

**Objection to the Issuance of Permit Approval No. IN LA 000614
LMH Utilities Corporation, Dearborn County, Indiana
2002 OEA 33 (01-S-J-2677)**

TOPICS:

hybrid permit
biosolids
site-specific application site
reasonable effort
land application permit
Indiana Code § 13-15-8-2
failed to notify
327 IAC 6.14-6(c)
equivalent methods
soil survey
water table
permeability
depth to saturation
mottling

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Alan D. Wilson
IDEM: Cindy Shively Klem

ORDER ISSUED:

December 10, 2002

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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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 PERMIT)	
APPROVAL NO. IN LA 000614)	CAUSE NO. 01-S-J-2677
LMH UTILITIES CORPORATION)	
DEARBORN COUNTY, INDIANA)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

I. STATEMENT OF CASE

This case involves the appeal of a land application permit granted by the Indiana Department of Environmental Management (“IDEM”) to LMH Utilities Corporation (“LMH”) on February 23, 2001, allowing application of biosolid waste to farmland located in Dearborn County. The permit is a “hybrid” permit which would have allowed LMH to land apply biosolids to: (1) qualifying farmland in Dearborn County upon the receipt of permission of the landowner; and (2) a certain pre-approved 20-acre site in Dearborn County identified in the permit as being a “site-specific” application site. Although Indiana Code § 13-15-8-2 requires a “reasonable effort” to provide notice of the initial permit application to all owners of land adjoining the site-specific portion, no such notice requirement is needed for the county-wide portion of the permit.

On March 9, 2001, Petitioners filed their Request for Adjudicatory Hearing. On March 14, 2001, Konstantine and Susan Koumoutos filed their appeal. On March 22, 2001, the Indiana Office of Environmental Adjudication (“OEA”) held a stay hearing regarding the land application permit issued to LMH. The Koumoutos’ failed to appear. The hearing was conducted by the Honorable Linda C. Lasley. The Petitioners were allowed to present all their evidence regarding their appeal of LMH’s land application permit. However, Judge Lasley prohibited LMH and the IDEM from proceeding with their evidence at the stay hearing. Furthermore, during the stay hearing, Judge Lasley deemed the evidence presented by the Petitioners to constitute their case in a final hearing.

On March 28, 2001, Judge Lasley issued an Order granting a stay on behalf of the Petitioners. Judge Lasley further required IDEM to respond within 90 days of the Order with evidence of: (1) that LMH sent notice of its permit application to Steve and Lisa Williamson within ten days after it filed its application with IDEM and, (2) to submit evidence that no soil on the twenty-acre site between 18-36 inches from the surface has a permeability greater than two inches per hour. Judge Lasley allowed Petitioners until April 16, 2001 to submit an amended Petition for Administrative Review to conform with the requirement stated in Ind. Code § 13-15-6-2.

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On April 6, 2001, Marvin Benning filed his appeal. On April 7, 2001, Steve and Lisa Williamson filed their appeal. Both Mr. Benning and the Williamsons' appeals are outside the appeal deadline.

On April 11, 2001, Petitioners filed an Amended Petition for Administrative Review. On June 2, 2001 IDEM filed its Response to the Indiana Office of Environmental Adjudication's Request for Evidence pursuant to its Ruling of March 28, 2001. On August 21, 2001, LMH filed its brief in support of Motion to Lift Stay Order.

II. FINDINGS OF FACT

A. NOTICE

1. On December 1, 1999, IDEM received an application for a land application permit from LMH. That same day, LMH mailed notices to adjoining landowners (to the 20 acre site-specific field) pursuant to Ind. Code § 13-15-8-2. However, the Williamsons, who are adjoining landowners, did not receive notice of the initial permit application and the Williamsons did not appear on the affected party list submitted by LMH in its application for a permit.
2. On January 18, 2000, IDEM was made aware of a potential defect with the initial permit application notification process when it received the Williamsons' letter dated January 10, 2000. In the letter, the Williamsons stated that they did not receive notice of the application and objected to any decision to issue a land application permit. *See, Williamsons' letter dated January 10, 2000, attached at Exhibit 9 to IDEM's Response Brief.* In response to the Williamsons' letter, LMH was required to explain to IDEM the procedure it used to notify adjoining landowners in order for IDEM to make a determination as to the reasonableness of the applicant's efforts to provide proper notification of its permit application.
3. Jay Tucker, the owner of LMH, obtained the names of adjoining landowners by reviewing tax records maintained by the Dearborn County Assessor's Office during the first or second week of September 1999. *See, LMH's letter dated February 2, 2000, attached as Exhibit 10, and Affidavit of Joan Sites, paragraph 6, attached as Exhibit 11 to IDEM's Response Brief.*
4. Mr. Tucker's notification of LMH's permit application was timely made to all landowners listed in the County Assessor's tax records at the time of his search. His notification to the adjoining landowners was done by regular and certified U.S. Mail.

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5. Once IDEM became aware of the potential defect with notice, IDEM contacted the Dearborn County Assessor's office to inquire about records maintained by that county office in order to determine if LMH's efforts were reasonable. The Assessor's office explained to IDEM that it was the proper county office in which a citizen would locate information pertaining to landowners in that County. The Dearborn County Assessor stated that the Williamsons purchased property from Juanita Konradi on August 9, 1999. However, because only a portion of the entire tract owned by Ms. Konradi was sold, this was a "split sale" which would have caused a delay in updating the tax records. In fact, it was not until September 21, 1999 that the tax records were updated. *See, Affidavit of Joan Sites, paragraphs 3 & 8, attached as Exhibit 11 to IDEM's Response Brief.* After reviewing these facts, IDEM determined that it could not conclude that Mr. Tucker's efforts to provide notice to adjoining landowners of LHM's permit application were unreasonable under the circumstances.
6. On June 15, 2000, the Williamsons attended the Public Hearing held in Dearborn County where they had the opportunity to comment on the permit application at that time. *See, Public Hearing sign-in sheet, attached as Exhibit 12 to IDEM's Response Brief.*
7. On February 23, 2001, the Williamsons, as well as over 300 individuals, were provided proper notice of IDEM's final decision to issue LMH's permit. *See, IDEM's Triple A Mail Tracking List, page 15, attached as Exhibit 8 to IDEM's Response Brief.*
8. There is no evidence that IDEM failed to notify any adjoining landowner of its final decision to grant the land application permit as required by Ind. Code § 4-21.5-3-5.
9. The Williamsons were not a party to the appeal filed by the Petitioners on March 9, 2001, and the Williamsons did not attend the Hearing for Administrative Review and Stay of Effectiveness held on March 22, 2001.
10. On April 7, 2001, the Williamsons filed an Appeal and on April 11, 2001, the Williamsons were named in the Amended Appeal filed by the Petitioners. It appears Marvin Benning also filed an appeal on or about April 6, 2001. However, the Williamsons' and Mr. Benning's appeals are well outside the time period allowed to appeal pursuant to Ind. Code § 4-21.5-3-7.
11. On October 26, 2001, oral arguments were heard on IDEM and LMH's motions to lift the Office of Environmental Adjudication's Order Granting Stay of Effectiveness, dated March 28, 2001. The Williamsons did not attend this hearing. On October 31, 2002, oral arguments were heard on LMH's Motion to Dismiss the Amended Appeal filed by the Petitioners, and the Williamsons again did not attend this hearing.

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B. SOIL

12. At the stay hearing, it was established that the 20-acre site specific field is comprised mostly of Avonburg soil and a small portion of Rossmoyne soil. *See, Area Soil Map, attached as Exhibit 2 to IDEM's Response Brief.*
13. During Petitioners' presentation of the evidence at the Stay Hearing, the Soil Survey of Dearborn and Ohio Counties ("Soil Survey") was accepted into evidence. The Soil Survey is a compilation of data that has been collected by the U.S. Department of Agriculture Soil Conservation Service, and contains various tables of information pertaining to soil and wildlife located in Dearborn and Ohio Counties.
14. 327 IAC 6.14-6(c) states,

Using soil survey data established by USDA Natural Resource Conservation Service, application of the biosolid or industrial waste product is prohibited if:
(1) the seasonal high water table is within eighteen (18) inches of the soil surface; and
(2) the seasonal high water table is:
(A) within thirty-six (36) inches of the soil surface; and
(B) any soil layer between eighteen (18) inches and thirty-six (36) inches below the surface as a permeability of greater than two (2) inches per hour.
15. In her Order, Judge Lasley held that under 327 IAC 6.1-4-6(c)(1) the 20-acre site may possibly be excluded from the land application program because the seasonal water table potentially could be within 18 inches of the soil surface according to the Soil Survey. Accordingly, Judge Lasley ordered IDEM to provide evidence that the soil satisfies the requirements of 327 IAC 6.1-4-6(c)(2)(B), and show that there are no soil layers at the site between 18-36 inches with a permeability greater than 2-inches per hour.
16. The Soil Survey explains the physical and chemical properties of the different types of soils located in these counties. *See, Table 17 of the Soil Survey, attached as Exhibit 1 to IDEM's Response Brief.* Table 17 of the Soil Survey includes a category of data entitled "permeability" for all of the soil types.
17. According to Table 17 of the Soil Survey, Avonburg soil's permeability at a depth of 17-26 inches is 0.6-2.0 inches per hour, and at depth of 26-72 inches, the permeability is less than 0.06 inches per hour. Rossmoyne soil's permeability at a depth of 7-23 inches is .06-2.0 inches per hour, and at a depth of 23-66 inches, the permeability is .06-0.2 inches per hour. Therefore, neither Avonburg nor Rossmoyne soils have a permeability greater than 2-inches per hour at the depth of between 18-36 inches.

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18. Even if permeability was an issue at the site, 327 IAC 6.1-3-1(e)(l) allows “equivalent methods” to be proposed to meet the site restriction requirements. 327 IAC 6-1-3-1(e)(l) states, in part:
- Proposals for equivalent methods for meeting requirements may be submitted for approval to the commissioner with the permit application for the following:
- (1) Site restrictions in 327 IAC 6.1-4-6 and 327 IAC 6.1-7-5.
19. In her Order, Judge Lasley did not address the ability of LMH to meet the requirements of 327 IAC 6.14-6 by providing an equivalent method even though IDEM approved the permit on the condition that LMH meet the restrictions by following an equivalent method.
20. LMH’s permit requires LMH to monitor the depth of the actual water table during the months the soil is known to have a seasonal high water table to meet the site restriction requirements. *See, LMH’s permit, page 2, attached as Exhibit 4 to IDEM’s Response Brief.*
21. Therefore, LMH must demonstrate that the seasonal high water table is not actually within 18 inches of the surface by monitoring the actual water table during the months known to have a potential for a high water table.
22. At the stay hearing, the EU relied on the testimony of State Department of Health Employee Mr. Bugni that the “mottling line” defines the seasonal high water table even though the land application rules do not refer to mottling. The term “mottling” refers to evidence of chemical and physical changes in the soil that are visible when a soil profile is extracted. Mottling is an indication in the soil of the highest point the ground water has ever reached. The consequence of interpreting the mottling line as the definition of the seasonal high water table would eliminate at least 45% of all Indiana land from the land application program.
23. IDEM interprets the seasonal high water table to be the actual location of the ground water level, not mottling, and conducts its land application program accordingly.
24. Table 18 of the Soil Survey indicates that between January and April, Avonburg soil will have high water table ranging anywhere from 1-3 feet of the surface. *See, Table 18, attached as Exhibit 5 to IDEM’s Response Brief.* As Table 18 reflects, the ground water level is always moving vertically and is expected to be high during certain months. In contrast, the mottling line never changes because it indicates the highest point the water table has ever reached.

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25. The soil report dated February 2, 1999 Mr. Bugni introduced into evidence at the stay hearing supports IDEM's position that the actual ground water table is the appropriate measuring level since the report notes that the seasonal water table is the depth to saturation, and does not reference the mottling line. *See, Soil Report, attached as Exhibit 6 to IDEM's Response.* Accordingly, the 12 inches for Avonburg soil listed on the soil report reflects the actual location of the ground water on February 2, 1999.

III. CONCLUSIONS OF LAW

A. NOTICE

1. 327 IAC 6. 1-4-4(d)(4) requires compliance with the notice procedure contained in Ind. Code § 13-15-8 before a site-specific land application permit is granted. Pursuant to Ind. Code § 13-15-8-2, within 10 working days after submitting the application, the applicant must make a "reasonable effort" to notify adjoining landowners that an application for a permit has been submitted to IDEM.
2. IDEM is not required to deny all site-specific permit applications where notification of the initial application may be defective. Instead, IDEM is only required to make a determination that the procedure used by the applicant to provide notice was reasonable.
3. The evidence in the instant case does not support a conclusion that IDEM improperly decided that LMH acted reasonably when providing notice of the site-specific permit application to adjoining landowners.
4. Ind. Code 4-21.5-3-5(f) pertains solely to the notification process required of IDEM after it has made a final decision to grant (or deny) a permit. There is no evidence that IDEM failed to provide proper notification of its decision to grant LMH's land application permit. Therefore, Ind. Code 4-21.5-3-5 is inapplicable in this case.
5. It is possible to overturn a permit due to lack of notice of a permit application if the adjoining landowner not receiving notification can show they were prejudiced by this failure. *In the Matter of Objection To The Issuance Of NPDES Permit IN -55429 Chemical Waste Management, Inc.*, 1993 WL 588733; *Pfeil v. Amax Coal West, Inc.*, (Wyo. 1995) 908 P.2d 956.
6. The Williamsons were not prejudiced by the failure to receive notification of the initial permit application since the Williamsons knew about the permit application within the public comment period and attended the public hearing on this matter. Further, they were properly provided notice by IDEM of the decision to grant the land application permit.
7. Petitioners had no standing to bring a claim for lack of notice on behalf of the Williamsons, and the Williamsons failed to timely appeal IDEM's decision to grant the permit.

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8. Neither the Williamsons nor any other adjoining landowners were entitled to notice with regards to the county-wide (or non-site specific) portion of the “hybrid” permit granted to LMH. Therefore, the stay should never have been granted as to the non-site specific portion of the permit.
9. The Williamsons and Mr. Benning did not timely appeal LMH’s land application permit; therefore, their appeals are dismissed.

B. SOIL TYPE

10. Mottling does not define the seasonal high water table for the purpose of land application rules. Instead, the actual location of the water table designates the seasonal high water table.
11. Pursuant to 327 IAC 6.1-4-6(c)(2)(B), the .20-acre site does not exceed the permeability requirement of this rule since the permeability for Avonburg and Rossmoyne soil does not exceed 2-inches per hour at a depth of between 18-36 inches.
12. Pursuant to 327 IAC 6.1-3-1(e)(1), an equivalent method can be approved by IDEM to meet the site-restriction rules. IDEM’s decision to allow LMH to use an equivalent method by monitoring the water table was proper.

IV. FINAL ORDER

It is therefore ORDERED that Permit No. IN LA 000614 is hereby APPROVED and the stay issued on March 28, 2001, is hereby LIFTED and Petitioners’ Appeals are DENIED.

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 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.

Dated this 10th day of December, 2002.

Wayne Penrod
Chief Administrative Law Judge