

**Objection to the Issuance of Confined
Feeding Operation Approval
Tanner R. and Katelyn B. Christner
Farm ID #7065
2020 OEA 16 (19-W-J-5085)**

OFFICIAL SHORT CITATION NAME: When referring to 2020 OEA 16, cite this case as *Christners, 2020 OEA 16*.

Topics:

CFO
CAFO
Confined Feeding Operation
10 day notice
§13-18-10-2(b)
327 IAC 19-8-7(a)
Flooding
327 IAC 12-2-2(a)(5)
Seasonal water table
327 IAC 19-12-4(o)
327 IAC 19-10-1
Ground water monitoring
Wetland
NPDES
327 IAC 19-12-4(b)
327 IAC 19-11-1
327 IAC 19-3-1

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

IDEM:	Susanna Bingman
Petitioners:	Bryce Runkle
Respondent:	Daniel McInerny, Bradley Sugarman

Order issued: July 9, 2020

Index category: Water

Further case activity: Judicial review

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

IN THE MATTER OF:)	
)	
OBJECTION TO ISSUANCE OF)	
CONFINED FEEDING OPERATION)	CAUSE NO. 19-W-J-5085
APPROVAL TANNER R. and KATELYN B.)	
CHRISTNER, FARM ID #7065)	
PERU, MIAMI COUNTY, INDIANA)	
_____)	
Todd and Sherri Gasaway, et al.)	
Petitioners)	
Tanner R. and Katelyn B. Christner)	
Permittee/Respondent)	
Indiana Department of Environmental Management)	
Respondent)	

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

The parties appeared on May 19 and 20, 2020 for a final hearing on the petitions for review. The presiding Environmental Law Judge (the ELJ) having heard the testimony and examined the evidence enters the following findings of fact, conclusions of law and final order.

Preliminary Matters

1. On March 4, 2020, Permittees filed their Motion *In Limine*. Petitioners filed a Motion for Transcription and In-person Hearing on Motion *In Limine* on March 6, 2020 and their Objections to Respondents' Motion *In Limine* on March 12, 2020. The parties agreed to argue the motion prior to the hearing set for May 19, 2020. The ELJ rules as follows:
 - a. Testimony regarding distance between Petitioners' homes and the Facility: Joint Stipulation #1 states that Todd and Sherri Gasaway are entitled to review of the CFO Approval at this Cause and have standing to pursue their appeal. Because of this stipulation, such testimony has been rendered irrelevant.
 - b. Testimony regarding vandalism: Petitioners argue that this testimony reflects Permittees' character. As Petitioners have no evidence that Permittee was responsible for these actions, this testimony is irrelevant.
 - c. Testimony regarding flooding: This is clearly relevant. Permittees' object to duplicative testimony. It is within the ELJ's authority to limit duplicative testimony

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- and such determinations will be made upon proper objections by any party.
- d. Testimony regarding ten (10) day letter: As the Petitioners contend that Permittees failed to comply with the applicable regulations regarding this document, this is relevant. The parties have stipulated to the admissibility of the documents.
 - e. Testimony regarding building permits: The Approval does not authorize Permittees to build without the appropriate local approvals and permits. However, such approvals and permits are not prerequisites to the Approval. As such, this is irrelevant.
 - f. Testimony regarding county assessor's records: Such evidence is irrelevant. Petitioner withdraws his objection to this.
 - g. Testimony regarding violations at another CFO: Petitioner offered testimony regarding violations at another CFO as rebuttal evidence, with the purpose of impeaching IDEM's testimony about how IDEM responds to spills from CFOs. Petitioner made an offer of proof. Petitioners' proffered testimony was about the spill. However, the witness did not have personal knowledge of IDEM's response. Therefore, the witness' testimony was not relevant and was excluded.
 - h. Testimony regarding the Eel River and possible endangered species: This is relevant, however, duplicative testimony may be limited upon proper objections.
 - i. Testimony regarding Christner Pork: As Christner Pork is not the owner or operator of this Facility, testimony regarding this entity is not relevant.
 - j. Introduction of warranty deed: Proof of property ownership is not necessary to obtain a CFO approval. This is irrelevant.
2. On April 27, 2020, Petitioners filed their Request for Findings of Fact and Conclusions of Law. Ind. Code §4-21.5-3-27(c) requires the ELJ to enter findings of fact and conclusions of law. Petitioners' Request is GRANTED.
 3. On May 8, 2020, the parties filed Waiver of Right to In-person Testimony and Consent to Testimony by Telephone or Video Conferencing.
 4. The ELJ restricted the number of persons in the hearing room due to Governor Holcomb's and Mayor Hogsett's current public health restrictions. Petitioners objected to Dr. Veenhuisen's presence as the client representative for Permittees. Dr. Veenhuisen was designated as the party representative for the first day of testimony and was called as the Permittee's expert witness on the second day. The ELJ concluded that Dr. Veenhuisen is exempt from exclusion under R. Evid 615(b) and (c).

Findings of Fact

5. On October 2, 2019, the Indiana Department of Environmental Management (IDEM) issued an Approval with Construction (the Approval) to Tanner R. and Katelyn Christner (Permittees) to construct and operate a confined feeding operation (CFO) at CR 100 E and CR 500 N, Miami County, Indiana.

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6. Joel David Aspinwall, Rebecca Aspinwall, Richard Beam, Thomas Joseph Bentley Jr., Connie Sue Bentley, Phillip Cohee, Michael Combs, Dennis Conklin, Jason Cook, Deloris Cook, Allen Fisher, Ellen Fisher, Todd Gasaway, Sherri Gasaway, Amelia E. Hair, Nancy L. Hair, Brian P. Haner, Wendy R. Haner, Zachary B. Haner, Charles Thomas Hoover, Linda Hoover, Steven T. Hoover, Jennifer K. Hoover, Sherry L. Jones, Robert Jones, Chris Keefer, James Kotterman, Vince Knauff, Jeannie Knauff, Michael Kuepper (representing Nickel Plate Trail Inc.), Bill Phillipy, Deb Phillipy, James O. Prior, Darryl Pugh, Nikki Pugh, Mike & Jennifer Roach, Donna Shepherd, Scott Shepherd, Brandon Sturch, Lori Sumpter, Julie A. Tussey, Russell J. Tussey, Phyllis J. Tussey, Patricia Wadman, Sara Welke each timely filed petitions for review. These individuals will be referred to collectively as the Petitioners.
7. The Petition for Review cites the following defects:
 - a. Flooding frequently occurs in close proximity;
 - b. Orphaned gas and oil wells in close proximity;
 - c. There are flood plains, waterways and wetlands adjacent to this property;
 - d. Highest point in Miami County is County Road 500 N, just north of this property;
 - e. Slope of the ground can result in contamination over much of Miami County;
 - f. Access roads to this facility are insufficient for the heavy trucks to travel;
 - g. Endangered species in the various waterways in close proximity;
 - h. Contamination of the soil and neighboring wells;
 - i. The air quality for the surrounding residences;
 - j. Nickel Plate trail – a bicycle path located in close proximity and one the area’s tourist attractions.
8. The following petitioners have been dismissed from this proceeding:
 - Vince and Jeannie Knauff: voluntary dismissal April 28, 2020.
 - Thomas Bentley: voluntary dismissal February 3, 2020.
 - Michael Combs: dismissal by default December 10, 2019
 - Nickel Plate Trail, Inc.: dismissal by default December 10, 2019
 - Scott and Donna Shepard: voluntary dismissal December 3, 2019
 - Dave and Patricia Wadman: dismissal by default December 3, 2019
 - Nicole and Darrell Pugh: voluntary dismissal November 19, 2019
9. The parties entered joint stipulations on May 4, 2020, which are incorporated herein.
10. Joint Stipulation #1 states that Todd and Sherri Gasaway are entitled to review of the CFO

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Approval at this Cause and have standing to pursue their appeal.

11. The CFO was not designed to and is not authorized to discharge to any waters of the State.
12. The CFO is a wean-to-finish facility and proposes to confine more than 2,500 hogs each weighing more than 55 pounds.
13. The CFO will consist of one building with a self-contained, below building concrete manure storage pit.
14. Because of the number of animals, the CFO is classified as a Confined Animal Feeding Operation and must comply storm water management practices (327 19-11-1(a)), manure application rate limitations (327 IAC 19-14-3(d)) and manure application activities (327 IAC 19-14-4(e)). The storm water management practices refer to requirements of the federal regulation for CAFOs (40 CFR 122.42(e)(2)). The Special Approval Conditions in the Approval incorporates these requirements.
15. Petitioners received notice of the CFO. The notice included the IDEM notification form, a narrative letter and a site map. The narrative letter incorrectly stated that the access road would be on CR 100 E instead of on CR 500 N. A map sent with the letter showed the correct position of the access road. The application and the associated plans show that the access road to the facility is on CR 500 N.
16. There is an isolated depressional area, which floods intermittently, on CR 100 E in front of the property on which the CFO will be located.
17. The property on which the Facility will be located has hydric soil consisting of clay.
18. A seasonal high water table is located approximately six (6) inches below the surface. A perimeter drain will be installed at 4 feet below the water table to intercept ground water and direct it to an outfall. A Special Approval Condition requires monthly monitoring.
19. IDEM did not require ground water monitoring.
20. The natural drainage patterns will drain east/southeasterly in the direction of the Eel River, which is located approximately one mile distance from the CFO.

Conclusions of Law

1. The Indiana Department of Environmental Management (the "IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq.* The OEA has jurisdiction over and is

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the ultimate authority regarding the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*, and per I.C. § 4-21.5.3.7(a)(1)(A).

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. This Court must apply a de novo standard of review to this proceeding when determining the facts at issue. 315 IAC 1-3-10(b); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993); *Jennings Water, Inc. v. Office of Env'tl. Adjudication*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “The ELJ . . . serves as the trier of fact in an administrative hearing and a de novo review at that level is necessary. *United Refuse*, 615 N.E.2d 100, 103. The ELJ does not give deference to the initial determination of the agency.” *Indiana-Kentucky Elec. Corp v. Comm’r, Ind. Dep’t of Env’tl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). “De novo review” means that “all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. 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, the OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues. If Petitioners do not believe that the laws and regulations are sufficiently protective, these are not issues that can be heard or resolved by OEA. OEA is an impartial litigation forum, not a body which formulates or advises as to public policy or regulatory content.
5. The Petitioners raised the following issues in their petitions for review: (f) access roads to this facility are insufficient for the heavy trucks to travel; (i) the air quality for the surrounding residences; and (j) Nickel Plate trail – a bicycle path located in close proximity and one the area’s tourist attractions. IDEM is not required to consider these factors in making its decision on whether to issue this permit. Further, no evidence of regarding these issues was introduced.

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6. The Petitioners raised the issue of orphaned gas and oil wells in close proximity. However, Petitioners introduced no evidence regarding this.
7. Both Petitioners and Permittees called experts in support of their contentions. Petitioners called Dr. Christopher Grobbel. Permittees called Dr. Michael Veenhuizen. Both experts are very qualified. However, in determining the outcome of this matter, the weight given to their conflicting testimony does not have to be equal. Petitioners argue that Dr. Veenhuizen has a direct financial interest in the Facility because his company prepared the application. However, Dr. Veenhuizen's testimony is accorded greater weight because of the extent of his experience with designing CFOs in general, his depth of knowledge of Indiana regulations and his specific knowledge of this CFO.
8. Dr. Grobbel testified extensively about other measures that could be taken to provide protection to human health and the environment, including secondary containment. IDEM's regulations set out the minimum standards for CFOs. The question here is whether the CAFO complies with these minimum standards, not whether this CAFO should be designed to meet a higher standard.
9. The rules require that the design include measures meant to protect the human health and the environment and prevent any releases to the environment. Speculation, without evidence, that there will be releases to the environment in violation of the Approval is not sufficient to support a decision to overturn the Approval. The IDEM presumes that any person that receives a permit will comply with the applicable regulations and with future permits. OEA may 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.); In Re: Sanitary Sewer Construction Permit, Lafollette Station Towne Centre, US 150 and Lawrence Banet Road, 2004 OEA 67, 70 (03-W-J-3263).*
10. Petitioners assert that this site is a bad choice because of the periodic flooding, the hydric soils and the seasonal high water table. It is not enough to assert that this is not a good place for the CFO without proof that the location does not meet the applicable requirements or that the design does not compensate for problematic site conditions. Petitioners' expert testified that the conditions on this site, including the hydric soils, the seasonal high water table and the flooding, all present issues that make this site less than ideal for a CFO. While this may be true, Indiana regulations do not require a perfect site, only a site on which the imperfections can be addressed through specific design components.
11. There is no question that periodic flooding occurs at and around the isolated depressional area on CR 100 E. However, the flooding is limited in area. The CFO will be set back far

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enough from this isolated area to avoid any potential discharge from the CFO. Petitioners did not present sufficient evidence to establish that this flooding will impact the CFO or cause contamination to leave the property.

12. Petitioners contend that the seasonal high water table will cause contamination to leave the CFO. The regulations specifically provides that a waste containment structure may not be constructed on sites with a seasonal water table, unless, the water table is lowered to keep the water table below the bottom of the waste management system. 327 IAC 12-2-2(a)(5). Further, 327 IAC 19-12-4(o) sets out the minimum requirements for any drainage system designed to lower the water table. In this case, the Special Approval Conditions require the installation of perimeter drain to address the seasonal water table. Permittees must install a perimeter drain to draw down the seasonal high water table and must monitor the outfall for contaminants. The perimeter drain is intended to intercept the seasonal high water table and drain it away from the building. The perimeter drain will be constructed around the building and one foot below the pit floor. It will be sloped to gravity drain to a collection point. The water collected by the perimeter drain is not expected to be contaminated because this water will not come in contact with the hog manure, but Permittee is required to monitor the outfall on a monthly basis.
13. Petitioners allege that the soils on the site indicate that wetlands are present and that the wetland delineation was inadequate. However, wetlands are classified as such by the presence of hydric soils, certain types of plant life and a hydraulic connection to a water source. The presence of hydric soils alone are not sufficient to prove the presence of a wetland. Petitioners were not able to provide evidence of any of the remaining factors other than hydric soils. IDEM and Permittees concede that the soils are hydric, but dispute that the site includes wetlands or other conditions that make this site inappropriate for a CFO if the design includes specific compensatory measures to deal with the hydric soils. The material relied by IDEM and Permittee show that there are no wetlands on this site and that the CFO design compensates for any issues created by the presence of hydric soils. Petitioners failed to present sufficient evidence to contradict this.
14. Petitioners also contend that the CFO does not comply with the setbacks from surface water. Petitioners point to a natural depression that leads to an ephemeral stream that flows to the Eel River. However, Permittees contend that this is not an ephemeral stream but an unclassified flow line, which does not qualify as a surface water. Petitioners failed to provide sufficient evidence to contradict this or that the CFO will not comply with all applicable setbacks.
15. Within ten (10) days of submitting an application, the applicant is required to give notice of their intent to build a CFO to any owner or occupant of land located within ½ mile of the proposed CFO. I.C. §13-18-10-2. Pursuant to I.C. §13-18-10-2(b) and 327 IAC 19-8-7(a), “The notice must be completed on forms provided or approved by the commissioner,

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sent by mail, be in writing, include the date on which the application was submitted to the department, and include a brief description of the subject of the application.” The Guidance Manual for Confined Feeding Operations includes the following information about the content of the letter, “A brief description of the subject of the application (describe what structures you are requesting approval for including new structures or existing structures that are not already approved as part of the CFO).”¹ The letter incorrectly states that the access road will be on County Road 100 E, although, the attached map correctly indicates the location of the access road. The access road is actually on CR 500 N. Petitioners complain that the 10 day letters were fatally flawed because of this error and therefore the notice given to Petitioners was insufficient². The Petitioners argue that this error did not allow them to bring a complaint before the county zoning commission regarding whether the access road on 500 N had adequate visual clearance.

16. The statute and corresponding regulations require the applicant to identify where the access road will be in the plans. Any change made after building the CFO would require notice to IDEM. The regulations do not specifically require that this information be included in the 10 day notice to nearby residents. The application, supporting documents and the map attached to the 10-day letter correctly identify the location of the access road. Thus, the 10-day notice met the applicable requirements. Petitioners’ argument that this creates a fatal flaw is not supported. Further, while the Approval specifically requires Permittee to comply with all applicable federal, state, and local requirements, IDEM is not required to investigate whether the applicant is in compliance with local ordinances when deciding whether the application should be approved.
17. IDEM has the discretion to require ground water monitoring pursuant to 327 IAC 19-10-1. In this instance, IDEM did not require a ground water monitoring plan. IDEM did an analysis of whether this was necessary and concluded that it was not needed. The Petitioners were unable to present sufficient evidence to prove that site conditions required ground water monitoring.
18. The manure will be land applied as fertilizer. No land application will occur on the property on which the CFO is located, but land application will take place on adjacent properties. Petitioners failed to present sufficient evidence that the land application conditions do not comply with the applicable laws and regulations.
19. Petitioners did not introduce evidence regarding their allegation that endangered species live in nearby waterways. However, IDEM presented evidence that the Department of Natural Resources, which has jurisdiction over endangered species and had the opportunity

¹ Guidance Manual for Indiana’s Confined Feeding Operation, December 29, 2014, pg. 17, https://www.in.gov/idem/cfo/files/guidance_manual_cfo_program.pdf

² While none of the Petitioners testified about the alleged deficiency in the notice, the letters were admitted as exhibits and therefore, will be addressed.

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to review the proposed Facility, did not raise any objections to the issuance of the permit on the basis that endangered species might be impacted by this Facility.

20. Petitioners did not specifically allege that the CFO should have a NPDES permit in their petition for review. IDEM and Permittee challenge whether the Petitioners should be allowed to raise this new issue at the hearing. The ELJ agrees that all issues addressed at the hearing must be alleged in the petition for review. In this instance, the issue of the NPDES permit was not raised in the petition for review. This issue has been waived. However, this issue will be addressed in Conclusions of Law 21, 22 and 23 for the sake of expediency.
21. This CFO is not allowed to discharge to the waters of the state. 327 IAC 19-12-4(b) states, “All waste management systems must be designed to not discharge to surface waters of the state. If a waste management system discharges or is designed to discharge, a NPDES³ CAFO permit under 327 IAC 15-16 is required.” Further, 327 IAC 19-11-1 states: “(a) All CFOs that are defined as concentrated animal feeding operations (CAFOs) in 40 CFR 122.23(b)(2) and all CAFOs with a NPDES permit must meet the storm water requirements in 40 CFR 122.23(e), 40 CFR 122.42(e)(1), and 40 CFR 122.42(e)(2). (b) All CFOs not defined as a CAFO in subsection (a) must comply with section 2 of this rule.” This facility is classified as a CAFO because of the number of hogs that will be confined, and, as such, must meet the storm water requirements in 40 CFR 122.23(e), 40 CFR 122.42(e)(1), and 40 CFR 122.42(e)(2). The Approval incorporates these requirements in the Special Approval Conditions.
22. Petitioners argues that the CFO must obtain an NPDES permit. However, the CFO is not designed to discharge and cannot legally discharge to waters of the state. None of the applicable rules require the CFO to obtain a NPDES permit.
23. Petitioners assume that there will be an untreated discharge of pollutants from the production area of the site. They point to the ventilation fans in the barn that will draw manure and other waste from the confinement area and deposit it on the ground. They also contend that because the unloading/loading area has no secondary confinement, waste will be deposited on the ground. Further, because the seasonal water table is only 6 inches deep, the waste will not break down before being carried away from the site to the Eel River. They contend that this constitutes a discharge for which a NPDES permit is required.
24. 327 IAC 19-3-1 requires that CFOs must be managed to avoid an unpermitted discharge. In addition, 327 IAC 19-13-1 requires that: “Manure at the production area must be stored in an approved waste management system until removed for land application in accordance with 327 19-14.” All uncontaminated surface water must be diverted away from the

³ National Pollutant Discharge Elimination System, 40 CFR 122 *et seq.*

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facility. 327 IAC 19- 7-3(b). CFOs are required to develop an emergency response plan that contains procedures for containing a manure release to prevent it from reaching waters of the state. 327 IAC 19-13- 4(a)(1)(A). If a CFO does not comply with the requirements of 327 IAC 19, it is subject to IDEM enforcement. Speculation that the CFO will not comply with the rules has been deemed insufficient to support a conclusion that the permit was improperly issued. In this case, Petitioners have failed to present any evidence other than speculation that contamination will leave the site.

25. Petitioners have not met their burden of proof. Judgement should be entered in IDEM's and Permittee's favor.

Final Order

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the Indiana Department of Environmental Management and Tanner R. and Katelyn B. Christner. The petitions for review filed by Joel David Aspinwall, Rebecca Aspinwall, Richard Beam, Connie Sue Bentley, Phillip Cohee, Dennis Conklin, Jason Cook, Deloris Cook, Allen Fisher, Ellen Fisher, Todd Gasaway, Sherri Gasaway, Amelia E. Hair, Nancy L. Hair, Brian P. Haner, Wendy R. Haner, Zachary B. Haner, Charles Thomas Hoover, Linda Hoover, Steven T. Hoover, Jennifer K. Hoover, Sherry L. Jones, Robert Jones, Chris Keefer, James Kotterman, Bill Phillipy, Deb Phillipy, James O. Prior, Mike & Jennifer Roach, Brandon Sturch, Lori Sumpter, Julie A. Tussey, Russell J. Tussey, Phyllis J. Tussey, Sara Welke are **DENIED**.

The parties are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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 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.

Information concerning hearing schedules and procedures may be obtained by calling the Office of Environmental Adjudication at (317) 233-0850.

IT IS SO ORDERED this 9th day of July, 2020 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge