

**Objections to the Issuance of Minor Modification
to the Velpen C/D Facility Permit, Pike County
1999 OEA 27 (98-S-J-2186)**

OFFICIAL SHORT CITATION NAME: When referring to 1999 OEA 27, cite this case as
Velpen C/D Facility Permit, 1999 OEA 27.

TOPICS:

solid waste land disposal facility
C/D site permit
modification
municipal solid waste landfill
physical imperfections
defects
aggrieved or adversely affected
demonstration of need requirements
economic effects
competition
waste screening program
subject matter jurisdiction
erroneous legal citations

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Sue A. Shadley, Esq.; Timothy Paris, Esq.; Carol S. Comer, Esq.
Plews Shadley Racher & Braun
Respondent/Permittee: Douglas W. Pool, Esq.; Robert M. Frye, Esq.
Foley & Pool, LLP
IDEM: Margaret Felton, Esq.

ORDER ISSUED:

June 29, 1999

LAND CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objections to the Issuance of Minor Modification
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STATE OF INDIANA)
) SS: BEFORE THE OFFICE OF
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTIONS TO THE ISSUANCE OF)
MINOR MODIFICATION TO THE) CAUSE NO. 98-S-J-2186
VELPEN C/D FACILITY PERMIT,)
PIKE COUNTY)

FINAL ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction to review decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to Ind. Code 4-21.5-7.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-27.
3. Velpen C & D Landfill, Inc. (“Velpen”) is a solid waste land disposal facility permitted by IDEM to operate as a construction/demolition site (“CID site”) in Pike County, Indiana for the disposal of construction/demolition waste (“C/D waste”).
4. On December 16, 1998, IDEM approved a minor modification to Velpen’s C/D site permit, Permit FP 63-7. The minor modification allows Velpen to accept items for disposal from manufacturing facilities that are consistent with and similar to C/D waste, but that, due to physical imperfections and/or defects, do not meet the specified requirements for finished products.
5. On or about January 4, 1999, American Disposal Services of Missouri, Inc. (“ADS”) filed its Petition for Administrative Review and Stay of Effectiveness (the “Petition”) pursuant to Ind. Code 4-21.5-3, challenging IDEM’s approval of the minor modification to Velpen’s permit.
6. ADS owns and operates a solid waste disposal facility in Pike County, known as the Blackfoot Landfill, which is a permitted municipal solid waste landfill.
7. Ind. Code § 4-21.5-3-7 and 315 IAC 1-3-2 provide that in order to qualify for review of an agency order, a person must petition for review in writing stating facts which demonstrate that the petitioner is a person to whom the order is specifically directed, is aggrieved or adversely affected by the order, or is entitled to review under any law.

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STANDING

8. ADS is a person aggrieved or adversely affected by IDEM's decision under Indiana law, in that it has a legally protected right to ensure, on a threshold jurisdictional basis, that IDEM's decision was properly made in accordance with applicable statutes and rules. Since IDEM has no authority to regulate competition, the OEA lacks subject matter jurisdiction to review a decision of IDEM on the basis that IDEM's decision grants Velpen a competitive advantage over ADS. Competition among permittees and other economic effects are not considerations that IDEM may include in a permitting decision. The environmental laws and regulations that IDEM is charged with administering and enforcing do not and are not intended to protect or regulate competition. ADS has no legally protected property interest in its own permit or the permitting decisions IDEM makes with regard to other solid waste disposal facilities. 329 IAC 10-134(a).

AUTHORITY TO MODIFY AND STATUTORY CONSTRUCTION

9. ADS first challenges IDEM's legal authority to grant the subject modification to Velpen's permit. IDEM may grant specific, written approval for a C/D site to accept wastes other than C/D waste if such other waste: (1) is incidental to the C/D site, (2) is of a similar type and size to C/D waste, and (3) will not create a greater threat to the environment than C/D waste. 329 IAC 10-9-3(b). ADS argues that the "incidental to the C/D site" requirement of 329 IAC 10-9- 3(b)(1) means that the waste must be generated at, or near to, a site where a structure is being constructed or demolished, not from a manufacturing facility.

329 IAC 10-9-3(b) is ambiguous. The term "C/D site" itself is defined at 329 IAC 10-2-36 as a permitted facility designed and operated to accept C/D waste, and under rules of statutory construction that definition may be applied in construing the "incidental to the C/D site" language of 329 IAC 10-9-3(b)(1). A strict and literal interpretation of 329 IAC 10-9-3(b) would lead to the result that a C/D site could only be authorized to accept waste that is similar to C/D waste if the waste was generated at the C/D site itself. A different interpretation of 329 IAC 10-9-3(b) is evidenced by IDEM's application of the regulation. Relevant is IDEM's historical interpretation of the meaning as reflected in two other C/D site permits that have granted authority to accept manufacturing waste that is generated from the construction, renovation, repair and demolition of structures and is of a similar nature to C/D waste.

Rules of statutory construction require that statutes be examined and interpreted as a whole and, where possible, every word must be given effect so that no part is held meaningless. Hoosier Environmental Council v. DNR, 673 N.E.2d 811 (Ind.App. 1996). The statute must be examined as a whole, giving words their common and ordinary meaning, and not overemphasize a strict, literal or selective reading of individual words. Collier v. Collier, 702 N.E.2d 351 (Ind. 1998). When striving to determine and give effect to legislative intent, a statute must be construed in such a way as to prevent absurdity and hardship and to favor public convenience. Blackmon v. Duckworth, 675

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N.E.2d 349 (Ind.App. 1996); Family and Social Serv. Admin. v. Calvert, 672 N.E.2d 488 (Ind.App. 1996), *trans. denied*. A court construing an ambiguous statute may consider the consequences of a particular construction. Economy Oil Corp. v. Ind. Dept. of State Revenue, 162 Ind.App. 658, 321 N.E.2d 215 (1975), *reh'g. denied*. The interpretation of a statute as applied by an agency is entitled to considerable weight as evidence of the meaning of the statute to those charged by law and most concerned with its administration. Baker v. Compton, 247 Ind. 39, 211 N.E.2d 162 (1965). However, an agency's interpretation is not entitled to any weight if it is incorrect. Peabody Coal Co. v. DNR, 606 N.E.2d 1306 (Ind.App. 1992). In the instant case IDEM's interpretation is not incorrect.

IDEM does not ignore the "incidental to the C/D site" language of 329 IAC 10-9-3(b); rather, it has interpreted the language in a manner that gives a practical effect to the rule. If waste is of a similar nature to C/D waste and poses no greater threat to the environment than C/D waste, then IDEM has authority to allow such waste to be disposed of at C/D sites. It appears absurd to require the disposal of wastes using capacity in a facility with environmental safeguards like leachate collection and groundwater monitoring when such safeguards are not necessary.

IDEM was within its statutory and regulatory authority to grant the modification to Velpen's permit to accept for disposal items that are consistent with and similar to C/D waste, but that, due to physical imperfections and/or defects, do not meet the specified requirements for finished products. Such interpretation is consistent with the overall purposes of the enabling statute. There being no genuine issues of material fact concerning IDEM's authority to modify Velpen's permit, Velpen is entitled to judgment as a matter of law. Ind. Code § 4-21.5-3-23(b).

PERMITTED SITE

10. ADS next argues in its Petition that Velpen's C/D site would have to be redesigned and re-permitted as a nonmunicipal waste landfill in order to accept the wastes authorized by IDEM's modification to Velpen's permit. Velpen counters that IDEM has the authority to allow Velpen to accept certain types of non-C/D waste, that IDEM has granted Velpen such authority, and, therefore, Velpen can dispose of such waste at its C/D site as it is currently designed and operated. ADS does not address this issue in its summary judgment motion.

Velpen is a duly permitted C/D site. As stated above, IDEM has the authority under 329 IAC 10-9-3 to grant approval to a C/D site to accept certain waste other than C/D waste as defined in 329 IAC 10-2-37.

There is no requirement that a C/D site be redesigned or re-permitted in order to be granted such approval. Therefore, ADS's claim that the Velpen site should be redesigned and re-permitted fails to state a claim upon which relief can be granted and should be dismissed. 315 IAC 1-3-6(c).

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There being no genuine issues of material fact concerning Velpen's status as a duly permitted C/D site and IDEM's authority to modify Velpen's permit as it has done here, Velpen is entitled to judgment as a matter of law. Ind. Code § 4-21.5-3-23(b).

DEMONSTRATION OF NEED

11. ADS next argues in its Petition that IDEM's decision to modify Velpen's permit violates the demonstration of need requirements of Ind. Code 13-20-1. The demonstration of need requirements apply only to new permits and major modifications to existing permits, not minor modifications such as one at issue here. Accordingly, ADS's claim that the modification to Velpen's permit violated the demonstration of need requirements of Ind. Code 13-20-1, fails to state a claim upon which relief can be granted and should be dismissed. 315 IAC 1-3-6(c).

SCREENING PROGRAM

12. Velpen does have a waste screening program in place. Whether Velpen employs adequate methods to ensure that the type of waste it accepts is authorized is a prospective enforcement issue for IDEM, not an issue upon which IDEM could base its decision to approve the minor modification at issue here.

There is no statute or regulation requiring C/D sites to have a waste screening program. However, 329 IAC 10-9-3 and Velpen's permit define and limit the types of waste that can be disposed of at Velpen's CID site. Further, 329 IAC 10-14-1 contains reporting requirements for all solid waste land disposal facilities, including quarterly reporting to IDEM of the amount of waste accepted at the site, the origin of the waste, and, where a load contains waste from more than one location, the type and amount originating in each county, state or country. The limits imposed upon the types of waste that can be disposed of at the Velpen C/D site, the detailed reporting requirements, and the threat of enforcement action or private lawsuits for accepting unauthorized wastes are sufficient safeguards. Velpen has demonstrated that it has trained personnel at its C/D site and that it has instituted a waste screening program.

There being no legal authority for imposing a waste screening program condition in Velpen's permit, and whether Velpen properly assures that the waste it accepts for disposal being a prospective enforcement issue rather than a permitting issue, IDEM is without jurisdiction over these issues and, therefore, the OEA is without jurisdiction to review IDEM's decision on such grounds. Thus, ADS's Petition for Review must be dismissed for lack of subject matter jurisdiction. 315 IAC 1-3-6(c).

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HARMLESS ERRONEOUS LEGAL CITATIONS

13. Finally, ADS challenges IDEM's modification of Velpen's permit on the ground that it contains erroneous legal citations which render the modification unenforceable. There is no legal authority supporting ADS's position that erroneous legal citations in a permit render the permit unenforceable. The errors are identified and recognized by Velpen. The errors are simple typographical errors and do not render the modification to Velpen's permit unenforceable.

Therefore, ADS fails to state a claim upon which relief can be granted and its Petition for Review should be dismissed accordingly. 315 IAC 1-3-6(c).

There being no genuine issue of material fact with regard to whether an erroneous legal citation in a permit renders the permit unenforceable, Velpen is entitled to judgment as a matter of law. Ind. Code § 4-21.5-3-23(b).

14. All motion's to strike portions of affidavits are denied.

FINAL ORDER

Velpen's Motion to Dismiss or in the Alternative Summary Judgment is hereby **GRANTED**. IDEM's decision to modify Velpen's permit, Permit FP 63-7, is hereby **UPHELD**. ADS's request for stay is hereby **DENIED**.

You are further notified that pursuant to provisions of SEA 156 (P.L.4 1-1995 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.

Dated this 29th day of June, 1999.

Wayne Penrod
Chief Administrative Law Judge