

Objection to the Issuance of Confined Feeding Operation Approval
Farm ID #6982/Animal Waste #AW 6716, Rippy Farms
Petitioners: Susan Coons, Audra Garland
2018 OEA 31 (17-W-J-4973)

OFFICIAL SHORT CITATION NAME: When referring to 2018 OEA 31, cite this case as
Rippy Farms, 2018 OEA 31.

TOPICS:

Pro se

Dismissal

T.R. 12(B)(6)

Confined Feeding Operation

CFO

Regulatory authority

Amendment

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:

April 10, 2018

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:)	
)	
OBJECTION TO THE ISSUANCE OF CONFINED)	
FEEDING OPERATION APPROVAL)	CAUSE NO. 17-W-J-4973
FARM ID #6982 / ANIMAL WASTE # AW 6716)	
RIPPY FARMS)	
PEKIN, WASHINGTON COUNTY, INDIANA)	
<hr style="width: 50%; margin-left: 0;"/>		
Susan Coons, Audre Garland)	
Petitioners)	
Rippy Farms)	
Permittee/Respondent)	
Indiana Department of Environmental Management)	
Respondent)	

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

Rippy Farms (the Permittee) filed a Motion to Dismiss on January 19, 2018. The Office of Environmental Adjudication (the OEA), having read the motion, now enters the following findings of fact, conclusions of law and order.

Findings of Fact

1. On October 3, 2017, the Indiana Department of Environmental Management (IDEM) issued a Confined Feeding Operation Approval (the Approval) to Rippy Farms Inc. The Approval authorized the Permittees to construct and operate a confined feeding operation (CFO) in Washington County.
2. Susan and Jeff Coons, Micah and John Harter, Jesse Smith, Jeffrey and Julia Wainscot, and Audra Garland (the Petitioners) filed their petitions for review between October 20, 2017 and October 23, 2017.
3. A Notice of Incomplete Filing, Order to Supplement Petition and Notice of Proposed Order of Default was issued to each Petitioner on October 24, 2017. On December 14, 2017, the presiding Environmental Law Judge issued an Order holding the Petitioners in default for

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failure to comply with the Notice. Petitioner, Audre Garland, filed a response to the Notice but failed to send the response to the OEA. Upon learning that IDEM and the Permittee had received a response, the December 14, 2017 Final Order of Default was set aside and an order was issued setting a prehearing conference for this case.

4. A prehearing conference was held on January 8, 2018. Audre Garland appeared in person and Susan Coons participated via telephone. No other Petitioners appeared.
5. On January 9, 2018, Petitioners, Jeff Coons, Micah and John Harter, Jesse Smith, Jeffrey and Julia Wainscot were held in default for failure to appear at the prehearing conference and dismissed from this proceeding.
6. The Permittee filed a Motion to Dismiss on January 19, 2018, but failed to serve Petitioner Garland at the correct address.
7. The presiding Environmental Law Judge (ELJ) issued a Case Management Order on January 23, 2018, ordering Permittee to serve Petitioner Garland. Further, the Case Management Order set a deadline for the remaining Petitioners (Garland and Coons) to file a response within thirty (30) days of service of the Motion to Dismiss.
8. Permittee served Petitioner Garland on January 25, 2018 at the correct address.
9. The Petitioners did not file a response.
10. The Petitioners are not represented by legal counsel.
11. The Petitioners live near the proposed facility.
12. Petitioner Coons complains that the CFO will negatively impact (1) the property value of her home; (2) the air quality at her home; (3) the roads near her home. She further has concerns regarding the disposal of turkey carcasses and whether adequate notice was given.
13. Petitioner Garland complains that the CFO will negatively impact (1) the air quality at her home; (2) the water quality of the Blue River; (3) the property value of her home; (4) ground water quality through leaching of manure applied during land application. She further alleges that notice was not properly given.
14. Both of the remaining Petitioners complain that the laws are inadequate to protect the neighbors of CFOs.
15. The Approval does not authorize the discharge of any storm water.

Conclusions of Law

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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.
16. The Petitioners chose to proceed without legal counsel, which they were allowed to do by I.C. § 4-21.5-3-15. However, they were not entitled to any special treatment as pro se litigants. “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).
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 IDEM complied with the applicable statutes and regulations. If the IDEM does not have the regulatory authority to address certain issues, 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 made that are not properly before the OEA. These objections are air quality and, in particular, odor; potential negative impact on their property values; and a negative impact on local roads. The Petitioners do not cite to any regulations supporting their contentions that IDEM failed to properly consider these factors. In fact, there are no statutes or regulations which require IDEM to consider these

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issues when determining whether to issue the Approval. The Motion to Dismiss should be granted as to these issues.

7. Allegations that neighbors did not receive notice may only be brought by those persons who were prejudiced by IDEM's failure to properly notify them. Neither of the Petitioners allege that they did not receive notice. Therefore, these objections are not properly before the OEA.
8. The Indiana legislature passed the laws regarding the regulation of CFOs. Neither IDEM nor the OEA have any authority to modify these laws. Thus, OEA does not have the jurisdiction to address Petitioners' requests to change the applicable laws.
9. Petitioner Garland does not identify how the CFO will affect the Blue River. Other than making some general allegations that there have been changes to the Blue River banks, Petitioner Garland has not stated sufficient facts to support a claim upon which the OEA can grant relief.
10. Any discharge would be a violation 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)*. Petitioner's allegations that ground water will be negatively impacted through land application are not based upon any facts other than speculation that the Permittee will not comply with the terms of the Approval. Therefore, the Petitioners' speculation that the Permittees will not comply is not sufficient to support a conclusion that the Approval was improperly granted.
11. 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.
12. 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.

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Order

IT IS ORDERED, ADJUDGED AND DECREED that the Permittee's 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 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 22nd day of March, 2018 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

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FINAL ORDER OF DISMISSAL

This constitutes notice of a Final Order of Dismissal of the Petitioners, Susan Coons, and Audre Garland. On March 22, 2018, the Office of Environmental Adjudication (OEA) issued Findings of Fact, Conclusions of Law and Order, granting Rippy Farms’ 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 22, 2018. Mailed copies were not returned, indicating effective mailing and that the Petitioners were served the Order. The Petitioners have not filed an amended petition for review.

THE COURT, being duly advised, **FINDS** that the Petitioners did not file an amended petition for review. The Findings of Fact, Conclusions of Law and Order, issued March 22, 2018, are incorporated herein as the final order in this matter. The OEA **ORDERS** that Petitioners’ petitions for review are **DISMISSED**.

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

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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 IC 4-21.5. Pursuant to IC 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 10th day of April, 2018 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge