

**Objection to the Issuance of Wastewater Treatment Plant Expansion
Construction Permit Approval No. 20788 for
Carriage Estates III to American Suburban Utilities Inc.
2017 OEA 94 (14-W-J-4710 & 16-W-J-4880)**

OFFICIAL SHORT CITATION NAME: When referring to 2017 OEA 94, cite this case as
Carriage Estates III, 2017 OEA 94.

TOPICS:

Pro se
Wastewater treatment plant
WWTP
Construction permit
NPDES
Sanitary sewer
Violations
Property rights
Soil samples
Inspection
327 IAC 5-2-5(b)
Local permits
Waste load allocation analysis
Effluent limits,

PRESIDING JUDGE: Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Sierra Alberts
ASU: Christopher Shelmon, Andrew Gutwein, Michael Hartman (Gutwein Law)
Petitioners: (Kurt Brock, Sharon Fitzpatrick): unrepresented

ORDER ISSUED:

November 1, 2017

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[None]

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4. Janet Myers, Daniel Aliaga, John and Lisa Ariano, Samantha Beesley, James and Paraskevi BeMiller, Peggy Benton, Debbie Boone, Kathy Busch, Karen Cadle, Dawn Choutka, Laura Clavio, Andy Cline, Alan and Sara Cloutier, Peter and Tiffanie Desmangles, David and Kristin Dimmich, Scott and Lisa Eaker, Vernan Emery, Ellen Germann, Barb Gotlund, Eric Grossman, Crystal Hagar, Daniel and Gabrielle Hlavek, Newlin and Elizabeth Howard, Larry Huba, Salman and Saina Husain, Christine Jaeger, Mark Kebert, Chuck Knochel, Kimberly Knochel, William Lesky, Carolyn Lesley, Jeff and Kerry Leuck, Cheryl Maier, Sharon McIntosh, H. Jay Melosh, David and Marilyn Maitke, Denis and Linda Miller, Dennis and Gail Mills, Maurice and Bette Mogridge, Tony Mull, Jan Myers, Malcolm and Kimberly Neumeyer, Elizabeth Nunamaker, Kevin Otto, Sandra Peticolas, Nick and Amanda Ribordy, Kenneth and June Rude, Haleigh Schoon, Jacob Schoon, David Schoorman, Louis and Debra Sherman, Major Sherwin, Vicki Sherwin, D. Furman Smith, Alayne Sundstrom, Sam and Cheryl Wagstaff, John and Robin Watson, Kevin and Janet Wiley, John and Janet Yaninek filed petitions for review. These individuals were dismissed from this proceeding on or before February 18, 2016.
5. On January 28, 2016, IDEM issued NPDES Permit No. IN00443273 (the NPDES Permit) to ASU. Mr. Brock and Sharon Fitzpatrick filed their petition for review on February 13, 2016. This case was assigned cause number 16-W-J-4880.
6. Cause Number 14-W-J-4710 and Cause Number 16-W-J-4880 were consolidated under Cause No. 14-W-J-4710 on January 17, 2017.
7. On October 3, 2017, the parties participated in a telephonic status conference. The Petitioners filed their Final Witness and Exhibit Lists on September 29, 2017 and requested that IDEM and ASU produce following persons as witnesses: (1) Bruno Pigott, IDEM; (2) Doug Whitman, ASU; and (3) Dennis Crandal ASU. Both ASU and IDEM moved to quash the production of these witnesses. The presiding ELJ granted the motions to quash in the telephonic status conference and at the hearing.
8. A final evidentiary hearing was held on October 11, 2017.

FINDINGS OF FACT

1. The IDEM issued Construction Permit No. 20788 (the Construction Permit) to ASU on February 21, 2014.
2. The Construction Permit approved ASU's application to expand the existing waste water pollution treatment plant (the WWTP) located at 4100 Bridgeway Drive, West Lafayette, Indiana.

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3. Kurt Brock resides at 4088 Ridgefield Court, West Lafayette Indiana. Mr. Brock timely filed his Petition for Review on March 7, 2014.
4. The Construction Permit does not authorize any modifications to the NPDES permit currently in effect for the Facility and specifically states, “if this project includes a change in design flow, addition of new treatment unit(s) or modification/removal of existing treatment unit(s), an NPDES Permit modification will likely be required.”
5. On January 28, 2016, IDEM issued NPDES Permit No. IN00443273 (the NPDES Permit) to ASU. Mr. Brock and Sharon Fitzpatrick timely filed their petition for review on February 13, 2016.
6. The NPDES Permit permits ASU to discharge treated water from the WWTP to Indian Creek. Indian Creek is designated as a full body contact recreation water of the state.
7. During the hearing, the Petitioners testified as the following issues:
 - a. Violations: In support of their argument that these Permits were improperly issued, the Petitioners pointed to several alleged violations of the current permit by ASU. The ELJ found that evidence of violations was irrelevant to the proceedings and denied admission of evidence and testimony regarding the alleged violations.
 - b. Property rights: The Petitioners raised objections to the Permits as a violation of their property rights. They point to photographs that purport to show erosion on their property from the flow of water from the WWTP.
 - c. Soil: The Petitioners raised questions about the lack of soil sampling to ensure that the soil being excavated during construction or the soil left on site had not been contaminated by the operation of the previous WWTP. The Petitioners presented no evidence that the soil was contaminated with constituents of concern or that ASU had failed to comply with applicable requirements contained in the rules or the Construction Permit.
 - d. Inspection: The Petitioners also questioned why IDEM did not oversee or periodically inspect the construction to determine that ASU was in compliance with the Construction Permit.
 - e. Permits: The Petitioners testified that ASU may not have the appropriate local or non-IDEM permits, including local construction permits or permits necessary to construct in a floodway. The Petitioners presented no evidence that any additional permits were necessary or that ASU had not gotten such permits.
 - f. Upstream/downstream differences: Petitioners testified as to their own observations of the condition of Indian Creek upstream and downstream of the WWTP outfall and introduced photographs. No evidence, other than Mr. Brock’s

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observations, was presented to document any differences in terms of aquatic life or the level of potential pollutants or water quality in general.

- g. Unique topographic features: The Petitioners introduced an article from an unidentified publication regarding alleged unique topographic features in the Hadley Lake Depression, which includes Indian Creek.
- h. Basis of waste load allocation analysis: Mr. Brock testified that IDEM failed to use the most recent data available to perform the waste load allocation analysis. He introduced data that was collected from United States Geologic Survey (USGS) stations that were closer in proximity to the outfall and more recent than the data relied on by IDEM. IDEM staff, including John Elliott, testified that IDEM did not rely on the USGS data, as it had not been subjected to IDEM's quality assurance/quality control (QAQC) analysis. Further, Mr. Elliot testified that Yellow Creek's¹ and Indian Creek's physical characteristics were similar. Waste load allocation analysis was based on a zero flow scenario and allowed for no dilution of the effluent. He used the data collected in the 1970s for Yellow Creek as this presented a more conservative scenario and was more protective of Indian Creek than the use of the more recent data. IDEM testified that the older data was used only to determine flow rate for purposes of the waste load allocation analysis.
- i. Basis of effluent limits: The Petitioners pointed to data collected by the USGS in support of their argument that the effluent limits were inappropriate. For purposes of determining the appropriate effluent limits in the NPDES Permit, IDEM expressed a preference for data that was less than 10 years old and further testified that the default information used is more conservative and therefore more protective.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code (I.C.) § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
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 office 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

¹ The data used was collected from Yellow Creek in the northern portion of the state.

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allowed. *Id.*; I.C. §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 Petitioners have the burden of proof in this matter. They must prove that IDEM erred in granting the Construction and NPDES permits.
5. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adj'd.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). “Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559,565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
6. The Petitioners chose to proceed without legal counsel. They had been previously advised² that they were within their rights to do so, but that their decision to proceed *pro se* would not affect the OEA’s review of their case.
7. Violations: Evidence that prior violations occurred is irrelevant to a determination of whether the Permits were properly issued in accordance with the regulations. Further, IDEM staff testified that, while they investigated whether violations had occurred, prior violations were not given any weight in the determination that the design for the new WWTP met the applicable requirements. Evidence that there were violations at the previous WWTP do not constitute probative evidence that the new WWTP, as designed, could not comply with the appropriate regulations. The IDEM presumes that any person that receives a permit will comply with the applicable regulations and with future permits.

² Order Denying Requests to Continue July 1, 2014 Prehearing Conference and Order Denying Requests to Stay Permit Until Appeals Are Heard, issued June 30, 2014.

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OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law.³

8. Property rights: It is clear that the permits themselves do not confer any rights to Permittee to violate the property rights of others. 327 IAC 5-2-8(6) states: “The permit does not convey any property rights of any sort or any exclusive privilege.” 327 IAC 5-2-5(b) states:
 - (b) The issuance of a permit does not:
 - (1) convey any property rights of any sort, or any exclusive privileges;
 - (2) authorize any injury to persons or private property or invasion of other private rights, or any infringement of federal, state, or local laws or regulations; or
 - (3) preempt any duty to obtain state or local assent required by law for the discharge or for construction or operation of the facility from which the discharge is made.

The Permit does not convey any property rights nor does it convey any authority to the Permittee to encroach upon the property rights of others. However, this is not within IDEM’s or OEA’s jurisdiction to enforce. Any complaints that a permittee has harmed the property of another must resolved in a different forum.

9. Soil: The Petitioners failed to point to any applicable requirement to conduct soil sampling. The Petitioners also failed to present any substantive evidence that the soil was contaminated or that ASU failed to comply with the applicable regulations when decommissioning sections of the previous WWTP.
10. Inspections: The Petitioners failed to provide any evidence that IDEM did not meet its regulatory duty regarding the construction of the WWTP.
11. Permits: Pursuant to the terms and conditions of the Permits and 327 IAC 5-2-5(b), ASU is responsible for obtaining any and all applicable approvals and permits from local, state or federal authorities. Petitioners have not provided any evidence that ASU has not complied with this requirement.
12. Upstream/downstream differences: Petitioners testified as to their own observations of the condition of Indian Creek upstream and downstream of the WWTP outfall and introduced photographs. The Petitioners presented no evidence (1) that the conditions they observed

³ *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Ind. Off. Env. Adjud.); Grahn, Id.; Sidney, Id.; In Re: Sanitary Sewer Construction Permit, Lafollette Station Towne Centre, US 150 and Lawrence Banet Road, 2004 OEA 67, 70 (03-W-J-3263).*

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were the result of the WWTP discharge; (2) that the effluent or Indian Creek contained any pollutants; (3) that the upstream and downstream conditions differed in anything other than appearance; or (4) that differences in aquatic life were the result of the discharge and not natural conditions (as explained by IDEM staff). Without evidence that the alleged different conditions were a result of the discharge from the WWTP, the Petitioners' observations are not sufficient, in and of themselves, to support a conclusion that the increased discharge from the WWTP will not be protective of human health and the environment nor comply with applicable laws and regulations.

13. Unique topographic features: The Petitioners failed to support their contention that this area had unique features that required additional consideration. The article produced was irrelevant to the question of whether Indian Creek presented a unique environment for aquatic life.
14. Basis of waste load allocation analysis: IDEM used data collected in the 1970s in another county to perform the waste load allocation analysis. The Petitioners pointed to data collected later from a point further upstream from the WWTP outfall and argued that IDEM should have used this data. However, IDEM explained that the data they used created a more conservative scenario and thus would be more protective of Indian Creek. The Petitioners had no evidence to rebut this proposition. The weight of the evidence supports IDEM's stance.
15. Basis of effluent limits: Here again, the Petitioners argued that IDEM should have used a different set of data to calculate the effluent limits in the NPDES Permit.⁴ But again, IDEM explained the rationale behind which data they used and the Petitioners were unable to produce evidence in rebuttal. Therefore, the weight of the evidence supports a conclusion that IDEM committed no error.
16. The Petitioners failed to present sufficient evidence in support of any of their concerns over which IDEM has jurisdiction. Judgment should be entered in IDEM's and ASU's favor.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioners' Petition for Review is DENIED. Judgment is entered in favor of the Indiana Department of Environmental Management and American Suburban Utilities, Inc.

You are further notified that pursuant to provisions of Ind. Code (I.C.) § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of

⁴ The Construction Permit contained no effluent limits as it governed the construction of the WWTP; the NPDES Permit governs the operation of the WWTP.

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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 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 1st day of November, 2017 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge