

**Objection to the Issuance of Approval No. AW 4906 Mr. Gary DeDecker Grant County
2002 OEA 9 (01-S-J-2787)**

TOPICS:

confined feeding approval
voluntary dismissal
standing
Administrative Orders and Procedures Act (“AOPA”)

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Deborah E. Albright, Daniel McInerny, Melinda R. Shapiro
IDEM: Janice Lengal

ORDER ISSUED:

May 30, 2002

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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2002 OEA 9 (01-S-J-2787)**

STATE OF INDIANA)		BEFORE THE INDIANA OFFICE OF
)		
COUNTY OF MARION)		ENVIRONMENTAL ADJUDICATION
IN THE MATTER OF:)		
)		
OBJECTION TO THE ISSUANCE OF)		
APPROVAL NO. AW 4906)	CAUSE No. 01-S-J-2787	
MR. GARY DEDECKER)		
GRANT COUNTY)		

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

On October 10, 2001, Gary DeDecker, by counsel, filed a Motion seeking dismissal of the above-referenced action. Petitioners, Mr. & Mrs. Fred Duling and Mr. Charles Ellsworth¹, filed a response on or about October 11, 2001. Respondent filed his reply on October 26, 2001. Having considered the motion and papers now before the Office of Environmental Adjudication, the Chief Administrative Law Judge issues the following Findings of Fact, Conclusions of Law and Final Order

Findings of Fact:

1. On September 19, 2001, the Petitioners filed a Petition for Administrative Review (the "Petition") seeking review of a September 4, 2001 letter from the Indiana Department of Environmental Management to Mr. DeDecker.
2. Paragraph 2 of the Petition acknowledges that prior to the filing of the September 19, 2001 Petition, the Petitioners appealed two confined feeding approvals issued to Mr. DeDecker. The first appeal was resolved when Mr. DeDecker withdrew his application.
3. Mr. DeDecker filed a second application, which was approved by IDEM under Approval AW No. 4906, and which Petitioners appealed. Mr. DeDecker filed a Motion for Summary Judgment based upon the fact that no questions of fact existed and that Approval AW No. 4906 had been issued in accordance with all applicable laws. Shortly before the Petitioners' response to Mr. DeDecker's dispositive motion was due, Petitioners voluntarily withdrew their appeal of Approval AW No. 4906.
4. On January 3, 2001, the Office of Environmental Adjudication issued an Order finally dismissing the appeal of Approval AW No. 4906. The Order indicated that Petitioners had a right to judicial review of the Order, which Petitioners did not pursue. The dismissal did not involve any agreement to re-open the appeal.

¹ Mr. Ellsworth recently passed away. On May 9, 2002, Sandra Jo Strickland, the daughter of Charles Ellsworth and executrix of his estate, was substituted for Petitioner Ellsworth in this matter.

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5. Construction of the operation permitted by Approval AW No. 4906 has been completed, and it is currently operating.
6. Pursuant to its enforcement authority, IDEM inspected the DeDecker site a number of times during construction. The September 4, 2001 letter represents only a portion of the communications between IDEM and Mr. DeDecker's representatives, all of which was conducted under IDEM's enforcement authority.
7. Having voluntarily withdrawn their appeal of Approval AW No. 4906, the Petitioners cannot now challenge IDEM's discretionary enforcement activities through the Office of Environmental Adjudication.

Conclusions of Law:

1. The Administrative Orders and Procedures Act ("AOPA"), Ind. Code 4-21.5-1-1 *et seq.*, provides private citizens with the right to appeal certain agency orders. The orders subject to administrative review are identified in Ind. Code § 4-21.5-3-4, -5 and -6. The September 4, 2001 letter does not fit into any of the categories of orders described in Ind. Code § 4-21.5-3-4, -5 or -6 and thus, cannot be appealed under AOPA.
2. The voluntary dismissal of the appeal of Approval No. AW 4906 resulted in Petitioners' waiver of their right to additional review of the approval.
3. Petitioners lack standing to further challenge or object to Approval No. AW 4906 through the administrative adjudication process.
4. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management and the parties to this controversy pursuant to LC. 4-21.5-7.
5. This is a Final Order issued pursuant to I.C. 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.

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Final Order

It is hereby ORDERED that Cause No. 01-S-J-2787 is dismissed without prejudice. You are further notified that 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 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 with thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 30th day of May, 2002.

Wayne E. Penrod
Chief Administrative Law Judge