In Re: Objection to Denials for Extension Period,
Renewal of Permit for Mallard Lake Landfill
2004 OEA 82 (03-S-J-3185)

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TOPICS:
motion to strike
landfills
permit issuance
timely requests
extensions of time
renewal applications
duly authorized representatives
good faith effort
statutory construction
"or"

PRESIDING JUDGE:
Gibbs

PARTY REPRESENTATIVES:

Petitioner:	Sue A. Shadley, Esq., John M. Ketcham, Esq., Amy Romig, Esq.
Intervenors:	Gregory P. Cafouros, Esq., Matthew T. Klein, Esq., Charles R. Rubright, Esq., Daniel P. McInerny, Esq.
IDEM:	Cindy Shively Klem, Esq.

ORDER ISSUED:
October 20, 2004

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

**In Re: Objection to Denials for Extension Period,
Renewal of Permit for Mallard Lake Landfill
2004 OEA 82 (03-S-J-3185)**

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTIONS TO THE DENIAL OF	)	
EXTENSION OF REPLY PERIOD AND	)	
DENIAL OF OPERATING PERMIT RENEWAL	)	
FOR THE MALLARD LAKE LANDFILL	)	CAUSE NO. 03-S-J-3185
MADISON COUNTY, INDIANA	)	
	)	
JM Corporation	)	
Petitioner,	)	
	)	
Indiana Department of	)	
Environmental Management	)	
Respondent,	)	
	)	
Anderson Community School Corp.	)	
Intervenor,	)	
	)	
Audra Hatfield and Killbuck	)	
Concerned Citizens Assn.	)	
Intervenor.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter having come before the Court on

(1) the Motions for Summary Judgment filed by the Indiana Department of Environmental Management (the "IDEM") and by JM Corporation, (the "Petitioner"), and

(2) the IDEM's Motion to Strike, which pleadings are a part of the Court's record;

and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, record of proceedings, evidence, and the briefs, responses and replies of the parties, now finds that judgment may be made upon the record; and the ELJ, by a preponderance of the evidence and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

IDEM'S MOTION TO STRIKE

This Court does not read the Petitioner's mention of the amount of money spent to date as a request for damages or even as a request for a factual finding that the Petitioner has, in fact, incurred damages which may be recovered. This Office does not have the statutory authority to grant such a request. These assertions are relevant to the Petitioner's argument that it had made a good faith effort to respond to IDEM's request for additional information. This Court, being duly advised, **DENIES** IDEM's Motion to Strike.

MOTIONS FOR SUMMARY JUDGMENT

FINDINGS OF FACT

1. JM Corporation (the "Petitioner") is the owner of property located in Madison County. Beginning in 1981, the Petitioner has attempted to build and operate a solid waste landfill (the "Mallard Lake Landfill").

2. In 1988, IDEM issued an operating permit (the "Permit") to the Petitioner. The Anderson Community School Corp. and Audra Hatfield and the Killbuck Concerned Citizens Association (the "Intervenors" in this matter) appealed the issuance of this Permit. After a long and protracted litigation[1], on July 2, 1998, Judge Wayne Penrod, Chief Environmental Law Judge for the Office of Environmental Adjudication (the "OEA"), issued an order regarding the Permit for the Mallard Lake Landfill (the "1998 Order"). In the 1998 Order, Judge Penrod approved the Permit and ordered IDEM "to expediently process and finalize JM's final operating permit".

3. The IDEM and the Petitioner worked for several months to carry out Judge Penrod's 1998 order. However, the process broke down over disagreements regarding the interpretation of the 1998 Order as it applied to the barrier. As a result, the Permit was not finalized. The last action occurred in December 1998.

4. There was a dispute regarding the depth of the barrier required at the landfill. The IDEM filed IDEM's Request for Clarification on December 11, 1998. The Petitioner filed J.M. Corporation's Response to IDEM's Request for Clarification on December 23, 1998. The OEA has not issued any order in response to these pleadings.

5. In early 2003, the IDEM contacted the Petitioner to inform it that the Permit for the Mallard Lake Landfill would expire in 2003 unless a renewal application was filed on or before March 5, 2003. The IDEM determined that the Permit became effective on July 2, 1998, the date the 1998 Order was issued.

[1] The facts leading up to this point are well documented in OEA Cause No. 89-S-J-208 and in the various appellate court cases that resulted from this matter. The Court takes judicial notice of same.

6. The Petitioner filed the renewal application on March 4, 2003. After reviewing the application, the IDEM notified the Petitioner in writing that the application was not complete, specified the deficiencies and requested additional information (the "RAI"). The deadline set by the IDEM for submitting this information was June 4, 2003. On June 4, 2004, the Petitioner requested an additional 60 days in which to supply the requested information. The IDEM granted that request.

7. On July 14, 2003, staff from the IDEM met with Consolidated Waste Industries, Inc., ("CWI) a potential buyer of the landfill, to discuss what information was needed to satisfy the RAI.

8. On August 5, 2003, CWI requested an extension of time in which to supply the necessary information. CWI included a check for Ten Thousand Dollars ($10,000) as payment of the annual operating fees that the IDEM contended were due.[2] Payment of the fees was contingent upon the IDEM granting CWI's request for additional time. The IDEM denied the request and returned the check.

9. On August 5, 2003, the Petitioner attempted to contact IDEM staff by telephone to determine whether a request for an extension of time had to be received on that date. The Petitioner received no response to this inquiry and sent a letter requesting an extension of time on August 5th. The IDEM received the letter on August 6, 2003.

10. On August 18, 2003, the IDEM notified the Petitioner that it was denying its request for an extension of time. In the same notice, the IDEM denied the Petitioner's application for renewal on the basis (1) the request for an extension of time was not timely and (2) the Petitioner had not made a good faith effort to provide the requested information.

11. The Petitioner filed this appeal on September 2, 2003. Subsequently, the Anderson Community School Corp. and the Killbuck Concerned Citizens Association filed Petitions to Intervene. Neither of the Intervenors has participated in briefing the Motions for Summary Judgment.

CONCLUSIONS OF LAW

1. 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 IC 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 Court 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

[2] Annual operating fees were $2,000 per year. The Permit had been issued in 1998; thus, 5 years of fees were due.

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 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. The OEA may enter judgment for a party if it finds that "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 judgment as a matter of law." IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.,* 725 N.E.2d 949 (Ind.Ct.App. 2000).

5. The first issue that must be determined in this matter is whether IDEM was correct in its determination that the Permit would expire in July 2003. The Petitioner argues that the Permit had not been "issued" and therefore, could not expire. It is clear to this Court, however, that the Permit was issued in 1988. Without this action, this Court would not have had jurisdiction to issue the 1998 Order. No other evidence was presented to this Judge to establish that a permit had not been issued. The Office of Environmental Adjudication's jurisdiction (and its predecessor, the Office of Hearings, the Indiana Department of Environmental Management), in this instance, could only be invoked by some action of the IDEM. That action in this instance was the issuance of the Permit.

6. Upon the issuance of the Permit, the Intervenors filed this appeal. This Court stayed the effective date of that Permit pending the resolution of the appeal and it remained stayed until the 1998 Order.

7. The regulations regarding the operation of a landfill had changed since 1988. The Petitioner could not have operated the Mallard Lake Landfill under the existing terms and conditions of the Permit as it was issued in 1988. Therefore, the Permit had to be "finalized". However, this does not change the fact that the Permit had been issued and was effective on July 2, 1998.

8. The question remains whether the IDEM was correct in denying the Petitioner's request for an extension of time and the renewal application.

9. 329 IAC 10-11-3 states:

> (a) All permit applications must be signed as follows:
> (1) For a corporation, by a responsible corporate officer.
> (2) For a partnership or sole proprietorship, by a general partner or the proprietor, respectively.
> (3) For a unit of government or state, by the executive of the unit.

(4) For a federal or other public agency, by either:
(A) a principal executive officer or ranking elected official; or
(B) a senior executive officer;
having responsibility for the overall operations of a principal geographic unit of the agency that covers the facility to be permitted.

(b) All reports required by permits and other information requested by or on behalf of the commissioner must be signed by the permittee or by a duly authorized representative of that person. A person is presumed to be an authorized representative if:
(1) the information is submitted on behalf of a person described in subsection (a);
(2) the information is submitted in response to a requirement of the permit or in response to a request for information directed to a person described in subsection (a); or
(3) written authorization is submitted to the commissioner by an individual identified in subsection (a) that identifies a specific individual or position as authorized to submit information.

(c) If an authorization under subsection (b)(3) is no longer accurate, a new authorization satisfying the requirements of subsection (b)(3) must be submitted to the commissioner prior to or together with any reports of information to be signed by the authorized representative.

(d) Any person signing a document under subsection (a) or (b) shall make a certification that states, "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the persons who managed the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. I further certify that I am authorized to submit this information".

10. The first rule of statutory construction is when a statute or regulation is clear and unambiguous on its face, the court does not need to "apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense." *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele,* 766 N.E.2d 699, 703-704 (Ind. 2002).

11. "Or" is defined as "a function word to indicate an alternative, the equivalent or substitutive character of two words or phrases, or approximation or uncertainty. MERRIAM-WEBSTER ONLINE, at http://www.merriam-webster.com (last visited October 1, 2004). *Bourbon Mini-Mart v. Gast Fuel & Servs.,* 783 N.E.2d 253 (Ind.App. 2003). In *Bourbon Mini-Mart*, the Court determined that the word "or" between the last 2 clauses in a statute indicated that all of the clauses should be read in the disjunctive. The Court stated:

> Even though the legislature only placed an "or" after I.C. § 13-7-20-19(b)(3) and not the other subsections, after a careful reading of I.C. § 13-7-20-19(b), we conclude that any one of the scenarios identified in subsections one through four would provide an appropriate basis for the commissioner taking action. Each

> would exist without any of the others and each describes a circumstance in which action by the commissioner would be consistent with the purposes of the legislation. Moreover, when a series of items are presented in the form of a list and the only conjunction used is an "or" between the last two items, all of the items should be read disjunctively. See C. Dallas Sands, 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 21.14 (4th ed. 1973); *Rose v. U.S. Postal Service,* 774 F.2d 1355, 1360-61 n. 14 (9th Cir. 1984). Thus, we conclude that the legislature drafted IC 13-7-20-19(b) in the disjunctive**,** and, therefore, IDEM must satisfy only one of the four subsections in order to undertake corrective action.

12. Similarly, in this case, this Court concludes that the Solid Waste Management Board intended 329 IAC 10-11-3(b) to be read in the disjunctive. Therefore, a person will be presumed to be the duly authorized representative of the permit applicant if either (1) *or* (2) *or* (3) is satisfied.

13. Written authorization was not necessary. Under 329 IAC 10-11-3(b), this is only one method of appointing a duly authorized representative. Under 329 IAC 10-11-3(b)(2), a person who submits information "in response to a requirement of the permit *or in response to a request for information* directed to a person described in subsection (a)" (emphasis added) is a duly authorized representative. The facts that the Court considered in reaching this conclusion are:
    a. CWI met with staff from the IDEM to discuss this specific matter and informed IDEM staff at that meeting that they were prospective buyers of the landfill.
    b. CWI sent a check for the annual operating fees that IDEM had assessed.
    c. In the letter from CWI to the IDEM requesting an extension of time in which to provide the requested information, CWI specifically stated that they had retained a reputable engineering firm to prepare the necessary drawings.[3]

    This Court determines that it would be reasonable to conclude from these facts that CWI was the duly authorized representative for the Petitioner and that CWI's request for an extension of time was timely.

14. IC 13-15-4-9 gives the agency the right to deny a permit application if the applicant has failed to submit or make a good faith effort to submit the requested information within sixty (60) days of the request. In this instance, it is clear that the Petitioner did not submit the requested information within sixty (60) days as requested by IDEM. However, this Court concludes that the Petitioner did make a good faith effort to do so. The IDEM seems to define a "good faith effort" as actually submitting the requested information. Clearly, something less than submitting the information is necessary to satisfy the requirement and to give the term "good faith efforts" their plain and ordinary meaning. In this matter, the Petitioner has provided evidence that it is unable financially to provide the IDEM with the requested information. The IDEM has not presented any evidence to contradict this

[3] No written information had actually been submitted to the IDEM therefore, the requirements under 329 IAC 10-11-3(d) are not relevant to this matter.

assertion. The Petitioner took the logical course of action in attempting to find a buyer for the landfill. The Petitioner found CWI, who met with the IDEM in an effort to supply the requested information. The IDEM was aware of these circumstances as the IDEM's Bruce Palin, in his deposition, indicated that they had met with CWI and other potential buyers of the landfill. IDEM also seemed to be aware that 2 of the principals of the Petitioner had filed bankruptcies. Under these circumstances, the Petitioner made a good faith effort to provide the IDEM with the requested information.

15. This Court finds that there is no genuine issue as to a material fact and that summary judgment is appropriate. It was improper for the IDEM to deny CWI's request for an extension of time on behalf of the Petitioner and to deny the renewal application.

ORDER

THE COURT hereby FINDS AND CONCLUDES that the Permit has been issued but that the IDEM improperly denied the Petitioner's request for extension of time and the permit renewal application. THE COURT ORDERS, ADJUDGES AND DECREES that judgment is entered in favor of the Petitioner and the IDEM is ordered to:

1. Reinstate the Petitioner's permit renewal application.
2. Grant the Petitioner's request for an extension of time until and including January 5, 2005 to submit the requested information. The IDEM shall grant any necessary and reasonable requests for extensions of time thereafter in accordance with its normal practice.
3. Review the permit renewal application in accordance with all applicable laws including the time frames established in IC 31-15-4.
4. The parties requested a clarification of the 1998 Order. This Court does not have the authority to modify a previous order. It is not possible to determine Judge Penrod's intent in issuing this Order as significant time has passed and Judge Penrod is no longer employed at the OEA. Therefore, this Court instructs the IDEM to use its best professional judgment in determining if a design for the barrier is environmentally protective and in compliance with the current regulations. If so, the IDEM shall approve the barrier design.

You are further notified that pursuant to provisions of IC 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 an order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED THIS 20th day of October, 2004.

Hon. Catherine Gibbs,
Environmental Law Judge