

In re: Objection to the Approval of Solid Waste Facility Permit FP-45-41,
Midwest Medical Solutions, LLC, Lake County, Indiana
2004 OEA 90 (04-S-J-3355)

TOPICS:

infectious waste
solid waste management plan
Solid Waste Management District
determination of need
requests for admission
summary judgment
statutory construction

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Permittee—**Midwest Medical Solutions, LLC:**

Richard VanRheenen, Esq., Ty H. Connor, Esq.; **Bose, McKinney & Evans LLP**

Petitioners—**Frank and Katie Robinson, pro se**

Petitioner—**Gary Common Council:** William C. Jones, Esq.

Petitioner—**Lake County Solid Waste Management District:**

Guinn P. Doyle, Esq., Laurence A. McHugh, Esq.; **Barnes & Thornburg**

IDEM—Kathleen Mills, Esq., Linda Runkle, Esq., Janice E.S. Lengel, Esq.,

Robert B. Keene, Esq., Cindy Shively Klem, Esq.

ORDER ISSUED:

October 26, 2004

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

FINDINGS OF FACT

Findings of Fact Applicable to All Parties

1. Midwest Medical Solutions LLC (“Midwest”) applied to IDEM for a solid waste facility permit on October 9, 2001.
2. IDEM issued Solid Waste Facility Permit FP #45-41 (the “Permit”) to Midwest on May 7, 2004.

Findings of Fact Applicable to Lake County Solid Waste Management District

3. During the course of the application review process, Midwest submitted information to IDEM to demonstrate a local or regional need for the proposed facility.
4. On February 4, 2004, the District wrote a letter to the IDEM requesting that it suspend its review of Midwest’s permit application so that the District could make its own determination of whether there was a local or regional need for such a facility.
5. IDEM evaluated the information submitted by Midwest and determined that there was a local or regional need for the proposed facility. IDEM issued the Permit to Midwest.
6. The Lake County Solid Waste Management District (the “District”) filed its Petition for Review on May 25, 2004 objecting to the issuance of the Permit.
7. Midwest filed a Motion for Summary Judgment against the District on September 17, 2004.
8. The District filed a Motion for Summary Judgment against IDEM on September 17, 2004.
9. The IDEM filed a Motion for Summary Judgment against the District on September 27, 2004.
10. The District has an approved solid waste management plan. This plan does not include a projection of a local or regional need for a solid waste facility such as the one planned by Midwest.
11. The District presents no evidence that the IDEM’s determination that there is a need for this facility is incorrect or not supported by sufficient evidence.

Findings of Fact Applicable to the Gary Common Council

12. The Gary Common Council (the “Council”) filed its Petition for Review on May 27, 2004. An Amended Petition was filed on July 12, 2004.

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13. Midwest filed its Motion for Summary Judgment against the Council on September 17, 2004. The IDEM filed its Motion for Summary Judgment against the Council on September 27, 2004. The Council responded to the Motions and made a Cross Motion in Support of the County Solid Waste Districts Motion for Summary Judgment.
14. The Council alleged that IDEM's determination of need was not supported by sufficient evidence. However, the Council presented no evidence, other than the mere allegation that the IDEM's determination was incorrect or not supported by sufficient evidence.
15. The Council also alleges that the permit was improperly issued because the IDEM did not allow the District to make its own determination of whether there was a local or regional need for such a facility. As the Council supports the District's Motion for Summary Judgment, the Findings of Fact applicable to the District are applicable to the Council also and are incorporated herein.

Findings of Fact Applicable to Frank and Katie Robinson

16. Frank and Katie Robinson ("the Robinsons") filed a Petition for Review on June 1, 2004.
17. Midwest filed its Motion for Summary Judgment against the Robinsons on September 17, 2004. The Robinsons did not respond to the Motion.
18. Midwest served the Robinsons with Requests for Admissions on July 30, 2004. Request for Admission #1 requested that the Robinsons admit or deny the following statement:

Admit you have no evidence the activities authorized by Solid Waste Facility Permit FP 45-41 issued by the Indiana Department of Environmental Management ("IDEM") to Midwest Medical Solutions LLC "poses any undue additional risk relative to our health and our safety" as you allege in your May 27, 2004, petition for administrative review".

19. The Robinsons did not respond to the Requests for Admissions, therefore Request for Admission #1 is deemed admitted.

CONCLUSIONS OF LAW

Conclusions of Law Applicable to All Parties

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.

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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 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).

Conclusions of Law Applicable to the District

5. When construing a statute or regulation, this Court must apply certain rules of statutory construction. The first rule is that 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).
6. IC 13-20-1 requires that an applicant for a solid waste permit demonstrate that there is a local or regional need for such a facility. The applicable portions of this chapter state:

IC 13-20-1-2 states:

A person that applies for a permit described in IC 13-15-1-3 that concerns a solid waste management facility must demonstrate that there is a local or regional need in Indiana for the facility.

IC 13-20-1-3 states:

A person that applies for a permit referred to in section 2 of this chapter must submit the following information to the department along with the permit application:

- (1) A description of the area that would be served by the solid waste management facility.
- (2) A description of existing solid waste management facilities in the area that would be served by the solid waste management facility.
- (3) A description of the need that would be fulfilled by constructing the solid waste management facility.

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7. 329 IAC 11-9-5, which implements the above statutes, sets out the specific requirements for demonstrating such a need:
 - (a) This section applies to all permits for new solid waste facilities or major modifications of permits issued after March 20, 1990, except those facilities exempt under IC 13-20-1-1.
 - (b) In accordance with subsection (a), and in addition to other permit application requirements outlined in this rule, the following are also required:
 - (1) A description of the anticipated area that would be served by the facility as indicated by the following:
 - (A) Solid waste management district or districts if established.
 - (B) County, counties, or portions thereof.
 - (C) County, counties, and state if the area includes portions outside of Indiana.
 - (2) A description of the existing solid waste management facilities that serve the same described area.
 - (3) A description of the need that would be fulfilled by constructing the proposed facility as follows:
 - (A) For facilities proposed in areas with approved district solid waste management plans, a description of the need identified in the district solid waste management plan required under IC 13-21-5.
 - (B) For facilities proposed in areas without approved district solid waste management plans, a description of need for the proposed area to be served.
 - (4) A description of recycling, composting, or other activities that the facility would operate within the proposed area of service.
 - (5) Additional information as requested by the commissioner.
 - (c) The commissioner shall review the submitted application and accompanying materials in accordance with this rule. If it is determined that there is not a local or regional need in Indiana for the solid waste management facility, the commissioner shall deny the permit application.
8. It is very clear from the above mentioned statutes and rules that the IDEM, not the local solid waste management district, has the authority and the duty to make the determination of whether there is a need for a solid waste facility in the district.
9. This Court concludes that the legislature did not intend to give solid waste management districts the authority to stop or delay the permitting process while the district makes a determination regarding the need for a facility. The Court reaches this conclusion based on the following:
 - a. The statute does not explicitly set out such authority.
 - b. The statute does not require the solid waste management district to make determinations of need. A solid waste management district must adopt a district solid waste management plan that contains, amongst other provisions, a *projection* of the need for facilities. IC 13-21-5-11(5).
 - c. IC 13-21-3-14(a)(5) states that a district does not have “the power to issue permits for an activity that is already permitted by a state agency, except as expressly granted by statute.”

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10. Pursuant to 329 IAC 11-9-5(b)(3)(A), the IDEM should consider whether a solid waste management district has made a projection of the need for a facility, if one has been made; however, there is no statutory or regulatory authority for the idea that such a projection is controlling on the IDEM.
11. The District admits that the IDEM could overrule a district's projection in certain circumstances. See Lake County Solid Waste Management District's Reply to the Indiana Department of Environmental Management's and Midwest Medical Solutions LLC's Responses to Lake County Solid Waste Management District's Motion for Summary Judgment, p. 5.
12. This conclusion does not negate the District's purpose for existence. The District clearly has a role in helping the IDEM determine whether a need exists. The District can, for example, submit comments to the IDEM during the public comment period. Also, the District clearly has other duties and responsibilities under IC 13-21-5 in addition to projecting the needs of the district.
13. The rules of statutory construction state, "If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience." *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003). The Court does not agree with the District's interpretation. Such an interpretation would result in absurd consequences. For example, if the IDEM determined that there was a need for a single type of solid waste facility for a region of the state, then one district within that region could defeat that need by asserting that it has made no such determination. One district could impose its determination of need upon other parts of the state, outside of the district boundaries. There is no indication that this was the Legislature's intent.
14. The IDEM must make decisions regarding permits within a certain time frame in accordance with IC 13-15-4. Adopting the District's argument that the IDEM has to wait until a solid waste management district makes a determination of need could result in a delay in issuing the permit. IC 13-15-4-11 lists the options that a permit applicant has in this instance. There is no indication in the language of the statute that it was the Legislature's intent to allow a solid waste management district to delay the permitting process.
15. Pursuant to IC 13-15-4-10, the time frame for issuing a permit can only be suspended for certain reasons. These reasons do not include waiting for a solid waste management district to make a determination of need. If, as the District argues, the IDEM must wait until the local solid waste management district makes a determination, the permitting process could be delayed interminably. This is particularly compelling in this case as the District waited almost 2½ years after learning of Midwest's application to tell the IDEM that it wanted to make the determination of need.

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16. The cases cited by the District, *Worman Enterprises v. Boone County Solid Waste Management District*, 805 N.E.2d 369 (Ind. 2004) and *Board of Commissioners of LaPorte County v. Town & Country Utilities*, 791 N.E. 2d 249 (Ind.App. 2003) are distinguishable and therefore, not persuasive. In 2003, the Legislature amended IC 13-21-3-14 to include subsection (5), which states that a district does not have “the power to issue permits for an activity that is already permitted by a state agency, except as expressly granted by statute.” The Supreme Court noted this change in *Worman*, but did not address the effect that this amendment would have on the outcome of the case. Similarly, the action in *LaPorte County* arose prior to IC 13-21-3-14(a)(5) being added. The Appellate Court did not consider whether this amendment had any bearing on the outcome. In addition, *LaPorte County* can be distinguished in that the Appellate Court addressed whether the county had the authority to pass *zoning* ordinances regarding the siting or permitting of solid waste facilities. In this instance, there is no contention that Lake County had passed any such ordinances.
17. This Court finds that there is no genuine issue as to any material fact and that judgment should be entered against the District and in favor of the IDEM and Midwest.
18. Because this matter can be disposed of for the above reasons, the Court will not address Midwest’s arguments regarding whether the District had the authority to file its Petition for Review.

Conclusions of Law Applicable to the Council

19. The Council makes no argument beyond supporting the District’s position in its Response to the IDEM’s and Midwest’s Motions for Summary Judgment. Therefore, the conclusions of law applicable to the District are also applicable to the Council and are incorporated by reference here.

Conclusions of Law Applicable to the Robinsons

20. Pursuant to Indiana Trial Rules 36(A), Midwest’s Request for Admission #1 is deemed admitted due to the Robinsons failure to respond to the Requests for Admissions.
21. By their own admission, the Robinsons do not have any evidence that the Permit will present any threat to their health and/or safety. The Robinsons cannot prove by a preponderance of the evidence that issuance of the Permit to Midwest was improper.
22. There is no genuine issue as to any material fact relating to the Robinsons. Summary judgment is entered against the Robinsons and in favor of Midwest.

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ORDER

THE COURT hereby ORDERS, ADJUDGES and DECREES the following:

1. The Motion for Summary Judgment filed by IDEM and Midwest against the District is GRANTED. The Motion for Summary Judgment filed by the District against Midwest and IDEM is DENIED.
2. The Motion for Summary Judgment filed by IDEM and Midwest against the Council is GRANTED. The Council's Cross Motion for Summary Judgment is DENIED.
3. The Motion for Summary Judgment filed by Midwest against the Robinsons is GRANTED.

Further, the Court VACATES the hearing date scheduled for November 9 and 10, 2004.

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 26 day of October, 2004.

Hon. Catherine Gibbs
Environmental Law Judge