

Objection to the Issuance of Permit Approval No. AW 4851
Clark Brothers, White County
2000 OEA 10 (99-S-J-2373)

TOPICS:

summary judgment
confined feeding
Ind. Code § 13-18-10
AW Manure Management Guidance Document
authority
property values
smell; odor
flies
noise
truck traffic
standing
contamination
enforcement
land application standards
potential enforcement issues
not receive notice

PRESIDING JUDGE:

Penrod; Lasley

PARTY REPRESENTATIVES:

Petitioner: Lee Ferdinand
Permittee: Dan Strahl, Esq.
IDEM: Janice Lengel, Esq.

ORDER ISSUED:

February 9, 2000

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objection to the Issuance of Permit Approval No. AW 4851
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STATE OF INDIANA)
) SS: BEFORE THE INDIANA OFFICE OF
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
PERMIT APPROVAL NO. AW 4851) CAUSE NO. 99-S-J-2373
CLARK BROTHERS, WHITE COUNTY)

FINAL ORDER AFFIRMING RECOMMENDED ORDER

This constitutes notice that on January 19, 2000, the Administrative Law Judge issued a Recommended Order in the above-captioned matter. On January 31, 2000, this office received a correspondence from Lee Ferdinand. The Chief Administrative Law Judge accepts this correspondence as an attempt by Lee Ferdinand to appeal the Recommended Order. The Chief Administrative Law Judge, having considered said correspondence, and acting as the ultimate authority for final decisions by the Indiana Department of Environmental Management, hereby **AFFIRMS** the Recommended Order and incorporates it herein by reference.

You are further notified that pursuant to Indiana Code 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 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 in Indianapolis, Indiana this 9th day of February 2000.

Wayne E. Penrod,
Chief Administrative Law Judge

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RECOMMENDED ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT

This constitutes notice that on August 23, 1999, this office received a Petition for Administrative Review from Harold Lehman. On August 24, 1999, this office received a Petition for Administrative Review from Lee Ferdinand. On September 23, 1999, an Order Scheduling Prehearing Conference was sent to all parties. On October 19 and 22, 1999, Respondents, Clark Brothers, by counsel, Dan Strahi and the Indiana Department of Environmental Management ("IDEM"), by counsel, Janice Lengel, filed Motions to Dismiss. The Administrative Law Judge held the Motions to Dismiss in abeyance until the Petitioners had an opportunity to amend their petitions to conform with Indiana Code § 13-15-6-2. Each Petitioner submitted an amended petition conforming to the requirements of Ind. Code § 13-15-6-2. Respondent Clark Brothers, by counsel, filed a Motion for Summary Judgment on November 17, 1999. On December 29, 1999, Respondent Clark Brothers renewed its Motion to Dismiss and requested a hearing on the Motion for Summary Judgment. The Administrative Law Judge, being duly advised now finds the following facts undisputed:

1. Clark Brothers submitted its confined feeding application on July 7, 1999.
2. IDEM approved Clark Brothers' application and issued confined feeding permit AW4851 on August 13, 1999.
3. The permit application includes the necessary information required by Ind. Code § 13-18-10 et seq. and the AW-1 Manure Management Guidance Document.
4. This office does not have authority or jurisdiction to grant relief on Petitioners' concerns regarding property values, smell/odor, flies, noise and truck traffic.
5. Petitioners in this case do not have standing to raise notification issues for others. Individuals who are aggrieved or adversely affected by a final decision from IDEM must raise notification issues on their own behalf.
6. Any potential contamination problems this confined feeding operation may cause are issues for IDEM's Office of Enforcement. This office has no authority to grant relief on potential enforcement issues.
7. The USGS topographic maps submitted with the application identify the nearest body of water as "Honey Creek." Even the map submitted by Petitioner Ferdinand, in his Response to the Motion for Summary Judgment, identifies the creek as Honey Creek.
8. In its application, Clark Brothers estimates that it will take approximately 1000 gallons of water to clean the concrete pits. Since 1000 gallons is an approximation, cleaning each pit could use more or less than 1000 gallons of water. Further, neither Petitioner indicated why this fact could serve as a basis for vacating the approval of AW 4851.

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9. Land application standards are recommendations and not requirements. There is uncontroverted evidence that Clark Brothers has more than enough land available to land apply the manure it will generate. If land application causes problems, then that is another issue for IDEM's Office of Enforcement.
10. Petitioner Ferdinand also asserts that he did not receive notice of the permit application ten days after its submittal. Unfortunately, Mr. Ferdinand presented no evidence on this issue. If he had at least offered the envelope or the dated letter notifying him of the Clark Brothers application, then there would be some issue for this tribunal to consider. Even so, Petitioner Ferdinand would have difficulty demonstrating that he was prejudiced by any delay in the notification process given his vigorous participation in this proceeding.

Conclusions of Law:

Based on the foregoing undisputed facts, the Administrative Law Judge concludes, as a matter of law, that this case presents no genuine issue of material fact and that Respondent Clark Brothers is entitled to judgment as a matter of law because permit AW 4851 was issued in accordance with Ind. Code § 13-18-10 et seq. and the applicable guidance document.

Recommended Order:

The Administrative Law Judge recommends that Respondent Clark Brothers' Motion for Summary Judgment be **GRANTED**, that Respondents' Motions to Dismiss be denied and that Respondent Clark Brothers request for hearing on Motion for Summary Judgment be denied.

The pre-hearing conference currently set for January 28, 2000 is hereby **VACATED**.

Appeal Rights:

You are hereby notified that pursuant to §4-21.5-3-29, you have the right to appeal the Recommended Order of the Administrative Law Judge. In order to do so, you must object in a writing that does the following:

- (1) specifies which portions of the Recommended Order you object to;
- (2) specifies which portions of the administrative record supports the objection(s); and
- (3) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days. Objections should be sent to:

Wayne E. Penrod, Chief Administrative Law Judge
Office of Environmental Adjudication
150 West Market Street, Suite 618
Indianapolis, IN 46204

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A final order disposing of the case or an order remanding the case to the administrative law judge for further proceedings shall be issued within sixty (60) days after the latter of:

- (1) the date that the order was issued under §4-21.5-3-27;
- (2) the receipt of briefs; or
- (3) the close of oral argument;

unless the period is waived or extended with the written consent of all parties or for good cause shown.

IT IS SO ORDERED in Indianapolis, Indiana this 19th day of January 2000.

Linda C. Lasley
Administrative Law Judge