

**Objection to the Issuance of Permit Approval Dave's Trucking Company
2000 OEA 36 (99-S-J-2235)**

TOPICS:

experimental
necessary
construction/demolition
summary judgment
testimony
evidence
solid waste
recycling
solid waste processing facility permit
competent
profitability

PRESIDING JUDGES:

Penrod, Lasley

PARTY REPRESENTATIVES:

Petitioner: Lewis Beckworth, Esq.
Respondent/Permittee: Larry F. Whitham, Esq.: Whitham, McColley & Ross, P.C.
IDEM: Robert Keene, Esq.

ORDER ISSUED:

August 8, 2000

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objection to the Issuance of Permit Approval Dave's Trucking Company
2000 OEA 36 (99-S-J-2235)**

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

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
PERMIT APPROVAL) CAUSE NO. 99-S-J-2235
DAVE'S TRUCKING COMPANY)

FINAL ORDER AFFIRMING RECOMMENDED ORDER

This constitutes notice that on May 31, 2000, the Administrative Law Judge issued a Recommended Order Granting Circle City's Motion for Summary Judgment. The Chief Administrative Law Judge, as the final authority for decisions by the Commissioner of the Indiana Department of Environmental Management (IDEM) and after reviewing the record of these proceedings, hereby **AFFIRMS** the Recommended Order and incorporates it herein by reference. In addition, the Chief Administrative Law Judge hereby finds the following:

1. IDEM's appeal of the Recommended Order rests on the fact that "IDEM was not aware that the order required that evidence be presented. If there is or was such a requirement IDEM stands ready to present such evidence." Objections to Recommended Order, page 3.

2. Inherent in the Administrative Law Judge's Order requiring IDEM to make an experimental and necessary determination, was the obligation to identify all evidence supporting its decision. IDEM could have relied upon evidence presented at the two days of hearings conducted on July 27 and 28, 1999 or brought forth other evidence supporting its decision. IDEM's "Report to the Court Regarding an Experimental and Necessary Determination of Dave's Trucking Company Operation," was another opportunity to make that determination in writing and for the record. The report echoes the reasoning presented in Mr. Rud's testimony and does nothing more. See Hearing Transcript, Testimony of Rud, page 313 ("What's experimental about this operation Mr. Rud? Well, again, I think, the fact that the C/D recycling is going on, I think, that's new to us, to our program, so that would be likely viewed as being new, and different, innovative"); page 314 ("Is there anything the least bit necessary about this project insofar as the further development of the state of the art of pollution control is concerned? I'm not sure about the economic feasibility of it. If it weren't, I say, if they were just in the full permit arena, I'm not sure it would be economically feasible"); and page 345 ("Okay, So you do use unique to define something that would constitute a demonstration project or something that would be experimental? I think that would be fair to say that it's unique. There's nothing unique about Dave's is there? . . . Since there are other facilities like that, I would have to say, 'no'").

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3. Given the above testimony, if IDEM had other evidence to present regarding its determination, then the Report should have contained it. IDEM cannot now complain it did not have a fair opportunity to present evidence. The Administrative Law Judge correctly found that IDEM failed to present evidence to support its decision, either during the hearing or in its Report.

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 8th day of August 2000.

Wayne E. Penrod
Chief Administrative Law Judge

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**RECOMMENDED ORDER GRANTING CIRCLE CITY'S
MOTION FOR SUMMARY JUDGMENT**

I. Statement of the Case:

On March 1, 1999, Circle City Recycling & Transfer, Inc. (Circle City) filed a Petition for Administrative Review. On August 25, 1999, the Administrative Law Judge issued an order denying Circle City's request for stay and recommended a summary disposition. The Administrative Law Judge's Recommended Order was affirmed on September 15, 1999. On November 12, 1999, in accordance with the Recommended Order, IDEM filed a report concluding that Dave's Trucking Company, Inc. (Dave's Trucking) operations were experimental and necessary to advance the state of the art of construction/demolition (c/d) waste recycling. The Administrative Law Judge requested a clarification of the report on November 16, 1999. Circle City filed a Petition for Administrative Review of IDEM's report and clarification and also moved for summary judgment. IDEM requested an extension of time to respond to the Motion for Summary Judgment and filed its Response and a Motion for Cross-Summary Judgment on February 7, 2000. Circle City filed its Response to IDEM's Motion for Summary Judgment and its Reply on March 10, 2000.

II. Undisputed Facts:

1. On November 12, 1999, counsel for IDEM submitted a "Report Regarding An Experimental and Necessary Determination of Dave's Trucking Company Operation."
2. The report states that "properly managed sites have always ceased operation when the regulatory requirements have been made known to them, as the profitability of such activities will not justify going through the permitting process."
3. The report goes on to state that "the main impediments to 'the further development of the state of the art of pollution control' by improving c/d waste reduction, reuse and recycling are the narrow profit margins involved in the activity and the mostly small, marginally financed companies involved in the c/d handling business."
4. Additionally, the report states "that the c/d processing demonstrations were issued as an experimental trial. Dave's Trucking Company operation is one such experimental trial and is found to be necessary for the further development of the state of the art of pollution control."
5. Finally, the report concludes "the experiments are expected to continue until the proposed regulatory revisions are adopted by the Solid Waste Management Board. If the language to all of these facilities to operate without a permit remains in the rules as adopted by the Board, the demonstration approvals will continue until the rules became effective. If the language to allow these operations to operate without a permit is stricken from the rule, the demonstrations will be terminated by notice to the operators."

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III. Discussion:

Circle City moves for summary judgment on the basis that IDEM has failed to make an experimental and necessary determination as required by statute and the Recommended Order. In support of this argument, Circle City points to the fact that IDEM does not discuss Dave's Trucking operations at all in its report and does not state why or how Dave's Trucking is experimental. Further, IDEM's report does not even mention the necessity of Dave's Trucking. Finally, Circle City argues that IDEM's Motion for Summary Judgment is unsupported by substantial evidence.

IDEM's Motion for Summary Judgment rests on its report and the fact that IDEM intends to revise the solid waste management rules to exempt operations like Dave's Trucking from the permitting process. Moreover, IDEM's argues that Circle City should not be granted summary judgment because Dave's Trucking is being held to strict environmental standards and IDEM should be allowed to test whether unpermitted activity can be done without causing environmental harm while generating environmental benefits.

For the following reasons, Circle City's Motion for Summary Judgment must be granted. IDEM is ignoring its own regulations, which require Dave's Trucking to obtain a solid waste processing facility permit. In addition, IDEM has failed to provide competent evidence on the issue of how Dave's Trucking operation is experimental and necessary.

A. Standard of Review

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Havens v. Richey, 582 N.E.2d 792, 795 (Ind. 1991); and Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630, 633 (Ind. 1991). A fact is "material" if its existence facilitates the resolution of any issues involved in the lawsuit. Funk v. Funk, 563 N.E.2d 127, 130 (Ind.Ct.App. 1990). Further, a claim must have legal probative force in order to be a "genuine issue of material fact" under Indiana Trial Rule 56. Raymundo v. Hammond Clinic Association, 449 N.E.2d 276, 280 (Ind. 1983). In construing a motion for summary judgment, a court will consider all pleadings, affidavits and testimony in a light most favorable to the non-moving party. Greathouse v. Armstrong, 616 N.E.2d 364, 366 (Ind. 1993). Overall, the purpose of summary judgment is to terminate litigation where there is no factual dispute and a determination may be made as a matter of law. Beradi v. Hardware Wholesalers, Inc., 625 N.E.2d 1259, 1261 (Ind.Ct.App. 1993); citing Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 614 (Ind.Ct.App. 1991), *trans. denied*.

B. Solid Waste Regulations

IDEM argues, in a round-about way, that a party who cannot afford to apply for a permit should not be required to do so if their activity does not cause harm to the environment. If there was a question as to whether Dave's Trucking comes within the ambit of solid waste regulations, then IDEM's argument would have merit. It is clear, however, the solid waste regulations intend to regulate operations like Dave's Trucking, whether or not it is profitable. Profitability and ability to pay are rarely an excuse for not complying with environmental regulations. *See City of Gary*

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v. Stream Pollution Control Board, 422 N.E.2d 312, 316 (Ind.Ct.App. 1981) ("financial and technological defenses when raised by pollution sources have been typically rejected at both common law and under federal and state legislation"). This tribunal has similarly held that financial considerations are not proper factors for IDEM to consider in its permitting decisions. See IN RE: OBJECTIONS TO THE ISSUANCE OF MINOR MODIFICATION TO THE VELPEN C/D FACILITY PERMIT, PIKE COUNTY; Cause Number 98-S-J-2186, decided June 29, 1999, p. 2. Thus, it is inappropriate here for IDEM to advocate that Dave's Trucking should not have to obtain a permit because of low profit margins.

C. Experimental and Necessary Determination

The statute and the Recommended Order specifically requested IDEM to make a determination as to how Dave's Trucking operation is experimental and necessary to further the state of the art. In its response, IDEM asserts that Dave's Trucking is experimental, not because of the activity it performs, but because IDEM has never regulated such an operation before. This argument is meritless for two reasons. First, IDEM is in the business of enforcing regulations and the fact that IDEM has not previously regulated operations like Dave's Trucking makes IDEM's actions "experimental," not Dave's Trucking. Second, Dave's Trucking has been in business for eleven years. IDEM has been inspecting Dave's Trucking for more than two years. It seems incredible that IDEM has not been able to determine by now whether the experiment is a success or failure. Is Dave's Trucking employing some novel instrument or process? Is Dave's Trucking the first of its kind? What are the results of the experiment? Surely, a business that has been operating for eleven years has information to answer these questions. But, IDEM offers no such information. Simply put, the fact that IDEM has not regulated operations like Dave's Trucking does not make it experimental.

Moreover, with respect to whether Dave's Trucking is necessary to advance the state of the art of c/d waste recycling, IDEM's arguments fall far short. First, IDEM contends Dave's Trucking is performing a service that would not otherwise be accomplished. While it is true that Dave's Trucking performs a highly beneficial service, Circle City performs the exact same service. The fact that it also processes municipal solid waste does not diminish the fact that it also engages in c/d waste sorting and recycling. Second, the fact that the demonstration project will end if the solid waste regulations are not amended to exempt Dave's Trucking, casts further doubt on IDEM's necessary argument. Third, Circle City correctly points out that IDEM has not raised a genuine issue of material fact. The mere belief that something will occur is not substantial, or for that matter, any other kind of evidence. Aeronautics Commission of Indiana v. Radio Indianapolis, Inc., 361 N.E.2d 1221, 1226 (Ind.Ct.App. 1977). This office has consistently held that events in the future are not a proper basis for granting relief. So, the fact that the Solid Waste Management Board may promulgate rules that exempt operations like Dave's Trucking is of little consequence for these proceedings. A decision must be based on the law in effect at the time the Petition for Administrative Review was filed. According to the law, Dave's Trucking must obtain a solid waste facility processing permit because it is neither experimental nor necessary to advance the state of the art.

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IV. Conclusions of Law:

The Administrative Law Judge, based on the foregoing Undisputed Facts and Discussion, concludes as a matter of law that Circle City is entitled to summary judgment because IDEM has not raised a genuine issue of material fact. The law requires Dave's Trucking to obtain a solid waste processing facility permit and IDEM did not present credible evidence that Dave's Trucking is experimental or necessary to advance the state of the art.

V. Recommended Order:

The Administrative Law Judge recommends that Circle City's Motion for Summary Judgment be **GRANTED** and IDEM's Motion for Summary Judgment be **DENIED**.

VI. 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

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 31st day of May 2000.

Linda C. Lasley
Administrative Law Judge