

**Objection to the Issuance of NPDES Permit No. ING806568**

**John A. and Becky S. Stuber  
Marion, Grant County, Indiana  
2009 OEA 96, (07-W-J-4003)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2009 OEA 96, cite this case as  
*John A. and Becky S. Stuber, 2009 OEA 96.*

**TOPICS:**

hearing  
Confined Animal Feeding Operation  
CAFO  
offer of proof  
strike  
Judicial Notice  
seasonal high water table  
concrete  
perimeter drain  
carcass management plan  
land application  
manure storage tanks  
manure management plan  
acres  
setback  
crop yields  
soil conservation plan  
surface water  
ground water

**PRESIDING ENVIRONMENTAL LAW JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

IDEM: Sierra Alberts, Esq.  
Petitioner: James P. Fenton, Esq.; Eilbacher Fletcher LLP  
Permittee/Respondent: Daniel P. McInerny, Esq.; Bose McKinney & Evans LLP

**ORDER ISSUED:**

July 29, 2009

**INDEX CATEGORY:**

Water

**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    )  
NPDES PERMIT NO. ING806568        )  
JOHN A. AND BECKY S. STUBER        )  
MARION, GRANT COUNTY, INDIANA    )  
                                                  )  
                                                  )                CAUSE NO. 07-W-J-4003  
\_\_\_\_\_  
Carol Bone, Lee R & Evaleen Smallwood, Phillip )  
& Deborah Mitchell,                                    )  
    Petitioners,                                            )  
John A. and Becky S. Stuber,                        )  
    Permittee/Respondent,                            )  
Indiana Department of Environmental Management,) )  
    Respondent                                            )

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

This matter having come before the Court for the final hearing held on February 17 and 18, 2009, on the Petitioners’ Petition for Review; and the Court, being duly advised and having read the pleadings, record and evidence and having heard the testimony, finds that judgment may be made upon the record, makes the following findings of fact and conclusions of law and enters the following Final Order:

Post-hearing Motions

On April 17, 2009, the Petitioners filed Petitioners’ Proposed Findings As to Facts Submitted on Offer of Proof; Petitioners’ Request That the Court Take Judicial Notice of Facts Not Subject to Reasonable Dispute; and Petitioners’ Motion to Strike Testimony of Michael A. Veenhuizen. The Court, being duly advised and having read the motions and Permittee’s Response in Opposition to Petitioners’ Request That the Court Take Judicial Notice of Facts Not Subject to Reasonable Dispute and Response in Opposition to Petitioners’ Motion to Strike Testimony of Michael A. Veenhuizen, now enters the following orders as to each motion:

1. Petitioners’ Proposed Findings As to Facts Submitted on Offer of Proof: The Court had previously ruled that evidence regarding air emissions from the CAFO<sup>1</sup> and carcass management were irrelevant and immaterial to this matter. The Court **AFFIRMS** this ruling.

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<sup>1</sup> Concentrated Animal Feeding Operation

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2. Petitioners' Request That the Court Take Judicial Notice of Facts Not Subject to Reasonable Dispute: The Court may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned"<sup>2</sup> pursuant to I.C. § 4-21.5-3-26(f)(1). Pursuant to I.C. § 4-21.5-3-26(f), official notice may be taken before the issuance of any order. Pursuant to Ind. Rules of Evidence 201(f), judicial notice may be taken at any stage during the proceeding. The design specifications<sup>3</sup> submitted as part of the General Permit Notice of Intent specify that the concrete mix shall be Type I, IA, II or IIA Portland cement. Therefore, the Court **GRANTS** the motion to take official notice of the descriptions of Type II and Type V Portland cement as set out by the PCA<sup>4</sup> on its web site<sup>5</sup>, and more specifically that (1) Type II Portland cement, is "used for structures in water or soil containing moderate amounts of sulfate" and (2) Type V Portland cement "resists chemical attack by soil and water high in sulfates". The Court finds that these are relevant to the issues raised in this matter and are facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." However, the Court **DENIES** the motion to take official notice that the PCA "does not indicate that Type I Portland cement has any resistance either to moderate or high sulfate concentrations" as this is not a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."
3. Petitioners' Motion to Strike Testimony of Michael A. Veenhuizen: The Court **AFFIRMS** the determination that Dr. Michael A. Veenhuizen is qualified to testify as an expert regarding CAFOs in the State of Indiana. Further, any argument regarding the validity of his opinions regarding the sulfate content of hog manure goes to the weight of his testimony rather than its admissibility. Dr. Veenhuizen adequately identified the source<sup>6</sup> of the information on which he based his testimony. The Petitioners' request to strike the entirety of his testimony based on their objections to his testimony on one particular fact is without merit. The Motion to Strike Testimony of Michael A. Veenhuizen is **DENIED**.

Statement of the Case

1. On October 12, 2007, the Indiana Department of Environmental Management (the "IDEM") issued NPDES Permit No. ING 806568 to John A. and Becky S. Stuber<sup>7</sup> (the Permittee) for the construction and operation of a Concentrated Animal Feeding Operation (CAFO) to be located at Section 25, Township 25 North, Range 8 East, Grant County, Indiana (the "Facility").

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<sup>2</sup> Indiana Rules of Evidence 201(a)(2).

<sup>3</sup> Page 92, paragraph 4, General Permit Notice of Intent, General Permit Construction Notice of Intent and Supporting Documentation, Petitioners' Exhibit 1A, received September 7, 2007 by the IDEM.

<sup>4</sup> Portland Concrete Association

<sup>5</sup> [www.cement.org/basics/concretebasics\\_facqs.asp](http://www.cement.org/basics/concretebasics_facqs.asp)

<sup>6</sup> The source was a study from Purdue University, which is widely recognized in Indiana as a reliable source and was relied upon by the Petitioners' expert.

<sup>7</sup> Mrs. Stuber is deceased.

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2. On October 22, 2007, Danford R. Pierce, Lee R. Smallwood, Evaleen Smallwood, Carol Bone, Deborah J. Mitchell and Philip Mitchell (collectively referred to as the Petitioners) filed a petition for review of the Permit with the Office of Environmental Adjudication.
3. On December 11, 2007, the Petitioners filed their Amended Verified Petition for Administrative Review.
4. Danford R. Pierce was dismissed at his request on July 18, 2008.
5. The Permittee filed a Motion for Summary Judgment on March 5, 2008. The Petitioners filed their Response in Opposition to Motion for Summary Judgment on April 18, 2008. The Permittee filed his reply on May 5, 2008. The Motion for Summary Judgment was denied on July 18, 2008.
6. The OEA determined that genuine issues of material fact existed which precluded summary judgment. The presiding ELJ also determined that evidence regarding air emissions and/or possible discharges from unknown land application areas were irrelevant and immaterial.
7. A hearing was held on February 17 and 18, 2009.
8. The Petitioners filed Petitioners' Proposed Findings of Fact and Conclusions of Law; Proposed Findings of Fact As to Facts Submitted on Offer of Proof; Petitioners' Request That the Court Take Judicial Notice of Facts Not Subject to Reasonable Dispute; and Petitioners' Motion to Strike Testimony of Michael A. Veenhuizen on April 17, 2009.
9. The Permittee filed his Proposed Findings of Fact, Conclusions of Law and Final Order on April 17, 2009.
10. The Permittee filed Permittee's Response in Opposition to Petitioners' Request That the Court Take Judicial Notice of Facts Not Subject to Reasonable Dispute and Response in Opposition to Petitioners' Motion to Strike Testimony of Michael A. Veenhuizen on May 8, 2009.

**FINDINGS OF FACT**

1. On September 6, 2007, Livestock Engineering Solutions, Inc., on behalf of John A. and Becky S. Stuber, submitted a General Permit Notice of Intent, General Permit Construction Notice of Intent and supporting documentation ("NOI Materials") in support of a Concentrated Animal Feeding Operation ("CAFO") to be located in Grant County, Indiana.

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2. On October 12, 2007, the Indiana Department of Environmental Management (the "IDEM") issued NPDES Permit No. ING 806568 to John A. and Becky S. Stuber (the Permittee) for the construction and operation of a CAFO to be located at Section 25, Township 25 North, Range 8 East, Grant County, Indiana (the "Facility"). The CAFO would consist of two wean-to-finishing buildings with concrete pits beneath slatted floors for the storage of liquid manure from approximately 648 nursery pigs and 3,672 finishing hogs each (for a total capacity of 1,296 nursery pigs and 7,344 finishing hogs).
3. The Permit was issued as a general permit under 327 IAC 15-15.
4. Pursuant to 327 IAC 15-15-4, the Facility may not discharge manure, litter or process wastewater pollutants to the waters of the State of Indiana.
5. On October 22, 2007, Danford R. Pierce, Lee R. Smallwood, Evaleen Smallwood, Carol Bone, Deborah J. Mitchell and Philip Mitchell (collectively referred to as the Petitioners) filed a petition for review of the Permit with the Office of Environmental Adjudication.
6. The Stipulations of the Parties, entered into the record at the hearing on February 17, 2008, are attached and made a part of the Court's record.
7. The Petitioners presented evidence regarding the alleged deficiencies in the NOI Materials as follows:
  - Deficiencies in the design of perimeter drains
  - Deficiencies in the design of the manure storage tanks
  - Deficiencies in the Manure Management Plan
  - Deficiencies in the Management and Operation Plan regarding the calculation of the number of acres needed for land application
  - Failure to justify reduced setbacks for use of injection during land application
  - Failure to present sufficient information regarding crop yield
  - Failure to present a carcass management plan
  - Failure to identify potentially threatened surface and ground waters
  - Failure to submit an adequate soil conservation plan
  - Failure to require greater setbacks from residences and public buildings

Further, the Petitioners argue that a general NPDES permit was inappropriate for this Facility and an individual permit should have been required.

8. The Petitioners relied on the expert testimony of Ms. Kathy Martin. The Permittee relied on the expert testimony of Dr. Michael Veenhuizen. Dr. Veenhuizen prepared the NOI Materials for the Facility and has consulted on many CAFOs in the State of Indiana. The Court finds that Dr. Veenhuizen's testimony was generally more credible due to his greater familiarity with the Facility and with Indiana's regulations.

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9. The Facility will be located on land with a seasonal high water table. The Permit includes the requirement that a perimeter drainage tile be installed to drain the soils surrounding the concrete manure storage structures and to act as an interceptor drain. The perimeter drain will be installed around each building below the base floor elevation of the structures. Each building has a collection sump and observation point. The sump pumps will lift the collected water to a rock distributor point toward a vegetative area.
10. The purpose of the perimeter drain is to protect the structural integrity of the floor of concrete manure structures, particularly before the pigs are put into the buildings.
11. Ms. Martin testified that the NOI Materials provided insufficient detail to allow for a determination that the perimeter drain meets the requirements in the regulations. Dr. Veenhuizen testified that sufficient information had been provided to meet the IDEM performance standards.
12. The NOI Materials<sup>8</sup> contain the specifications for the manure storage structures. Amongst other requirements, the structures will be constructed from Type I, IA, II or IIA Portland cement.<sup>9</sup> The NOI Materials state that the preferred type of concrete is Type I with an added air entrainment admixture. Further, the NOI Materials specify that concrete shall conform to the ACI Manual of Concrete Practices, ACI 301 and the structures shall have a particular minimum compressive strength.
13. Ms. Martin testified that the NOI Materials do not contain sufficient information to allow IDEM to determine whether the structures will be constructed in such a way as to minimize leaking or seepage as required by the regulations. In particular, the NOI Materials do not specify the permeability of the concrete or require the use of Type V Portland cement. Ms. Martin believed that Type V Portland cement was necessary because of the highly corrosive nature of hog manure.
14. The Court has taken judicial notice of the fact that Type II Portland cement is “used for structures in water or soil containing moderate amounts of sulfate” and that Type V Portland cement “resists chemical attack by soil and water high in sulfates”. However, Dr. Veenhuizen testified that, based on his review of applicable literature, the NOI Materials proposal to use Type I, high-quality, air entrained concrete with a compressive strength of 4,000 PSI and a water-cement ratio of 0.50 and concrete cover of 2 inches over the reinforcement bar is suitable for manure storage structures.
15. The Manure Management Plan, as submitted in the NOI Materials and as approved by the Permit and applicable regulations require manure and soil sampling prior to the initial land application and at various times so that manure will be applied at the appropriate agronomic rate.

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<sup>8</sup> Marked as Plaintiff’s Exhibit 1A, pages 72 and 92.

<sup>9</sup> Plaintiff’s Exhibit 1A, page 92.

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16. The Permittee identified 922 acres available for land application of the hog manure produced by the CAFO. The IDEM, using its guidance<sup>10</sup>, calculated that a minimum of 508.2 acres was required for land application, based on the number and size of the hogs. The IDEM guidance is based on a publication from Purdue University<sup>11</sup>. The acreage needed for land application is based on the amount of nitrogen needed as fertilizer. Ms. Martin presented testimony that there is a potential error of 30% in the guidance based on potential nitrogen loss from the manure prior to land application. However, Dr. Veenhuizen found no error after calculating the nutrient value using both the IDEM's guidance and Purdue University's publication. He concluded that the actual number of acres needed for land application to ensure that the manure was applied at the proper agronomic rate was less than the 508.2 acres that the IDEM had calculated.
17. The manure storage units allow for 331 days of storage. This represents the net storage capacity; the net tank dimensions were calculated by subtracting the volume taken up by support columns, dividing walls, and ventilation openings.
18. The Permittee proposes to land apply the manure by injection. Manure is injected into the soil thus minimizing nutrient loss to air and runoff; and by reducing the potential for runoff, thereby reducing the potential for surface water contamination. The Permit contains reduced setback requirements because of the proposed method of land application. Dr. Veenhuizen testified that if the Permittee chose to surface apply the manure, approximately 75 acres could not be used due to the greater setbacks required for surface application around surface water features.
19. The Petitioners object to the lack of information regarding crop yield in each of the land application areas. This data is useful in determining the proper agronomic rate. The NOI Materials provided information on soil types in each of the land application areas.
20. The Petitioners object to the absence of a carcass management plan in the NOI Materials. Evidence regarding this was ruled to be irrelevant as the Board of Animal Health regulates this activity. The Petitioners made an offer of proof.
21. Petitioners, Lee Smallwood and Philip Mitchell, testified that they were aware that land application of manure has taken place on the farm fields near their residences for over twenty (20) years.
22. Mr. Smallwood testified that he has had his water well tested for potential contamination and that no contamination was found.

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<sup>10</sup> Indiana Confined Feeding Regulation Program Guidance Manual, Presented by the Indiana Department of Environmental Management, dated October 28, 2004, Petitioners' Exhibit #9.

<sup>11</sup> Animal Manure as a Plant Nutrient Resource, ID-101 (Reviewed 02/05/01), Plaintiff's Exhibit 10.

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23. Mr. Mitchell testified that he has had his water well tested, and could not recall whether any contamination was identified, but he stated that if contamination had been found, he would probably have recalled that fact.
24. The Permittee testified that he has approximately twenty-four (24) years of experience raising hogs and ten (10) years of experience in land application using injection/incorporation. He stated that he has personally land applied manure on the farm fields near the residences of Mr. Smallwood and Mr. Mitchell with no adverse affects. His own residence is located within fifty (50) feet of one of the land application areas.

**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. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004); *Jennings Water, Inc. v. Office of Env'tl. Adjudication*, 2009 Ind. App. LEXIS 965, July 20, 2009 (Ind. Ct. App. 2009); *see also* I.C. § 4-32.5-3-27(d). “Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA at 129. *See also Blue River Valley*, 2005 OEA at 11, 12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #*



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9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338), 2005 OEA 26, 41.

5. The OEA will not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: 327 Article 3 Construction Permit Application Plans and Specifications for Sidney Wastewater Treatment Plant and Sanitary Sewer System Permit Approval No. 16684*, 2004 In. Env. Lexis 22 (Ind. Off. Env. Adjud., November 5, 2004); see also *Jennings Water, Inc. v. Office of Env'tl. Adjudication*, 2009 Ind. App. LEXIS 965, 972, July 20, 2009 (Ind. Ct. App. 2009). To the extent that the Petitioners allege that the Permit was improperly issued because of the possibility that the Permittee will violate the Permit, these allegations are not sufficient to support a conclusion that the Permit is invalid.
6. The Appellate Court found in *Jennings Water, Inc. v. Office of Env'tl. Adjudication*, 2009 Ind. App. LEXIS 965, 972, July 20, 2009 (Ind. Ct. App. 2009) that the OEA committed no error in its determination "that while Jennings Water had shown possible improvements to Lykins' proposed CFO, (*Appellant's App.* at 78), it had not shown by substantial evidence that IDEM's issuance of the permit did not comply with all the regulatory and statutory requirements." It is not sufficient to argue that the Permittee should have to use better methods or materials; the Petitioners must show by substantial evidence that the Permit was not issued in compliance with the regulations.
7. In addition, the OEA presumes that the rules promulgated by the Water Pollution Control Board are protective of human health and the environment. The appellate court in *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind.Ct.App. 2003) said "In addressing Bryant Health Care's contention, we are mindful that a State agency has the undoubted right to adopt rules and regulations designed to enable it to perform its duties and to effectuate the purposes of the law under which it operates, when such authority is delegated to it by legislative enactment." See *Dep't. of Ins. v. Golden Rule Ins.*, 639 N.E.2d 339, 341 (Ind. Ct. App. 1994) (referring to administrative boards).
8. The Petitioners in this case have not challenged the rules governing CAFOs, but have challenged whether the Permit issued in this matter complies with the applicable rules and is consistent with guidance published by the IDEM. This Court's review is limited to that question. Any evidence that the rules and guidance contain errors cannot serve as support for the conclusion that the Permit *in this case* is invalid as the Petitioners have not directly challenged the rules and guidance, but are challenging whether the Permit was issued in compliance with the rules and guidance.
9. In addition, the Court finds that, while both expert witnesses are certainly qualified to testify as experts in this matter, Dr. Veenhuizen is more persuasive as he has a greater familiarity with the Facility and with Indiana's statutes, regulations and guidance than Ms. Martin.

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Perimeter Drain

10. 327 IAC 16-8-1(a)(5) provides that manure management systems may not be placed in soil that is expected to be in the seasonal high-water table unless the water table is lowered to below the bottom of the waste management system. Various regulations provide the minimum requirements for perimeter drains. These include 327 IAC 16-8-3 (requires an access point for sampling) and 327 IAC 16-7-10 (must show detailed views and cross sections to define all dimensions and construction materials). The perimeter drain, as proposed by the NOI Materials, complies with the regulatory requirements.
11. The Petitioners have the burden of proof on any of their allegations. The Court finds that Dr. Veenhuizen had more credibility on this issue due to his familiarity with Indiana's requirements for perimeter drains and with the site conditions at the Facility. On this issue, the Petitioners have failed to produce substantial evidence that the Permittee has not provided sufficient detail on the design of the perimeter drain to meet the IDEM standards.

Manure Storage Tanks

12. 327 IAC 15-15-4 requires that all manure management systems must be constructed to minimize leakage, seepage and prevent spills. 327 IAC 16-8-6 provides that all new manure storage structures for liquid manure must meet certain basic structural requirements.
13. The Petitioners argue that the Permittee should be required to use better materials than the ones the Permittee proposes. However, the Petitioners have failed to present substantial evidence that the proposed design specifications do not comply with the regulations or are incapable of protecting human health and the environment.
14. The Permittee has presented substantial evidence that the manure management systems, installed in compliance with industry standards using the concrete specifications proposed in the NOI Materials which are maintained and monitored as required by the Permit and the regulations are adequate to protect ground or surface water.
15. The Petitioners' allegations, that the design and construction specifications for the concrete structures are insufficient to assure adequate protection of ground or surface water, are unsupported by the evidence. The evidence supports a conclusion that the concrete structures have been designed in accordance with industry and IDEM standards and regulations.

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Manure Management Plan

16. The Petitioners argue that the manure management plan (MMP) as set out in the Permit is inadequate. However, the Petitioners have failed to prove that the MMP does not comply with the applicable regulations. Any allegations that the Permittee will violate the regulations are speculative and insufficient to prove that the MMP is inadequate. Further, while the Petitioners and Ms. Martin present evidence as to what they believe are better methods/practices, they have not challenged the rules, but are objecting to this specific Permit. The Petitioners failed to prove how this specific MMP does not comply with the applicable regulations.

Land Application Acres

17. The Petitioners have failed to present sufficient evidence that the Permittee does not have adequate acreage on which to land apply the waste. The evidence consisted of testimony by Ms. Martin that the guidance document used by the IDEM to calculate the number of acres needed for land application has an error of 30%<sup>12</sup>. The IDEM presented evidence that, in compliance with applicable guidance, the number of acres needed was 508.2. The Permittee has 922 acres available. Even accounting for the alleged 30% error,<sup>13</sup> the Permittee has adequate acreage for land application as calculated using IDEM guidance. The Petitioners did not present substantial evidence that the number of acres needed for land application was inconsistent with either the regulations or the guidance.

18. Speculation that the erroneous calculation of acres would lead to the over application of manure is insufficient to support a conclusion that the Permit is deficient. 327 IAC 16-10-2 requires that “the agronomic rate for potentially available nitrogen must not exceed the nitrogen requirements of current or planned crops of the upcoming growing season” and 327 IAC 16-6-1(e)(2) requires that “all manure application must be in accordance with agronomic rates for potentially available nitrogen as documented in records at the confined feeding operation.” Various provisions in 327 IAC 15-15, including 327 IAC 15-15-4 and 327 IAC 15-15-10 regulate the rate and manner in which manure may be applied. 327 IAC 15-15-12 requires that land application rates must conform to certain published standards. If the Permittee fails to properly calculate the agronomic rate and over-applies manure, this could be a violation. Speculation that a permittee will not comply with the regulations is not sufficient to support a conclusion that the Permit is invalid.

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<sup>12</sup> This is based on the loss of nitrogen in the barn prior to the manure being land applied. Ms. Martin contends that potential nitrogen loss is taken into consideration twice in the guidance.

<sup>13</sup> 30% of 508.2 are 152.46. Therefore, the total of acres needed taking into account the 30% error is 660.66.

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Land Application Setbacks

19. The Petitioners argue that the Permittee has failed to provide sufficient justification for reduced setbacks. The method of land application chosen by the Permittee is injection. 327 IAC 15-15-5(b)(1)(O) requires that an applicant seeking to use the land application setbacks for injection must demonstrate that this method will provide as much environmental protection as the usual setbacks. 327 IAC 15-15-12(l) provides the setback distances when a permittee is injecting manure. Injection incorporates the manure into the soil thereby minimizing nutrient loss to the air and ground water and reducing the potential for run-off to surface water. Therefore, the Permittee adequately demonstrated that injection will provide as much environmental protection as the usual setbacks. The Petitioners have failed to present substantial evidence that the IDEM erred in approving the reduced setbacks.

Crop Yield Information

20. Information regarding crop yields is not required to be submitted as part of the NOI. Under 327 IAC 15-15-4(h)(1), CAFOs must maintain operating records. Information regarding expected crop yields must be maintained for a period of five (5) years after the issuance of the permit. The Petitioners have failed to present substantial evidence that the Permit was improperly issued for failure to include crop yield information in the NOI Materials.

Carcass Management

21. Pursuant to 327 IAC 15-15-4(g)(7), the Facility may not dispose of mortalities in a liquid manure or process wastewater system. Further, 327 IAC 15-15-10(h) requires that dead animal compost operations must have run-on and run-off controls. This rule allows for the land application of dead animal compost and provides that the disposal of dead animals must comply with the regulations promulgated by the Board of Animal Health. The rule does not require that this information be submitted as part of the application. Failure to comply with this requirement would be a violation and would potentially subject the facility to an enforcement action. The absence of a carcass management plan is not relevant to the issue of whether the permit should have issued.

Surface and Ground Water Contamination

22. The Petitioners presented no persuasive evidence that surface or ground water would be contaminated by the Facility. There was no evidence of any contamination from prior land application activities in the vicinity of the Petitioners' residences. No persuasive evidence was introduced that the manure management structures would leak as a result of improper design. Any allegations that surface or ground water contamination would occur as the result of violations of the applicable statutes or regulations do not serve as a basis for overturning the approval of this Permit.

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Soil Conservation Plan

23. Pursuant to 327 IAC 15-15-11, CAFOs must develop and implement soil conservation plans. The soil conservation plan is not required to be part of the NOI. The absence of a soil conservation plan is not relevant to the issue of whether the permit should have issued.

Setbacks for Waste Management Systems

24. 327 IAC 16-8-2(e) allows the IDEM to impose greater setback distances if necessary to protect human health or the environment. The Petitioners argue that IDEM should have imposed greater setback distances because of the air emissions from the CAFO. However, the Petitioners did not present substantial evidence that the IDEM was unaware of potential emissions and failed to consider the effect of the exhausting of nitrogen and dust when it reviewed and approved the design standards. There is no indication that this process is insufficient to protect human health and the environment.

An individual NPDES permit is not required.

25. The Petitioners have failed to produce substantial evidence that the Facility or the Permittee meet any of the conditions that justify the requirement for an individual permit under 327 IAC 15-15-9(a).

**FINAL ORDER**

**AND THE COURT**, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that judgment shall be entered in favor of the Respondents. The Petition for Review is **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 29th day of July, 2009 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge