

**OBJECTION TO THE ISSUANCE OF
FESOP OPERATION PERMIT F039-5406-03325
BROOKS CONSTRUCTION CO.
ELKHART COUNTY, INDIANA
1998 OEA 016, OEA CAUSE NO.: 97-A-J-1847**

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326 IAC 2-8-4
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326 IAC 2-8-13
326 IAC 2-8-14
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IC 13-14-10-1
IC 13-17-1-1

Presiding ELJ: Lori Kyle Endris

Party Representatives: Loraine L. Seyfried, Esq.
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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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)
FESOP OPERATION PERMIT NO.)
F039-5406-03325 BROOKS CONSTRUCTION)
CO., INC. ELKHART COUNTY)

CAUSE NO. 97-A-J-1847

FINAL ORDER GRANTING BROOKS' MOTION FOR SUMMARY JUDGMENT

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This constitutes notice that on October 17, 1997, Brooks Construction Company, Inc. (Permittee), by counsel, filed a Motion for Summary Judgment and Alternative Motion for Exclusion of Evidence. On November 14, 1997, Objectors Citizens Protesting Rezoning and its individual members (Objectors), by counsel, filed a Designation of Material Issues of Fact and Brief in Opposition to Brooks Construction Co., Inc.'s Motion for Summary Judgment and Alternative Motion for Exclusion of Evidence. On November 26, 1997, the Indiana Department of Environmental Management, by counsel, filed a Response to Brooks Construction Co., Inc.'s Motion for Summary Judgment. Lastly, on December 12, 1997, Permittee, by counsel, filed a

Reply Brief in Support of its Motion for Summary Judgment.

The Environmental Law Judge considered the Motion, the Responses, 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 July 24, 1997, Permittee was issued a Federally Enforceable State Operating Permit (FESOP) by the IDEM's Office of Air Management for the operation of a portable hot mix asphalt concrete plant. On August 11, 1997, Objectors, by counsel, filed a Petition for Administrative Review and alleged that the IDEM violated state regulation by failing to provide an additional thirty day public comment period prior to the issuance of the FESOP to Permittee and that the IDEM violated various state regulations and statutes by issuing the FESOP to Permittee because the permitted facility will impose a direct threat to the health of some area residents.
 5. Objectors Citizens contend that the IDEM "violated its regulations...by failing to provide a thirty (30) day public comment period [on certain permit conditions]¹ added after the public notice period and public hearing on the proposed permit thereby denying petitioners their right to comment." (Petition for Administrative Review, p. 3(f) emphasis original). The IDEM's legal

¹Objectors did not raise any challenges made to the permit conditions added after the public notice period and hearing.

requirements regarding the issuance and denial of a FESOP are contained in 326 IAC 2-8. Specifically, 326 IAC 2-8-4 and 326 IAC 2-8-5 provide what requirements a FESOP should contain when issued; 326 IAC 2-8-7 provides a FESOP may only be issued if certain conditions have been met; and 326 IAC 2-8-13 and 326 IAC 2-8-14 provide the public notice requirements and certain times when a permit may be denied or additional conditions imposed upon the permit.

The rules of interpretation 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 [of] the language in the regulation was used intentionally." Id.

The IDEM is required to provide for a comment period after the draft FESOP is available and before the final FESOP is issued. 326 IAC 2-8-13(c)(1)(C) (stating the commissioner shall notify the public of at least a thirty (30) day period to submit written comments on the commissioner's draft permit). Further, the IDEM clearly is required to consider comments made during that public comment period. 326 IAC 2-8-13(c)(3) (stating all comments received during the public comment period shall be considered by the commissioner before the permit is finally approved or disapproved); *see also*, United Rural Elec. v. Ind. & Mich. Elec. Co., 549 N.E.2d 1019, 1021 (Ind. 1990), reh'g denied (when the word 'shall' appears in a statute, it is construed as mandatory rather than discretionary unless it appears clear from the context or purpose of the statute that the legislature intended a different meaning).

With respect to the opportunity for a public hearing, 326 IAC 2-8-13(c)(1)(D) as written states,

Notification to the public of the opportunity for a public hearing for consideration of the permit application or notice of such a hearing *if one has been scheduled*. (emphasis added).

Thus, even at the FESOP's draft stage, there is no language requiring a public hearing be held; The regulation only requires the commissioner to notify the public if a public hearing has been scheduled. Similarly, there is no requirement for a public hearing at the FESOP final stage. 326 IAC 2-18-13(c)(4) as written states,

There shall be an opportunity for a public hearing *if deemed necessary by the commissioner*. (emphasis added).

Lastly, there is no requirement that the IDEM receive or consider further public comment prior to the final FESOP issuance. In sum, no genuine issue as to a material fact on this issue exists, and Permittee is entitled to judgment as a matter of law.

6. In Indiana administrative agency has only those powers conferred on it by the General Assembly; powers not in its legislative grant cannot be assumed by the agency or implied to exist in its powers. Fort Wayne Educ. Ass'n v. Aldrich, 527 N.E.2d 201, 216 (Ind.App. 1988). Because the power of agencies is limited to its express legislative grant, agency actions "must be guided by ascertainable standards which are well stated and followed." Community Care Centers v. Dept. Of Public Welfare, 523 N.E.2d 448, 450 (Ind.App. 1988); *see also*, Boaz v. Bartholomew Consolidated School Corp., 525 N.E.2d 360, 361 (Ind. Tax 1988).

7. Objectors opine the IDEM violated statutory and regulatory authority by issuing a FESOP they allege will impose a direct threat to the health of several area residents. (Petition for Administrative Review, p. 2(a)-(e)). Ind.Code §13-12-3-1 establishes the general purpose of Indiana's environmental policy; one purpose is to ensure for future generations "clean air, clean water, and a healthful environment." Ind.Code §13-12-3-1(3). The statute does not provide powers, however, to address the health concerns of individuals residing in the area of a facility for which an air permit is issued.

Ind.Code §13-12-4-3 declares the policy behind and Ind.Code §13-12-4-4 establishes the policy objectives of Environmental Impact Statements. Notwithstanding, Ind.Code §13-12-4-8 specifically states that an environmental impact statement is not required under state law for the issuance of a license or permit by any state agency.

Ind.Code §13-14-10-1 grants the commissioner, in concert with the commissioner of the state department of health, the authority to request the Governor² to declare an emergency in the event "that contamination of air, water, or land in any area has reached the point where the contamination constitutes a clear and present danger to the health and safety of persons in any area." Ind.Code §13-14-10(a). Notwithstanding, this statute does not contain language that governs the issuance of FESOPs.

Ind.Code §13-17-1-1 sets forth the intent and purpose of the air pollution control laws. This statute reflects the General Assembly's desire to balance the need to protect the public health and welfare with maximum employment and full industrial development for Indiana. It does not provide authority to the IDEM to consider individual health concerns when granting a FESOP.

326 IAC 2-8-13(c)(6) reads as follows:

A permit may be denied by the commissioner on the basis of adverse comment if the comment demonstrates the following:

(A) The ambient air quality standards under 326

²This statute does not require the Governor to declare an emergency upon request. Ind.Code §13-14-10-1(b).

IAC 1-3 cannot be attained or maintained if a permit is issued.

(B) The prevention of significant deterioration requirements under 326 IAC 2-2 will not be met.

(C) The offset requirements under 326 IAC 2-3 will not be satisfied.

(D) For any other reason such as, but not limited to, interference with attainment and maintenance of the standards under 326 IAC 12.

Objectors argue that this provision “contains no restriction on the reason, such as violation of a technical rule or standard, for denial of a permit as long as an adverse comment received during the public comment period or during a public hearing is the basis for such denial.” (emphasis original) (Petitioners’ Designation of Material Issues of Fact, p. 14). Objectors further argue that “public health protection is recognized...in...326 IAC 2-8-13(c)(7).” *Id.* 326 IAC 2-8-13(c)(7) states:

The commissioner may impose such conditions on the permit as necessary to ensure that the source or facility will comply with all applicable rules; and that the ambient air quality standards established under 326 IAC 1-3, the prevention of significant deterioration standards established under 326 IAC 2-2, and the offset requirements established under 326 IAC 2-3, will be attained and maintained and that the public health will be protected.

Objectors “admit that the emission standards of the EPA and IDEM as listed in the permit would be adequate to protect the ‘average’ human being in the human population.” (*Id.* at 23). Notwithstanding, Objectors argue that “a direct emissions threat to a human being who is not the average human being [should] be addressed by IDEM even though the emissions admittedly meet EPA and IDEM standards.” (emphasis original). (*Id.*). Neither of the two regulations cited above provides the IDEM with the authority to deny a permit, which otherwise meets the standards promulgated by the EPA and the IDEM, due to an individual’s health risk. Thus, there is no genuine issue of material fact, and Permittee is entitled to summary judgment as a matter of law.

IT IS THEREBY ORDERED that the Brooks Construction Company, Inc.’s Motion for Summary Judgment is hereby **GRANTED** and the FESOP Operation Permit No. F039-5406-03325 is hereby **UPHELD**.

You are further notified that pursuant to the provisions of Ind.Code §4-21.5-7, the Environmental Law Judge of the Office of Environmental Adjudication serves as the Ultimate Authority in administrative reviews 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. Pursuant to Ind.Code §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.

Dated this 12th day of January, 1998.

Lori Kyle Endris
Environmental Law Judge

cc: Felicia R. George, Assistant Commissioner
Office of Air Management