

**OBJECTION TO THE ISSUANCE OF CONFINED
FEEDING OPERATION PERMIT ISSUED
FARM ID #6901 / ANIMAL WASTE AW#6567
LEEDY FAMILY PORK, LLC
MACY, MIAMI COUNTY, INDIANA
2017 OEA 1, (16-S-J-4904)
and
OBJECTION TO THE ISSUANCE OF CONFINED
FEEDING OPERATION PERMIT ISSUED
FARM ID #6902 / ANIMAL WASTE AW#6568
PINE RIDGE PORK, LLC
MACY, MIAMI COUNTY, INDIANA
2017 OEA 1, (16-S-J-4911)**

OFFICIAL SHORT CITATION NAME: When referring to 2017 OEA 1 cite this case as
Leedy Family Pork, LLC and Pine Ridge Pork, LLC, 2017 OEA 1.

TOPICS:

pork production	Evidentiary hearing
barn construction	unrepresented party
mail	I.C. § 4-21.5-3-7(a)
fail to serve	I.C. § 4-21.5-3-24
complete filing	I.C. § 13-13, <i>et seq.</i>
Petition for Administrative Review	I.C. § 13-15-6-2, -3
copy of the petition	315 IAC 1-3-2(b)
complete copy of IDEM's action	315 IAC 1-3-7
Motion to Dismiss	<i>Goosens v. Goosens</i> , 829 N.E.2d 36, 43
Notice of Proposed Order of Dismissal	(Ind. Ct. App. 2005)

PRESIDING LAW JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Donald Snemis, Esq.
Petitioner: Ray Reichard, pro se
Permittee: Alex C. Intermill, Esq.; Daniel P. McInerny, Esq.; Bose McKinney & Evans, LLP

ORDER ISSUED:

January 12, 2017

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:)
)
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FARM ID #6901 / ANIMAL WASTE AW#6567)
LEEDY FAMILY PORK, LLC)
MACY, MIAMI COUNTY, INDIANA)
_____) CAUSE NO. 16-S-J-4904
Ray Reichard,)
Petitioner,)
Leedy Family Pork, LLC,)
Permittee/Respondent,)
Indiana Department of Environmental Management,)
Respondent)

AND)
)
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

These matters came before the Office of Environmental Adjudication (the “Court” or the “OEA”) on an evidentiary hearing on Permittee/Respondent Leedy Family Pork, LLC’s Verified Motion to Dismiss and on Permittee/Respondent Pine Ridge Pork, LLC’s Verified Motion to Dismiss, and related responses and objections. In sum, Petitioner Ray Reichard objected to IDEM pork production barn construction and operating permits issued to two farms, but the parties dispute whether the similar petitions for administrative review achieved minimum legal requirements to proceed on their merits. And the Court, being duly advised and having read the motions and record, which documents are a part of the Court’s record, enters the following Findings of Fact, Conclusions of Law and Final Orders.

FINDINGS OF FACT

1. On May 24, 2016, the Indiana Department of Environmental Management (the IDEM) issued its Confined Feeding Operation Approval with Construction for Farm ID No. 6901, Animal Waste No. 6567 (the Leedy Approval) to Permittee/Respondent, Leedy Family Pork, LLC (“Leedy”), assigned OEA Cause 16-S-J-4094. Per IDEM’s May 24, 2016 Approval, the approved site is at 2514 West County Road 1075 North, Macy, IN (“Leedy Site”). A copy of the first page of the May 24, 2016 Approval was filed with the Court by Petitioner Ray Reichard, as an attachment to his June 10, 2016 letter requesting a hearing for appeal of the Approval. *OEA case file in cause 4904, June 10, 2016 Petition for Review filed by Petitioner Reichard, page 3.*
2. On June 10, 2016 Petitioner Reichard filed a similar challenge to another permit issued on May 24, 2016 to Pine Ridge Pork, LLC, Farm ID No. 6902, Animal Waste No. 6568, (“Pine Ridge Approval”) assigned OEA Cause No. 16-S-J-4911 (“Pine Ridge case”). Per IDEM’s May 24, 2016 Approval, the approved site is at 8716 North County Road 100 West, Macy, IN (“Pine Ridge Site”). *OEA case file in cause 4911 June 10, 2016 Petition for Review filed by Petitioner Reichard, page 3.*

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3. On June 10, 2016, Petitioner Ray Reichard filed separate letters with OEA requesting a hearing for appeal of the Leedy Approval, *see Ex. B*, and of Pine Ridge Approval. *see Ex. A*. Petitioner Reichard's June 10, 2016 letters contained the following items¹:
- *Pages 1, 2*: Cover letter requesting a hearing for appeal of the approval, listing 9 of "just a few" of Petitioner Reichard's "issues" with the Approval and with statewide environmental quality. The cover letter referenced owner, Wesley Leedy. The cover letter did not include a return address or phone number for Petitioner, nor did it indicate that other entities were sent the contents.
 - *Page 3*: First page of IDEM's Approval issued to the respective farm (first page references enclosures, not included).
 - *Pages 4-6*: Photocopy of newspaper article, Gerber, Carson, *Pigs vs. Produce Hog barn proposal has greenhouse operator concerned*, Kokomo Trib., n.d.
 - *Page 7*: Photocopy of emails between "raycarley" and Scott Monroe, copied to others, concerning questions about the effect of hog barn odors on greenhouse produce.
 - *Pages 8 – 16*: Photocopy of article, Michael A. Jahne et al., *Bioaerosol Deposition to Food Crops near Manure Application: Quantitative Microbial Risk Assessment*, Journal of Environmental Quality, 666-673 (2016).
 - *Page 17*: Photocopy of email referencing Angie Brown, Senior Watershed Planner, IDEM Office of Water Quality, (recipient unnamed, but identified in testimony as Petitioner Reichard. *Tr. p. 36, lines 13 – 15*; author unnamed, *Tr. p. 37, lines 10 -23*), responding to an inquiry about the cost of cleaning up a watershed in portions of Miami County. The following website address is referenced at the bottom of page 17: <https://mail.google.com/mail/u/0/h/puoj1dazyuqw/?&th=154f2d8930f0c28e&ser=AIKcX5...> 5/27/2016.
 - *Page 18*: Response to Public Comments, Leedy Family Pork, LLC, Farm ID #6901, Pine Ridge Pork, LLC, Farm ID #6902, Page 4, with handwritten underlining and notes on bottom left side.
 - *Page 19*: Photocopy of envelope in which June 10, 2016 Petition arrived (no return address provided).

¹ Page numbers were printed in the bottom right corner of each page by the presiding environmental law judge.
2017 OEA 1, page 4

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4. Petitioner Reichard testified that he did not mail a copy of these documents to Leedy, *Tr. p. 39, lines 17 – 21*; or to Pine Ridge Pork, *Tr. p. 45, lines 2 -5*.
5. Petitioner Reichard testified that in the Leedy case, more (unspecified) documents were attached to his June 10, 2016 mailing. *Tr. p. 38, 4 – 13*). Petitioner Reichard’s June 10, 2016 filing in the Leedy case did not contain additional documents, its page 3 referred to the Leedy facility, the Court did not affix a page 19, and Petitioner’s return address was included on this transmittal envelope.
6. On June 25, 2016, Petitioner Ray Reichard filed a copy of pages 1, 2, above, with the handwritten addition of his return address and phone number (“Petition”). *Re: Leedy, Ex. 5; re: Pine Ridge, Ex. 6*.
7. In response to the Leedy, Petition, the Court’s June 17, 2016 Notice of Incomplete Filing and Order to Supplement Petition Ordered Petitioner Reichard to “file the following information within thirty (30) days of the date this order was issued.”: a “copy of the Petition must be sent to all parties, including the IDEM and the permittee.” and “The Petitioners must provide his/her complete address and telephone number.”
8. In response to the Pine Ridge Petition, the Court’s June 28, 2016 Notice of Incomplete Filing and Order to Supplement Petition Ordered Petitioner Reichard to “file the following information within thirty (30) days of the date this order was issued.”: “attach a complete copy of the Indiana Department of Environmental Management’s (“IDEM”) action to which Petitioner objects” and ordered that a “copy of the Petition must be sent to all parties, including the IDEM and the permittee.”
9. The Orders to Supplement Petition further provided that:
 - “If the Petitioners fail to provide the requested information, the matter will be dismissed and closed.” And
 - “A party must file all documents and pleadings with this office and all parties identified on the distribution list. Failure to do so may result in the judge not considering your document or pleading.”

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2017 OEA 1, (16-S-J-4911**

10. The Order's distribution list included three addresses: Petitioner, Permittee (as included on the portion of IDEM's Approval provided by Petitioner Reichard) and legal counsel for IDEM.
11. On August 5, 2016, Permittees Leedy and Pine Ridge filed Appearance of (the same) Counsel and a Verified Motion to Dismiss. Leedy's Verified Motion to Dismiss was based on Leedy's contention that it had not been served with Petitioner's Petition, constituting a failure to comply with the Court's June 17, 2016 Notice of Incomplete Filing and Order to Supplement Petition. Pine Ridge's Verified Motion to Dismiss was based on Pine Ridge's contention that it had not been served with Petitioner's Petition, constituting a failure to comply with the Court's June 28, 2016 Notice of Incomplete Filing and Order to Supplement Petition.
12. The Court's August 11, 2016 Notice of Proposed Order of Dismissal, issued in each case per I.C. § 4-21.5-3-24 and 315 IAC 1-3-7, ordered Petitioner Reichard as follows:

Within seven (7) days after the service of this "Proposed Order of Dismissal", the Petitioner may file a written motion identifying his attorney(s), if any, and further requesting that the Proposed Order of Dismissal not be imposed and stating the grounds relied upon therefore. If the Petitioner does not file a written motion, the Environmental Law Judge must enter the Dismissal Order.
13. In the only footnote, the Order provided: "While a party may decide to proceed without legal representation, "[i]t is well established that pro se litigants are held to the same standards as are licensed lawyers." *Goosens v. Goosens*, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005).
14. The Court's August 11, 2016 Notices of Proposed Order of Dismissal were mailed to Petitioner Reichard on August 11, 2016; the copies sent via certified mail were signed as received on August 15, 2016.
15. On August 18, 2016, Petitioner Reichard filed his responses to both August 11, 2016 Notices of Proposed Order of Dismissal. *See Ex. 11 (Pine Ridge)*. In his response, Petitioner Reichard contended that Pine Ridge was served via a certified letter sent on July 12, 2016, and received by Pine Ridge on July 14, 2016; IDEM's service was also perfected by receipt. *Id.*

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Petitioner Reichard's response referenced a similar petition for administrative review of another Macy, IN, Miami County facility, Leedy Family Pork, LLC (assigned OEA Cause No. 16-S-J-4904). *Id.* In both cases, the petitions were filed by Petitioner Reichard; the permittee/respondents are represented by the same legal counsel. Petitioner Reichard stated that his response included another copy of the information sent to Respondents. This information contained the same incomplete portion of the IDEM Approval; Petitioner Reichard did not include a complete copy of the IDEM Approval. *Id.* Petitioner Reichard's August 18, 2016 letter did not contain information indicating that it was served on the parties. *Id.*

16. Petitioner Reichard's July 12, 2016 letter was not filed with the Court, contrary to the Court's June 28, 2016 Order.
17. Leedy's and Pine Ridge's August 30, 2016 Response and Objection to Petitioner's August 17, 2016 Letter² stated that the certified letter sent to Pine Ridge on July 12, 2016 included only the first two pages of his initial petition, contrary to the Court's August 11, 2016 Order and to Petitioner's August 18, 2016 letter.
18. The Court's September 2, 2016 Order Scheduling Prehearing Conference for September 26, 2016 stated the conference's purpose:

"Petitioner Reichard's (August 18, 2016) Letter and Permittee/Respondent's (August 30, 2016) Objection state conflicting material facts. Therefore, the Court requires an evidentiary hearing to make a determination as to whether Petitioner Reichard complied with the Court's August 11, 2016 Notice of Proposed Order of Dismissal. The Court will therefore set this cause for a prehearing conference focused on the issue of Petitioner Reichard's compliance."
19. The parties attended the September 26, 2016 Prehearing conference in person, accompanied by Macy, IN residents Charles D. Smith and Carol A. Cohee. By agreement, the prehearing conferences were held concurrently in both cases OEA Cause 16-S-J-4904 (concerning

² Petitioner Reichard's letter began with a date of August 17, 2016; the postmark stated August 18, 2016.

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2017 OEA 1, (16-S-J-4911**

Leedy Family Pork, LLC) and in OEA Cause 16-S-J-4911 (concerning Pine Ridge Pork, LLC).

20. The Court's September 26, 2016 Report of Prehearing Conference and Order Scheduling Evidentiary Hearing for October 6, 2016 specified:

“The sole issue to be heard . . . is whether Petitioner complied with service requirements stated in the Court's June 28, 2016 Notice of Incomplete Filing and Order to Supplement Petition and the Court's August 11, 2016 Notice of Proposed Order of Dismissal.

. . .
Per I.C. § 4-21.5-3, *et seq.*, Petitioner Reichard has the burden of proof, by substantial evidence.”

21. The parties agreed that the evidentiary hearing would be held concurrently for both OEA Cause 16-S-J-4911 concerning Pine Ridge Pork, LLC, and for OEA Cause 16-S-J-4904 concerning Leedy Family Pork, LLC.
22. The parties attended the October 6, 2016 Evidentiary Hearing. Per the parties' agreement, the evidentiary hearing was held concurrently for both OEA Cause 16-S-J-4911 concerning Pine Ridge Pork, LLC, and for OEA Cause 16-S-J-4904 concerning Leedy Family Pork, LLC.
23. Petitioner Reichard elected to represent himself without legal counsel, and was accompanied by Macy, IN residents A. Nicole Smith, Judy Davis, Charles D. Smith, Carol Cohee, and Chris Leif. Permittee/Respondents participated by legal counsel; Aaron See participated on behalf of Pine Ridge Pork, LLC, and Chris Leedy participated on behalf of Leedy Family Pork, LLC. Respondent, IDEM, participated by legal counsel. Chief Environmental Law Judge Mary L. Davidsen, Esq., presided; the Court's law student intern, Robert D. Klobusnik, observed. Margie Addintgon, CSR, CM, Accurate Reporting of Indiana, provided court reporting services. Witnesses were sworn and evidence heard. The Court received the hearing transcript on October 12, 2016.

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24. Petitioner Reichard testified that “everything that’s in this red folder is everything I sent” to both Permittee/Respondents Leedy Pork and Pine Ridge Pork. *Tr. p. 13, lines 23, 24.* The red folder contained the following documents, which are identified by the individual exhibit number assigned by the Court at the October 6, 2016 evidentiary hearing:

- *Ex. 1A1:* April 1, 2016 handwritten letter from Carley Reichard to (IDEM’s) Bruce Palin, Dan Gruger, 1 page. Exhibit 1A1 was excluded over objection, on the basis that pre-dated IDEM’s May 24, 2016 Approval, and Petitioner Reichard’s petition for review, and not relevant to what was served on Permittee/Respondents as part of Petitioner Reichard’s Petition for Review. Petitioner Reichard also testified that this document was offered as a timeline of IDEM’s activity on the case, which the Court ruled was not relevant to the issue of service on permittee/respondents.
- *Ex. 1A2:* April 1, 2016 handwritten letter from Petitioner Ray Reichard to (IDEM’s) Bruce Palin, Dan Gruger, 1 page. Exhibit 1A2 was excluded over objection, on the same basis as Ex. 1A1.
- *Ex. 2-1:* May 24, 2016 IDEM Response to Public Comments concerning both Leedy Family Pork, and Pine Ridge Pork, LLC approval requests, 5 pages. Exhibit 2-1 was excluded over objection, on the same basis as Ex. 1A1.
- *Ex. 2-2:* May 24, 2016 IDEM Response to Public Comments concerning both Leedy Family Pork, and Pine Ridge Pork, LLC approval requests, 5 pages. Exhibit 2-2 was excluded over objection, as identical to Ex. 2-1, and therefore cumulative, and subject to the same objection and ruling as Ex. 1A1.
- *Ex. 3:* IDEM’s May 24, 2016 Approval issued to Leedy Family Pork, Farm ID No. 6901, Animal Waste No. 6567 (subject of OEA Cause 16-S-J-4904), 13 pages. Ex. 3 was admitted over objection.
- *Ex. 4:* IDEM’s May 24, 2016 Approval issued to Pine Ridge Pork, Farm ID No. 6902, Animal Waste No. 6568 (subject of OEA Cause 16-S-J-4911), 13 pages. Ex. 4 was admitted over objection.
- *Ex. 5:* Petitioner Reichard’s June 25, 2016 supplement to his June 10, 2016 Petition for Administrative Review of the Leedy Approval, 2 pages.
- *Ex. 6:* Petitioner Reichard’s June 25, 2016 supplement to his June 10, 2016 Petition for Administrative Review of the Pine Ridge Approval, 2 pages.

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2017 OEA 1, (16-S-J-4911**

- *Ex. 7:* The Court's June 28, 2016 Notice of Incomplete Filing and Order to Supplement Petition issued in Cause 16-S-J-4911, Pine Ridge Pork, 2 pages.
- *Ex. 8:* The Court's June 28, 2016 Notice of Incomplete Filing and Order to Supplement Petition issued in Cause 16-S-J-4904, Leedy Pork, 2 pages.
- *Ex. 9:* Permittee/Respondent Pine Ridge Pork's August 5, 2016 Response and Objection to Petitioner's August 17, 2016 Letter re: Cause 16-S-J-4911, Pine Ridge Pork, 9 pages.
- *Ex. 10:* Permittee/Respondent Leedy Pork's August 5, 2016 Response and Objection to Petitioner's August 17, 2016 Letter re: Cause 16-S-J-4904 Leedy 9 pages.
- *Ex. 11:* Petitioner Reichard's August 18, 2016 Response to the Court's August 11, 2016 Notice of Proposed Order of Dismissal, with photocopies of certified mail return "green cards", 4 pages.

25. Petitioner Reichard testified that he believed that he served the permittee/respondents with what they were to have received. *Tr. p. 34, lines 5 -12.* Exs. 3 and 4 "gives the instructions on . . . how I was supposed to go about filing a petition ", and that's why he included them as exhibits at the evidentiary hearing. *Tr. p. 21, lines 13- 16 re Leedy; Tr. p. 22, lines 21 – 23, re: Pine Ridge.* Petitioner Reichard testified that in response to the Court's June 28, Notice of Incomplete Filing and Order to Supplement Petition, he attached a complete copy of the IDEM action and sent it to all parties. *Tr. p. 28, lines 15 – 20.* In closing, Petitioner Reichard stated that:

"I didn't realize that I had to send all the information . . . If it was to his attorney that I was supposed to send everything to, then I would've, like I did on August 17, but I guess just to send it to them personally, I sent what my petition was which was two pages and then the rest of it was just either extra information that I came up with to help support my business that will be ruined from these two barns that will be put up and I guess that's where I guess I failed sending all the information out."

26. *Tr. p. 61, lines 16, - 25, p. 62, lines 1 -3.* Petitioner Reichard testified that through contact with the farms' legal counsel, concerning the July and August mailings, he was instructed to send information meant for the farms to their legal counsel. Mr. Reichard testified that the farms' legal counsel "never said anything about sending the whole thing to Leedy or

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anything, and I guess (the Court's) letter did say the complete response from IDEM and I guess I did not send that to them." *Tr. p. 63, lines 23 – 25, p. 64, lines 1, 2.*

27. Permittee/Respondent Leedy's Verified Motion to Dismiss, *Ex. 10*, was supported by an affidavit from Wesley C. (Chris) Leedy. In his affidavit, Mr. Leedy averred that Leedy Family Pork received the following documents from Petitioner Reichard: the 2-page letter, sent in July, 2016, *see Ex. 5*, and the August 18, 2016 response letter, *see Ex. 11; Tr. p. 50, line 25, p. 51, lines 1 -25.* In sum, Petitioner Reichard testified that he believed that he sent Leedy Pork the 18 pages of documents included in *Ex. A*, but did not recall when. Mr. Leedy denied receiving the 18 pages of documents from Petitioner Reichard. *Tr. p. 51, lines 20 – 25, p. 52, lines 1 -3.* On July 12, 2016, Petitioner Reichard sent Leedy Pork a copy of his 2-page Petition, but did not recall if he sent additional documents at that time. *Tr. p. 41, lines 1 – 9.* On August 17, 2016, Petitioner Reichard testified that he sent the Court and Leedy Pork's legal counsel, the documents contained in *Ex. B*³, in response to the Court's August 11, 2016 Notice of Incomplete Filing and Order to Supplement Petition. *Tr. p. 43, lines 10 – 25.* A review of the case file shows that the documents contained in *Ex. B* were not served on the Court, contrary to Petitioner Reichard's testimony. Exhibit B contains the first three pages of IDEM's May 24, 2016 Approval referencing the permit appeals process, *see Ex. B, pp. 9 – 11*, but does not contain the complete Leedy Pork Approval. *See Ex. 5.*
28. Permittee/Respondent Pine Ridge's Verified Motion to Dismiss, *Ex. 9*, was supported by an affidavit from Aaron See. In his affidavit, Mr. See averred that Pine Ridge Pork received the following documents from Petitioner Reichard: the 2-page letter, *see Ex. 6*, and the August 18, 2016 response letter, *see Ex. 11; Tr. p. 54, lines 10 – 23, p. 55, lines 6 -15.* In sum, Petitioner Reichard testified that he believed that he sent Pine Ridge Pork the 18 pages of documents included in *Ex. A*, but did not recall when. He did not copy Pine Ridge Pork with his initial Petition. *Tr. p. 45, lines 2 – 5.* On July 12, 2016, Petitioner Reichard sent Pine Ridge Pork a copy of his 2-page Petition, but did not recall if he sent additional documents at that time. *Tr. p. 46, lines 3 – 24.* On August 17, 2016, Petitioner Reichard testified that for both the Leedy and Pine Ridge Pork cases, he sent the Court and the farms' legal counsel, the

³ Page numbers were printed in the bottom right corner of each page by the presiding environmental law judge.
2017 OEA 1, page 11

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documents contained in Ex. B⁴, in response to the Court's August 11, 2016 Notice of Incomplete Filing and Order to Supplement Petition. *Tr. p. 43, lines 10 – 25; Tr. p. 47, lines 1 - 12.* Pine Ridge did not receive a complete copy of IDEM's Approval from Petitioner Reichard, as part of the appeal process. *Tr. p. 57, lines 6 -11.* A review of the case file shows that the documents contained in Ex. B were not served on the Court, contrary to Petitioner Reichard's testimony. Exhibit B contains the first three pages of IDEM's May 24, 2016 Approval referencing the permit appeals process, *see Ex. B, pp. 9 – 11*, but does not contain the complete Leedy Pork or Pine Ridge Pork Approval. *See Ex. 3 (Leedy), Ex. 4 (Pine Ridge).*

29. Petitioner Reichard served IDEM the mailings sent to the farms on July 12, 2016. *Tr. p. 48, lines 3 – 20.* Petitioner Reichard did not serve IDEM with his June Petitions. *Tr. p. 47, lines 19 – 25; p. 48, lines 1, 2.*
30. On July 12, 2016, the farms and IDEM first received Petitioner Reichard's two-page letter of his grievances, which initiated his petitions for administrative review. *See Exs. 5, 6.* Petitioner Reichard did not file these documents with the Court when he served the responding parties.
31. Complete copies of the IDEM Approval for each farm, Exhibits 3 and 4, were included in a red folder of exhibits which Petitioner Reichard testified had been sent to the permittees. A review of the documents and testimony shows that Petitioner Reichard first presented them to the permittees during the September 26, 2016 evidentiary hearing.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and relevant rules, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA" or "Court") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy, per I.C. § 4-21.5-7, *et seq.*, and I.C. § 4-21.5-3-7(a)(1)(A).

⁴ Page numbers were printed in the bottom right corner of each page by the presiding environmental law judge.
2017 OEA 1, page 12

**OBJECTION TO THE ISSUANCE OF CONFINED
FEEDING OPERATION PERMIT ISSUED
FARM ID #6901 / ANIMAL WASTE AW#6567
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2017 OEA 1, (16-S-J-4904)**
and
**OBJECTION TO THE ISSUANCE OF CONFINED
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PINE RIDGE PORK, LLC
MACY, MIAMI COUNTY, INDIANA
2017 OEA 1, (16-S-J-4911)**

2. Matters before OEA are subject to procedures stated in I.C. § 4-21.5-3, *et seq.* and 315 IAC 1, *et seq.* 2. This is a final order pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as Conclusions of Law, or Conclusions of Law that may be construed as Findings of Fact, are so deemed.
3. The OEA's findings of fact must be based exclusively on the evidence presented to 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.*
4. 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).
5. 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). "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). *Gas America 347*, 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.

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2017 OEA 1, (16-S-J-4911)**

6. Permittees Leedy and Pine Ridge Pork seek dismissal of the Petitioner Reichard's Petitions for Review, on the basis that for failure to serve this petitions as required by law. Motions to dismiss generally test the legal sufficiency of a claim, not the facts supporting it. *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind.Ct.App. 2003). 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). *See In the Matter of: Objections to Issuance of 327 Article 3 Construction Permit Application Plans and Specifications for Wastewater Treatment Plant and Sanitary Sewer System, Permit Approval No. 17872, Permit Approval No. 17872R , Twin Lakes Regional Sewer District, Monticello, Carroll and White Counties, Indiana, 2007 OEA 53.*
7. I.C. § 4-21.5-3-7(a) and § 13-15-6-2 state requirements for appealing an IDEM permit. Per I.C. § 13-15-6-2:

A written request for an adjudicatory hearing under section 1 of this chapter must do the following:

 - (1) State the name and address of the person making the request.
 - (2) Identify the interest of the person making the request.
 - (3) Identify any persons represented by the person making the request.
 - (4) State with particularity the reasons for the request.
 - (5) State with particularity the issues proposed for consideration at the hearing.
 - (6) Identify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.
8. For a petitioner to maintain an administrative action, I.C. § 13-15-6-3 requires that a Petition for Administrative Review must comply with the requirements of I.C. § 13-

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2017 OEA 1, (16-S-J-4911)**

15-6-2. *Indiana Office of Environmental Adjudication v. Kunz* 714 N.E.2d 1190 (Ind.Ct.App. 1999), cited in *Grahn*, 2004 OEA 40, 43.

9. Additionally, Indiana Administrative Code provision 315 IAC 1-3-2(b) contains the following requirements related to the initiation of a proceeding for administrative review with the Office of Environmental Adjudication:

(b) The petition for administrative review shall contain the following information:

...

- (4) State with particularity the legal issues proposed for consideration in the proceedings as follows:

(A) In a case involving an appeal of a permit, identify the following:

- (i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.
- (ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

10. The June 17, 2016 Orders to Supplement gave Petitioner Reichard notice as to how his written filings did not comply with the minimum legal requirements stated in I.C. § 13-15-6-2 and 315 IAC 1-3-2(b). The Orders to Supplement gave Petitioner Reichard at least 30 days to cure the deficiencies in his petition for review. The Orders to Supplement gave Petitioner Reichard notice that documents would not be considered by the Court if he did not served them on all parties and the Court. The Orders to Supplement gave Petitioner Reichard notice that the consequence for not complying with the Order to Supplement was dismissal, per I.C. § 4-21.5-3-24; 315 IAC 1-3-7.

11. Petitioner Reichard may have complied with the Orders to Supplements' requirement to serve the responding parties on July 12, 2016, but did not fulfill the legal requirement to serve the Court. The content of Petitioner Reichard's June 25, 2016 two-page letters did not comply with the Orders' content requirements. Petitioner Reichard did not tender complete copies of the IDEM Approvals until the September 26, 2016 evidentiary hearing, contrary to the requirements of I.C. § 13-15-6-2(b)(4) and 315 IAC 1-3-2. The IDEM Approvals were included in an exhibit intended to

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2017 OEA 1, (16-S-J-4911**

demonstrate all of the documents served previously on the responding parties, but, by Respondent Reichard's own testimony, were not.

12. The Court's August 11, 2016 Notices of Proposed Orders of Dismissal gave Petitioner Reichard notice of noncompliance with the Orders to Supplement, and a seven-day opportunity to avoid dismissal. Petitioner Reichard's August 18, 2016 filings did not contain a complete copy of the IDEM Approvals at issue, nor state technical deficiencies or alternative permit terms and conditions specified in 315 IAC 1-3-2(b)(4).
13. Petitioner Reichard was notified as to how his filings did not meet applicable legal requirements for sustaining petitions for administrative review of the two permits, and of the consequence of dismissal for noncompliance, by the Court's June, 2016 Notices of Incomplete Filing and Orders to Supplement Petitions, and by the August 11, 2016 Notice of Proposed Order of Dismissal. Petitioner Reichard was also informed of the alleged legal deficiencies and consequences by Permittee/Respondent's Verified Motions to Dismiss and responsive pleadings. Petitioner Reichard did not correct the petitions' deficiencies, either in response to the Notices of Incomplete Filing and Orders to Supplement Petitions, the Notices of Proposed Orders of Dismissal, nor the evidentiary hearing. Substantial evidence in this case supports the conclusion that, in the Leedy case and in the Pine Ridge Pork case, the content and timing of Petitioner Ray Richard's written filings are insufficient as petitions for administrative review of the Leedy Permit and the Pine Ridge Permit and should be dismissed.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Permittee/Respondent Leedy Family Farm, LLC's and Permittee/Respondent Pine Ridge Pork, LLC's Verified Motion to Dismiss is **GRANTED**. The petitions for administrative review are filed by Ray Reichard are **DISMISSED**. All further proceedings are **VACATED**.

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2017 OEA 1, (16-S-J-4911**

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 12th day of January, 2017 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge