

**Objection to Issuance of Construction Approval
for Confined Feeding Operation, Farm No. 6959
Animal Waste No. AW 6687, Broshears Farm
Kyle and Leah Broshears, Seymour, Jackson County, Indiana
2018 OEA 1 (17-W-J-4957)**

OFFICIAL SHORT CITATION NAME: When referring to 2018 OEA 1, cite this case as
Broshears Farm, 2018 OEA 1.

TOPICS:

Confined feeding
CFO
Acreage
Land application
Responsible party
Violations
Notice
Set back
Wetland
Run off
Alternative compliance approach
327 IAC 19-5

PRESIDING JUDGE: Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM:	Susanna Bingman
Counsel for Broshears:	Todd Janzen, Brianna Schroeder (Janzen Agricultural Law)
Petitioners (Billy and Trina McClain):	unrepresented

ORDER ISSUED: January 9, 2018

INDEX CATEGORY: Water

FURTHER CASE ACTIVITY: None

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5. The Approval authorizes of the use of a berm to divert surface water drainage away from a wetland located northwest of the swine confinement building. The berm will provide at least 300 feet of drainage control. *See* Respondents' Exhibit 1, Confined Feeding Operation Approval, Special Approval Conditions.
6. During the hearing, the Petitioners presented evidence regarding the following issues:
 - a. Petitioners contest whether there was sufficient acreage for land application of manure and presented evidence regarding this. However, Petitioners failed to elicit testimony at the hearing which supported this contention. In their proposed Findings of Fact, Petitioners raise, for the first time, the question whether all of the acres identified for land application are suitable because the acres are wooded. Petitioners point to Respondent's Exhibit 1 as support for this contention. However, Petitioners did not present any testimony at the hearing regarding this contention. An examination of the Application does not reveal whether the wooded area shown on various maps was considered to be potential land application acreage.
 - b. Petitioners further presented expert testimony regarding the possibility that run-off from land application activities would present a threat to human health and the environment, specifically contamination of drinking water wells on neighboring properties. This testimony was based on the assumption that polluted water would be discharged from the Facility. Any such discharge would be a violation of the Approval.
 - c. Petitioners attempted to present evidence that the Permittees had failed to include a responsible party in its application for a CFO approval. However, the Petitioners failed to present any evidence that an entity called "Premiere Ag" should have been included as a responsible party.
 - d. Petitioners contended that notice of the CFO application should have been given to the United States, U.S. Fish and Wildlife Service or the Indiana Department of Natural Resources because of their potential interest in the wetland area. However, Petitioners presented no evidence that notice to the DNR, U.S. Fish and Wildlife or the U.S. was necessary. The evidence proves that notice was given to the actual property owner.
 - e. Petitioners presented evidence that the Approval did not comply with all setback requirements, specifically, a 300 feet setback from a wetland located north of the proposed building. Petitioners' expert, Tai Hubbard, doubted whether an earthen berm, that will be constructed to divert surface water run-off away from the wetland, would be effective as an appropriate alternative compliance approach under 327 IAC 19-5. Mr. Hubbard further opined that such a berm would be ineffective if it was not constructed properly. However, the Petitioners failed to elicit sufficient evidence to prove that the design of the berm was inadequate. In their proposed Findings, Petitioners questioned whether the application contained sufficient information regarding this berm to support IDEM's conclusion that the berm would be effective. However, Petitioners did not elicit testimony from Mr. Hubbard regarding the sufficiency of the information in the application.

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Conclusions of Law

1. The IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq.* The OEA has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code (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 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. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envntl. Adjud.*, 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.
5. Speculation that the Permittees will not comply with the requirements of the Approval and the applicable laws and regulations is not sufficient to support overturning the Approval. The IDEM presumes that any person that receives a permit will comply with the applicable regulations and with future permits. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *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.*;

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*In Re: Sanitary Sewer Construction Permit, Lafollette Station Towne Centre, US 150 and
Lawrence Banet Road, 2004 OEA 67, 70 (03-W-J-3263).*

6. The Petitioners assumed that the Permittees would not comply with the terms and conditions of the Approval and that a release of polluted water would occur. Much of their evidence was based on this assumption. They speculated about the harm that would result as a result of such a release. However, IDEM and OEA presumes that the Permittees will comply with the terms and conditions of the Approval. Speculation that the Permittees will not comply with the Approval does not constitute evidence the Approval was improperly issued.
7. Petitioners have the burden of proof. As Petitioners did not solicit testimony to support their claim that wooded areas were considered part of the land application acreage, Petitioners failed to present sufficient evidence of this claim. The evidence presented at the hearing is insufficient to support a conclusion that there is insufficient acreage for land application.
8. The United States, U.S. Fish and Wildlife Service and the DNR are not owners of the wetland. Therefore, notice of the application was not required to these entities. Notice was given to the owner of the property on which the wetlands were located.
9. No evidence was presented that Premiere Ag was a responsible party and therefore, should have been included in the application.
10. The Petitioners' evidence relating to the berm was speculative and failed to provide support for their contention that the IDEM improperly approved the berm as an appropriate alternative compliance approach under 327 IAC 19-5.
11. The Petitioners failed to present any evidence that the application contained errors or that the Approval was not issued in compliance with all applicable laws and regulations. Therefore, judgment in favor of IDEM and the Permittees is appropriate.

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 Kyle and Leah Broshears.

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 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 9th day of January, 2018 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge