

**OBJECTION TO THE ISSUANCE OF
MAJOR MODIFICATION TO SOLID WASTE PERMIT NO. FP02-02
REPUBLIC SERVICES OF INDIANA, LP
ALLEN COUNTY, INDIANA
2006 OEA 048 OEA CAUSE NO.: 05-W-J-3573**

Official Short Cite Name: Republic Services of Indiana, LP, 2006 OEA 048

OEA Cause No.: 05-W-J-3573

	IC 4-21.5-3-27
	IC 4-21.5-7-3
	landfill major modification
	lack of jurisdiction

Presiding ELJ: Catherine Gibbs

Party Representatives: Sue Shadley, Esq.
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Kathy Mills, Esq.

Order Issued: 1/6/2006

Index Category: Waste

Further Case Activity:

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)

OBJECTION TO THE ISSUANCE OF)
MAJOR MODIFICATION TO SOLID)
WASTE PERMIT NO. FP02-02)
NATIONAL SERV-ALL LANDFILL)
ALLEN COUNTY, INDIANA)

CAUSE NO. 05-W-J-3573

MARK DENNIS)
Petitioner)

INDIANA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT)
Respondent)

REPUBLIC SERVICES OF INDIANA LP)
Respondent/Permittee)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND FINAL ORDER

This matter having come before the Court on the Motion for Summary Judgment filed by Republic Service of Indiana, LP (“Republic”) and responsive pleadings thereto; and the Environmental Law Judge (“ELJ”) having read and considered the petitions, motions, evidence, briefs, responses and replies of the parties, now finds that judgment may be made upon the record. 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. Republic Services of Indiana, LP (“Republic”) is the owner of property located in Allen County at which it operates the National Serv-All Landfill (“Landfill”) under Solid Waste Permit No. FP02-02.
2. On February 24, 2004 Republic submitted a major modification permit application to expand the Landfill.
3. The total acreage in the expansion area for the Landfill is approximately 214 acres comprised of land already owned by Republic and an additional 80 acres (“Farm Property”) that it purchased from Mark Dennis.
4. As part of the agreement in which Republic purchased the Farm Property Dennis retained the right to farm the Farm Property through March 15, 2009.

5. As part of the agreement in which Republic purchased the Farm Property Republic retained the right to enter the Farm Property:

Buyer [Republic] covenants and agrees not to excavate any soil or make any other preparations for operating a sanitary landfill on the real estate, prior to paying the entire balance of the purchase price and accrued interest and otherwise comply with Section 12.04 and 12.05 hereof, as well as any other relevant terms and conditions contained herein; provided Buyer [Republic] **may enter the real estate to obtain information required for a construction and/or operating permit for a solid waste disposal facility from the Indiana Department of Environmental Management**, including geological studies, soil borings, etc. In addition, Buyer [Republic] shall have access to the real estate at all reasonable times upon notice to Seller of the date and purpose of entering the real estate. Buyer [Republic] shall be responsible for any damage to growing crops caused by Buyer's [Republic's] entry upon the real estate equal to the reasonable value thereof.

Sale Contract, p. 12, ¶12.03 included in Republic's Reply Brief. (emphasis added)

6. IDEM approved Republic's modification application on July 1, 2005. Dennis filed this appeal on July 19, 2005. He alleged that his farming would be affected by "flying paper, dust and other debris" and "birds and other vermin." During the briefing, Dennis claimed that the placement of monitoring wells on his property affected his right to farm.

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 IND. CODE §4-21.5-7-3.
2. This is a Final Order issued pursuant to IND. CODE § 4-21.5-3-27. 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.
3. This Court 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.*; IND. CODE §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.
4. Dennis has the burden of showing that a permit was issued contrary to law or is somehow deficient as a matter of law. *In the matter of Objection to the Issuance of Permit*

Approval No. IN 0061042 Aquasource Services and Technology, 2002 IN ENV LEXIS 18 at *6 (In. Off. Env. Adjud., December 18, 2002)(“*Aquasource*”)

5. 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.” IND. CODE §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. *Am. Family Ins. Co. v. Globe Am. Cas. Co.*, 774 N.E.2d 932, 935 (Ind. Ct. App. 2002); *In the Matter of Objection to the Denial of Excess Liability Trust Fund, Claim No. 200011504/FID #10539 Gas America # 40*, No. 01-F-J-2806, pp. 3-4, OEA (October 21, 2002).
6. Dennis has only raised issues that deal with how the landfill will operate and the possible affect such operations would have on the Farm Property. The IDEM presumes that any person that receives a permit will comply with the applicable regulations. The OEA cannot overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: 327 Article 3 Construction Permit Application Plans and Specifications for Sidney Wastewater Treatment Plant and Sanitary Sewer System Permit Approval No. 16684*, 2004 In. Env. Lexis 22 (In. Off. Env. Adjud., November 5, 2004).
7. Dennis’ concerns seem to be with the damages that the proximity of the landfill operations might have on the Farm Property and Dennis’ crops. These types of damages are not within the jurisdiction of the OEA, but rather should be brought in court of general jurisdiction such as a suit for damages or for injunctive relief. *See e.g. In the Matter of: Objection to the Issuance of Permit Approval No. 473-05 Mr. Perry Godlove, Godlove Enterprises, Inc.*, 2002 IN ENV LEXIS 14 (In. Off. Env. Adjud., Sept. 22, 2002)(“The Office of Environmental Adjudication is an administrative court of limited, statutory jurisdiction and is not endowed with equity jurisdiction.” *Id.* at *2); *In the Matter of Objections to the Denial of Extension of Reply Period and Denial of Operating Permit Renewal for the Mallard Lake Landfill*, 2004 IN ENV LEXIS 13 (In. Off. Env. Adjud., October 20, 2004), 2004 OEA 82. (“This Office does not have the statutory authority to grant such a request [request for damages]” *Id.* at *1.)
8. Dennis complains about the installation of monitoring wells on the property. These monitoring wells are allowed by the terms of the sale of the Farm Property. Dennis attempted to show that he could not use certain chemicals near the wells; therefore his right to farm the Farm Property had been affected. The evidence presented by the parties fails to show why he cannot spray chemicals. Moreover, even if Dennis had proved that the installation of the monitoring wells interfered with his farming operations, he has failed to show that the IDEM had to consider this fact in determining whether to issue the permit. As stated above, the Office of Environmental Adjudication does not have the authority to award damages to Mr. Dennis.


9. Dennis has raised no issues challenging the validity of IDEM's decision; he has not alleged that Republic's permit application fails to comply with applicable laws and rules. None of the issues raised by Dennis address the permit's terms. Since Dennis has not raised any issues relating to the approval of the permit application, this Court cannot overturn IDEM's decision to issue the permit.
10. This Court finds that there is no genuine issue as to a material fact and that summary judgment is appropriate. Dennis has failed to point to any statute or regulation that IDEM violated in issuing Republic's permit, therefore Republic is entitled to judgment as a matter of law and IDEM's approval of Republic's permit should be affirmed.

FINAL ORDER

THE COURT hereby FINDS AND CONCLUDES that Dennis has not shown that IDEM acted incorrectly in issuing Republic's permit. **THE COURT ORDERS, ADJUDGES AND DECREES** that judgment is entered in favor of Republic and against Dennis. Dennis' Petition for Review is therefore **DISMISSED** and the issuance of Permit No. FP02-02 to Republic Services of Indiana is **AFFIRMED**.

You are further notified that pursuant to provisions of IND. 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 an order subject to further review consistent with applicable provisions of IND. CODE. §§4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED THIS 6th day of January, 2006.



Hon. Catherine Gibbs
Environmental Law Judge

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