Commissioner, Indiana Department of Environmental Management
v.
Eagle Enclave Development, LLC,
IDEM Case No. 2014-22414-Q
2017 OEA 64, (16-W-J-4917)

OFFICIAL SHORT CITATION NAME: When referring to 2017 OEA 64 cite this case as ***Eagle Enclave Development, LLC*, 2017 OEA 64.**

TOPICS:
Summary judgment
Dismissal
Notice of Violation (NOV)
Commissioner's Order (CO)
Agreed Order (AO)
Notice
Appeal
Order
Void
Timeliness
Rule 5
327 IAC 15-5
I.C. § 4-21.5-3-6
I.C. § 13-30-3-3
I.C. § 13-30-3-4
I.C. § 4-21.5-1-9

PRESIDING ENVIRONMENTAL LAW JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM:	Sierra Alberts, Esq.
Respondent:	James D. Johnson, Esq.; Jackson Kelly

ORDER ISSUED:
April 27, 2017

INDEX CATEGORY:
Water

FURTHER CASE ACTIVITY:
[none]

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
COMMISSIONER, INDIANA DEPARTMENT OF	)	
ENVIRONMENTAL MANAGEMENT,	)	
Complainant,	)	
	)	
v.	)	CAUSE NO. 16-W-J-4917
	)	
EAGLE ENCLAVE DEVELOPMENT, LLC,	)	
IDEM Case No. 2014-22414-Q,	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Eagle Enclave Development, LLC (the Respondent) filed a Motion for Partial Summary Judgment. The Indiana Department of Environmental Management (IDEM) filed a Motion to Dismiss or in the Alternative, Cross Motion for Summary Judgment. The Office of Environmental Adjudication (the OEA), being duly advised and having read the motions, responses, replies and examined the evidence, now enters the following findings of fact, conclusions of law and order denying Respondent's motions and granting IDEM's motion.

FINDINGS OF FACT

1. Eagle Enclave is the owner and operator of a subdivision in Evansville, Vanderburgh County, Indiana. The subdivision is known as Enclave at Eagle Cliff.

2. On July 30, 2014, IDEM issued a Notice of Violation (NOV) to Danial Buck d/b/a Old Orchard Development LLC for violations of 327 IAC 15-5 (Rule 5). A proposed Agreed Order (AO) was attached. Mr. Buck received the NOV and proposed AO on August 11, 2014.

3. IDEM and Respondent met on at least one occasion to discuss the AO. Respondent proposed changes to the language and IDEM made some of these changes.

4. IDEM and Respondent entered into an AO, which became effective on January 23, 2015.

5. The AO contained Paragraph 14 in the Findings of Fact section, which states, "In recognition of the settlement reached, Respondent waives any right to administrative and judicial review of this Agreed Order."[1]

6. The AO required the payment of a civil penalty and required Respondent to undertake corrective actions. The specific action to which the Respondent objects is found in Paragraph 6 of the Order section, and requires the Respondent to submit a plan to "remove any sediment attributable to the activities at the Site from the off-site pond owned by Barbara Bolin."[2]

7. Further, the AO contains Paragraph 7,[3] which states:

> The plans required by Paragraphs 5 and 6 above are subject to IDEM approval. In the event IDEM determines that any plan submitted by Respondent is deficient or otherwise unacceptable, Respondent shall revise and resubmit the plan to IDEM in accordance with IDEM's notice. After three (3) submissions of any plan by Respondent, IDEM may modify and approve any plan and Respondent must implement the plan, as modified by IDEM.
>
> Respondent, upon receipt of written notification from IDEM, shall immediately implement the approved plan(s) and adhere to the milestone dates therein. The approved plan shall be incorporated into the Agreed Order and shall be deemed an enforceable part thereof. Failure by Respondent to submit any plan by the specified date or to meet any of the milestones in the approved plans will subject the Respondent to stipulated penalties as described below.

8. On June 1, 2016, Respondent requested a modification of the terms of the AO, specifically the requirements in paragraph 6 to remove sediments from Ms. Bolin's pond.

9. IDEM notified Respondent on August 12, 2016 that it was denying the modification request (the Denial).

10. Respondent filed its Petition for Review on August 29, 2016. Respondent requests that the OEA declare the AO void (First Count) and find that IDEM incorrectly denied the modification request (Second Count).

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[1] Agreed Order, page 7, paragraph 14, Exhibit D, Respondent's Motion for Summary Judgment, filed October 10, 2016 and as Exhibit 10, the Indiana Department of Environmental Management' Motion to Dismiss, filed October 20, 2016.

[2] Agreed Order, pages 8-9, paragraph 6, attached as Exhibit D, Respondent's Motion for Summary Judgment, filed October 10, 2016 and as Exhibit 10, the Indiana Department of Environmental Management' Motion to Dismiss, filed October 20, 2016.

[3] Agreed Order, pages 9, paragraph 7, attached as Exhibit D, Respondent's Motion for Summary Judgment, filed October 10, 2016 and as Exhibit 10, the Indiana Department of Environmental Management' Motion to Dismiss, filed October 20, 2016.

11. Respondent filed its Motion for Partial Summary Judgment on October 10, 2016, seeking summary judgment on the First Count of the Petition.

12. IDEM filed its Motion to Dismiss and response to Respondent's motion on October 20, 2016. IDEM seeks dismissal of the Petition for Review, contending that (1) Respondent waived his right to review the AO and that Respondent's request for review of the AO is untimely and (2) that the Denial is not an appealable order under the Administrative Orders and Procedures Act (AOPA), Ind. Code (I.C.) § 4-21.5-3.

13. Respondent filed its response to IDEM's motion and its reply in support of its motion for summary judgment on November 11, 2016.

14. IDEM then filed its reply in support of its motion to dismiss or in the alternative, cross motion for summary judgment on November 22, 2016.

15. Oral argument was held on December 21, 2016.

16. The parties engaged in mediation between December, 2016 and April, 2017. Mediation concluded on April 24, 2017 without resolution.

CONCLUSIONS OF LAW

1. The IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq*. The OEA has jurisdiction over the decisions of the Commissioner of IDEM pursuant to I.C. § 4-21.5-7, *et seq*.

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. 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 environmental law Judge (the "ELJ"), and deference to the IDEM's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d).

4. The Respondent seeks summary judgment on the First Count of the Petition. The Respondent argues that IDEM failed to give the requisite notice under I.C. § 4-21.5-3-6 and thus the AO is void (rather than voidable). Judgment in favor of Respondent would reset this matter to when the NOV was issued.

5. IDEM seeks dismissal of the Petition or, in the alternative, summary judgment, and argues that Respondent waived its rights to administrative and judicial review of the AO and that the Denial is not an appealable order.

6. The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith 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 a judgment as a matter of law." 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).

7. Each party has requested summary judgment in this matter. "The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992) *see also; Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).

8. "An issue of material fact "is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth." *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (citing *Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310, 1313 (Ind. 1983))." Moreover, the court in *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706, Ind. Ct. App. 1999, further addresses the standard when conflicting evidence is presented. "Summary judgment must be denied if the resolution hinges upon state of mind, credibility of the witnesses, or the weight of the testimony. Mere improbability of recovery at trial does not justify the entry of summary judgment against the plaintiff. On a motion for summary judgment, the evidence must be construed in favor of the non-movant**,** and any doubt about the existence of a genuine issue of material fact must be resolved against the moving party."

9. I.C. § 13-30-3-3 establishes IDEM's authority to issue a Notice of Violation to persons whom the Commissioner believes may have committed violations. An initial question is whether the NOV is an "order" as defined by AOPA. "Order" is defined in I.C. § 4-21.5-1-9 as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." The NOV serves only to notify a person that the IDEM believes violations *may* have occurred. It does not serve as a determination of "the legal rights, duties, privileges, immunities, or other legal interests of" the alleged violator. IDEM may not seek enforcement of a NOV, but must issue an order under I.C. § 13-3-30-4 before such action may be taken. Therefore, the NOV is not an appealable order under AOPA and notice to the alleged violator of his rights under I.C. § 4-21.5-3 is not required.

10. If an AO is not entered into, the IDEM may issue an order under I.C. § 13-30-3-4. This statute requires the notice include a "brief description of the procedure for requesting review under I.C. § 4-21.5." I.C. § 13-30-3-4(b)(3). IDEM cannot proceed under Section 4 without first issuing the NOV and providing the alleged violator with an opportunity to resolve the violations through an AO.

11. I.C. § 13-30-3-3 authorizes IDEM to enter into AOs to resolve the alleged violations. There is no question that an AO is an order under AOPA. *Ind. Dep't of Envtl. Mgmt. v. Raybestos Prods. Co.*, 897 N.E.2d 469, 474, 2008 Ind. LEXIS 1124, 39 ELR 20298 (Ind. 2008).[4]

12. Respondent signed the AO including the provision wherein he waived his right to review under AOPA. "Waiver is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it." *Van De Leuv v. Methodist Hosp.*, 642 N.E.2d 531, 533, 1994 Ind. App. LEXIS 1573, (Ind. Ct. App. 1994). Both of the parties have presented evidence on the question of whether the Respondent knowingly relinquished this right. It is clear that there is a question of fact as to whether this is true.

13. While there is a question of material fact, some issues may be resolved as a matter of law. Respondent argues that I.C. § 4-21.5-3 requires that notice of rights must be given whenever an order is issued. There is no question that this is true. Respondent then contends that failure to give the notice makes the AO void *ab initio.* Respondent, however, has not cited to any case law that supports such an argument.

14. Further, Respondent argues that notice must be given in a separate document from the order. Respondent cites to no directly applicable case law to support this argument so it is necessary to look to the statutory language to determine the legislature's intent.

> In statutory construction, our primary goal is to ascertain and give effect to the intent of the legislature. *Gray v. D & G, Inc*., 938 N.E.2d 256, 259 (Ind. Ct. App. 2010). The language of the statute itself is the best evidence of legislative intent, and we must give all words their plain and ordinary meaning unless otherwise indicated by statute. Id. Furthermore, we presume that the legislature intended statutory language to be applied in a logical manner consistent with the statute's underlying policies and goals. Id. However, we will not interpret a statute which is clear and unambiguous on its face; rather, we will give such a statute its apparent and obvious meaning. *Ind. State Bd. of Health v. Journal-Gazette Co,* 608 N.E.2d. 989, 992 (Ind. Ct. App. 1993), adopted, 619 N.E.2d 273 (Ind. 1993).
>
> *United States Steel Corp., et al v. Northern Indiana Public Service Corp*. 951 N.E.2d 542, 552, (Ind. Ct. App. 2011).
>
> The ELJ concludes that the language of I.C. § 4.21.5-3-6 is clear and unambiguous. The statute does not contain any language which supports the conclusion that the notice of rights must be a separate document. Respondent's argument must fail.

[4] "IDEM is plainly an "agency" as defined by I.C. § 4-21.5-1-3, and the Agreed Order was an action by its Commissioner." *Ind. Dep't of Envtl. Mgmt. v. Raybestos Prods. Co.,* 897 N.E.2d 469, 474, 2008 Ind. LEXIS 1124, 39 ELR 20298 (Ind. 2008)

15. Notice of appeal rights was not necessary for the NOV. However, having concluded that the AO is an order under AOPA and that notice must be given for orders, the issue is whether Respondent received notice. I.C. § 4-21.5-3 does not specify how notice shall be given or the particular words that must be used. Paragraph 14 references Respondent's rights to administrative and judicial review. This is sufficient to provide notice to the Respondent. The proposed AO was sent to the Respondent when the NOV was issued. While there is a question as to whether the Respondent knowingly waived his rights, there is no question that the Respondent received notice and had an opportunity to negotiate the language of the AO with IDEM. The language of Paragraph 14 was not changed nor did the Respondent make any request to change the language. The waiver itself provided notice of the rights which were purported to be waived.

16. The Respondent's motion for summary judgment should be denied. Paragraph 14 fulfilled the requirement for notice under I.C. § 4-21.5-3-6(c)(2). Alternatively, even if this were not true, there is a question of fact as to whether the Respondent knowingly waived his right to review of the AO.

17. The Petition for Review appeals two (2) IDEM actions. The First Count appeals the issuance of the AO; the Second Count appeals the issuance of the Denial. IDEM moves for dismissal of both counts.

18. IDEM contends that the First Count was not timely filed. The AO was effective on January 23, 2015. Under I.C. § 4-21.5-3-7(a)(2)(3)(A), the petition must be filed within fifteen (15) days of the notice of the order. Having concluded that Paragraph 14 provided notice of his right to appeal, Respondent cannot argue that he did not receive notice of the AO and his right to appeal. Regardless of whether it is determined that he waived his right to appeal, the petition had to be filed on or before February 8, 2015. It is clear that the petition was filed outside of this deadline. Given that the Respondent did not timely file a petition for review of the AO, IDEM's motion to dismiss the First Count of the Petition should be granted.

19. IDEM argues that the Denial is not an appealable order under AOPA. An examination of the AO is necessary to determine whether the Denial is appealable. Under Paragraph 7, IDEM can require Respondent to complete any action that IDEM determines to be appropriate. Failure to conduct such action could subject Respondent to penalties. IDEM conceded in oral argument that any order that assesses a stipulated penalty would be an appealable order, but argues that if IDEM only orders the Respondent to take a certain action, there is no appealable order and that appeal rights only arise when (or if) IDEM chooses to take civil enforcement action. This argument must fail. The right to administrative appeal arises when an "order" as defined by I.C. § 4-21.5-1-9 is issued. When IDEM orders a specific action pursuant to Paragraph 7, which IDEM can enforce through civil enforcement or by assessing penalties, such an agency action becomes one of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person and

meets the definition of an order and gives rise to the right to administratively appeal such action.[5]

20. In this matter, however, IDEM has not ordered Respondent to take action; it has merely refused Respondent's request to modify the AO. The AO states that IDEM may unilaterally modify a plan after the Respondent has submitted its proposal three (3) times. IDEM may modify and approve the proposal and Respondent must implement the plan, as modified by IDEM. Respondent must perform this action or be subject to penalties or civil enforcement. However, until such time as the terms of Paragraph 7 are met, Respondent has no right to review. However as soon as the conditions of Paragraph 7 have been met and IDEM unilaterally orders Respondent to conduct a specific action, Respondent has the right to appeal. It is clear that such an order is an agency action of particular applicability given to a specific person. Notice of appeal rights under I.C. § 4-21.5-3 **MUST** be given at this time. However, in this case, IDEM has not ordered Respondent to conduct specific action and Respondent can continue to work with IDEM until such time as impasse is reached. IDEM argues that the request for modification is not a "plan". However, the ELJ finds this argument to be without merit and concludes that the Respondent's June 1, 2016 request, whether it is called a request for modification or plan, should be considered Respondent's first proposal.

21. It is clear that the Denial does not constitute such as order. Respondent has prematurely requested review. IDEM's motion to dismiss the petition should be granted.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that IDEM's Motion to Dismiss and cross motion for summary judgment is **GRANTED.** The Respondent's motion for summary judgment is **DENIED.**

You are 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 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 27th day of April, 2017 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

[5] I.C. § 4-21.5-1-9.