

Objection to the Issuance of Hazardous Waste Permit No. INR000128975
ShoreMet, LLC
Nabb, Scott County, Indiana
2016 OEA 18, (14-S-J-4755)

OFFICIAL SHORT CITATION NAME: When referring to 2016 OEA 18 cite this case as
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TOPICS:

summary judgment

aggrieved

adversely affected

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I.C. § 4-21.5-3-7

Huffman v. Indiana Office of Environmental Adjudication

Hauer v. BRDD of Indiana, Inc., 654 N.E.2d 316

Nat'l Wine & Spirits Corp. v. Indiana Alcohol & Tobacco Comm'n., 945 N.E.2d 182

Wine & Spirits Wholesalers of Indiana v. Indiana Alcoholic Beverage Commission, 556 N.E.2d
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PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: April Lashbrook, Esq.

Petitioner: Anthony Sullivan, Esq.; Cheryl Gonzalez, Esq.;
Barnes & Thornburg

Permittee/Respondent: Andrea M. Salimbene, Esq.; David Nash, Esq.; Amy Romig, Esq.;
Plews Shadley Racher & Braun LLP

ORDER ISSUED:

May 27, 2016

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
HAZARDOUS WASTE PERMIT)
NO. INR000128975)
SHOREMET LLC)
NABB, SCOTT COUNTY, INDIANA)
_____)) CAUSE NO. 14-S-J-4755
World Resource Company,)
 Petitioner,)
ShoreMet, LLC,)
 Permittee/Respondent,)
Indiana Department of Environmental Management,))
 Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter comes before the Office of Environmental Adjudication (the OEA) on ShoreMet LLC’s Motion for Summary Judgment and World Resources Company’s Motion for Summary Judgment Based On Indirect Ownership. The presiding Environmental Law Judge (the ELJ), having read the motion, responses, replies and evidence, enters the following findings of fact, conclusions of law and final order.

Summary of Decision

ShoreMet LLC (ShoreMet) requests summary judgment on two issues: (1) whether World Resources Company (WRC) is aggrieved or adversely affected by the Exemption; and alternatively (2) that WRC’s objections to the issuance of the Exemption are meritless. WRC moves for summary judgment and asserts that the Indiana Department of Environmental Management’s (IDEM) erroneously approved ShoreMet’s good character disclosure. In its response to both motions, the Indiana Department of Environmental Management (IDEM) also raises the issue of whether WRC is aggrieved or adversely affected. The ELJ concludes that WRC is not aggrieved or adversely affected and that summary judgment must be entered in ShoreMet and IDEM’s favor.

FINDINGS OF FACT AND STATEMENTS OF THE CASE

1. On October 21, 2013, ShoreMet filed its application for a RCRA Part B Permit to store F006/F019 hazardous waste.

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2. On August 27, 2014, the IDEM issued Hazardous Waste Management Permit No. INR000128975 (the Permit) to ShoreMet.
3. WRC filed its Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of RCRA Permit on September 11, 2014. This matter was assigned Cause No. 14-S-J-4755.
4. WRC claims that is aggrieved or adversely affected by IDEM's decisions because it is ShoreMet's competitor and that its "economic interests are harmed because ShoreMet's RCRA permit circumvents or avoids the full panoply of regulatory and permitting requirements of RCRA."¹
5. Further, WRC states it is "aggrieved or adversely affected by the issuance of the RCRA Permit in a vacuum, since it allows ShoreMet to operate a plant in a manner inconsistent with fundamental principles of RCRA, thereby putting WRC at a competitive disadvantage in the marketplace ..."²
6. On August 27, 2014, as part of the determination to issue the Permit, IDEM determined that ShoreMet complied with the good character requirements in Indiana Code (I.C.) § 13-19-4.
7. WRC filed its Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of Good Character Determination on September 11, 2014. This case was assigned Cause No. 14-S-J-4756.
8. WRC alleges that it is aggrieved or adversely affected because "the Good Character Determination is a necessary prerequisite to the issuance of a lawful RCRA Permit, and because WRC's competitive and contractual interests would be undermined if IDEM issued a faulty Good Character Determination to ShoreMet..."³
9. In response to a request from ShoreMet, IDEM determined that certain information submitted by ShoreMet should be treated as confidential. IDEM notified ShoreMet on April 20, 2015. WRC became aware of the determination on May 5, 2015⁴ and filed its Petition for Adjudicatory Hearing and Administrative Review on May 20, 2015. This case was assigned Cause No. 15-S-J-4796.
10. WRC claims to be aggrieved or adversely affected by IDEM's confidentiality determination for the following reasons:

¹ Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of RCRA Permit, filed September 11, 2014, page 2.

² Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of RCRA Permit, filed September 11, 2014, page 3.

³ Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of Good Character Determination, filed September 11, 2014, page 4.

⁴ Petition for Adjudicatory Hearing and Administrative Review, filed May 20, 2015, page 1.

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First, IDEM harmed WRC's legal right to be notified of the issuance of the Confidentiality Determination. Second, IDEM harmed WRC's legal right to inspect public records. Third, if IDEM grants ShoreMet's request for an exemption from classification as a solid waste, ShoreMet has asserted it will begin operating and will directly compete with WRC for customers.⁵

11. ShoreMet filed a request to exempt F006 and F019 hazardous wastes from classification as solid waste on April 24, 2014 (the Exemption). ShoreMet intended to process the wastes to produce a metal concentrate that would be sold to metal smelters. The Exemption would excuse ShoreMet from having to transport the processed metal concentrate as a hazardous waste.
12. IDEM approved the Exemption on August 27, 2015. WRC filed its Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of Exemption from Classification as a Solid Waste on September 11, 2015. This matter was assigned Cause No. 15-S-J-4830.
13. WRC claims it is aggrieved or adversely affected by issuance of the exemption because "ShoreMet's partial-reclamation operations will directly compete with WRC for customers." Further, "WRC is aggrieved or adversely affected by its inability to properly evaluate the Exemption due to improper withholding of critical application information from public review. In addition, WRC is aggrieved by the improper issuance of the required approvals for ShoreMet's operations, such as the Exemption, because improper approvals question the legitimacy and environmental protections afforded by the exemption criteria for partial-reclamation variances ..."⁶
14. WRC has produced no evidence that it has suffered pecuniary harm as a result of IDEM's decision to issue the various decisions at issue in this cause.
15. Cause Nos. 14-S-J-4755, 14-S-J-4756, 15-S-J-4796 and 15-S-J-4830 were consolidated under Cause No. 14-S-J-4755 on October 26, 2015.
16. WRC and ShoreMet each filed a motion for summary judgment on February 26, 2016. ShoreMet, WRC and IDEM filed responses on March 28, 2016. WRC and IDEM filed replies on April 12, 2016.

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.*

⁵ Petition for Adjudicatory Hearing and Administrative Review, filed May 20, 2015, page 4.

⁶ Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of Exemption From Classification as a Solid Waste, filed September 11, 2015, page 3-4.

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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. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the environmental law Judge (the “ELJ”), and deference to the IDEM’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d).
4. Both WRC and ShoreMet have requested summary judgment. The OEA shall consider a motion for summary judgment “as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.” I.C. § 4-21.5-3-23. Trial Rule 56 states, “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 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). “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, 703-704, (Ind. Ct. App. 1992) *see also*; *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).
5. Although IDEM has not moved for summary judgment, pursuant to Ind. T.R. 56(B), “the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by any such party.”
6. The Indiana Supreme Court, in *Huffman v. Indiana Office of Environmental Adjudication, et al.*, 811 N.E.2d 806 (Ind. 2004), addressed the definition of “aggrieved or adversely affected”. Huffman had challenged the issuance of a permit to Eli Lilly and Company to discharge pollutants into Indiana's waters. Huffman owned the corporation that had one unit of and was the managing member of the corporation that owned a property adjacent to the property from which the discharge would occur. The lower courts dismissed Huffman's objection to the issuance of the permit because of a lack of factual support for the allegations that Huffman or the property might be harmed. Huffman had alleged that her management duties of the neighboring property required her to be present on the property with frequency, and thus she might be exposed to health risks not addressed by the permit issued by IDEM. In response, the permittee alleged that due to the downstream location of the discharge point, no impact to Huffman was possible. Huffman's petition was challenged by a motion to dismiss supported by facts outside Huffman's pleadings, and thus was required to be treated by the Court as a Motion for Summary Judgment. The Indiana Supreme Court ruled that Huffman's dismissal by the lower courts was not supported by substantial evidence.

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7. The *Huffman* Court held that “whether a person is entitled to seek administrative review depends upon whether the person is “aggrieved or adversely affected” . . . and that the rules for determining whether the person has “standing” to file a lawsuit do not apply” and further found that “imposition of the "judicial doctrine of standing" inappropriate here because AOPA itself identifies who may pursue an administrative proceeding.” *Huffman* at 809.
8. The Court held that “Essentially, to be "aggrieved or adversely affected," a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest.” The Court defined “aggrieved” as “[A] substantial grievance, a denial of some personal or property right or the imposition upon a party of a burden or obligation. . . The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal.” *Huffman* at 810.
9. The Court further interpreted the language of I.C. § 4-21.5-3-7 as not allowing administrative review based upon a generalized concern as a member of the public. To the extent that WRC alleges that IDEM failed to properly apply the regulations, those allegations do not support a determination that WRC is individually aggrieved or adversely affected. In particular, WRC’s allegations that the Exemption was improperly issued because “improper approvals question the legitimacy and environmental protections afforded by the exemption criteria for partial-reclamation variances . . .”⁷ do not support a finding that WRC is itself aggrieved or adversely affected. By raising generalized concerns to the public, not individualized concerns to WRC, WRC fails to raise a genuine issue of material fact that it is aggrieved or adversely affected.
10. The Court remanded Huffman's case back to OEA to provide Huffman with an opportunity to present additional evidence of her health concerns. The Court states “Particularly because the OEA never gave Huffman an opportunity to provide additional evidence or to develop the argument more fully, it was impossible for the OEA to tell what Huffman’s personal health claim was and whether it had any merit. Dismissing the claim was therefore premature.” *Id.* at 815.
11. In *Wine & Spirits Wholesalers of Indiana v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. Ct. App. 1990), Wine & Spirits Wholesalers of Indiana, the National Wine & Spirits Corporation and The Olinger Distributing Company (Wholesalers) brought an action challenging the permit issued by the Indiana Alcoholic Beverage Commission (IABC) to Indiana Wholesale Wine & Liquor Company (Indiana Wholesale). The trial court concluded that Wholesalers did not have standing to bring the suit. The appellate court affirmed that decision, saying:

⁷ Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of Exemption from Classification as a Solid Waste, filed September 11, 2015, page 3-4.

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Wholesalers are not interested under a deed, will, written contract or other writing constituting a contract. Neither do Wholesalers have rights, status or other legal relations that have been affected by a statute, municipal ordinance, contract or franchise. The rights, status or legal relationship Wholesalers have are in the continued validity of their own permits, licenses to wholesale wine and liquor in competition with all other holders of similar licenses. These rights, status and legal relationships have not been altered by the IABC's issuance of the subject permit. Wholesaler's asserted harm, "loss of business, loss of profit, and confusion of the wholesale liquor and wine market in Indiana" are not rights protected by their permits.

12. In *Hauer v. BRDD of Indiana, Inc*, 654 N.E.2d 316 (Ind. Ct. App. 1995), the Indiana Court of Appeals overturned the trial court's determination that BRDD of Indiana, Inc. d/b/a Family Fireworks Co. (Family Fireworks) had standing to bring suit against the State Fire Marshall to prevent it from issuing certificates of compliance to competitors. In this case, the appellate court held that *Wholesalers* was applicable. Family Fireworks argued that it had due process rights to contest the issuance of "unlawful" certificates. However, the court rejected these arguments, distinguishing the fireworks situation from case law that analyzed factual situations in which companies challenged competitors on the basis of exclusive territories granted by the legislature. In the cases involving power companies, the court determined that the power companies had standing because their property interests arose from the exclusive territories and "exclusive business the Indiana legislature granted to power companies..." *Id.* at 319.
13. The appellate court went to hold that fireworks laws "do not include any right of business exclusivity" and the laws "are not designed to protect the market share of fireworks dealers, and nothing within the statutory framework of the fireworks laws establishes any right to sales exclusivity or affords any protection from completion." *Id.* at 319. The court concludes with "Family Fireworks asserted damages of loss of business and loss of market share are not rights protected by their permits... Family Fireworks' permit to sell fireworks does not include the right to be protected from competitors. Family Fireworks has no property interest in the certificates of compliance issued to its competitors, and therefore has no standing..." *Id.* at 319.
14. In *Nat'l Wine & Spirits Corp. v. Indiana Alcohol & Tobacco Comm'n*, 945 N.E.2d 182 (Ind. Ct. App. 2011), the Court of Appeals affirmed the dismissal of National Wine & Spirits Corporation's petition for judicial review for lack of standing. As this was a case brought under I.C. § 4-21.5-3, a petitioner must be aggrieved or adversely affected in to have standing for judicial review. This court applied the decisions discussed above and used the *Huffman* standard for aggrieved or adversely affected. It held that National Wine was not aggrieved or adversely affected and that "what National Wine actually seeks is to prevent a competitor from being granted a permit." *Id.* at 186.

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15. The ELJ ruled in a previous case⁸ that WRC could be aggrieved or adversely affected by the issuance of a permit to a competitor. The ELJ relied upon federal and Oklahoma case law. However, upon due reconsideration, the case law pointed out by IDEM clarifies how Indiana defines “property interest”. In particular, *Nat’l Wine* is dispositive as it directly addresses the issue of whether a competitor can be aggrieved or adversely affected under the standard expressed in *Huffman*. The ELJ concludes that the case law discussed above is directly applicable binding precedent and is dispositive of this issue.
16. WRC’s position is identical to Wholesalers, National Wine and Family Fireworks. WRC alleges that it is aggrieved or adversely affected by IDEM’s decision to allow ShoreMet to operate the same business. However, neither the applicable law nor the permits at issue in this case grant territorial exclusivity. WRC cannot show that it has a property interest in permits issued to competitors. Further, WRC cannot show that the issuance of the various IDEM decisions constitute “a denial of some personal or property right or the imposition upon a party of a burden or obligation. . . The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal.” *Huffman* at 810. It is clear from the applicable Indiana case law that WRC is not aggrieved or adversely affected by possible loss of business.
17. In *Huffman*, the Supreme Court remanded the case back to the Office of Environmental Adjudication to give the Petitioner an opportunity to present evidence of how she had been affected. This is not necessary in this instance. ShoreMet has introduced evidence that WRC has not suffered any harm. WRC has failed to present reliable and relevant evidence that it actually is or will be affected. In this case, even though evidence of business losses would not be sufficient to show that WRC was aggrieved or adversely affected, there is no genuine issue of material fact.
18. There being no genuine issue as to any material fact, summary judgment in ShoreMet’s and IDEM’s favor is appropriate.
19. As the conclusion that WRC is not aggrieved or adversely affected is dispositive, the ELJ declines to address the remaining issues.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is entered in ShoreMet LLC’s and the Indiana Department of Environmental Management’s favor. World Resource Company’s petitions for review are DISMISSED. All further proceedings are VACATED.

⁸ Objection to the Issuance of F006/F019 Wastewater Treatment Sludge Exemption of Classification as a Solid Waste No. INR000128975, ShoreMet LLC, Cause No. 11-S-J-4447.

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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. 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 27th day of May, 2016.

Hon. Catherine Gibbs
Environmental Law Judge