

**Objection to the Issuance of Permit Approval No. AW 4568,
Mr. Rollin Newcomer, Elkhart County, Indiana.
1999 OEA 8 (98-S-J-2019)**

OFFICIAL SHORT CITATION NAME: When referring to 1999 OEA 8, cite this case as
Newcomer, 1999 OEA 8.

TOPICS:

summary judgment
confined feeding
material fact
field tiles
perimeter drain
concrete
genuine issue of material fact
manure
soil test
unsupported allegations
permit application
sufficiency

PRESIDING JUDGE:

Lasley

PARTY REPRESENTATIVES:

Petitioner: Deborah Albright, Esq.
Respondent: Daniel McNerny, Esq.
IDEM: Jennifer Thompson, Esq.

ORDER ISSUED:

January 14, 1999

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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III. Undisputed Facts:

1. IDEM is the agency charged with approving applications and issuing confined feeding permits pursuant to Indiana Code 13-18-10.
2. Rollin Newcomer applied for a confined feeding permit on January 30, 1998. He submitted additional information on April 9, 1998.
3. IDEM approved Mr. Newcomer's confined feeding operation on May 1, 1998.
4. Jim Butler, a Temporary Environmental Manager for IDEM reviewed Mr. Newcomer's application and found that:
 - i. The concrete storage tank and perimeter drain are structurally sound and will relieve hydrostatic pressure.
 - ii. The plans and specifications for the facility met the requirements of Indiana Code 13-18-10-2.
 - iii. Mr. Newcomer identified field tiles in accordance with Ind. Code 13-18-10-2 and the AW-1 guidance.
 - iv. The manure management plan complies with agency recommendations and provides for frequencies and procedures for soil and manure testing.
 - v. The method of manure disposal is acceptable to IDEM.
5. Petitioners concede that Mr. Newcomer has land agreements for the disposal of the manure.

IV. Discussion:

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.¹ A fact is "material" if its existence facilitates the resolution of any issues involved in the lawsuit.² Further, a claim must have legal probative force in order to be a "genuine issue of material fact" under Indiana Trial Rule 56.³ In construing a motion for summary judgment, a court will construe all pleadings, affidavits and testimony in the light most favorable to the non-moving party.⁴ Overall, the purpose of summary judgment is to

¹ Havens v. Richey, 582 N.E.2d 792, 795 (Ind. 1991); and Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630, 633 (Ind. 1991).

² Funk v. Funk, 563 N.E.2d 127, 130 (Ind.Ct.App. 1990).

³ Raymundo v. Hammond Clinic Association, 449 N.E.2d 276, 280 (Ind. 1983).

⁴ Greathouse v. Armstrong, 616 N.E.2d 364, 366 (Ind. 1993).

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terminate litigation where there is no factual dispute and a determination may be made as a matter of law.⁵

Construing the pleadings and affidavits in a light most favorable to the Petitioners reveals no genuine issues of material fact in dispute. Petitioners assert that Mr. Newcomer should be required to meet standards that are not identified in statute, regulation or the AW-1 guidance document. Mr. Newcomer cannot fairly be held to the unsupported standards proposed by Petitioners.

A. The permit application

Petitioners do not allege that Mr. Newcomer has failed to include required information in his permit application. Rather, they allege that if built, the proposed facility will leak into the surrounding soil and eventually reach the Wakarusa Stream. Petitioners, however, offered no affidavit from someone experienced with confined feeding operations to support this assertion. Mr. Newcomer offered the affidavit of the IDEM employee who reviewed the application and concluded that the proposed facility, if built according to plans, would be structurally sound. Nor do Petitioners allege that soil or geologic features make the proposed facility inherently unsafe. Since there is no allegation that the permit application did not meet the statutory and regulatory requirements, IDEM properly approved the permit application.

B. Field tiles

Another issue raised by the Petitioners is the fact that if there is a release of manure from the facility, manure will go into the field tiles and eventually reach the Wakarusa Stream. Petitioners contend that Mr. Newcomer should have identified the location of field tiles for those areas where he will land apply manure. In support of their argument, Petitioners allege in their Petition for Administrative Review that farmers in the area typically place field tiles every two to five feet, and, thus, there is a heightened potential for manure contamination to the Wakarusa Stream. But, once again, Petitioners offer nothing in support of that allegation. Mere allegations are insufficient to overcome a motion for summary judgment.⁶ Since IDEM interprets Ind. Code 13-18-10-2 as only requiring the depiction of field tiles within 300 feet of the waste treatment/control facility, Mr. Newcomer properly depicted his field tiles as being 400 feet from the manure treatment/control facility.

Of course, there could be situations in which location of field tiles or the geologic features of the land application site could pose an environmental threat. But, the Petitioners had the burden of raising a genuine issue regarding that fact. As stated earlier, mere allegations are insufficient to overcome a motion for summary judgment.

⁵ Beradi v. Hardware Wholesalers, Inc., 625 N.E.2d 1259, 1261 (Ind.Ct.App. 1993) citing Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 614 (Ind.Ct.App. 1991) trans. denied.

⁶ Ambassador Financial Services, Inc. v. Indiana Nat. Bank, 605 N.E.2d 746, 751 (Ind. 1992) ("to survive the summary judgment motion, the opponent may not rest upon the mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial").

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C. Adequacy of plans

Petitioners also assert that Mr. Newcomer's application does not contain the type of information they would like to see. And yet, they offer nothing of substance indicating how the plans are inadequate. Petitioners are content to merely state that the subterranean drain is inadequate or that the frequency and procedures for manure testing are inadequate. Why or how are these inadequate? Mr. Newcomer states that he will take four random samples of manure and mix them to make a composite sample each year. Soil samples will be taken every other year and tested for nutrient levels. He specifically states that if the nutrient levels are too high, then manure will not be applied in that area. Petitioners fail to point out any defects in that plan. Moreover, IDEM requires nothing more from Mr. Newcomer. Petitioners concede that Mr. Newcomer has the appropriate land agreements but argue that the amount of land is not adequate. When faced with IDEM's approval of the acreage for land application, Petitioners must do more than respond with unsupported assertions.

V. Conclusions of Law:

Based on the foregoing Undisputed Facts and Discussion, I conclude as a matter of law that Respondent demonstrated that no material facts are in dispute. Furthermore, Petitioners failed to raise any genuine issues of material fact in their pleadings. As a result, Respondent is entitled to summary judgment as a matter of law, and IDEM's issuance of a confined feeding permit to the Respondent should be upheld as consistent with Ind. Code 13-18-10.

VI. Order:

Respondent's Motion for Summary Judgment is hereby **GRANTED** and IDEM's decision to issue a confined feeding permit to Respondent is hereby **UPHELD**.

You are further notified that pursuant to provisions of Indiana Code § 4-21.5-7-5, 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 applicable provisions of IC 4-21.5. Pursuant to IC 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 in Indianapolis, Indiana this 14th day of January 1999.

Linda C. Lasley
Environmental Law Judge