

**OBJECTION TO THE ISSUANCE OF  
APPROVAL NO. AW 4504  
MR. STEPHEN GETTELFINGER  
WASHINGTON, INDIANA  
1998 OEA 062, OEA CAUSE NO.: 98-S-J-1958**

Official Short Cite Name:	STEPHEN GETTELFINGER, 1998 OEA 062
OEA Cause No.:	98-S-J-1958
Topics/Keywords:	IC 4-21.5-3-27(d) IC 4-21.5-3-7 315 IAC 1-3-2 Ind. Tr. R. 12(B) Confined feeding
Presiding ELJ:	Wayne E. Penrod
Party Representatives:	Deborah E. Albright, Esq. Daniel P. McInemy, Esq. Elizabeth A. Zlatos, Esq.
Date of Order:	Dec 8, 1998
Index Category:	Solid Waste
Further Case Activity:	



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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Chief Administrative Law Judge

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STATE OF INDIANA )  
 )  
COUNTY OF MARION )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
OBJECTION TO THE ISSUANCE OF )  
APPROVAL NO. AW 4504 )  
MR. STEPHEN GETTELFINGER )  
WASHINGTON, INDIANA )

CAUSE NO. 98-S-J-1958

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

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This constitutes notice that on August 14, 1998, Mr. Stephen Gettelfinger, by counsel, filed a Motion to Dismiss the Petitioners' appeals and a Memorandum in Support of Motion to Dismiss. On September 14, 1998, the Indiana Department of Environmental Management ("IDEM"), by counsel, filed a Response to Stephen Gettelfinger's Motion to Dismiss. On September 14, 1998, Petitioners, by counsel, filed their Response to Motion to Dismiss. On September 25, 1998, Mr. Gettelfinger, by counsel, filed a Reply to Response to Motion to Dismiss and Motion to Strike Exhibit 1 attached to the Response to Motion to Dismiss.

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

***Findings of Fact:***

1. On January 21, 1998, Approval No. AW 4504 (the "Approval") was issued to Mr. Stephen Gettelfinger by IDEM for the construction and operation of a confined feeding operation in accordance with I.C. 13-18-10.
2. Four petitions for administrative review (the "Petitions") were filed with the Office of Environmental Adjudication ("OEA") objecting to the issuance of the Approval. Three of the four Petitions requested a stay of the Approval.
3. On February 26, 1998, Environmental Law Judge Wayne E. Penrod issued an Order Scheduling Prehearing Conference and Stay Hearing for June 3, 1998.
4. The prehearing conference and stay were held and each of the parties who had requested a stay withdrew their request on the record. At the prehearing the Chief ALJ scheduled a telephone conference for June 16, 1998.
5. On June 16, 1998, a telephone conference was held and a briefing scheduling was established and subsequently revised. Additionally, a telephonic status conference was scheduled for October 6, 1998.
6. On August 14, 1998, Mr. Gettelfinger, by counsel, and pursuant to IC 4-21.5-3-7, 315 IAC 1, and Trial Rule 12(B), Indiana Rules of Procedure, filed a Motion to Dismiss the Petitioners' appeals and a Memorandum in Support of Motion to Dismiss. The Motion to Dismiss and supporting Memorandum were based on the following issues: (1) the Petitioners deprived the OEA of subject matter jurisdiction over the Petitions because the Petitions did not state facts demonstrating that the Petitioners were aggrieved or adversely affected by the Order as required by IC 4-21.5-3-7, (2) the Petitioners failed to state a claim upon which relief could be granted by the OEA because their claims were prospective, and based solely upon speculation that Mr. Gettelfinger may violate the law at some point in the future by contaminating surface or groundwater resources and, (3) the Petitioners' claims were not based upon any defect or deficiency in the Gettelfinger application, or any defect or deficiency in the IDEM review or approval process.
7. On September 14, 1998, IDEM, by counsel, filed a Response to Stephen Gettelfinger's Motion to Dismiss concurring in Mr. Gettelfinger's Motion to Dismiss and the Memorandum in Support of Motion to Dismiss and stating that, "Petitioners have failed to state a claim upon which relief may be granted." On September 14, 1998, Petitioners, by counsel, also filed their Response to Motion to Dismiss (the "Response") taking the position that the Motion should be denied. Attached as Exhibit 1 to Petitioners' Response was an affidavit from an environmental consultant.
8. On September 25, 1998, Mr. Gettelfinger, by counsel, filed a Reply to Response to

Motion to Dismiss and Motion to Strike Exhibit 1 attached to the Response.

9. On October 6, 1998, Judge Penrod conducted a telephonic status conference regarding the motions filed in the above captioned matter. The status conference was attended by Petitioners' counsel, Deborah E. Albright, and Respondent's counsel, Daniel P. McInerney. At that time, Judge Penrod granted the Respondent's Motion to Dismiss based on Petitioners' failure to state a claim cognizable by the OEA. He further stated that in reaching his decision to grant the Motion to Dismiss, he did not consider the affidavit submitted with Petitioners' Response to Motion to Dismiss finding, in his discretion, that consideration of factual evidence was not appropriate in the context of the Motion to Dismiss.

10. A motion to dismiss under T.R. 12(B)(6) tests the legal sufficiency of the claim, not the facts which support it. *Absher v. Clark County Rural Electric*, 629 N.E.2d 870, 871 (Ind.Ct.App.1994), trans. denied. The pleadings are viewed in the light most favorable to the nonmoving party and every reasonable inference therefrom is drawn in favor of that party. *Hill v. Beghin*, 644 N.E.2d 893, 895 (Ind.Ct.App.1994), trans. denied. "We will affirm a successful T.R. 12(B)(6) motion when a complaint states a set of facts which, even if true, would not support the relief requested in that complaint." *Garage Doors of Indianapolis v. Morton*, 682 N.E.2d 1296, 1301 (Ind.Ct.App.1997), trans. denied. Further, we will affirm the trial court's grant of a motion to dismiss if it is sustainable on any theory or basis found in the record. *Havert v. Caldwell*, 452 N.E.2d 154, 157 (Ind.1983).

11. None of the Petitioners allege that Mr. Gettelfinger's application fails to meet any statutory requirement, or is in any other way deficient or defective.

12. None of the Petitioners allege any deviation from statutory requirements, or other deficiencies or defects in the IDEM review or approval process.

13. The Petitioners have alleged no injury in fact; rather, their allegations of potential future harm are purely conjectural and hypothetical. Moreover, the alleged harm does not flow from the issuance of the Approval itself, but could result only from future management of the operation in a manner which would not be in accordance with the law. Because the Petitioners' petitions for administrative review (the "Petitions") are based upon unfounded speculation as to potential future harm, they have failed to state facts demonstrating that they are "aggrieved or adversely affected" by the issuance of the Approval, which is a jurisdictional prerequisite for administrative review under IC 4-21.5-3-7(a)(1) and 315 IAC 1-3-2.

14. The Petitioners have failed to state a claim upon which relief can be granted by the OEA because their claims are prospective, and based solely upon speculation that Mr. Gettelfinger may violate the law at some point in the future by contaminating surface or groundwater resources. The Petitioners' claims are not based upon any defect or deficiency in the Gettelfinger application, or any defect or deficiency in the IDEM review or approval process.

15. A confined feeding approval may not be overturned upon speculation that it will not be operated in accordance with the law. The Approval states on its face that, "The manure treatment and control facilities, including the availability of sufficient acreage for manure application, meet or exceed the minimum requirements established by IDEM." In the matter of *Objection to the Issuance of Permit Approval No. AW -4429, William Smith, Rush County, Indiana*, Cause No. 97-S-J-1855, the Environmental Law Judge considered whether assertions of potential future leakage from pits or runoff from the spreading of manure constituted claims upon which relief could be granted by the OEA. The Environmental Law Judge's conclusion was that such issues constituted enforcement issues rather than permit issues, and did not state a claim upon which relief could be granted. (See *Smith* decision, p. 5). The *William Smith* decision is directly on point, and rests upon the fundamental premise that an otherwise properly issued approval cannot be overturned based upon claims that the applicant will not abide by the law. It must be presumed that Mr. Gettelfinger will abide by the law and the stated conditions of his Approval. The Petitioners' allegations are based, not upon any defect in the application or approval process, but upon the premise that Mr. Gettelfinger may violate the law in the future. As has been held in previous Office of Environmental Adjudication ("OEA") decisions, such claims constitute enforcement issues, not issues related to the issuance of the Approval itself, and therefore state no claim upon which relief may be granted by the OEA.

16. Pursuant to I.C. 4-21.5-3-27(d) "[c]onclusions of law must consider prior final orders (other than negotiated orders) of the ultimate authority under the same or similar circumstances if those prior final orders are raised on the record in writing by a party and must state the reasons for deviations from those prior orders." In his Motion to Dismiss, counsel for the Respondent raised OEA's prior final order in the *William Smith* decision, Cause No. 97-S-J-1855. This opinion, being rendered in the above captioned Cause No. 98-S-J-1958, is consistent with the OEA's opinion in the *William Smith* decision, Cause No. 97-S-J-1855.

### ***Conclusions of Law:***

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management and the parties to this controversy pursuant to I.C. 4-21.5-7.

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. The Petitions do not state facts demonstrating that the Petitioners are aggrieved or adversely affected by the Order as required by IC 4-21.5-3-7 and 315 IAC 1-3-2.

4. The Petitions state a set of facts which, even if true, would not support the relief requested in the Petitions.

5. The Petitioners have failed to state a claim upon which relief may be granted by the OEA.

***Final Order***

Mr. Gettelfinger's Motion to Dismiss is hereby GRANTED. It is therefore ORDERED that the Approval No. AW 4504 is hereby UPHELD.

You are further notified that pursuant to the provisions of P.L. 41-1995, amending I.C. 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 I.C. 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 8<sup>th</sup> day of December, 1998.

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Wayne E. Penrod, Chief  
Administrative Law Judge