

**Objection to the Issuance of Confined Feeding Operation Permit No. AW-5851,  
Farm ID No. 6549, Kyle Hall, Bedford, Lawrence County, Indiana.  
2008 OEA 100 (08-W-J-4056)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2008 OEA 100 cite this case as  
*Kyle Hall, 2008 OEA 100.*

**TOPICS:**

Confined Feeding Operation permit  
solid manure management systems  
summary judgment  
burden  
soil  
elevation  
waste management system construction  
approval conditions  
manure management plan  
Petition for Administrative Review  
water  
I.C. § 13-18-10  
327 I.A.C. 16

**PRESIDING JUDGE:**

Daidsen

**PARTY REPRESENTATIVES:**

IDEM: Denise A. Walker, Esq.  
Petitioners: Deborah Albright, Esq.  
Permittee/Respondent: Jennifer Thompson, Esq; Matthew Gernand, Esq.

**ORDER ISSUED:**

August 5, 2008

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF	)	
CONFINED FEEDING OPERATION PERMIT	)	
NO. AW-5851, FARM ID NO. 6549	)	
KYLE HALL	)	
BEDFORD, LAWRENCE COUNTY, INDIANA.	)	
_____	)	CAUSE NO. 08-W-J-4056
	)	
Michael and Barbara Artinian, <i>et al.</i> ,	)	
Petitioners,	)	
Kyle Hall,	)	
Respondent/Permittee,	)	
Indiana Department of Environmental Management,	)	
Respondent.	)	

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

This matter is before the Court pursuant to an April 28, 2008 Motion for Summary Judgment filed by Respondent/Permittee Kyle Hall (“Kyle Hall” or “Permittee”) as to whether any genuine issues of material fact exist as to Respondent, Indiana Department of Environmental Management’s (“IDEM”) issuance of a Confined Feeding Operation Permit involving construction of a three-unit animal confinement operation with an approximate total capacity of 30,000 turkeys. In the Conclusion of Petitioners’ June 30, 2008 Surreply, Petitioners noted that “[t]here is no genuine issue of material fact that Kyle Hall’s application did not meet the legal standard with respect to the clay liner . . . and Petitioners are entitled to judgment as a matter of law.” The parties fully briefed their positions on summary judgment, and did not request oral argument. Petitioners filed their proposed findings of fact, conclusions of law and orders on July 25, 2008; no other proposed findings were filed. The Chief 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 Chief 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:

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**FINDINGS OF FACT**

1. On January 11, 2008, the Indiana Department of Environmental Management (“IDEM”) issued Confined Feeding Approval AW-5851 (“CFO” “Approval” or “Permit”) to Kyle Hall (“Kyle Hall” or “Permittee”) for Kyle Hall’s May 31, 2007 application to construct and operate a confined feeding operation on farm 6549 in Lawrence County, Indiana. The proposed turkey facility consists of one brooder barn and two grow-out buildings with solid manure management systems with earthen floors, and a solid manure storage structure (“litter stack building”) with a concrete floor. *Petitioners’ January 24, 2008 Petition for Administrative Review (“Petition”); Permittee/Respondent’s Motion for Summary Judgment (“Motion”), designated supporting evidence Ex. F.*
2. IDEM reviewed Kyle Hall’s submitted Application. *Petitioner/Permittee’s Motion for Summary Judgment (“Motion,” Exs. 1- 19* (including certified copies of IDEM’s public file materials concerning Kyle Hall’s Application). Notices of Deficiency were issued by IDEM; the first, June 22, 2008 Notice, responded to by Kyle Hall, required Kyle Hall to seek floodplain analysis from the Indiana Department of Natural Resources (“DNR”) and to use an approved liner in turkey barn construction. *Affidavit of Kyle R. Hall, Ex. E; Motion, Ex. A-11.*
3. Site-specific evaluation was conducted on July 20, 2007 by Joseph E. Woods, III, IDEM Permits Geology Section. *Ex. E, affidavit of Kyle Hall.* In his August 22, 2007 memorandum, Mr. Woods stated that the Hall farm is in an “upland area with limited karst features at the surface,” located at least 400 feet from the proposed barn locations. *Ex. D., affidavit of Joseph Woods; Motion, Ex. D, Ex. A-13.* Mr. Woods observed Kyle Hall advance two soil borings taken by a solid stem augur at a five-foot depth; the “holes showed dry clay type soil,” neither boring encountered bedrock. *Id.*
4. IDEM’s second, September 4, 2007, Notice of Deficiency requested documentation that the production barns and waste storage structure would be elevated at least two feet above the 506.0 foot 100-year frequency flood elevation. *Ex. E., affidavit of Kyle Hall; Motion, Ex. A-14.* The DNR’s August 2, 2007 Floodplain Analysis and Regulatory Assessment (“Assessment”) stated that the 100-year flood elevation is 505.9 feet at the Hall farm’s downstream limit and 506.0 at the upstream limit; lower elevations are deemed floodway. *Motion, Ex. A-12.* Michael D. Arena’s October 15, 2007 survey determined that the structure elevations were at least two feet above the 506.0 100-year frequency flood elevation. *Motion, Ex. A-15.* Lawrence County Highway Department employee Robert Dillon, Jr.’s January 7, 2008 Hall farm survey indicated that the corners of the buildings were “safely outside the 100-year flood elevation of 505.6 feet,” with the lowest elevation present in the Hall farm waste management system construction at 512.90 feet, 6.9 feet above the 100-year flood elevation. *Ex. E., affidavit of Kyle Hall; Motion, Ex. A-15, Ex. B.*
5. IDEM’s third, December 7, 2007, Notice of Deficiency requested additional documentation detailing barn roof stormwater management to prevent soil erosion. *Ex. E., affidavit of Kyle Hall; Motion, Ex. A-16.*

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6. IDEM geologist Joseph Woods and permit writer Tyson Long conducted a final site vision on December 19, 2007, to observe additional soil borings made by Kyle Hall, at four boring locations selected by Mr. Woods. *Motion, Ex. A-18*. Mr. Woods' December 26, 2007 summarizing memorandum notes that the borings were advanced to at least five feet, and no bedrock was encountered. *Motion, Ex. A-19*.
7. For the manure storage and land application related to the permitted CFO, IDEM calculated the amount of waste expected to be generated using IDEM's *Confined Feeding Regulation Program Guidance Manual (March, 2002)* ("Guidance Manual"), which calculations were included in IDEM's public file on the Kyle Hall CFO. *Ex. C, affidavit of Tyson Long; Ex. A-9*. The Guidance Manual states that one turkey would generate .003 cubic feet of manure a day. *Guidance Manual, p. 14*. Based upon the maximum number of 30,000 turkeys allowed on the Kyle Hall CFO, IDEM determined that 30,000 turkeys, at .003 cubic feet per day, would generate 90.0 cubic feet of solid waste, and 3.6 cubic feet of wastewater per day, for a total of 93.6 cubic feet of waste per day. Extrapolated to 180 days, the Hall farm would generate 16,848 cubic feet of total waste per 180 days. *Ex. C, affidavit of Tyson Long; Ex. A-9*. In this case, rainfall is excluded from the calculation because the buildings are enclosed on at least three sides so as to prevent rainfall entry. The calculation spreadsheet in this case shows that the turkey barns contain 65,000 cubic feet of storage space; the facility also includes additional storage in the litter stack building, for which calculations were not made. The Guidance Manual further provides a table indicating that one acre of land can support waste produced by 365 turkeys per year; 30,000 turkeys would require 82.2 acres for land application, as calculated by dividing the total number of actual turkeys by the number of turkeys which would require one acre of land for application (or,  $30,000/365 = 82.2$  acres). *Id.* A composting design or other details were not included. Kyle Hall's April 22, 2007 Land Use Agreement with landowners Maurice and Nueva Oldham allowed Hall to land-apply manure on 420 tillable acres of the Oldham's land, *Id., see also Ex. E, affidavit of Kyle Hall; Ex. A-10*. A plot map outlined the land application area on the Oldham property. *Ex. A-6*.
8. For the manure management plan, Kyle Hall used the template plan included in IDEM's Confined Feeding Application package. The manure sampling procedures provided that a composite sample of the manure would be taken upon cleanout of the turkey barns, then a private laboratory would conduct the nutrient analysis of the samples. The manure samples would not be done in separate batches for brooder birds and for growout birds. The plan further provided that soil sample collection would be via management unit (field level) method and that the samples would be sent to a private laboratory for analysis, all to be conducted at least every three years. *Ex. A-8*.
9. Soils mapping was included in Kyle Hall's Application. Soil tests and boring were conducted. IDEM determined that there were prohibited soils in the top sixty (60) inches of soil, and required Kyle Hall to construct a clay liner to protect area groundwater. *Ex. A-11*.
10. Kyle Hall did not submit a nutrient management plan, contrary to Petitioners' contentions.

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11. Kyle Hall submitted legible maps of manure application areas which define the land application area. Petitioners contend that the maps do not provide specific notations of measurements delineating the relationship of setbacks from regulated features such as karst features, surface waters, waterways, wells, roads and property boundaries.
12. Kyle Hall did not submit details about future land application techniques, contrary to Petitioners' contentions that Kyle Hall was required to submit "a discussion of how the waste will be land applied, including, but not limited to method of land application, calibration of spreaders, avoidance of setback areas, and limitation on when waste will be applied with respect to weather conditions and potential for contaminated stormwater runoff."
13. Kyle Hall's Application included four pages of concrete construction specifications for the litter stack building, a building permitted for solid manure storage. *Ex. A-5*. The other buildings would also contain solid manure storage, *Ex. A-1*, but would have a clay liner equal to the footprint (length and width) of each building. None of the structure plans were certified by a registered professional engineer. The building plans included detailed AFS and NRCS construction drawings. *Ex. A-2, A-4*. Drawings for the litter stack building, even though NRCS drawings, define dimensions, cross sections, and construction materials. *Ex. A-4*. Sheet 3 of 8 indicates that the span between posts is eight (8) feet, has eight (8) spans and is 64 feet long. *Id.* The loading pad's length is ten (10) feet, thus defining the building's dimensions. *Id.* Manure storage calculations are not included. Kyle Hall submitted a memorandum stating that to insure the integrity of the structures, that the earth beneath the structures would be compacted to exceed 90% of maximum density. The building design specifications provided no detail as to how their construction would comply with floodplain restrictions, nor does the Application or Approval show that the structures would be constructed within the 100-year floodplain.
14. Kyle Hall's Application included a clay liner beneath the two roofed, earthen-floored turkey barns. *Ex. A-2*, constructed so as not to "exceed a seepage rate of one-sixteenth (1/16) inch per day," without specifying the type or source of clay to be used. Runoff would be controlled using a GeoTech membrane and gravel. *Ex. A-17*.
15. The January 11, 2008 Approval does not allow Kyle Hall to discharge. The Approval further provides, in pertinent parts: The Approval "does not authorize any injury to any person or private property; the invasion of other private rights; the infringement of federal, state, or local laws or regulations; nor does it preempt any duty to comply with other state or local requirements." *Approval, p. 2, para. 1.*

Approval Conditions

...

12. Manure must be handled in a manner that will not cause conditions that threaten to pollute waters of the state.
13. Manure must be applied in a manner that will not cause runoff to any stream, drainage ditch or other body of water and to minimize nutrient leaching.

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14. Manure, litter, or contaminated bedding may not be stockpiled/staged/placed/piled outside of any building at the confined feeding operation overnight or during inclement weather.

Approval Performance Standards

1. The confined feeding operation must be managed to avoid an unpermitted discharge into waters of the state.
  2. The confined feeding operation must be conducted in a manner that minimizes nonpoint source pollution entering waters of the state.
  3. The confined feeding operation will immediately take all reasonable steps to prevent spills or the discharge of manure, including seepage and leakage.
  4. All waste management systems must be constructed and maintained to minimize leaks and seepage and to prevent spills.
  5. Manure to be staged or applied to land in Indiana must be staged or applied in such a manner as to not enter or threaten to enter waters of the state; to minimize nutrient leaching beyond the root zone; and to prevent: run-off, ponding for more than twenty-four (24) hours and to prevent spills.
16. Kyle Hall did not provide, nor did the Approval address, either an emergency spill response plan, a soil conservation plan for the land application areas. Petitioners further contend that the Approval did not address potential adverse impacts to public health with respect to a public park west of the proposed facility.
17. On January 24, 2008, as amended on March 12, 2008, Petitioners<sup>1</sup> timely filed their Petition for Administrative Review of the January 11, 2008 Permit (collectively referred to as “Petition”). Petitioners established, without dispute, that they are aggrieved and adversely affected by the Approval. In their Petition, Petitioners sought administrative review of the CFO Permit on the basis that “IDEM has not made an adequate assessment of the facility’s potential to violate the water quality standards of the ground and surface waters in the vicinity of the proposed facility and its land application areas, nor has the applicant submitted sufficient information to allow it to do so, in the following respects,” in sum:

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<sup>1</sup> The January 24, 2008 letter petitioning for administrative review was signed by several people, first by Michael S. and Barbara K. Artinian. Petitioners’ counsel’s, Deborah E. Albright, Esq., March 11, 2008 Amended Appearance clarified that she represented Petitioners Chad and Brandi Anderson, Ned and Diane Anderson, Rickie Anderson and David Briles, Barb and Mike Artinian, Shannon Collingsworth, Chris Cox, Sharon and Jerry Fox, Alan Hamilton, Terri and Mike Miller, and Edna Rainey; these individuals are deemed to be Petitioners in this cause. The remaining individuals who were eventually dismissed in the Court’s May 16, 2008 Final Order of Default are: Rodney and Barbie Arthur, Warren and Cheryl Brown, Ken and Joyce Chaillaux, Jeff and Michelle Fouch, Jerry and Sharon D. Fox, Frank Ira, Micah and Lori Keith, James A. and Cheryl Robbins.

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- A. Floodway, fringe and floodplain characterization and delineation were inadequate, along with inadequate facility location, construction and operation restrictions for activity permitted in the vicinity's floodway and flood plain, all required before IDEM could legally issue the Permit;
- B. Facility farmstead (hand-drawn) mapping inaccurately located significant site features and their distances from manure containment and animal confinement structures, all required before IDEM could legally issue the Permit;
- C. Manure storage areas and land application acreage were not accurately determined, nutrient and waste volume calculations were not provided, all required before IDEM could legally issue the Permit;
- D. Proposed manure management plan ("MMP") information lacking to extent that manure storage and land application's adequacy to avoid water quality standards violations, including not-current soil map, no quantity of total nitrogen present in land-applied waste for nutrient management plan, maps for land-application areas unsatisfactory for setbacks in reference to regulated features such as property boundaries, karst features and others, land-application plan did not state application methods, limits as to time, location, weather or contaminated stormwater runoff, all required before IDEM could legally issue the Permit;
- E. Generic concrete construction plans lack construction siting, design to comply with floodway regulations, structural integrity for known sinkholes, floodplain/floodway elevation requirements, storage capacity, compost design, corrosive nature of material, subsurface materials and geology, all required before IDEM could legally issue the Permit;
- F. Waste and pathogens characterized and managed in a manner to avoid violation of applicable rules was not addressed, all required before IDEM could legally issue the Permit;
- G. Manure land use agreements inadequately identify lands for which access is granted, required before IDEM could legally issue the Permit;
- H. Bedrock elevations not adequately specified below the facility, located in geologically sensitive area, required to show that construction and operation will not violate applicable rules, required before IDEM could legally issue the Permit;
- I. Facility design and engineering is inadequate to protect surface and ground waters at the facility and land application sites, inadequate measures protective of the sensitive groundwater and geologic features, inadequate site mapping, all required before IDEM could legally issue the Permit;

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- J. Inadequate permit conditions to address fill placement and compaction, to avoid facility undermining during flooding, thus IDEM unable to determine if buildings will be stable so as to prevent release of contaminants into the environment, all required before IDEM could legally issue the Permit;
  - K. No MMP provisions for land application soil sampling or turkey litter sampling, impact of excessive mortality's effect on overall waste composition (including nutrient and pathogen content) to be land-applied.
  - L. Generic drawings provide insufficient detail for various liners at barns and manure storage structures, handwritten indication of production barn clay liner conflicted with printed indication of dirt floor, no liner material assessment.
  - M. Manure storage structure drawings lack details to show that structure "prevents storm water" entry allowing lesser setbacks to surface waters of the state, sinkholes, drainage inlets and offsite wells, no showing run-on and run-off stormwater control construction for manure storage structure when used for mortality composting.
  - N. Potential adverse affects to public health not addressed concerning public park to west of facility; no emergency spill response plan; no soil conservation plan for the land application areas which have erodible soils, hydric soils, frequently flooded soils, and soils associated with up to 18% slope.
18. On April 28, 2008, Permittee/Respondent Kyle Hall filed a Motion for Summary Judgment, supporting brief and designated evidence; Petitioners responded on June 9, 2008, Kyle Hall replied on June 19, 2008; Petitioners submitted a surreply on June 30, 2008.
19. Kyle Hall averred that its application and supporting information met or exceeded regulatory requirements, and that many of Petitioners' claims sought impermissible sanction for alleged future violations. Petitioners maintained that genuine issues of material fact remained about the sufficiency and accuracy of Kyle Hall's submissions, so that IDEM could or should not have concluded that the issued Permit met applicable legal requirements and environmental protection.

**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 Ind. Code § 4-21.5-7-3. Ind. Code § 4-21.5-3, *et seq.*, and I.C. § 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 I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27, and 315 Ind. Admin. Code 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 fact are so deemed.



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3. In this case, Permittee/Respondent Kyle Hall moved for summary judgment as to whether any genuine issues of material fact exist as to Respondent, Indiana Department of Environmental Management's ("IDEM") issuance of Confined Feeding Operation Permit involving construction of a three-unit animal confinement operation with an approximate total capacity of 30,000 turkeys. In the Conclusion of Petitioners' June 30, 2008 Surreply, Petitioners moved for summary judgment, that "[t]here is no genuine issue of material fact that Kyle Hall's application did not meet the legal standard with respect to the clay liner . . . and Petitioners are entitled to judgment as a matter of law."
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." I.C. § 4-21.5-3-23; *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App 1998); Ind. Trial Rule 56(C).
5. The moving party bears the burden of establishing that summary judgment is appropriate. "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). "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 fact is "material" if it helps to prove or disprove an essential element of plaintiff's cause of action. *Weida v. Dowden*, 664 N.E.2d 742, 747 (Ind. Ct. App. 1996). 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); *State v. Livengood*, 688 N.E.2d 189, 192 (Ind. Ct. App. 1997). The moving party must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospital of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991), *citing Elkhart Community School Corp. v. Mills*, 546 N.E.2d 854 (Ind. Ct. App. 1989). A moving party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan v. Snap-On Tool Corp.*, 478 N.E.2d 116, 122 (Ind. Ct. App. 1985). Factual disputes that are irrelevant or unnecessary will not be considered. *Owen v. Vaughn*, 479 N.E.2d 83, 87 (Ind. Ct. App. 1985). Once each 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.

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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 700, (Ind. Ct. App. 1992) 703-04. 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. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23. In this case, Respondent/Permittee Hall 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; Petitioners bear a similar burden on the issue of whether there is no genuine issue of material fact that Kyle Hall’s application did not meet the legal standard with respect to the clay liner as a matter of law.
  
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.2d 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 issues 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 Envntl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also*, I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM lacked legal authority to grant Confined Feeding Operation Permit No. AW-5851, OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” I.C. § 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*, 2005 OEA 1, 11-12. *Marathon Point Service and Winimac Service*, 2005 OEA 26, 41.

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9. As for floodway characterizations required for confined feeding operations such as permitted to Kyle Hall, 327 Ind. Admin. Code 16-8-1(a)(2-3) allows new waste management system construction in a floodway or floodplain only if access to the waste management system is at least two feet above the 100-year floodplain elevation. The highest 100-year flood elevation on the Hall farm property is 506.0 feet. The lowest elevation present in the Hall farm waste management system construction is 512.90 feet. The lowest elevation in the farm waste management system, at 6.9 feet above the 100-year flood elevation, is at least two feet above the property's highest 100-year floodplain elevation of 506.0 feet. Substantial evidence demonstrates that no genuine issue of material fact exists that permit AW-5851 issued to Kyle Hall complies with floodway characterization requirements stated in 327 I.A.C. 16-8-1, as a matter of law.
10. Confined feeding operations such as permitted to Kyle Hall must comply with Farmstead Plan requirements stated in Ind. Code § 13-18-10, *et seq.*, and 327 Ind. Admin. Code 16-7-9. 327 I.A.C. 16-7-9 provides:
- (a) a farmstead plan must show all existing and proposed waste management systems, and, within five hundred (500) feet of the waste management systems, the following known features:
    - (1) Residences.
    - (2) Surface waters of the state.
    - (3) Public and private roads.
    - (4) Water well locations.
    - (5) Characteristics of karst terrain as identified in 327 I.A.C. 16-2-21.
    - (6) Drainage patterns.
    - (7) Property boundary line.
    - (8) All outfalls of known subsurface drainage structures.
    - (9) Drainage inlets, including water and sediment control basins.
  - (b) in addition to subsection (a), the farmstead plan must show the diversion of uncontaminated surface water.
  - (c) The farmstead plan must be legible and either:
    - (1) drawn to approximate scale; or
    - (2) show specific distances between:
      - (A) the waste management systems; and
      - (B) the features in subsection (a) that are within five hundred (500) feet of the existing or proposed waste management system.
  - (d) The plan must be submitted on paper no less than eight and one-half (8 ½) inches by 11 inches in size.

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11. Petitioners seek revocation of Permit AW-5851, based on inadequacies in the Farmstead Plan. In summary, some features noted as inadequate were more than 500 feet away from the waste management system. The submitted drawings were also noted to of inadequate detail, for lack of scale or specific distance indication. Petitioners indicated that some portions of the Farmstead Plan had to be indicated on a topographical map. Petitioners also relied on the Farmstead Plan's lack of showing locations of: wetlands, pipes (other than drainage inlets), public parks, utilities, railways, floodzone A areas, or other features that have setback restrictions. None of the Farmstead Plan inadequacies cited by Petitioners are included as requirements in I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16-7-9. I.C. § 13-18-10, *et seq.*, and 327 I.A.C.16-7-9 require features which are within 500 feet of the waste management systems to be shown, either by including specific distances to objects or by drawing to approximate scale. The Plan's scale met requirements stated in 327 I.A.C. 16-7-9; IDEM also verified the distances. *Motion, Ex. C, affidavit of Tyson W. Long.* 327 I.A.C. 16-7-9 specifically requires the plan to be submitted on 8 ½ by 11 inch paper without specifically requiring submission of a larger, topographical map. Neither IDEM nor the Office of Environmental Adjudication ("OEA") may require an applicant to include information in excess of that required by law. *See Talara Lykins - CAFO*, 2007 OEA 114, *aff'd.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). Nor can OEA overturn an IDEM approval based upon speculation of future violations. *Id.* As a matter of law, Permittee/Respondent presented substantial evidence that no genuine issue of material fact exists that Kyle Hall's Farmstead Plan complied with I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16-7-9.
  
12. As for the adequacy of generated manure storage and land application, the Kyle Hall facility complied with applicable requirements pertaining to manure storage and land application. 327 I.A.C. 16-8-4 requires that: New manure storage structures for the confined feeding operation must be designed, constructed, and maintained with a combined storage capacity of at least one hundred eighty (180) days storage for:
  - (1) manure;
  - (2) if applicable, bedding;
  - (3) net average rainfall; and
  - (4) if applicable, the expected rainfall and run-off from a twenty-five (25) year, twenty-four (24) hour precipitation event that falls on the drainage area around the liquid manure storage structure, but not to include the expected rainfall and run-off from a twenty-five (25) year, twenty-four (24) hour precipitation event that falls directly on the liquid manure storage structure.

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IDEM calculated the amount of waste to be generated using IDEM's *Confined Feeding Regulation Program Guidance Manual* (March 2002) ("Guidance Manual"), and included the calculations in IDEM's public file in this matter. *Motion, Ex. C, Affidavit of Tyson Long; Ex. A 9*. The maximum number of 30,000 turkeys allowed on the Kyle Hall CFO, IDEM determined that 30,000 turkeys, at .003 cubic feet per day, would generate 90.0 cubic feet of solid waste, and 3.6 cubic feet of wastewater per day, for a total of 93.6 cubic feet of waste per day. Extrapolated to 180 days, the Hall farm would generate 16,848 cubic feet of total waste per 180 days. *Ex. C, affidavit of Tyson Long; Ex. A-9*. The calculation spreadsheet in this case shows that two of the buildings, the turkey barns, contain 65,000 cubic feet of storage space; additional manure storage is also contained in the litter stack building. Calculations for the third, litter stack building were not provided, as Kyle Hall deemed that sufficient capacity was provided as calculated for the two other buildings. In this case, rainfall is excluded from the calculation because the buildings are enclosed on at least three sides so as to prevent rainfall entry. Even if rainfall does enter manure storage from the one exposed site of the barns, or turkey misting water runoff enters manure storage, it is reasonable to conclude that these presumed amounts of liquid would not fully consume the facility's excess manure storage capacity. As a matter of law, Permittee/Respondent presented substantial evidence that no genuine issue of material fact exists that Kyle Hall's Farmstead Plan complied with I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16-8-4.

13. As for the adequacy of generated manure land application, the Kyle Hall facility complied with applicable requirements. 327 I.A.C. 16-10-1 requires that a soil and manure test be performed to determine the agronomic rates for potentially available nitrogen. Since newly-permitted CFOs are not in operation, they have not yet generated manure, and manure testing cannot be performed. Therefore, IDEM's Guidance Manual allows that "newly approved CFOs have one (1) year to begin testing manure and soil to make manure application decisions." *Guidance Manual, p. 27*. However, new confined feeding operators are provided information in the Guidance Manual to determine the amount of needed land application acreage. *Id.* Per the Guidance Manual table, 82.2 acres of land for manure application is required for the 30,000 turkeys on the Kyle Hall facility. The 420 acres of land obtained by Kyle Hall for land application exceeds the Guidance Manual's 82.2 acres needed. As a matter of law, Permittee/Respondent presented substantial evidence that no genuine issue of material fact exists that Kyle Hall's Farmstead Plan complied with I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16-10-1.
14. As for the required manure management plan, the Kyle Hall facility complied with applicable requirements, stated in I.C. § 13-18-10-2.3 and 327 I.A.C. 16-7-11. 327 I.A.C. 16-7-11 provides:
  - (a) A manure management plan must be developed and submitted to the commissioner that, at minimum, contains the following:
    - (1) Procedures for soil testing as described in subsections (c) and (e).
    - (2) Procedures for manure testing as described in subsections (b) and (e).
    - (3) Legible maps of manure application areas.

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- (b) If applicable, the manure management plan must also contain a description of any:
  - (1) alternate methods proposed by the applicant for managing of the manure;
  - (2) other practices to be used that assure the confined feeding operation meets the performance standards in this article.
- (c) A soil test must be obtained that provides sufficient information about soil fertility to allow for nutrient recommendations for existing or planned crops and to minimize nutrient leaching.
- (d) A manure test must be obtained that provides sufficient information about the manure content to allow for nutrient recommendations for existing or planned crops and to minimize nutrient leaching.
- (e) The frequency of soil and manure testing must:
  - (1) be specified in the manure management plan; and
  - (2) be conducted a minimum of once every three (3) years unless a different frequency is justified in the manure management plan.
- (f) One (1) manure test must be completed for each type of manure generated.
- (g) A manure management plan must be submitted to the department at least one (1) time every five (5) years and with any approval application and renewal application to maintain a valid approval for the confined feeding operation. A copy of the current manure management plan must be reasonably accessible to a representative of the department during an inspection.

Even though Kyle Hall used the template plan included in IDEM's Confined Feeding Application package, the manure management plan's contents, sampling protocol (which does not require that brooder litter be sampled separately from growout litter), and three (3) year frequency complied with I.C. § 13-18-10-2.3 and 327 I.A.C. 16-7-11. Neither IDEM nor the Office of Environmental Adjudication ("OEA") may require an applicant to include information in excess of that required by law. *See Talara Lykins - CAFO*, 2007 OEA 114, *aff'd.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). As a matter of law, Permittee/Respondent presented substantial evidence that no genuine issue of material fact exists that Kyle Hall's Manure Management Plan complied with I.C. § 13-18-10-2.3 and 327 I.A.C. 16-7-11.

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15. As for adequacy of the location of manure land application, the Kyle Hall facility complied with applicable regulations. Per 327 I.A.C. 16-10-1, “any acreage for the application of manure that is not owned by the owner of the confined feeding operation must be documented in the operating record via land use agreements signed by the property owners on whose property the manure will be applied”; no requirement is stated that the land application acreage location be stated. Kyle Hall’s Application contained a Land Use Agreement, and included a plot map outlining the land application area. *Ex. A-6*. The land application maps submitted by Kyle Hall are legible, and present substantial evidence of application areas and setbacks as required in 327 I.A.C. 16-7-11. Such information complies with I.C. § 13-18-10, *et seq.*, and with 327 I.A.C. 16, *et seq.* Even though Kyle Hall’s Application and Approval lacked a discussion of how and when manure will be land applied, such information is not required in 327 I.A.C. 16-7-11. Nor did Kyle Hall provide a compost design or other composting details, nor does a legal requirement exist for Kyle Hall to do so. Neither IDEM nor the Office of Environmental Adjudication (“OEA”) may require an applicant to include information in excess of that required by law. . *See Talara Lykins - CAFO*, 2007 OEA 114, *aff’d.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). Nor can OEA overturn an IDEM approval based upon speculation of future violations. *Id.* As a matter of law, Permittee/Respondent presented substantial evidence that no genuine issue of material fact exists that Kyle Hall’s Application and Approval complied with I.C. § 13-18-10-2.3 and 327 I.A.C. 16-7-11.
16. Due to the soils mapping provided with Kyle Hall’s application, along with soils testing and boring, IDEM determined that soil types in the top sixty (60) inches of soil required additional protection, in the form of a clay liner under the two earthen-floored turkey barns, to be constructed to protect groundwater. Petitioners’ contention that the provided soils map did not present a current representation of soil designations for Lawrence County is not supported by 327 I.A.C. 16-7-11. Neither IDEM nor the Office of Environmental Adjudication (“OEA”) may require an applicant to include information in excess of that required by law. . *See Talara Lykins - CAFO*, 2007 OEA 114, *aff’d.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). As a matter of law, Permittee/Respondent presented substantial evidence that no genuine issue of material fact exists that Kyle Hall’s Application and Approval complied with I.C. § 13-18-10-2.3 and 327 I.A.C. 16-7-11.
17. While Petitioners correctly contend that Kyle Hall did not submit a nutrient management plan, none is required to be submitted prior to the issuance of a confined feeding operation approval. I.C. § 13-18-10, *et seq.*; 327 I.A.C. 16. Neither IDEM nor the Office of Environmental Adjudication (“OEA”) may require an applicant to include information in excess of that required by law. . *See Talara Lykins - CAFO*, 2007 OEA 114, *aff’d.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). As a matter of law, substantial evidence that no genuine issue of material fact exists, even without a nutrient management plan, that Kyle Hall’s Application and Approval complied with I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16.

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18. The Approval did not include an emergency spill response plan, a soil conservation plan, or give specific address to “potential adverse impacts to public health with respect to the proximity to the site of a public park west of the proposed facility,” contended as required by Petitioners. 327 I.A.C. 16-9-4 requires that an emergency spill response plan be prepared and kept at the Kyle Hall farm as part of the operating record, but is not required as part of an application. The Approval complies with applicable legal requirements, none of which specifically require the above elements Petitioners contend. It is reasonable to infer that compliance with existing regulations satisfies legislative intent to provide such specific protection. Neither IDEM nor the Office of Environmental Adjudication (“OEA”) may require an applicant to include information in excess of that required by law. . *See Talara Lykins - CAFO*, 2007 OEA 114, *aff’d.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). As a matter of law, Permittee/Respondent presented substantial evidence, that no genuine issue of material fact exists that Kyle Hall’s Application and Approval complied with I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16, *et seq.*
19. As for sufficiency of construction specifications for the buildings and clay liner proposed on the Kyle Hall farm, 327 I.A.C. 16-7-10 requires that the waste management system drawings show “detailed views and necessary cross sections to define all dimensions and construction materials.” The four pages of concrete construction specifics for the litter stack building, for storage of solid (versus liquid) manure, *Ex. A-5*, provide substantial evidence of compliance with 327 I.A.C. 16-7-10 and 327 I.A.C. 16-8-8. While Kyle Hall included a memorandum that the earth below the structures would be compacted to exceed 90% of the maximum density, the structures are not proposed to be constructed within the 100-year floodplain. Therefore the structural design does not require demonstration of compliance with floodplain restrictions. Even if the structures were within the 100-year floodplain, 327 I.A.C. 16 contains no requirements that the drawings detail compliance with floodplain restrictions. IDEM’s nonrule policy document, “Confined Feeding Operations – Standards for Design of Solid Manure Storage Structures and Production Units in Indiana (Addendum to Guidance Manual for Indiana Confined Feeding Regulation Program)” (“NPD”), requires earthen-floor structures to be compacted to at least 90% of the maximum density. *NPD at 4*. 327 I.A.C. 16-8-8 does not require solid manure storage structures to be certified by a registered professional engineer. Petitioners’ urging that “the applicant should be required to submit specifications which are site-specific and which show how these site conditions will be addressed” is contrary to the existing regulations, and beyond OEA’s authority to change. *City of Angola*, 2005 OEA 14. Kyle Hall provided information compliant with I.C. § 13-18-10, *et seq.* and 327 I.A.C. 16-7-10 concerning the design of the clay liner for the two turkey barns. Neither IDEM nor the Office of Environmental Adjudication (“OEA”) may require an applicant to include information in excess of that required by law. *See Talara Lykins - CAFO*, 2007 OEA 114, *aff’d.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). Nor can OEA overturn an IDEM approval based upon speculation of future violations. *Id.* As a matter of law, Permittee/Respondent presented, and Petitioners failed to present, substantial evidence that no genuine issue of material fact exists that Kyle Hall’s Application and Approval complied with I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16-7-10, in regard to construction plans.



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20. As for Petitioners' contentions that Kyle Hall's Approval does not address how it will manage pathogens, and discharges from drinking water, runoff from building roofs or cooling water, and should require surface water monitoring, the Approval does not authorize any discharges, and its conditions and 327 I.A.C. 16-3-1 specifically disallow runoff from the facility, whether from manure management or nonpoint sources (roofs, etc.). Pathogen management requirements are not provided in applicable law.<sup>2</sup> Neither IDEM nor the Office of Environmental Adjudication ("OEA") may require an applicant to include information in excess of that required by law. *See Talara Lykins - CAFO*, 2007 OEA 114, *aff'd.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). Nor can OEA overturn an IDEM approval based upon speculation of future violations. *Id.* As a matter of law, Permittee/Respondent presented substantial evidence that no genuine issue of material fact exists that Kyle Hall's Application and Approval complied with I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16, *et seq.*, for lack of pathogen or discharge management.
21. As to the adequacy of the clay liner design and whether bedrock elevations beneath the production barns were adequately assessed, exact location of bedrock beneath solid manure storage structures is not required in I.C. § 13-18-10, *et seq.*, and 327 I.A.C. 16, *et seq.* IDEM's nonrule policy document, "Confined Feeding Operations – Standards for Design of Solid Manure Storage Structures and Production Units in Indiana (Addendum to Guidance Manual for Indiana Confined Feeding Regulation Program)" ("NPD"), addresses IDEM's policy for solid manure storage structures not addressed in 327 I.A.C. 16. The NPD provides that solid manure storage structures in karst terrain should be constructed with a concrete floor, that the production units (here, the turkey barns) should be constructed with "an approved liner (concrete, synthetic, clay)" if the base of the production unit is located less than five feet to bedrock. *NPD at 4.* A clay liner should be designed not to exceed a seepage rate of one-sixteenth (1/16) inch per day. *Id.* Although Petitioners state that water well logs in the facility's location indicate that bedrock "is much closer" than Kyle Hall states, six on-site soil boring tests did not locate bedrock. The Approval requires that the Kyle Hall farm clay liner under the two production barns must be designed not to exceed a seepage rate of one-sixteenth (1/16) inch per day. Neither IDEM nor the Office of Environmental Adjudication ("OEA") may require an applicant to include information in excess of that required by law. *See Talara Lykins - CAFO*, 2007 OEA 114, *aff'd.*, Marion County Superior Court Civil Division, Room F-12, Cause No. 49F12-0708-MI-32019 (April 4, 2008). Nor can OEA overturn an IDEM approval based upon speculation of future violations. *Id.* As a matter of law, Permittee/Respondent presented, and Petitioners failed to present, substantial evidence that no genuine issue of material fact exists that Kyle Hall's Application and Approval complied with and exceeded I.C. § 13-18-10, *et seq.*, 327 I.A.C. 16, *et seq.*, and IDEM's nonrule policy document specified above for design requirements if bedrock is within five feet of a solid manure storage structure's floor.

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<sup>2</sup> Per U.S. EPA's 2006 303(d) list for pathogens, and for impaired bodies of water, Salt Creek in Lawrence County is impaired due to a fish consumption advisory for PCBs and Mercury, not for pathogens. The list can be accessed at <http://www.in.gov/idem/programs/water/303d/303dlist2006.xls>.

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22. On Permittee/Respondent Kyle Hall's Motion for Summary Judgment, Kyle Hall has provided substantial evidence required to meet his burden of showing that permit IDEM issued did not comply with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Kyle Hall is entitled to judgment as a matter of law that IDEM's issuance of Confined Feeding Operating Permit No. AW-5851, for farm 6549, complied with applicable law. On Petitioners' issue for Motion for Summary Judgment, Petitioners did not provide substantial evidence required to meet their burden of showing the lack of genuine issue of material fact that Kyle Hall's application did not meet the legal standard with respect to the clay liner," as a matter of law, and that no genuine issue of material fact exists to the contrary.

**FINAL ORDER**

**AND THE COURT**, being duly advised, hereby **FINDS AND ORDERS** that Permittee/Respondent Kyle Hall has provided substantial evidence required to meet its burden of showing that Confined Feeding Operation Permit No. AW-5851, for farm 6549, complied with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary. Petitioners did not provide substantial evidence required to meet its burden of showing the lack of genuine issue of material fact that Kyle Hall's application did not meet the legal standard with respect to the clay liner," as a matter of law, and that no genuine issue of material fact exists to the contrary. Permittee/Respondent Kyle Hall is entitled to judgment as a matter of law that Confined Feeding Operation Permit No. AW-5851, for farm 6549, complied with applicable law.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Permittee/Respondent Kyle Hall's Motion for Summary Judgment is **GRANTED**; Permittees' Motion for Summary Judgment on the issue as to whether Kyle Hall's application did not meet the legal standard with respect to the clay liner, as a matter of law, is **DENIED**. Judgment is entered in favor of Permittee/Respondent Kyle Hall and against Petitioners Chad and Brandi Anderson, Ned and Diane Anderson, Rickie Anderson and David Briles, Barb and Mike Artinian, Shannon Collingsworth, Chris Cox, Sharon and Jerry Fox, Alan Hamilton, Terri and Mike Miller, and Edna Rainey. 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 I.C. § 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 I.C. § 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 5th day of August, 2008 in Indianapolis, IN.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge