

COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

v.

B. L. BUILDERS, INC.

2004 OEA 140, OEA CAUSE NO.: 00-W-E-2558

Official Short Cite Name:	B. L. Builders, Inc., 2004 OEA 140
OEA Cause No.:	00-W-E-2558
Topics/Keywords:	327 IAC 15-5-5 327 IAC 2-1-2(1) 327 IAC 5-22 327 IAC 15-3-2 327 IAC 15-5-6 327 IAC 15-6-7 327 IAC 15-2-5 327 IAC 15-5-7 315 IAC 1-3-7 315 IAC 1-3-1(b)(2)(7) I.C. § 13-18-4-5 I.C. § 4-21.5-3-7 I.C. § 23-1-5-2-1(a)-1(c) I.C. § 13-18-4-4 I.C. § 4-21.5-3-23 I.C. § 13-30-4-1 I.C. § 4-21.5-3-24
Presiding ELJ:	Mary Davidsen
Party Representatives:	Mary Ann Habeeb Chang (Bob) Huei Luan
Date of Order:	December 17, 2004
Index Category:	Water
Further Case Activity:	

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
SS: ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
COMMISSIONER, INDIANA DEPARTMENT)
OF ENVIRONMENTAL MANAGEMENT)
)
Complainant,)
)
v.)
)
B. L. BUILDERS, INC.,)
)
Respondent.)

CAUSE NO. 00-W-E-2558

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
FINAL ORDER
GRANTING THE COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Office of Environmental Adjudication ("OEA" or "Court") pursuant to a timely petition for administrative review of the Notice and Order of the Commissioner of the Indiana Department of Environmental Management ("IDEM") filed by Respondent B.L. Builders, Inc. ("B.L."), owner of Emerson Forest, a residential development in St. Joseph County, Indiana (the "Site") on or about August 4, 2000.

On or about October 22, 1998, B.L. received a Notice of Violation ("NOV") from IDEM for failing to submit a Notice of Intent ("NOI") letter to IDEM, for failing to implement erosion and sediment control measures in violation of 327 IAC 15-5 *et seq.* (1992)¹ and further for violations of Ind. Code §13-18-4-5, 327 IAC 2-1-2(1) and 327 IAC 5-2-2 and Sections 401 and 404 of the Clean Water Act. Respondent and IDEM failed to settle the violation charge and on or about July 17, 2000, a Notice and Order of the Commissioner ("Commissioner's Order") was issued to Respondent for these violations. More than sixty (60) days passed between the issuance of the NOV and the Commissioner's Order.

Pursuant to a Case Management Order of February 26, 2004 the parties were to complete discovery by May 7, 2004. Only the Commissioner conducted discovery. Pursuant to a Revised Case Management Order of May 25, 2004 the parties were to file dispositive motions by June 28, 2004. Respondent did not file a dispositive motion. On June 28, 2004 the Commissioner pursued a dispositive motion in the form of a Motion for Summary Judgment. Respondent B.L. did not submit any responses to the Commissioner's Motion for Summary Judgment, which Motion was supported by B.L.'s

¹ The violations described in this action occurred prior to substantive changes to 327 IAC 15 which were made effective on January 9, 2004. All references herein to 327 IAC 15 are to the rules in effect at the time of the violations.

Admissions and by Affidavit of Mark Stanifer, Section Chief, Office of Enforcement, Water Section.

And the Chief Environmental Law Judge ("ELJ"), having read and considered the petitions, motions, record of proceedings, evidence, and briefs and responses of the parties, now finds that IDEM met its required burden of proof to support the Commissioner's Order against Respondent B.L. Builders Inc. Judgment may be made upon the record. The ELJ, by a preponderance of the evidence, now makes the following findings of fact and conclusions of law, and enters the following Order with respect to the Petition of Respondent B.L.

Findings of Fact

1. On July 17, 2000, the Commissioner of the Indiana Department of Environmental Management issued a Notice and Order of the Commissioner of the Department of Environmental Management to B.L., as owner of Emerson Forest, St. Joseph County, Indiana, specifying unauthorized land disturbing activities and other violations of Indiana law occurring on or before May, 1997, and continuing through March 5, 1998, Ordering Respondent to cease and desist its violations, and assessing a civil penalty of Forty-Five Thousand Two Hundred and Fifty Dollars (\$45,250).
2. On or about August 1, 2000, B.L. petitioned for administrative review of the Commissioner's Order; B.L.'s Petition for Administrative Review ("Petition") was assigned OEA Cause No. 00-W-E-2558.
3. B.L.'s petition was timely filed, per Ind. Code § 4-21.5-3-7. The Court record reflects that B.L. was first represented by Ms. Lyn Leone, attorney at law. Ms. Leone later withdrew her appearance and notified the ELJ that Respondent was represented by Mr. W. Todd Woelfer, attorney at law. Subsequently, Mr. Woelfer notified the ELJ that he did not represent Respondent in this matter and thereafter, Respondent was represented in these proceedings by Mr. Chang (Bob) Huei Luan ("Luan"), President and principal owner of B.L. Builders, Inc.
4. The parties appeared at prehearing conferences on September 8, 2000 and July 17, 2003, and a status conference on October 20, 2003. IDEM appeared at a final prehearing conference on August 23, 2004, as Ordered by the ELJ in the Case Management Order of February 26, 2004, and the Revised Case Management Order of May 25, 2004. Respondent B.L. Builders, Inc. failed to appear at the August 23, 2004 final prehearing conference. No documents, pleadings, responses, evidence, or communications sent by the Court were returned as unclaimed or undeliverable.
5. The parties' formal discovery schedule was established in the Court's February 26, 2004 Case Management Order.
6. IDEM filed discovery in the form of Interrogatories, Admissions, and Motion to Produce to B.L. on March 31, 2004.

7. The Court record demonstrates that B.L. did not participate in discovery except that Luan, on behalf of Respondent, did present some information in response to IDEM's First Request for Interrogatories and First Request for Production of Documents by providing some documents relating to the financial situation of Luan and the prospective foreclosure of the property known as Emerson Forest which is the subject of this action.
8. On May 19, 2004, the Commissioner filed its Motion to the ELJ for an Order Establishing Respondent's Admissions and supporting brief.
9. On May 21, 2004, the Court took the matter of the Commissioner's Motion to the ALJ for an Order Establishing Respondent's Admissions under advisement and Ordered that if a party files a response to the Motion, such response is to be received by the Court by June 14, 2004, after which time the Court will issue its ruling on the Motion based upon the Court's record as of June 14, 2004.
10. On June 28, 2004, the Commissioner filed a Motion for Summary Judgment, per the Court's Revised Case Management Order.
11. B.L.'s Admissions were ordered established by the Court on August 23, 2004, after B.L. failed to submit responses to the Commissioner's Request for Admissions or to respond to the Commissioner's Motion to the ELJ for an Order Establishing Respondent's Admissions. In granting the Commissioner's Motion for Summary Judgment, the Court's August 23, 2004 Order further provided that "[T]he Commissioner's June 28, 2004 Motion for Summary Judgment is GRANTED, effective August 24, 2004, with the Commissioner ordered to draft proposed findings of fact, conclusions of law and order for the Court's review by September 16, 2004. The Court's ruling will be effective August 24, 2004, but Respondent will be accorded full review rights beginning the day the Court issues its Findings of Fact, Conclusions of Law and Order.
12. At the time of the violations cited by IDEM in its NOV and Commissioner's Order Respondent B.L. Builders, Inc. and/or Chaang (Bob) Luan was the sole owner of Emerson Forest (the "Site"), real estate located in St. Joseph County, Indiana.
13. B.L. Builders, Inc. is a corporation registered to do business in the State of Indiana at the time of the violations noted in the Commissioner's Order.
14. Luan is the person responsible for handling the corporate and business affairs of B.L.
15. Luan was the representative of B.L. responsible for the decision to place fill material into the wetlands located in the Emerson Forest residential development (Site) in St. Joseph County in March, 1998.

16. B.L. does not conduct annual meetings of its shareholders, it has no board of directors, it does not maintain minutes of its annual meetings of the shareholders as proscribed by Ind. Code § 23-1-52-1(a) and does not maintain appropriate accounting records as proscribed by Ind. Code § 23-1-52-1(b).
17. The Site is at least five (5) acres in size.
18. B.L. initiated land disturbing activities at the Site on or before May, 1997.
19. B.L. failed to submit a Notice of Intent ("NOI") letter as defined by 327 IAC 15-3-2 and 327 IAC 15-5-5, to IDEM prior to initiating land disturbing activities at the Site.
20. On or about February 17, 1998, an On-Site evaluation was conducted at Emerson Forest by representatives of the Indiana Department of Natural Resources ("IDNR") and the St. Joseph County Soil and Water Conservation District ("SWCD").
21. At the time of the On-Site evaluation described in paragraph 21 above, the Site rated as unsatisfactory and required corrective action in the following areas:
 - a. The plan is being effectively implemented
 - b. Sediment is contained on-site.
There is evidence of off-site sedimentation.
Site conditions present a high potential for off-site sedimentation.
 - c. Public or private roadways are being kept clear of tracked sedimentation/soil.
 - d. Measures are appropriately incorporated into land disturbing activities.
 - e. Drainage channels and outlets have been stabilized.
 - f. Areas have been stabilized as specified in the construction sequence.
 - g. Storm inlets are adequately protected.
22. No evidence was presented that B.L. secured a permit under Sections 401 and 404 of the Clean Water Act to place fill in the wetlands at the Site.
23. The wetlands at the Emerson Forest Site is a jurisdictional water of the state.
24. On March 5, 1998, an inspection at the Site was conducted by staff of IDEM which resulted in IDEM's seeking enforcement against B.L. for an unpermitted discharge of fill materials into wetlands in violation of Ind. Code § 13-18-4-5, 327 IAC 2-1-2 (1) and 327 IAC 5-2-2.

25. On March 17, 1998, IDEM sent a letter to B.L. Builders, Inc. which presented documentation of an unpermitted discharge of fill material into wetlands located at the Emerson Forest Site in violation of Ind. Code §13-18-4-4, 327 IAC 2-1-2(1) and 327 IAC 5-2-2.
26. On October 26, 1998 Respondent received a Notice of Violation from IDEM for violation of 327 IAC 2-1-2, 327 IAC 5-2-2, 327 IAC 15-5-6, 327 IAC 15-6-7, and Ind. Code §13-18-4-5 related to failure to submit a Notice of Intent letter to IDEM, DNR or the St. Joseph County SWCD prior to initiating land disturbing activities, failure to maintain adequate erosion control measures at the Site and for unlawful discharge into wetlands at the Site.
27. 327 IAC 2-1-2, 327 IAC 5-2-2, 327 IAC 15-2-5, 327 IAC 15-5-5, 327 IAC 15-5-6, 327 IAC 15-5-7, 327 IAC 15-5, *et seq.* and Ind. Code § 13-18-4-5 are applicable to Site and to the facts of this case.
28. IDEM presented substantial evidence to support its assessment of a civil penalty in this case in the sum of Forty-Five Thousand Two Hundred Fifty Dollars (\$45,250).
29. There are no facts in dispute in this case, as all of the above facts were either established and unrefuted by the evidence submitted by IDEM in its Motion for Summary Judgment and/or deemed admitted by Respondent through its failure to deny them when presented as the Commissioner's First Requests for Admissions on or about May 19, 2004, per this Court's Order Establishing Respondent's Admissions entered on August 23, 2004. *See* Indiana Rules of Trial Procedure 36, 37; *City of Muncie v. Peters*, 709 N.E.2d 50 (Ind.Ct.App. 1999); *Corby v. Swank*, 670 N.E.2d 1322 (Ind.Ct.App. 1996).
30. 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.

Conclusions of Law

Based upon the foregoing Findings of Fact and Statement of the Case, the Chief Environmental Law Judge concludes, as a matter of law:

1. The Indiana Office of Environmental Adjudication has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to the controversy pursuant to Ind. Code § 4-21.5-3-23.
2. B.L. Builders, Inc. ("B.L." or "Respondent") as the owner Emerson Forest, a residential development in St. Joseph County, Indiana (the "Site") during all times relevant to the violations asserted herein, is liable for any regulated activity on the Site.

3. As the Site is at least five (5) acres in size, it is subject to IDEM's jurisdiction for land disturbing activities by B.L., and is subject to the requirements of 327 IAC 15-2-5, 327 IAC 15-5-5, 327 IAC 15-5-6, 327 IAC 15-5-7, 327 IAC 15-5 *et seq* and Ind. Code § 13-18 *et seq*. Respondent failed to submit a Notice of Intent letter to IDEM as defined in 327 IAC 15-3-2 and required by 327 IAC 15-2-5 and 327 IAC 15-5 *et seq*. prior to initiating land disturbing activities. B.L.'s failure to submit an NOI letter prior to initiating land disturbing activities is a violation of 327 IAC 15-5-6. Respondent further failed to properly implement and maintain erosion and sediment control measures while engaging in land disturbing activities at the Site as documented in the February 17, 1998 On-Site Evaluation, in violation of 327 IAC 15-5-7. Respondent further violated 327 IAC 2-1-2, 327 IAC 5-2-2 and Ind. Code § 13-18-4-5 by its unpermitted activities and unlawful discharge of sediments into wetlands, waters of the state, at the Site. Respondent further violated Ind. Code § 13-18-4-5, 327 IAC 2-1-2 and 327 IAC 5-2-2 for discharging fill material into a water of the state without a permit under Sections 401 and 404 of the Clean Water Act.
4. Per Ind. Code § 13-30-4-1, the Commissioner of IDEM may assess penalties for violations of any environmental management laws, or a rule or standard adopted by one of the boards. The civil penalty of Forty-Five Thousand Two Hundred Fifty Dollars (\$45,250) imposed upon Respondent by the Commissioner of the Indiana Department of Environmental Management is not an arbitrary and capricious assessment, nor an abuse or discretion, and it is supported by substantial evidence as conceded by Respondent as a matter of law and as set forth in IDEM's evidence.
5. IDEM has met its burden of proof and persuasion in establishing facts to support the violations alleged in the Notice and Order of the Commissioner.
6. Respondent has failed to participate in these proceedings by its failure to appear at the final prehearing conference on August 23, 2004 as ordered, and its petition for administrative review is eligible for dismissal as authorized in Ind. Code § 4-21.5-3-24 and 315 IAC 1-3-7. However, the Court elects to exercise its discretion provided by the above-cited statute and administrative rule to enter a final order on the merits of this case.
7. No genuine issues of material fact exist in this case, and the Commissioner of the Indiana Department of Environmental Management is entitled to judgment as a matter of law. Ind. Code § 4-21.5-3-23; 315 IAC 1-3-1(b)(2)(7).

ORDER

AND THE COURT, being duly advised, hereby ORDERS; ADJUDGES AND DECREES that the Motion for Summary Judgment filed by the Commissioner, Indiana Department of Environmental Management is GRANTED.

Respondent, B.L. Builders, Inc., shall pay a civil penalty in the amount of Forty-Five Thousand Two Hundred and Fifty Dollars (\$45,250), to be remitted to the Indiana Department of Environmental Management within thirty (30) days of the effective date of this Order. Checks shall be made payable to the Environmental Management Special Fund, with the Case Number (B-2336) indicated on the check and mailed to: Cashier, IDEM, 100 North Senate Avenue, P.O. Box 6015, Indianapolis, IN 46206-6015.

Respondent shall, henceforth from the effective date of this Order, maintain erosion control measures and regular maintenance of the construction project at Emerson Forest. The erosion control plan must be followed and maintained until the completion of the construction activity at the Site. Upon completion of construction activity at the Site, Respondent shall submit a notification of completion letter to IDEM as required by 327 IAC 15-5-11.

You are further advised that, pursuant to Ind. Code § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to 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.

IT IS HEREBY ORDERED this 17th day of December, 2004 in Indianapolis, Indiana.

Mary Davidsen
Chief Environmental Law Judge