

**OBJECTION TO THE ISSUANCE OF
 RULE 326 IAC 4-1 OPEN BURNING APPROVAL
 OPEN BURNING PERMIT APPROVAL NO. FT-291716
 SOUTHWEST FIRE DISTRICT TRAINING TOWER
 SOUTHWEST ALLEN COUNTY FIRE PROTECTION DISTRICT
 2024 OALP 050, CAUSE NO.: IDEM-2403-000866**

Official Short Cite Name:	Southwest Fire District Training Tower, 2024 OALP 050
Cause Nos.:	IDEM-2403-000866 (OEA 24-A-J-5282)
Topics/Keywords:	326 IAC 4-1 326 IAC 4-1-3(b)(6) 326 IAC 4-1-4.1 326 IAC 4-1-4.1(d) Open Burning Fire department training
Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Caroline Markley & Mary Markley, Pro se, Petitioners Carrie G. Doehrmann, Esq., Permittee/Respondent Mark Finley, Esq., Respondent Kyle Tucker, Esq., Respondent
Order Issued:	October 2, 2024
Index Category:	Air
Further Case Activity:	Revised Final Order Issued 10/22/2024 Southwest Fire District Training Tower, 2024 OALP 056.



ISSUED:
October 2, 2024

STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS

CAROLINE MARKLEY AND MARY
MARKLEY,
Petitioners,

Administrative Case Number: IDEM-2403-000866
24-A-J-5282

v.

Agency Number: Open Burning Approval No.
FT-291716

SOUTHWEST ALLEN COUNTY FIRE
PROTECTION DISTRICT,
Permittee/Respondent,

INDIANA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,
Respondent.

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

This matter came before the Office of Administrative Law Proceedings (OALP or Court) via the Motion for Summary Judgment filed by counsel for the Indiana Department of Environmental Management (IDEM) and the Concurrence filed by counsel for the Southwest Allen County Fire Protection District (SWFD). The Administrative Law Judge (ALJ) having considered the pleadings now issues this Order regarding Burn Approval, FT-291716.

Findings of Fact

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 Administrative Law Proceedings (OALP or Court) has jurisdiction over this cause pursuant to IC § 4-15-10.5-12.

2. The SWFD uses its location at 12912 Indianapolis Road, Yoder, Allen County, Indiana for burn training, i.e., fire suppression, vehicle extraction, firefighter rescue and survival.¹

¹ VFC # 83604495, Open Burn Approval.

3. On March 4, 2024, IDEM issued the SWFD an Open Burn Approval (Approval), FT-29716 pursuant to 326 IAC 4-1.²

4. On March 22, 2024, Caroline Markley and Mary Markley (Petitioners) filed a Petition for Administrative Review (Initial Petition)³ and contended (1) IDEM's Approval does not comply with Allen County laws of burning only between the hours of 8:00 a.m. to 5:00 p.m.; (2) air, soil and noise pollution along with the water volume cannot be contained to SWFD premises; (3) smoke causes Petitioners to go indoors; and (4) noise is a nuisance.

5. On April 3, 2024, the Court issued a Notice of Incomplete Filing, Order to Supplement the Petition and Notice of Proposed Order of Default to the Petitioners.⁴

6. On April 22, 2024, Petitioners filed an Amended Petition for Administrative Review (Amended Petition)⁵ and contended (1) "smoke and potential airborne debris . . . can and will likely enter Petitioners' property interfering with the use of the property and potentially causing injury through inhalation;" (2) "debris incidental to the burning will likely wind up on Petitioners' property" and "the effects of such open burning involves trespass;" and (3) the "burning is a private nuisance, as it interferes with the quiet enjoyment of the property."

7. On August 30, 2024, SWFD filed a Motion to Dismiss. As this Decision was made on IDEM's Motion for Summary Judgment and SWFD's Concurrence, SWFD's Motion to Dismiss is moot.

8. On August 30, 2024, IDEM filed a Motion for Summary Judgment; on September 3, 2024, SWFD filed its Concurrence to IDEM's Motion.

9. Petitioners did not file a Response.

Conclusions of Law

1. This is a Final Order issued under IC § 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. OALP 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

² *Id.*

³ VFC # 83629212.

⁴ VFC # 83629213.

⁵ VFC # 83629214.

N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ALJ, and deference to the agency's initial factual determination is not allowed. Id.; IC § 4-21.5-3-27(d).

3. OALP may enter summary judgment for a party if it finds that "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Tr. R. 56(C); IC § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant, and all doubts as to the existence of a material issue must be resolved against the moving party. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000); *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005); *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). "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." *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (internal citations omitted).

4. A party opposing summary judgment must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of their pleading but must set forth specific facts showing that there is a genuine issue for trial. *Tharp, supra*. "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." Ind. R. Civ. P. 56.

5. IDEM is authorized to determine whether an Approval should be issued by applying the relevant statutes and regulations and can only consider the relevant statutes and regulations when deciding to issue the Approval. *Page Road*, 2022 OEA 150, 152; *Wolf Lake*, 2023 OEA 001, 006; *American Suburban Utilities*, 2019 OEA 48, 53.

6. OALP's review is limited to determining whether IDEM complied with the applicable statutes and regulations when it issued the Approval. *Berkshire Pointe WWTP*, 2023 OEA 105, 110; *Blue River Valley*, 2005 OEA 1, 11. OALP does not have authority to address any other issues.

7. Issues 2 – 4 raised in the Initial Petition and Issues 1 – 3 raised in the Amended Petition do not address whether IDEM's issuance of the Approval complied with 326 IAC 4-1. These Issues are speculative and cannot create questions of fact sufficient to defeat summary

judgment. *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1256 (Ind. Ct. App. 2009). Opinions expressing mere possibility to a hypothetical situation likewise cannot create questions of fact to defeat summary judgment. *Beatty v. LaFontaine*, 896 N.E.2d 18, 20 (Ind. Ct. App. 2008) (citing *Briggs v. Finley*, 631 N.E.2d 959, 964 – 65 (Ind. Ct. App. 2008)). Moreover, the Issues presume that SWFD will not comply with the Approval. OALP “may not overturn an IDEM Approval upon speculation that the regulated entity will not operate in accordance with the law.” *Jennings Water, Inc. v. Off. of Env’tl Adjud.*, 909 N.E.2d 1020, 1026 (Ind. Ct. App. 2009).

8. Issue 1 raised in the Initial Petition concerns the timeframe during which SWFD may conduct its burning. Condition 6 of the Approval states, “[b]urning may be conducted during daytime and nighttime hours.” 326 IAC 4-1-3(b)(6) states, “[b]urning *shall* be conducted during daylight hours only, and all fires *shall* be extinguished before sunset.” (Emphasis added). The plain language of 326 IAC 4-1-3(b)(6) is clear; thus, IDEM erred in approving SWFD to burn during nighttime hours. *Indiana Family & Soc. Servs. Admin. v. Methodist Hosp. of Ind.*, 669 N.E.2d 186, 190 (Ind. Ct. App. 1996) (When an agency promulgates rules and regulations, it is bound to follow them). *Cf. Indiana St. Dep’t of Pub. Welfare v. Cowdell*, 421 N.E.2d 667, 671 (Rights created or benefits conferred by an administrative rule should not be extended by interpretation beyond the plain terms of the rule itself).

Final Order

Approval FT-291716 is hereby **REMANDED** to IDEM for correction of Condition 6 to limit the timeframe in which the SWFD may conduct its burn training to daylight hours. Issues 2 – 4 in the Initial Petition and 1 – 3 in the Amended Petition are **DENIED**. IDEM’s Approval is otherwise **UPHELD**.

You are further notified that, pursuant to IC § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to IC § 4-21.5-5, 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.

SO ORDERED October 2, 2024.



Administrative Law Judge

Hon. Lori Kyle Endris

Distribution

(Sent via the email address on file with the Indiana Role of Attorneys, unless otherwise noted):

Petitioners, Caroline Markley and Mary Markley, sent via email to C.J.Markley@Comcast.net

Permittee/Respondent, Southwest Allen County Fire Protection District, sent via counsel Carrie G. Doehrmann, Esq. and Logan Koehring, Esq., as noted above.

Respondent, Indiana Dept of Environmental Management, sent via counsel Mark Finley, Esq. and Kyle Tucker, Esq., as noted above.