

**OBJECTION TO THE APPROVAL OF
 NPDES CONCENTRATED ANIMAL FEEDING OPERATION
 WOLF CREEK CALF COMPANY, LLC
 FARM ID NO. 6353
 WHEATFIELD, JASPER COUNTY, INDIANA.
 2009 OEA 179, OEA CAUSE NO.: 08-W-J-4078**

Official Short Cite Name:	Wolf Creek Calf Company, LLC, 2009 OEA 179
OEA Cause No.:	08-W-J-4078
Topics/Keywords:	Concentrated animal feeding operation
	Ind. Tr. R. 56(c) Motion for Summary Judgment
	327 IAC § 15-15-8(a)
	327 IAC § 15-15-9(a)
	I.C. § 15-15-12 et seq.
	I.C. § 4-21.5-3.27(d)
	I.C. § 4-21.5-3.23(b)
	327 IAC 2-1.5
Presiding ELJ:	Mary Davidsen
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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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)
NPDES CONCENTRATED ANIMAL FEEDING OPERATION)
OPERATION OF WOLF CREEK CALF COMPANY, LLC)
FARM ID NO. 6353)
WHEATFIELD, JASPER COUNTY, INDIANA.)

CAUSE NO. 08-W-J-4078

Spike Development, LLC, Richard Hughes,
Leonard Richardson, and Scott Helton
Petitioners,
Wolf Creek Calf Company, LLC,
Respondent/Permittee,
Indiana Department of Environmental Management,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
FINAL ORDER

This matter comes before the Office of Environmental Adjudication ("OEA" or "Court") on Cross-Motions for Summary Judgment by Spike Development, LLC, Richard Hughes, Leonard Richardson and Scott Helton, (collectively "Petitioners") and Respondent/Permittee Wolf Creek Calf Company, LLC ("Wolf Creek") regarding the Indiana Department of Environmental Management ("IDEM") approval of the Notice of Intent and Application ("NOI") submitted by Wolf Creek resulting in a general National Pollutant Discharge Elimination System ("NPDES") permit allowing Wolf Creek to operate and/or construct a cow concentrated animal feeding operation ("CAFO"). The Chief Environmental Law Judge ("ELJ") having considered the petitions, 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 December 10, 2007, Wolf Creek submitted a NOI for a NPDES General Permit to IDEM by Wolf Creek for a CAFO on property located at 198 E. Co. Rd. 800 N. in Wheatfield, Jasper County, Indiana.

2. In the NOI, Wolf Creek proposed to modify a previously permitted chicken CAFO formerly owned by Schuringa Poultry Farm, Inc. ("Schuringa") to provide capacity for 3,150 dairy calves. No new buildings were to be constructed, but the existing CAFO facilities would be retrofitted to accommodate dairy calves instead of chickens.
3. On February 26, 2008, IDEM issued the document entitled "NPDES CAFO Information" ("CAFO Approval") to Wolf Creek acknowledging its receipt and review of Wolf Creek's NOI and authorizing construction of Wolf Creek's proposed CAFO.
4. On March 12, 2008, Petitioners filed their Petition for Administrative Review ("Petition") of the CAFO Approval with the OEA.
5. On May 7, 2008, Petitioners filed their Amended Petition for Administrative Review ("Amended Petition").
6. On June 27, 2008, Petitioners filed their Motion and Brief in Support of Summary Judgment ("Petitioners' Brief") containing the affidavit of Paul Troy ("Troy Affidavit").
7. On June 27, 2008, Wolf Creek filed its Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment ("Wolf Creek's Brief"). Wolf Creek designated the following evidence in support of its motion for summary judgment:
 - a. The Amended Petition;
 - b. All OEA decisions cited within the Brief;
 - c. The Affidavit of Scott Severson ("Severson Affidavit");
 - d. The Affidavit of Daniel J. Bruggen ("Bruggen Affidavit");
 - e. 327 Ind. Admin. Code § 15-15;
 - f. The CAFO Approval;
 - g. Jasper County Ordinance 5-6-96A
8. On July 21, 2008, Wolf Creek filed its Response to Petitioners' Motion and Brief in Support of Summary Judgment ("Wolf Creek's Response").
9. On July 22, 2008, Petitioners filed their Brief in Opposition to Wolf Creek's Motion for Summary Judgment ("Petitioners' Response") and Motion to Strike Affidavits ("Motion to Strike").
10. On August 4, 2008, Petitioners filed their Reply Brief in Support of Their Motion for Summary Judgment ("Petitioners' Reply").
11. On August 4, 2008, Wolf Creek filed its Reply to Petitioners' Brief in Opposition to Wolf Creek's Motion for Summary Judgment and Opposition to Petitioners' Motion to Strike Affidavits ("Wolf Creek's Reply").
12. Petitioners raised three legal issues proposed for consideration in their Amended Petition: (1) that the IDEM incorrectly determined that the facility had adequate manure distribution and land application capabilities; (2) that the IDEM should have required new notice pursuant to 327

I.A.C. § 15-15-8(a) that identified the true owner/operator of the CAFO; and (3) that the IDEM should have required Wolf Creek to obtain an individual NPDES permit pursuant to 327 I.A.C. § 15-15-9(a).

13. Petitioners presented evidence that:

- a. About one hundred (100) wells could be identified within a one (1) mile radius of the Wolf Creek CAFO.
- b. The nitrogen in the aquifer underlying the Wolf Creek CAFO forms nitrate, a persistent groundwater contaminant regulated by the United States Environmental Protection Agency ("EPA").
- c. The surface waters in this area have been identified as having unacceptable levels of E. coli and the IDEM has placed the Kankakee/Iroquois river watershed on the section 303d list of impaired waterways in 2002 and 2008.
- d. The sensitive aquifer underlying the Wolf Creek CAFO and surrounding surface waters are at significant risk from any potential manure releases. If the aquifer underlying the Wolf Creek CAFO is contaminated with nitrates, pharmaceuticals, or other contaminants, cleanup options will be expensive and not very effective. *Troy Affidavit p. 2-3.*

14. Respondents presented evidence regarding:

- a. Wolf Creek's manure storage capacity of 230,310 cubic feet (ft³) is more than three times the capacity required (73,710 ft³) for 3,150 dairy calves based on 180 days of manure storage.
- b. The availability of 333 acres for land application, which is more than three (3) times the acreage necessary (109 acres) for manure produced by 3,150 dairy calves based on annual manure production
- c. Existing animal buildings will be improved by replacing earthen floors with concrete. Solid manure storage facilities previously approved by the IDEM will also be utilized. (Severson and Bruggen Affidavits).

15. According to the NOI materials, Wolf Creek has a dry manure storage capacity of 230,000 ft³, a total land application area of over 333 acres, and the site complies with the set-back criteria of Ind. Code § 15-15-12, *et seq.*.

16. According to the NOI materials, manure production for Wolf Creek will be 149,468 ft³/yr requiring a storage capacity of 73,710 ft³/180 days and 109 acres for distribution.

17. The land subject to the permit was not undeveloped and had a valid NPDES permit at the time the NOI was submitted to the IDEM. According to the NOI materials, Schuringa currently had a NPDES General Permit (ING806353) covering the same land as the current Wolf Creek permit.

18. The NOI materials provided manure distribution records for October, 2004 through October 2006 for Schuringa and indicated that the facility had successfully distributed 100% of manure produced in each of the previous two (2) years.

19. IDEM's Bruggen saw no evidence of any unauthorized construction during a January 24, 2008 site inspection (Bruggen Affidavit, para. 9) or had any knowledge that Wolf Creek submitted any false information to the IDEM regarding the CAFO approval at issue or any other permit application (Bruggen Affidavit, para. 10).

CONCLUSIONS OF LAW

1. The OEA has jurisdiction over the decisions of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-27, and 315 I.A.C. 1-2-1(9). Findings of fact they may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. In this case, Petitioners and Wolf Creek both moved for summary judgment as to whether any genuine issues of material fact exist whether the IDEM correctly determined that Wolf Creek had adequate manure storage and distribution capabilities; whether notice was required pursuant to 327 I.A.C. 15-15-8(a); and whether Wolf Creek should have been required to get an individual permit pursuant to 327 I.A.C. 15-15-9(a).
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 of 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, 703-704 (Ind. Ct. App. 1992). A fact is "material" if it helps to prove or disprove an essential element of plaintiff's cause of action. *Weide 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 opposing party must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals 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). An opposing party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact as 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.

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." *Id.* In this case, each party has the burden of showing, as a matter of law, whether IDEM correctly determined that: (1) Wolf Creek had adequate manure storage and land application capabilities; (2) Wolf Creek was not required to give new notice pursuant to 327 I.A.C. 15-15-8(a); or (3) Wolf Creek was not required to get an individual NPDES permit. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 OEA 41 ("Aquasource"). 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. In this case, Petitioners have the burden of showing that IDEM's determination concerning Wolf Creek's general NPDES permit either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law; Respondent Wolf Creek bears a similar burden on the issue of whether there is no genuine issue of material fact that IDEM's determination to issue the Wolf Creek NPDES permit met applicable legal standards as a matter of law.

7. The ELJ is not permitted to weigh the evidence or judge credibility when deciding whether to grant summary judgment. "Summary judgment must be denied if the resolution hinges upon state of mind, credibility of the witnesses, or the weight of the testimony. Mere improbability of recovery at trial does not justify the entry of summary judgment against" a party. *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706 (Ind. Ct. App. 1999).

8. The OEA's 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. *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." *Grissell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

9. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Environmental Adjudication*, 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 dispute whether the IDEM correctly determined that: (1) Wolf Creek had adequate manure storage and land application capabilities; (2) Wolf Creek was not required to give new notice pursuant to 327 I.A.C. 15-15-8(a); or (3) Wolf Creek was not required to get an individual NPDES permit, 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 test '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 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.

10. As Wolf Creek correctly argues, the OEA has considered several appeals of Confined Feeding Operations and CAFO approvals, and has established precedent, including:

a. The OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In Re: Objection to the Issuance of Confined Feeding Operation Approval, Swine Pro 1, LLC*, 2007 OEA 115 (“Swine Pro”); *In Re: Objection to Issuance of Approval No. AW5499/Farm ID #6370, NPDES CAFO ID No. ING806370, Concentrated Animal Feeding Operation, Talara Lykins*, 2007 OEA 114, *aff’d*, Cause No. 49F12-0708-MI-32019 (April 4, 2008) (“Lykins”); *In Re: Objection to Amendment to Approval No. AW #5076/Farm ID#6165, Confined Feeding Operation, DeGroot Dairy*, 2006 OEA 1 (“DeGroot”); *In Re: Objection to Issuance of Approval No. AW5404, Mr. Stephen Gettlefinger, Washington, IN*, 1998 WL 918589 (Ind. Off. Env. Adjud.) (“Gettlefinger”).

b. OEA may not overturn the IDEM’s approval of a permit upon speculation that the permittee would allow unauthorized run-off, that the permittee would not detect or control failure of a concrete tank which otherwise complied with applicable design or operation requirements and regulations, or that the permittee would fail to comply with land application rules. *Lykins, supra*.

c. The Water Pollution Control Board promulgated applicable regulations, and in so doing, determined that the regulations were protective of human health and the environment. Therefore, OEA only has jurisdictions to determine whether the IDEM acted in accordance with Title 13 and applicable regulations. *Swine Pro, supra*.

11. In support of its Motion for Summary Judgment, Wolf Creek relies upon the Bruggen and Severson Affidavits. Petitioners’ Motion to Strike the affidavits was denied in the Court’s September 26, 2008 Order, which Order is incorporated herein. Each affidavit states fact testimony that the affiant has the personal knowledge gained from reviewing the NOI materials submitted by Wolf Creek. The affidavits show affirmatively that each affiant is competent to testify and is at or over the age of eighteen (18), and has experience with and/or his employment involves the review of CAFO NOI materials. Each affidavit sets forth facts admissible into evidence as to each affiant’s identity, that they conducted a review of the NOI materials, and as to each of their stated qualifications.

12. In addition, the affidavits set forth each affiant’s belief that the NOI complied with specified regulations (327 I.A.C. 15-15). As Petitioners note, “Wolf Creek cited these affidavits for the proposition that the NOI materials submitted by Wolf Creek complied with the rules for CAFOs,” (Motion to Strike Affidavits, p.2), and further list six (6) particular topics for which each affiant identifies as complying with regulatory requirements. (Bruggen Affidavit, para. 5; Severson Affidavit, para. 7). Witnesses generally may not testify as to legal conclusions. *Ind. Evidence Rule 701; Evid. R. 704(b); Duncan v. Duncan*, 764 N.E.2d 763, 766 (Ind. Ct. App. 2002). *Evid. R. 702* provides:

a. If scientific, technical, or other specializing knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as

an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

- b. Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

An expert witness is one who, by reason of special knowledge or skill, generally may state opinions. *Burp v. State*, 612 N.E.2d 169, 171, n. 1 (Ind. Ct. App. 1993). "Affidavits that make assertions and cite to legal authority in an effort to provide essential information to the trier of fact do not constitute inadmissible legal conclusions." *Anderson, et. al. v. Yorktown Classroom Teachers Ass'n*, 677 N.E.2d 540, 543 (Ind. Ct. App. 1997). Severson is identified as "the President of Earthwise, Inc." and someone who has "prepared multiple NOI applications seeking coverage for proposed CAFO operations in Indiana pursuant to 327 I.A.C. 15-15." (Severson Affidavit, para. 3). Bruggen is identified as an employee of the IDEM as an "Environmental Manager in the Solid Waste Permit Section, Office of Land Quality, Permits Branch" and someone who reviewed the NOI materials "in compliance with all applicable IDEM requirements under 327 I.A.C. 15-15." (Bruggen Affidavit, para. 3, 6). A review of the affidavits, through the perspective of the case in controversy, shows that the affiants are qualified as technical expert witnesses, thus competent to cite 327 I.A.C. 15-15 so as to direct OEA to the regulatory requirements used by each affiant in evaluating the NOI.

13. However, OEA cannot rely solely on each affiant's averment that the NOI materials in controversy comply with 327 I.A.C. 15-15, *et seq.*, without conducting further *de novo* review of the facts which Wolf Creek offers in support of its Motion for Summary Judgment.

14. Pursuant to 327 I.A.C. 15-15-8(a), public notice is required whenever "[a]n owner or operator ... submits a NOI to construct on land that is undeveloped or for which a valid existing CFO approval or NPDES permit has not been issued. The NOI materials show the Wolf Creek application was for modification of construction within existing buildings began by Schuringa under General Permit ING806353 approved on May 14, 2007. Petitioners have presented no evidence that the Wolf Creek site did not have a valid existing NPDES permit at the time the NOI was submitted to the IDEM. No genuine issue of material fact exists to preclude granting summary judgment in favor of Wolf Creek as to the issue complying with the notice requirements of 327 I.A.C. 15-15-8(a).

15. Petitioners have not presented substantial evidence that the NOI lacked all required information regarding adequate manure storage and distribution capabilities. Substantial evidence shows that Wolf Creek has an anticipated manure production of 149,468 ft³/yr requiring 109 acres for application, as stated in the NOI. The NOI materials further show that Wolf Creek has storage capacity for 230,310 ft³/yr and 333 acres available for application. No genuine issue of material fact exists that Wolf Creek has adequate manure storage and application capabilities.

16. Pursuant to 327 I.A.C. 15-15-9(a) the IDEM "may" require a CAFO operator to obtain an individual NPDES permit in certain situations, including:

- (1) The applicable requirements contained in this article [327 I.A.C. 15-15] are not adequate to ensure compliance with:

- (a) water quality standards under 327 I.A.C. 2-1 or 2-1.5; or
- (b) the provisions that implement water quality standards contained in 327 I.A.C. 5

(7) The owner or operator has commenced construction, as defined at I.C. 13-11-2-40.8, before receiving written confirmation from the department that the construction plan is consistent with the general permit.

(9) The owner or operator has knowingly or intentionally submitted false information to the department as part of the NOI or the false information is in the required operating records under this rule.

17. Petitioners' allegations that the aquifer underlying the Wolf Creek CAFO will be a risk from any potential discharge of manure through inadequate management practices, land application or unintended manure releases does not establish a genuine issue of material fact as to the IDEM requiring Wolf Creek to obtain an individual NPDES permit. *See Lykins, supra* (OEA may not overturn the IDEM's approval of a permit upon speculation that the permittee would allow unauthorized run-off or that the permittee would fail to comply with land application rules). Petitioners have presented no evidence that the owner or operator commenced construction prior to receiving written confirmation from the IDEM or that Wolf Creek, as owner or operator, submitted false information to the IDEM as part of the NOI at issue. Substantial evidence establishes that Bruggen saw no evidence of any unauthorized construction during a January 24, 2008 site inspection, *Bruggen Affidavit, para. 9*, or had any knowledge that Wolf Creek submitted any false information to the IDEM regarding the CAFO approval at issue or any other permit application. *Bruggen Affidavit, para. 10*. There is no genuine issue of material fact that the IDEM did not err in not requiring Wolf Creek to get an individual permit pursuant to 327 I.A.C. 15-15-9(a)

FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Wolf Creek has provided substantial evidence required to meet its burden of showing that NPDES Concentrated Animal Feeding Operation General Permit No. ING806353 for Farm ID #6353, complied with applicable law, as a matter of law, and that no genuine issue of material fact exists to the contrary on the following issues:

1. Wolf Creek possesses adequate manure storage and land application capabilities;
 2. Wolf Creek was not required to provide new notice pursuant to 327 I.A.C. 15-15-8(a);
 3. Wolf Creek was not required to obtain an individual NPDES permit;
- and that Wolf Creek's Motion for Summary Judgment should be granted.

IT IS THEREFOR ORDERED, ADJUDGED AND DECREED that Wolf Creek's Motion for Summary Judgment is **GRANTED**, and Petitioners Spike Development, LLC, Richard Hughes, Leonard Richardson and Scott Helton's Motion for Summary Judgment is **DENIED** as to the following issues:

1. Wolf Creek possesses adequate manure storage and land application capabilities;
2. Wolf Creek was not required to provide new notice pursuant to 327 I.A.C. 15-15-8(a);
3. Wolf Creek was not required to obtain an individual NPDES permit.

THE COURT FINDS FURTHER that Petitioners' Amended Petition for Administrative Review is hereby **DENIED**.

You are further notified that pursuant to the provisions of Ind. Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative decisions of the Commissioner of the Indiana Department of Environmental Management. Pursuant to I.C. § 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 30th day of June, 2009.

Mary Davidsen
Chief Environmental Law Judge