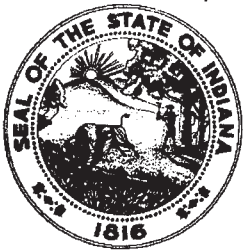


**OBJECTION TO THE APPROVAL OF EXPANSION OF  
 CONFINED FEEDING OPERATION  
 BAKER FARM ID #4742  
 ANIMAL WASTE NO. AW-5416  
 OWEN COUNTY, INDIANA  
 2006 OEA 059, OEA CAUSE NO.: 04-S-J-3485**

Official Short Cite Name:	Baker Farms, 2006 OEA 059
OEA Cause No.:	04-S-J-3485
Topics/Keywords:	Confined feeding permit
	327 IAC 16-7-13
	327 IAC 16-7-12
Presiding ELJ:	Catherine Gibbs
Party Representatives:	Nancy Holloran, Esq
	Kevin & Aileen Flowers
	Perry & Linda Trader
	Mr. & Mrs. Dennis Miller
	Doris Dunigan
	Melvin Kline and Donna Shields
	Dorothy Newforth
	Baker Farms c/o Don Baker
Date of Order:	January 11, 2006
Index Category:	Land
Further Case Activity:	



**INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION**

Mary Davidsen  
Chief Environmental Law Judge

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STATE OF INDIANA )  
 )  
COUNTY OF MARION )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )

OBJECTION TO THE APPROVAL OF )  
EXPANSION OF CONFINED FEEDING )  
OPERATION BAKER FARM ID #4742 )  
ANIMAL WASTE NO. AW-5416 )  
OWEN COUNTY, INDIANA )

CAUSE NO. 04-S-J-3485

Kevin and Aileen Flowers, Victor Bird, Dorothy )  
Newforth, Perry and Linda Trader, Donna Shields )  
Mr. & Mrs. Dennis Miller, Violet Knox )  
Petitioners, )  
Baker Farms, c/o Don Baker )  
Permittee/Respondent, )  
Indiana Department of Environmental Management )  
Respondent. )

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND FINAL ORDER**

This matter having come before the Court on the final hearing in this matter and the Environmental Law Judge (“ELJ”), being duly advised and having considered the petitions, record of proceeding, and evidence presented at the hearing finds that judgment may be made upon the record, now makes the following findings of fact and conclusions of law and enters the following Order:

Findings of Fact

1. On November 16, 2004, IDEM issued Permit Approval No. AW 5416 (the “Permit”) to Mr. Don Baker of Baker Farms (the “Respondent”).
2. The Permit authorizes Baker Farms, Farm ID #4742, to install two (2) fiberglass portable nursery units at the confined feeding operation located at Section 25, T10N, R4W, in Owen County, Indiana (the “Farm”). Baker Farms had previously received a permit to operate a confined feeding operation on November 15, 1993.
3. The Petitioners filed various letters of objections with the Office of Environmental Adjudication; Perry and Linda Trader filed on December 2, 2004; Dorothy Newforth

filed on December 1, 2004; Donna Shields filed on December 2, 2004; Violet Knox filed on December 2, 2004; Mr. and Mrs. Dennis Miller filed on December 3, 2004; Kevin and Aileen Flowers filed on November 30, 2004; and Victor Bird filed on December 1, 2004. These Petitions were timely filed.

4. The following Petitioners did not appear at the hearing as ordered: Kevin and Aileen Flowers, Dorothy Newforth, Perry and Linda Trader, Donna Shields, Mr. & Mrs. Dennis Miller, Violet Knox. None of these Petitioners contacted the presiding ELJ or requested a continuance of the hearing.
5. Victor Bird appeared at the hearing and presented testimony regarding his objections to the issuance of the Permit.
6. Mr. Bird and his family suffer from headaches and nausea. No evidence was presented that these complaints were a result of the air emissions from the Farm.
7. Freeboard at this Farm was calculated properly.
8. The IDEM has not taken any enforcement action against the Farm as a result of the alleged spill of animal waste that occurred in either 1999 or 2000.
9. The IDEM complied with all applicable statutes requiring notice to interested parties including adjacent landowners.

#### Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the agency actions of the Indiana Department of Environmental Management and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.
2. 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 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).

4. The following Petitioners are in default: Kevin and Aileen Flowers, Dorothy Newforth, Perry and Linda Trader, Donna Shields, Mr. & Mrs. Dennis Miller, Violet Knox.

5. Mr. Bird had the burden of proof to show by substantial evidence that the IDEM improperly issued the Permit to the Respondent.
6. Mr. Bird alleged that he and his family suffered adverse health affects, such as headaches and nausea, as a result of the air emissions from the operation of the confined feeding operation. However, Mr. Bird presented no medical evidence that the air emissions was the reason for the health affects nor did he present any evidence that the recent installation of the portable nursery units had aggravated these health problems.
7. There are no regulations that require the Farm to monitor or restrict odor or other air emissions.
8. Mr. Bird also questioned witnesses whether the freeboard at this facility had been calculated properly. However, Mr. Bird presented no evidence that the freeboard had been calculated improperly; he merely raised the question of whether it had been. The IDEM and the Respondent presented evidence that the freeboard had been properly calculated.
9. Mr. Bird also testified that a spill had occurred at the Farm approximately 5 years ago and that IDEM failed to properly consider this fact in issuing the approval. The evidence presented by the IDEM and the Respondent proved that the spill did not result in any enforcement action by the IDEM.
10. Mr. Bird also contended that the IDEM failed to provide proper notice to adjacent landowners and should have held a public hearing on the issuance of this Permit under 327 IAC 16-7-13.
11. 327 IAC 16-7-12 states:

An applicant who applies for approval to construct a confined feeding operation on land that is undeveloped or for which a valid existing approval has not been issued shall make a reasonable effort to provide notice:

(1) to:

(A) each person who owns land that adjoins the land on which the confined feeding operation is to be located; or

(B) if a person who owns land that adjoins the land on which the confined feeding operation is to be located does not occupy the land, all occupants of the land; and

(2) to the county commissioners of the county in which the confined feeding operation is to be located;

not more than ten (10) working days after submitting an application. The notice must be sent by mail, be in writing, include the date on which the application was submitted to the department, and include a brief description of the subject of the application. The applicant shall pay the cost of complying with this section. The applicant shall submit an affidavit to the department that certifies that the applicant has complied with this section.

12. Because the Farm was operating under a valid existing approval (originally issued November 15, 1993), notice was not required under 327 IAC 16-7-12.

13. 327 IAC 16-7-13 states:

(a) This section applies to:

(1) an application for an approval for a confined feeding operation that has:

(A) conducted confined feeding activities as defined in 327 IAC 16-2-4 prior to application for an approval; and

(B) had a discharge prior to application for an approval;

(2) an application for an approval for a confined feeding operation that will have twenty

(20) times the animal numbers listed in 327 IAC 16-2-5; or

(3) an application for an approval renewal for a confined feeding operation that has had a discharge subject to an enforcement action by the agency within the previous five (5) years.

(b) Upon receipt of an application package, the department shall provide notice of receipt of the application to:

(1) the owner/operator;

(2) the public through notice in a newspaper; and

(3) local officials in accordance with IC 13-15-3-1.

(c) A comment period of at least thirty (30) days following the date of public notice of the receipt by the department of an approval application shall be provided. During this period, any interested persons may submit written comments on the approval application and may request a public hearing. A request for a public hearing shall be in writing and shall state the nature of the issues to be raised and the reasons why a hearing is warranted. The commissioner, after reviewing all comments, shall make a decision consistent with this article and applicable federal and state laws.

(d) A public hearing on an approval application may be held by the commissioner in appropriate cases where environmental concerns relevant to applicable rules or laws are raised, either on the commissioner's own initiative or in response to a request or requests for public hearing submitted during the public comment period. Such a hearing shall be held where the commissioner finds there is a significant public interest in the approval application.

14. No notice was required under 327 IAC 16-17-13.

15. Whether to hold a public hearing was within the discretion of the commissioner. Mr. Bird did not present sufficient evidence that the IDEM failed to comply with this rule.

16. Mr. Bird failed to present substantial evidence that the IDEM improperly issued the Permit.

### **ORDER**

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the Petitioners failed to meet their burden of proof and that the Permit Approval No. AW 5416 (the "Permit") issued to Mr. Don Baker of Baker Farms is **AFFIRMED**.

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. 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 11th day of January 2006.

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Hon. Catherine Gibbs  
Environmental Law Judge