COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
v.
ONYX PAVING, INC.
2005 OEA 076, OEA CAUSE NO.: 03-A-E-3179

Official Short Cite Name:	Onyx Paving, Inc., 2005 OEA 076
OEA Cause No.:	03-A-E-3179
	IC 13-14-5-1 - IC 13-14-5-6
	Federally Envorceable State Operating Permit
	Statutory construction
Presiding ELJ:	Catherine Gibbs
Party Representatives:	Jay Rodia, Esq.
	David Paugh, Esq.
Orders Issued:	(Final) Order of Dismissal, December 20, 2005
	Findings of Fact, Conclusions of Law and Order, August 22, 2005
Index Category:	Air
Further Case Activity:	

DEC 2 0 2005

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	)	
	)	
Complainant	)	
	)	
v.	)	CAUSE NO. 03-A-J-3179
	)	
ONYX PAVING, INC.	)	
	)	
Respondent	)	

ORDER OF DISMISSAL

Please be notified that on December 19, 2005, the Respondent, Onyx Paving, Inc., by counsel, filed correspondence withdrawing its Petition for Review, which pleading is a part of the Court's record.

THE COURT, being duly advised, now **FINDS** that, pursuant to 315 IAC 1-3-7, that this matter is **DISMISSED.**

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 the 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.

IT IS SO ORDERED in Indianapolis, Indiana this 20th day of December, 2005.

Catherine Gibbs
Environmental Law Judge

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

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	)	
ONYX PAVING, INC.	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter having come before the Court on the Motion for Summary Judgment filed by the Indiana Department of Environmental Management (the "IDEM"), and the Cross Motion for Summary Judgment filed by Onyx Paving, Inc. (the "Respondent"), which pleadings are part of the Court's record; and the Environmental Law Judge ("ELJ"), having read and considered the petitions, motions, evidence, and the briefs and responses of the parties, now finds that judgment may be made upon the record; and the ELJ, being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

FINDINGS OF FACT

1. On May 18, 1999, the IDEM issued Federally Enforceable State Operating Permit no. F071-9643-03180 (the "Permit") to Onyx Paving, Inc., New Ford Road, Seymour, Indiana (the "Facility"). IDEM's Exhibit 1.

2. On September 15, 2000, an IDEM inspector conducted an inspection of the Facility. During this inspection, the inspector determined that the Respondent was in violation of several of the permit conditions. IDEM's Exhibit 2.

3. Upon concluding his inspection on September 15, 2000, the inspector conducted an exit interview with Brad Pardieck of Onyx and informed him of his findings of violations. IDEM's Exhibit 2.

4. Condition D.1.5 of the Permit required the Respondent to conduct a stack test within twelve (12) months after issuance of the Permit.

5. As of the date of the inspection, the Respondent had not conducted this test. Therefore, the Respondent failed to conduct the test within the required time frame.[1]

6. On October 30, 2000, the IDEM sent an inspection summary to the Respondent. The Respondent did not receive this summary.[2] IDEM's Exhibit 2.

7. On November 4, 2000, the IDEM sent a violation letter to the Respondent. The Respondent received this letter. IDEM's Exhibit 3.

8. A Notice of Violation was subsequently sent to the Respondent on July 16, 2001 and an Amended Notice of Violation was sent on September 18, 2001.[3] The parties did not enter into an Agreed Order in settlement of this matter. More than sixty (60) days after the NOV was issued, on August 26, 2003, the IDEM issued a Notice and Order of the Commissioner of the Indiana Department of Environmental Management (the "Order") to the Respondent.

9. On September 10, 2003, the Respondent sent its Petition for Administrative Review to the Office of Environmental Adjudication. This Petition was received on September 15, 2003.

10. On May 31, 2005, the IDEM filed a Motion for Summary Judgment and supporting documents. On June 23, 2005, the Respondent filed a Cross Motion for Summary Judgment and supporting documents.

11. A hearing was held on August 9, 2005. Both parties were represented by counsel. The hearing was not recorded.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.

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[1] The Respondent subsequently attempted to conduct the stack test on various dates beginning on May 31, 2001 and ending with a successful test on October 3, 2003. The test showed that Respondent was in compliance with PM/PM_{10} limits.

[2] A copy of a signed certificate of service was attached to IDEM's Motion for Summary Judgment as part of Exhibit 2. At the hearing held on August 9, 2005, IDEM stated that the signature was that of an IDEM employee and that this copy was not proffered as proof that the Respondent had actually received the inspection summary.

[3] The IDEM provided copies of the Notices of Violation to the ELJ after the August 9th hearing. The Respondent consented to this action. Also, as part of the public record maintained by IDEM, the ELJ may take judicial notice of such documents.

2. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.,* 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.;* I.C. 4-21.5-3-27(d). "*De novo* review" means that:

> all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.
>
> Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

3. The OEA may enter judgment for a party if it finds that "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 judgment as a matter of law." IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.,* 725 N.E.2d 949 (Ind.Ct.App. 2000). As the non-movant, all facts and inferences should be construed in the IDEM's favor.

4. The pertinent portions of IC 13-14-5 state:

> **IC 13-14-5-1**
> This chapter applies to inspections conducted under IC 13-14-2-2 after July 1, 1993.
> **IC 13-14-5-2**
> Except as provided in section 3 of this chapter, the designated agent of the department conducting the inspection must provide the property owner with the following:
> (1) Before completing an inspection of property under IC 13-14-2-2, an oral report of the inspection that includes any specific matters discovered during the inspection that the designated agent of the department believes may be a violation of a law or of a permit issued by the department.
> (2) Not later than forty-five (45) calendar days after the inspection, a written summary of the oral report given under subdivision (1).
> **IC 13-14-5-3**
> If the designated agent of the department completes the inspection at a time when the property owner is not available to receive an oral report under section 2 of this chapter, the designated agent shall mail a written summary of the inspection by certified mail, return receipt requested, to the property owner not later than forty-five (45) calendar days following the inspection.
> **IC 13-14-5-4**
> A designated agent of the department is not required to include in an oral report or in a written summary:

(1) a matter that is not evident to the designated agent at the time of the designated agent's inspection; or

(2) any fact that indicates or evidences an intentional, a knowing, or a reckless violation of:

(A) this title;

(B) a rule or standard adopted by a board; or

(C) any determination, permit, or order made or issued by the commissioner under this title or any other law.

IC 13-14-5-6

(a) The property owner may provide information in response to any of the following:

(1) An oral report provided under section 2 of this chapter.

(2) A written summary provided under section 2 or 3 of this chapter.

(3) Questions raised during the inspection visit.

(b) The department shall review and consider any information presented by the property owner under subsection (a). The department shall append any written information provided under subsection (a) to the inspection report and include the written information in the public file.

5. When construing a statute or regulation, the Court must apply certain rules of statutory construction. One of these rules is, "If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience." *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003).

6. When the word "shall" appears in a statute, it is construed as mandatory rather than directory unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. *United Rural Elec. Membership Corp. v. Indiana & Michigan Elec.*, 549 N.E.2d 1019, 1022 (Ind. 1990). Under *Hancock County Rural Electric Membership Corporation v. City of Greenfield,* 494 N.E.2d 1294 (Ind.Ct.App. 1986), the Court of Appeals cited three (3) factors in determining whether "shall" should be deemed mandatory or merely declaratory in nature. The first is whether the statute specified adverse consequences for a failure to act in accordance with the statute; the second is whether the provision spoke to the essence of the statutory purpose and the third is whether a mandatory construction would clash with the legislative intent.

7. The word "must", rather than "shall" is used in the statute in question here. However, the analysis conducted in *Hancock County REMC v. City of Greenfield* is appropriate in accordance with the decision in *Huntington County Community School Corporation v. Indiana State Board of Tax Commissioners* (2001) Ind.Tax, 757 N.E.2d 235. The Court in that case held "The term "must" carries the same meaning as "shall."" p. 240.

8. The first factor to consider is whether the statute specifies adverse consequences for a failure to act in accordance with the statute. In this instance, the statute does not specify

that IDEM will suffer any consequences if it fails to act in accordance with the statute.[4] Indeed, no negative or prohibitive words are used at all in this statute.

9. The second consideration is whether the provision in question is essential to the statutory purpose. The main purpose of this statute was to give property owners reasonable notice that an inspection had occurred and the results of such an inspection so as to give the owner an opportunity to present mitigating or exculpatory evidence on its behalf. The timing of the written inspection summary is not essential to this purpose. This is particularly true in this case where an oral interview was conducted and the Respondent received a violation letter shortly after the 45 days expired. The Respondent cannot argue that it did not receive notice or had no opportunity to present any mitigating or exculpatory evidence it might have in its possession.

10. The last factor is whether a mandatory construction would clash with the legislative intent. In this case, to construe this statute as mandatory would lead to an absurd result. The Respondent argues that failure to provide a written inspection summary precludes further enforcement action. However, to adopt this interpretation would allow companies to avoid enforcement actions merely by choosing to not pick up its mail.

11. The ELJ's interpretation is further bolstered by the fact that the statute (1) does not require the IDEM to state each and every violation if such a violation was not evident or was intentional[5] and (2) allows the property owner to submit information in response to either an oral *or* written summary[6].

12. The IDEM has presented substantial evidence that the Respondent violated the Condition D.1.5 of the Permit requiring the Respondent to conduct a stack test within twelve (12) months after issuance of the Permit. The ELJ finds that there is no genuine issue of material fact as to whether a violation occurred.

13. The IDEM has not presented substantial evidence of the remaining violations cited in the Order. In addition, the issue regarding the amount of the penalty, if any, remains to be resolved. Therefore, as there are still genuine issues of material fact to be decided, further proceedings are necessary.

ORDER

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the IDEM's Motion for Summary Judgment is **GRANTED** and Petitioner's Cross Motion for Summary Judgment is **DENIED**.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of

[4] This ELJ believes that a failure to comply with this statute *might* provide mitigating circumstances that could be taken into consideration in a penalty determination.
[5] IC 13-14-5-4.
[6] IC 13-14-5-6(a).

decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable r Catherine Gibbs
Environmental Law Judge

IT IS SO ORDERED THIS 22nd day of August, 2005.

Catherine Gibbs
Environmental Law Judge