

**Objection to the Issuance of Confined
Feeding Operation Approval with Construction
Eric Smitley
Cause No. 18-W-J-5019**

OFFICIAL SHORT CITATION NAME: When referring to 2019 OEA 9, cite this case as **Eric Smitley 2019 OEA 9.**

Case name: Objection to the Issuance of Confined Feeding Operation Approval with Construction, Eric Smitley

Cause No. 18-W-J-5019

Topics:

Confined Feeding
Telephonic testimony
Failure to appear

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:	Susanna Bingman
Petitioner Jerry & Lori Leach:	unrepresented
Permittee:	Brianna Schroeder

Order issued: March 26, 2019

Index category: Water

Further case activity: none

4. The ELJ issued Findings of Fact, Conclusions of Law and Order denying Permittee's Motion to Dismiss on December 14, 2018. The ELJ did not dismiss Petitioners' claims that surface water could be impacted by run-off from the Site. However, as the IDEM does not regulate air emissions from CFOs, the ELJ dismissed Petitioners' claim that IDEM erred in issuing the permit without considering the air emissions from the CFO.
5. At approximately 8:00 a.m. on March 21, 2019, the Petitioners contacted the ELJ to inform her that, due to medical issues, they would not appear for the hearing. The ELJ contacted the Petitioners to ask that they be available at 10:00 a.m. to discuss their absence telephonically so that all parties had the opportunity to discuss the options for proceeding. The ELJ spoke with Mr. Leach. The Permittee and his counsel and the IDEM counsel appeared at 10:00 a.m. for the hearing. The Petitioners were available via telephone. The Permittee and IDEM objected to a continuance of the hearing. Because of the late notice and because the Petitioners had been granted previous continuances, the motion for a continuance was denied. After discussion, the parties agreed to allow Jerry Leach to testify over the telephone. Mr. Leach was sworn in and provided testimony. Mr. Leach had sent his exhibits to opposing parties. Permittee allowed the Court to use the exhibits he had received from Mr. Leach. Mrs. Leach did not ask to testify. Permittee moved for a directed verdict upon the Petitioners resting their case. The ELJ took this under advisement. Permittee and IDEM did not present evidence.
6. Mr. Leach² testified that he used a fishing pond located near the Site. He further testified that run-off from the Site could impact the fishing pond. He presented photographs of the Site purporting to show run-off in the direction of the fishing pond.
7. The ELJ had previously dismissed Petitioners' claims relating to potential air emissions from the CFO. Therefore, evidence relating to impacts of air emissions on Mrs. Leach's health was excluded.
8. The CFO has not been constructed.
9. The CFO will be a zero discharge facility. Any discharge into surface waters could be a violation of the Approval.

Conclusions of Law

1. The OEA has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") pursuant to Indiana Code (I.C.) § 4-21.5-7, et seq.
2. 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.

² Lori Leach did not testify nor participate in the hearing.

3. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the environmental law Judge (the “ELJ”), and deference to the IDEM’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d).
4. There is no question that the CFO is not permitted to discharge to waters of the state. However, allegations that a facility will not comply with the terms and conditions of a permit are generally insufficient to support a determination that the permit was erroneously issued.³
5. If a petitioner can show that a facility, as designed, cannot comply with the permit and the applicable laws and regulations, then that could be the basis for a determination that the permit was improperly issued. In this case, Mr. Leach had the burden to prove that the CFO was improperly designed. He failed to do so. The photographs and his testimony did not present sufficient specific evidence related to the design of the CFO to prove that the design was flawed. None of the photographs showed proof of that run-off would be in the direction of the pond nor did the majority of the photographs show running water. Petitioners failed to present sufficient evidence in support of the photographs that did show standing or flowing water to show the direction of the flow. Further, the Petitioners failed to present any evidence that the CFO design had not taken these conditions into account and compensated for them. Petitioners’ evidence that surface water might flow in the direction of the fish pond was insufficient to (1) prove that this would actually happen or (2) that the topography of the Site had not been taken into account in the design of the CFO.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Eric Smitley and the Indiana Department of Environmental Management. The Petitioners’ petition for review is dismissed.

You are further notified that pursuant to provisions of Ind. Code (I.C.) § 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 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 26th day of March, 2019 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

³ *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana*, 1998 WL 918589, at 17 (Ind. Off. Evtl. Adjud.).