Objection to the Issuance of Confined Feeding Operation Approval
Kevin and Sarah Troyer
Farm ID #7082
2021 OEA 10 (20-W-J-5115)

OFFICIAL SHORT CITATION NAME: When referring to 2021 OEA 10, cite this case as ***Troyers,* 2021 OEA 10.**

Topics:

CFO
CAFO
Confined Feeding Operation
Due process
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327 IAC 19-12-4(b)
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Seasonal water table
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327 IAC 19-14-3
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327 IAC 19-7-1(c)(10)

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

IDEM:	Susannna Bingman
Petitioners:	Bryce Runkle
Intervenors:	Brianna Schroeder, Todd Janzen

Order issued: February 25, 2021

Index category: Water

Further case activity: Judicial review

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF	)	
CONFINED FEEDING OPERATION	)	CAUSE NO. 20-W-J-5115
FARM ID #7082	)	
KEVIN & SARAH TROYER	)	
LIGONIER, NOBLE COUNTY, INDIANA	)	
_____	)	
Calvin Cole, Joyce Cole, et al.	)	
Petitioners	)	
Kevin & Sarah Troyer	)	
Permittee/Respondent	)	
Indiana Department of Environmental Management	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (OEA) for a final evidentiary hearing on Petitioners' petition for review on December 4, 2020. The presiding Environmental Law Judge (ELJ), having heard the evidence, enters the following findings of fact, conclusions of law and final order.

Findings of Fact

1. The Indiana Department of Environmental Management (IDEM) issued Confined Feeding Operation (CFO) Approval (the Approval) to Kevin and Sarah Troyer on June 12, 2020.

2. Calvin Cole, Joyce Cole, James Porter, Jim Annis, Roxanne Annis, Don Ratliff, Susan Miller, Mary Miller, Maria Coria, Pedro Ruvalcaba, William Larner, Mark Gordon, Laura Gordan, Robert D. Bevins, Nancy Lambright, Dawn Waldron, Delvin Gangwer, Ramiro Ruvalcaba, Dave Miller, Harvey Taylor, Jerry Anglin, Amy Anglin, Carolyn Anglin, Sharon Blackshire, Jeremy Sparks, Jim and Teresa Vanauken, Rob Debolt Artemio Delgado, Jennifer Delgado, Dale Fought, Barbara Fought, Sandy Shull, Dana Slone, Angela Estep, and Kim Fish all filed petitions for review on June 29, 2020. IDEM was designated a party to this matter upon the opening of the case.

3. On July 24, 2020, Co-Alliance LLP, and Agronomic Solutions LLC (Intervenors) filed a Motion to Intervene. The Motion to Intervene was unopposed and was granted on August 25, 2020.

4. Bryce Runkle filed his appearance for Jerry Anglin, Calvin Cole, and James Porter on July 27, 2020. Mr. Runkle filed his appearance for Joyce Cole and Amy Anglin on August 31, 2020. (hereafter referred to as "Petitioners")[1]

5. The prehearing conference was held on July 28, 2020. Counsel for Intervenors arranged for the parties to participate via telephone. The following individuals participated in the prehearing conference: Amy Anglin and Joyce Cole, in person (as reported by Mr. Runkle); Susanna Bingman on behalf of the Indiana Department of Environmental Management; Bryce Runkle on behalf of Jerry Anglin, Calvin Cole and James R. Porter; Brianna Schroeder on behalf of Intervenors, Co-Alliance LLP and Agronomic Solutions LLC.

6. Permittees, Kevin Troyer and Sarah Troyer, received notice of the prehearing conference. However, they did not participate. Intervenors represented[2] to the presiding Environmental Law Judge that their failure to appear is based on religious objections to taking part in legal proceedings. OEA, IDEM, and the Intervenors did not serve the Troyers with any orders or pleadings after the prehearing conference. Petitioners continued to serve the Troyers with pleadings.

7. These Petitioners did not appear at OEA's offices nor did they participate via telephone: Artemio & Jennifer Delgado, Dale & Barbara Fought, Joas Bontrager, Sandy Shull, Dana Slone, Angela Estep, and Kim Fish. A Notice of Proposed Order of Default was issued to these individuals on July 28, 2020.[3] On August 6, 2020, these Petitioners filed a pleading requesting that the proposed Order of Default not be imposed. Each signed the request except for Joas Bontrager. Each Petitioner stated that they were not able to participate because of work obligations and technical difficulties in connecting to the telephone call.

8. On August 6, 2020, Jim and Roxanne Annis, Don Ratliff, Susan and Mary Miller, Maria Coria, Pedro Ruvalcaba, William Larner, Mark and Laura Gordan, Robert D. Bevins, Nancy Lambright, Dawn Waldron, Delvin Gangwer, Ramiro Ruvalcaba, Dave Miller, Harvey Taylor, Jerry and Amy Anglin, Carolyn Anglin, Sharon Blackshire, Jeremy Sparks, Jim and Teresa Vanauken, Rob Debolt filed a motion requesting that the Proposed Order of Default not be imposed.

9. On August 6, 2020, Artemio and Jennifer Delgado, Dale and Barbara Fought, Sandy Shull, Dana Slone, Angela Estep, and Kim Fish filed a motion requesting that the Proposed Order of Default not be imposed.

10. On August 7, 2020, Jerry Anglin filed a Response to Proposed Order of Default.

[1] All remaining petitioners will be referred to as Unrepresented Petitioners.
[2] Motion to Intervene, filed July 24, 2020 and Motion to Quash Subpoenas, filed November 25, 2020.
[3] The Notice was dated July 28, 2017. The ELJ hereby corrects the record to indicate the date of issuance was July 28, 2020.

11. Petitioners filed their First Amended Petition for Administrative Review on August 31, 2020.

12. An Order Setting Aside Proposed Order of Default to all Petitioners who responded was issued on September 10, 2020.

13. OEA issued notice on November 10, 2020 that the final prehearing conference and the final hearing would be conducted virtually via Zoom. Parties without access to Zoom were provided with a telephone number through which they could participate.

14. Petitioners filed their Objection to Trial Without In-person Public Testimony and Alternatively, Request for Continuance Until the Court is Comfortable with an In-person Public Evidentiary Hearing on November 17, 2020. The motion was denied during the final prehearing conference. None of the Unrepresented Petitioners objected. It was confirmed in the Notice to All Parties and Order issued on November 18, 2020 that the hearing would be held virtually via Zoom. Parties without access to Zoom were provided with a telephone number through which they could participate. No petitioner stated an objection to participating via Zoom thereafter.

15. The final prehearing conference was held on November 17, 2020 at 9:30 a.m. The Indiana Department of Environmental Management appeared by counsel. The Intervenors, Co-Alliance LLP and Agronomic Solutions LLC, appeared by counsel. Petitioners, Calvin Cole, Joyce Cole, Jerry Anglin, Amy Anglin, and James Porter personally participated and were represented by counsel, Bryce Runkle. The following unrepresented Petitioners participated: Angie Estep, Jim Annis, Dana Slone, Sandy Shull, Barbara Fought, Dawn Waldron, Jennifer Delgado, Nancy Lambright, Harvey Taylor.

16. The following unrepresented Petitioners did not appear or participate in the final prehearing conference: Kim Fish, Maria Coria, William Larner, Jim and Teresa Vanauken, Dave Miller, Joas Bontrager, Don Ratliff, Susan and Mary Miller, Pedro Ruvalaba, Mark and Laura Gordon, Robert D. Bevins, Rob Debolt, Jeremy Sparks, Sharon Blackshire and Kevin Weber, Ramiro Ruvalcaba, Delvin Gangwer[4]. Pursuant to Ind. Code Sec. 4-21.5-3-24 and 315 IAC 1-3-7, these Petitioners were notified that they would be held in default if they failed to respond to the Notice to All Parties and Order issued on November 18, 2020. None of these Petitioners responded to the Proposed Order of Default.

17. Intervenors and IDEM filed Final Witness and Exhibit Lists on October 30, 2020. Petitioners filed their Final Witness and Exhibit List on October 31, 2020. No other parties filed final witness and exhibit lists.

18. On November 18, 2020, Petitioners issued subpoenas to Kevin Troyer and Sarah Troyer.

19. Intervenors filed a Motion to Quash Subpoenas on November 25, 2020. The Motion to Quash was denied on December 2, 2020.

[4] All orders and notices sent to Delvin Gangwer have been returned as not deliverable. The address used is the address supplied by Mr. Gangwer.

20. The final hearing was held on December 4, 2020 via Zoom and telephone. The Indiana Department of Environmental Management appeared by counsel. The Intervenors, Co-Alliance LLP and Agronomic Solutions LLC, appeared by counsel. Petitioners appeared by counsel and individually.

21. The following unrepresented Petitioners also appeared: Jennifer Delgado, Jerry Anglin Sr., Dana Slone, Mitchell Holcomb, James Annis, and Roxanne Annis.

22. Kevin Troyer and Sarah Troyer failed to appear. The Troyers were not notified of the hearing by the Court. However, the Troyers received the subpoenas.

23. In their Amended Petition, Petitioners allege that the Approval is unlawful because it violates the Clean Water Act, 33 U.S.C. §1311 et seq., specifically as follows:

    a. The proposed CFO constitutes a point source discharge to waters of the United States and requires a NPDES[5] permit.
    b. The proposed CFO authorizes land application without a NPDES permit.
    c. The proposed CFO authorizes a point source discharge without requiring a nutrient management plan.

24. Petitioners further allege that the Approval violates state environmental laws, specifically:

    a. The Approval does not comply with set-back requirements[6] in relation to on-site wells and surface water.
    b. The Approval does not contain certain required documents, including soil or plot maps[7].
    c. The Approval violates the requirements for land application[8], including, but not limited to, set-back distances and soil testing.
    d. The Approval does not meet the minimum requirements for land application acreage.
    e. The Approval does not contain sufficient information relating to drainage and the perimeter drain. The Petitioners allege the ground water monitoring plan is insufficient.
    f. The Application does not contain sufficient information to support the issuance of the Approval, including lack of data relating to test holes beneath structure.
    g. Mortality management is not sufficient to protect human health and the environment.
    h. The design does not adequately address the seasonal high-water table.
    i. The waste management system is not designed to minimize leaks and seepage.

25. The CFO Approval authorizes the construction of one swine confinement structure. This structure has a concrete pit beneath slatted floors, providing liquid manure storage for a

[5] National Pollutant Discharge Elimination System.
[6] 327 IAC 19-12-3.
[7] 327 IAC 19-7-2.
[8] 327 IAC 19-14-5.

total capacity of 2,200 wean-to-finish pigs, 2,200 nursery pigs (four to six weeks a year).

26. The application affirms that the waste management system is not designed to discharge to surface waters of the state. The Approval does not allow for discharge.

27. The CFO has 154.97 acres of crop land available for land application.

28. Mortalities will be composted on site.

29. The Site has a high seasonal water table. The Approval contains Special Approval Conditions which require the installation of a perimeter drain which drains to a rocky outlet and then to a maintained vegetative area. The flow will be monitored monthly for ammonia nitrogen via field sampling and visually inspected for discoloration, odor, and other indicators of the presence of livestock waste.

30. IDEM held a public meeting on the Troyer CFO Approval application on May 12, 2020 in which several of the Petitioners participated.

31. Represented Petitioners filed a Post-hearing Brief on January 4, 2020. IDEM and Intervenors filed their post-hearing briefs on February 4, 2020.

32. Mr. Runkle, on Represented Petitioners' behalf, filed a Motion for Leave to File Post-hearing Reply Brief on February 15, 2021. The Motion was granted on February 19, 2021.

Conclusions of Law

1. The Indiana Department of Environmental Management (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 and is the ultimate authority regarding the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to the Administrative Orders and Procedures Act (AOPA, I.C. § 4-21.5-3 *et seq.*), I.C. § 4-21.5-7, *et seq*. and per I.C. § 4-21.5-3-7(a).

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 Petitioners have the burden of proof in this matter. Pursuant to I.C. § 4-21.5-3-14(c) and I.C. § 4-21.5-3-27(d), the person seeking review has the burden of persuasion by presenting substantial and reliable evidence proving that IDEM improperly issued the Approval.

4. The OEA and IDEM, as state agencies, only have the authority to take those actions that are granted by the law. "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 and 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. If Petitioners do not believe that the laws and regulations are sufficiently protective, these are not issues that can be heard or resolved by OEA. OEA is an impartial litigation forum, not a body which formulates or advises as to public policy or regulatory content.

5. The rules require that the design include measures meant to protect the human health and the environment and prevent any releases to the environment. The rules and the Approval require compliance with local regulations. Speculation, without evidence, that there will be releases to the environment in violation of the Approval is not sufficient to support a decision to overturn 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.); *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. Petitioners called Dr. Christopher Grobbel as an expert. Intervenors called Melissa Lehman. Both experts are very qualified. However, in determining the outcome of this matter, the weight given to their conflicting testimony does not have to be equal. While Ms. Lehman has a financial interest in the CFO, her knowledge of designing CFOs in general, her depth of knowledge of Indiana regulations and her specific knowledge of this CFO is persuasive.

Petitioners' arguments not raised in the Petition for Review are waived and are not supported by statute or case law.

7. Petitioners made the following arguments for the first time at the hearing. I.C. §13-15-6-2 requires that petitions for review "state with particularity the issues proposed for consideration at the hearing." The appellate court in *Bd. of Comm'rs v. Great Lakes Transfer, LLC*, 888 N.E.2d 784 (Ind. Ct. App. 2008), held that issues not properly raised are waived. Those arguments which could have been raised before the hearing are waived. Regardless of whether the argument is waived, each will be addressed on their merits.

8. The applicable statutory authority is AOPA, I.C. §4-21.5-3 *et seq.* Petitioners argue that this is unconstitutional as it allows for pre-deprivation without a hearing. The OEA, as an administrative review agency, does not have the authority to declare AOPA is unconstitutional. The United States Supreme Court in *Califano v. Sanders* (1977) 430 U.S. 99, 109, 97 S. Ct. 980, 986, 51 L. Ed. 2d 192, 201-2 stated, "Constitutional

questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." The Indiana Supreme Court in *Wilson v. Review Board of Ind. Emp. Sec. Div.,* 270 Ind. 302, 385 N.E. 2d 438 (Ind. 1979), says "In the present case, the question presented is of constitutional character. With all due respect, we think that the resolution of such a purely legal issue is beyond the expertise of the Division's administrative channels and is thus a subject more appropriate for judicial consideration."

9. This argument should have been raised prior to the hearing and is considered waived. However, the argument that a pre-deprivation hearing was necessary is without merit. OEA's jurisdiction rests on IDEM issuing an agency order (I.C. §4-21.5-7-3(a)) therefore OEA did not acquire jurisdiction until the Approval was issued. Further, Petitioners' assertions that the possible loss in real estate value resulted in a taking that requires a pre-deprivation hearing is not supported by statute or case law. All of the Petitioners had the opportunity to participate in the hearing and to provide comments to IDEM regarding the proposed Approval at the public meeting held on May 12, 2020.

10. Petitioners argue that the informal practice of calling this proceeding an "appeal"[9] violates Petitioners' due process rights. Again, this issue should have been raised prior to the hearing and is waived. The OEA concedes that it is the ELJ's practice to call these matters "appeals". However, the ELJ recognizes that these cases are not "appeals" and that the OEA, as the ultimate authority and the trier of fact, does not owe any deference to IDEM's decision. This Court has long recognized that a de novo standard of review must be applied when determining the facts at issue. 315 IAC 1-3-10(b); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc*., 615 N.E.2d 100 (Ind. 1993); *Jennings Water, Inc. v. Office of Envtl. Adjudication,* 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"), and deference to the agency's initial factual determination is not allowed. Id.; I.C. § 4-21.5-3-27(d). "The ELJ . . . serves as the trier of fact in an administrative hearing and a de novo review at that level is necessary. *United Refuse*, 615 N.E.2d 100, 103. The ELJ does not give deference to the initial determination of the agency." *Indiana-Kentucky Elec. Corp v. Comm'r, Ind. Dep't of Envtl. Mgmt*., 820 N.E.2d 771 (Ind. Ct. App. 2005). "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).

11. Petitioners argue that the Troyers must be defaulted because of a failure to appear. This issue could not have been raised before the hearing as it was not known whether the Troyers would appear until the hearing. In this case, the Troyers did not receive notice of the hearing. But there is no indication that the Troyers would have appeared even if they had notice. Intervenors informed the presiding ELJ that the Troyers' religious beliefs would not allow them to participate in a legal proceeding. Petitioners argue that the Troyers' religious beliefs do not constitute any defense to their failure to appear. However, the Petitioners fail to provide any statutory authority or case law for this

[9] "Appeal" does not appear in I.C. §4-21.5-3 *et seq.* or 4-21.5-7 *et seq*.

proposition. Therefore, this argument fails.

12. Even if the Troyers are defaulted and OEA concedes that the Troyers cannot assert their religious beliefs as a defense against default, this is not conclusive as to the outcome of this case. Petitioners argue that judgment should be entered in their favor because the Troyers did not appear. Petitioners assert that the Troyers are the real parties in interest and neither IDEM nor the Intervenors have standing and can present evidence in defense of the Approval. Petitioners overlook the fact that they have the burden of proof. Even if the Troyers are defaulted and neither IDEM nor the Intervenors presented evidence, this does not change. Petitioners' arguments are wholly unconvincing.

13. Petitioners argue that Intervenors may not provide evidence in support of the Approval because they are not "real parties in interest" and argue that they do not have a financial stake in the Approval. The Petitioners did not oppose the Motion to Intervene when it was filed. Therefore, the Petitioners' argument has been waived. Further, while Petitioners initially argue in their Post-hearing Brief that neither Intervenor has a pecuniary interest in this matter, they later assert that Melissa Lehman, the fact and expert witness for Agronomic, "has a direct financial interest in this case"[10], conceding that Agronomic Solutions has a pecuniary interest. Further, this argument must fail if it is considered on its merits. Petitioners cite to Ind. T.R. 24 as the applicable standard. However, the appropriate standard is I.C. §4-21.5-3-21, which allows intervention by any aggrieved or adversely affected party. The Indiana Supreme Court held, in *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806 (Ind. 2004) that "whether a person is entitled to seek administrative review depends upon whether the person is "aggrieved or adversely affected" . . . and that the rules for determining whether the person has "standing" to file a lawsuit do not apply". at 807. The Court went on to say 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. Pursuant to I.C. §4-21.5-3-21 and the standards set out in *Huffman*, the presiding ELJ found that the Intervenors were aggrieved or adversely affected and granted the unopposed petition to intervene.

14. Intervenors have the right to present evidence as authorized under the trial rules. "An intervenor is treated as if he were an original party and has equal standing with the original parties." *Panos v. Perchez,* 546 N.E.2d 1253, 1254 (Ind. Ct. App. 1989). There is no provision in AOPA or the trial rules which support an argument that Intervenors do not have the right to present evidence in this matter. Contrary to Petitioners' allegations, Intervenors have not argued that they act as de facto counsel for the Troyers. The Intervenors, in their Motion to Intervene, do not make such assertions. While the presiding ELJ designated counsel for Intervenors as counsel for Permittee in the Distribution list, this was an error. There is no order in which Intervenors' counsel is recognized as Permittees' counsel.

15. Petitioners raised the argument that IDEM does not have the authority to defend their decision to issue the Approval. Petitioners did not object to IDEM's participation in this

[10] Post-hearing Brief, filed January 4, 2021, pg. 8, ¶25.

matter at any time before the hearing, therefore this argument could be considered waived. However, if this argument is considered on its merits, there is no support for the argument that IDEM cannot defend its action. This matter is controlled by AOPA. There are various provisions which clearly provide for agency participation. IDEM has been designated as a party to this case in accordance with AOPA, which requires the notice be given to all parties, including the agency[11]. Further, IDEM has an interest in advocating for the integrity of its permitting process and its issuance of each permit.

16. The cases that Petitioners point to are not applicable for the reasons pointed out in Intervenors' Post-hearing Brief[12]. In those matters, the government agency had filed for declaratory relief in plenary court. The courts held that the agencies were not the real party in interest because in each case the agency did not have standing. In this matter, IDEM's "standing" is conferred by statute in AOPA and in I.C. §13 *et seq.*

17. Petitioners further allege that there is no justiciable controversy in this cause. As Intervenors correctly point out, it this were true, the appropriate remedy would be dismissal, not judgment in Petitioners' favor.

18. In the event parties are defaulted, the presiding Environmental Law Judge "shall conduct any further proceedings necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party." I.C. §4-21.5-3-24(d). This statute supports the conclusion that default does not moot the case.

An NPDES Permit is not required for this Site.

19. Petitioners argue that this CFO requires a NPDES permit. There must be an actual discharge to waters of the state to trigger the need for an NPDES permit. *Nat'l Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 751 (5th Cir. 2011). 327 IAC 19-12-4(b) states "[a]ll waste management systems must be designed to not discharge to surface waters of the state. If a waste management system discharges or is designed to discharge, a NPDES CAFO permit under 327 IAC 15-16 is required." The rule defines "discharge" as "any addition of any pollutant, or combination of pollutants, into any waters of the state from a point source. The term includes without limitation, an addition of a pollutant into any waters of the state from the following: (1) surface runoff that is collected or channeled by human activity; (2) discharges through pipes, sewers, or other conveyances, including natural channels, that do not lead to treatment works." 327 IAC 19-2-12.

20. Petitioners argue that the perimeter drain constitutes a point source discharge of pollutants. As designed, the perimeter drain should not discharge process wastewater or pollutants. Its purpose is to draw down the water table around the barns. Petitioners argue that the water in the perimeter drain will be contaminated by the deposit of pollutants in and around the barns through the various processes associated with the operation of a CFO. However, the flow from the perimeter drain is not designed to come into contact

[11] I.C. §4-21.5-3-18(d)(3) and I.C. §4-21.5-3-20(c)(2).
[12] *See* Co-Alliance and Agronomic Solutions Post-hearing Brief, filed February 4, 2021, pgs. 10-11.

with any pollutants. Further, it does not flow into waters of the state. In spite of this, Petitioners rely on their expert regarding whether the perimeter drain will discharge pollutants. Dr. Grobbel's opinion was not persuasive. He had not visited the Site and was not aware that the Approval places the perimeter drain on the northwest side of the barn, not on the south side of the barn as proposed in the Application. As a result of this change, the water drains away from the Elkhart River.

21. Further, Petitioners provide only speculation as to the source of any pollutants. 327 IAC 19-3-1 sets out the performance standards for CFOs. Any pollutants that enter the perimeter drain would be in violation of this regulation. Speculation that a permittee will not comply with the applicable regulations is not sufficient evidence to justify revocation of this Approval. Petitioners argue that pollutants will be discharged through surface water runoff. The District Court for the Northern District of West Virginia held that "litter and manure which is washed . . . to navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge, thereby rendering it exempt from the NPDES permit requirement of the Clean Water Act." *Lois Alt v. United States EPA*, 979 F. Supp. 2d 701, 715 (N.D.W. Va. 2013), this would be a violation of the Approval as the CFO must be operated to prevent any discharge to surface waters.

22. 327 IAC 19-11-1 states: "(a) All CFOs that are defined as concentrated animal feeding operations (CAFOs) in 40 CFR 122.23(b)(2) and all CAFOs with a NPDES permit must meet the storm water requirements in 40 CFR 122.23(e), 40 CFR 122.42(e)(1), and 40 CFR 122.42(e)(2) (b) All CFOs not defined as a CAFO in subsection (a) must comply with section 2 of this rule." This CFO must comply with the specified storm water requirements of 327 IAC 9-22-2. The Petitioners have failed to produce evidence that the CFO does not meet the requirements set out in this rule.

23. 40 CFR 122.23(b)(6)(ii) states that an AFO will be considered a medium CAFO if it confines between 750 and 2499 swine each weighing up to 55 pounds and:

> Either one of the following conditions are met:
> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
> (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

However, while this CFO meets the size requirement, Petitioners have failed to produce sufficient evidence that either of the conditions set out in 40 CFR 122.23(b)(6)(ii) will be met.

24. The CFO is not designed to discharge process wastewater to waters of the state. Further, the CFO must be operated at all times in compliance with all applicable regulations. If at any time, the CFO discharges pollutants, it would be a violation. The perimeter drain is

not a point source. A NPDES permit is not required.

The Approval complies with all applicable laws and regulations.

25. The regulations specifically provide that a waste containment structure may not be constructed on sites with a seasonal water table unless the water table is lowered to keep the water table below the bottom of the waste management system. 327 IAC 12-2-2(a)(5). Further, 327 IAC 19-12-4(o) sets out the minimum requirements for any drainage system designed to lower the water table. Petitioners do not provide sufficient evidence that the design of the perimeter drain does not comply with any applicable requirements or 327 IAC 19-3-1.

26. Petitioners contend that the application is deficient in that it does not comply with the requirements of 327 IAC 19-7-2. Pursuant to this rule, the application must include:

> (a) The applicant shall submit plot maps of the location proposed for approval consisting of the following:
> (1) A United States Department of Agriculture Natural Resources Conservation Service soil survey map.
> (2) A United States Geological Survey topographical map that includes identification of any public water supply wells and public water supply surface intake structures within one thousand (1,000) feet of the manure storage facilities.
> (b) The maps in subsection (a) must be legible and clearly show the following:
> (1) The location of the waste management systems.
> (2) The boundaries of the property of the CFO.
> (3) The boundaries of livestock and poultry production areas.
> (4) The boundaries and owners of all manure application areas.
> (5) Available acreage for manure application after calculation of setbacks.

Petitioners argue that IDEM and Intervenors have not met their burden of proving that the application contains these plot maps. It is Petitioners' burden to prove that the application was deficient. These maps are included in the application[13]. Petitioners have failed to prove that the application was deficient for failure to comply with 327 IAC 19-7-2.

27. The Petitioners argue that the CFO fails to meet the land application requirements, specifically, I.C. § 13-18-10-2 and 327 IAC 19-7-2 (maps), 327 IAC 19-14-2 (required acreage), and 327 IAC 19-14-6 (setbacks). Petitioners assert that the available acreage is not sufficient as it does not consider setbacks. However, the maps clearly show the setbacks. Further, they argue that soil tests should be taken before approval so that the minimum acreage can be accurately calculated. However, none of the regulations require soil testing of land application acreage before an application can be approved. Pursuant to I.C. § 13-18-10-2(a)(2) and (3), in pertinent part, the application must include a manure management plan that sets out the procedures for soil and manure testing. The application

[13] IDEM/Intervenor Exhibit A, 000036-44.

must include maps of manure application areas. 327 IAC 19-14-3 requires soil testing before land application and sets out the standards for nitrogen and phosphorus. Petitioners did not present sufficient evidence in support of their contentions that the manure management plan is insufficient or that there is inadequate acreage for land application.

28. Soil borings were required and submitted as part of the application. During the application review process, IDEM requested soil borings at a lower depth. These soil borings were performed, and the data was submitted to IDEM. 327 IAC 19-7-1(c)(10) authorizes the submission of such supplemental information. Petitioners failed to provide sufficient evidence to prove that this was an error.

29. Dr. Grobbel testified extensively about other measures that could be taken to provide protection to human health and the environment, including secondary containment. However, the regulations do not require secondary containment. IDEM's regulations set out the minimum standards for CFOs. As stated above, neither IDEM nor OEA can require something that is not mandated by the rules. The question here is whether the CAFO complies with these minimum standards, not whether this CAFO should be designed to meet a higher standard.

30. The CFO is not allowed to discharge. It must comply with all applicable regulations including (1) having emergency response plan (327 IAC 19-13-4(a)(1)(A)); (2) All uncontaminated surface water must be diverted away from the facility. (327 IAC 19-7-3(b)); (3)

31. Petitioners failed to present sufficient evidence to support their allegations that the CFO does not comply with laws and regulations. The Unrepresented Petitioners failed to provide sufficient evidence to support a conclusion that the Approval failed to comply with the applicable laws and regulations.

Final Order

IT IS ORDERED, ADJUDGED AND DECREED

1. Kim Fish, Maria Coria, William Larner, Jim and Teresa Vanauken, Dave Miller, Joas Bontrager, Don Ratliff, Susan and Mary Miller, Pedro Ruvalaba, Mark and Laura Gordon, Robert D. Bevins, Rob Debolt, Jeremy Sparks, Sharon Blackshire and Kevin Weber, Ramiro Ruvalcaba, Delvin Gangwer are held in default.
2. Kevin Troyer and Sarah Troyer are held in default.
3. Judgment is entered in favor of the Indiana Department of Environmental Management and Kevin and Sarah Troyer. The petitions for review are dismissed.

The parties are hereby further notified that pursuant to provisions of Indiana Code § 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 IC 4-21.5. 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 this 25th day of February 2021 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge