

**OBJECTION TO THE DENIAL OF
A. FINKL & SONS REQUEST FOR
DETERMINATION OF LEGITIMATE USE OF SLA
G 1997 OEA 051, OEA CAUSE NO.: 97-S-J-1730**

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| Presiding ELJ: | Lori Kyle Endris |
| Party Representatives: | Margaret Felton, Esq. Renee R. McDermott, Esq. James T. Harrington, Esq. Paula E. Neff, Esq. |
| Order Issued: | November 19, 1997 |
| Index Category: | Solid waste |
| Further Case Activity: | |



SIGNIFICANT
APPEAL ACTIVITY

NOV 19 1997

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod
Chief Administrative Law Judge

150 West Market Street
Suite 618
Indianapolis, IN 46204
Telephone 317-232-8591
Fax 317-233-0851

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)

OBJECTION TO THE DENIAL OF)
A. FINKL & SONS REQUEST FOR)
DETERMINATION OF LEGITIMATE)
USE OF SLAG)

CAUSE NO. 97-S-J-1730

**FINAL ORDER GRANTING PETITIONERS'
MOTION FOR SUMMARY JUDGMENT AND VACATING
THE IDEM'S JANUARY 28, 1997 NOTICE OF DECISION**

TO: Margaret Felton, Esq.
Office of Legal Counsel
Indiana Department of
Environmental Management
P.O. Box 6015
Indianapolis, IN 46206-6015

James T. Harrington, Esq.
Ross & Hardies
150 North Michigan Avenue
#2500
Chicago, IL 60601

Renee R. McDermott, Esq.
P.O. Box 1517
Nashville, IN 47448

Paula E. Neff, Esq.
8585 Broadway
Suite 600
Merrillville, IN 46410

This constitutes notice that on August 1, 1997, A. Finkl & Sons (Finkl) and Scoria Iron Processing, Incorporated (Scoria), by counsel, filed a Joint Motion for Summary Judgment. On August 15, 1997, the Indiana Department of Environmental Management (IDEM), by counsel, filed a Response to Joint Motion for Summary Judgment. Thereafter, on August 29, 1997, Finkl and Scoria, by counsel, filed a Reply to the IDEM's Response to Joint Motion for Summary Judgment.

The Environmental Law Judge considered the Joint Motion, the Response, and the Reply and hereby finds the following:

Findings of Fact and Conclusions of Law:

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to this controversy pursuant to Ind.Code §4-21.5-7.
2. This is a Final Order issued pursuant to Ind.Code §4-21.5-3-27. 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. Ind.Code §4-21.5-3-23(b) provides in pertinent part that "[t]he judgment [on a motion for summary judgment] shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law."

The Indiana Supreme Court has held that "[a] summary judgment is proper only where there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law. [citations omitted] Any doubt about the existence of a factual issue should be resolved against the movant, with all properly asserted facts and reasonable inferences construed in favor of the nonmovant." Schrader v. Eli Lilly and Co., 639 N.E.2d. 258, 261 (Ind. 1994).

4. On January 28, 1997, the IDEM issued a Notice of Decision denying Finkl's request to use steel mill slag pursuant to 329 IAC 10-3-1(13) indicating that the slag produced by Finkl and processed by Scoria was a special waste, governed by the Indiana solid waste regulations. The Decision indicated that the Total Chromium levels in certain samples were elevated and that the slag contained too high a percentage of refractory material. Thereafter, on February 14, 1997, Finkl and Scoria (collectively Petitioners) each filed their respective Petitions for Administrative Review with the Office of Environmental Adjudication.

5. Finkl and Scoria contend "[t]he sole issue before the Hearing Officer [sic]...is whether the Finkl Slag is slag within the meaning of 329 IAC 10-3-1(13)," which provides in pertinent part:

The following solid waste management activities are not subject to the provisions of this article:

(13) The legitimate use of iron and steelmaking slags including the use as a base for road building, but not including use for land reclamation except as allowed under subdivision (15).

(Petitioners' Reply Brief, p. 2; *see also*, Petitioners' Joint Motion for Summary Judgment, p.2; Petitioners' Brief in Support of Petitioners' Motion for Summary Judgment, p. 2).

6. Although the IDEM admits that 329 IAC 10-3-1(13) "excludes from regulation by the waste rules '(t)he legitimate use of iron and steelmaking slags including the use as a base for road building'" (IDEM Response to Joint Motion for Summary Judgment, p. 2), the IDEM contends that "section [sic] 15 of the same rule on exclusions states, '[o]ther uses of solid waste may be approved by the commissioner if the commissioner determines them to be legitimate uses that do not pose a threat to public health and environment.'" Id. (emphasis supplied by the IDEM).

Rules applying to statutory construction apply to rules and regulations. Indiana State Dep't of Welfare v. Stagner, 410 N.E.2d 1348, 1352 (Ind.App. 1980). In examining the language used by an agency, Indiana courts will "give effect if possible to every word and clause since [they] presume that all the language in the regulation was used intentionally." Id. The IDEM's reliance upon 329 IAC 10-3-1 as a means to disapprove a use enumerated in subdivisions (1) - (14) if the uses do not pose a threat to public health and environment is misplaced.

First, by the plain meaning of its wording and the use of the plural form "slags," subdivision (13) includes all kinds of iron and steelmaking slag and does not exclude any form of iron or steelmaking slag from the exemption of solid waste regulation when used for legitimate purposes, including the use as a base for road building. Second, nothing in the language of subdivision (15) indicates that it applies to or could override any of the exemptions contained in subdivisions (1) through (14). Its plain meaning is clear; the subdivision provides only that "other" uses may be approved if they do not pose a threat to public health and environment. In other words, if a material qualifies for any of the more specific exemptions in 329 IAC 10-3-1, the material need not additionally qualify under subdivision (15)¹.

7. The IDEM also relies on 329 IAC 10-4-2, concerning open dumps, which provides,

No person shall cause or allow the storage, containment, processing, or disposal of solid waste in a manner which creates a threat to human health or the environment, including the creating of a fire hazard, vector attraction, air or water pollution, or other contamination.

¹On June 27, 1997, Petitioners filed an amended request with the IDEM for the use of Finkl Slag under subdivision (15). To date, the IDEM has not responded to that amended request, and that request is not the subject of this proceeding.

and Ind.Code §13-30-2-1(3-5)², concerning prohibited actions, to contend that the slag in question posed a threat to human health or the environment.

Whether the storage or dumping of solid waste, as referenced by the March 12, 1996 violation letter³, violated 329 IAC 10-4-2, is an enforcement issue and thus separate from the issue of whether the slag met the exemption in 329 IAC 10-3-1(13). Moreover, as 329 IAC 10-3-1 specifically states that "[t]he following solid waste management activities are not subject to the provisions of this article" (article referring to "10"), there is no language in 329 IAC 10-3-1 which suggests the generalized provisions of 329 IAC 10-4-2 and Ind.Code §13-30-2-1(3-5) apply (and no indication that the Solid Waste Management Board intended for them to apply) to 329 IAC 10-3-1⁴.

In sum, the IDEM's determination that Finkl's slag did not meet the exemption in 329 IAC 10-3-1(13) was arbitrary and capricious.

Final Order

The Petitioners' Joint Motion for Summary Judgment is hereby GRANTED. It is therefore ORDERED that the IDEM's January 28, 1997 Notice of Decision is VACATED and REMANDED to the IDEM for a decision consistent with this Final Order.

You are further notified that pursuant to the provisions of P.L. §41-1995, amending Ind.Code §4-21.5-7, which became effective July 1, 1995, 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, 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.

²This statutory provision is not cited in the Notice of Decision, but rather, is relied upon in the IDEM's Response to Joint Motion for Summary Judgment, p.2.

³The letter was addressed to several parties, including Scoria, but not including Finkl.

⁴329 IAC 10-3-1 does not prescribe any limit on the amount of refractory material that can be present in slag for the slag to qualify as the subdivision (13) exemption. Thus, when slags are used for legitimate purposes, they are not wastes and thus not subject to solid waste regulation. Should the IDEM desire to implement standards regarding the exemption, the IDEM is required to proceed through rulemaking procedures before the standards could become mandatory as a regulatory requirement. Johnson Cty. Farm Bur. V. Dep't of Revenue, 568 N.E.2d 578, 586 (Ind. Tax 1991) (a rule issued by an agency pursuant to its statutory authority to implement the statute has the force of law).

IT IS SO ORDERED this 19th day of November, 1997.

Lori Kyle Endris
Environmental Law Judge

cc: Bruce Palin, Acting, Assistant Commissioner
Office of Solid and Hazardous Waste Management