

**Commissioner, Indiana Department of Environmental Management v. David E. Carter
2008 OEA 53 (08-W-E-4069)**

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 53 cite this case as
David E. Carter, 2008 OEA 53.

TOPICS:

water quality
dismissal
owner
burden of proof
summary judgment
Rule 5

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Respondent: Marcus Burgher III, Esq.
IDEM: Timothy Junk, Esq.

ORDER ISSUED:

June 10, 2008

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

Judicial Review: IDEM v. David A. Carter, 13C01-0806-MI-020. (Crawford Cir. Ct. 2009) affirmed.

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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION
)	
COUNTY OF MARION)	
IN THE MATTER OF:)	
)	
COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT)	
)	
Complainant)	
)	
v.)	CAUSE NO. 08-W-E-4069
)	
DAVID CARTER)	
IDEM Case No. 2007-17279-W)	
)	
Respondent)	
<hr style="width: 40%; margin-left: 0;"/>		
)	
Carole Carpenter, Jim Keck, Christine Keck)	
Intervenors)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DENYING MOTION TO DISMISS**

This matter having come before the Court on the Respondent’s Motion to Dismiss Notice and Order of the Commissioner of the Indiana Department of Environmental Management, which pleading is a part of the Court’s record; and the Court, being duly advised and having read the motion, briefs and record, now enters the following findings, conclusions and order:

Findings of Fact

1. On January 31, 2008, the Indiana Department of Environmental Management (the “IDEM”) issued a Notice and Order of the Commissioner of the Indiana Department of Environmental Management (the “CO”) to David Carter for violations of 327 IAC 15.
2. The alleged violations were observed by IDEM staff on September 12, 2007 at a development referred to as River Bluff Estates, located at Section 6, Township 4S, Range 2E in Leavenworth, Crawford County, Indiana (the “Site”). A Notice of Violation was issued on November 8, 2007. The parties did not enter into an agreed order resolving the violations.
3. On February 12, 2008, David Carter (the “Respondent”) filed his Petition for Administrative Review of Notice and Order of the Commissioner Dated January 31, 2008.
4. The IDEM filed a Motion for Summary Judgment on April 9, 2008 asking for expedited review of this matter due to the worsening conditions at the Site.

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5. Jim and Christine Keck petitioned to intervene in this matter on April 4, 2008. Carole Carpenter petitioned for intervention on April 8, 2008. These petitions were granted on May 8, 2008.
6. A prehearing conference was held on April 15, 2008. This matter was set for a final hearing on the merits and on the motion for summary judgment on May 19, 2008.
7. On May 5, 2008, Respondent's counsel filed an unverified motion to dismiss alleging that the Respondent is not the owner of the Site. The IDEM responded on May 9, 2008.¹

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.
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. In reviewing a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party." *Huffman v. Indiana Office of Environmental Adjudication, et al.* 811 N.E.2d 806, 814 (Ind. 2004).
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. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).
5. 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 (Ind. Ct. App. 1992) at 864. "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).

¹ In accordance with OEA procedural rules, the Respondent's Motion to Dismiss was filed as of May 5, 2008 as that is the date it is postmarked. However, at the time of the final prehearing conference held on May 8, 2008, neither the Court nor the IDEM had received the pleading. At the request of the ELJ, the motion was faxed to IDEM's counsel on May 8, 2008. The OEA received the document on May 8, 2008.

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6. The CO alleges violations of Title 327 of the Indiana Administrative Code (IAC), specifically, 327 IAC 15-2-5, 327 IAC 15-5-2, 327 IAC 15-5-5 and 327 IAC 15-5-6.5 and 327 IAC 15-5-7.
7. These regulations, to a large extent, place the burden of compliance on the “project site owner.”
8. The IDEM, as the complainant, has the burden of proving the violations. IC 13-30-3-9. As such, if the IDEM fails to prove that the Respondent is the project site owner, the IDEM has not met its burden as to all essential elements of the violations.
9. The Respondent has alleged that he is not the owner of the property. However, these allegations take the form of statements made by the Respondent’s counsel, without any evidence or verification of the statements. Under the dismissal standard, the Court is required to take as true the allegations made in the CO. The CO states that the Respondent is the owner. Under the dismissal standard, the Respondent’s motion should be denied.
10. Whether the Respondent is the owner is a matter of fact, not law. Therefore, this Court may treat this motion as a motion for summary judgment. The Respondent, as the movant, has the burden of producing sufficient evidence to show that there is no genuine issue as to any material fact. Who the responsible party is in this instance is a material fact. However, the Respondent has produced no evidence of any kind to show that he is not the owner of this Site. No affidavits are presented. The Respondent has failed to produce even a scintilla of evidence as to who is the owner. The unverified allegations made in the motion are not sufficient to establish that there is no genuine issue as to the ownership of the Site.² He has failed to meet his burden and summary judgment should be denied.
11. Given (1) that the IDEM must prove that the Respondent is the responsible party in this matter and (2) the Respondent’s failure to raise this issue at a more appropriate time (such as, at the prehearing conference), the Court determines that the motion should be denied.

Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Respondent’s Motion to Dismiss is **DENIED**.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED this 10th day of June, 2008 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

² Counsel for the Respondent merely asserts that the Respondent is neither the owner nor operator of the Site and does not provide any information as to who the actual owner is.