

STATE OF INDIANA ) MARION SUPERIOR COURT  
 )SS: ENVIRONMENTAL DIVISION  
 COUNTY OF MARION ) CAUSE NO. 49F12-1404-MI-000723

GARY/CHICAGO INTERNATIONAL )  
 AIRPORT AUTHORITY, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 INDIANA OFFICE OF ENVIRONMENTAL )  
 ADJUDICATION, INDIANA DEPARTMENT )  
 OF ENVIRONMENTAL MANAGEMENT, )  
 THOMAS EASTERLY, in his official capacity )  
 as Commissioner of the Indiana Department of )  
 Environmental Management, and )  
 GREENTREE ENTERPRISES, LLC #2, )  
 )  
 Respondents. )

**FILED**  
 MAY 14 2015 (232)  
*Myla A. Eldridge*  
 CLERK OF THE MARION CIRCUIT COURT

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**  
**ON MOTION TO VACATE THE OFFICE OF ENVIRONMENTAL**  
**ADJUDICATION'S MARCH 7, 2014 FINAL ORDER**

This matter came before the Court on Petitioner Gary/Chicago International Airport Authority's ("Gary/Chicago Airport") Motion to Vacate the Office of Environmental Adjudication's March 7, 2014 Final Order. The court considered the parties' briefs, the evidence in the administrative record, and the oral argument presented on February 27, 2015. The court thanks the parties for their able advocacy.

Based on the following findings of fact and conclusions of law, the court GRANTS the Gary/Chicago Airport's Motion to Vacate. It is ORDERED that the Office of Environmental Adjudication's Final Order of March 7, 2014, is VACATED, and this matter is REMANDED to the Office of Environmental Adjudication with instructions that the Gary/Chicago Airport's petition for administrative review was timely filed.

14-03475  
 TJS AAW

## FINDINGS OF FACT

1. On July 18, 2012, Greentree Enterprises, LLC #2 (“Greentree”) submitted an application to the Indiana Department of Environmental Management (“IDEM”) for an Industrial Waste Products Processing and Marketing and Distribution Permit (“Permit”) to process, market, and/or distribute approximately 5,000 tons of food compost per year at 355 North Clark Road in Gary, Indiana. [Certified Copy of Agency Record, dated April 29, 2014 (“Rec.”), at pp. 125-7.]

2. The proposed location of this food composting facility is in close proximity to the approach and departure airspace of the Gary/Chicago Airport. [*Id.* at p. 125.]

3. On September 7, 2012, the Gary/Chicago Airport provided comments to IDEM regarding the application and challenging the proposed location of the composting facility because of its proximity to a Gary/Chicago Airport runway. [*Id.* at pp. 198-9.]

4. The Gary/Chicago Airport’s concern focused on the odor emanating from composting facilities that is likely to attract flies, rodents, birds, and other hazards directly into the flight paths of planes approaching and departing from the Gary/Chicago Airport. [*Id.*]

5. The Gary/Chicago Airport also asserted the proposed location would violate a Federal Aviation Administration directive on Hazardous Wildlife Attractions on or near Airports (AC No.: 150/5200-33B). [*Id.* at p. 198.] This directive addresses the need to establish buffer zones to prevent enticements for wildlife to come into airspace transited by airplanes. [*Id.*] The directive recommends a distance of five miles if the feature attracting wildlife could cause wildlife movement into or across approach or departure airspace. [*Id.* at 199.]

6. On March 19, 2013, the IDEM issued the Permit to Greentree. [*Id.* at pp. 80-93.]

7. The IDEM also issued Public Notice No. 13-03-C-PI, which provided the deadline to appeal the issuance of the Permit to Greentree was April 10, 2013. [*Id.* at pp. 16-17.]

8. On March 26, 2013, the IDEM submitted a Publisher's Claim to give public notice in the local newspaper. [*Id.* at p. 19.] This notice provided April 10, 2013, as the deadline to appeal the Permit decision. [*Id.*]

9. On March 27, 2013, Peter Julovich, a City of Gary employee, sent an email to Lauren Riga, another City of Gary employee stating, "We have until April 10, 2013 to challenge the decision . . . ." [*Id.* at p. 14.] This email also copied Steve Landry, the former director of the Gary/Chicago Airport. [*Id.*]

10. On April 10, 2013, the Gary/Chicago Airport submitted its petition for administrative review to the Office of Environmental Adjudication ("OEA"). [*Id.* at pp. 195-97.] The Gary/Chicago Airport amended its petition for review on October 31, 2013. [*Id.* at pp. 125-50.]

11. On December 2, 2103, the IDEM moved to dismiss the Gary/Chicago Airport's petition for administrative review based on the assertion that it was not timely filed. [*Id.* at pp. 76-9.]

12. On December 4, 2013, Greentree joined the IDEM's motion to dismiss. [*Id.* at pp. 74-5.]

13. On December 9, 2013, the IDEM withdrew its motion and acknowledged its discovery that the Public Notice the IDEM issued stated the appeals deadline as April 10, 2013. [*Id.* at pp. 66-70.]

14. Greentree filed a Motion for Ruling on February 7, 2013. [*Id.* at pp. 51-52.]

15. On March 7, 2014, the OEA issued its Order granting the motion for dismissal, concluding the Gary/Chicago Airport's petition for administrative review was not timely filed ("OEA's Order"). [*Id.* at pp. 40-45.]

16. The Gary/Chicago Airport filed a Motion to Reconsider the Order on April 3, 2014 [*id.* at pp. 26-39], and filed its Verified Petition for Judicial Review on April 4, 2014.

17. During oral argument before the court on February 27, 2015, Greentree's counsel admitted there was no evidence in the administrative record showing notice of the Permit was provided to the Gary/Chicago Airport on March 19, 2013, as a separate, legal entity and as stated in the OEA's Order.

### CONCLUSIONS OF LAW

#### A. Applicable Legal Standards.

1. Indiana's Administrative Orders and Procedures Act provides an agency action may be set aside if the court:

determines that a person seeking judicial relief has been prejudiced by an agency action that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d).

2. A court will "give deference to an administrative agency's findings of fact, if supported by substantial evidence, but review questions of law *de novo*." *Huffman v. OEA*, 811 N.E.2d 806, 809 (Ind. 2004).

3. "In reviewing an administrative decision, [the court] must determine 'whether substantial evidence, together with any reasonable inferences that flow from such evidence, support the [OEA's] findings and conclusions.'" *Jennings Water, Inc. v. OEA*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009) (quoting *Zeller Elevator Co. v. Slygh*, 796 N.E.2d 1198, 1206 (Ind. Ct. App. 2003)).

4. According to Indiana law, aggrieved parties must submit their petitions for administrative review within fifteen (15) days after being given notice of the decision either to issue or deny the permit. Ind. Code § 4-21.5-3-7(a) (“To qualify for review . . . a person must petition for review in a writing that . . . is filed . . . with the ultimate authority for the agency issuing the order within fifteen (15) days after the person is given notice of the order[.]”); Ind. Code § 13-15-6-1(a) (“Not later than fifteen (15) days after being served the notice provided by the commissioner under IC 13-15-5-3 . . . any other person aggrieved by the commissioner’s action . . . may appeal the commissioner’s action to the office of environmental adjudication[.]”).

5. Service may be made by United States mail, personal service, electronic mail, or any other method approved by the Indiana Rules of Trial Procedure, including service by publication for individuals whose whereabouts are unknown. Ind. Code § 4-21.5-3-1(b).

**B. The OEA erred in concluding the City of Gary and the Gary/Chicago Airport received notice on March 19, 2013.**

6. The OEA concluded the City of Gary and the Gary/Chicago Airport received notice of the IDEM’s decision to issue the Permit to Greentree on March 19, 2013. [Rec. at p. 44, ¶ 14.] The OEA appears to have inferred the Permit was signed and served on the same date, although there is no evidence in the administrative record to support this conclusion.

7. The administrative record only shows the Permit was issued by the IDEM on March 19, 2013, not that it was served on any party on March 19, 2013. There is no evidence in the record notice was provided to any party on March 19, 2013.

8. The evidence in the record, taken together with all reasonable inferences construed in favor of the non-moving party, the Gary/Chicago Airport, demonstrates both the City of Gary and the Gary/Chicago Airport were provided notice of the Permit on March 26, 2013. *See In re: Elson’s Land Corp., LLC*, 2011 OEA 58, 2011 WL 2691375, \*6 (Ind. Off. of Env. Adjud. April

18, 2011) (citing *Meyers v. Meyers*, 861 N.E.2d 704, 705-06 (Ind. 2007)) (stating “all reasonable inferences must be drawn in favor of the non-moving party”).

9. The IDEM’s Public Notice to entities that commented on the Permit application stated the deadline to appeal the Permit was April 10, 2013, implying the Public Notice issued on March 26, 2013, or fifteen (15) days before April 10.

10. The IDEM published notice in the local newspaper on March 26, 2013. The notice stated April 10, 2013, as the deadline to appeal the Permit. The newspaper publication was the first notice the Gary/Chicago Airport received of the Permit’s issuance and the deadline to appeal the decision.

11. The OEA’s decision in *Elson’s Land* decision is similar to the facts in this case. In *Elson’s Land*, the IDEM issued a permit on November 10, 2010. 2011 WL 2691375, \*1. The petitioner stated he did not receive notice of the permit decision until December 1, 2010 and asserted he filed a timely appeal on December 1, 2010. *Id.* at \*2. The permittee insisted the petitioner received notice on November 10, 2010, which, if true, would render his appeal untimely. *Id.* at \*8. The only evidence supporting a November 10 notice date was argument from the permittee’s counsel. *Id.* The OEA concluded the petitioner received notice on December 1 and that his appeal was timely filed. *Id.*

12. In this case, the only evidence the Gary/Chicago Airport received notice of the Permit on March 19, 2013, was the IDEM’s argument by counsel, which has been withdrawn. There is no evidence in the administrative record supporting conclusion the Gary/Chicago Airport received notice on March 19, 2013.

13. Greentree’s counsel acknowledged during oral argument there is no evidence in the administrative record indicating the Gary/Chicago Airport received notice on March 19, 2013.

14. The evidence in the administrative record supports the conclusion the Gary/Chicago Airport and the City of Gary received notice of the Permit on March 26, 2013. The OEA's conclusion both entities received notice on March 19, 2013 is unreasonable and is not based on substantial evidence.

C. **The OEA erred in concluding the Gary/Chicago Airport did not provide legal authority showing it was entitled to notice.**

15. The OEA concluded the Gary/Chicago Airport did not provide legal authority showing the IDEM was required to serve notice of the decision to issue Greentree's Permit on the Gary/Chicago Airport. [Rec. at p. 43, ¶ 10.]

16. The IDEM and Greentree never alleged the Gary/Chicago Airport was not entitled to notice, and whether Gary/Chicago Airport was entitled to notice was not a contested issue for the OEA to decide.

17. Indiana Code § 13-15-5-3 provides, with respect to the issuance or denial of a permit, "[n]otice of the commissioner's action shall be served upon . . . [e]ach person who submitted written comments . . . ."

18. In its petition for administrative review, the Gary/Chicago Airport stated it submitted comments to the IDEM opposing its decision to issue the Permit on September 7, 2012. [Rec. at p. 196.]

19. Indiana Trial Rule 9.1(E) provides matters of which judicial notice may be taken do not need to be stated in a pleading. The OEA, as a tribunal of this state, takes judicial notice of Indiana statutes. *See Apple v. Apple*, 274 N.E.2d 402, 410 (Ind. Ct. App. 1971).

20. The Gary/Chicago Airport's right to receive notice was apparent from the face of its petition for administrative review.

21. The OEA's conclusion the Gary/Chicago Airport did not demonstrate it was entitled to notice is not supported by evidence in the record and is contrary to law.

22. The IDEM published a Public Notice in the local newspaper on March 26, 2013, providing notice of its decision to issue the Permit.

23. Even if the Gary/Chicago Airport had not demonstrated it was entitled to notice, the evidence in the administrative record shows it was provided notice no earlier than March 26, 2013.

**D. The OEA erred in concluding the City of Gary and the Gary/Chicago Airport are sufficiently interrelated for purposes of notice.**

24. The OEA concluded the Gary/Chicago Airport is sufficiently interrelated with the City of Gary to make service on the City equivalent to service on the Airport. The OEA stated:

Petitioner Gary Airport does not establish its relationship to City of Gary, but it is reasonable to infer from Petitioner Gary Airport's argument on actual notice that City of Gary was a party which IDEM was required to serve, which IDEM did serve, and who is sufficiently interrelated to Gary Airport such that service on the City would be germane to calculating service on the Airport.

[Rec. at p. 44, ¶ 13.]

25. The Gary/Chicago Airport was created by Indiana Code § 8-22-1 and a 1995 agreement known as the Chicago Gary Airport Compact pursuant, which provides revenues to the Airport from Chicago's O'Hare and Midway airports.

26. The Gary/Chicago Airport, as an airport authority, is both a separate legal entity from the City of Gary and a political subdivision under Indiana Code § 36-1-2-13.

27. In *Apple*, the Indiana Court of Appeals held:

As to statutes, the courts of this state take judicial notice of our statutes. It is a matter of judicial knowledge and need not be pleaded or proved. Our courts are compelled to know the law in effect now and at the time a cause of action arose. . . .



*Apple*, 274 N.E.2d at 410; *see also, e.g., In re: Commissioner, IDEM Case No. 2004-14134-S Pennville, Jay County, Ind. v. Landers*, Cause No. 06-S-E-3832, 2009 WL 4429083, \*5 (Ind. Off. Env. Adjud. July 30, 2009) (taking judicial notice of Indiana statutes).

28. The Gary/Chicago Airport was not required to plead that it is a separate entity from the City of Gary, as the OEA is responsible for knowing Indiana statutes.

29. The only evidence advanced by Greentree to suggest the City of Gary and the Gary/Chicago Airport are interrelated is the email sent on March 27, 2013, between two employees of the City that also copied an Airport employee. Peter Julovich, a City employee, sent an email to Lauren Riga, another City employee, stating: “We have until April 10, 2013 to challenge the decision. . . .” Mr. Julovich also copied Steve Landry, the former director of the Gary/Chicago Airport, on that email. Greentree argues the pronoun “we” in that email demonstrates the City and the Airport are interrelated entities. It does not and cannot. Using a particular pronoun does not transform two separate, legal entities into one interrelated entity as a matter of law. The email does not support the OEA’s decision the City of Gary and the Gary/Chicago Airport are sufficiently interrelated to abrogate the IDEM’s statutory obligation to give notice of its decision to issue the Permit to the Airport.

30. There is no evidence in the administrative record the City of Gary and the Gary/Chicago Airport are interrelated as a matter of law. The OEA’s conclusion is not supported by substantial evidence and is clearly erroneous.

**E. The OEA erred in concluding it lacks subject matter jurisdiction over reviewing the timeliness of appeals of the IDEM’s decision.**

31. The OEA concluded it lacks subject matter jurisdiction over appeals that are not timely filed.

32. As our Court of Appeals instructs, “Subject matter jurisdiction refers to jurisdiction over the class of cases to which the particular case belongs. ‘The office of environmental adjudication is established to review . . . decisions of the commissioner of the department of environmental management.’” *OEA v. Kunz*, 714 N.E.2d 1190, 1194 (Ind. Ct. App. 1999).

33. The timely filing of a petition for administrative review of decisions by the IDEM is a procedural requirement, but the timeliness of a petition for review does not affect the subject matter jurisdiction of the OEA. *Id.* at 1193-94 (holding that several procedural requirements in Ind. Code § 13-15-6 were procedural matters and not jurisdictional prerequisites); *see also Blinn v. Dyer*, 19 N.E.3d 821 (Ind. Ct. App. 2014) (explaining the failure to file timely notice of appeal is not a jurisdictional matter and that a court may allow a case to proceed despite untimely notice); *Packard v. Shoopman*, 852 N.E.2d 927, 931-32 (Ind. 2006) (“Because the timeliness of filing does not affect the subject matter jurisdiction of the Tax Court, any objection to the timeliness of filing is a procedural rather than jurisdictional error that can be waived . . . Timely filing relates to neither the merits of the controversy nor the competence of the court to resolve it.”).

34. The OEA was established by our Legislature and given exclusive competence and authority to review decisions of the IDEM. The OEA’s conclusion it lacked subject matter jurisdiction is contrary to Indiana law and clearly erroneous.

**F. Conclusion**

35. The evidence in the administrative record, taken together with all reasonable inferences construed in favor of the Gary/Chicago Airport, supports the Gary/Chicago Airport’s argument it received notice of the IDEM’s decision to issue the Permit no earlier than March 26, 2013.

36. The Gary/Chicago Airport appealed the IDEM's decision by filing its petition for administrative review on April 10, 2013, fifteen days after receiving notice and within the period provided for challenging a permit decision.

37. The Gary/Chicago Airport filed a timely petition for administrative review.

38. The Gary/Chicago Airport and the City of Gary are separate, legal entities as a matter of law.

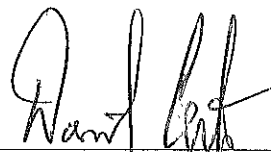
39. The Legislature conferred on the OEA the exclusive competence and authority to review permit decisions by the IDEM, including petitions for review that are alleged to be untimely filed.

40. The timeliness of a petition for review of decisions by the IDEM does not impair or abrogate the subject matter jurisdiction the OEA.

41. The court deeply regrets our legal lexicon lacks a courteous way to articulate the legal standard for decisions that are "clearly erroneous," as the court admires the public service rendered by the administrative law judges of the OEA.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that the Gary/Chicago Airport's Motion to Vacate the Office of Environmental Adjudication's Final Order dated March 7, 2014, is GRANTED. This matter is REMANDED to the Office of Environmental Adjudication with instructions that the Gary/Chicago Airport's petition for administrative review filed on April 10, 2013, was timely filed.

So ordered this 14<sup>th</sup> day of May, 2015



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Judge David J. Certo  
Marion Superior Court,  
Environmental Division