

Objection to the Issuance of Part 70 Operating Permit Renewal No. T039-24536-00538
VIM Recycling Inc.
Elkhart, Elkhart County, Indiana
2009 OEA 86, (09-A-J-4257)

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 86, cite this case as
Vim Recycling, Inc., 2009 OEA 86.

TOPICS:

dismissal
Petition for Review
filing
I.C. § 4-21.5-3-2
I.C. § 4-21.5-3-7
receipt
effective

PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Valerie Tachtiris, Esq.
Petitioners: Kim Ferraro, Esq.; Legal Environmental Aid Foundation
Permittee/Respondent: Amy Romig, Esq.; Plews Shadley Racher & Braun

ORDER ISSUED:

July 16, 2009

INDEX CATEGORY:

Air

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
PART 70 OPERATING PERMIT RENEWAL)
NO. T039-24536-00538)
VIM RECYCLING INC.)
ELKHART, ELKHART COUNTY, INDIANA)
_____) CAUSE NO. 09-A-J-4257
Baugo North Neighborhood Group, *et al.*,)
 Petitioners,)
VIM Recycling, Inc.,)
 Permittee/Respondent,)
Indiana Department of Environmental Management,))
 Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court on VIM Recycling, Inc.'s Motion to Dismiss, which pleading is a part of the Court's record; and the Court, being duly advised and having read the record, motion, responses and reply now enters the following findings of fact, conclusions of law and final order:

FINDINGS OF FACT

1. On April 8, 2009, the Indiana Department of Environmental Management (the "IDEM") issued Part 70 Operating Permit Renewal No. T039-24536-00538 (the "Permit") to VIM Recycling, Inc. ("VIM") for the facility located at 29861 Old U.S. Highway 33, Elkhart, Indiana (the "Site").
2. Service of notice was sent by U.S. mail on April 9, 2009 to several persons who expressed interest, including but not limited to Mrs. Joyce Bellows, Wayne Stutsman, and Kim Ferraro.
3. The Petitioners, Baugo North Neighborhood Group, by its representative members, Joyce Bellows, Wayne Stutsman, Barbara Stutsman and Edgar Bellows (the "Neighborhood Group") filed their Petition for Administrative Review and Stay of Effectiveness on April 29, 2009.
4. It is unknown when Mrs. Bellows or Mr. Stutsman received the Notice. Kim Ferraro, the Petitioners' attorney, received the Notice of Decision on April 20, 2009.

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CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 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. § 4-21.5-3-2, in pertinent part, states:
 - (c) A period of time under this article that commences when a person is served with a paper, including the period in which a person may petition for judicial review, commences with respect to a particular person on the earlier of the date that:
 - (1) the person is personally served with the notice; or
 - (2) a notice for the person is deposited in the United States mail.
 - ...
 - (e) If a notice is served through the United States mail, three (3) days must be added to a period that commences upon service of that notice.
5. 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 or any longer period set by statute”. I.C. § 13-15-6-1(a) iterates this time frame. I.C. § 4-21.5-3-2(e) adds three (3) days if service is by U.S. mail so a petition for review should be filed within eighteen days.
6. As the Permit in question is a renewal of a Title V air permit, the Petition for Review must have been filed within 15 days “after the person is given notice or “any longer period set by statute.” The Notice of Decision was deposited in the United States mail on April 9, 2009. Therefore, a petition for review should have been filed within eighteen days or on or before April 27, 2009.
7. The Notice of Decision sent to the Petitioners states, in relevant part:

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For a Title V Operating Permit renewal, a petition for administrative review must be submitted to the Office of Environmental Adjudication with fifteen (15) days from the receipt of this notice provided under I.C. § 13-15-5-3, pursuant to I.C. § 13-15-6-1(a).

8. The Petitioners argue that the use of the word “receipt” sets a different time frame for filing a petition for review. They rely on I.C. § 4-21.5-3-6(d) which states that an order is *effective* fifteen days after the order is served, unless a statute other than this article specifies a different date *or the agency specifies a later date in its order*.
9. I.C. § 4-21.5-3-3(c) states:
 - (c) An order is effective when it is issued as a final order under this chapter, except to the extent that:
 - (1) a different date is set by this article;
 - (2) a later date is set by an agency in its order; or
 - (3) an order is stayed.
10. The above statutes extend the effective date of an order; it does not extend the time frame for filing a petition for review. Pursuant to I.C. § 4-21.5-3-7(a)(3)(A), a petition for review must be filed “within fifteen (15) days after the person is given notice of the order or any longer period set by statute.” IDEM does not have the authority to extend the time deadline for filing a petition for review. Only the state legislature may enact a statute specifying a different time frame.
11. The Permit in question here is a renewal of a Title V Air Permit. Notice of IDEM’s decision was mailed by U.S. mail. The petition for review must have been filed within eighteen days, therefore no later than April 27, 2009.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition for Review filed by Petitioners is hereby **DISMISSED**.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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 16th day of July, 2009 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge