

Objection to the Issuance of Confined Feeding Operation Approval, Swine Pro 1, LLC,
Animal Waste No. AW-5676, Hancock County, Indiana.

Conley and Nellie Seal, et al: Petitioners;
Swine Pro 1 LLC: Permittee/Respondent;
Indiana Department of Environmental Management: Respondent.
2007 OEA 155 (06-W-J-3825)

OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 155, cite this case as
Swine Pro 1, LLC CFO Objection, 2007 OEA 155.

TOPICS:

NPDES

CAFO

confined feeding

summary judgment

field tiles

statutory construction

farmstead plan

soil conservation plan

13-18-10

327 IAC 5-4-3

327 IAC 15-15-5(b)(1)

327 IAC 16-7-2

327 IAC 16-5

327 IAC 16-8

327 IAC 15-15-12(k)

327 IAC 15-15-11

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioners: Michael Sutherlin, Esq.

Permittee/Respondent: Dan Strahl, Esq.

IDEM: Nancy Holloran, Esq.

ORDER ISSUED:

September 26, 2007

CATEGORY INDEX:

Water

FURTHER CASE ACTIVITY:

[none]

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No. ING806491 (the Permit) to Swine Pro 1, LLC (hereinafter referred to as the Respondent) for the construction and operation of a CAFO². The Permit was issued on October 30, 2006.

2. A prehearing conference was held on December 13, 2006 with all parties present in person or by counsel.
3. An Amended Petition for Administrative Review was filed on January 16, 2007.
4. A stay hearing was held on February 27, 2007. The Petitioners' request for a stay was denied on March 5, 2007.
5. The Petitioners and the Respondent filed Motions for Summary Judgment on March 9, 2007. Responses and replies were subsequently filed.
6. The Petitioners ask for summary judgment on the following grounds:
 - a. Swine Pro failed to identify all field tiles as required by the statutes and regulations.
 - b. Swine Pro failed to provide sufficient assurance to the IDEM that soil testing, as required by the regulations would be met.
 - c. Swine Pro failed to identify who would develop its soil conservation plan.
7. Swine Pro requested that summary judgment be entered in its favor on the basis that the Petitioners had failed to sufficiently identify the reasons for administrative review.
8. The hearing on summary judgment was consolidated with the final evidentiary hearing in this matter and held on June 4 and 5, 2007.
9. The ELJ takes official notice of, with the consent of the parties, the testimony presented at the stay hearing held on February 27, 2007.

Findings of Fact

1. General NPDES permit No. ING806491 (the Permit) was issued to Swine Pro 1, LLC on October 30, 2006. The owners of Swine Pro 1 LLC are Shannon K. Lawyer and Josh R. Lawyer.³ The CAFO will be located at Section 11, T17N, R8E, Hancock County, Indiana. This CAFO is in close proximity to an AFO owned and operated by Eric Lawyer, Shannon and Josh's father. Swine Pro 1 LLC is a new facility. Construction was not completed at the time of the hearing.

² Concentrated animal feeding operation.

³ Shannon and Josh are siblings.

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2. The Petitioners timely filed their Petition for Administrative Review on November 16, 2007. These Petitioners are: Conley and Nellie Seal; Bill and Linda Falkenstein; Ronnie Riggs; Mark Riggs; Richard and Kaleda Goudy; Scott and Lisa Taylor; Mike and Pat Gullett; Butch and Sarah Minnick; Jim and Tracey Linvile; John and Vicky Good; Terry and Linda Troxil; Don and Alma Wallen; Dave and Gayle Wallen; Dennis and Krista Wallen; Trent and Stephanie Haynes; Tom and Bernice Thackery; Mike and Michelle Waymyer; and Larry Riggs.
3. The Petitioners filed their Amended Petition for Administrative Review on January 16, 2007. In the Amended Petition, the Petitioners are: Conley and Nellie Seal; Bill and Linda Falkenstein; Ronnie Riggs; Mark Riggs; Richard and Kaleda Goudy; Scott and Lisa Taylor; Mike and Pat Gullett; Butch and Sarah Minnick; Jim and Tracey Linvile; Don and Alma Wallen; Dave and Gayle Wallen; Dennis and Krista Wallen; and Trent and Stephanie Haynes. The following Petitioners did not join in the Amended Petition: Tom and Bernice Thackery; Mike and Michelle Waymyer; John and Vicky Good; Terry and Linda Troxil; and Larry Riggs. The Amended Petition attempted to add the following Petitioners: Tom and Kaye Wolverton; and Gerry and Wanda McRoberts.⁴
4. The Indiana Department of Environmental Management (the "IDEM") determined that the materials submitted complied with the requirements of 327 IAC 15-15 and that the issuance of a general permit was proper.
5. The Permit authorized the Respondent to construct and operate two (2) swine confinement grow-to-finish buildings, each with a self-contained concrete pit beneath slatted floors for the storage of liquid manure from approximately 4,000 finishing hogs. The total capacity is 8,000 hogs.
6. The Respondent, pursuant to the permit, is required to comply with the provisions of 327 IAC 15-15 and any rules referenced within.
7. Pursuant to 327 IAC 15-15, a CAFO may not discharge manure, litter, or process wastewater pollutants to waters of the state.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.

⁴ These Petitioners failed to file a petition for review within the time limits set out in IC 4-21.5-3-7. The attempt to add them as Petitioners through the amended petition for review is insufficient. Even though no party raised this as an issue, this is a matter of jurisdiction and therefore, it is an appropriate issue for the ELJ to determine. The ELJ, sua sponte, denies the request to add these individuals as Petitioners.

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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. This office 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 ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). "*De novo* review" means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. IC 13-18-10 applies to all confined feeding operations. With regards to the contents of an application for a confined feeding operation (CFO), IC 13-18-10-2(a) states:

Application for approval of the construction of a confined feeding operation must be made on a form provided by the department. An applicant must submit the completed application form to the department together with the following:

- (1) Plans and specifications for the design and operation of manure treatment and control facilities.
 - (2) A manure management plan that outlines procedures for the following:
 - (A) Soil testing.
 - (B) Manure testing.
 - (3) Maps of manure application areas.
 - (4) Supplemental information that the department requires, including the following:
 - (A) General features of topography.
 - (B) Soil types.
 - (C) Drainage course.
 - (D) Identification of nearest streams, ditches, and lakes.
 - (E) Location of field tiles.
 - (F) Location of land application areas.
 - (G) Location of manure treatment facilities.
 - (H) Farmstead plan, including the location of water wells on the site.
5. The Petitioners argue that this statute requires the submission of information about the location of field tiles in the NOI. "The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004). It is clear from the statute that the

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legislature intended to allow the IDEM to determine when the supplemental information would be required. The regulations promulgated by the Water Pollution Control Board specify when this supplemental information will be required.

6. Pursuant to 327 IAC 5-4-3, this is a concentrated animal feeding operation⁵ and is subject to the requirement to obtain a general NPDES permit under 327 IAC 15-15.⁶ 327 IAC 15-15-5(b)(1) requires an applicant submit a NOI which includes the following information:

- (A) Name, telephone number, and mailing address of the owner and operator.
- (B) Name, location, and address of the operation. Contact person and telephone number.
- (C) Type and number of animals at the operation.
- (D) Type of containment and storage and total capacity for manure, litter, and process wastewater storage (tons/gallons).
- (E) Total number of acres under control of the applicant available for land application.
- (F) Estimated amount of manure, litter, and process wastewater generated per year (tons/gallons).
- (G) Estimated amount of manure, litter, and process wastewater transferred to other persons per year (tons/gallons).
- (H) List of other environmental permits held and permit numbers, including the CFO farm ID number provided on state CFO approval under 327 IAC 16.
- (I) A soil survey map of the operation, as required under section 17(c) of this rule, and land application areas, as required under section 4 of this rule.
- (J) SIC code for the operation.
- (K) Name of waterbody receiving drainage from the production area.
- (L) Telephone number and title of person signing the NOI.
- (M) List all discharges to waters of the state during the five (5) years preceding the submittal of the NOI.
- (N) For newly constructing CAFOs, a list of names and addresses of all property owners adjacent to the production area property.

⁵ More than two thousand five hundred (2,500) swine each weighing at least fifty-five (55) pounds constitutes a large concentrated animal feeding operation (327 IAC 5-4-3(b)(7)). More than seven hundred fifty (750) to two thousand four hundred ninety-nine (2,499) swine each weighing at least fifty-five (55) pounds or three thousand (3,000) to nine thousand nine hundred ninety-nine (9,999) swine each weighing less than fifty-five (55) pounds constitutes a medium concentrated animal feeding operation (327 IAC 5-4-3(b)(10)). No evidence was presented as to the weight of the animals to be confined in the feeding operation. However, the number of animals (8000) makes this Facility either a medium or a large CAFO, and, therefore, it is subject to 327 IAC 15-15.

⁶ 327 IAC 15-15-2(d) states, "A CAFO that has a general permit under this rule is not required to obtain or renew the CFO approval under 327 IAC 16-7."

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- (O) For CAFOs applying to use the land application setbacks for injection or single pass incorporation under section 12 of this rule, a demonstration, on forms provided by the department, that the method of application will provide equivalent environmental protection as provided by the setbacks listed in Table 1 of section 12 of this rule.
 - (P) For CAFOs applying to use the land application setbacks for solid manure or litter surface applied and incorporated within twelve (12) hours under section 12 of this rule, a demonstration, on forms provided by the department, that the method of application will provide equivalent environmental protection as provided by the setbacks listed in Table 1 of section 12 *[of this rule]*.
 - (Q) Other than Indiana, list all states wherein the owner or operator owns or operates a CAFO.
7. This is a new CAFO that has not been constructed. Therefore, 327 IAC 15-15-7(b) requires that the NOI also contain the information required by 327 IAC 16-7-2 and that the operation comply with the requirements of 327 IAC 16-5 and 327 IAC 16-8.
 8. 327 IAC 16-7-2 requires that the NOI include a farmstead plan. The farmstead plan requires the identification of certain known features that lie within 500 feet of the waste management systems, including, but not limited to, all outfalls of “subsurface drainage structures” and “drainage inlets”. The IDEM presented evidence that the Respondent had identified the field tiles in the farmstead plan submitted with the NOI.⁷
 9. 327 IAC 15-15-12(k) requires that the permittee inspect land application sites for field tiles prior to land application and that any tiles be monitored during and immediately after land application for evidence of a discharge. The Petitioners argue that the NOI must contain this information. However, there is nothing in this regulation that requires that this information be part of the NOI.
 10. The plain language of the statute and applicable regulations do not require the identification of field tiles in the land application areas as part of the NOI.
 11. The Petitioners’ other objections speculate that the Respondent will not comply with the applicable regulations, including the requirement to identify who will develop the soil conservation plan. The IDEM presumes that any person that receives a permit will comply with the applicable regulations. The OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Ind.Off.Env.Adjud.)* The speculation that the permittee will not comply does not constitute a valid objection to the terms of the permit and is not reviewable. The IDEM may require that the Respondent obtain an individual NPDES

⁷ See the testimony of Dr. Thomas Park at the stay hearing held on February 27, 2007, transcript p. 168, lines 2 – 16.

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permit or may take enforcement action, including assessing penalties, for any future noncompliance by the Respondent.

12. 327 IAC 15-15-11 requires that CAFOs develop soil conservation plans and identify who will develop these plans within certain deadlines. The Petitioners argue that the failure of the Respondent to identify who will develop the soil conservation plan in the NOI makes this Permit invalid. However, 327 IAC 15-15-11(c) states “All new sources,⁸ as defined in section 3 of this rule, must comply with this section upon the date of permit coverage under this rule.” This CAFO qualifies as a new source, therefore, this information was not required in the NOI, but the permittee must supply the information upon the date of permit coverage.
13. The Petitioners have not presented substantial evidence that the Respondent is unable to comply with the regulations. The evidence presented regarding the nitrogen content of manure from Eric Lawyer’s operation is not persuasive as (1) Swine Pro is a different operation; (2) the Respondent must take and analyze its own manure samples prior to land application⁹; and (3) must comply with various regulations regarding the application of manure.¹⁰
14. The Water Pollution Control Board promulgated the applicable regulations and, in doing so, determined that these regulations were protective of human health and the environment. The Petitioners have alleged that this CAFO will present a threat to their health through emissions to the air and ground water and will decrease their property values. However, the regulations do not require the IDEM to consider air emissions or property value in determining whether it is proper to issue the Permit. The OEA only has the jurisdiction to determine whether the IDEM acted in accordance with Title 13 and the applicable regulations. If the laws and regulations do not require that the IDEM consider air emissions or property values, then the OEA does not have the authority to consider these factors.
15. The evidence presented by the Petitioners regarding possible contamination of ground water and Sugar Creek is not persuasive. Contamination could only occur through the failure of the Respondent to operate within the parameters of the Permit and the applicable regulations. If the Respondent does so, he is in violation of the permit and subject to enforcement action.
16. The Petitioners have not met their burden of proof in this matter. Judgment should be entered in favor of the Respondent and the Indiana Department of Environmental Management.

⁸ Pursuant to 327 IAC 15-15-3(4), “New source” means any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced after February 13, 2003.

⁹ 327 IAC 15-15-12(b) frequency of sampling; 327 IAC 15-15-12(c) protocols for sampling and testing;

¹⁰ 327 IAC 15-15-12(e) land application rates; 327 IAC 15-15-12(f) setbacks for land application

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Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Petitioners have failed to meet their burden of proof in this matter. The Petitioners' Motion for Summary Judgment is **DENIED**. The issuance of Permit No. ING806491 is **AFFIRMED**. The Petition for Review is **DISMISSED**.

You are hereby further notified that pursuant to provisions of IND. CODE § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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 this 26th day of September, 2007 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge