

**Objection to the Approval of Minor Modification to Solid Waste Facility**  
**Permit No. FP65-06**  
**Springfield Environmental C/D Site**  
**Mount Vernon, Posey County, Indiana**  
**2012 OEA 45, (11-S-J-4521)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2012 OEA 45 cite this case as  
*Springfield Environmental General Partnership, 2012 OEAE 45.*

**TOPICS:**

Summary Judgment  
dismissal  
solid waste  
construction debris  
shingles  
modification  
*Huffman*  
aggrieved or adversely affected  
pro se  
representation  
Ind. Admis. & Disc. Rule 3 §2  
I.C. §13-19-4-2  
I.C. §4-21.5-3-15  
public standing  
compliance history  
noncompliance  
leachate control

**PRESIDING JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM:	Julie Lang, Esq.
Petitioners:	self-represented, appeared by agreement by Clarence Clowers
Permittee/Respondent:	Amy Romig Esq., Sue Shadley Esq.; Plews, Shadley, Racher & Braun

**ORDER ISSUED:**

June 27, 2012

**INDEX CATEGORY:**

Solid waste

**FURTHER CASE ACTIVITY:**

[none]

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**FINDINGS OF FACT**

1. On October 24, 2011, the IDEM issued the Approval of Minor Modification to Solid Waste Facility Permit FP 65-06 (the Minor Modification) to Springfield Environmental General Partnership (Springfield) for the Springfield Environmental C/D<sup>1</sup> site (the Site) in Posey County, Indiana.
2. The Site is permitted to accept off-specification shingles from the GAF plant in Mount Vernon, Indiana. It may also accept construction debris.<sup>2</sup> The Minor Modification allows the Facility to conduct shingle excavation and grinding for purposes of recycling. The Minor Modification contains conditions specific to the excavation and grinding operations.
3. Clarence Clowers, Mark Duckworth, Roger T. Horacek, James Ries, James Wyatt, and Tim McCloud, the original Petitioners, filed their petition for review on November 9, 2011. The Petitioners allege that they own and reside on properties adjacent to the Site and that they will suffer harm from pollution from the Site.
4. An amended petition for review was filed on January 17, 2012. A “Statement Allowing for Representation” was attached to the amended petition. Mark Duckworth, Roger T. Horacek, James Ries, James Wyatt, Tim McCloud, Kenneth J. Juncker, Gerald F. King, and Woodie Puntney affirm that they agree to allow Clarence Clowers to represent them and their interests. Kenneth J. Juncker, Gerald F. King, and Woodie Puntney were not signatories to the original petition for review.
5. The Petitioners assert, in their petition for review, that the Minor Modification should not have been issued for the following reasons:
  - a. It will contribute to water pollution, namely streams and the Petitioners’ water wells and possible impact on wetlands.
  - b. Irreversible property damage.
  - c. Past non compliance with various permit conditions including allowing waste to migrate off-site.
  - d. Failure to obtain appropriate permits for noise, air and water.
  - e. Negative affect upon “community quality of life” and Petitioners’ property values
  - f. Failure to consider any affect that the construction of Highway 69 may have upon floodways.

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<sup>1</sup> Construction/demolition

<sup>2</sup> Permittee Springfield Environmental General Partnership’s Motion for Summary Judgment, Exhibit A, Affidavit of Kevin Phelps, filed on February 29, 2012.

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6. The IDEM and Springfield filed their separate motions for summary judgment on February 29, 2012; the Petitioners filed their response on April 9, 2012; the IDEM and Springfield filed their separate replies on April 24, 2012. Springfield's request for oral argument was denied on May 16, 2012.

**Applicable Law**

The OEA 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.*; Ind. Code (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, 809 (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).

The Respondents (IDEM and Springfield) have moved for summary judgment. The Court may enter judgment for a party if it finds that "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Tr. R. 56(C); I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

A party opposing summary judgment must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991); *citing Elkhart Community School Corp. v. Mills*, 546 N.E.2d 854 (Ind. Ct. App. 1989). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Ind. Tr. R. 56(E). An opposing party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact as to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan v. Snap-On Tool Corp.*, 478 N.E.2d 116, 122 (Ind. Ct. App. 1985). Factual disputes that are irrelevant or unnecessary will not be considered. *Owen v. Vaughn*, 479 N.E.2d 83, 87 (Ind. Ct. App. 1985). Once a moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. However, Ind. Tr. R. 56(C) states: "Summary judgment shall not be granted as of course because the

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opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court.”

The Respondents argue that the Court should enter judgment as a matter of law on some of Petitioners’ claims. This is more in the nature of a motion to dismiss rather than a motion for summary judgment. In reviewing a motion to dismiss brought under Ind. Tr. R. 12(B)(6) for a failure to state a claim upon which the Court can grant relief, the OEA is required to take as true all allegations upon the face of the petition and may only dismiss if the petitioners would not be entitled to recover under any set of facts admissible under the allegations of the petition. *Huffman v. Indiana Office of Environmental Adjudication*, 811 N.E.2d 806, 813 (Ind. 2004). The OEA must view the pleadings in the light most favorable to the nonmoving party and must also draw every reasonable inference in favor of that party. *Id.*; *Lattimore v. Amsler*, 758 N.E.2d 568 (Ind. Ct. App. 2001). A motion to dismiss because the Petitioner is not aggrieved or adversely affected is properly brought under Ind. Tr. R. 12(B)(6). *Id.*

Springfield asserts various reasons why the Petitioners should be dismissed. The Administrative Orders and Procedures Act, I.C. § 4-21.5-3 (AOPA) mandates that requests for review must be submitted with specific time frames<sup>3</sup>. Any person who fails to meet the deadline waives their right to challenge the agency action. If an agency modifies a permit, an aggrieved or adversely affected person may object to only those terms and conditions that were modified. All other terms and conditions remain in effect and any attempts to object to the unaffected terms should be dismissed as untimely.

In addition, in order to bring a petition for review, a person must be “aggrieved or adversely affected”. I.C. § 4-21.5-3-7. The Indiana Supreme Court held, in *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806 (Ind. 2004) 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.” at 810. The Court further interpreted the language of I.C. § 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public.

I.C. § 4-21.5-3-15 states:

- (a) Any party may participate in a proceeding in person or, if the party is not an individual or is incompetent to participate, by a duly authorized representative.
- (b) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, unless prohibited by law, by another representative.

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<sup>3</sup> I.C. §4-21.5-3-7.

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Ind. Admis. & Disc. Rule 3 §2, requires attorneys appearing in an administrative proceeding, who are not admitted to practice in Indiana, to request temporary admission from the Indiana Supreme Court.

In addition, the Respondents argue that some of the Petitioners' objections cannot be heard by the OEA. Just as the IDEM does not have the authority to act in a manner inconsistent with the authority explicitly granted to it by the legislature, neither can the OEA. "An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law." *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003). IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations. The IDEM may only consider those factors specified in the applicable regulations in deciding whether to issue a permit. As the ultimate authority for the IDEM, the OEA's authority is limited by statute (I.C. § 4-21.5-7-3) to determining whether the IDEM decision complies with the applicable statutes and regulations. If the IDEM does not have the regulatory authority to address certain issues, the OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues.

One of the Petitioners' main complaints is that Springfield has not complied with its permit conditions in the past and therefore, it was improper for the IDEM to approve the Minor Modification. The IDEM has only limited authority to consider whether a regulated entity's past non-compliance should prevent that entity from receiving a permit. I.C. § 13-19-4-2 provides that before the issuance, transfer or major modification of a permit for a solid waste processing facility, the applicant must disclose any previous history with solid waste facilities, including a history of non-compliance. The action at issue in this case is a minor modification. As such, Springfield was not required to disclose past non-compliance. In addition, the OEA has consistently held it will not revoke a permit upon speculation that a facility will not operate in accordance with its permit. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana*, 1998 WL 918589, at 17 (Ind. Off. Env'tl. Adjud.).

**CONCLUSIONS OF LAW**

1. 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.
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.

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3. The IDEM and Springfield, as the moving parties, have the burden of proving that there are no genuine issues of material fact. If they present sufficient evidence to establish a prima facie case in favor of summary judgment, the burden then shifts to the Petitioners to establish a factual issue. However, the ELJ must determine whether summary judgment is appropriate based on the evidence designated in support thereof, not based on the mere absence of evidence submitted in opposition.
4. Further, although Springfield and IDEM have asked for summary judgment, in those instances where the parties are requesting the Court determine that, *as a matter of law*, Petitioners' claims do not state a claim upon which relief can be granted, the appropriate standard is that of dismissal.

**Are Petitioners aggrieved or adversely affected?**

5. The Petitioners have stated that they own and reside on properties adjacent to the Site. Further, they allege that they will suffer harm from the operation of the Site. This is sufficient to show that they are personally aggrieved or adversely affected under the standard for dismissal.
6. However, under the *Huffman* standard, the Petitioners may not petition for review on behalf of the community or public concerns. The Petitioners' claim that this Minor Modification will result in "diminished community quality of life" and any other claims made on behalf of individuals who are not Petitioners in this matter should be dismissed as this fails to state a claim upon which the Court can grant relief.
7. Springfield has requested summary judgment but has failed to present sufficient evidence to create a prima facie case. It relies instead on arguments that the Petitioners, as a matter of law, have failed to state a claim for relief; that is, the Petitioners allege that they will be harmed by "speculative harms that may occur from operational noncompliance"<sup>4</sup>. As Springfield has failed to meet its burden, summary judgment should be denied as to whether the Petitioners are aggrieved or adversely affected.

**May Clowers represent the other Petitioners?**

8. The original petition for review was filed on November 9, 2011. This was signed by Clarence Clowers, Mark Duckworth, Roger T. Horacek, James Ries, James Wyatt, and Tim McCloud. The amended petition for review was filed on January 17, 2012 and was signed by Clarence Clowers, Mark Duckworth, Roger T. Horacek, James Ries, James Wyatt, Tim McCloud, Kenneth J. Juncker, Gerald F. King, and Woodie Puntney.

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<sup>4</sup> Permittee Springfield Environmental General Partnership's Motion for Summary Judgment, filed February 29, 2012, pg. 13.

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9. The amended petition for review purports to add Kenneth J. Juncker, Gerald F. King, and Woodie Puntney to this matter. However, the time deadline for filing a petition for review had passed when Mr. Juncker, Mr. King and Mr. Puntney added their names to the Amended Petition for Review. Therefore, Mr. Juncker, Mr. King and Mr. Puntney were not timely in filing for review and must be dismissed as Petitioners.
10. Springfield argues that all of the Petitioners, other than Mr. Clowers, should be dismissed as they have failed to appear or respond to the Motion for Summary Judgment. They point to the Indiana Admission and Disciplinary Rules, specifically, Ind. Admis. & Disc. Rule 3 §2, which requires attorneys not admitted to practice in Indiana, to request temporary admission from the Indiana Supreme Court. However, AOPA (I.C. § 4-21.5-3-15) is clear that a party may represent themselves or others (if not prohibited by law). Springfield argues that Mr. Clowers representing the other Petitioners is the unauthorized practice of law. The presiding ELJ, considering the AOPA provision, is not convinced that Ind. Admis. & Disc. Rule 3 § 2 mandates a conclusion that Mr. Clowers may not represent the remaining Petitioners and that dismissal of these Petitioners is proper. Therefore, Springfield's motion should be denied.
11. It is clear that the other Petitioners (that is, Mark Duckworth, Roger T. Horacek, James Ries, James Wyatt, and Tim McCloud) have agreed to be bound by the resulting determination by this Court. Therefore a dismissal or summary judgment entered in this matter is legally binding upon all of the Petitioners.

**Issues Outside of OEA's Authority to Review**

12. The OEA's review is limited to those terms and conditions of the permit that were modified by the Minor Modification. Objections to unmodified terms and conditions are not timely filed as these should have been raised at the time the original permit was issued. The Minor Modification does not modify the original permit's terms regarding cover or ground water monitoring. Further, the Minor Modification does not change the facility's boundaries. Therefore, those allegations of error concerning whether the facility lies in a flood plain, or requirements for cover or groundwater monitoring should be dismissed. Specifically, Paragraphs 1, 3, 10 and 11 in the Petitioners' Response to Motion for Summary Judgment address the Petitioners' contentions relating to these issues and should be dismissed.
13. The Petitioners complain that the Minor Modification will cause "irreversible property damage" and "further erosion of property value for all petitioners". There is no rule or statute that requires the IDEM to consider the affect of a permit upon the property values of adjacent properties. Therefore, the OEA may not consider this factor in determining whether the Minor Modification was properly issued. Any claims that the Minor Modification was not properly issued for this reason are dismissed.

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14. Further, the Petitioners question whether Springfield has obtained the necessary permits for air, water and noise. The only permit at issue in this matter is the Minor Modification, which regulates the solid waste activity at the Site. Any questions regarding air, water, or noise are outside of the scope of the OEA's review of the Minor Modification. Any claims that the Minor Modification was not properly issued for this reason are dismissed.

**Allegations of past non-compliance**

15. The action to which the Petitioners object is the approval of the Minor Modification. The Petitioners allege that the Minor Modification should not have been issued because Springfield failed to comply with its permit conditions in the past. I.C. §13-19-4-2 allows the IDEM to consider past compliance history for the issuance of permits or *major* modifications. As this is only a minor modification, I.C. §13-19-4-2 does not apply. Springfield was not required to disclose its compliance history and the IDEM was not required to examine the facility owner's compliance history.

16. Furthermore, unless compliance history is a factor that may be considered, evidence of past non-compliance or allegations that a facility might not operate in accordance with the terms and conditions of its permit, does not constitute sufficient reliable evidence to prove that the permit should not have been issued. The OEA has consistently held it will not revoke a permit upon speculation that a facility will not operate in accordance with its permit. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589, at 17 (Ind. Off. Envtl. Adjud.)*.

17. The Petitioners point to the operational requirements contained in 329 IAC 10-36 as support for their argument that the Minor Modification should not have been approved. However, while Springfield must comply with 329 IAC 10-36, the Petitioners have presented no evidence that Springfield is incapable of complying with the rule. The Petitioners state their objections to the methods set out in the Minor Modification, but they do not provide any support for their misgivings. Mere speculation that a permittee will not comply or that the prescribed compliance method is inadequate are not enough to support a conclusion that the Minor Modification was issued erroneously.

18. Dismissal of the Petitioners' complaints relating to the facility's alleged non-compliance is appropriate. Specifically, paragraphs 8, 9, 12 and 13 of Petitioners' response to the motion for summary judgment complain of past compliance issues and should be dismissed.

**Inapplicable rules**

19. In their Response, the Petitioners cite to specific rules that they argue are applicable to this Minor Modification.

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20. This facility accepts construction/demolition debris, mostly consisting of off-specification shingles.
21. The following solid waste rules (1) are not applicable or (2) do not provide substantive support to the Petitioners' claims:
- 329 IAC 10-2: This rule defines the terms used in Title 329 IAC Article 10, Solid Waste Land Disposal Facilities. As such, the definitions do not create any substantive requirements or prohibit certain conduct. This includes citations to 329 IAC 10-2-137; 329 IAC 10-2-115; 329 IAC 10-2-74; 329 IAC 10-2-180; 329 IAC 10-2-75.1; 329 IAC 10-2-12; 329 IAC 10-2-13; and 329 IAC 10-2-17.
  - 329 IAC 10-16-2: The Site does not accept municipal solid waste. As such, it is not a municipal solid waste landfill. Any allegations that the Minor Modification does not comply with rules applicable to MSWLFs are dismissed.
  - 329 IAC 10-2-137: Any allegations that the waste disposed of at this site does not comply with requirements for "pollution control waste" are dismissed as this waste is not "pollution control waste".
  - 329 IAC 10-7.2-1: This rule applies to generators. Springfield is not a generator as that term is defined in 329 IAC 10-2-78.
  - 329 IAC 10-11-6.5: This rule applies to research, development, and demonstration minor modification applications. There has been no indication that Springfield proposes to utilize innovative and new methods. It is not applicable to this Minor Modification.
  - 329 IAC 10-33-1: This rule deals with the boundaries of C/D sites. The boundaries of the Site have not changed so this provision is inapplicable.
  - 329 IAC 10-37-1: This rule establishes closure requirements for C/D sites. As this Site is not closing, the rule is not applicable.
  - 329 IAC 10-4-2: This rule prohibits open dumping. This is not applicable as this Site was permitted to accept waste in accordance with the Indiana code and applicable regulations.
22. The Petitioners also cite to various provisions of Title 326 of the Indiana Administrative Code, which sets out the regulations relating to air pollution. The Minor Modification is issued pursuant to Title 329, the IAC title that relates to solid waste. As such, the rules for 326 IAC are not applicable.

**Remaining contentions**

23. The Court has concluded that judgment should be entered in favor of the Respondents for the claims stated in paragraphs 1, 3, 8, 9, 10, 11, 12 and 13 of Petitioners' response. The Court will address the remaining contentions below.

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24. Paragraph 2: The Petitioners have failed to state a claim for which relief can be granted as the cited regulations are not applicable.
25. Paragraph 4: 329 IAC 10-32 through 329 IAC 10-36, while addressing C/D sites, set out the standards for the construction of the site and are not applicable to the construction of the berm (as required by paragraph 5 of the Permit Requirements).
26. Paragraph 5: This contention raises questions that are beyond the scope of the OEA's review of the Minor Modification (ground/well water) and raises questions about future compliance. Neither of these is sufficient to create a genuine dispute as to a material fact.
27. Paragraph 6: The Petitioners' cite to 329 IAC 10-36-15 and 16. These regulations contain requirements for leachate control. Contrary to Petitioners' assertions, the Minor Modification contains specific conditions for controlling and disposing of leachate generated during the excavation process. The Petitioners fail to state how the requirements set out in the Minor Modification do not comply with these rules. Further, neither of these rules mandates any requirements for monitoring and/or inspections. Therefore, the Petitioners have failed to provide any legal or factual support for their contention that the Minor Modification does not adequately address these issues. As such, the Petitioners' response fails to create a genuine issue of material fact and summary judgment in the Respondents' favor is appropriate.
28. Paragraph 7: The Court has already indicated that 329 IAC 10-11-6.5 does not apply to the Minor Modification. In the event that the Petitioners intended to cite to 329 IAC 10-11-6, their argument is still not persuasive because a permittee is obligated to comply with all applicable regulations whether specifically included in the permit or not.
29. Judgment in favor of the Respondents, IDEM and Springfield, is appropriate.

**FINAL ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that judgment is entered in favor of the IDEM and Springfield Environmental General Partnership. This case is **DISMISSED**. All further proceedings are **VACATED**.

It is **ORDERED, ADJUDGED AND DECREED** that Kenneth J. Juncker, Gerald F. King, and Woodie Puntney are **DISMISSED** as petitioners in this cause.

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

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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 27th day of June 2012 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge