Objection to the Issuance of Approval of
Amended Monitoring Well Installation Plan
Tanners Creek Plant Fly Ash Pond
Tanners Creek Development
2021 OEA 64

OFFICIAL SHORT CITATION NAME: When referring to 2021 OEA 64, cite this case as Tanners Creek Amended Monitoring Well Installation Plan, 2021 OEA 64.

Topics:

dismissal
coal combustion residuals (CCR)
501(c)(3) non-profit corporation
Out of state attorney
Attorney
Ind. R. Admission & Discipline, Rule 3, Section 2(a)
Ind. R. Admission & Discipline, Rule 3, Section 2(d)
Professional Laminate & Millwork Inc. v. B & R Enters., 651 N.E.2d 1153
Gifford v. Hartford Steam Boiler Inspection & Ins. Co., 811 N.E.2d 853
Ind. Tr. R. 11(A)
Hoosier Envtl. Council v. Dep't of Nat. Res., 673 N.E.2d 811

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

IDEM:	Kyle Burns, Clark Kirkman
Petitioners:	Kim Ferraro, Mandy DeRoche, Sameer Doshi, Thomas Cmar
Permittee:	E. Sean Griggs, Jessica Reiss

Order issued: June 3, 2021

Index category: Solid Waste

Further case activity:

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF APPROVAL	)	
OF AMENDED MONITORING WELL	)	
INSTALLATION PLAN	)	CAUSE NO. 21-S-J-5133
TANNERS CREEK PLANT FLY ASH POND	)	
TANNERS CREEK DEVELOPMENT LLC	)	
DEARBORN COUNTY, INDIANA	)	
_____	)	
Hoosier Environmental Council	)	
Petitioner	)	
Tanners Creek Development LLC	)	
Permittee/Respondent	)	
Indiana Department of Environmental Management	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Tanners Creek Development LLC (TCD) filed a Motion to Dismiss Petition for Administrative Review on April 5, 2021. The presiding Environmental Law Judge (the ELJ), having read the motion, response, and reply, now enters the following findings of fact, conclusions of law and final order:

Findings of Fact

1. On February 9, 2021, the Indiana Department of Environmental Management (IDEM) approved the Amended Monitoring Well Installation Plan (AMWIP) submitted by Tanners Creek Development LLC for the Tanners Creek Fly Ash Pond located in Dearborn County, Indiana.

2. Mandy DeRoche and Thomas Cmar at Earthjustice received a copy of the Approval via email on February 9, 2021. Tim Maloney and Kim Ferraro of the Hoosier Environmental Council (HEC) received a copy of the Approval via email on February 9, 2021.

3. HEC is an Indiana 501(c)(3) non-profit corporation.

4. HEC, on behalf of certain named members, filed its Petition for Administrative Review on February 24, 2021. The Petition was signed by Mandy DeRoche. Ms. DeRoche is an attorney but is not admitted to practice law in the State of Indiana. To date, Ms. DeRoche has not been granted temporary admission to appear in this cause. Kim Ferraro's name also appears on the petition, but she did not electronically sign the document. Ms. Ferraro is an attorney (Atty #27102-64) admitted to practice law in Indiana.

5. HEC filed an Amended Petition for Administrative Review on February 26, 2021. Ms. Ferraro signed the Amended Petition. No other amendments were made other than adding Ms. Ferraro's signature.

6. TCD filed its Motion to Dismiss Petition for Administrative Review on April 5, 2021. Petitioner filed its Response to Tanner Creek Development LLC's Motion to Dismiss Petition for Administrative Review on May 3, 2021. TCD filed its Reply on May 19, 2021.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 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 petition for review was not signed by an attorney admitted to practice in the State of Indiana. OEA must determine whether it has jurisdiction to hear the petition. If not, then the petition cannot be amended. However, if OEA obtained jurisdiction, then OEA must determine whether Petitioners should be allowed to amend the petition.

4. TCD argues that HEC, as a corporation[1], must be represented by counsel that has been admitted to practice in the State of Indiana. TCD argues that "Only attorneys admitted to practice in Indiana can represent a party before an Indiana tribunal. IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rules 3 and 21."[2] Because Ms. DeRoche is not admitted to the Indiana bar and no member of the Indiana bar signed the petition, TCD maintains that OEA did not acquire jurisdiction over the petition and the petition should be dismissed.

[1] TCD points to I.C. §34-9-9-1(c) as support that a corporation must be represented by counsel. However, this matter was filed under AOPA (Administrative Orders and Procedures Act, I.C. §4-21.5-3), which does not have the same requirement. It is not necessary to decide whether a corporation must be represented by counsel in administrative proceedings as it is undisputed that HEC is represented by counsel.
[2] TCD's Motion to Dismiss, pg. 2

5. The Indiana Supreme Court has exclusive jurisdiction over the practice of law in the State of Indiana. Ind. Const. Art 7, §4. Pursuant to Ind. R. Admission & Discipline, Rule 3, Section 2(a), attorneys not admitted to the Indiana bar seeking to appear in an administrative proceeding, must seek temporary admission with the Indiana Supreme Court and comply with the requirements of Ind. R. Admission & Discipline, Rule 3, Section 2(d). This rule states: "Responsibilities of Attorneys. Members of the bar of this state serving as co-counsel under this rule shall sign all briefs, papers and pleadings in the cause and shall be jointly responsible therefore. The signature of co-counsel constitutes a certificate that, to the best of co-counsel's knowledge, information and belief, there is good ground to support the signed document and that it is not interposed for delay or any other improper reason. Unless ordered by the trial court, local counsel need not be personally present at proceeding before the court."

6. TCD asserts that the Petition is a nullity. The Court of Appeals in *Professional Laminate & Millwork Inc. v. B & R Enters*., 651 N.E.2d 1153, 1156 (Ind. Ct. App. 1995) held "Thus, absent leave of the court, an attorney not licensed to practice law in Indiana may neither enter an appearance on behalf of a client nor file any briefs, papers, or pleadings without the aid of local counsel." Further, the Court held, ". . .without leave of the court, and absent the signature of local counsel licensed to practice law in this state, any papers filed by Pro-Lam were a nullity." *Id.* at 1157. *See also Gifford v. Hartford Steam Boiler Inspection & Ins. Co*., 811 N.E.2d 853 (Ind. Ct. App. 2004).

7. TCD emphasizes that counsel for HEC, on three (3) occasions, had notice that the signature of local counsel is required. The first is Ind. R. Admission & Discipline, Rule 3, Section 2(a), with which attorneys are bound to comply. The second is the Order from the Supreme Court granting temporary admission to Ms. DeRoche in another cause[3] before the OEA. The third is the language contained in the Order Scheduling Prehearing Conference, issued on March 2, 2021 for this cause, which states: "Attorneys not admitted to the Indiana bar, seeking to appear in an administrative proceeding, must comply with the requirements of Rules for Admission to the Bar and the Discipline of Attorneys, Rule 3, Section 2, effective January 1, 2012. This rule requires that the attorney seeking admission petition the Supreme Court of Indiana for temporary admission. The rule specifies the information the petition must contain."

8. TCD relies on Ind. Tr. R. 11(A). Ind. Tr. R. 11(A) states, "Every pleading or motion of a party represented by an attorney shall be signed by at least one [1] attorney of record in his individual name. . ." The rule further states "If a pleading or motion is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false[4] and the action may proceed as though the pleading had not been served." Under 315 IAC

[3] Objection to Issuance of Closure/Post Closure Plan to Tanners Creek Fly Ash Pond, Tanners Creek Development LLC, Cause No. 20-S-J-5107.
[4] There is no evidence that the Petition is either "sham or false".

1-3-1(b)(18), the presiding Environmental Law Judge (the "ELJ") may apply the Indiana Rules of Trial Procedure when it would not be inconsistent with the Administrative Orders and Procedures Act ("AOPA") (Ind. Code §4-21.5-3) or with the remaining rules in Title 315 of the Indiana Administrative Code.

9. TCD asserts that the failure of Ms. Ferraro to sign the Petition makes the Petition a nullity that cannot be amended. TCD cites *Hoosier Envtl. Council v. Dep't of Nat. Res.*, 673 N.E.2d 811, 815-16 (Ind. Ct. App. 1996) as support for the idea that the OEA did not acquire jurisdiction and therefore any attempt to amend the petition is futile. The court in this case held "Applying this interpretation, we find that the trial court never obtained jurisdiction over the case. Although the unverified petition was timely filed, at the time HEC sought to amend its petition, the thirty-day period had expired. As such, HEC's amended petition could not "relate back" to the initial petition because "there [being] no timely filing, there is nothing which an amended pleading could relate back to." The Court determined that the failure to verify the judicial petition was fatal to the cause. The court held that "Although I.C. § 4-21.5-5 does not expressly state that a petitioner must file a verified petition within thirty days, it is clear from reviewing the statute as a whole that a party must do so. First, the statute indicates that a party who fails to file a timely petition waives the right to judicial review. I.C. § 4-21.5-5-4(b). Second, the petition is timely only if it is filed within thirty days after notice of the agency action is served. I.C. § 4-21.5-5-5. Third, the petition must comply with certain requirements, including verification. I.C. § 4-21.5-5-7. Permitting a party to amend an otherwise noncompliant petition, after the thirty-day period has elapsed, would make the thirty-day requirement ineffective." *Id.* at 815. Although this case was decided under I.C. § 4-21.5-5 (judicial review), not I.C. § 4-21.5-3 (administrative review), this case is persuasive on the issue of whether amendment is proper.

10. The timely-filed Petition for Review was not signed by an attorney admitted to practice law in the State of Indiana and is therefore a nullity and cannot be amended. The amended Petition, although signed by an attorney admitted to practice in Indiana, was not timely filed. Although there is no evidence that the Petition for Review was sham or false or that there was any intent to deceive on Ms. DeRoche or Ms. Ferraro's parts, the Petition for Review should be dismissed. The Motion to Dismiss is granted.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss Petition for Administrative Review is **GRANTED.**

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-

5, et seq. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of a Final Order is timely only if filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 3rd day of June 2021 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge