

3. The Project involves the installation of an approximately 4,140-foot low-pressure sewer which will connect to an existing sanitary sewer line along Witmer Road, providing service to 19 single-family homes, an elementary school, a shopping center and a retail shoe store. *Id.* Privately owned and maintained simplex grinder pump stations will be installed on each residential lot and duplex grinder pump stations will be installed at the school and commercial properties. *Id.*

4. The Town of Grabill is responsible for inspecting the installation of the sewer and for maintenance of the sewer after construction is completed.

5. On May 12, 2022 David Cole (Petitioner) filed a Petition for Administrative Review (Petition) with OEA.¹ On May 19, 2022, this Court issued a Notice of Incomplete Filing, Order to Supplement the Petition and Notice of Proposed Order of Default. On June 20, 2022, Petitioner filed a response to the Notice of Incomplete Filing (Amended Petition).

6. On July 18, 2022, the parties participated in a telephonic Prehearing Conference. Permittee/Respondent did not attend.

7. On August 26, 2022, IDEM filed a Motion for Summary Judgment and a Memorandum in Support.

8. On the same date, Petitioner filed a "Response to the Motion for Summary Judgment submitted by Susanna Bingman Esq." (Response).

9. On September 27, 2022, Petitioner supplemented his Response via email. (Supplemental Response).

10. On October 7, 2022, IDEM filed a Reply to Petitioner's Responses.

CONCLUSIONS OF LAW

1. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-23 (I.C.). 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.

2. IDEM is authorized to implement and enforce Indiana environmental statutes and rules promulgated relevant to those statutes. *See* I.C. § 13-13 *et seq.* and I.C. § 13-14-1-11.5. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding whether to issue the permit. *American Suburban Utilities*, 2019 OEA 48, 53.

¹ Permittee/Respondent did not participate in the Prehearing Conference or respond to either Petitioner's or IDEM's pleadings.

3. OEA has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. In addition, OEA is governed by the regulations found under 315 IAC 1 *et seq.*

4. The OEA must apply a de novo standard of review to this proceeding when determining the facts at issue. *Indiana Dep't 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.*; I.C. § 4-21.5-3-27(d). OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806 (Ind. 2004).

5. The OEA considers a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Ind. Trial Rule 56." I.C. § 4-21.5-3-23(b). Citing Ind. Tr. R. 56(C), the Indiana Supreme Court stated, "[d]rawing all reasonable inference in favor of...the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Hughley v. State*, 15 N.E.3d 1000, 1003. "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.*

6. The moving party bears the initial burden to establish the absence of any genuine issue of material fact. *Id.* Once established, the burden shifts to the non-moving party to "'come forward with contrary evidence' showing an issue for the trier of fact." *Id.* Summary judgment is particularly appropriate where the relevant facts are undisputed and pure legal questions of statutory interpretation are presented. *Kluger v. J.J.P Enterprises, Inc.*, 159 N.E.3d 82, 87 (Ind. Ct. App. 2020). All rational assertions of fact and reasonable inferences are deemed to be true and are viewed in the nonmovant's favor. *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1256 (Ind. Ct. App. 2009). Mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact sufficient to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989).

7. Whenever a permit is required by any rule of the Environmental Rules Board under I.C. § 13-15-1 for the construction, installation, operation, or modification of any facility, equipment, or device, the permit may be issued only after the department staff has: (1) approved the plans and specifications; and (2) determined that the facility, equipment or device meets the requirements of the rule. I.C. § 13-15-3-5.

8. 315 IAC 1-3-2(b)(4)(A) requires a petitioner in a case involving an appeal of a permit to state with particularity and identify:

- (i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.

(ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

9. To prevail on his appeal of the issuance of the 327 IAC 3 construction permit, Petitioner must show that the Permittee did not meet the requirements of 327 IAC 3. OEA's review is limited to determining whether IDEM complied with applicable statutes and regulations. I.C. § 4-21.5-7-3; *Blue River Valley*, 2005 OEA 1, 11. OEA does not have authority to address any other issues.

10. Petitioner contends the "project appears to have been designed for the current residents and does not incorporate any significant additional capacity for future expansion." Petition, p. 1. 327 IAC 3 does not authorize IDEM to take into consideration potential future expansion or dictate the design, size or location of a sewer project.

11. Petitioner contends that "[m]any of the residents and businesses along Page Rd are not connected to the electric utility power grid [such that] [p]ower is not available 24x7 and not in large amounts."² Petition, p. 1. Here, Petitioner has not identified an environmental concern or technical deficiency related to IDEM's issuance of the Permit and thus does not comply with 315 IAC 1-3-2(b)(4)(A).

Petitioner is correct that the installed grinder pumps will require reliable power. Although potential future users will need to be connected to the electric grid for the grinder pumps to operate properly, 327 IAC 3 does not require an applicant to show that potential future users are connected to the electric grid at the time of application.

12. In his Amended Petition, Petitioner contends that because the proposed low pressure sewer system is incorrect for the situation, the "faulty system will lower property values, create sewage overflow situations, and burden myself and other property owners with an expensive to maintain and unreliable sewage system." Amended Petition, p. 1.

Petitioner's contentions are unsupported allegations, and as such they are speculative and cannot create questions of fact sufficient to defeat summary judgment. *Lindsey supra*, at 1251. Likewise, opinions expressing possibility with regard to a hypothetical situation also cannot create questions of fact to defeat summary judgment. *Beatty v. LaFontaine*, 896 N.E.2d 18, 20 (Ind. Ct. App. 2008).

13. In response to the Notice of Incomplete Filing requiring Petitioner to "identify which portions of the permit to which s/he is objecting," Petitioner states, "I object to the installation of a low[-]pressure system that does not follow the EPA guidelines in the fact sheet." Amended Petition, p. 3. In support of his objection, Petitioner cites the Environmental Protection

² Permittee/Respondent's property is not connected to the electric power grid. It is unclear how the Permittee/Respondent intends to be able to utilize the lower pressure sewer.

Agency's (EPA) Wastewater Technology Fact Sheet Sewers, Pressure. See <https://www.epa.gov/sites/default/files/2015-06/documents/presewer.pdf>.

EPA's Wastewater Technology Fact Sheet (EPA's Fact Sheet) was not promulgated as a rule under the Administrative Procedure Act (APA), 5 USC § 551 *et seq.* Only a rule³ issued in compliance with the APA that falls within the agency's scope of authority delegated by Congress has the force and effect of federal law. Rules not promulgated under the APA, such as interpretive rules and policy statements, lack the force and effect of law. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, (D.C. Cir. 2000).

Here, not only is the information contained in EPA's Fact Sheet not promulgated under the APA, EPA's Fact Sheet does not interpret a rule or acts as a policy statement; instead, it provides information regarding pressure sewers. Moreover, the information contained in EPA's Fact Sheet was not promulgated under Indiana's Administrative Orders and Procedures Act, I.C. § 4-22-2 *et seq.* or incorporated into 327 IAC 3; thus, IDEM was not required to consider the information contained in EPA's Fact Sheet in issuing a 327 IAC 3 construction permit.

14. In his Response, Petitioner clearly sets forth information regarding the various utilities' locations in the area in which the proposed sewer is to be constructed including the existence of a high-pressure sewer line that "runs down Page Rd," "buried telephone lines and a 4[-]year old 3+ inch plastic natural gas line." Response pp. 1 – 2. Petitioner is correct that the proposed system will require the grinder pumps to be connected to the electric grid. *Id.* p. 4. Because many of the residences along Page Road are not currently connected to the electric grid, Petitioner is concerned these residents will refuse to connect on religious grounds. Response, p. 2. In his Supplemental Response, Petitioner reiterates his concerns regarding the many properties that are not connected to the electric grid including the new house the Permittee/Respondent is completing as well as the Town of Grabill not responding to IDEM's inquiry regarding this issue. Supplemental Response, pp. 1 – 2.

327 IAC 3 does not require an applicant to show that future users are connected to the electric grid; thus this issue is not one IDEM is required to consider in the issuance of a 327 IAC 3 construction permit. Moreover, the Indiana Court of Appeals has held that "OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law." *Jennings Water, Inc. v. Off. of Env't'l Adjud.*, 909 N.E.2d 1020, 1026 (Ind. Ct. App. 2009).

FINAL ORDER

IT IS THEREFORE ORDERED Petitioner's Petition for Administrative Review is hereby **DISMISSED**, and IDEM's Motion for Summary Judgment is **GRANTED**. The 327 IAC 3 permit issued by IDEM is hereby **AFFIRMED**.

³ Rules that carry the force and effect of law are referred to as legislative rules.

You are further notified that pursuant to the provisions of I. C. § 4-21.5-7-5, OEA serves as the ultimate authority in the administrative review of decisions of the Commissioner of IDEM. This is a Final Order subject to judicial review consistent with the applicable provisions of I.C. § 4-21.5. 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 11th day of October, 2022 in Indianapolis, IN.

Hon. Lori Kyle Endris
Environmental Law Judge