

LAWRENCE SUPERIOR COURT I  
Courthouse Plaza, Suite 300  
918 16th Street  
Bedford, IN 47421

WALKER, DENISE A.

IN GOV CENTER S, 5TH FLR  
302 W WASHINGTON STREET  
INDIANAPOLIS, IN 46204-2770

CASE NO. 47D01-0809-MI-01284  
CHRIS COX, ET AL VS KYLE HALL, ET AL

NOTICE.

PLEASE TAKE NOTICE OF THE FOLLOWING ACTION OF THE COURT:

FILE DATE: 08/21/09

The Court now enters judgment as follows: The decision of the Office of Environmental Adjudication, as rendered by its Chief Environmental Law Judge, granting Respondent's Motion for Summary Judgment is hereby affirmed. Findings of Fact and Conclusions Thereon and Final Order filed. (Albright/Gernand/Bippus/Walker/RJO) SPECIAL JUDGE ALLEN

Judge Michael Robbins  
LAWRENCE SUPERIOR COURT I

CC: ALBRIGHT, DEBORAH E.  
ALLEN, ERIC (CHIP)

GERNAND, MATTHEW A.

BIPPUS, GARY WAYNE

STATE OF INDIANA            )                    IN THE LAWRENCE SUPERIOR COURT 1  
   ) SS:  
 COUNTY OF LAWRENCE )                    CASE NO. 47D01-0809-MI-1284

CHRIS COX, CHAD ANDERSON, BRANDI    )  
 ANDERSON, EDNA RAINEY, SHANNON    )  
 COLLINGSWORTH, TERRI MILLER, MIKE   )  
 MILLER, SHARON FOX, JERRY FOX, ALAN   )  
 HAMILTON, RICKIE ANDERSON, DAVID    )  
 BRILES, NED ANDERSON, and DIANE    )  
 ANDERSON,                                    )  
   Petitioners,                                    )

VS.

KYLE HALL, INDIANA DEPARTMENT OF    )  
 ENVIRONMENTAL MANAGEMENT, and    )  
 INDIANA OFFICE OF ENVIRONMENTAL    )  
 ADJUDICATION,                            )  
   Respondents.                                    )

FINDINGS OF FACT AND CONCLUSIONS THEREON  
AND FINAL ORDER

This matter having come before the Court on the Petitioners' Verified Petition for Judicial Review of Final Administrative Order; Respondent Kyle Hall's Answer to Petitioners' Verified Petition for Judicial Review of Final Administrative Order; Petitioners' Brief on Judicial Review; Respondent Kyle Hall's Response to Petitioners' Brief on Judicial Review and oral arguments conducted on June 5, 2009. The Court, being duly advised and having considered the pleadings of the parties and the arguments presented at oral argument, now finds that judgment may be made upon the record and makes the following findings of fact and conclusions thereon affirming the granting of summary judgment to Respondent Kyle Hall by the Indiana Office of Environmental Adjudication ("OEA"):



## Findings of Fact

1. On May 31, 2007, Kyle Hall submitted to the Indiana Department of Environmental Management (“IDEM”) a Confined Feeding Facility Approval Application (hereinafter “Application”) for approval to construct a turkey farm to be located in Lawrence County, Indiana. The turkey farm will include: (i) one brooder barn and two growout buildings which will be constructed as solid manure management systems with earthen floors and (ii) a solid manure storage structure (also referred to as the “litter stack building”) with a concrete floor.
  
  2. The Application and other materials reviewed by IDEM included:
    - a. The completed application forms provided in the IDEM application package. *See, Permittee/Respondent’s Motion for Summary Judgment, Exhibit A-1.*
  
    - b. A plot map. *See, Permittee/Respondent’s Motion for Summary Judgment, Exhibit A-6.*
  
    - c. A Farmstead Plan. *See, Permittee/Respondent’s Motion for Summary Judgment, Exhibit A-7.*
  
    - d. Waste management system drawings. *See, Permittee/Respondent’s Motion for Summary Judgment, Exhibit A-2 and A-4.* The drawings also include:
      - i. A memorandum stating that the earthen floors of the growout and brooder buildings (the “production barns”) would be compacted to at least 90 percent of maximum density. *See,*
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*Permittee/Respondent's Motion for Summary Judgment, Exhibit A-*

3.

ii. Concrete specifications for the concrete floor in the litter stack building. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-5.*

iii. A handwritten notation by Kyle Hall that a clay liner would be installed under the production barns, submitted in response to the Notice of Deficiency discussed below in Paragraph 4. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-2.*

e. A manure management plan. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-8.*

f. A Land Use Agreement. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-10.*

g. A Floodplain Analysis and Regulatory Assessment conducted by the Indiana Department of Natural Resources ("IDNR"). *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-12.*

h. A survey of the Hall Farm conducted by Michael D. Arena. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-15.*

i. A memorandum from Kyle Hall stating that a material known as GeoTech and gravel will be placed around the production barns to prevent runoff from the barns from eroding the soils. *See, Permittee/Respondent's Motion*

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*for Summary Judgment, Exhibit A-17.*

- j. A list of potentially affected parties and a one hundred dollar application fee. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-1.*
  - k. Calculations of the amount of waste generated and amount of land application acreage needed. *See, Permittee/Respondent's Motion for Summary Judgment, Affidavit of Tyson Long, Exhibit C and Exhibit A-9.*
3. On June 22, 2007, the IDEM issued a Notice of Deficiency ("NOD") to Kyle Hall. The NOD requested that Hall have the Indiana Department of Natural Resources ("IDNR") conduct a floodplain analysis for the proposed location. In addition, the NOD required Hall to use an approved liner in the construction of the turkey barns. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-11.* In response to the NOD, Kyle Hall amended the waste management system drawings by including a handwritten notation that a clay liner would be installed under the production barns.
4. On July 20, 2007, Joseph Woods, IDEM Permits Geology Section, conducted a site-specific evaluation of the Hall Farm. *See, Permittee/Respondent's Motion for Summary Judgment, Affidavit of Kyle Hall, Exhibit E.* Joseph Woods observed Kyle Hall advance two soil borings with a solid stem auger to a depth of five feet. No bedrock was encountered in either soil boring. *See, Permittee/Respondent's Motion for Summary Judgment, Affidavit of Joseph Woods, Exhibit D and Exhibit A-13.*
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5. On September 4, 2007, the IDEM issued a second NOD requesting Hall provide documentation showing the elevations of the production barns and waste storage structure would be at least two feet above the 100-year frequency flood elevation of 506.0 feet. *See Kyle Hall Affidavit and Exhibit A-14.* Kyle Hall responded by having a survey conducted of the proposed barn locations. The survey determined that the elevation of the proposed barn locations is at least two feet above the 100-year frequency flood elevation. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-15.*
6. On December 3, 2007, the IDEM issued a third NOD to Kyle Hall. *See, Permittee/Respondent's Motion for Summary Judgment Exhibit A-16.* The NOD requested that Kyle Hall provide additional documentation detailing how stormwater from the barn roofs will be managed to prevent soil erosion. *See Exhibit A-16.* In response to this NOD, Kyle Hall submitted a letter to IDEM detailing that a stormwater from the barns would be controlled with the use of a fabric known as "GeoTech" placed under gravel. The letter provided details on the size and depth of the gravel. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-17.*
7. On December 19, 2007, Joseph Woods, IDEM geologist, and Tyson Long, IDEM permit writer, conducted a final site visit to observe additional soil borings conducted by Kyle Hall. Mr. Joseph Woods selected the four boring locations and Kyle Hall used a solid stem auger to drill the borings. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-18.* On December 26, 2007, Joseph Woods drafted a memorandum summarizing the

results of the soil borings. The borings were advanced to at least five feet and no bedrock was encountered. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-19.*

8. On January 11, 2008, the IDEM issued the Permit to Kyle Hall. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit F.*
9. On January 24, 2008, several individuals filed a Petition for Review of IDEM's January 11, 2008 Approval of the Hall Farm with the Indiana Office of Environmental Adjudication ("OEA").
10. Subsequently, on March 12, 2008, Chris Cox, Chad and Brandi Anderson, Edna Rainey, Shannon Collingsworth, Terri and Mike Miller, Sharon and Jerry Fox, Barb and Mike Artinian, Alan Hamilton, Rickie Anderson, David Briles, and Ned and Diane Anderson (hereinafter "the Petitioners") filed an Amended Petition for Administrative Review ("Amended Petition").
11. On April 18, 2008, the Chief Environmental Law Judge ("ELJ") issued a Notice of Proposed Order of Default to the remaining original petitioners.
12. On April 28, 2008, Kyle Hall submitted his Motion for Summary Judgment, supporting brief and designation of evidence; the Petitioners filed their response brief on June 9, 2008 and Kyle Hall replied on June 19, 2008. A sur-reply was filed by the Petitioners on June 30, 2008.
13. On August 5, 2008, the Chief ELJ issued her Findings of Fact, Conclusions of Law and Final Order granting Summary Judgment in favor of the Respondents,

Kyle Hall and IDEM.

14. On September 4, 2008, the Petitioners filed their Verified Petition for Judicial Review.

15. The Petitioners' Brief on Judicial Review was filed on May 13, 2009; Kyle Hall submitted his Response to Petitioners' Brief on Judicial Review on May 27, 2009.

Oral Arguments were heard by this court on June 5, 2009.

### Conclusions of Law

1. An ELJ of the OEA is the ultimate authority over decisions made by the IDEM. *See*, IC § 4-21.5-7-5. The Petitioners carry the burden of establishing error that would warrant the overturning of the ELJ's order. IC § 4-21.5-5-14.
2. A decision by the OEA may only be overturned if it is found that the decision was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. IC § 4-21.5-5-14.
3. A reviewing court must "neither substitute its judgment on factual matters for that of the agency, nor reweigh the evidence. Rather, the evidence is considered in the light most favorable to the administrative proceedings, and the agency's action will not be disturbed so long as there is substantial evidence to support the determination." *Indiana Department of Environmental Management v. Boone County Resource Recovery Systems, Inc.*, 803 N.E.2d 267, 271-272 (Ind. Ct. App. 2004).



4. “Review of an agency's decision is largely confined to the agency record and the court may not try the case de novo or substitute its judgment for that of the agency. Deference is to be given by the reviewing court to the expertise of the administrative body...” *Id.* “The challenging party has the burden of proving that an administrative action was arbitrary and capricious.” *Id.*
5. A decision is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances in the case without some basis which would lead a reasonable and honest person to the same conclusion. *Equicor Development, Inc. v. Westfield-Washington Tp. Plan Com'n*, 758 N.E.2d 34, 37 (Ind. 2001).
6. Thus, the Petitioners have the burden of proving that no reasonable and honest person could have come to the same conclusion at the Chief ELJ that there were no genuine issues of material fact and that the OEA’s granting of summary judgment was in error.
7. For the reasons set forth below, this Court finds that there was no error in the OEA’s finding that there were no genuine issues of material fact and that the OEA properly granted summary judgment to the Respondent, Kyle Hall.
8. First, the Petitioners argued that Kyle Hall’s waste management system drawings and plans required by 327 IAC 16-7-10 were inadequate in that they failed to provide the detailed views and necessary cross-sections that define all dimensions and construction materials of the manure management system as required by 327 IAC 16-7-10. Specifically, the Petitioners contend the drawings are deficient as they do not

adequately depict the clay liner or stormwater control measures that IDEM has required. *See, Petitioners' Brief at 12-13.*

9. Because the parties agree as to what Kyle Hall submitted to IDEM for review, there is no factual dispute; rather, the dispute is a question of law as to whether the submissions complied with 327 IAC 16-7-10. Thus, in order to succeed on this issue, the Petitioners must show that the ELJ's reasoning was faulty such that it was arbitrary and capricious or unsupported by substantial evidence.
10. 327 IAC 16-7-10 requires an applicant to submit drawings of a waste management system that show "detailed views and necessary cross sections to define all dimensions and construction materials."
11. Kyle Hall's amended waste management system drawings included a notation which stated "the clay on the barn floors will not exceed a seepage rate of one sixteenth (1/16) in per day." This notation complies with 327 IAC 16-7-10. The construction material, clay, was defined and the drawings clearly depict the dimensions of the barn. The thickness of the clay liner will depend on the permeability and compaction of the particular clay used and thus cannot be included on the waste management system drawings. The ELJ committed no error in granting summary judgment to Kyle Hall on this issue.
12. Likewise, there was no error in the ELJ's determination that Kyle Hall's memorandum detailing the use of gravel and a geotech fabric for stormwater control was adequate. The memorandum states that the fabric would be four feet wide and would be covered by six inches of varying sizes of gravel. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-17.* The

supplemental memorandum regarding the stormwater control measures when viewed with the original submitted drawings clearly defines the dimensions and construction materials.

13. The ELJ properly concluded that Kyle Hall “presented substantial evidence that no genuine issue of material fact exists” and that “Kyle Hall’s Application and Approval complied with 327 IAC 16-7-10.” *See, Findings of Fact, Conclusions of Law and Final Order*, Conclusion No. 19. The Petitioners have failed to show that the OEA order is arbitrary and capricious.
14. Next, the Petitioners argue that the waste management system drawings were inadequate as they do not depict the drinking or cooling water system to be used in the turkey barns.
15. 327 IAC 16-7-10 does not require that the drawings depict the operational components of the confinement buildings such as the drinking and cooling systems. It only requires “detailed views and necessary cross sections to define all dimensions and construction materials.” Depictions of the drinking and cooling systems are not needed to define all dimensions and construction details. The Chief ELJ was not arbitrary and capricious in her conclusion that the waste management system drawings, as amended, complied with 327 IAC 16-7-10.
16. The Petitioners argue that the cooling and drinking water could impact the amount of manure storage that is required to be maintained by 327 IAC 16-8-4. 327 IAC 16-8-4 requires that:

New manure storage structures for the confined feeding operation must be designed, constructed, and maintained with a combined storage capacity of at least one hundred eighty (180) days storage for:

- (1) manure;
- (2) if applicable, bedding;
- (3) net average rainfall; and
- (4) if applicable, the expected rainfall and run-off from a twenty-five (25) year, twenty-four (24) hour precipitation event that falls on the drainage area around the liquid manure storage structure, but not to include the expected rainfall and run-off from a twenty-five (25) year, twenty-four (24) hour precipitation event that falls directly on the liquid manure storage structure.

17. Because at the time of application, no manure had been produced, the IDEM used a formula from its *Confined Feeding Regulation Program Guidance Manual* (March 2002) to calculate the amount of manure that will be produced. Using the Guidance Manual, IDEM determined that 30,000 turkeys (the maximum allowed under his Permit) would generate 90.0 cubic feet of solid waste per day ( $30,000 \times 0.003$ ) and 3.6 cubic feet of wastewater per day. The total waste produced per day will be 93.6 cubic feet - or when extrapolated out to 180 days - 16,848 cubic feet of total waste production per 180 days. Kyle Hall's turkey barns alone provide storage space for 65,000 cubic feet of waste - four times the amount required. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-9.* In addition, Kyle Hall will utilize a litter stack building that will provide additional storage which will greatly exceed the regulatory requirements. *See, Id.* Kyle Hall submitted an affidavit of the IDEM permit writer, Tyson Long, which stated that the net rainfall was not included in the calculations because the barns will be enclosed structures which will prevent rainfall from entering the structures. Additionally, Mr. Long

stated that because the available storage space so greatly exceeded the amount of manure that would be produced, it was not necessary for him to include bedding calculations or the additional amount of storage that would be provided by the litter stack building. *See, Permittee/Respondent's Motion for Summary Judgment, Affidavit of Tyson Long, Exhibit C, ¶ 8.* Additionally, 327 IAC 16-8-4 does not require that IDEM consider the drinking and cooling water in its storage calculations.

18. The ELJ stated “it is reasonable to conclude that these presumed amounts of liquid would not fully consume the facility’s excess manure storage capacity.” *See, Findings of Fact, Conclusions of Law and Final Order, Conclusion No. 12.*
19. The Petitioners’ criticize the ELJ for “speculating” that the drinking and cooling water would not consume all of the storage space.
20. A court reviewing a motion for summary judgment is required to construe all facts and *reasonable* inferences therefrom in a light most favorable to the nonmoving party, *unreasonable* inferences do not create a genuine issue of material fact.
21. The Petitioners mere conjecture that the drinking water and cooling water will consume the storage requirements cannot be considered a *genuine* issue of material fact. In *C & C Oil v. Dept. of State Revenue*, 570 N.E.2d 1376, 1380 (Ind. Tax 1991), the court stated, “[g]iven the effectiveness of C & C Oil’s mechanical and procedural safeguards in preventing the No. 2 Fuel Oil from entering the gas tanks of motor vehicles, the Department’s assertion that taxable events *could* occur is an unreasonable inference. The issue of material fact asserted by the Department therefore is not genuine because it is merely conjecture.” (emphasis in original). Further, a dispute about a material fact is “genuine” only if it cannot be foreclosed by

reference to undisputed facts and is such that a reasonable jury could return a verdict for the non-moving party. *Weida*, 664 N.E.2d at 747; *Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310 (Ind. 1983).

22. The Petitioners have designated no evidence to contradict the calculations performed by Tyson Long and the statements proffered in his affidavit and rely only on their bald assertions. “The mere possibility that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment.” *Posey v. Skyline Corp.* 702 F.2d 102, 106 (7<sup>th</sup> Cir. 1983). Further, “hypothetical speculation flowing from the given facts does not raise a genuine issue.” *C & C Oil v. Dept. Of State Revenue*, 570 N.E.2d 1376, 1379 (Ind. Tax 1991). Finally, reasserting “their own opinions and conclusions...is not sufficient to oppose a motion for summary judgment.” *Hostetler v. State Farm Fire and Casualty Company*, 521 N.E.2d 1357, 1360 (Ind. App. 1988). As, such the Petitioners have failed to show that the Chief ELJ’s order was in error.
23. Next, the Petitioners argue that the ELJ erred for failing to find that there was a genuine issue of material fact as to whether Kyle Hall had access to sufficient land to to apply the waste generated at his farm. 327 IAC 16-10-1 requires that an applicant have access to a minimum number of acres for manure application. The number of acres needed for land application is based on the nitrogen content in the waste and soil which can only be determined by a soil and manure test. Because at the time of application no waste had been produced, IDEM again used a formula from its Guidance Manual to determine the amount of acreage needed. According to the Guidance Document, one acre of land can support waste produced by 365 turkeys per

year. Using this table, IDEM determined that 30,000 turkeys would require 82.2 (30,000/365 = 82.2) acres, excluding any required setback distances, for land application. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-9.*

24. 327 IAC 16-10-4 requires that land application not occur within the setback distances around certain features such as drinking water wells and surface waters. For example, for solid or composted manure applications the rule requires a setback distance of 50 feet be maintained around surface waters and 10 feet from property lines and public roads. Thus, Kyle Hall must ensure that he has 82.2 acres of land – free from setbacks – to which he can land apply his waste.
25. To meet this requirement, Kyle Hall negotiated a Land Use Agreement, submitted with his application, to apply the manure on 420 acres of land owned by Maurice and Nueva Oldham. *See, Permittee/Respondent's Motion for Summary Judgment, Affidavit of Kyle Hall and Exhibit A-10.* Thus, Kyle Hall has 338 acres above what is required by the Guidance Manual.
26. The ELJ did not err in her conclusion that that 420 acres as a matter of law provides sufficient land application area for the 82.2 acres needed. *See, Findings of Fact, Conclusions of Law and Final Order, Conclusion of Law No. 13.* It is an unreasonable inference to assume that the setback requirements will consume more than 338 acres of the 420 acres that Kyle Hall has available. As stated above, unreasonable inferences cannot satisfy the Petitioners' burden when opposing a motion for summary judgment. The Petitioners must designate some evidence showing that a genuine issue of material fact exists that would preclude the judge

from entering summary judgment in the movant's favor. "The mere possibility that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment." *Posey v. Skyline Corp.* 702 F.2d 102, 106 (7<sup>th</sup> Cir. 1983). Further, "hypothetical speculation flowing from the given facts does not raise a genuine issue." *C & C Oil v. Dept. Of State Revenue*, 570 N.E.2d 1376, 1379 (Ind. Tax 1991). Finally, reasserting "their own opinions and conclusions...is not sufficient to oppose a motion for summary judgment." *Hostetler v. State Farm Fire and Casualty Company*, 521 N.E.2d 1357, 1360 (Ind. App. 1988). Because the Petitioners were unable to designate any evidence of the amount of setbacks, other than a bald assertion that salt creek borders the land application site, the finding of the ELJ was not arbitrary and capricious.

27. Finally, the Petitioners assert that there is a genuine issue of material fact as to whether Kyle Hall provided design specifications that indicate that his barns will have adequate structural integrity and environmental protection to be located in karst terrain as required by 327 IAC 16-8-1(b)(3). Again, there is no dispute as to what was submitted to IDEM; rather the dispute is whether these submittals were adequate. Kyle Hall submitted waste management system drawings which defined the dimensions and construction materials of the barns and four pages of specifications detailing the construction of the concrete floor in the litter stack building. *See, Permittee/Respondent's Motion for Summary Judgment, Exhibit A-5.* In addition, IDEM specifically requested that because the facility was located in karst terrain that Kyle Hall control the stormwater from the barns to prevent soil erosion. In response to this request, Kyle Hall supplemented the waste management system drawings with



a memorandum detailing the use of the GeoTech fabric and gravel. The ELJ found no error in IDEM's finding that these submittals assured that the facility would have adequate structural integrity. *See, Findings of Fact, Conclusions of Law and Final Order*, Conclusion Nos. 19 and 21. The Petitioners offer no explanation of how this was in error other than asserting that IDEM *should have* required more. The ELJ's conclusion that the IDEM properly considered the karst terrain in its approval of the Respondent's farm was not arbitrary and capricious.

28. Finally, the Petitioners argued that 327 IAC 16-8-1(b)(4) and 327 IAC 16-8-3(c) required that IDEM impose additional protective measures on the Hall Farm. 327 IAC 16-8-1(b)(4) states that the IDEM may approve the construction of a waste management system in karst terrain upon the submission of certain information including "(4) Other information that the commissioner *deems* necessary to ensure protection of human health and the environment." 327 IAC 16-8-3(c) states that in certain sensitive areas, the commissioner *may* require additional design standards if determined necessary to protect human health and the environment.
29. As can be seen from the regulatory language, the use of the words "deems" and "may" denotes that these provisions are discretionary. They do not compel IDEM to perform any additional acts or for the applicant to provide any additional information unless specifically requested by the commissioner. The Petitioners use this language in an attempt to show that the ELJ erred in her conclusions that the Petitioners were asking IDEM and Kyle Hall to perform acts not required by law. While the provisions do allow the commissioner to require additional information or additional design standards upon a finding that such items are needed to protect human health or

the environment, these provisions are only invoked and only apply when the commissioner so requires. IDEM did invoke the use of these provisions by requiring Kyle Hall to perform several additional tasks, including conducting additional soil borings on his property to determine the depth of bedrock beneath his property and constructing a clay liner beneath the barns and take measures to control stormwater. *See, Permittee/Respondent's Motion for Summary Judgment, Affidavit of Joseph Woods, Exhibit D, Exhibit A-13 and A-19 and Deposition transcript of Joseph Woods.* Petitioners argue that these regulatory provisions allowed IDEM to request additional tasks be performed such as a dye trace and seasonal groundwater table determination. However, these provisions only apply if IDEM believes that additional measures are needed to protect human health and the environment. The ELJ was correct in her conclusion that the petitioners failed to present any persuasive evidence that IDEM believed additional measures were needed. Mere conjecture is not enough to present a genuine issue of material fact. *See Conclusion of Law No. 21, supra.* To the contrary, during a deposition of IDEM geologist, Joseph Woods, stated he believed the site was suitable for a confined feeding operation and that no further protective measures were required. *See Deposition of Joseph Woods, pg. 45, lines 9-13. See also, Affidavit of Joseph Woods ¶ 8.*

30. Because the Petitioners offered no evidence that conditions existed that required IDEM to request additional information or protective measures, there was no error in the ELJ's conclusion in Paragraphs 11, and 15-21, that the Petitioners were seeking Kyle Hall to perform tasks that were in excess of that required by law.

**ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Office of Environmental Adjudication, as rendered by its Chief Environmental Law Judge, granting Respondent's Motion for Summary Judgment is **HEREBY AFFIRMED**.

IT IS SO ORDERED this 21 day of Aug., 2009 in Bedford, Indiana.



Special Judge, Lawrence Superior Court 1  
*Erik C. Allen*

**DISTRIBUTION**

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