

**Objection to the Issuance of Approval of
Closure/Post Closure Plan
Tanners Creek Fly Ash Pond
Tanners Creek Development LLC
2020 OEA 27 (20-S-J-5109)**

OFFICIAL SHORT CITATION NAME: When referring to 2020 OEA 27, cite this case as *Tanners Creek Development, 2020 OEA 27*.

Topics:

Dismissal
I.C. §4-21.5-3-7(a)(3)(A)
I.C. §4-21.5-3-2-(e)
Timeliness
Failure to appear
Default
I.C. §4-21.5-3-24(a)
315 IAC 1-3-4(b)

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

IDEM:	Stephen Thill
Petitioner:	Matthew Miles
Respondent, Tanners Creek Development:	E. Sean Griggs, Jessica Reiss

Order issued: July 28, 2020

Index category: Solid Waste

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)	
APPROVAL OF CLOSURE/POST CLOSURE PLAN)	CAUSE NO. 20-S-J-5109
TANNERS CREEK FLY ASH POND)	
TANNERS CREEK DEVELOPMENT LLC)	
FLOYD COUNTY, INDIANA)	
_____)	
Matthew Miles)	
Petitioner)	
Tanners Creek Development LLC)	
Permittee/Respondent)	
Indiana Department of Environmental Management)	
Respondent)	

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

Tanners Creek Development LLC (Permittee) filed its Motion to Dismiss on June 23, 2020. The presiding Environmental Law Judge (the ELJ), having read the motion, enters the following findings of fact, conclusions of law and final order.

Findings of Fact

1. On April 23, 2020, the Indiana Department of Environmental Management (IDEM) issued Approval of the Closure and Post-Closure Plan for the Tanners Creek Fly Ash Pond (the Approval) to Permittee.
2. Matthew Miles (Petitioner) had previously submitted comments on the draft Approval and provided an email address. The Indiana Department of Environmental Management sent the Petitioner notice to his email address of the issuance of the Approval on April 23, 2020.
3. Petitioner filed his Petition for Review and Stay on May 15, 2020. Petitioner stated his address is P.O. Box 112, Aurora IN 47001.
4. The presiding ELJ issued the Order Scheduling Prehearing Conference on May 19, 2020.

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5. The Order was sent to Petitioner at P.O. Box 112, Aurora IN 47001 via certified mail and regular US mail. Both copies were returned to OEA with the indication “Box closed Unable to Forward”.
6. Petitioner did not appear at the prehearing conference on June 16, 2020.
7. The presiding ELJ attempted to call Petitioner at the telephone number listed in the Petition for Review on June 16, 2020 and on June 17, 2020. The ELJ left a message for Petitioner on June 17, 2020. Petitioner has not contacted the ELJ.
8. Permittee filed its Motion to Dismiss on June 23, 2020. Permittee served Petitioner with the motion at both the address supplied by Petitioner and at an email provided by Petitioner. Petitioner did not respond to the motion.
9. Emails sent by the ELJ to the only known email address for Petitioner were returned as delivery failed.

Conclusions of Law

1. 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 Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
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 office 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 ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “*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. I.C. §4-21.5-3-7(a)(3)(A) states that a Petition for Review must be filed within fifteen (15) days after the person is given notice of the order. I.C. §4-21.5-3-2(e) provides that three (3) days shall be added to this deadline if service is by mail.

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5. The Petitioner had eighteen (18) days from April 23, 2020, the date of the notice and the presumed date of mailing, until Monday, May 11, 2020, to file the Petition for Review.
6. The Petition for Review was not filed until May 15, 2020 and was not timely filed in this matter.
7. Further, Permittee has moved to default the Petitioner without notification to Petitioner. I.C. 4-21.5-3-24(a) provides that, if a party fails to attend a prehearing conference, the ELJ may issue a proposed order of default. The OEA properly served Petitioner at the address provided by Petitioner and attempted to contact him via telephone and email. In accordance with I.C. § 4-21.5-3(1)(f): “If the current address of a person is not ascertainable, service shall be mailed to the last known address where the person resides or has a principal place of business.” 315 IAC 1-3-4(b) states “Any changes in name, mailing address, or telephone number occurring during the course of a proceeding shall be communicated promptly to the ELJ and all parties to the proceeding. Service of orders or correspondence from [OEA] shall be made to the last known address on file.” See also Ind. Tr. R. 3.1(E). Here, OEA attempted to contact Petitioner at the contact points provided by Petitioner. In response, none of the contact points were current or valid for Petitioner. In this case, attempting once again to notify Petitioner of the motion for default would be futile. Petitioner did not fulfill his duty to provide correct contact information to OEA. Petitioner is therefore in default.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED judgment is entered in favor of Tanners Creek Development LLC. The 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 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 28th day of July, 2020 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge