

**OBJECTION TO CLOSURE OF FUGITIVE DUST COMPLAINT # 240966**  
**ACES ID No. 241302, Violation No. # 241303**  
**BROWN COUNTY HIGHWAY DEPARTMENT**  
**PETITION BY CHRISTOPHER C. & KIMBERLY J. CLEGG**  
**2022 OEA 059, 20-A-J-5098**

<b>Official Short Cite Name:</b>	<b>Fugitive Dust Complaint No. 240966, 2022 OEA 059</b>
<b>OEA Cause No.:</b>	20-A-J-5098
<b>Topics/Keywords:</b>	State Form 50014 Lack of subject matter jurisdiction In. Tr. R. 12(B)(6) I.C. 4-21.5-1-4 agency action I.C. 13-30-3-3 I.C. 4-21.5-2-5 exempt agency actions I.C. 4-21.5-7-3 unappealable agency action 326 IAC 6-4-6 exception from fugitive dust rules 315 IAC 1-3-2
<b>Presiding ELJ:</b>	LORI KYLE ENDRIS
<b>Party Representatives:</b>	VALERIE TACHITRIS, ESQ., IDEM CHRISTOPHER C. & KIMBERLY J. CLEGG, PRO SE., PETITIONERS CHERYL A. GONZALEZ, ESQ, PERMITTEE JESSICA REISS, ESQ. PERMITTEE
<b>Order Issued:</b>	January 13, 2022
<b>Index Category:</b>	AIR QUALITY
<b>Further Case Activity:</b>	



# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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

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

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 20-A-J-5098

OBJECTION TO THE CLOSURE OF )  
FUGITIVE DUST COMPLAINT # 240966 )  
ACES ID # 241302 )  
VIOLATION # 241303 )  
BROWN COUNTY HIGHWAY DEPARTMENT )  
SEYMOUR, BROWN COUNTY, INDIANA. )  
\_\_\_\_\_)  
Christopher C. & Kimberly J. Clegg, )  
Petitioners, )  
Brown County Highway Department, )  
Respondent/Investigated Entity, )  
Indiana Department of Environmental Management, )  
Respondent. )

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
FINAL ORDER OF DISMISSAL OF PETITIONERS' AMENDED PETITION**

**PLEASE SUBMIT ALL FILINGS TO THE COURT VIA EMAIL AT [frontdesk@oea.in.gov](mailto:frontdesk@oea.in.gov).**

Self-represented Petitioners Christopher C. and Kimberly J. Clegg ("Petitioners"), complain of harms suffered from fugitive dust from traffic on a road adjoining their home. This matter came before the Office of Environmental Adjudication ("OEA" or "Court") on April 3, 2020, on separate Motions to Dismiss filed by Respondent/Investigated Entity Brown County Highway Department ("Brown Co.") and by Respondent Indiana Department of Environmental Management ("IDEM"), both represented by legal counsel. The OEA's Chief Environmental Law Judge ("ELJ"), having read the motions, responses and replies thereafter entered Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss and Notice of Proposed Final Order of Dismissal. Petitioners filed an Admended [sic] Petition for Administrative Review (Amended Petition), and the Respondents filed Motions to Dismiss the Amended Petition. The ELJ having read the motions, responses and replies enters Findings of Fact, Conclusions of Law and Final Order of Dismissal.

## FINDINGS OF FACT

1. Since March 1, 2002, Petitioners have owned and resided at 7080 South Garrity Road, Seymour, Brown County, Indiana 47274 (“Property”).

2. According to property records accessible through the Brown County Assessor’s Office, the Property is a five (5) acre wooded lot with an eastern property line that abuts approximately 340 feet of South Garrity Road, an unpaved, gravel road.

3. On September 18, 2019, Petitioner Kimberly Clegg, completed a Complaint Form, State Form 50014, (“Complaint”) and submitted it to IDEM. The Complaint alleged concerns regarding dust emanating from South Garrity Road when cars pass.

4. On October 11, 2019, IDEM issued an Inspection Summary/Violation Letter (“Inspection Summary”) to Brown Co. The Inspection Summary stated that on October 4, 2019, IDEM inspector Vaughn Ison conducted a surveillance inspection at the Property and noted fugitive dust at the location.

5. On December 6, 2019, IDEM issued a Failure to Reply Violation Letter (Reply VL) to Brown Co.

6. On January 17, 2020, Brown Co. submitted information to IDEM including a long-range schedule for road improvements.

7. On February 3, 2020, Petitioner Kimberly Clegg sent an email to IDEM requesting “an update regarding where IDEM is at on this matter.”

8. Later that day, Janusz Johnson of IDEM emailed the Petitioners. The email stated,

Good morning, Mrs. Clegg

Attached is additional information we received from the Brown County Highway Department on 1/17/2020. We will not be taking further action at this time and are closing out the complaint. I encourage you to work with the county and local authorities on this matter.

Sincerely,

Janusz Johnson

IDEM – OAQ Compliance Section 1

The IDEM did not include Brown Co. in its email to Petitioners thus giving Brown Co. no notice of its decision to close the Complaint.

9. On February 6, 2020, the Petitioners filed a Petition for Review: IDEM’s Failure to Act and Enforce Environmental Air Quality Control Laws (“Original Petition”) based on IDEM “[i]nappropriately closing out Fugitive Dust complaint,” in which they identified the February 3, 2020 email from Janusz Johnson as the action being appealed.

10. On March 2, 2020, this Court held a Prehearing Conference and thereafter set a briefing schedule for a motion to dismiss. Following a request for extension of time filed by Brown Co., this Court set the deadline for filing as April 3, 2020.

11. On April 3, 2020, Brown Co. filed a Motion to Dismiss based on Ind. Tr. Rules 12(B)(1) and 12(B)(6). IDEM filed a Motion to Dismiss based on Ind. Tr. Rule 12(B)(6).

12. On April 30, 2020, Petitioners filed a Response in Opposition to the Motions to Dismiss.

13. On May 15, 2020, Brown Co. and IDEM filed separate Replies.

14. On May 29, 2020, Brown Co., IDEM and Petitioners filed Proposed Findings of Fact, Conclusions of Law and Orders.

15. On February 12, 2021, OEA issued Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss and Notice of Proposed Final Order (Order). The Order dismissed the Original Petition pursuant to Ind. Tr. Rule 12(B) and afforded Petitioners the opportunity to amend the Original Petition.

16. On February 16, 2021, Petitioner filed an Admended [sic] Petition for Administrative Review (Amended Petition). The Amended Petition included the Inspection Summary Report and Failure to Reply Letter as Exhibits A and B.

17. On March 18, 2021, IDEM filed its Motion to Dismiss the Amended Petition. On March 19, 2021, Brown Co. filed its Motion to Dismiss the Amended Petition.

18. On April 15, 2021, Petitioners filed their Response in Opposition to [IDEM's] and [Brown Co.'s] Motions to Dismiss their Amended Petition.

19. On May 3, 2021, Brown Co. filed its Reply in Support of its Motion to Dismiss. On May 4, 2021, IDEM filed its Reply in Support of its Motion to Dismiss.

### **CONCLUSIONS OF LAW**

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and relevant rules, per Ind. Code § 13-13, et seq. The Office of Environmental Adjudication ("OEA" or "Court") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy, per Ind. Code § 4-21.5-7, et seq., and § 4-21.5-3-7(a)(1)(A).

2. Matters before OEA are subject to procedures stated in Ind. Code § 4-21.5-3, et seq. and 315 IAC 1, et seq. This is a final order pursuant to Ind. Code § 4-21.5-3-23, § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as Conclusions of Law, or Conclusions of Law that may be construed as Findings of Fact, are so deemed.

3. Pursuant to Indiana Trial Rule 12(B)(1), a court's jurisdiction is limited to and cannot be extended beyond those matters over which the General Assembly has determined that it may

exert subject matter jurisdiction. *Alcoa, Inc.*, 2004 OEA 30, 33 (Apr. 30, 2004); *LTV Steel Company v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). In ruling on a motion to dismiss for lack of subject matter jurisdiction, affidavits or evidence submitted in support may be considered. *Fratus v. Marion Community Schools Bd.*, 749 N.E.2d 40, 43 (Ind. 2001) (citing *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1287 (Ind. 1994)). This Court may weigh evidence to determine the existence of requisite jurisdictional facts. *Id.*

4. Pursuant to Ind. Tr. R. 12(B)(6), a motion to dismiss tests the legal sufficiency of the claim, not the facts which support it. *IDEM v. Singh*, 2009 OEA 62, 66 (citing *Trail v. Boys and Girls Clubs of NW Indiana*, 845 N.E.2d 130, 134 (Ind. 2006)). When ruling on 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.” *Id.* (quoting *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 814 (Ind. 2004)). All reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007).

5. This Court is authorized to review agency actions of IDEM that are recognized under the Administrative Orders and Procedures Act (“AOPA”). AOPA defines “agency action” as “the whole or a part of an order; the failure to issue an order; an agency’s performance of, or failure to perform, any other duty, function, or activity under this article.” Ind. Code § 4-21.5-1-4.

6. After reviewing the materials Brown Co. proffered on February 3, 2020, IDEM’s Office of Air Quality compliance section chose not to initiate a formal enforcement action against Brown Co. under Ind. Code § 13-30-3-3. The email notifying the Petitioners that formal enforcement action would not be pursued does not constitute an agency action.

7. AOPA defines “order” as “an agency action of a particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons. Ind. Code § 4-21.5-1-9.

8. Here, IDEM did not issue an order. *Id.*

9. AOPA does not confer authority to OEA to review agency actions that are exempt under AOPA. *DaveCo Farms, LLC*, 2009 OEA 53, 59 (June 25, 2009). AOPA exempts the following agency actions:

IC 4-21.5-2-5 Exemptions; agency actions

Sec. 5. This article [AOPA] does not apply to the following agency actions:

...

(8) A decision to issue or not issue a complaint, summons, or similar accusation.

(9) A decision to initiate or not initiate an inspection, investigation, or other similar inquiry that will be conducted by the agency, another agency, a political subdivision, including a prosecuting attorney, a court, or another person.

(10) A decision concerning the conduct of an inspection, investigation, or other similar inquiry by an agency.

...

10. Both the Original Petition<sup>1</sup> and the Amended Petition asked OEA to review “IDEM’s action to not act” by not initiating an enforcement action against Brown Co. Amended Petition at 10. Because IDEM’s choice not to initiate an enforcement action is within its discretion and is exempt under Ind. Code § 4-21.5-2-5(8) from OEA’s administrative review, it is not an appealable agency action<sup>2</sup> under AOPA. Ind. Code § 4-21.5-7-3(a). IDEM’s decision not to undertake inspection or investigation is exempted under Ind. Code § 4-21.5-2-5(9) and (10). OEA cannot compel IDEM to initiate enforcement action and IDEM’s “action to not act” was within its authority and not unlawful.

11. Petitioners contend IDEM’s interpretation of the 326 IAC 6-4-6 exception was unlawful. The Inspection Summary Report and Failure to Reply Letter attached to the Amended Petition reflect no agency action or order regarding the exception. The Inspection Summary Report stated,

Pursuant to 326 IAC 6-4-6(2), a claim for exception from the requirements of the fugitive dust rule must also include a reasonable long-range schedule for making necessary road improvements.

Within thirty (30) days, please submit a long-range schedule for making necessary road improvements. The schedule may include items such as the feasibility of applying dust suppressants, chip and seal, or other road improvements to reduce dust.

Inspection Summary Report, p. 2. The Failure to Reply letter states, “[f]ailure to respond to this violation letter or failure to provide a reasonable long-range schedule for necessary road improvements may result in no exception under 326 IAC 6-4-6 being applicable.” Failure to Reply Letter, p. 1.

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<sup>1</sup> In the dismissal of the Original Petition, the ELJ stated, “[t]he Indiana legislature specifically exempted an agency’s determination whether to pursue enforcement from administrative review. I.C. § 4-21.5-2-5(8). IDEM’s discretion to pursue enforcement is comparable to ‘prosecutorial discretion’. . . [n]ot only does [IDEM] have extreme latitude in making the initial decision to prosecute; it also has a great deal of freedom in deciding who it will prosecute.’ OEA cannot compel IDEM to initiate enforcement action.” Order ¶ 14 (footnotes omitted).

<sup>2</sup> OEA has historically and consistently held that IDEM has the discretion to decide whether to pursue enforcement when IDEM observes a violation of its rules. *American Suburban Utilities*, 2019 OEA 48, 54 – 55 (September 10, 2019) (“[I]t is within the discretion of IDEM whether or not to bring an enforcement action and the OEA has no authority to force them to do so”); *Mr. Gary Decker Grant County*, 2002 OEA 9, 11 (May 30, 2002) (“Petitioners cannot. . . challenge IDEM’s discretionary enforcement activities through [OEA]”); *Objection to the Issuance of Permit Approval No. AW 4851 Clark Brothers, White County*, 2000 OEA 10, 12 (Jan. 19, 2000) (OEA “has no authority to grant relief on potential enforcement issues”).

IDEM has not issued any order or taken any agency action regarding the applicability of the exemptions under 326 I.A.C. 6-4-6. In the absence of an agency action, OEA has no jurisdiction to declare IDEM's interpretation of 326 I.A.C. 6-4-6 unlawful. Ind. Code § 4-21.5-7-3(a).

12. In addition to not reflecting an agency action over which OEA has authority to review, the Inspection Summary Report and Failure to Reply Letter attached as exhibits in the Amended Petition do not comply with 315 I.A.C. 1-3-2(c)(3) which requires a "copy of the pertinent portions of the notice of the commissioner's action issued by the department that is the basis of the petition for administrative review." *Id.*

13. Even assuming the IDEM's Inspection Summary Report and Failure to Reply Letter were agency actions subject to review, Ind. Code § 4-21.5-3-7(a)(3)(A) requires petitions for review of an agency action to be filed within eighteen (18) days of the action. IDEM issued the Inspection Summary Report on October 11, 2019, and the Failure to Reply Letter on December 6, 2019. To be timely filed, a petition for review of those actions would have had to occur on October 29, 2019, and December 24, 2019 respectively. The Original Petition was filed on February 6, 2020 (appealing the email from Janusz Johnson) and the Amended Petition was filed on February 16, 2021, neither of which were timely. Ind. Code § 4-21.5-3-2(e); *see also* Ind. Tr. Rule 15(C).

#### **FINAL ORDER**

**IT IS THEREFORE ORDERED** that IDEM's and Brown Co.'s Motions to Dismiss are hereby GRANTED and the original and amended Petition for Review is hereby **DISMISSED** for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

You are further notified that pursuant to provisions of Ind. Code § 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 the applicable provisions of Ind. Code § 4-21.5-5 et seq. Pursuant to Ind. Code § 4-21.5-5, a Petition for Judicial Review of a Final Order is timely only if filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED** this 13<sup>th</sup> day of January, 2022 in Indianapolis, IN.

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Mary L. Davidsen, Esq.  
Chief Environmental Law Judge

