

**Commissioner, Indiana Department of Environmental Management v.
Rajbir Singh d/b/a RK Petroleum, LLC, Evansville Vanderburgh County, Indiana
2009 OEA 62, (09-S-E-4224)**

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 62, cite this case as
IDEM v. Singh, 2009 OEA 62.

TOPICS:

Initial Site Characterization Plan
Further Site Investigation Plan
underground storage tank
Notice of Violation
329 IAC 9-5-5.1(a)
site
investigation
Corrective Action Plan
civil penalty

PRESIDING ENVIRONMENTAL LAW JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Steven D. Griffin, Esq.
Petitioner: Thomas W. Baker, Esq.; Hatchett & Hauck LLP

ORDER ISSUED:

June 26, 2009

INDEX CATEGORY:

Land

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:)	
)	
COMMISSIONER, INDIANA DEPARTMENT OF)	
ENVIRONMENTAL MANAGEMENT,)	
Complainant,)	
)	
v.)	CAUSE NO. 09-S-E-4224
)	
RAJBIR SINGH d/b/a RK PETROLEUM, LLC,)	
EVANSVILLE, VANDERBURGH COUNTY, INDIANA)	
IDEM Case No. 2006-16106-S)	
Respondent)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL ORDER

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on Complainant, Indiana Department of Environmental Management’s February 2, 2009 Motion to Dismiss (“Motion”). The parties fully briefed their positions and did not request oral argument. 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. Rajbir Singh d/b/a RK Petroleum, LLC (“RK”) owns and/or operates underground storage tank (“UST”) systems, UST Facility ID No. 2710, at 1526 Judson Avenue, Evansville, IN (“Site”).
2. Records of the Indiana Secretary of State’s office state that since April 11, 2001, RK Petroleum LLC’s Registered Agent is Rajbir Singh, 2901 East 38th Street, Indianapolis, Indiana. *March 6, 2009 Reply to Response to Motion to Dismiss, Ex. A.*
3. On June 19, 2007, IDEM issued a Notice of Violation (“NOV”) to RK for failure to submit initial response information to IDEM per 329 IAC 9-5-5.1(a), relative to a May 26, 2005 release at the Site, which release was assigned Incident # 200505515. IDEM sent the NOV by certified mail to Rajbir Singh, d/b/a RK Petroleum, LLC at 1526 Judson Avenue, Evansville, Indiana, (“Evansville address”) and at 2901 East 38th Street, Indianapolis, IN (“Indianapolis address”). *Respondent IDEM’s Motion to Dismiss, NOV (“Motion”), Ex. A.* The NOV includes the two certified mail article numbers for each of the RK NOV mailings. *Id.* The certified article domestic return receipt, or “green card”, for RK’s Evansville’s

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address, was signed as received on June 23, 2007; the signature is not legible to the Court. *Motion, Ex. B.*

4. On November 19, 2007, IDEM sent RK a written offer to enter into an Agreed Order, per I.C. § 13-30-3-3. *Motion, Ex. C.* As in the case of the NOV, the Agreed Order was sent to RK's same two addresses via certified mail, with the certified mail article numbers contained in the Agreed Order. *Id.* The certified article domestic return receipt, or "green card", for RK's Evansville address, was signed as received on November 23, 2007; the signature appears to be Pardeel Kumar. *Motion, Ex. D.*
5. The parties did not enter into an Agreed Order. On July 24, 2008, the Indiana Department of Environmental Management ("IDEM") issued a Commissioner's Order ("CO") to *Motion, Ex. E.* As in the cases of the NOV and Agreed Order, the CO was sent to RK's same two addresses via certified mail, with the certified mail article numbers contained in the Agreed Order. *Id.* The certified article domestic return receipt, or "green card", for RK's Indianapolis address, was signed as received on July 25, 2008; the signature appears to be from a person with the first name of Nabel. *Motion, Ex. F.* The certified article domestic return receipt, or "green card", for RK's Indianapolis address, was signed as received on July 28, 2008; the signature is not legible to the Court. *Id.*
6. The CO informed RK that if RK did not file its objections via petition for administrative review with OEA within nineteen (19) days¹ from RK's receipt of the Notice and Order, then the Notice and Order would become effective and enforceable. The CO required RK to do specified tasks, including:
 - (a) immediately cease and desist violation of 329 IAC 9-5-5.1(a);
 - (b) within sixty (60) days of the effective date of the CO, submit an Initial Site Characteristic Plan ("ISCP") to IDEM, setting forth in detail the actions RK would take to complete and submit to IDEM an Initial Site Characterization ("ISC") for IDEM's approval;
 - (c) within thirty (30) days of IDEM's approval of the ISCP, implement the ISCP in accordance with the ISCP's schedule and submit the results of the ISC to IDEM;
 - (d) within sixty (60) days of receiving written notice from IDEM, submit a Further Site Investigation Plan ("FSIP") to IDEM, setting forth in detail the actions RK would take to complete and submit to IDEM a Further Site Investigation ("FSI") for IDEM's approval;
 - (e) upon IDEM's approval of the FSIP, implement the FSIP in accordance with the FSIP's schedule and submit the results of the FSI to IDEM;
 - (f) within sixty (60) days of receiving written notice from IDEM, submit a Corrective Action Plan ("CAP") to IDEM, setting forth in detail the actions RK would take to implement corrective action at the site for IDEM's approval;

¹ I.C. § 13-30-3-5 requires twenty (20) days. Whether RK responded within nineteen (19) days or twenty (20) days is not dispositive of this cause.

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- (g) upon IDEM's approval of the CAP, implement the CAP in accordance with the CAP's schedule and apply to IDEM for any necessary permits or approvals prior to implementing corrective actions; and
- (h) pay a civil penalty of Seven Thousand Dollars (\$7,000.00) for violation of the applicable requirements within thirty (30) days of the effective date of the CO.

Motion, Ex. E., p. 2 -4.

7. On October 3, 2008, IDEM sent RK a letter notifying RK that IDEM had not received a request for administrative review and, therefore, IDEM considered the CO effective as of August 14, 2008. *Motion, Ex. G.* The October 3, 2008 letter was sent to RK's Indianapolis address via certified mail, with the certified mail article numbers contained in the letter. *Id.* The certified article domestic return receipt, or "green card", for RK's Indianapolis address, was signed as received on October 4, 2008; the signature appears to be from a person whose first name is Nabbell. *Motion, Ex. H.*
8. Based on its determination that RK did not comply with the CO, IDEM filed a "Verified Petition for Civil Enforcement ("Petition") and Summons, in Vanderburgh Superior Court 3 on January 6, 2009. *Motion, Ex. I. (Commissioner, Indiana Department of Environmental Management v. Rajbir Singh d/b/a RK Petroleum, LLC, Cause No. 82D03-0901-PL-158).* Per the Vanderburgh Superior Court's docket, RK received a copy of the Petition and Summons on January 14, 2009. *Motion, Ex. J.* The Summons was sent via certified mail to RK's Indianapolis and Evansville addresses, signed by Rajbir Singh. *Id.*
9. RK, by counsel, filed its Petition for Administrative Review and Request for Hearing ("Petition for Administrative Review") on January 23, 2009. In its Petition for Administrative Review of the CO, RK states "[t]he person filing this Petition is Rajbir Singh, 2824 Sugarmill Drive, Evansville, Indiana . . . Rajbir Singh is the party to whom the [CO] was directed. Rajbir Singh represents no other entity."
10. RK does not dispute that the addresses used for RK by IDEM were incorrect, but does dispute that the only document it received was the CO, on January 15, 2009. "Rajbir Singh became aware of this [CO] upon receipt of a facsimile containing two pages of this [CO] on January 15, 2009. *Petition for Administrative Review, p. 2, para. 6.* Neither party presented evidence as to the disposition of the NOV, Agreed Order and CO IDEM transmitted by certified mail, or the relationship, if any, among RK and those accepting receipt.
11. In comparing the cause before this forum and the case before the Vanderburgh Superior Court, the parties to the two matters are identical. The subject matter of the two matters is similar. Similar relief is sought by the parties from the two forums.

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12. On July 16, 2008, RK's counsel, by email, requested that IDEM's provide RK's counsel "a copy of any order directed to [RK]." *Respondent's February 23, 2009 Response to Complainant's Motion to Dismiss, Ex. 2.* IDEM's counsel replied that she would "let enforcement know that you'd like to receive a copy"; IDEM did not provide a copy of the CO directly to RK's counsel. *Id.*

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. 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. By this Final Order, OEA takes official notice of the Vanderburgh Superior Court and Indiana Secretary of State documents presented by Complainant IDEM. I.C. § 4-21.5-3-26(f); *Roeschlin v. Thomas*, 280 N.E.2d 581, 584 (Ind. 1972) ("we are bound to know the public records, including the acts of state officials").
4. In this case, Claimant IDEM challenges the legal sufficiency of the claim, as a motion to dismiss. Per Trial Rule 12(B)(6), a motion to dismiss tests the legal sufficiency of the claim, not the facts which support it. *Trail v. Boys and Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 134 (Ind. 2006). When ruling on 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." *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). Determinations considering facts beyond the complaint are treated by the court as a motion for summary judgment. *Id.* Whether on a motion to dismiss or on summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007).
5. In determining the facts at issue, this Court must apply a *de novo* standard of review to this proceeding. *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 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ. I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; "*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, 253 (Ind. Ct. App. 1981).

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6. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. 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 IDEM's determination that RK received the CO and did not appeal it in a timely manner, 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. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26, 41.
7. The parties dispute whether Respondent's Petition for Administrative Review in this forum was timely filed. A person who is "aggrieved or adversely affected" by, and wants to challenge, an agency action or order, to seek administrative review by filing a written petition for administrative review in compliance with I.C. § 4-21.5-3-7(a). Petitions for review of IDEM agency actions are filed with OEA, I.C. § 4-21.5-7, *et seq.*
8. I.C. § 13-30-3-5 provides that Commissioner's Orders ("CO") must be appealed to the Office of Environmental Adjudication within twenty (20) days of the CO's receipt. If not timely appealed, the CO takes effect.
9. RK had twenty (20) days after it received notice of the CO to file an administrative appeal with OEA.
10. RK asserts that it received the CO when Rajbir Singh personally received the CO on January 15, 2009. *Response, p. 1*. RK further asserts that prior mailings to RK's addresses, via certified mail, signed by individuals other than Rajbir Singh, do not provide service to RK. *Response, p. 2*. In support, RK relies on *Indiana Dep't of Highways v. Dixon*, 541 N.E.2d 877, 880 (Ind. 1989). Dixon challenged his dismissal as an employee of the Indiana Department of Health. *Id.* The administrative decision was sent to Dixon's last known address, a home he had shared with his mother. *Id.* Although Dixon no longer resided with her, his mother signed the certified mail receipt for the administrative decision. *Id.* Eventually, Dixon personally received the documents, then filed a petition for administrative review which was timely as to Dixon's personal receipt, but not timely as to receipt by Dixon's mother. *Id.* The Indiana Supreme Court held that Dixon was not deemed to have received the documents until he, personally, received them. *Id.* OEA relied upon *Dixon in Comm'r, Indiana Dep't of Environmental Management v. Peter Coules a/k/a Peter Coulopoulos d/b/a Western Scrap and Constance Coulopoulos*, OEA Cause 06-S-E-3683.

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In *Coulopoulos*, IDEM sent its CO via certified mail to an address where Constance Coulopoulos shared housing with her sister. *Id.* Constance Coulopoulos' sister signed for the CO in her sister's absence, then forgot or discarded the CO. *Id.* Constance Coulopoulos eventually received the CO. *Id.* OEA held that, in *Coulopoulos*, Constance Coulopoulos was served when she received IDEM's determination, under circumstances where IDEM sent its determination via certified mail to a person's last known address.

11. Both *Dixon* and *Coulopoulos* concerned addressees who were individuals, and not part of corporations. In this case, RK is not an individual, it is a business entity in the form of a Limited Liability Company ("LLC"). See also *Comm'r, Indiana Dep't of Environmental Management v. Harry Randhawa, La Oasis, Inc.*, 2009 OEA 1. As an LLC, RK is required to follow Indiana's legal requirements for registered offices and registered agents. Indiana's Business Corporation statutes require LLCs to register their business office location and to appoint a registered agent, so that those interacting with the corporation may reasonably rely on an identified contact and address. I.C. § 23-18-2-10; I.C. § 23-18-2-13. The LLC's agent personally does not have to sign for the certified mail; service of unsigned certified mail, if mailed postage paid and addressed correctly, is deemed perfected five (5) days after it is deposited in the U.S. Mail. No evidence was presented that IDEM did not fulfill its service obligations in this case. In this case, as a matter of law, there is no genuine issue of material fact that IDEM sent the CO, and the prior required documents, to RK at the addresses it provided, and at the address for its registered agent.
12. OEA lacks subject matter jurisdiction over Respondent RK's petition for administrative review. Substantial evidence shows that Respondent Rajbir Singh d/b/a RK Petroleum, LLC received required notice on June 28, 2008, the date when the certified article domestic return receipt, or "green card", for RK's Indianapolis address, and addressed to the same address and addressee as RK provided to the Indiana Secretary of State. As a matter of law, there is no genuine issue of material fact that Respondent RK's January 23, 2009 filing of its Petition for Administrative Review exceeded the mandatory deadline required in I.C. § 13-30-3-5 and in I.C. § 4-21.5-3-7(a).
13. OEA does not have, and has no discretion to acquire, subject matter jurisdiction of a petition for administrative review filed after the deadlines mandated by statute. OEA must dismiss the Petition with prejudice. *Walker Mfg. Co v. Dep't of Local Gov't Finance*, 772 N.E.2d 1, 4-6 (Ind. Tax 2002); *In re: Objection to the Issuance of Notice of Decision, Murphy Oil USA, Inc., Seymour, Jackson County, Indiana*, 2004 OEA 51, 55; *Variance for Open Burning, Herring*, 2008 OEA 7; *In re: Objection to Denial of Excess Liability Trust Fund Claim, Frank Suverkup, Benzol Cleaning Co., Inc.*, 2004 OEA 48. As a matter of law, OEA lacks subject matter jurisdiction over this cause.

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FINAL ORDER

IT IS THEREFORE ORDERED that the Petition for Administrative Review and Request for Hearing filed by Petitioner Rajbir Singh, d/b/a RK Petroleum, LLC is hereby **DISMISSED**, and the Indiana Department of Environmental Management's February 2, 2009 Motion to Dismiss is hereby **GRANTED**.

You are further advised that, pursuant to I.C. § 4-21.5-5, *et seq.*, this Final Order is subject to judicial review. Pursuant to I.C. § 4-21.5-5, 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 26th day of June, 2009 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge