

**OBJECTION TO THE ISSUANCE OF
SOLID WASTE FACILITY PERMIT FP 45-33
ALTERNATE DISPOSAL, INC.
LAKE COUNTY, INDIANA
96-S-J-1674**

Official Short Cite Name:	Alternate Disposal - Permit FP 45-33, 1997 OEA 014
OEA Cause No.:	96-S-J-1674
Topics/Keywords:	IC 13-5-6-2 IC 4-21.5-3-7(a)(1) IC 4-21.5-3-23(b) Ind. Tr. Rule 12 (B)(1) 329 IAC 2-19-1 329 IAC 11-13-2 329 IAC 11-9-2(j)(7) 329 IAC 11-2-48 33 USC § 1344 33 USC § 1251 et seq.
Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Kathleen P. Mills, Esq. Mark A. LaRose, Esq. Willie Harris, Esq. Ellen Szarleta, Esq.
Order Issued:	6-May-97
Index Category:	Solid Waste
Further Case Activity:	

this cause of action. The Presiding Environmental Law Judge included that schedule in an Order to the parties dated January 28, 1997. On February 3, 1997, Objector Gardest Gillespie, by counsel, filed another Amended Petition for Review concurrently with a Statement of Disputed Issues. On February 28, 1997, Permittee, by counsel, filed a Motion to Strike Petitioner Gardest Gillespie's (Third) Amended Petition for Review. On April 2, 1997, the Indiana Department of Environmental Management, by counsel, filed a Motion to Dismiss and in the Alternative, Motion for Partial Summary Judgment. On April 4, 1997, Permittee, by counsel, filed a Motion for Summary Judgment. On April 17, 1997, Permittee, by counsel, filed a Motion for Leave to Supplement its Motion for Summary Judgment. On April 21 and 22, 1997, Objectors, by counsel, filed a Response to IDEM's Motion to Dismiss and in the Alternate, Motion for Summary Judgment, and a Petitioner Gardest Gillespie et al.'s Response to Permittee's Motion for Summary Judgment. On April 23, 1997, Objectors, by counsel, filed a Motion for Enlargement of Time. On April 24, 1997, Permittee, by counsel, filed a Reply Brief in Support of its Motion for Summary Judgment. Further, on April 25, 1997, the IDEM, by counsel, filed a Reply to Petitioners' Response to Motion to Dismiss and in the Alternative, Motion for Partial Summary Judgment. On April 28, 1997, Objectors, by counsel, filed Petitioners [sic] Objection to Interrogatories¹. On April 29, 1997, the Presiding Environmental Law Judge issued a Notice of Proposed Dismissal Order, proposing to dismiss the Reverend Colin Blanford pursuant to Ind.Code §4-21.5-3-24². On April 29, 1997, the Presiding Environmental Law Judge issued an Order Denying Motion for Leave to Supplement [Permittee's] Motion for Summary Judge and an Order Denying [Objectors'] Motion for Enlargement of Time. Lastly, on May 1, 1997, the IDEM, by counsel, filed a Motion to Compel.³

The Environmental Law Judge considered the remaining Motions, the Responses, and the Replies 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) pursuant to Ind.Code §4-21.5-7.

¹The resolution of this case by this Order obviates the need for the Presiding Environmental Law Judge to issue an Order either granting or denying the Objection to Interrogatories.

²As of May 5, 1997, the Reverend Colin Blanford has not responded. The resolution of this case by this Order obviates the need for the Presiding Environmental Law Judge to issue a Final Order to Dismiss.

³The resolution of this case by this Order obviates the need for the Presiding Environmental Law Judge to issue an Order either Granting or Denying the Motion to Compel.

2. This is a Final Order issued pursuant to Ind.Code §4-21.5-3-27.

3. Ind.Code §4-21.5-3-7(a)(1) requires that a person's petition for review must "state facts demonstrating that the petitioner is a person to whom the order is specifically directed, the petitioner is aggrieved or adversely affected by the order or the petitioner is entitled to review under any law."

Ind.Code §13-15-6-2, provides:

A written request for an adjudicatory hearing under section 1 [IC 13-15-6-1] of this chapter must do the following:

- (1) State the name and address of the person making the request.
- (2) Identify the interest of the person making the request.
- (3) Identify any persons represented by the person making the request.
- (4) State with particularity the reasons for the request.
- (5) State with particularity the issues proposed for consideration at the hearing.
- (6) Identify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

Objectors, by counsel, stated that they have met the notice pleading requirements and cited State v. Rankin, 294 N.E.2d 604, 606 (Ind. 1973) for the proposition that "a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts." As the issues raised in the Objectors Petitions are disposed of below, the question whether Objectors met the requirements of Ind.Code §§ 4-21.5-3-7(a)(1) is moot.

4. Trial Rule 12(B)(1)⁴ provides in pertinent part, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion (1) [l]ack of jurisdiction over the subject-matter."

a. Several Objectors in their Petitions for Review listed the potential decrease in the value of property in the vicinity of the proposed transfer station as a ground for appealing the IDEM's issuance of the transfer station permit to Alternate Disposal. The IDEM has no jurisdiction over the potential decrease in the value of property in the vicinity of the proposed

⁴The IDEM, by counsel, in its Memorandum in Support of Motion to Dismiss and Partial Summary Judgment, characterized Objectors' issues 4a - 4d as the "[p]etitioners[]" fail[ure] to state a claim upon which relief can be granted." As the Office of Environmental Adjudication does not have jurisdiction over these issues, they are more properly governed by Ind. R. Tr. Pr. 12 (B)(1) (1997).

transfer station; therefore, the Office of Environmental Adjudication is without jurisdiction over this issue. Ind. R. Tr. Pr. 12 (B)(1) (1997).

b. Several Objectors in their Petitions for Review averred that the proposed transfer station site is too close to a school, a residential neighborhood, farmland, and a river. Neither the Indiana Code⁵ nor the Indiana Administrative Code have established setback requirements for a transfer station. Hence, the IDEM has no jurisdiction over the location of a transfer station with respect to a school, residential neighborhood, farmland or a river. Thus, the Office of Environmental Adjudication is without jurisdiction over this issue. Ind. R. Tr. Pr. 12 (B)(1) (1997).

c. Several Objectors contend that the transfer station will be unsightly and take away from the beauty of that area of the neighborhood. The IDEM has no jurisdiction to deny an application based upon the aesthetic appearance of the facility. Thus, the Office of Environmental Adjudication is without jurisdiction over this issue. Ind. R. Tr. Pr. 12 (B)(1) (1997).

d. Objector Gardest Gillespie, by counsel, raised concern with respect to heavy truck traffic traveling on the roadways supporting the transfer station and cited 329 IAC 2-19-1 in support thereof. 329 IAC 2-19-1, which is now 329 IAC 11-13-2, only applies to on-site roads. The IDEM has no jurisdiction over the routes traffic may take to the transfer station and cannot base its approval or denial of a permit on the basis of an off-site road. Therefore, the Office of Environmental Adjudication is without jurisdiction over this issue. Ind. R. Tr. Pr. 12 (B)(1) (1997).

5. Trial Rule 12(B)(6) provides in pertinent part, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsible pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion (6) [f]ailure to state a claim upon which relief can be granted...."

a. Certain Objectors opposed the transfer station permit due to cancer ridden hazardous waste, purported R.C.R.A. and state requirements concerning the proper handling of hazardous waste. Pursuant to permit condition D4, no hazardous waste, as that is defined in 329 IAC 3.1, may be accepted at the transfer station. As hazardous waste is not authorized, Objectors have not stated a claim upon which relief can be granted. Ind. R. Tr. Pr. 12 (B)(6) (1997).

b. Certain Objectors contend that there is the "potential for nuisance" involving

⁵Ind.Code §13-20-12-2 prohibits a person from establishing a *sanitary landfill* for the disposal of garbage, rubbish or refuse on land within one-half (1/2) of an area that has been subdivided for residential purposes. The permit in this case authorizes a transfer station and thus, IC 13-20-12-2 is not applicable.

vectors in the area of the transfer station. The term "vector" includes rodents and is defined in 329 IAC 11-2-48 as "any animal capable of harboring and transmitting microorganisms from one (1) animal to another or to a human." The requirements for a solid waste facility permit application are set forth in 329 IAC 11-9-2(j)(7) and require an applicant to submit vector control information. Moreover, vector control is required of Alternate Disposal pursuant to 329 IAC 11-13-5(a). Alternate Disposal satisfied the permit application requirement to include a vector control plan (the IDEM's Motion to Dismiss and in the Alternative, Motion for Partial Summary Judgment, exhibit B); any failure on behalf of Alternate Disposal to comply with its plan is an enforcement issue rather than a permit issue. Thus, Objectors have not stated a claim upon which relief can be granted. Ind. R. Tr. Pr. 12 (B)(6) (1997).

c. Certain Objectors contend that the IDEM or Alternate Disposal has failed to comply with certain wetlands regulations. Neither the Indiana Code nor the Indiana Administrative Code have addressed the issue of prohibiting the construction of a transfer station on or near a wetland. More importantly, section 404, 33 U.S.C. §1344, of the Federal Water Pollution Control Act (33 U.S.C. §§1251 *et seq.*)⁶, requires an individual to obtain a permit from the U.S. Army Corps of Engineers for dredging and filling in waters of the United States, which includes wetlands. Section 401 of the Act requires the applicant to obtain certification from the state that the discharge of dredged or fill materials will not violate the water quality standards of the state. The Corps of Engineers cannot complete their processing of the §404 permit until the State provides certification or waives this right. Under Ind.Code §13-18-4-1, the Commissioner of the IDEM may take appropriate steps to prevent any pollution that is determined to be unreasonable and against the public interest in view of the conditions in any stream or any other waters of the state. The issue of wetlands is outside the purview of the transfer station permit; therefore, Objectors have not stated a claim upon which relief can be granted. Ind. R. Tr. Pr. 12 (B)(6) (1997).

6. 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."

a. Objector Gardest Gillespie contends the permit should be denied because the citizens should have been notified in advance about Alternate Disposal, Inc. receiving a solid waste facility permit. The notice of the IDEM's receipt of Alternate Disposal's solid waste permit application appeared in the *Times* and the *Gary Post Tribune* on October 23, 1996 and October 21, 1996 respectively. (Jeff Sewell, the Permit Manager with the Office of Solid and Hazardous Waste Management, pursuant to Affidavit April 2, 1997). The notice of the IDEM's issuance of the permit appeared in the *Times* and the *Gary Post Tribune* on December 5, 1996 and December 9, 1996 respectively; true and accurate copies of the respective publisher's affidavits were

⁶The Federal Water Pollution Control act is also known as the Clean Water Act.

submitted with the IDEM's Motion to Dismiss and in the Alternative, Motion for Partial Summary Judgment. The IDEM, although not required by either the Indiana Code or the Indiana Administrative Code, provided individual notice of the receipt of Alternate Disposal's application by letter and provided copies of the letter to certain entities and individuals. Thus, a genuine issue as to the material fact of notice does not exist and the IDEM is entitled to judgment on this issue as a matter of law.

b. Objector Gardest Gillespie initially contended the site of the proposed transfer station is in a floodway. Flood plain management is within the purview of the Indiana Department of Natural Resources, and whether any given area of land within Indiana is considered to be within a floodway is a matter of law and determined by the Indiana Natural Resources Commission of the Department of Natural Resources. *See* Ind.Code §14-28-1 *et seq.* and 310 IAC 6-1-8. Moreover, David B. Knipe, head of the Hydrology and Hydraulics Section, Indiana Department of Natural Resources, through Affidavit, has affirmed, under penalties of perjury, that the proposed site is not within a floodway. Therefore, a genuine issue as to the material fact concerning a floodway does not exist and the IDEM is entitled to judgment on this issue as a matter of law.

Final Order

The Permittee's Motion for Summary Judgment and the IDEM's Motion to Dismiss and in the Alternative, Motion for Partial Summary Judgment is hereby GRANTED. The issuance of Solid Waste Facility Permit, FP 45-33 to Alternate Disposal, Inc. is hereby UPHeld.

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.

Dated this 5th of May, 1997.

Lori Kyle Endris
Environmental Law Judge

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

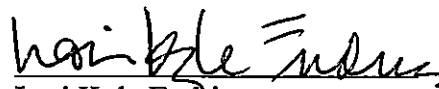
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Motion** has been duly served upon each party, attorney of record, or interested person listed below by hand-delivery or United States Mail, first class, postage prepaid this 16th day of May, 1997

Kathleen P. Mill, Esq.
Office of Legal Counsel
Indiana Department of
Environmental Management
100 North Senate
P.O. Box 6015
Indianapolis, IN 46206

Willie Harris, Esq.
Ellen Szarleta, Esq.
NBD Bank Building
504 Broadway, Suite 1016
Gary, IN 46402-1921

Mark A. LaRose, Esq.
Mark A. LaRose, Esq.
734 North Wells Street
Chicago, IL 60610


Lori Kyle Endris
Environmental Law Judge