

**OBJECTION TO THE ISSUANCE OF CONFINED ANIMAL FEEDING OPERATION NOI PERMIT
APPROVAL, LOG #6438, INDIAN TRAIL NURSERY, MAXWELL FOODS OF INDIANA, INC.,
RANDOLPH COUNTY, INDIANA.**

**Rachel Carpenter, Wendy Carpenter, Courtney Hess, John Zakelj: Petitioners;
Maxwell Foods of Indiana, Inc.: Permittee/Respondent;
Indiana Department of Environmental Management: Respondent.
2007 OEA 41 (06-W-J-3772)**

OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 41, cite this case as
Indian Trail Nursery, 2007 OEA 41.

TOPICS:

dismissal
request for admissions
deemed admitted
315 IAC 1-3-1(a)(18)
Indiana Rule of Trial Procedure 6
Indiana Rule of Trial Procedure 36(A)
Rule 36(A)
excusable neglect
aggrieved or adversely affected

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner: E. Thomas Kemp, Esq.
Permittee/Respondent: Daniel P. McNerny, Esq.
Bose, McKinney & Evans LLP
IDEM: Timothy Junk, Esq.

ORDERS ISSUED:

March 16, 2007

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

NOTE:

This case is related to these three (3) other cases:
2007 OEA 23
2007 OEA 29
2007 OEA 35

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

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
CONFINED ANIMAL FEEDING OPERATION)
NOI PERMIT APPROVAL, LOG #6438)
INDIAN TRAIL NURSERY)
MAXWELL FOODS OF INDIANA, INC.)
RANDLOPH COUNTY, INDIANA)

CAUSE No. 06-W-J-3772

Rachel Carpenter, Wendy Carpenter,)
Courtney Hess, John Zakej)
 Petitioners)
Maxwell Foods of Indiana, Inc.)
 Permittee/Respondent)
Indiana Department of Environmental Management)
 Respondent)

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND FINAL ORDER**

This matter having come before the Court on the Petitioners' Emergency Motion for Extension of Time to File Response and the Permittee/Respondent's, Maxwell Foods of Indiana Inc., Motion to Dismiss, which pleadings are part of the Court's record; and the Court, being duly advised and having read and considered the pleadings, briefs and responses of the parties finds that judgment may be made upon the record, now makes the following findings of fact and conclusions of law and enters the following Final Order:

Findings of Fact

1. On August 1, 2006, the Indiana Department of Environmental Management (the "IDEM") issued a general NPDES¹ permit to Maxwell Foods of Indiana, Inc. for the construction of a concentrated animal feeding operation (CAFO).
2. On August 18, 2006, Rachel Carpenter, Wendy Carpenter, Courtney Hess, and John Zakelj (the Petitioners) filed their petitions for review.

¹ National Pollutant Discharge Elimination System

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3. E. Thomas Kemp entered his appearance for the Petitioners and filed a Supplemental/Amended Petition for Administrative Review on September 22, 2006.
4. On October 24, 2006, the parties filed an Agreed Case Management Order and the presiding Environmental Law Judge (the "ELJ") approved it on October 26, 2006. The parties were ordered to complete discovery by January 17, 2007. As set out in the Order, this was the date by which all written discovery must be answered.
5. The Permittee/Respondent served discovery requests on the Petitioners on December 22, 2006.
6. The parties filed a Second Amended Agreed Case Management Order, on January 17, 2007, which was approved by the ELJ on January 22, 2007. This Second Order established January 31, 2007 as the date by which all discovery should be answered.
7. On February 16, 2007, the Permittee/Respondent filed a Motion to Dismiss.
8. The Petitioners, by counsel, filed an Emergency Motion for Extension of Time to File Response on February 21, 2007. The Petitioners alleged that they required additional time to answer the discovery requests because their expert had not been available for consultation.
9. The ELJ issued a Case Management Order on February 22, 2007 ordering the parties to file responses to either the Motion to Dismiss or the Emergency Motion for Extension of Time to File Response on or before March 5, 2007.
10. The Permittee/Respondent filed Maxwell Foods' Response to Petitioners' Emergency Motion for Extension of Time to File Response on March 5, 2007. The Petitioners did not file any response to Permittee/Respondent's Motion to Dismiss.
11. The Permittee/Respondent filed a Reply Brief on March 12, 2007.
12. The Permittee/Respondent reported in the Reply Brief that the Petitioners, on March 5, 2007, served Maxwell Foods with a document entitled "Petitioner's Response to Maxwell Foods of Indiana, Inc.'s First Requests for Admissions, Interrogatories and Request for Production of Documents to Petitioners". The Office of Environmental Adjudication did not receive a copy of this document.
13. The Petitioners have not requested withdrawal or amendment of the admissions.

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CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the 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, et seq.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.4-3-27. 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. OEA’s procedural rule, 315 IAC 1-3-1-(a)(18), allows an ELJ to apply the Indiana Rules of Trial Procedure, if the trial rules are not inconsistent with the Administrative Orders and Procedures Act or Title 315 of the Indiana Administrative Code. 315 IAC 1-3-5 allows an ELJ to grant an extension of time in which to file motions if the motion is timely. Indiana Rule of Trial Procedure 6(B) provides clarification of when a request for an extension of time to answer discovery, including requests for admissions, is “timely” and provides a standard for evaluating an untimely motion. This rule states:

(B) Enlargement. When an act is required or allowed to be done at or within a specific time by these rules, the court may at any time for cause shown:

- (1) order the period enlarged, with or without motion or notice, if request therefor is made before the expiration of the period originally prescribed or extended by a previous order; or
- (2) upon motion made after the expiration of the specific period, *permit the act to be done where the failure to act was the result of excusable neglect*; but, the court may not extend the time for taking any action for judgment on the evidence under Rule 50(A), amendment of findings and judgment under Rule 52(B), to correct errors under Rule 59(C), statement in opposition to motion to correct error under Rule 59(E), or to obtain relief from final judgment under Rule 60(B), except to the extent and under the conditions stated in those rules.

Emphasis added.

4. There is no general rule as to what constitutes excusable neglect. Each case must be determined on its particular facts. *Grecco v. Campbell* (1979), Ind.App., 386 N.E.2d 960, 961; 4 W. Harvey & R. Townsend Indiana Practice § 60.10, at 209 (1971) [hereinafter Harvey]; 17 I.L.E. Judgments § 187 (1959).

The following facts have been held to constitute excusable neglect, mistake, and inadvertence: (a) absence of a party's attorney through no fault of party; (b) an agreement made with opposite party, or his attorney; (c) conduct of other persons

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causing party to be misled or deceived; (d) unavoidable delay in traveling; (e) faulty process, whereby party fails to receive actual notice; (f) fraud, whereby party is prevented from appearing and making a defense; (g) ignorance of defendant; (h) insanity or infancy; (i) married women deceived or misled by conduct of husbands; (j) sickness of party, or illness of member of family. At 670.

There are numerous cases that hold that the negligence of a lawyer, insurance agent, adjuster, or other handling process does not amount to excusable neglect as a matter of law, and does not require reversal by this court. At 671.

Vanjani v. Federal Land Bank, 451 N.E.2d 667 (Ct. App. 1983)

5. Indiana Rule of Trial Procedure 36 deals with Requests for Admissions. A request for admission is deemed admitted if not answered within thirty (30) days under Trial Rule 36(A), which states: “The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.”
6. The Petitioners did not answer the Requests for Admissions nor request an extension of time in which to answer the requests for admissions prior to the deadline established by the Second Amended Agreed Case Management Order (February 15, 2007).
7. The Petitioners did not state sufficient grounds for excusable neglect. Therefore, the Petitioners’ Emergency Motion for Extension of Time to File Response is **DENIED**.
8. The Requests for Admissions are deemed admitted by operation of law.
9. Indiana Rule of Trial Procedure 36(B) states: “Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”
10. Request for Admission No. 1 requests that the Petitioners admit the truth of the following statement, “Admit you will not be aggrieved or adversely affected by the issuance of the CAFO Approval.”
11. As this fact has been conclusively established by the failure of the Petitioners to timely respond to this Request for Admission, the ELJ concludes that the Petitioners are not aggrieved or adversely affected and that their Petitions for Review must be dismissed.

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12. As this conclusion resolves this matter, the Permittee/Respondent's other arguments will not be addressed.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition for Administrative Review filed by Petitioners is hereby **DISMISSED**.

You are hereby further notified that pursuant to provisions of Indiana 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 16th day of March, 2007 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge