Objection to Issuance of Hazardous Waste Corrective Action Management Unit Plan, Major Modification Application Revision, Willcutt Landfill – Medora Sanitary Landfill, FP36-01, Rumpke of Indiana, Inc., Medora, Jackson County, Indiana.
2008 OEA 11 (07-S-J-3958)

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 11, cite this case as ***Willcut Landfill – Medora Sanitary Landfill*, 2008 OEA 11.**

TOPICS:

landfill
major modification
lateral expansion
ownership
revised
reduced the footprint
application
complete
public meeting
public hearing
summary judgment
stay hearing
substantial evidence
IC 4-21.-5
IC 4-21.5-3-23
IC 13-15-3-3
315 IAC 1-2-1(9)
329 IAC 10-12-1
Ind. Trial Rule 56(C)
Trial Rule 56(E)

PRESIDING JUDGE:
Davidsen

PARTY REPRESENTATIVES:
Petitioners: David Dearing, Esq.
Permittee: Sue A. Shadley, Esq., Amy E. Romig, Esq.,
Plews Shadley Racher & Braun
IDEM: Julie Lang, Esq.

ORDER ISSUED:
February 22, 2008

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF HAZARDOUS WASTE CORRECTIVE ACTION MANAGEMENT UNIT PERMIT, MAJOR MODIFICATION APPLICATION REVISION, WILLCUTT LANDFILL-MEDORA SANITARY LANDFILL, FP-36-01 RUMPKE OF INDIANA, LLC MEDORA, JACKSON COUNTY, INDIANA.	)	
_____	)	CAUSE NO. 07-S-J-3958
	)	
James and Brenda Ault, Petitioners	)	
Rumpke of Indiana, LLC, Permittee/Respondent,	)	
Indiana Department of Environmental Management, Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter is before the Court pursuant to a Motion for Summary Judgment by Rumpke of Indiana, LLC ("Rumpke") and Petitioners' Cross-Motion for Summary Judgment regarding the major permit modification to Solid Waste Facility Permit 36-01. The Court held an evidentiary stay hearing on October 24, 2007; thereafter the parties fully briefed their requests for summary judgment. The Environmental Law Judge ("ELJ") having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. On November 23, 2004, Rumpke of Indiana, LLC ("Rumpke") applied for a major modification to allow a lateral expansion of the Medora Sanitary Landfill ("Landfill"). Rumpke also applied for the issuance of a Hazardous Waste CAMU[1] for the closed Willcutt Landfill that is located in the proposed expansion area for the Landfill.

[1] Petitioners' briefs contained admissions that they were no longer challenging the CAMU so this order addresses only the major modification to allow lateral expansion of the Landfill.

2. IDEM notified Rumpke that it considered Rumpke's application complete on August 5, 2005. August 5, 2005 Completeness Review.

3. Prior to approving the expansion permit, IDEM conducted a public hearing on September 28, 2005. *See* Stay Trans., p. 59. IDEM solicited, received and considered comments that were submitted at the public hearing. *Id.*

4. On the same day as IDEM's public hearing, Rumpke conducted a public meeting. *Id.* More than two hundred members of the public attended the public meeting. *Id*. Rumpke answered questions that the public presented at the meeting and excluded no one. *Id.* at p. 60.

5. Based upon ownership issues related to a portion of the expansion area raised in part by Petitioners, and referenced by them as the "Pleasantville lots", IDEM required Rumpke to initiate a Quiet Title Action to further document its ownership to this contested portion of the expansion area. Stay Trans. p. 60, IDEM letter dated March 31, 2006. Because Rumpke was running out of disposal space, in order to allow some expansion of the Landfill in a timely manner before the Quiet Title Action could be resolved, Rumpke revised its pending application on March 30, 2007 by reducing the area of the original proposed expansion to 83.0 acres within the originally-proposed footprint and by removing all property that was the subject of the quiet title action. *Id*. at p. 61. A Jackson County court confirmed that Rumpke owned the disputed land on May 3, 2007. *Id*. at p. 61. *See also* Jackson County Circuit Court Order, attached as Exhibit D to Rumpke's Summary Judgment Motion.

6. The original application for expansion encompassed 101 acres, while the revised expansion application was for 83 acres. Stay Trans. p. 67. The revision only reduced the footprint of the Landfill. *Id*. There are no other changes to the Landfill or how it will operate due to the reduction in the expansion area. *Id*. at pp. 67-68.

7. IDEM's April 20, 2007 letter notified Rumpke that its revision was considered complete and would then proceed onto the technical review process. A thirty (30) day comment period ending May 30, 2007 was provided for input on the revised plans. Due to a public request for additional time, the comment period was extended to June 29, 2007.

8. IDEM approved the 83-acre expansion on July 16, 2007.

9. Petitioners, *pro se,* filed their Petition for Review and request for stay, alleging that they were harmed by the failure to have another public hearing and/or public meeting after Rumpke revised the expansion application.[2] *See* August 3, 2007 "Request for Appeal of the Notice of the Decision for Major Modification and CAMU at the Medora Sanitary Landfill site." *See* Petition, pp. 1-2. The Petition also raised operational issues and stated that the Landfill generated odors and failed to use daily cover. *Id.* at p. 2.

[2] On October 6, 2007, David Dearing, Esq., entered his Appearance as counsel for Petitioners.

10. A Stay Hearing was held on October 24, 2007. Petitioner James Ault appeared in person, by legal counsel David Dearing, Esq.; Marvin Huffman joined Mr. Ault in presenting testimony on Petitioners' case. Rumpke attended by John Hattersley and by legal counsel Amy E. Romig, Esq. IDEM attended by John Hale and by legal counsel Julie E. Lang, Esq.

11. At the Stay Hearing, Rumpke's John Hattersley testified that the revision only decreased the area of proposed expansion and did not change any operational requirements or waste density in the landfill. *Stay Trans*. pp. 67, 68.

12. At the Stay Hearing, IDEM's John Hale testified that Rumpke's revision submitted on March 30, 2007 was still considered part of the same application Rumpke submitted on November 23, 2004, and was not considered a new application. *Stay Trans*., pp. 94-95. Mr. Hale testified that the application review is a two-step process, with the first step being a determination of whether an applicant has submitted an item in compliance with each required statutory element. *Id.,* p. 98, ll. 10-19. After this step is complete, the application is determined "complete" and the requirement for a public meeting is triggered. *Id.* The second step is for IDEM to review each of the submitted items to determine whether they suffice to ensure compliance with statutory requirements. *Id.*

13. At the Stay Hearing, Petitioners alleged that were harmed by IDEM's failure to have another hearing. *Stay Trans*. pp. 18, 29. In their testimony, Petitioners also alleged concern about harms such as odor, future pollution, or devaluation of property value that will allegedly occur because of the operation of the Landfill. Petitioners did not specify how these alleged harms or concerns were any different with respect to the proposed expansion than the original operation of the Landfill, nor how these concerns were affected by the revision as permitted. *Id*.

14. Petitioner James Ault, stated that he could not identify any issues he would have raised at either a public meeting or hearing. *Id.* at p. 22. IDEM has given opportunities to the public to make comments and to raise concerns about Rumpke's Waste CAMU and its Major Modification for lateral expansion, including the revision. IDEM extended the public comment until June 29, 2007. Petitioners' witness, Marvin Huffman, testified that he met with IDEM's Commissioner Easterly about his concerns. *Id.* at p. 33.

15. As a result of IDEM's two-step review, IDEM's March 31, 2006 letter stated concerns with verification of ownership of specific property; Rumpke's March 30, 2007 revision addressed IDEM's property ownership concern. Substantial evidence supports a finding that Rumpke's revision submitted on March 30, 2007, in response to concerns IDEM discovered, then noted in its March 31, 2006 letter, is not a new application.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC § 4-21.5-7-3. IC § 4-21.5-3, *et seq*, and IC § 4-21.5-7 allow the OEA to promulgate rules and standards in order to allow it to conduct its duties.

2. This is a Final Order issued pursuant to IC § 4-21.5-3-23, IC § 4-21.5-3-27, and 315 IAC 1-2-1(9). Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of face are so deemed.

3. In this case, both Petitioners and Respondent Rumpke sought summary judgment in their favor, as to whether the major modification for lateral expansion was properly granted without Rumpke's conducting a public meeting after IDEM's April 20, 2007 notice to Rumpke that Rumpke's revision decreasing the expansion size, was complete ("step one") so that Rumpke's application would proceed to technical review.

4. 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; *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App 1998); Ind. T.R. 56(C). .

5. The moving party bears the burden of establishing that summary judgment is appropriate. When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. "A factual issue is said to be 'genuine' if a trier of fact is required to resolve the opposing parties differing versions of the underlying facts." *York v. Union Carbide Corp.,* 586 N.E.2d 861, 864 (Ind. Ct. App. 1992). "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. of Voters Registration,* 585 N.E.2d 700, 703-04 (Ind. Ct. App. 1992). 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).

6. "The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion County Bd. of Voters Registration,* 585 N.E.2d at 703-04. (Ind. Ct. App. 1992). In this case, each party has the burden of showing whether the permit IDEM issued either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *Aquasource Services and Technology*, 2002 OEA 41, 44. Each movant has the burden of proof, persuasion and of going forward on its motion for summary judgment. IC § 4-21.5-3-14(c); IC § 4-21.5-3-23.

7. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. I.C. § 4-21.5-3-27(d)**;** *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "*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).

8. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d at 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* IC § 4-21.5-3-27(d). While the parties disputed whether IDEM properly granted the major modification for lateral expansion without requiring a public meeting to be conducted after Rumpke submitted its March 30, 2007 revision decreasing the expansion size, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." IC § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a 'preponderance of the evidence test' to a 'beyond a reasonable doubt' test. The 'clear and convincing evidence' test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47,* 2004 OEA 123, 129. *See also, Blue River Valley Area Sanitary Sewer and Water Projects*, 2005 OEA 1, 11-12. *Marathon Point Service and Winimac Service,* 2005 OEA 26, 41.

9. IC § 13-15-3-3(a) states:

> (a) A public hearing shall be held on the question of:
> (1) the issuance of an original or renewal permit for a hazardous waste disposal facility under IC 13-22-3; or
> (2) the issuance of an original permit for a solid waste disposal facility or a solid waste incinerator regulated under IC 13-20-8….

The statute only requires public hearings for original permits for solid waste facilities. Additionally, for a party to require IDEM to hold a public hearing, the party must file a petition with at least 100 signatures. IC § 13-15-3-3(b).

10. In this case, Rumpke and IDEM were required to comply with the public participation requirement of 329 IAC 10-12-1, which provides, in pertinent part:

> (a) (2) A major modification for a lateral expansion permit or a vertical expansion permit.
>
> . . .
>
> (c) A public meeting must be conducted by the applicant submitting an application for the following:
>
> . . .
>
> (2) A major modification to a solid waste land disposal facility permit.
>
> (d) The applicant shall complete the following for the public meeting as required in subsection (c):
>
> (1) Within sixty (60) days after the date the applicant received notification from the commissioner that the application has been deemed complete, conduct a public meeting in the county where the solid waste land disposal facility or major modification designated in the application will be located.
>
> . . .
>
> (g) Failure of the applicant to comply with subsections (c) through (f) may result in the denial of the application by the department.
>
> (h) Public notice must be made by the department as required by IC 5-3-1-2(i) after the date the applicant received notification from the commissioner that the permit application is deemed completed.
>
> . . .
>
> (i) The department shall hold a public hearing if required by IC 13-15-3-3.
>
> . . .
>
> (2) During a hearing, a person may testify within the time provided or submit written comments, or both. The department will consider testimony that is relevant to the requirements of IC 13 and this article.
>
> *(Solid Waste Management Board; 329 IAC 10-12-1; filed Mar 14, 1996, 5:00 p.m.: 19 IR 1812; filed Mar 19, 1998, 11:07 a.m.: 21IR 2756; filed Aug 2, 1999, 11:50 a.m.: 22 IR 3792; filed Feb 9, 2004, 4:51 p.m.: 27 IR 1804, eff Apr 1, 2004.)*

329 IAC 10-12-1 requires a permit applicant hold a public meeting within 60 days after the date the applicant receives notification from IDEM that the application has been deemed complete. 329 IAC 10-12-1(d)(1) . This rule applies to either a new solid waste land disposal facility or a major modification to a solid waste land disposal facility. 329 IAC 10-12-1(c). The purpose of that public meeting is for the permit applicant to answer questions from the public. Even if an applicant fails to comply with the public process in 329 IAC 10-12-1, 329 IAC 10-12-1(g) allows, but does not require, IDEM to deny the application.

11. The parties do not dispute, and substantial evidence shows, that on September 28, 2005, Rumpke satisfied its 329 IAC 10-12, *et seq*., public meeting requirement, and IDEM held a public hearing, on Rumpke's November 24, 2004 application for a major modification for a lateral expansion permit.

12. The Indiana Court of Appeals addressed whether 329 IAC 10-12-1's predecessor regulation (using identical language, in pertinent part), required a landfill applicant to hold a public hearing after amending the application. *Office of Environmental Adjudication, et al., v. J.M. Corporation,* 691 N.E.2d 449 (Ind. App. 1997). The landfill applicant initially applied for approval of a forty-seven acre facility. *Id.* At a public hearing, certain geographical issues were raised about the site, such that the applicant submitted an amended application with a major redesign of the facility on a site reduced to thirteen acres. *Id.* The Indiana Court of Appeals held that a second public hearing on the amended application was not required, noting that public hearings on the amended application was not required, noting that public hearings are often the vehicle by which concerned parties may prompt appropriate application amendment. *Id.*

13 As Rumpke's November 24, 2004 application proceeded with IDEM from the first step of a determination as to whether Rumpke had submitted an item for each statutory requirement, and through IDEM's second step, IDEM's March 31, 2006 letter stated concerns with verification of ownership of specific property; Rumpke's March 30, 2007 revision addressed IDEM's property ownership concern. Substantial evidence supports a finding that Rumpke's revision submitted on March 30, 2007, in response to concerns IDEM discovered, then noted in its March 31, 2006 letter, is not a new application.

14. To the extent that Petitioners are requesting a second public meeting, they have not shown that the revisions in any way made the original application "incomplete." Rumpke held a public meeting on September 28, 2005 after its application was deemed complete. Revisions to the application that only reduced the size of the expansion would not require a second public meeting since none of the public questions or comments were actually induced by the size of the landfill. Moreover, there is no statute or regulation requiring additional notice or public comment when an application is only revised.

15. Petitioners have not demonstrate that a second public meeting was required by the solid waste rules, or by other applicable law.

16. To the extent that Petitioners complained in their petitions and testimony about potential odor or potential future pollution that will result from operation of the Landfill, they have only raised issues that deal with how the Landfill will operate. IDEM is required to presume that any person who receives a permit will comply with the applicable regulations. The OEA is not authorized to overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *Sidney Wastewater Treatment Plant and Sanitary Sewer,* 2004 OEA 99.

17. To the extent that Petitioners raised concerns are the potential damages that the proximity of the Landfill operations might have on their property, these types of damages are not within the jurisdiction of the OEA. *See e.g., Godlove Enterprises, Inc.*, 2002 OEA 18, 20. ("The Office of Environmental Adjudication is an administrative court of limited, statutory jurisdiction and is not endowed with equity jurisdiction."); *Mallard Lake Landfill*, 2004 OEA 82, 84. ("This Office does not have the statutory authority to grant such a request [request for damages].")

18. On Petitioners' Cross-Motion for Summary Judgment, Petitioners have not provided substantial evidence of a genuine issue of material fact or of substantial evidence required to meet their burden of showing whether the permit IDEM issued either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law, or that a genuine issue of material fact exists. Petitioners have failed to show that IDEM's approval of the major modification and lateral expansion of the Rumpke's landfill application was contrary to law or was deficient as a matter of law, such that the Cross Motion for Summary Judgment should be denied.

19. On Rumpke's Motion for Summary Judgment, Rumpke has provided substantial evidence required to meet its burden of showing that permit IDEM issued complied with applicable law, and may be sustained, as a matter of law, and that no genuine issue of material fact exists to the contrary. Rumpke has provided substantial evidence to show that IDEM's approval of the major modification and lateral expansion of the Rumpke's landfill application was not contrary to law or was deficient as a matter of law. Rumpke is entitled to judgment as a matter of law that IDEM did not err in issuing the expansion permit.

ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that:

1. Petitioners did not present substantial evidence of a genuine issue of material fact that IDEM erred in issuing the permit for the major modification for a lateral expansion of the Rumpke landfill.

2. Respondent/Permittee Rumpke presented substantial evidence that no genuine issue of material fact exists, and that IDEM did not err in issuing the permit for the existing landfill's major modification for a lateral expansion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioners James and Brenda Ault's Cross Motion for Summary Judgment is **DENIED,** Respondent/Permittee Rumpke of Indiana, LLC's Motion for Summary Judgment is **GRANTED.** Judgment is entered in favor of Rumpke and against Petitioners. Petitioners' Petition for Review is therefore **DISMISSED.** All further proceedings before the Office of Environmental Adjudication are hereby **VACATED.**

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 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, *et seq*. 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 this 22nd day of February, 2008.

Hon. Mary Davidsen
Chief Environmental Law Judge