

**OBJECTION TO THE ISSUANCE OF SOLID WASTE PROCESSING PERMIT
SW PROGRAM ID 40-004
AMERICAN MANUFACTURING SOLUTIONS, INC
2022 OEA 12**

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Presiding ELJ:	LORI KYLE ENDRIS
Party Representatives:	April Lashbrook, Esq., IDEM Richard S. VanRheenen, Esq., PETITIONER Tabitha L. Balzer, Esq., PETITIONER
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*
Lori Kyle Endris, *Environmental Law Judge*
Sara C. Blainbridge, *Legal Administrator*

INDIANA GOVERNMENT CENTER NORTH
100 NORTH SENATE AVENUE, SUITE N103
INDIANAPOLIS, INDIANA 46204-2273
FRONTDESK@OEA.IN.GOV
(317) 233-0850

STATE OF INDIANA)
)
COUNTY OF MARION)
)
IN THE MATTER OF:)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 21-S-J-5167

OBJECTION TO ISSUANCE OF)
SOLID WASTE PROCESSING PERMIT)
SW PROGRAM ID 40-004)
AMERICAN MANUFACTURING SOLUTIONS, INC)
NORTH VERNON, JENNINGS COUNTY, INDIANA.)
_____)
American Manufacturing Solutions, Inc.)
Petitioner,)
Indiana Department of Environmental Management,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter comes before the Office of Environmental Adjudication (OEA), by legal counsel, on cross motions for summary judgment filed by Petitioner American Manufacturing Solutions, Inc. (AMS) and Respondent Indiana Department of Environmental Management (IDEM) which pleadings are now part of the Court's record. Having read and considered the petition, motions, evidence, briefs, responses, reply and surreply, the presiding Environmental Law Judge (ELJ) makes the following findings of fact, conclusions of law and enters the Final Order:

FINDINGS OF FACT

1. AMS owns and operates a tool and die shop located at 1440 East Buckeye Street, North Vernon, Jennings County, Indiana (Facility). North Vernon Industry Corporation (NVIC) purchases ductile gray iron chips (Chips) from various third parties; both AMS and IDEM agree that the Chips have monetary value before they are sold to NVIC. AMS proposes to commence additional operations wherein the company would receive Chips owned by NVIC and heat them to reduce water moisture content to less than one percent. After AMS heats the Chips, it will then return them to NVIC, which will use the Chips to manufacture castings. At no time does AMS own the Chips.

2. IDEM was established under Indiana Code § 13-13-1-1 and is duly authorized to issue permits for the operation of facilities that perform processing of solid waste in the State of Indiana. See Ind. Code § 13-15-1-3.

3. On October 5, 2021, following correspondence and communication AMS sought IDEM's determination whether its proposed operation of using heat to dry the Chips would require a solid waste processing facility permit. In the alternative, AMS requested an exemption from the solid waste processing facility permit pursuant to 329 IAC 11-3-1.

4. IDEM issued its October 13, 2021, Determination that AMS is required to apply for a solid waste processing facility permit for its proposed operation and denied its request for an exemption.

5. On October 29, 2021, AMS filed its Petition for Administrative Review and Request for Hearing (Petition) and raised four (4) issues for review which are restated as follows:

- i. Whether AMS is required to obtain a solid waste processing facility permit.
- ii. Whether AMS is entitled to a permit exemption pursuant to 329 IAC 11-3-1(13).

6. On January 18, 2022, both parties submitted Motions for Summary Judgment. On February 8, 2022, both parties submitted Responses to the Motions for Summary Judgment. On February 23, 2022, IDEM submitted a Reply in Support of its Motion for Summary Judgment. On March 7, 2022, AMS filed its Surreply in Support of its Motion for Summary Judgment.

CONCLUSIONS OF LAW

1. This is an Order issued pursuant to Ind. Code § 4-21.5-3-23. 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.

2. IDEM is authorized to implement and enforce Indiana environmental statutes and rules promulgated relevant to those statutes. See Ind. Code § 13-13 *et seq.* and Ind. Code § 13-14-1-11.5. OEA has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-7-3. In the exercise of its jurisdiction, OEA is governed by the Administrative Orders and Procedures Act (AOPA) per Ind. Code § 4-21.5 *et seq.* and OEA-specific rules per 315 IAC 1, *et seq.*

3. The ELJ must apply a de novo standard of review 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 requires that the ELJ must determine all issues anew, based solely upon the evidence, and independent of any previous agency findings. *City of Indianapolis*, 2017 OEA 29. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806 (Ind. 2004).

4. The OEA considers a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Ind. Trial Rule 56." Ind. Code § 4-21.5-3-23(b). Citing Ind. Tr. R. 56(C), the Indiana Supreme Court has stated, "[d]rawing all reasonable inference in favor of...the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Cross-Motions for Summary Judgment do not alter this standard. *Am. United Life Ins. Co. v. Dep't of St. Rev.*, 84 N.E.3d 1244, 1249 (Ind. Tax Ct. 2017) (citing *Horseshoe Hammond, LLC v. Indiana Dep't of State Revenue*, 865 N.E.2d 725, 727 (Ind. Tax Ct. 2007)), *rev. denied*. "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley*, 15 N.E.3d at 1003. The moving party bears the initial burden to establish the absence of any genuine issue of material fact. *Id.* Once established, the burden shifts to the non-moving party to "'come forward with contrary evidence' showing an issue for the trier of fact." *Id.* All rational assertions of fact and reasonable inferences are deemed to be true and are viewed in the nonmovant's favor. *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1256 (Ind. Ct. App. 2009).

5. The rules which apply to the construction of statutes also apply to the construction of administrative rules and regulations. *Miller Brewing Co. v. Bartholomew Cty. Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996). The first step in interpreting an Indiana statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question. *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 704 (Ind. 2002) (citing *Rheem Mfg Co. v. Phelps Heating & Air Conditioning, Inc.*, 746 N.E.2d 941, 947 (Ind. 2001)). When a statute is clear and unambiguous, no rules of construction need be applied other than to require that words and phrases be taken in their plain, ordinary, and usual sense. Clear and unambiguous statutory meaning leaves no room for judicial construction. *Id.*

Whether AMS requires a solid waste processing facility permit:

6. The Indiana General Assembly, under Ind. Code § 13-19-1-2 “State Goal of Encouraging Source Reduction and Recycling,” stated, “[t]he goal of the state is to encourage solid waste source reduction, recycling, and other alternatives to conserve environmental resources.” Ind. Code § 13-19-1-2(a). To that end, the legislature directed IDEM to “develop proposed rules that provide for the legitimate use of solid and hazardous waste instead of its disposal; and provide that a material being legitimately used is not considered a solid or hazardous waste.” Ind. Code § 13-19-1-2(b).

7. A “solid waste processing facility is a facility at which at least one (1) of the following is located: (1) A solid waste incinerator; (2) A transfer station; (3) A solid waste baler; (4) A solid waste shredder; (5) A resource recovery system; (6) A composting facility; (7) A garbage grinding system; (8) A medical or an infectious waste treatment facility; (9) A solid waste solidification facility that is not located on an operating, permitted landfill; or (10) A facility that uses plasma arc or another source of heat to treat solid waste. 329 IAC 11-2-43.

8. To determine whether AMS requires a solid waste processing facility permit, it must first be determined whether the Chips qualify as “solid waste.” The definition of “solid waste,” set forth in 329 IAC 11-2-39, provides that “solid waste” has the meaning set forth in 329 IAC 10-2-174(a). 329 IAC 10-2-174(a) provides that “solid waste” has the meaning set forth in Ind. Code § 13-11-2-205(a) which reads as follows:

“Solid waste” . . . means any garbage, refuse, sludge from a waste treatment plant, sludge from a water supply treatment plant, sludge from an air pollution control facility, *or other discarded material*, including solid, liquid, semisolid, or contained gaseous material *resulting from industrial, commercial, mining, or agricultural operations* or from community activities. (emphasis added).

9. To invoke IDEM’s authority to determine whether the Chips are solid waste, Ind. Code § 13-11-2-205(a) requires that the Chips be “discarded material. . .resulting from industrial . . . operations . . .” Per 329 IAC 11-2-9.8,

‘discard’ means to abandon by (1) disposal; (2) burning or incinerating, including being burned as a fuel for the purpose of recovering usable energy; or (3) accumulating, storing, or physically or chemically treating, other than burning or incinerating, in lieu of or prior to disposal.

10. In its plain and ordinary meaning, “discard” means “to get rid of especially as useless or unwanted.” Discard. Merriam-Webster (11th ed. 2003). Black’s Law Dictionary defines “abandon” to mean to desert, surrender, forsake, or cede; to relinquish or give up with intent

of never again resuming one's right or interest; to give up or to cease to use; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in. "Abandon" includes the intention, and also the external act by which it is carried into effect. Abandon, Black's Law Dictionary (11th ed. 2019).

11. "'Disposal,' for purposes of environmental managements laws, means the (1) discharge; (2) deposit; (3) injection; (4) spilling; (5) leaking; or (6) placing of any solid waste . . . into or on any land or water so that the solid waste . . . or any constituent of the waste, may enter the environment, be emitted into the air, or be discharged into any waters, including ground waters." Ind. Code § 13-11-2-57(a). Here the Chips are not abandoned by disposal because at no time are they discharged, deposited, injected, spilled, leaked or placed into or on any land or water such that they enter the environment, are emitted into the air, or discharged into any waters.

12. The Chips are not abandoned by burning or incinerating them because at no time are they either burned or incinerated.

13. With respect to whether the Chips are accumulated, stored, or physically or chemically treated in lieu of or prior to disposal, the conveyance of the Chips occurs as follows: Third parties create, gather and sell the Chips to NVIC,¹ and during these actions, both AMS and IDEM agree that the Chips have monetary value.² Because the Chips have value as is, at no time are the third parties gathering, accumulating or storing the Chips in lieu of or prior to disposal.

Once purchased, NVIC, in turn, provides the Chips to AMS to remove moisture. At no time does NVIC consider the Chips as useless or unwanted. Neither does NVIC ever desert, surrender or cede its ownership in the Chips. NVIC purposefully conveys the Chips to AMS for it to reduce the Chips' moisture content. Once the moisture is removed, AMS returns the Chips to NVIC to receive payment. Because AMS does not have ownership in the Chips, AMS is never in the position to abandon or discard the Chips.

14. The plain, ordinary and usual meaning of "discard" and "abandon" are not synonymous with words describing the conveyance of Chips from third parties to NVIC, from NVIC to AMS, and from AMS to NVIC: "sell" "buy," "convey," "return." To interpret the language of Ind. Code § 13-11-2-205(a) and 329 IAC 11-2-9.8 otherwise would be absurd. Statutes and regulations are not to be construed so as to produce an absurdity. *Civil Rights Comm'n v. County Line Park, Inc.*, 738 N.E.2d 1044, 1048 (Ind. 2000). In sum, the actions of the third parties, NVIC and/or AMS do not reflect that they are selling, buying, conveying or returning

¹ Montgomery Aff. dated January 13, 2022, ¶ 1, ¶ 4.

² IDEM's Response Opposing AMS's Motion for Summary Judgment, p. 2.

the Chips “in lieu of or prior to disposal” and thus, do not meet the definition of “discard” under Ind. Code § 13-11-2-205(a).

15. IDEM’s contention that “[w]ithout the heat treatment to reduce the moisture content, it is *likely* that the wet waste metal boring mixture *would be*³ destined for disposal” is speculative. (emphasis added). Mere speculation cannot create questions of fact sufficient to defeat summary judgment. *Briggs v. Finley*, 631 N.E.2d 959, 964 – 965 (Ind. Ct. App. 1994). Opinions expressing mere possibility with regard to a hypothetical situation are insufficient to establish a genuine issue of material fact. *Id.*

16. IDEM contends that “the process of heating the [Chips] is thermal treatment that is resource recovery, an activity that qualifies as solid waste processing.”⁴ The definition of “processing” under 329 IAC 11-2-30 requires the material at issue to be “solid waste.”⁵ The material here is not solid waste. “Resource recovery” is defined as “the processing of solid waste into commercially valuable materials or energy.” 329 IAC 11-2-34. AMS is not processing solid waste into a commercially valuable material; the Chips, in the possession of third parties, are already commercially valuable prior to being sold to NVIC. None of the enumerated facilities in 329 IAC 11-2-43 are located at AMS; thus, AMS is not a solid waste processing facility as that is defined. *Id.* In sum, AMS is not required to obtain a solid waste processing permit.

Whether AMS is entitled to a permit exemption pursuant to 329 IAC 11-3-1(13):

17. Given that AMS is not required to obtain a solid waste processing permit, OEA declines to address whether AMS is entitled to a permit exemption pursuant to 329 IAC 11-3-1(13) as the parties have no legally cognizable interest in this question.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Indiana Department of Environmental Management’s motion for summary judgment is **DENIED**. American Manufacturing Solutions, Inc.’s motion for summary judgment is **GRANTED**. Judgment is entered in favor of American Manufacturing Solutions, Inc.

³ (emphasis added).

⁴ IDEM Memorandum in support of its Motion for Summary Judgment, p. 7.

⁵ “Processing” is defined as (1) the method, system, or other handling of solid waste so as to change its chemical, biological, or physical form; (2) to render solid waste more amenable for disposal or recover of materials or energy; or (3) the transfer of solid waste materials excluding the transportation of solid waste. 329 IAC 11-2-30.

This is a Final Order, subject to Judicial Review consistent with applicable provisions of Ind. Code § 4-21.5. Pursuant to Ind. Code § 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 22nd day of March, 2022 in Indianapolis, IN.