

\*\*STATE OF INDIANA ) MARION SUPERIOR COURT, CIVIL DIV. 12  
 )  
COUNTY OF MARION ) CAUSE NO. 49D12-2007-PL-023064

THOMAS CUTTS, DEBRA CUTTS, STEVEN )  
COWLEY, and KIM STARKEY, )

Petitioners, )

vs. )

INDIANA DEPARTMENT OF )  
ENVIRONMENTAL MANAGEMENT, )  
INDIANA OFFICE OF ENVIRONMENTAL )  
ADJUDICATION, and NATURAL PRAIRIE )  
INDIANA FARMLAND HOLDINGS, LLC, )

Respondents. )

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

This cause came before the Court on Petitioners’ Verified Petition for Judicial Review filed July 15, 2020 (the “Petition”), which seeks to set aside two rulings by the Office of the Environmental Adjudication (OEA) upholding a Confined Feeding Operation Approval the Indiana Department of Environmental Management (“IDEM”) issued to Natural Prairie Indiana Farmland Holdings, LLC (“Natural Prairie”) on January 10, 2019 (the “DEA Orders”). Having reviewed the administrative record, having heard oral argument from counsel and considered the parties’ written submissions, and otherwise being duly advised, the Court now finds that the Petition must be denied, and that the OEA Orders should be upheld in all respects.

**I. STANDARDS OF REVIEW**

1. Judicial Review under AOPA is a form of limited appellate review, as all disputed issues of fact are confined to the agency record and the reviewing court shall “not try the cause de novo or substitute its judgment for that of the agency.” Ind. Code § 4-21.5-5-11.

2. Under AOPA, the burden to show the invalidity of the agency determination is “on the party asserting invalidity,” here the Petitioners. Ind. Code § 4-21.5-5-14(a); see *Umbrella Family Waiver Servs., LLC v. Indiana Family & Soc. Servs. Admin.*, 7 N.E.3d 272, 275 (Ind. Ct. App. 2014).

3. A party may not obtain judicial review of an issue not raised before the agency unless a necessary party failed to receive notice, or the issue concerns a change in controlling law which occurred after the agency decision. I.C. § 4-21.5-5-10.

4. A court may grant relief from an administrative decision only if the determination of the agency is proven to be one of the following: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code § 4-21.5-5-14.

5. Courts must analyze the record as a whole to determine whether the administrative findings are supported by substantial evidence. See *Whirlpool Corp. v. Vanderburgh County-City of Evansville Human Relations Comm’n*, 875 N.E.2d 751, 759 (Ind. Ct. App. 2007).

6. “The substantial evidence standard is met if a reasonable person could conclude that the evidence and the logical inferences therefrom are of such a substantial character and probative value as to support the administrative determination.” *John Malone Enter., Inc.*, 674 N.E.2d at 606.

7. “If there is any substantial evidence to support the finding of the board or agency, the court may not disturb the board’s or agency’s determination.” *Med. Licensing Bd. of Ind. v.*

*Robertson*, 563 N.E.2d 168, 173 (Ind. Ct. App. 1990) (quoting *Ind. Educ. Emp't Relations Bd. v. Baugo Cmty. Sch.*, 377 N.E.2d 414, 416 (Ind. Ct. App. 1978)).

8. Further, “[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” *Moriarity v. Ind. Dep't of Natural Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (quoting *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000)); *see also Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 163 (Ind. Ct. App. 2006), *trans. denied.*

## II. FINDINGS OF FACT

9. This action involves a parcel of farmland located at 4500 West 400 North in Lake Village, Newton County, Indiana (the “Farm”) where Respondent Natural Prairie is currently operating a dairy farm with approximately 4,350 dairy cows.

10. Natural Prairie purchased the Farm in 2016 and, thereafter, while continuing to plant crops on the land, began securing necessary approvals from governmental agencies to build and operate a confined feeding operation (i.e. its dairy farm).

11. Prior to applying for a Confined Feeding Operation (“CFO”) permit, Natural Prairie filled in portions of Bogus Island Ditch on the property where the CFO would be located. By December 2018, IDEM was aware that Natural Prairie had filled numerous on-site drainage ditches to make way for its CAFO.<sup>1</sup> During a March 15, 2019 hearing on a Motion to Stay, the Environmental Law Judge (ELJ) ruled evidence of Natural Prairie’s ditch filling activities was an improper collateral attack on the Army Corps of Engineer’s jurisdictional determination the ditch was not waters of the United States.

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<sup>1</sup> OEA Record Vol.IVG: 819-821 (IDEM report of December 3, 2018 confirming that “[a]ll open ditches that were within the footprint or closely adjacent to the footprint of the proposed facility have been filled”).

12. The ELJ barred any further evidence regarding this issue both IDEM and Natural Prairie refused to respond to any interrogatories. *Indiana Department of Environmental Management's Responses to Petitioners' Interrogatories*, No. 3, p. 4.)

13. One of those approvals was a Confined Feeding Operation (“CFO”) Approval issued by IDEM under authority granted to the agency by Indiana Code § 13-18-10 (the “CFO statute”).

14. The CFO statute provides that a “person may not start construction of a confined feeding operation ... without obtaining [IDEM’s] prior approval.” Ind. Code § 13-18-10-1. To obtain IDEM’s approval, the CFO statute requires an application to submitted to IDEM “on a form provided by [the agency].” Ind. Code § 13-18-10-2.

15. In addition to the information requested on the IDEM form, the CFO statute requires the applicant to submit certain additional information. *See* Ind. Code § 13-18-10-2. Relevant to the present appeal is the requirement for the applicant to submit “supplemental information” that IDEM “requires” including the “identification of nearest streams, ditches, and lakes.” Ind. Code § 13-18-10-2(4)(D).

16. IDEM did not request from Natural Prairie any “supplemental information” regarding closed streams or ditches, but Natural Prairie did identify surface waters that were “known and identifiable at the time an application is submitted for approval” for purposes of the setback requirements located at 327 IAC 19-12-3.

17. On January 10, 2019, IDEM issued a CFO Approval to Natural Prairie for the construction and operation of the dairy farm. (R. Vol. 3 at 82; V01. 4B at 4.)

18. IDEM holds statutory discretion to adopt rules for the issuance of permits that impose conditions that it considers necessary to preserve, protect or enhance the environment. *See*

Ind. Code § 13-15-2-1. Using this discretion, IDEM promulgated groundwater monitoring requirements as part of its CFO Rules. *See* 327 IAC 19-10. IDEM's CFO Rules allow IDEM to determine whether a CFO application must include a groundwater monitoring plan ("GWMP"). 327 IAC 19-10-1(a). In this instance, IDEM determined that Natural Prairie should include a GWMP with its application and Natural Prairie submitted a GWMP with its application.

19. Natural Prairie's GWMP was submitted to and approved by IDEM after three revisions made at IDEM's request. (*Kurylo Aff.*, R. Vol. II p. 445-446.)

20. On January 25, 2019, Protect Our Kanakee River Basin, Roy Barnes, Thomas Cutts, Debra Cutts, Steven Crowley, Kim Starkey, and Pat Starkey Starkey filed a Petition for Administrative Review and Stay of Effectiveness of the CFO (the "Petition for Administrative Review"). (R. Vol. 3 at 82.)<sup>2</sup>

21. Protect Our Kankakee River Basin, Roy Barnes, and Pat Starkey were voluntarily dismissed from the case on July 1, 2019. (R. Vol. 3 at 82.)

22. Petitioners raised several alleged defects in their Petition for Administrative Review:

- a. The Approval allows a continuing Violation of Section 404 of the Clean Water Act
- b. The Approval allows unlawful filling and conversion of wetlands in Violation of Section 404 of Clean Water Act and the Swampbuster Provisions of the Food Security Act.
- c. The Approval wrongly approved the Janicki System.
- d. The Approval violated ground water monitoring requirements.
- e. The Approval violates land application requirements.

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<sup>2</sup> Petitioners argue in the Reply Brief that portions of Natural Prairie's Brief (pages 2-3 and footnote 3) should be struck as an "*Ad Hominem*" attack on Hoosier Environmental Council ("HEC") and Petitioners' counsel. The Court GRANTS the Petitioners' motion to strike.

f. The Approval allows a substantial endangerment to human health and the environment.

(R. Vol. 3 at 82; Vol. 1 at 8-32.)

23. The Environmental Law Judge (ELJ) issued findings of fact and conclusions of law on January 28, 2020. (R. Vol. 3 at 82-94.) The ELJ held that:

- the Petitioners had standing to maintain the administrative action, (R. Vol. 3 at 87-88);
- the CFO approval did not Violate the water setback requirements of 327 IAC 19-12-3, (R. Vol. 8 at 88-89);
- the Janicki system was properly approved, (R. Vol. 3 at 89-91);
- there was a dispute of fact about the GWMP Which precluded summary judgment, (R. Vol. 3 at 91—92);
- there is sufficient land acreage for approval of the CFO, (R. Vol. 3 at 92-93); and,
- there is no evidence that the CFO approval will result in harm to human health or the environment to warrant reversal. (R. Vol. 3 at 93-94.)

24. OEA granted summary judgment in favor of IDEM and Natural Prairie on all issues except the GWMP, on which the ELJ's Order found the parties' experts were in conflict which, in turn, created an issue of fact precluding summary judgment. (R. Vol. 3 at 94.)

25. After that first order, but prior to the date of final hearing on this sole remaining issue, the parties filed a joint motion requesting that OEA rule on the GWMP issue based upon the previously submitted briefs, arguments and evidence.

26. Petitioners withdrew the previously submitted expert report and deposition testimony of Martin Risch and stipulated that such evidence should not be considered in arriving at the ELJ's final order. (R. Vol. 3 at 127.)

26. In light of this request, the ELJ acknowledged Petitioners' withdrawal of this evidence. (R. Vol. 3 at 134.)

27. On June 11, 2020, the ELJ issued her Findings of Fact, Conclusions of Law and Final Order ("OEA Order 2"), granting summary judgment in favor of Natural Prairie on the GWMP issue (OEA Order 2, R. Vol. 3 at 136-143).

28. The original Verified Petition for Judicial Review was filed on July 13, 2020. A subsequent First Amended Verified Petition, the operative Petition, was filed on July 15, 2020, and seeks to set aside OEA's final determinations regarding the propriety of IDEM-issued CFO Approval based on only two arguments:

- a. That Natural Prairie's application does not violate the surface water setback requirements in the CFO rule (OEA Order 1, Rec. Vol. III p. 89 ¶ 18); and
- b. That the Petitioners failed to prove that the GWMP does not comply with the ground water monitoring requirements. (OEA Order 2, Rec. Vol. III p. 139 ¶ 12).

29. Any of the foregoing Findings of Fact that should be considered legal conclusions are hereby incorporated by reference into the following Conclusions of Law.

### III. CONCLUSIONS OF LAW

*Petitioners failed to establish the OEA's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*

#### **Setback Requirements**

30. Having concluded that Natural Prairie was not required to submit, and thus IDEM was not required to consider, surface waters that did not exist at the time of the application, the OEA's ruling that "the CFO approval did not Violate the water setback requirements of 327 IAC 19-12-3" was supported by substantial evidence.

31. For all these reasons, the OEA's Order with respect to the setback requirements is

affirmed in this judicial review.

32. IDEM regulations require that an application for a CFO include “[i]dentification of nearest streams, ditches, and lakes.” Ind. Code § 13-18-10-2(a)(4)(D).

33. The identification of nearby surface waters is relevant because waste management systems must be located at least three hundred (300) feet from a “surface water,” that is “known and identifiable at the time an application is submitted for approval.” 327 IAC 19-12-3.<sup>3</sup>

34. To enforce these provisions, an application for a CFO must include a farmstead plan, which “must show ... within five hundred (500) feet of the waste management systems, the following known features: (1) Surface waters of the state.” 327 IAC 19-7-3.

35. The term “surface water” refers to “waters present on the surface of the earth, including: (1) streams; (2) lakes; (3) ponds; (4) rivers; (5) swamps; (6) marshes; or (7) wetlands.” 327 IAC 19-2-45.

36. According to this definition, water must be present for something to be deemed a “surface water,” which, in turn, implies that if there is no existing body of water, then there is no surface water.

37. The term “surface water” does not include filled or former surface waters because it must be an existing body of water.

38. This is supported by the fact that surface waters must be “known and identifiable at the time an application is submitted for approval.” 327 IAC 19-12-3.

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<sup>3</sup> “All waste management systems must be designed to not discharge to surface waters of the state,” and if “a waste management system discharges or is designed to discharge, a NPDES CAFO permit under 327 IAC 15-16 is required.” 327 IAC 19-12-4.



39. If a stream or lake is filled, it cannot be identified because there is no existing body of water and the contours of that body of water cannot be located.

40. Natural Prairie was not obligated to identify locations where a ditch was filled and no longer existed, so there was no violation of IDEM's setback requirements.

41. Construction may not begin before the confined feeding operation application is submitted. However, construction does not include site preparation. And, site preparation does not include land drainage or excavating. (327 IAC 19-2-9; 327 IAC 19-2-40.)

### **Ground Water Monitoring Plan**

42. When approving a CFO permit, the Commissioner of IDEM has discretion on whether to require a ground water monitoring plan (GWMP) be established to protect human health and the environment. 327 IAC 19-10-1(a).

43. If IDEM requires a GWMP, the permittee must monitor at least the following parameters: (i) field pH; (ii) field specific conductance; (iii) nitrates; (iv) chloride; (v) fecal coliform bacteria; (vi) sulfate; and (vii) total dissolved solids. 327 Ind. Admin. Code 19-10-1(d)(3)(A).

44. The GWMP should also include, among other things, "a description of how the owner/operator shall determine whether there is a statistically significant increase over background values for each parameter monitored, with the exception of field pH and field specific conductance." 327 IAC 19-10-1(d)(3).

45. IDEM's groundwater regulation also stipulates that the "owner/operator shall make these statistical determinations each time the owner/operator collects samples" and that the required monitoring, "must be conducted throughout the active life" of the CFO's waste storage facility. 327 IAC 19-10-1(d)(3)(G), (g).

46. Natural Prairie's GWMP first requires that at least one ground water sampling event occur before any manure is deposited into the waste lagoon. *See* Point a of the GWMP, *supra*.
47. Then, piezometers must be installed and monitored for a year to determine the ground water flow, which in turn will determine the best location to install wells for permanent ground water monitoring. *See* Points b-d of the GWMP, *supra*.
48. Next, in order to determine background levels for the monitoring parameters, *e.g.* the base level of the parameters in the ground water, the GWMP requires that Natural Prairie take 8 samples each quarter, thus establishing background levels over the second and third year the CFO is operating. *See* Points g-1 of the GWMP, *supra*.
49. The data from each of those sampling events must be submitted to IDEM within 60 days, and the data will be reviewed to: (1) establish background levels of the monitored parameters and (2) determine if there is a statistically significant increase, such that additional monitoring is required. *See* Points j-1 of the GWMP, *supra*.
50. Petitioner alleges that this plan contradicts Indiana law on two grounds:
- a. that the 8 samples taken over the initial 2-year time period will allegedly not be used to determine a statistically significant increase over background levels of the monitoring parameters, as required by 327 IAC 19-10-1(d)(3)(G); and
  - b. that the 3-year delay (1 year for determining ground water flow and 2 years for establishing background levels) contradicts the requirement that monitoring occur "throughout the active life of the storage facility." 327 IAC 19-10-1(g).
51. To make the statistical determination of whether there is a "significant increase over background values," the owner/operator must first establish what the background values are for each parameter being monitored. 327 IAC 19-10-1(d)(3)(G).

52. The statute does not specify how these background values are to be established, so IDEM's Guidance Manual provides that there will be an initial two-year time frame for taking 8 quarterly samples in order to establish background values.
53. However, the first 8 sampling events will still be used to determine if there are indications of an increase in background levels, as required by 327 IAC 19-10-1(d)(3)(G).
54. The Guidance Manual notes that "if the sampling results during the first 8 quarters of monitoring show a markedly increasing trend indicating a problem with the waste management system, the statistical evaluation procedures described in this guidance may not be appropriate, and IDEM may require alternative procedures or corrective action." (R. Vol. 2 at 670).
55. IDEM has reasonably interpreted its own regulation as allowing for a two-year period to establish background values for monitoring the required parameters.
56. The GWMP properly requires that the required monitoring be carried out throughout the active life of the CFO.
57. The "[r]equired monitoring" which should be carried out "throughout the active life" of the storage facility refers to how often samples should be taken. 327 IAC 19-10-1(g).
58. However, the regulation is silent on how often samples should be taken. *See* 327 IAC 19-10-1.
59. Given this, IDEM has discretion to determine what the "required monitoring" should look like during the active life of the storage facility.
60. There is nothing in IDEM's regulations that states that the background values for the required monitoring must be established before the waste management system begins operating. *See contra* 329 IAC 10-19-1.
61. Thus, as discussed above, IDEM may use the first few years that the waste management system is operating to establish background values for monitoring.

62. However, even during this initial period of establishing background values, IDEM is reviewing the initial 8 sampling events for “a markedly increasing trend indicating a problem with the waste management system,” such that “IDEM may require alternative procedures or corrective action.” (R. Vol. 2 at 670).

63. Because the first 8 sampling events will still be used to determine if there is an increase of the monitored parameters, as required by 327 IAC 19-10-1(d)(3)(G), there is no error in the GWMP.

64. Petitioner has not shown that the OEA’s decision warrants reversal under Indiana Code § 4-21.5-5-14(d).

65. Petitioners also challenge the OEA’s ruling that Natural Prairie’s GWMP complied with the ground water monitoring requirements. (OEA Order 2, Rec. Vol. III p. 139 ¶ 12.)

66. Petitioners argue that the CFO Rule requires “that throughout the active life of the [CFO’s manure] storage facility . . . *regular sampling for* statistically significant increase[s] over background levels” of various parameters must be made “each time the [CFO] owner/operator collects samples (emphasis added).” (Petitioners’ Br. at p. 5). However, the CFO Rule does not include the words “regular sampling for” and, what is more, Petitioners’ have rearranged the language of IDEM’s CFO Rule in a manner inconsistent with the plain language of the CFO Rule as well as the agency’s interpretation.

67. IDEM, in response, notes that it has the discretion to determine whether a GWMP is required at all. Further, when IDEM does so, the CFO Rules require monitoring of certain parameters, but provide IDEM great latitude in determining “monitoring frequency, sample collection methods and identification, and analytical procedures.” (IDEM Br. at pp. 9-15.)

68. In exercising this discretion, IDEM's Groundwater Rule, 327 IAC 19-10-1, only required Natural Prairie to:

*“include ... a description* of how the owner/operator shall determine whether there is a statistically significant increase over background values for each parameter monitored, with the exception of field pH and field specific conductance. The owner/operator shall make these statistical determinations each time the owner/operator collects samples.” (327 IAC 19-10-1(d)(3)(G).)

69. Petitioners then argue that 327 IAC 19-10-1 requires Natural Prairie to take eight samples, over the course of two years, before it can begin operations. For the reasons that follow, this argument is not supported by the administrative record or the law.

70. OEA properly determined that Natural Prairie's GWMP required (a) at least one groundwater sampling event before any manure is deposited into the storage lagoon, (OEA Order 1, Rec. Vol. III p. 89 ¶ 11(a)); (b) one year of sampling to determine groundwater flow direction, (OEA Order 1, Rec. Vol. III p. 89 ¶ 11(c)); and, (c) eight sampling events to “establish normal site conditions.” (OEA Order 1, Rec. Vol. III p. 89 ¶ 11(g).)

71. Petitioners' argument is again at odds with IDEM's interpretation of its own regulations. As noted above, this Court must defer to IDEM's interpretation so long as it is not inconsistent with the statute itself.

72. Here, the CFO statute gives IDEM broad discretion as to whether to even require groundwater monitoring in approving a CFO application. IDEM's interpretations of 327 I.A.C. 19-10-1 in this proceeding are not inconsistent with the statute.

73. Petitioners conflate the discussion in the regulations of an owner making “statistical determinations” each time an owner collects samples into a multi-year requirement of background sampling that must be completed before any CFO operations can commence. The Court finds no support for this requirement under either the CFO statute or the Groundwater Rule.

74. As IDEM stated in its brief, “if IDEM wanted to require . . . preoperational testing for CFOs, it could have enacted [other regulations similar to landfill regulations].” (IDEM Br. at 15.)

75. This Court cannot substitute its judgment for IDEM’s authority established by the General Assembly.

76. This is not to say that a Petitioner could never challenge a GWMP through judicial review. If IDEM required a GWMP, and then the owner omitted any sampling for nitrates (or any other parameter specifically specified in the Groundwater Rule), then a reviewing court could determine that such a GWMP does not comply with the Groundwater Rule.

77. Here, however, the OEA’s determination that “Petitioners failed to prove that the GWMP does not comply with the ground water monitoring requirements” was supported by substantial evidence. (OEA Order 2, Rec. Vol. III p. 139 ¶ 12.)<sup>4</sup>

78. Any of the foregoing Conclusions of Law that should be considered a factual finding is hereby incorporated by reference in the preceding Findings of Fact.

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<sup>4</sup> Petitioners voluntarily withdrew their only expert opinion with respect to the GWMP’s compliance with the ground water monitoring rule. Petitioners argued to the OEA that such testimony would be offered “as to whether the GWMP approved by IDEM meets [regulatory requirements.]” (Resp. to Motion to Exclude, Rec. Vol. III p. 1-4). Having withdrawn such expert testimony, Petitioners’ arguments for legal error by the OEA in issuing summary judgment is without support.

**IV. SUMMARY**

79. For the foregoing reasons, the OEA's conclusion that IDEM made no error of law regarding the interpretation and application of its own regulations regarding the setback requirements and ground water monitoring plan applicable to Natural Prairie's application is hereby affirmed, and the Petition is denied.

IT IS ORDERED, ADJUDGED, AND DECREED THE PETITION FOR JUDICIAL REVIEW IS DENIED.

SO ORDERED this First day of June, 2021

Date: June 1, 2021

*Therese Hannah.*  
\_\_\_\_\_  
Marion County Superior Court

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