions of the commissioner of environmental management." *Indiana Office of Environmental Adjudication and Indiana Department of Environmental Management v. Kunz*, 714 N.E.2d 1190, 1194 (Ind. Ct. App. 1999).
2. 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). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; IC § 4-21.5-3-27(d). "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 (Ind.Ct.App. 1981).

4. The Permittee argues that the petition was not timely filed. IC §4-21.5-3-7(a)(3)(A) states that a Petition for Review must be filed within fifteen (15) days after the person is given notice of the order. Pursuant to IC §4-21.5-3-1(f)(2) and 315 IAC 1-3-3(c)(2), the date of filing is the date of the postmark on the envelope containing the document if the document is deposited with a private carrier. The Permit was issued on May 22, 2008; the petition for review was filed on May 27, 2008. The petition was timely filed.
5. The Permittee argues also that the petition for review was not sufficient. “In reviewing a Rule 12(B)(6) motion, 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. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party.” *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806, 813 (Ind. 2004).
6. In *Indiana Office of Environmental Adjudication and Indiana Department of Environmental Management v. Kunz*, 714 N.E.2d 1190, (Ind. Ct. App. 1999), the Kunzes had filed a petition for review with the OEA. The OEA dismissed the petition for lack of subject matter jurisdiction and subsequently, denied the Kunzes’ motion for leave to amend the petition. On judicial review, the trial court denied IDEM’s motion to dismiss, granted the petition for review and remanded the matter back to OEA for further action consistent with its decision. The IDEM and respondent appealed the trial judge’s decision. The appellate court concluded that the OEA had subject matter jurisdiction, but held that the language of IND. CODE §13-15-6-3(a) requires that the ELJ must determine whether the petition was properly submitted, that is, whether the petition meets the requirements of IND. CODE §13-15-6-2. The Court stated, “The plain language of Indiana Code Section 13-15-6-3 reveals that a hearing need not be set unless there is both subject matter jurisdiction and the request is properly submitted (i.e., the subparts of Indiana Code Section 13-15-6-2 are met).” p. 1194. The Court then found that OEA’s determination that the Kunzes’ original petition did not meet these requirements was not arbitrary and capricious. However, the Court held that it was an error to deny the Kunzes an opportunity to amend their petition, concluding that administrative pleadings need only be specific enough to “give the responding party notice of the charges against him.” *Id.* at 1196.
7. As part of determining whether the request has been properly submitted, the ELJ must determine whether the Petitioner is aggrieved or adversely affected.<sup>1</sup> The Indiana Supreme Court held, in *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806, 807 (Ind. 2004) that “whether a person is entitled to seek administrative

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<sup>1</sup> In *Huffman*, the Court notes that a challenge to standing is not a challenge to subject matter jurisdiction, but is properly brought under 12(B)(6), for failure to state a claim.

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”. 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.* at 810. The Court further interpreted the language of IND. CODE §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 owned the corporation that had one unit of and was the managing member of the limited liability corporation that owned the property adjacent to the property from which the discharge would occur. 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 no impact to Huffman was possible because the discharge outlet was downstream from the Huffman property. 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 claims were and whether they had any merit. Dismissing the claim was therefore premature.” *Id.* at 815.

8. In addition to a determination of whether the petitioner is aggrieved or adversely affected or is otherwise entitled to seek administrative review, the Court, in *Kunz, supra*, held that the requirements of IC § 13-15-6-2 must also be met before the OEA can set a matter for hearing. This section states:

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.

9. Both Respondents argue that the Petitioner has failed to comply with IC §13-15-6-2 by failing to state the reasons for the requests or the issues with sufficient particularity. In *Kunz, supra*, at 1196, the Court stated "A complaint in an administrative proceeding need not "enumerate precisely every event to which a hearing examiner may finally attach significance." *L.G. Balfour Co. v. Federal Trade Comm'n*, 442 F.2d 1, 19 (7th Cir. 1971)." The appellate court in *Parker v. State*, 400 N.E.2d 796, 798 (Ind. Ct. App. 1980) said "In determining the propriety of a dismissal pursuant to Trial Rule 12(B)(6), we note that under our system of "notice" pleading, the plaintiff is merely required to make a clear and concise statement in order to put the defendant on notice that he has a justiciable claim and is entitled to relief under some legal theory. *Roberts v. State* (1974), 159 Ind. App. 456, 307 N.E.2d 501; *McCarthy v. McCarthy* (1971), 150 Ind. App. 640, 276 N.E.2d 891."
10. In this case, the Petitioner has stated in his Petition for Review that "Sanitary sewer to run down (illegible) I own all of the right side." Under the standard set out in *Huffman, supra*, that is, that he has suffered or is likely to suffer harm to a property or personal interest in the immediate future, the Petitioner has established that he is personally aggrieved or adversely affected.
11. The Petition states sufficient facts to give the Permittee notice of the Petitioner's claim, including allegations that certain properties produce insufficient flow and that flooding affects the area of the sanitary sewer. Drawing every reasonable inference in favor of the Petitioner, the Petition for Review has stated sufficient facts such that this Court can conclude that the Petitioner would not be entitled to recover under any set of facts admissible under the allegations of the complaint. Therefore, the motion to dismiss should be and is hereby **DENIED**.

Order

**AND THE COURT**, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Permittee/Respondent's Motion to Dismiss is **DENIED**.

Further, the Court **ORDERS** the following:

1. Any amendments to the Petition for Review shall be filed on or before **January 9, 2009**.
2. The parties shall submit a proposed case management order including, but not limited to, deadlines for discovery, the filing of preliminary witness and exhibit lists and dispositive motions, and proposed hearing dates, on or before **January 23, 2009**.

You are further notified that pursuant to provisions of IC §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 an order subject to further review consistent with applicable provisions of IC §4-21.5 and other applicable rules and statutes.

IN. IT IS SO ORDERED this 10th day of December 2008 in Indianapolis,

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Hon. Catherine Gibbs  
Environmental Law Judge