

Objection to the Expiration of Individual NPDES/CAFO Construction Permit
Animal Waste No. AW-5744, Farm ID NO. 6477
Boerman Carroll Dairy, LLC
Carroll County, Indiana
2010 OEA 191, (10-W-J-4379)

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 191 cite this case as
Boerman Carroll Dairy, LLC, 2010 OEA 191.

TOPICS:

hearing	exploratory trench
confined feeding	driveway
expire	surveying
construction	field tiles
site preparation	drainage
statutory construction	culvert
<i>in pari materia</i>	detention pond
storm water	silt fences
waste management system	NPDES
manure control equipment	concentrated animal feeding operation
sub base	I.C. § 13-18-10-2.2
sub grade	I.C. § 13-11-2-40.8

PRESIDING JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Denise Walker, Esq.
Petitioner: Gerrit Arendson, pro se

ORDER ISSUED:

November 12, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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4. The IDEM received a Construction Notification Form from the Petitioner on November 2, 2007. *Jt. Stipulated Exhibit 2 and Stipulation 8.*
5. Prior to May 25, 2010, the following construction had been completed at the Site: a silt fence was installed; the entire facility had been surveyed and staked out; an exploratory trench was completed around the Site; the primary drainage was installed including tiles and earthen swales; concrete header walls for drainage culverts were constructed and 2 and ½ miles of drainage by-pass was installed to connect storm water to the designated county drain; storm water detention pond was installed; bunkers and confinement barn pads were stripped and compacted in preparation for concrete; the front drive with stone was installed; excavation of other drives was initiated. *Petitioner's Exhibit A.*
6. The exploratory trench was complete on or around July 1, 2008. *Petitioner's Exhibit B.*
7. Construction changes were proposed to the IDEM on July 31, 2008 and approved on December 5, 2008. *Petitioner's Exhibit C and D.*
8. The IDEM conducted inspections of the Site on July 7, 2009 and January 22¹, 2010. *Stipulation 9.*
9. On July 7, 2009, the inspector observed "some preliminary site grading and drainage work", but reported that none of the buildings were constructed. *Jt. Stipulated Exhibit 3.*
10. As of January 22, 2010, a drainage swale, culverts, a gravel driveway and other site preparation had been done. *Jt. Stipulated Exhibit 8.*
11. On May 25, 2010, the IDEM notified the Petitioner that the Permit had expired due to Petitioner's failure to begin construction before April 10, 2009. *Jt. Stipulated Exhibit 6.*
12. The Petitioner timely filed its petition for review on June 10, 2010. *Jt. Stipulated Exhibit 7.*
13. The OEA conducted a hearing on the petition for review on October 27, 2010.²

¹ The stipulation of facts filed on October 19, 2010 says that the inspection occurred on January 29, 2010; however, the testimony and *Jt. Stipulated Exhibit 4* support a finding that the inspection took place on January 22, 2010.

² Cause No. 10-W-J-4377, *Objections to Expiration of Individual NPDES/CAFO Construction Permit, Animal Waste No. AW-5807, Farm ID #6523, Far Hills Dairy LLC, Cass County, Indiana* was heard on the same day. The legal issues were the same. The parties stipulated to using testimony heard in *Far Hills* in support of the Petition for Review in this matter.

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Applicable Law

The Indiana Department of Environmental Management (IDEM) is authorized to implement and enforce specified Indiana environmental laws and rules promulgated relevant to those laws, pursuant to I.C. § 13. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7-3.

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 allowed. *Id.*; I.C. § 4-21.5-3-27(d). Further, 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) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).

Both the Permit and I.C. § 13-18-10-2.2 require that a permittee begin construction of a CAFO within two (2) years of the effective date of the permit. Construction is defined by I.C. § 13-11-2-40.8 as:

"Construction", for purposes of I.C. § 13-18-10, means the fabrication, erection, or installation of a facility or manure control equipment at the location where the facility or manure control equipment is intended to be used. The term does not include the following:

- (1) The dismantling of existing equipment and control devices.
- (2) The ordering of equipment and control devices.
- (3) Offsite fabrication.
- (4) Site preparation.

This case requires that the Court interpret the meaning of “site preparation.” When construing a statute or regulation, the Court must apply certain rules of statutory construction. The first rule is that when a statute or regulation is clear and unambiguous on its face, the court does not need to “apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense.” *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703-704 (Ind. 2002); *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14 (Ind.Ct.App. 2004); I.C. § 1-1-4-1(1). If the court determines that the wording of the rule or statute is unambiguous, it is not subject to interpretation. The Court may consult with English language dictionaries to ascertain a word’s common and ordinary meaning. *Fort Wayne Patrolmen's Benevolent Ass'n v. City of Fort Wayne*, 903 N.E.2d 493 (Ind. Ct. App. 2009).

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However, if the Court determines that there is ambiguity, then other rules of statutory construction shall be applied. “If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience.” *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003). “The meaning and intention of the legislature are to be ascertained not only from the phraseology of the statute but also by considering its nature, design, and the consequences which flow from the reasonable alternative interpretations of the statute. Statutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious statutory scheme.” *State v. Hensley*, 716 N.E.2d 71, 76 (Ind. Ct. App. 1999).

“Site preparation” is not defined. “Preparation” is defined by Merriam-Webster as follows:

- 1: the action or process of making something ready for use or service or of getting ready for some occasion, test, or duty
- 2: a state of being prepared: readiness
- 3: a preparatory act or measure
- 4: something that is prepared; *specifically*: a medicinal substance made ready for use <a *preparation* for colds>

“Prepare” is defined as “to make ready beforehand for some purpose, use, or activity”. 2010 Merriam-Webster, Incorporated, <http://www.merriam-webster.com/dictionary>.

Manure control equipment is not defined. However, "waste management system" is defined by 327 IAC 16-2-44 as “any method of managing manure at the confined feeding operation, including:

- (1) manure storage structures;
- (2) manure transfer systems;
- (3) manure treatment systems, such as:
 - (A) a constructed wetland;
 - (B) a vegetative management system;
 - (C) a wastewater treatment system under a valid national pollutant discharge elimination system (NPDES) permit; or
 - (D) another system approved by the commissioner;
- (4) feedlots;
- (5) confinement buildings; or
- (6) waste liquid handling, storage, and treatment systems.”

Manure storage structure” is defined by 327 IAC 16-2-24 as “any pad, pit, pond, lagoon, tank, building, or manure containment area used to store or treat manure, including any portions of buildings used specifically for manure storage or treatment.”

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CONCLUSIONS OF LAW

1. The OEA has subject matter jurisdiction to hear the petition for review. Further, the Court concludes that the petition was timely filed.
2. There is no question that the Petitioner has done a considerable amount of work at the Site. However, the question is whether the work completed by the Petitioner qualifies as “construction” as defined by I.C. § 3-11-2-40.8.
3. The IDEM maintains that the work was “site preparation” as the Petitioner had not started “construction of an approved manure control equipment.”³ IDEM argues that any work done to prepare the site for the construction of the manure control equipment is “site preparation”. Further, IDEM argues that “manure control equipment” has the same definition as “waste management system”. IDEM bases this interpretation on whether the IDEM has the authority to cite the permittee for violations relating to the completed work. If the IDEM has no regulatory authority over how the work must be done, then the IDEM considers the work to be site preparation. The fact that the permit contains specifications for the work does not necessarily mean that the IDEM has the authority to take enforcement action for a failure to meet those specifications.
4. The statute is clear that not all of the work that might be considered construction, as that term is normally used, at a CAFO qualifies as “construction” as defined by I.C. § 3-11-2-40.8 for the purpose of meeting the construction deadline.
5. The Petitioner cites to the amount of money spent on the work done at the Site. However, the statute does not reference monies expended as a qualifier for construction. Moreover, the statute specifically excludes certain activities that might require the expenditure of large sums of money such as the ordering of equipment or offsite fabrication. The Petitioner’s argument that the amount of money spent is relevant is not persuasive.
6. The Petitioner also makes the point that no effort was made to verify what work had been completed at the Site prior to expiring the permit. However, the IDEM did inspect the Site once after the construction deadline. Moreover, the rules do not require such verification.
7. I.C. § 13-11-2-40.8 is unambiguous in that it applies to the construction of a facility or manure control equipment. If one reads the statutes and rules *in pari materia*, it is clear that “facility or manure control equipment” means the same as “waste management system”.

³ Jt. Stipulated Exhibit 5.

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8. Further, the definition of “waste management system” is clear that only structures used for manure storage or treatment are manure control equipment. So, it is clear that the installation or construction of any components of a facility that are not directly related to manure storage or treatment is site preparation and does not count as “construction” of manure control equipment.
9. The storm water management system is not part of the waste management system. The purpose of the storm water system is to keep uncontaminated storm water from coming into contact with the manure or any part of the waste management systems. The permit applicant submits the details of how storm water is diverted from the production area to the IDEM for its approval, but these details are not mandated by the IDEM. The Permit requires that a Storm Water Pollution Prevention Plan be drafted and maintained at the Site but does not require IDEM’s approval.
10. The IDEM’s CAFO authority does not extend to the construction of storm water management systems. While it is true that the IDEM can take enforcement action in the event that the storm water systems fail, the basis of the enforcement action is not the failure to construct the system to certain specifications, but the release of contaminants into the environment.
11. Therefore, the construction of structures used for control of uncontaminated storm water, including but not limited to, the rerouting of field tiles, exploratory trench to locate field tiles, drains, culverts, or detention ponds, does not qualify as construction under I.C. § 13-11-2-40.8 as none of these structures are used for the actual storage or treatment of manure or process wastewater.
12. Further, driveways, silt fences and surveying clearly are not part of the waste management system. None of these structures are used for the actual storage or treatment of manure or process wastewater and do not qualify as construction under I.C. § 13-11-2-40.8.
13. On May 7, 2010, the IDEM sent out a message via electronic mail⁴ that iterated its interpretation of “construction”. The pertinent portion of this e-mail relating to construction states, “a facility is not considered to have started construction unless, they have started construction of an approved manure control equipment and in the location it was approved to be placed. The construction is also expected to meet the approved design specifications and any requirements established by the agency and within the approval. Items that will not be considered starting construction for the purpose of I.C. § 13-18-10-2.2 are as follows; installation of a concrete pad in the wrong location and not meeting agency design specs, installation of a post, flags or markers delineating structure locations or drainage tiles and, site preparation including driveway construction and installation of utilities.”

⁴ At least two of the Petitioner’s witnesses received this e-mail, Brian Daggy and Michael Veenhuizen.

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14. This communication is not decisive of the issues in this case because (1) it was sent after the Petitioner's construction deadline had passed; (2) there is no indication in the email whether this was published as a non rule policy document pursuant to I.C. § 13-14-1-11.5; and (3) OEA proceedings are *de novo* so IDEM's interpretation is not entitled to any deference. However, this email is useful for clarifying the IDEM's interpretation. The IDEM's interpretation is consistent with the ELJ's conclusions relating to clean storm water systems and other structures described in Conclusions of Law 6 and 7 above.
15. The only construction that may qualify as construction of manure control equipment is the preparation of the soil pad for the confinement barns. The pads (also referred as the sub base and sub grade) are necessary for the proper construction of the barns and other structures. The pads are an important part of the construction of the confinement barns, (which are clearly part of the waste management system pursuant to 327 IAC 16-2-44(5)). The IDEM does not make any argument that the confinement barns are not part of the waste management system. However, the IDEM argues that the construction of the pads is not regulated by the IDEM, unlike the construction of the actual structure, including the concrete floor which sits upon the pad.
16. The specifications for the soil pad are proposed by the applicant. The IDEM reviews and approves these specifications for the purpose of ensuring that the waste management system, as designed, will perform as required. However, the ELJ can find no specific regulations requiring that the pads meet certain specifications. In contrast, there are regulations that specify design requirements for the actual manure storage and treatment structures, depending on whether the manure is liquid or solid and whether the structure will be concrete or earthen.
17. The Merriam-Webster definition supports a conclusion that the soil pads are "site preparation". The soil pads are installed in order to prepare for the pouring of the concrete structure, that is, "to make ready beforehand for some purpose, use, or activity". The installation of the soil pads serves no other purpose than to prepare the area for the construction of the manure management system.
18. The installation of soil pads in preparation for the pouring of the concrete manure management systems is not construction as defined by I.C. § 13-11-2-40.8.
19. The Petitioner has failed to meet its burden of proof in this matter. Boerman Carroll Dairy LLC failed to begin construction of the manure management system prior to April 10, 2009. NPDES CAFO Individual Permit #INA006477 has expired.

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FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition for Review filed by Boerman Carroll Dairy LLC is hereby **DISMISSED** and the judgment is entered in favor of the Indiana Department of Environmental Management.

You are hereby further notified that pursuant to provisions of I.C. § 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 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 12th day of November, 2010 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge