

**Objection to the Denial of Solid Waste Facility Permit
Boone County Resource Recovery Systems, Inc. Boone County, Indiana
2000 OEA 54 (00-S-J-2453)**

TOPICS:

summary judgment
construction/demolition landfill permit
c/d
owned/operated
officers
directors
responsible parties
Indiana Department of Environmental Management v. Northside Landfill, Cause No. N-95
clean fill operation
container collections operation
superfund
sanitary landfill
local zoning ordinance
repeatedly violated state or federal environmental protection laws
piercing the corporate veil
equitable remedy
estopped
good character
accurate information
complete information
formal allegation
public agency
repeatedly

PRESIDING JUDGE:

Lasley

PARTY REPRESENTATIVES:

Petitioner: David S. Biderman; S. Gregory Zubek, Esq.; Carol Sparks Drake, Esq.
IDEM: Aaron Schmoll, Esq.

ORDER ISSUED:

October 26, 2000

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

Yes

**Objection to the Denial of Solid Waste Facility Permit
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STATE OF INDIANA)
) SS: BEFORE THE OFFICE OF
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE DENIAL OF)
SOLID WASTE FACILITY PERMIT)
BOONE COUNTY RESOURCE) CAUSE NO. 00-S-J-2453
RECOVERY SYSTEMS, INC.)
BOONE COUNTY, INDIANA)

FINAL ORDER GRANTING IDEM’S MOTION FOR SUMMARY JUDGMENT

I. Statement of the Case:

On January 5, 2000, Boone County Resource Recovery Systems, Inc. (BCRRS) filed for administrative review of an IDEM decision to deny its construction/demolition (c/d) landfill permit. After discovery and depositions, the Indiana Department of Environmental Management (IDEM) filed a Motion for Summary Judgment. BCRRS filed its response on August 18, 2000 and IDEM filed its reply on September 5, 2000. A three day hearing is currently set for November 1, 2 and 3, 2000.

II. Issue:

The issue in this case is whether IDEM properly denied BCRRS’s application for a c/d landfill permit.

III. Undisputed Facts:

The Environmental Law Judge finds the following facts undisputed:

1. Northside Sanitary Landfill, Inc. (NSLI) was owned by Jonathan Bankert, Sr., Jonathan Bankert, Jr., Cindy Russell, Robert Bankert, Gregory Bankert and Kathryn Bankert. Jonathan Bankert, Jr., Cindy Russell and Kathryn Bankert were either officers or directors for NSLI.
2. NSLI operated the Northside Sanitary Landfill. The landfill was shut down in 1991 and its assets were disposed of by court order.

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3. On February 2, 1987, the Solid Waste Management Board issued Findings of Fact, Conclusions of Law and Order in Indiana Department of Environmental Management v. Northside Sanitary Landfill, Inc., Cause No. N-95. The decision concludes, in part, that “due to the business practices, waste management techniques, and operational practices on the permitted landfill site, the nature of the substances placed on or disposed of in it, and the nature of the surface and subsurface in the area, a remedy is necessary in order to reasonably protect the public health and environment.” Final Order, page 73.
4. In addition, the order provides that it applies to “the parties’ agents, successors, employees, servants and assigns, and to all other persons, firms or corporations acting through or on behalf of the parties.” Final Order page 104.
5. In 1983, Bankert Farms, Inc. (BFI) was formed and was owned by Jonathan Bankert, Jr., Cindy Russell, Robert Bankert, Gregory Bankert and Kathryn Bankert. All of the Bankert children served as either officers or directors for BFI.
6. BFI operated a clean fill operation north of the Northside Sanitary Landfill. BFI merged with BCRRS in 1997.
7. In 1988, BCRRS was formed and is owned by Jonathan Bankert, Jr., Cindy Russell, Robert Bankert, Gregory Bankert and Kathryn Bankert. All of the Bankert children serve as either officers or directors for BCRRS.
8. BCRRS operated a container collection system in Boone County for more than ten years. It only began landfilling operations when it merged with BFI in 1997.
9. On June 5, 1992, the trustees of the Northside Sanitary Landfill (trustees) filed a Verified Application for Preliminary Injunction against BFI, BCRRS, Patricia Bankert, Jonathan Bankert, Jr., Cynthia Russell, Robert Bankert and Gregory Bankert. The Boone County Superior Court, on August 29, 1992, entered Findings of Fact, Conclusions of Law and Order of Preliminary Injunction enjoining the parties from placing “clean” or “non-clean” solid waste on the land they own in Boone County. The court specifically held: “The operation of the Parcel 26 Landfill has and will continue to specially harm the plaintiffs interests in real property, both by delaying and making more costly the design, construction and completion of the Superfund remedy at the Northside Sanitary Landfill.” Additionally, the court found that BFI had placed solid waste on land, which constituted the operation of a “sanitary landfill” and such operation was prohibited by a local zoning ordinance. Injunction pages 6-7.
10. On September 15, 1998, the trustees filed a Petition for Administrative Review of an IDEM decision to grant BCRRS a c/d landfill permit. Objection to the Issuance of Solid Waste Facility Permit #FP-06-07, Boone County Resource Recovery Systems, Inc., Cause No. 98-S-J-1994. This office entered an order granting summary judgment in favor of the trustees, concluding BCRRS had obtained the permit in violation of the Good Character and Financial Statement statutes.

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11. On December 31, 1998, BCRRS again applied for a c/d landfill permit.
12. On December 22, 1999, IDEM denied the permit application because “the applicant or a responsible party has knowingly and repeatedly violated state or federal environmental protection laws....“ In addition, the denial also states that “the applicant has a repeated history of repeated violations of the Environmental Protection Acts” and that the commissioner has revoked the applicant’s previous permit to operate.
13. BCRRS appealed timely the final decision by IDEM denying its permit application.
14. Bruce Palm is a duly authorized designee for the Commissioner of IDEM.
15. Nothing in the statute or regulations requires personal knowledge on the part of the Commissioner of IDEM or her designee in order to deny a permit application if she finds that an applicant or responsible party knowingly and repeatedly violated environmental laws.
16. Piercing the corporate veil is an equitable remedy. This office does not have the authority to exercise equitable principles. *See, Ninth Avenue Remedial Group. et al.. v. Allis-Chalmers Corporation. et al.*, 195 B.R. 716, 727 (N.D. Ind. 1996) (“the successor doctrine is derived from equitable principles. . .”) and *Winkler v. G. Reed and Sons. Inc.*, 638 N.E.2d 1228, 1232 (Ind. 1994) (“when a court exercises its equitable power to pierce a corporate veil. . .”).
17. IDEM is estopped from arguing that it revoked BCRRS’ permit. During the administrative litigation in Cause No. 98-S-J-1994, counsel for IDEM filed a statement indicating that it believed the permit issued was “*void ab initio.*” Therefore, IDEM cannot now argue it revoked the permit, especially since it was declared void.
18. Because the 1998 permit was declared void, BCRRS cannot rely on the Good Character analysis completed by IDEM.

IV. Discussion:

IDEM moves for summary judgment because it believes BCRRS and its responsible parties have a history of noncompliance with the environmental laws. It cites three examples in support of this proposition. First, it contends that the responsible parties were involved with the operations of the Northside Sanitary Landfill, which is now a Superfund site. These same responsible parties were also involved with BFI’s “clean fill” site, which was enjoined by the Boone County Superior Court. Second, IDEM argues that BCRRS was also responsible for the operations at the Northside Sanitary Landfill and BFI’s “clean fill” site. It also believes that BCRRS has evidenced an inability or unwillingness to comply with state environmental laws. Third, IDEM states that since it revoked BCRRS’s permit in 1998, it was appropriate to deny BCRRS’s current c/d landfill application.

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BCRRS counters the above arguments first with an argument that IDEM failed to properly designate its evidence for summary judgment and second, with the argument that neither BCRRS or its responsible parties are successors for either NSLI or BFI. Furthermore, BCRRS also notes that neither IDEM nor the Environmental Protection Agency (EPA) ever cited BCRRS or its responsible parties for knowing and repeated violations of the state environmental laws. It urges the Environmental Law Judge to deny the Motion for Summary Judgment because (1) the violation in the Johnson case only relates to a zoning violation, (2) IDEM once before approved BCRRS's good character, (3) the denial of BCRRS's current application was by the Assistant Commissioner, and (4) IDEM did not revoke a valid permit issued to BCRRS.

For the following reasons, IDEM's motion must be granted. BCRRS and its responsible parties failed to provide accurate information, regarding each's history, in their Good Character Disclosure Statements. If such information had been provided, it is clear that the Commissioner of IDEM, or her designee, could conclude BCRRS, and its responsible parties, has a history of noncompliance with the environmental laws.

A. The Bankert Children and BCRRS Did Not Submit Complete Information

While not specifically addressed in IDEM's Motion for Summary Judgment, it is clear after reviewing the pleadings and exhibits in this matter, that the Bankert children and BCRRS failed to include important information in their Good Character Disclosure Statements. The Good Character Law provides:

Before an application for the issuance, renewal, transfer, or major modification of a permit described in IC 15-15-1-3 may be granted, the applicant and each person who is a responsible party with respect to the applicant must submit to the department:

- (1) a disclosure statement that:
 - (A) meets the requirements set forth in section 3(a) of this chapter; and
 - (B) is the executed under section 3(b) of this chapter; or
- (2) all of the following information:...
 - (B) A description of all judgments that:
 - (i) have been entered against the applicant or responsible party in a proceeding described in section 3(a)(3) of this chapter; and
 - (ii) have imposed upon the applicant or responsible party a fine or penalty described in section 3(a)(3)(A) of this chapter...

Indiana Code § 13-19-4-2. The information in subsection 3(a)(3) states:

A description of all civil and administrative complaints against the applicant or responsible party for the violation of any state or federal environmental protection law that:

- (A) have resulted in a fine or penalty of more than ten thousand dollars (\$10,000) within five (5) years before the date of the submission of the application; or
- (B) allege an act or omission that:
 - (i) constitutes a material violation of the state or federal environmental protection law; and
 - (ii) presented a substantial endangerment to the public health or the environment...

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Ind. Code § 13-19-4-3. Under the above provisions, an applicant or responsible party can either disclose all judgments entered against them that imposed a fine or penalty OR disclose all civil and administrative complaints filed against them, which alleged a violation of state environmental law. In this case, both BCRRS and the Bankert children have had civil and administrative complaints filed against them, and yet, none of the parties revealed this in their Good Character Disclosure Statements.

The dictionary defines a complaint as “a formal allegation against a party.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 235 (10th ed. 1993). Here, there have been two formal allegations filed against the Bankert children. First, in Indiana Department of Environmental Management v. Northside Sanitary Landfill, Inc., Cause No. N-95, the Solid Waste Management Board entered an order against NSLI. The order specifically provides “the provisions of this Order shall apply to the parties’ agents, successors, employees, servants and assigns, and to all other persons, firms or corporations acting through or on behalf of the parties.” Final Order page 104. At the time this order was entered, Jonathan Bankert, Jr., Cindy Russell and Kathryn Bankert all served as either directors or officers in NSLI. Affidavit of Cindy Russell. Greg Bankert was a foreman for the landfill before 1989 and has served as operations manager since 1989. Greg Bankert Deposition page 21. Robert Bankert was an employee of NSLI. Robert Bankert Deposition page 8. Thus, each of the Bankert children either had responsibility for and/or were employed by NSLI. In their defense, the Bankert children complain they never had “decision-making” authority in NSLI. Such a claim, however, is completely self-serving because there are no documents to support it. When many of the facts “about which there is uncertainty were peculiarly within the knowledge of the appellant, [then] such a situation may give rise to an inference that if these had been fully disclosed they would have been unfavorable.” Morris v. Buchanan, 44 N.E.2d 166, 169 (Ind. 1942).

Along with requiring the responsible parties to comply with the terms of the order, it also concludes there were material violations of the environmental statutes. Specifically, it states “the NSL permitted site continues to release and threaten to release chemicals to the surface and groundwater so as to significantly impair, threaten and pollute the environment of the State of Indiana in violation of IC 13-1-3-8 and 13-7-4-1(a), (b) and (f).” Final Order page 72. It also found a substantial endangerment to the environment. Final Order page 73. Thus, the final order should have been included on the Bankerts disclosure form and IDEM has carried its burden of demonstrating, at the time this order was entered, that at least four of the Bankert children were responsible parties in NSLI and one was an employee of NSLI. The burden then shifted to the Bankerts to present evidence refuting IDEM’s claim. No such evidence was offered.

Second, in Keith Johnson. et al. v. Bankert Farms. Inc., Boone County Resource Recovery Systems, Inc., Northside Sanitary Landfill, Inc., Patricia Bankert, Jonathan W. Bankert, Jr., Cynthia A. Russell, Robert Bankert And Gregory Bankert. Boone County Superior Court, Cause No. 06D01-9205-CP-145, the trustees filed suit against BCRRS and the Bankert children for operating a landfill without proper zoning. The court entered an injunction against the Bankert children and BCRRS. The trial court held that BFI received solid waste and operated a sanitary landfill. All of the Bankert children were responsible parties for BFI. In addition, this finding is credible evidence on the issue of violating state environmental protection laws.

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329 IAC 10-11-1(a) prohibits the operation of a sanitary landfill without a permit. The state definition of solid waste and sanitary landfill are identical to the definitions considered by the trial court judge. Furthermore, the parties involved in this case are almost identical to the parties involved in the injunction proceedings (the exception being Patricia Bankert). This is a classic case of collateral estoppel.

Generally, collateral estoppel serves to “bar a subsequent re-litigation of the same fact or issue where the fact or issue was necessarily adjudicated in a former suit.” Tofany v. NBS Imaging Systems, Inc., 616 N.E.2d 1034, 137 (Ind. 1993). Basically, IDEM is attempting to assert offensive collateral estoppel in this case. Considerations for the application of offensive collateral estoppel are:

- (1) whether the plaintiff could have participated in the previous lawsuit,
- (2) whether the defendant had a full and fair opportunity to litigate the issue, and
- (3) whether it would be unfair to the defendant to apply the doctrine given the facts of the particular case.

Id. Another consideration is whether there was an incentive for the defendant to litigate the prior action, taking into account the interests at stake and whether the defendant was able to engage in discovery. *Id.* at 1039. First, it is true that IDEM could have participated in the Boone County case. But, a government agency is not the same as a private party when it comes to litigation. A public agency must take into account the cost of litigation and whether its interests will be represented in its absence. In fact, IDEM’s interests were adequately represented by the trustees because they were able to obtain an injunction to prevent further waste disposal. Second, from the trial court’s findings, the Bankerts did have a fair opportunity to litigate their case. Third, there was a strong incentive to litigate because it was alleged the BFI sanitary landfill would impact the remedy at the Northside Sanitary Landfill. If true, it could have cost the Bankerts millions to correct the harm. While not completely clear from the trial court’s order, it seems extensive discovery was allowed as evidenced by the numerous depositions IDEM offered in support of its motion, which were all taken in the Boone County case. Hence, there would be no point to holding a hearing on this matter because the parties are the same and the testimony would be the same. No doubt the Bankert children already made the argument before the trial court that only a “few non-clean fill” items made it onto the site. The trial court, however, soundly rejected the argument. Accordingly, it would not be unfair for this tribunal to apply offensive collateral estoppel because the Bankerts and BCRRS had an opportunity to litigate the issue and the trial court still found there was a sanitary landfill on the site.

Therefore, the trial court’s finding “constitutes” a material violation of state environmental protection laws because neither BCRRS or the Bankert children had a state permit to operate the sanitary landfill. Moreover, the trial court also found “the operation of the Parcel 26 Landfill has and will continue to specially harm the plaintiffs interests in real property, both by delaying and making more costly the design, construction and completion of the Superfund remedy a the Northside Sanitary Landfill.” This finding certainly supports the conclusion that the parties’ acts presented a substantial endangerment to environment. As a result, the Bankert children should have included this civil complaint in their disclosure statements.

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Additionally, it is clear from the above analysis regarding the Johnson case that BCRRS should have also included the civil complaint in its disclosure statement as the applicant. It should have disclosed the administrative complaint filed against it by the trustees in Objection to the Issuance of Solid Waste Facility Permit #FP-06-07, Boone County Resource Recovery Systems, Inc., Cause No. 98-S-J-1994, filed on April 9, 1998. In that case, the trustees alleged BCRRS obtained its c/d landfill permit without disclosing its merger with BFI. The Environmental Law Judge agreed, and entered an order granting summary judgment in favor of the trustees. In the order, BCRRS was found to have illegally obtained the c/d landfill permit because it had not complied with the Good Character and Financial Statement statutes. These constitute material violations of state environmental protection laws. The legislature recognizes the importance of granting permits to individuals who will uphold the environmental laws of the state and have the financial ability to do so. Nothing presents a more substantial threat to the environment than to allow parties to operate a landfill when they have a history of not complying with the environmental laws. To hold otherwise would render those statutes meaningless. In short, IDEM is entitled to judgment as a matter of law because BCRRS and the Bankert children, as responsible parties, failed to comply, again, with the Good Character Statute by not disclosing that they had civil and administrative complaints filed against them.

B. IDEM Properly Denied BCRRS's Permit Application

By enacting the Good Character Statute, the Indiana Legislature understood the need to investigate an applicant's or responsible party's background. Undoubtedly, this authority stems from the problem of abandoned landfill sites in Indiana. It addressed this problem by giving IDEM the authority to deny a permit application if the commissioner finds that:

- (2) a civil or administrative complaint described in section 3(a)(3) of this chapter has been filed against the applicant or a responsible party within five (5) years before the date of submission of the application;. . . or
- (5) the applicant or responsible party has knowingly and repeatedly violated any state or federal environmental protection laws.

Ind. Code § 13-19-4-5. The Commissioner could find a violation of subsection (2) in this case because an administrative complaint had been filed against BCRRS within five years of it submitting an application. And, the Commissioner could easily conclude BCRRS and its responsible parties, the Bankert children, have knowingly and repeatedly violated state environmental protection laws. The "knowingly" element is satisfied because BCRRS and the Bankert children are charged with knowledge of the laws of this state, especially in the highly regulated field of solid waste management. *See, Advisory Board of Zoning Appeals of City of Hammond v. Foundation for Comprehensive Mental Health, Inc.*, 497 N.E.2d 1089, 1093 (Ind.Ct.App. 1 986)("persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."). "Repeatedly" is simply defined as "again and again." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 991 (10th ed. 1993). Here, both BCRRS and the Bankert children had more than one complaint filed against them. While BCRRS advocates limiting this subsection also to five years before submitting an application, no such limitation exists in the statute. Indeed, it would be

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myopic of IDEM to ignore the clear history of environmental noncompliance in this case. The fact that a party has not continuously violated the environmental laws makes no difference since it often takes many years for environmental damage to be discovered. The passage of time and the limits of technology should not work in a permit applicant's favor.

Likewise, IDEM appropriately denied BCRRS's application under 329 IAC 10-11-1(c)(3), which allows the commissioner to deny a permit application if the applicant "has a history of repeated violations of the environmental laws or regulations or material permit conditions that evidence an inability or unwillingness to comply with requirements of this article or a facility permit." BCRRS is the applicant in this case. As noted above, it has been found to have violated, on more than one occasion, the environmental laws. In fact, the violations in this case are essentially identical to the violations found in 1998; namely, a failure to provide complete and accurate information in its permit application. Based on this, it is plain to see how the Commissioner of IDEM concluded BCRRS had a history of repeated violations of the environmental laws that evidence an inability or unwillingness to comply with the requirements of the solid waste management laws.

Despite their arguments to the contrary, the Bankert children are responsible parties in at least three corporations, which all had civil and administrative complaints filed against them alleging violations of state environmental protection laws. The Bankerts could have included this information in their disclosure statements and characterized it in whatever way they felt was fair. By not including the information, unfortunately, they again violated the environmental laws and gave IDEM a reasonable basis for denying the permit application filed by BCRRS.

V. Conclusions of Law:

The Environmental Law Judge concludes as a matter of law, based on the foregoing Undisputed Facts and Discussion, that:

1. Jonathan Bankert, Jr., Cindy Russell, Robert Bankert, Gregory Bankert and Kathryn Bankert are responsible parties for NSLI, BFI and BCRRS as the term is defined in md. Code 13-11-1-191;
2. Each Bankert had a duty to disclose the administrative and civil complaints filed against them pursuant to Ind. Code § 13-19-4-2 and 3;
3. BCRRS also had a duty to disclose the administrative and civil complaints filed against it pursuant to Ind. Code § 13-19-4-2 and 3;
4. the Commissioner of IDEM properly denied BCRRS's permit application pursuant to Ind. Code §13-19-5-2 and 5 and 329 IAC 10-1 1-1(c)(3); and
5. the Administrative Orders and Procedures Act does not require strict compliance with the Indiana Trial Rules of Procedure (Ind. Code §4-21.5-3-25(b)).

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VI. Order:

IDEM's Motion for Summary Judgment is hereby **GRANTED** and the Commissioner's decision to the deny the construction/demolition landfill application by BCRRS is hereby **UPHELD**. The hearing set for November 1, 2 and 3, 2000 is hereby **VACATED**.

You are further notified that pursuant to provisions IC 4-21.5-7, 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 Final Order is subject to Judicial Review consistent with applicable provisions of IC 4-2 1.5. 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 in Indianapolis, Indiana this 26th day of October 2000.

Linda C. Lasley
Environmental Law Judge