

**OBJECTION TO THE ISSUANCE OF
PERMIT APPROVAL AW-4283
MICHAEL BONTRAGER // CONTRACT PORK, LL
LAGRANGE COUNTY, INDIANA
1997 OEA 057, OEA CAUSE NO.: 97-W-J-1781**

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potentially affected persons

Presiding ELJ: Lori Kyle Endris

Party Representatives: Jennifer Thompson, Esq. for IDEM
Craig Carpenter, Esq.
David B. Thomas, Esq.

Order Issued: November 20, 1997

Index Category: Water / Solid waste

Further Case Activity:

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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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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)
PERMIT APPROVAL AW-4283)
MICHAEL BONTRAGER)
CONTRACT PORK, LLC)

CAUSE NO. 97-W-J-1781

**FINAL ORDER GRANTING PERMITTEE'S
MOTION FOR SUMMARY JUDGMENT**

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This constitutes notice that on October 10, 1997, Contract Pork, L.L.C. (Contract Pork), by counsel, filed a Motion to Dismiss or in the Alternative for Summary Judgment. Also on October 10, 1997, Objectors, by counsel, filed a "Complaint" for Summary Judgment. Thereafter, on October 23, 1997, the Indiana Department of Environmental Management (IDEM), by

counsel, filed a Response to Contract Pork's Motion to Dismiss or in the Alternative For Summary Judgment. Also on October 23, 1997, Contract Pork, by counsel, and the IDEM, by counsel, each filed a Motion to Strike Objectors' Complaint for Summary Judgment.

The Environmental Law Judge considered the pleadings and hereby finds the following:

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. Ind.Code §4-21.5-3-23(b) provides in pertinent part that "[t]he judgment [on a motion for summary judgment] shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law."
- The Indiana Supreme Court has held that "[a] summary judgment is proper only where there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law. [citations omitted] 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. On March 11, 1997, the IDEM issued an approval, A.W. Approval No. 4283. Thereafter, on May 9, 1997, Objectors filed their Petition for Administrative Review in which they raised the issue of whether they should have received notice and been given a chance to object to the facility.
 5. Ind.Code §4-21.5-3-7 states in relevant part that "[n]ot more than thirty (30) days after filing a petition for review under this section and upon a finding of good cause by the administrative law judge, a person may amend the statement of issues contained in a petition for review to add one (1) or more additional issue." Although Objectors raised additional issues in their Complaint for Summary Judgment filed on October 10, 1997, Objectors did not amend their Petition for Administrative Review within the statutory time frame. Moreover, the Objectors' Complaint for Summary Judgment did not set forth specific facts regarding the confined feeding operation in question and was not supported with affidavits or other evidence as required by Ind.Code §4-21.5-3-23. Thus, the issues raised are not properly before the Office of Environmental Adjudication.

6. Ind.Code §13-15-8-2 sets forth an applicant's notice requirements for permits of undeveloped land and property without a permit and provides in relevant part:

Not more than ten (10) working days after submitting an application for a permit issued under IC 13-15-1..., the person that submitted the application for the permit shall make a reasonable effort to provide notice:

- (1) to all owners of land that adjoins the land that is the subject of the permit application; or
- (2) if the owner of land that adjoins the land that is the subject of the permit application does not occupy the land, to all occupants of the land;

That the person has submitted the application for the permit.

Objectors have failed to demonstrate that they are adjoining landowners and thus entitled to notice under Ind.Code §13-15-8-2. Ind.Code §4-21.5-3-5(b) provides that an agency is required to give notice of its decision on the application to "potentially affected persons". The relevant portion of that statute's description of "potentially affected persons" reads as follows:

- (1) Each person to whom the order is specifically directed.
- (2) Each person to whom a law requires notice to be given.
- ...
- (4) Each person who has provided the agency with a written request for notification of the order...
- (5) Each person who has a substantial and direct proprietary interest in the subject of the order.
- (6) Each person whose absence as a party in the proceeding concerning the order would deny another party complete relief in the proceeding or who claims an interest related to the subject of the order and is so situated that the disposition of the matter, in the person's absence, may:
 - (A) as a practical matter impair or impede the person's ability to protect that interest; or

(B) leave any other person who is a party to a proceeding concerning the order subject to a substantial risk of incurring multiple or otherwise inconsistent obligations by reason of the person's claimed interest.

As Objectors are not a person to whom the decision is directed, are not entitled to notice as adjoining land owners, never provided a written request for notification of the decision to the IDEM, do not have a substantial and direct proprietary interest in the issuance of the approval, and their absence as a party would not deny another party complete relief, the Objectors are not potentially affected parties as defined by Ind.Code §4-21.5. Moreover, even if Objectors had shown they were potentially affected parties, they have not shown how their lack of notice substantially prejudiced them. Ind.Code §4-21.5-3-5(f) (the failure to notify a potentially affected person is not grounds for invalidating an order, unless an unnotified person is substantially prejudiced by the lack of notice, and the burden of persuasion as to substantial prejudice is on the unnotified person); *see also, City of New Haven v. Indiana Suburban Sewers*, 257 Ind. 609, 277 N.E.2d 361, 362 (technical requirement of notice will be disregarded if complaining party had actual notice and participated in proceedings).

Final Order

The Permittee's Motion for Summary Judgment is hereby GRANTED and A.W. Approval No. 4283 is hereby UPHeld. Objectors' Complaint [sic] for Summary Judgment is hereby DENIED.

You are further notified that pursuant to the provisions of P.L. §41-1995, amending 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 20th day of November, 1997.

Lori Kyle Endris
Environmental Law Judge

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