

**OBJECTION TO THE ISSUANCE OF
PERMIT APPROVAL NO. AW-4429
SMITH MANURE MANAGEMENT SYSTEM
WILLIAM SMITH
RUSH COUNTY, INDIANA
1998-OEA-023, 98-S-J-1855**

Official Short Cite Name: SMITH MANURE, 1998-OEA-023

OEA Cause No.: 97-S-J-1855

Topics/Keywords: IC 13-18-10
IC 13-18-10-2(a)
IC 13-18-10-2(a)(1) - (4)
IC 4-21.5-3-7(a)(1)
Ind. Tr. Rule 12(B)/ Motion to Dismiss

Presiding ELJ: Lori Kyle Endris

Party Representatives: Jennifer Thompson, Esq. for IDEM
James Lisher, Esq.
Dan L. Strahl, Esq.

Order Issued: March 6, 1998

Index Category: Solid Waste

Further Case Activity:

The Environmental Law Judge considered the Motions and hereby finds as follows:

Findings of Fact and Conclusions of Law:

1. The Office of Environmental Adjudication has jurisdiction over 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.

2. This is a Final Order issued pursuant to Ind.Code §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. A party may move for summary judgment in its favor on any or all of the issues; the motion must be supported with affidavits or specific facts showing there is no genuine issue in dispute. I.C. 4-21.5-3-23(a). Summary Judgment is properly granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "Any doubt about the existence of a factual issue should be resolved against the movant, with all properly asserted facts and reasonable inferences construed in favor of the nonmovant." Schrader v. Eli Lilly and Co., 639 N.E.2d 258, 261 (Ind. 1994).

4. William E. Smith submitted an application to the IDEM for approval of a confined swine feeding operation on June 18, 1997. The plan proposed construction of eight (8) separate 40 ft. X 80 ft. swine confinement buildings. Slotted floors included in the construction plans allowed for liquid manure storage in a concrete pit below each building. The walls of the pits are eight inches thick and the floor four inches thick. With 1,000 finishing hogs per building, the capacity of the pits is over 120 days worth of waste storage. The manure is to be applied with a tank wagon or manure spreader to portions of 799 acres of farmland. The 120 period provides adequate time to allow for application of the waste.

5. Mr. Smith's application was approved by the IDEM on August 7, 1997 in accordance with Ind.Code § 13-18-10. Applications for approval of construction of a confined feeding operation must be made on a departmental form and the applicant must provide, among other things, the "plans and specifications for the design and operation of manure treatment and control facilities," and a manure management plan outlining procedures for soil testing and manure testing. Ind.Code § 13-18-10-2(a). John Long, an environmental scientist with the IDEM in the Land Use Section in the Office of Solid and Hazardous Waste Management, reviewed Mr. Smith's application and made the determination that it was acceptable. (Affidavit ¶¶ 1-5)

Mr. Long, in making the determination, noted that one of his duties at IDEM is to approve confined feeding operations. (Affidavit ¶ 2). He reviewed the proposed construction plans of Mr. Smith's operation and determined that the application "met all of the requirements in I.C. 13-18-10 and in Manure Management, AW-1." (Affidavit ¶ 5). Also, Mr. Long asserted that the "proposed building sites are over 50 feet from any road, 100 feet from any well and 100

feet from any stream, drainage ditch or other body of water.” (Affidavit ¶ 8).

6. When Mr. Smith received his approval notification from IDEM, he was informed of the requirement to submit a manure management plan. Listed underneath this requirement were recommendations from the IDEM based on current best management practices for manure handling. The IDEM made the following recommendations regarding water quality:

manure should be applied at a rate to reduce runoff; manure should not be applied closer than 200 feet from any water well; manure should not be applied closer than 100 feet from any intermittent stream or other body of water without immediate incorporation; and the facility’s operation should be maintained so there are no discharges to any waters in the State. (IDEM Approval).

7. On August 7, 1997, Petitioners, George and Mary Roller, filed a timely petition for administrative review and a request for stay pursuant to Ind.Code § 4-21.5-3-7. Petitioners are located upstream from the proposed operation and have children who are prone to health problems, i.e., asthma. Because of concerns about possible negative impacts to the land, water, air, and health of their children stemming from the operation, Petitioners requested a review of the IDEM’s approval.

Almost five months later, on January 16, 1998, the Petitioners submitted their statement of the issues in which they raised additional, different issues from those contained in the petition for review. Because the Petitioners did not amend their issues within thirty (30) days, they have failed to meet the requirements of I.C. 4-21.5-3-7(a), which states that “[n]ot more than thirty (30) days after filing a petition for review...a person may amend the statement of issues contained in a petition for review[.]” Thus, only the issues raised in the petition for administrative review are properly before the Environmental Law Judge¹. See Objection to the Issuance of the

¹Petitioners failed to timely raise the following issues : (1) whether the proper documents have been submitted in order to comply with the IDEM requirements for issuance of a Confined Feeding Operation Permit; (2) Whether any changes have occurred since the filing of the above-referenced documents which would necessitate re-evaluation of the issuance of a permit by IDEM; (3) Whether the guidelines set forth by Purdue University contained in its Extension Office Bulletin PIH #33 have been complied with and are necessary for the issuance of a permit; (4) Whether the State Board of Health guidelines and rules need to be complied with pertaining to airborne contaminants, water contaminants, etc. as it related to the health and safety of the surrounding citizens, particularly those suffering from prior known health risks such as breathing afflictions and asthma. Whether a duly licensed medical doctor’s recommendations as to safe distances from a perceived or known health hazard be enforced through the permit process; (5) Is the planned site for the placement of the Confined Feeding Operation buildings and the waste disposal or dispersal sites outside the required distances from any waterways or streams in order to avoid potential surface water contamination (referencing at least North Branch Creek and Ben

Modification to Permit FP#82-02 Laubscher Meadows Landfill, 96-S-J-1677.

8. Ind. Rules of Trial Procedure, Rule 12(B) provides in part,

[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsible pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion

(1) Lack of jurisdiction over the subject-matter.

...

(6) Failure to state a claim upon which relief can be granted.

a. Petitioners contended, in their petition for administrative review, that “[d]ust and odors from the confinement will have a negative effect upon the health of our children. The IDEM has no jurisdiction² over the dust and odors from the confinement area; therefore the Environmental Law Judge is without jurisdiction over this issue. Ind.Code §4-21.5-7; Ind.R. Tr. Pr. 12 (B)(1) (1997).

B. Petitioners raised concern “about the flies that huge confinement operations attract.” The IDEM has no jurisdiction³ over vectors in and around the confinement area; therefore the Environmental Law Judge is without jurisdiction over this issue. Ind.Code §4-21.5-

Davis Creek); (6) Should there be monitoring of the wells and waterways in the area to insure compliance with water standards. Should samples be taken before and during operation to determine compliance; and (7) Does the waste management plan take into consideration application of phosphate as well as nitrogen and the length of time that the recommended application rate should be followed for safe dispersal upon the land.

²The IDEM is required to approve an application if it meets the requirements of Ind.Code § 13-18-10. The statutes relative to confined feeding programs regulates odors or dust from confined feeding operations. Moreover, the applicant is not required to submit an odor or dust plan. *See* AW-1.

³The IDEM is required to approve an application if it meets the requirements of Ind.Code § 13-18-10. The statutes relative to confined feeding programs regulates odors or dust from confined feeding operations. Moreover, the applicant is not required to submit an odor or dust plan. *See*AW-1.

7; Ind.R. Tr. Pr. 12 (B)(1) (1997).

C. Petitioners asserted that “a leak in the pits might contaminate the aquifer from which [they] draw [their] drinking water [and] about leaks in the pits affecting the water quality in [their] family’s and...neighbors streams.” Any failure of the pits to store the waste properly is an enforcement issue rather than a permit issue. Thus, Petitioners have not stated a claim upon which relief can be granted. Ind.R. Tr. Pr. 12 (B)(6) (1997).

D. Petitioners expressed concern that their well is less than a quarter mile from the fields where the waste will be spread and that the runoff from the spreading of manure will contaminate their well. An application for approval of the construction of a confined feeding operation must include plans and specifications for the operation, a manure management plan that outlines procedures for soil testing and manure testing, and general features of the topography, drainage patterns, and location of the operation. Ind.Code § 13-18-10-2(a)(1)-(4).

The plans and specifications of the eight buildings to comprise the operation were detailed and considered. Second, the timing, storage and application were considered, and Long asserts that the Respondent’s application met the requirements of Ind.Code § 13-18-10 and the Manure Management, AW-1. (Affidavit ¶5). Furthermore, the IDEM, in its letter of approval, required Respondent to submit a plan that outlines soil testing, manure testing and maps of application at least once every five years. Should the spreading of the manure contaminate a water source, the Permittee would be subject to an enforcement action. Thus, Petitioners have not stated a claim upon which relief can be granted. Ind.R. Tr. Pr. 12 (B)(6) (1997).

9. Petitioners argued that the site of the confined feeding operation is in conflict with the State Division of Historic Preservation and Archeology due to the close proximity to the Arnold Farm listed on the National Register of Historic Places. Ind.Code § 4-21-5-3-7(a)(1) requires a petition for review to demonstrate that “the *petitioner* is a person to whom the order is specifically directed and the *petitioner* is aggrieved or adversely affected by the order.” (Emphasis added). As the Petitioners do not own the Arnold Farm, the prescription of Ind.Code § 4-21-3-7(a)(1) has not been met. Moreover, the statutes governing confined feeding do not require the IDEM to consider whether an adjacent landowner’s⁴ property is listed on the Register for purposes of its review.

Final Order

The IDEM’s Motion to Dismiss or in the Alternative for Summary Judgment is hereby GRANTED. It is therefore ORDERED that Approval No. AW-4429 is hereby UPHeld.

You are further notified that pursuant to the provisions of P.L. §41-1995, amending

⁴It is unclear the exact proximity of the farm from the proposed confined feeding operation.

Ind.Code §4-21.5-7, which became effective July 1, 1995, 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 the applicable provisions of Ind.Code §4-21.5-5, 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 6th day of March, 1998.

Lori Kyle Endris
Environmental Law Judge

cc: Bruce Palin, Acting, Assistant Commissioner
Office of Solid and Hazardous Waste Management