

**Objection to the Issuance of Confined Feeding Operation Approval**  
**Farm ID #6935/Animal Waste #AW 6734, Cooper Farms**  
**Petitioners: Tim & Tricia McQueen**  
**2018 OEA 24 (17-W-J-4985)**

---

**OFFICIAL SHORT CITATION NAME:** When referring to 2018 OEA 24, cite this case as  
*Cooper Farms, 2018 OEA 24.*

**TOPICS:**

Dismissal

T.R. 12(B)(6)

Confined Feeding Operation

CFO

Regulatory authority

*Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495

*Kunz*, 714 N.E.2d 1190

**PRESIDING JUDGE:** Catherine Gibbs

**PARTY REPRESENTATIVES:**

Counsel for IDEM:

Susanna Bingman

Petitioner:

unrepresented

Permittee:

Brianna Schroeder, Todd Janzen

**ORDER ISSUED:**

March 8, 2018

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

[None]

---

**Objection to the Issuance of Confined Feeding Operation Approval  
Farm ID #6935/Animal Waste #AW 6734, Cooper Farms  
Petitioners: Tim & Tricia McQueen  
2018 OEA 24 (17-W-J-4985)**

STATE OF INDIANA )  
 )  
COUNTY OF MARION )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
OBJECTION TO THE ISSUANCE OF CONFINED )  
FEEDING OPERATION APPROVAL ) CAUSE NO. 17-W-J-4985  
FARM ID #6935 / ANIMAL WASTE # AW 6734 )  
COOPER FARMS )  
FRANKLIN COUNTY, INDIANA )  
\_\_\_\_\_)  
Tim & Tricia McQueen )  
Petitioners )  
Cooper Family Farm, Scott & Susan Cooper )  
Permittee/Respondent )  
Indiana Department of Environmental Management )  
Respondent )

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER**

Cooper Family Farm, Scott & Susan Cooper (the Permittees) filed a Motion to Dismiss on January 25, 2018. The Office of Environmental Adjudication (the OEA), having read the motion, response and reply, now enters the following findings of fact, conclusions of law and order.

**Findings of Fact**

1. On December 4, 2017, the Indiana Department of Environmental Management (IDEM) issued a Confined Feeding Operation Approval (the Approval) to Scott and Susan Cooper. The Approval authorized the Permittees to construct and operate a confined feeding operation (CFO) in Franklin County.
2. Tim and Tricia McQueen (the Petitioners) filed their petition for review on December 19, 2017.
3. A prehearing conference was held on January 16, 2018.
4. The Permittees filed a Motion to Dismiss on January 25, 2018.

**Objection to the Issuance of Confined Feeding Operation Approval**  
**Farm ID #6935/Animal Waste #AW 6734, Cooper Farms**  
**Petitioners: Tim & Tricia McQueen**  
**2018 OEA 24 (17-W-J-4985)**

5. The presiding Environmental Law Judge (ELJ) issued a Case Management Order on February 6, 2018, ordering Petitioners to file a response on or before February 26, 2018.
6. The Petitioners did not file a response.
7. The Petitioners live near the proposed facility. They allege that the CFO will cause several problems. They allege that trucks entering and leaving the facility will create traffic safety issues and noise pollution; that the odor will make their home inhabitable; and that their well could potentially be impacted by polluted storm water leaving the CFO.
8. The Approval does not authorize the discharge of any storm water.

**Conclusions of Law**

1. The OEA has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to Indiana Code (I.C.) § 4-21.5-7, et seq.
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 Permittees move to dismiss this cause and alleges that the Petitioners have failed to state a claim upon which relief can be granted.
4. A motion to dismiss under Ind. Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted tests 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). In reviewing 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. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party.” *Huffman* at 814.
5. The OEA and IDEM, as state agencies, only have the authority to take those actions that are granted by the law. “An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.” *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003). IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations and may only consider those factors specified in the applicable regulations in deciding whether to issue a permit. As the ultimate authority for the IDEM, the OEA’s authority is limited by statute (I.C. §4-21.5-7-3) to determining whether the IDEM decision complies with the applicable statutes and regulations. If the IDEM does not have the regulatory authority to address certain issues,

**Objection to the Issuance of Confined Feeding Operation Approval**  
**Farm ID #6935/Animal Waste #AW 6734, Cooper Farms**  
**Petitioners: Tim & Tricia McQueen**  
**2018 OEA 24 (17-W-J-4985)**

the OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues.

6. There are several objections that the Petitioners have that are not properly before the OEA. These objections are traffic, noise and odor. The Petitioners do not cite to any regulations supporting their contentions that the Approval should be revoked because of these objections. In fact, there are no regulations which require IDEM to consider the affect the Approval will have on these matters. The Motion to Dismiss should be granted as to these issues.
7. The last objection the Petitioners make to the Approval is that run-off from the CFO will pollute their well. Any discharge would be a violation of the Approval. This is sheer speculation on the Petitioners' part that the Permittees will violate the terms of the Approval. Speculation that the Permittees will not comply with the requirements of the Approval and the applicable laws and regulations is not sufficient to support overturning the Approval. The IDEM presumes that any person that receives a permit will comply with the applicable regulations and with future permits. OEA will not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Ind. Off. Env. Adjud.); Grahn, Id.; Sidney, Id.; In Re: Sanitary Sewer Construction Permit, Lafollette Station Towne Centre, US 150 and Lawrence Banet Road, 2004 OEA 67, 70 (03-W-J-3263).* Therefore, the Petitioners' speculation that the Permittees will not comply is not sufficient to support a conclusion that the Approval was improperly granted.
8. As the Petitioners did not respond to the motion to dismiss, the allegations in the petition for review, even taken as true and viewed in the most favorable light for the Petitioners, do not state a claim upon which relief can be granted.
9. The last question is whether the Petitioners should be allowed to amend the petition. In *Kunz*, 714 N.E.2d 1190, the Court of Appeals found that the OEA erred in not allowing the petitioners an opportunity to amend the petition for review. 315 IAC 1-3-1(b)(18) allows the ELJ to apply the Indiana Rules of Trial Procedure. T. R. 12(B) provides that a pleading may be amended by right within ten (10) days after service of the court's order dismissing a matter under T.R. 12(B)(6). The Petitioners may amend the petition for review within ten (10) days of the effective date of this Order.

**Order**

**IT IS ORDERED, ADJUDGED AND DECREED** that the Permittees' Motion to Dismiss is **GRANTED**. Pursuant to T.R. 12(B), the Petitioners are given leave to amend their petition for review within ten (10) days after service of this Order. Pursuant to Ind. Code Sec. 4-21.5-3-24 and 315 IAC 1-3-7, this constitutes notice of a Proposed Order of Dismissal. It is

**Objection to the Issuance of Confined Feeding Operation Approval  
Farm ID #6935/Animal Waste #AW 6734, Cooper Farms  
Petitioners: Tim & Tricia McQueen  
2018 OEA 24 (17-W-J-4985)**

proposed that this matter be dismissed if Petitioners fail to file an amended petition. Failure to amend the petition for review shall result in the entry of a final order of dismissal of this matter.

You are further notified that pursuant to provisions of IC §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 an order subject to further review consistent with applicable provisions of IC §4-21.5 *et seq* and other applicable rules and statutes.

**IT IS SO ORDERED this 8<sup>th</sup> day of March, 2018 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge

**Objection to the Issuance of Confined Feeding Operation Approval  
 Farm ID #6935/Animal Waste #AW 6734, Cooper Farms  
 Petitioners: Tim & Tricia McQueen  
 2018 OEA 24 (17-W-J-4985)**

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE ISSUANCE OF CONFINED	)	
FEEDING OPERATION APPROVAL	)	CAUSE NO. 17-W-J-4985
FARM ID #6935 / ANIMAL WASTE # AW 6734	)	
COOPER FARMS	)	
FRANKLIN COUNTY, INDIANA	)	
<hr style="width: 50%; margin-left: 0;"/>		
Tim & Tricia McQueen	)	
Petitioners	)	
Cooper Family Farm, Scott & Susan Cooper	)	
Permittee/Respondent	)	
Indiana Department of Environmental Management	)	
Respondent	)	

**FINAL ORDER OF DISMISSAL**

This constitutes notice of a Final Order of Dismissal of the Petitioners, Tim and Tricia McQueen. On March 9, 2018, the Office of Environmental Adjudication (OEA) issued Findings of Fact, Conclusions of Law and Order, granting Cooper Family Farm’s and Scott and Susan Cooper’s Motion to Dismiss for failure to state a claim. Pursuant to 315 IAC 1-3-1(b)(18) and Ind. Rule of Trial Procedure 12(B), the Petitioners were granted leave to file an amended petition for review within ten (10) days after service of the Order. The Order was served via U.S. Mail and certified mail on March 9, 2018. Mailed copies were not returned, indicating effective mailing and that the Petitioner was served the Order. The OEA has not received an amended petition for review.

**THE COURT**, being duly advised, **FINDS** that the Petitioner did not file an amended petition for review. The Findings of Fact, Conclusions of Law and Order, issued March 9, 2018, are incorporated herein as the final order in this matter. The OEA **ORDERS** that Petitioners, Tim and Tricia McQueen’s petition for review is **DISMISSED**.

You are further notified that pursuant to provisions of Ind. Code (I.C.) § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of

**Objection to the Issuance of Confined Feeding Operation Approval  
Farm ID #6935/Animal Waste #AW 6734, Cooper Farms  
Petitioners: Tim & Tricia McQueen  
2018 OEA 24 (17-W-J-4985)**

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 27<sup>th</sup> day of March, 2018 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge