

**OBJECTION TO THE ISSUANCE OF
SOLID WASTE FACILITY, PERMIT NO.: FP-0607
BOONE COUNTY RESOURCE, RECOVERY SYSTEMS, INC.
BOONE COUNTY, INDIANA
1998 OEA 040, OEA CAUSE NO. 98-S-J-1994**

OFFICIAL SHORT CITE NAME:	BOONE COUNTY RESOURCE, RECOVERY SYSTEMS, INC., 1998 OEA 040
OEA Cause No.	98-S-J-1994
Topics/Keywords:	Construction permit for construction/demolition landfill Summary Judgement
Presiding ELJ:	LINDA LASLEY
Party Representatives:	ELIZABETH ZLATOS, ESQ., IDEM JENNIFER THOMPSON, ESQ., IDEM GREGORY ZUBECK, ESQ. JOHN KYLE/NICK KYLE, ESQ. CAROL SPARKS DRAKE, ESQ.
Order Issued:	September 15th, 1998
Index Category:	SOLID WASTE
Further Case Activity:	

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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod
Chief Administrative Law Judge

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

IN THE MATTER OF)
OBJECTION TO THE ISSUANCE)
SOLID WASTE FACILITY) CAUSE NO. 98-S-J-1994
PERMIT #FP-06-07)
BOONE COUNTY RESOURCE)
RECOVERY SYSTEMS, INC.)

ORDER GRANTING SUMMARY JUDGMENT

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I. Statement of the Case

On December 18, 1997, the Indiana Department of Environmental Management (IDEM) approved a Construction/Demolition Landfill (C/D landfill) permit for Boone County Resource Recovery Systems, Inc. (BCRRS). On April 9, 1998, Objectors, Northside Sanitary Landfill Site Trust Fund et al. (NSL), filed a Petition for Administrative Review and Stay of Effectiveness. The petition was set for a pre-hearing conference and stay hearing on September 4, 1998. Subsequently, on July 6, 1998, NSL filed a Verified Emergency Request for Immediate Entry of

Stay And/Or Immediate Stay Hearing. Objectors request for the entry of an immediate stay, without a hearing, was denied on July 23, 1998. A stay hearing, however, was set for July 22, 1998. The hearing was later continued upon Objectors motion because their expert was unavailable on that date. The stay hearing was continued until July 31, 1998 at 10:00 a.m. at the Office of Environmental Adjudication (OEA). Gregory Zubeck and Carol Sparks Drake appeared for BCRRS; John Kyle and Susan Wigginton appeared for NSL; and Elizabeth Zlatos and Jennifer Thompson appeared for the IDEM. The parties agreed to conduct a pre-hearing conference first, during which dates for discovery and final hearing were set. The parties agreed to remove the pre-hearing conference set for September 4, 1998 from the calendar. Since each party in this matter called several witnesses, and to accommodate the vacation schedules of Respondent's experts, two additional days were added to the stay hearing -- August 3, 1998 and August 10, 1998. Thereafter, each party submitted proposed findings of fact and conclusions of law. On August 13, 1998, the parties contacted the OEA and informed the Environmental Law Judge that a four week settlement had been reached. The parties requested the Environmental Law Judge to withhold her decision until September 11, 1998. On September 11, 1998, the Environmental Law Judge granted NSL and IDEM's request for stay of effectiveness.

II. Undisputed Facts

The Environmental Law Judge finds the following facts undisputed:

1. BCRRS submitted an application for a C/D landfill permit on February 28, 1997.¹
2. As part of its permit application, BCRRS submitted a letter from Cassen Company, LLC, the accountant hired by BCRRS, which stated "a compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements, and, accordingly, do not express an opinion or any other form of assurance on them." The letter goes on to state "management has elected to omit substantially all of the disclosures and the statement of retained earnings ordinarily included in financial statements."²
3. BCRRS admits that documents submitted to IDEM, concerning its financial status, were not based on generally accepted accounting principles, do not contain an audited financial statement, do not contain a verified statement of no unsatisfied judgments and do not contain the unqualified opinion of an independent certified public accountant stating that BCRRS had a positive net worth of at least \$250,000.00 as of December 31, 1997.³
4. IDEM requested and received additional information concerning BCRRS' C/D permit

¹ Petitioner's Exhibit 13.

² Petitioner's Exhibit 1c.

³ Petitioner's Exhibit 3, Admission No. 5.

application. One document, received nine days before IDEM approved the C/D landfill permit, was a letter by Cassen Company stating that BCRRS had \$251,259.81 in equity as of December 31, 1996.⁴

5. While the permit application was pending, BCRRS merged with Bankert Farms, Inc. BCRRS did not give IDEM the merger information until after the C/D permit was approved.⁵

6. IDEM performed a Good Character Review, including a Concise Statement of Good Character and findings of fact, for BCRRS before the C/D permit application was approved.⁶

7. IDEM did not perform a Good Character Review for Bankert Farms, Inc. before the C/D permit was approved.⁷

8. IDEM approved the C/D permit application on December 18, 1997.⁸

III. Discussion

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.⁹ A fact is "material" if its existence facilitates the resolution of any issues involved in the lawsuit.¹⁰ Further, a claim must have legal probative force in order to be a "genuine issue of material fact" under Indiana Trial Rule 56.¹¹ In construing a motion for summary judgment, a court will construe all pleadings, affidavits and

⁴ Testimony of Bankert, Transcript Vol. III, p. 680; and Petitioner's Exhibit 1f.

⁵ Testimony of Bankert, Transcript Vol. III, pp. 678 and 681.

⁶ Petitioner's Exhibit 1g and Admission Nos. 12 and 13. It should be noted that in IDEM's Proposed Findings of Fact and Conclusions of Law it admits that it did not make findings of fact for the Good Character Review (findings 6 and 17). Presumably, these statements are merely an oversight on the part of IDEM since in its responses to discovery and during the hearing, it contends it did make findings of fact with respect to BCRRS.

⁷ Testimony of Bankert, Transcript Vol. III., p. 713.

⁸ Petitioner's Exhibit 1, Admission No. 1.

⁹ Havens v. Richey, 582 N.E.2d 792, 795 (Ind. 1991); and Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630, 633 (Ind. 1991).

¹⁰ Funk v. Funk, 563 N.E.2d 127, 130 (Ind.Ct.App. 1990).

¹¹ Raymundo v. Hammond Clinic Association, 449 N.E.2d 276, 280 (Ind. 1983).

testimony in the light most favorable to the non-moving party.¹² Overall, the purpose of summary judgment is to terminate litigation where there is no factual dispute and a determination may be made as a matter of law.¹³

Construing the facts of this case in a light most favorable to BCRRS, reveals no genuine issue of material fact in dispute. Evidence in the record, in particular, the testimony of Greg Bankert, make clear the fact that BCRRS failed to comply with the statutory requirements for obtaining a solid waste permit. Moreover, the ab initio argument raised by NSL is unnecessary given the plain, uncontradicted evidence in this case.

A. BCRRS admits to not submitting the proper documentation, in the proper form, to IDEM.

Admission No. 5 is the primary piece of evidence supporting summary judgment. That admission is fatal to BCRRS' case. In its response to the Motion for Summary Judgment, BCRRS tries in vain to distinguish its admission by arguing that it does not go far enough to conclusively establish its non-compliance with the Financial Statement Statute and the Good Character Statute. First, and foremost, Admission No. 5 conclusively establishes that BCRRS did not comply with Indiana Code §13-20-2-1.¹⁴ Admission No. 5 is bolstered further by the statements from BCRRS' own accountant, which state that the financial documents were not audited, the accountant would not give an unqualified opinion and that management elected to omit certain information. Second, Greg Bankert testified that before IDEM approved the C/D permit application, the financial documents contained in Petitioner's Exhibit 1 were all the financial documents submitted to IDEM.¹⁵ His statements negate any argument by BCRRS that the admission did not go far enough. Even if BCRRS later submitted the required financial documents, it cannot escape the fact that the statute specifically and unambiguously requires submission of those documents before the permit was approved. Third, IDEM employee Jeff Sewell confirmed that IDEM did not receive a financial statement or a Good Character disclosure statement from Bankert Farms, Inc.¹⁶ Those statements were necessary for IDEM to accurately determine the financial net worth of BCRRS after the merger and identify the responsible parties.

¹² Greathouse v. Armstrong, 616 N.E.2d 364, 366 (Ind. 1993).

¹³ Beradi v. Hardware Wholesalers, Inc., 625 N.E.2d 1259, 1261 (Ind.Ct.App. 1993) citing Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 614 (Ind.Ct.App. 1991) trans. denied.

¹⁴ See Indiana Trial Rule 36(B) ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission").

¹⁵ Testimony of Bankert, Transcript Vol. III, p. 714.

¹⁶ Testimony of Sewell, Transcript Vol. II, pp. 308-309.

B. BCRRS did not substantially comply with the Financial Statement Statute or the Good Character Statute.

BCRRS, in opposing the Motion for Summary Judgment, cites the fact that it has substantially complied with the Financial Statement Statute and the Good Character Statute. It argues, among other things, that courts have held that "substantial compliance with a statutory mandate is sufficient if the act of compliance accomplishes the essential purpose of the statute."¹⁷ The case cited by BCRRS concerns a school board's refusal to renew a non-permanent teacher's contract. The Court of Appeals found that one section of the statute mandated strict compliance by the board when choosing to not renew a contract. Another section, primarily relied upon by the plaintiff as a condition precedent, did not take effect until the board chose to not renew the contract. The court concluded that "the unambiguously expressed intention of this section is a contract does not continue if proper notice is given. There is no exception or further condition for termination of the contract."¹⁸

Likewise, the Financial Statement Statute unambiguously expresses the intention for permit applicants to submit financial information, including an unqualified opinion as to the financial statement, before a permit may be granted. There are no exceptions or further conditions identified. Thus, a permit applicant cannot substantially comply with the statute by simply submitting a statement as to its financial net worth, which statement is of dubious value in this case considering the accountant was not given all of the relevant information. If the Financial Statement Statute centered solely around an applicant having a financial net worth of \$250,000.00, then BCRRS' argument would undeniably have merit. In contrast, however, a financial net worth of \$250,000.00 is only one of four requirements that have to be met by a permit applicant. This tribunal declines the invitation to view the other three requirements as superfluous. A similar analysis would apply to the requirements of the Good Character Statute. It too requires compliance before a permit may be granted and does not provide for exceptions. Therefore, BCRRS' substantial compliance argument is unavailing.

C. Conclusion

Summary judgment is appropriate in this case where there is an admission, testimony and documentation demonstrating BCRRS' non-compliance with statutory mandates. The fact that IDEM approved the permit without requiring strict compliance does not help BCRRS' case. As a state agency, IDEM's powers are controlled and limited by statute. IDEM is not free to disregard statutory mandates. IDEM should have carefully reviewed the financial statement submitted by BCRRS. The fact that it did not does not obviate BCRRS' statutory duty. BCRRS had to read the statutory requirements for obtaining a solid waste permit and it had to meet those requirements *before* obtaining a solid waste permit. Besides, common sense dictates that BCRRS should want to meet all of the necessary requirements so that challenges, like this one,

¹⁷ Moran v. Board of School Trustees, 501 N.E.2d 472, 475 (Ind.Ct.App. 1986).

¹⁸ Id.

could be met with evidence of full compliance.

IV. Conclusion of Law

Based on the foregoing Undisputed Facts and Discussion, NSL is entitled to judgment as a matter of law because BCRRS obtained a C/D landfill permit without meeting all of the statutory requirements contained in Ind. Code §13-20-2-1 and Ind. Code §13-19-4-2.

V. Order

NSL's Motion for Summary Judgment is hereby **GRANTED**. Solid Waste Facility Permit No. FP 06-07 is **VOID**. BCRRS is **FURTHER ORDERED** to submit a plan, for IDEM's approval, within ninety (90) days from the date of this order for the proper closure of the C/D landfill or removal and proper disposal of the C/D waste at a permitted solid waste landfill.

You are further notified that pursuant to provisions of S.E.A. 156 (P.L.41-1995 amending IC 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 Final Order is 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 in Indianapolis, Indiana this 15th day of September 1998.

Linda C. Lasley
Environmental Law Judge

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