

Objection to Approval of Renewal, Solid Waste Facility Permit No. FP 46-09
Great Lakes Transfer Station
Michigan City, LaPorte County, Indiana
2011 OEA 73, (10-S-J-4432)

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 73 cite this case as
Great Lakes Transfer Station, 2011 OEA 73.

TOPICS:

| | |
|--------------------------------------|---|
| Solid Waste Transfer Station | I.C. § 13-15-4-9(2) |
| Solid Waste Facility Permit | 329 IAC 11-9-2(a)(12) |
| Initial permit | 329 IAC 11-9-2(h) |
| permit renewal application | 329 IAC 11-9-4 |
| 120 days | 329 IAC 11-9-49d) |
| road cut | Ind. Trial Rule 9.2 |
| driveway permit | Ind. Trial. Rule 12(C) |
| collateral estoppel | <i>Great Lakes Transfer</i> , 2006 OEA 24 |
| Notice pleading | <i>City of Hobart</i> , 2010 OEA 220 |
| Motion for Judgment on the Pleadings | <i>JM Corp.</i> , 2011 OEA 26 |
| I.C. § 13-15-4-6 | |

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

| | |
|-----------------------|--|
| IDEM: | April D. Lashbrook, Esq. |
| Petitioners: | Douglas L. Biege, Esq., (LaPorte County) Gwenn R. Rinkenberger, Esq., (Porter County) |
| Respondent/Permittee: | John Lloyd, Esq.; Krieg DeVault LLP Barry F. McDonnell, Esq. |

ORDER ISSUED:

June 9, 2011

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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Great Lakes Transfer Station
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| STATE OF INDIANA |) | BEFORE THE INDIANA OFFICE |
| |) | OF ENVIRONMENTAL ADJUDICATION |
| COUNTY OF MARION |) | |

| | | |
|---|---|-----------------------|
| IN THE MATTER OF: |) | |
| |) | |
| OBJECTION TO THE APPROVAL OF RENEWAL |) | |
| SOLID WASTE FACILITY PERMIT NO. FP 46-09 |) | |
| GREAT LAKES TRANSFER STATION |) | |
| MICHIGAN CITY, LAPORTE COUNTY, INDIANA |) | |
| <hr style="width: 50%; margin-left: 0;"/> |) | CAUSE NO. 10-S-J-4432 |
| Porter County Board of Commissioners, |) | |
| Porter County Highway Department, Monte Struyf, |) | |
| LaPorte County Board of Commissioners, |) | |
| LaPorte County Board of Health, |) | |
| Petitioners, |) | |
| Great Lakes Transfer, LLC, |) | |
| 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” or “Court”) on the March 10, 2011 Motions for Judgment on the Pleadings filed by Respondent, Indiana Department of Environmental Management, and by Permittee/Respondent, Great Lakes Transfer, LLC, as to whether to dismiss Petitions for Administrative Review filed by Petitioner Porter County Board of Commissioners and Porter County Highway Department (“Porter County”) and the LaPorte County Board of Commissioners and LaPorte County Health Department (“LaPorte County”) for judgment on the pleadings for failure to state a claim for relief. Petitioners Porter County and LaPorte County also filed a February 18, 2011 Petition for Temporary Stay of Proceedings as to whether administrative litigation of this cause should be stayed, pending a decision concerning road access now pending before the Indiana Court of Appeals.

The Chief Environmental Law Judge (“ELJ”), having considered the petitions, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. On November 9, 2005, the Indiana Department of Environmental Management (“IDEM”) approved Solid Waste Facility Permit FP 46-09 (“Permit”) to Great Lakes Transfer, LLC (“Great Lakes” or “Permittee”) for a permit to construct and operate a solid waste transfer

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station on property located at 5535 North County Line Road, Michigan City, LaPorte County, Indiana. The transfer station will be constructed and operated on a portion of property owned by Darren and Gina Kaletha (“Kaletha”). Great Lakes and the Kalethas each sought road access for the transfer station on the Porter-LaPorte County Line Road (“Road”).

2. Petitioners Porter County Board of Commissioners and Porter County Highway Department (“Porter County”) and the LaPorte County Board of Commissioners and LaPorte County Health Department (“LaPorte County”) (collectively, “Counties”) were among the parties¹ which sought administrative review of the initial Permit in this forum.
3. Petitioners raised the following challenges to IDEM’s issuance of the initial Permit:
 - a) Although Great Lakes’ permit application showed road access, the application was incomplete because Great Lakes had been denied a County² driveway permit.
 - b) The Permit violated IDEM’s Environmental Justice Strategic Plan.
 - c) Due process rights of the Towns and their citizens were violated.
 - d) There was a significant adverse effect on public health and the environment.
 - e) The permit application did not meet relevant requirements.
 - f) The facility would not be constructed and operated according to the relevant statutes.

Board of Commissioners of LaPorte County, Board of Commissioners of Porter County, Town of Beverly Shores and Town of Pines vs. Great Lakes Transfer, LLC and the Indiana Department of Environmental Management, 888 N.E.2d 784, 787 (Ind. Ct. App. 2008).

4. The initial Permit was sustained on administrative review, *Great Lakes Transfer Station SWFP*, 2006 OEA 24, on judicial review by the Marion County Superior Court, *Cause 49F12-0610-PL-044019*, and on appellate review. 888 N.E.2d 784 (Ind. Ct. App. 2008) (“*Great Lakes Transfer Station SWFP I*”).
5. The initial Permit was set to expire, by operation of law, on November 1, 2010. Great Lakes applied to renew the initial permit on October 12, 2010. This cause concerns IDEM’s November 9, 2010 Approval of Great Lakes’ Renewal (“Renewal”) of the Permit. *Porter Co.’s Petition, Ex. A*. The Renewal authorized an extension of time, until November 1, 2015, for Great Lakes to construct and operate the solid waste transfer station, as authorized in the Permit.
6. The transfer station has not been constructed or operated.

¹ Petitions for Administrative Review of the initial Permit were filed by Town of Pines, Town of Beverly Shores, the Porter County Board of Commissioners (including named board members) were assigned OEA Cause Numbers 05-S-J-3632 and -3635. LaPorte County Board of Commissioners intervened. The two causes were litigated as one case.

² Great Lakes sought a driveway permit on the county line road at LaPorte County’ western boundary and Porter County’s eastern boundary. Per county ordinance 12.004.410, Porter County Board of Commissioners has jurisdiction over driveway permits on its eastern county line.

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7. Porter County Board of Commissioners (and named Commissioners) and Porter County Highway Department timely petitioned for administrative review of the Renewal on November 19, 2010. LaPorte County Board of Commissioners (and named Commissioners) and LaPorte County Health Department timely petitioned for administrative review of the Renewal on November 23, 2010, as did Monte Struyf.³
8. An initial prehearing conference on the petitions for administrative review was held as rescheduled on January 26, 2011. Based on the parties' expectation that the Counties might file a Petition for Temporary Stay of Proceedings, the Court issued a Report of prehearing conference and case management order concerning temporary stay briefing on January 27, 2011.
9. The parties do not dispute that Road cut access is subject to the jurisdiction of the Porter County Board of Commissioners and the Porter County Highway Department. *Porter Co. Pet., p. 4*. The Counties based the majority of their similar petitions for administrative review on Porter County's denial of a road cut required for site access. Additionally, the Counties asserted that IDEM's Renewal was improper for the following reasons:
 - a) The property is close to wetlands and to Mount Baldy in Indiana Dunes.
 - b) After the Permit was issued, property on the other side of the County Road had its zoning changed to residential.
 - c) If a Permitted facility is not constructed, it cannot be renewed.
 - d) The application for Renewal was untimely filed less than 120 days before the Permit expired.
10. Great Lakes and the Kalethas applied for driveway permits from the Porter County Highway Department; the applications were denied. February 18, 2011 *Petition for Temporary Stay of Proceedings, Ex. A, attached Exs. A, B, C, D*. Great Lakes and the Kalethas appealed Porter County's denials of the driveway permit to the LaPorte Superior Court. *Complaint for Declaratory Judgment, Writ of Mandamus and Inverse Condemnation*, Cause No. 46D02-0801-PL-018, February 18, 2011 *Petition for Temporary Stay of Proceedings, Ex. A*. The LaPorte Superior Court's September 30, 2010 ruling in favor of Porter County (holding that the County's decision was non-judicial, discretionary decision and is thus not subject to judicial review), is pending before the Indiana Court of Appeals. February 18, 2011 *Petition for Temporary Stay of Proceedings, Ex. C*; Appellate Cause 46A03-1010-PL-00554.
11. The Counties' February 18, 2011 Petition for Temporary Stay of Proceedings seeks to place litigation of this cause in abeyance, so as to conserve litigant and Court resources until the plenary appeal of Porter County driveway permit denials concludes.

³ Mr. Struyf's petition for administrative review is subject to a January 24, 2011 Notice of Proposed Order for Dismissal for failure to respond to a November 30, 2010 Notice of Incomplete Filing and Order to Supplement Petition, and is addressed in a separate Final Order.

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12. Respondents sought to conserve litigant and Court resources by terminating the administrative cause via judgment on the pleadings. *IDEM's March 10, 2011 Response to the Counties' Petition for Temporary Stay, its Motion for Judgment on the Pleadings and supporting memorandum; Respondent Great Lakes' March 10, 2011 Response to the Counties' Petition for Temporary Stay.*
13. In its March 10, 2011 Response, IDEM asked the Court to deem the pleadings closed per 315 IAC 1-3-2, correctly noting that more than thirty days had passed since the January 26, 2011 initial prehearing conference.
14. On April 8, 2011, the Counties addressed IDEM's and Great Lakes' opposition to the Petition for Temporary Stay and responded to the Motion for Judgment on the Pleadings. *Counties' April 8, 2011 Request for Ruling on Motion to Stay and Brief in Response to IDEM's Motion for Judgment on the Pleadings filed by IDEM and Great Lakes Transfer, LLC ("Counties' Response").*

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("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 Counties, as Petitioners, timely filed their petitions for administrative review. The Office of Environmental Adjudication ("OEA" or "Court") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-27. 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. In their Motions for Judgments on the Pleadings, both Respondent IDEM and Permittee Great Lakes seek to dismiss the Counties' Petitions for Administrative Review. Judgment on the pleadings, per Ind. Trial Rule 12(C), may be sought after the pleadings are closed. In this case, more than thirty days have passed since the time when the Counties could amend their Petitions as a matter of right. 315 IAC 1-3-2(e). The Counties have not obtained leave of Court or the parties' written consent to amend their Petitions. *Id.* The Counties do not directly oppose IDEM's request to deem the pleadings closed per 315 IAC 1-3-2(e), but do state, "[respondents] may choose to argue collateral estoppels before the close of the pleadings in this matter filed after the issues in this matter, however Indiana is a notice pleading state where plaintiff need only plead operative facts. [Respondents] fail to demonstrate that it is clear from the face of the complaint that under no circumstances could relief be granted." *Counties' Response, p. 9.* IDEM's March 10, 2011 request to deem the pleadings closed per 315 IAC 1-3-2 should be and is granted.

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4. Per T.R. 12(C), after the pleadings are closed, any party may move for judgment on the pleadings. “A motion for judgment on the pleadings tests the sufficiency of the complaint to state a redressable claim, not the facts to support it. *Steele v. McDonald's Corp.*, 686 N.E.2d 137, 141 (Ind. Ct. App. 1997), *trans. denied*. The test to be applied is whether the allegations of the complaint, taken as true and in the light most favorable to the non-movant and with every intendment regarded in his favor, sufficiently state a redressable claim. *Id.* When the pleadings present no material issues of fact and the facts shown by the pleadings clearly entitle a party to judgment, the entry of judgment on the pleadings is appropriate. *Mirka v. Fairfield of America, Inc.*, 627 N.E.2d 449, 450 (Ind. Ct. App. 1994), *trans. denied*.” *Book v. Hester*, 695 N.E.2d 597, 599 (Ind. Ct. App. 1998); *City of Indianapolis v. Kahlo*, 938 N.E.2d 734, 741 (Ind. Ct. App. 2010). *See also Cristiani v. Clark Co. Solid Waste Management Dist.*, 675 N.E.2d 715, 717 (Ind. Ct. App. 1996); *Davis ex rel. Dais v. Ford Motor Co.*, 747 N.E.2d 1146, 1149 (Ind. Ct. App. 2001). Under Indiana’s notice pleading rules, the petitioner does not need to file a complaint which states all elements of a cause of action. *Miller v. Mem’l Hosp. Of S. Bend, Inc.*, 679 N.E.2d 1329, 1332 (Ind. 1997) (*citing State v. Rankin*, 294 N.E.2d 604, 606 (1973)). But, the petitioner is required to plead the operative facts required to set forth an actionable claim. *State v. American Family Voices, Inc.*, 898 N.E.2d 293, 296 (Ind. 2008)(*citing Trail v. Boys and Girls Clubs of N.W. Ind.*, 845 N.E.2d 130, 135 (Ind. 2006)). Written documents attached to a complaint become part of the pleadings (*See T.R. 9.2*), and are appropriate for a court to review in ruling on a T.R. 12(C) motion for judgment on the pleadings, without treating the motion as a motion for summary judgment. *Gregory & Appel, Inc. v. Duck*, 459 N.E.2d 46 (Ind. Ct. App. 1984).
5. In considering Respondents’ Motions for Judgments on the Pleadings, the Court will consider the Counties’ Petitions, in addition to the Counties’ Motions to Stay Proceedings, their responses to the Respondents’ Motions for Judgments on the Pleadings and replies to Respondents.
6. This Court must apply a *de novo* standard of review to this proceeding 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), I.C. § 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.*; “*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, 253 (Ind. Ct. App. 1981). *See also Objection to the Issuance of Renewal of NPDES Permit No. IN0061344, City of Hobart, Lake County, Indiana (09-W-J-4256)*, 2010 OEA 220 (“Hobart Renewal”).

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7. 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. § 4-21.5-3-27(d). While the parties disputed whether IDEM's issuance of Renewal to Great Lakes was proper, OEA is authorized to determine whether the facts shown by the pleadings clearly entitle the Respondents to judgment on the evidence, per Ind. Tr. R. 12(C). "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.
8. Respondents IDEM and Great Lakes seek favorable judgment on the pleadings, for the reasons that Petitioners fail to state a claim upon which relief can be granted on the issue that Great Lakes did not submit a sufficient or timely renewal application, and, for all other issues, that the prior adjudication of the original permit bars relitigation of identical issues raised in challenge to the original permit's renewal.
9. Issues which were, or which could have been litigated in challenges to the initial permit may not be relitigated in the Counties' administrative challenge to the initial permit's renewal. Litigation of the initial permit concluded with the Indiana Court of Appeals' decision in *Board of Commissioners of LaPorte County, Board of Commissioners of Porter County, Town of Beverly Shores and Town of Pines v. Great Lakes Transfer, LLC and the Indiana Department of Environmental Management*, 888 N.E.2d 784 (Ind. Ct. App. 2008) ("*Great Lakes Transfer Station SWFP I*").
10. The parties to this instant case, challenging the initial permit's renewal, are: the Porter County Board of Commissioners (and named Commissioners), Porter County Highway Department, LaPorte County Board of Commissioners (and named Commissioners), LaPorte County Health Department and Monte Struyf. Mr. Struyf's petition for administrative review is being determined on other grounds, in a separate order. Although the Town of Beverly Shores and the Town of Pines (collectively, "Towns") sought administrative review of the original permit, the Towns did not seek administrative review of the original permit's renewal, nor did any parties seek to add the Towns as parties to the renewal challenge.

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11. In LaPorte County's Petition, the LaPorte County Board of Commissioners aver that they "are responsible for the health and welfare of the citizens of LaPorte County." *Pet.*, p. 2. LaPorte County's Petition further avers that the Road in controversy is under the jurisdiction of the LaPorte County Board of Commissioners and the LaPorte County Health Department. *Id.*, p. 2, 3. LaPorte County's Petition also states that the "Road is under the jurisdiction of the Porter County Board of Commissioners" and that the Porter County Board of Commissioners and the Porter County Health Department⁴ denied Great Lakes' Application for a Permit to Cut into a County Road. *Id.*, p. 4. LaPorte County's Petition contained similar facts supporting aggrieved or adversely affected status and issues in contention for both the LaPorte County Board of Commissioners and the LaPorte County Health Department. Petitioning Counties do not assert that the LaPorte County Health Department's interests were not or could not have been represented in the administrative challenge of the initial permit. LaPorte County Health Department has not presented substantial evidence that its interests sufficiently diverge from interests asserted by the other County entities. Therefore, the individual County entities have privity, and their interests were or could have been represented in the initial permit's administrative challenge.
12. The issues raised by petitioning Counties in their challenge to Great Lakes' initial permit were litigated and decided by this Court on September 12, 2006 during administrative review of Great Lakes' initial permit under OEA Causes 05-S-J-3632 and -3635. *See* 2006 OEA 24. Issues decided in the administrative challenge to the initial permit cannot be retried in this cause, the administrative challenge to the initial permit's renewal. Collateral estoppel or issue preclusion bars subsequent litigation of an issue necessarily adjudicated in a former suit if the same issue is presented in the subsequent suit. "*Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., Inc.*, 783 N.E.2d 253, 257 (Ind. 2003) (quoting *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 968 (Ind. 1998)). "Issue preclusion applies only to matters actually litigated and decided, not all matters that could have been decided." *Miller Brewing Co. v. Ind. Dep't of Revenue*, 903 N.E.2d 64, 68 (Ind. 2009). Where collateral estoppel applies, the former adjudication is conclusive in the subsequent action even if the two actions are on different claims. *Afolabi v. Atl. Mortgage & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006). "[G]enerally facts available at the time of the first suit are foreclosed in a subsequent suit, as are new arguments based on the same legal theory." *Miller Brewing*, 903 N.E.2d at 68. "We have used a two-part analysis to determine whether issue preclusion applies: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case." *Afolabi*, 849 N.E.2d at 1175. *Objection to the Issuance of the Renewal of Final NPDES Permit No. IN0061344, City of Hobart, Lake County, Indiana* (09-W-J-4256), 2010 OEA 220, 227.
13. Conclusions of Law in OEA's final order affirming IDEM's issuance of the initial permit, 2006 OEA 24, held:

⁴ LaPorte County's Petition stated no further mention of the Porter County Health Department, nor was it referenced in Porter County's Petition.

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7. Petitioners and Intervenor [LaPorte County] have essentially complained of harms that will allegedly occur because of the operation of the Transfer Station and trucks entering and leaving County Line Road. Operational issues and traffic issues are not within the jurisdiction of the OEA, and present no genuine issue of material fact as to whether the moving parties, Great Lakes and IDEM, are entitled to judgment as a matter of law.
8. Petitioners and Intervenor have also complained that IDEM's Environmental Strategic Justice Plan will be violated by issuance of the permit because residents of the area will be disproportionately affected by pollution. Petitioners and Intervenor have presented no evidence indicating that indeed the issuance of the permit will result in pollution or other negative environmental impacts upon the local residents that might trigger any environmental justice issues. Speculation that the transfer station may lead to additional pollution is again an operational issue that is not within the jurisdiction of the OEA. Petitioners and Intervenor have likewise not presented any evidence demonstrating how the Environmental Strategic Justice Plan is incorporated into the permitting process. The regulations governing issuance of transfer station permits does not allow IDEM to deny a permit based solely upon environmental justice issues. The existence of disputed facts concerning compliance with or violation of the Environmental Strategic Justice Plan present no genuine issue of material fact as to whether the moving parties, Great Lakes and IDEM, are entitled to judgment as a matter of law.
9. While Petitioners have shown that their legal interest in enforcing road weight limits, local zoning and building permit regulations is aggrieved and adversely affected should Great Lakes' not comply with applicable regulations, including lack of a road-cut permit because if the alleged harm, i.e., the alleged inability to construct an access road because Great Lakes lacks a road cut permit, such condition will also prevent IDEM from allowing Great Lakes to operate if in fact that condition is true. . . .
15. . . . 329 IAC 11-9-2(h) only requires that Great Lakes submit an application that contains a plot plan that shows how the facility will have road access, i.e. how the facility will connect to local roads. The regulation does not require that Great Lakes must demonstrate that it has obtained all certifications and permits to access local roads. However, the lack of a permitted driveway will also prevent IDEM from allowing Great Lakes to operate if in fact that condition is true.
16. Porter County makes the corresponding undisputed allegation that overweight trucks from the operation of the Transfer Station will harm its roads. Porter County presented testimony that it has the sole and exclusive jurisdiction over the roadways in Porter County, including County Line Road. Testimony of Commissioner Harper, March 1, 2006, p. 60, l. 20. In addition, the Porter County Code specifically governs enforcement of violation of regulated weight limits of vehicles utilizing public rights-of-way in Porter County. Exhibit 32, admitted March 1, 2006, Porter County Code

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§§ 10.024.050, 10.024.060. This Court does not have the jurisdiction to consider traffic issues that are within the province of local municipalities. Both the jurisdiction to consider such traffic issues, and the enforcement power to enforce local regulations cannot be encroached upon by this Court, should operation of the Transfer Station in fact harm Porter County's roads.

17. La Porte County has raised analogous issues concerning the zoning and building permits issued to Great Lakes. La Porte County has since noted that Great Lakes' zoning or building permits status has changed. The La Porte County Plan Commission and Board of Zoning Appeals is vested with enforcing its own zoning and building issues, not this Court. I.C. § 36-7-4 *et seq.* IDEM requested, and received proper documentation relating to the zoning and building permits for the site. Mansue Test., pp. 11-12. La Porte County has the jurisdiction to challenge the validity of the zoning or building permits, not this Court. The lack of appropriate zoning and/or building permits will also prevent IDEM from allowing Great Lakes to operate if in fact that condition is true.

14. The Counties' Petitions show that the issues they raised in challenge to the renewal were already decided in *Great Lakes Transfer SWPF I*, except for the issue of timeliness of the renewal application. Except for the issue of the timeliness of Great Lakes renewal application, the Counties, as parties in the prior action had a full and fair opportunity to litigate the issues. In sum, *Great Lakes SWPF I* held that neither IDEM nor OEA had authority to supersede local authorities' jurisdiction on the issues raised by the Counties, but if true, IDEM could not authorize Great Lakes to operate the facility if it lacked local approvals for the various issues raised by the Counties. The Counties' arguments seek to relitigate these issues, and do not provide substantial evidence that it is otherwise unfair to apply collateral estoppel, given the facts of this particular case. The Counties are collaterally estopped from challenging the renewal permit based on issues already adjudicated in their challenge to the initial permit. On all issues raised in their petitions, except for the timeliness of renewal, Respondents' judgment on the evidence should be granted.

15. The Counties' Petitions raise "the following issues from the public comment section: . . . **4. Comment:** The Notice of Application to Local Officials states that the permit application is "for a renewal to continue operations at the facility." There has never been any construction at the site." *Petitions, p. 7 of each.* As the Counties later cite in their briefs opposing Respondents' 12(C) Motion, 329 IAC 11-9-4 states requirements for facilities which are not constructed before the permit must be renewed. The Counties provide no further legal authority for the Petitions' contention that a facility must be constructed in order to be renewed. Respondents are entitled to judgment on the evidence on this issue.

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16. The Counties seek to defeat collateral estoppel on the issue of building and zoning permits based on a change in relevant renewal application regulations made after *Great Lakes SWPF I* was decided. For facilities which are not constructed before the permit must be renewed, “the renewal application must include any construction and operation requirements as specified in this article, as amended in 2010, and applicable to the facility.” 329 IAC 11-9-4(d) (June 28, 2010). 329 IAC 11-9-2(a)(12) (June 28, 2010) requires that:
- a. a complete application for a solid waste facility permit must consist of the following information, submitted to [IDEM] . . . (12) Documentation from the zoning authority that proper zoning approvals have been obtained and one (1) or more of the following documents, as applicable:
 - (A) A copy of the zoning requirements, if any, for solid waste facilities in the area where the facility is to be located.
 - (B) The status of any appeals of any zoning determination and, if none pending, the date by which the appeal must be initiated.
17. Per the 2010 versions of 329 IAC 11-9, *et seq.*, Great Lakes’ renewal application was to include documentation that zoning approvals were obtained and copies of applicable zoning requirements and the status of appeals. Attached to Porter County’s Petition are uncertified documents which appear to be partial copies of Great Lakes’ renewal application (e.g., design drawings are among the items noted on a checklist but not attached to Porter County’s Petition). “While a permit applicant has the obligation to submit a complete renewal application, the IDEM must also review the application for completeness and give the applicant the opportunity to supplement its application before it is denied.” See I.C. § 13-15-4-9(2); *Objections to Renewal of Solid Waste Permit No. FP 48-06, Mallard Lake Landfill, JM Corporation, Anderson, Madison County, Indiana*, 2011 OEA 26, 33. IDEM’s November 1, 2010 written request for additional information is also attached to Porter County’s Petition. The request for additional information does not seek documentation of the zoning approvals. The copy of Great Lakes’ renewal application presented to the Court appears to be a partial copy. IDEM’s November 1, 2010 request for additional information does not cite the deficiency alleged by the Counties. Although the Counties allege that Great Lakes’ renewal application failed to meet the updated requirements stated in 329 IAC 11-9, *et seq.*, the Counties’ allegations, even when taken as true and in the light most favorable to the non-movant Counties and with every intendment regarded in their favor, do not provide substantial evidence that the content of Great Lakes’ completed renewal application failed applicable regulatory standards. And, as noted in *Great Lakes SWPF I*, “the lack of appropriate zoning and/or building permits will also prevent IDEM from allowing Great Lakes to operate if in fact that condition is true.”
18. The Counties base an objection to the permit Renewal on the contention that IDEM lacked authority to issue a renewal when the renewal application was filed less than 120 days before the permit expired. It is undisputed that Great Lakes filed its renewal applications less than 120 days before its initial permit was set to expire. Per. I.C. § 13-15-4-6, “[w]hen a person holding a valid permit concerning an activity of a continuing nature has made a timely and sufficient application for a renewal or a new permit in accordance with rules of one (1) of the

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boards, the existing permit does not expire until a final determination on the application has been made by” IDEM. Applications for renewal must be submitted at least 120 days prior to the date the initial permit expires. 329 IAC 11-9-4. Construed together, the above statute and rule provide that if a permittee files a renewal application less than 120 days before the initial permit expires, then the permit may expire before IDEM issues a determination, if IDEM does not renew the initial permit prior to its expiration date. When a permit’s renewal application is timely filed, the effectiveness of an initial permit is administratively extended, in the event that the IDEM does not complete its review prior to a permit’s expiration date. If a permittee fails to file its renewal application on time, the consequence is that the permit may expire before IDEM can make a determination. There is no provision that the IDEM is then precluded from completing its review and issuing the renewal prior to the initial permit’s expiration, as it did in this case. The allegations of the Counties’ Petitions, taken as true and in the light most favorable to them and with every intendment regarded in their favor, present no material issues of fact. The facts shown by the pleadings clearly entitle Respondents to entry of judgment on the pleadings in their favor.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Respondent Great Lakes Transfer, LLC’s and the Indiana Department of Environmental Management’s request to close Petitioners’ pleadings per 315 IAC 1-3-2(e) is **GRANTED** and Motion for Judgment on the Evidence is **GRANTED**. The Petitions for Administrative Review filed by Porter County Board of Commissioners, Porter County Highway Department, LaPorte County Board of Commissioners and LaPorte County Health Department are **DISMISSED**. All further proceedings are **VACATED**.

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 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 June, 2011 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge