

**Objection to Denial of Closure Plan/Post-Closure Plan,
Boone County Resource Recovery Systems, Inc., Boone County, Indiana.
2008 OEA 149 (01-S-J-2696)**

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 149, cite this case as
Boone County Resource Recovery III, 2008 OEA 149.

TOPICS:

summary judgment	I.C. § 4-21.5-3, <i>et seq.</i>
construction/demolition waste	I.C. § 4-21.5-3-23
landfill	I.C. § 13-13-1-1
Solid Waste Facility	329 I.A.C. 10-2-30
closure	329 I.A.C. 10-2-37
prior OEA Order	329 I.A.C. 1-2-139
removal and proper disposal	329 I.A.C. 10-11-1(a)
Closure Plan	329 I.A.C. 10-37-4
Post-Closure Plan	Ind. Trial Rule 56

PRESIDING JUDGE:

Dauidsen

PARTY REPRESENTATIVES:

Petitioner/Applicant: S. Gregory Zubek, Esq.: Whitham Hebenstreit & Zubek, LLP.
IDEM: Sierra L. Cutts, Esq.

ORDER ISSUED:

October 3, 2008

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY

Prior history:

The Indiana Department of Environmental Management v. Boone County Resource Recovery Systems, Inc., 803 N.E.2d 267 (Ind. Ct. App. 2004), *trans. denied.*

This case refers to a March, 1998 OEA decision by Linda Lasley as well.

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4. On September 11, 1998, OEA's ELJ Linda C. Lasley issued an Order Granting Stay of Effectiveness in Cause 98-S-J-1994, ordering that "all landfill operations shall cease as of the date of this order, with the exception of operations necessary to properly cover and maintain cover over the C/D waste already present at the site."
5. BCRRS deposited C/D waste at the Site between the December 18, 1997 permit issuance and the OEA's September 11, 1998 stay order. BCRRS' undisputed assertions provide substantial evidence that the C/D waste is approximately 170 feet long, 80 feet wide, 8 feet deep (thus an area 13,600 square feet, approximately .3122 acres). The C/D waste has been monitored and covered by six (6) inches of soil and vegetation, and monitored by BCRRS since its deposit. It is further undisputed that IDEM has inspected the C/D waste Site without citing violations.
6. On September 15, 1998, OEA issued an Order Granting Summary Judgment in Cause No. 98-S-J-1994 ("1998 Order"). The 1998 Order granted NSL's summary judgment, thus voiding Permit No. FP 06-07. In the 1998 Order, BCRRS was ordered "to submit a plan, for IDEM's approval, within ninety (90) days from the date of this order for the proper closure of the C/D landfill or removal and proper disposal of the C/D waste at a permitted solid waste landfill."

In its Conclusion, the 1998 Order stated that as a state agency, "IDEM's powers are controlled and limited by statute. IDEM is not free to disregard statutory mandates."

7. No Petition for Judicial Review was filed concerning the 1998 Order, therefore it remains in full force and effect.
8. On December 11, 1998, BCRRS submitted a Plan for Closure of Construction/Demolition Landfill ("Closure Plan") for IDEM's review.
9. On January 6, 1999, IDEM sent BCRRS a deficiency letter, stating that the Closure Plan was incomplete, per 329 Ind. Admin. Code 10-37, for lack of a Post-Closure Plan.
10. On January 21, 1999, BCRRS resubmitted its Closure Plan for IDEM review.
11. On February 1, 1999, BCRRS submitted a Post-Closure Plan, per 329 Ind. Admin. Code 10-38.
12. Prior to submitting its Closure/Post-Closure Plan, in December, 1998, BCRRS filed a second application for a C/D landfill permit to operate a C/D landfill at the same site which the 1998 Order had ordered closed.
13. On December 22, 1999, IDEM denied BCRRS' second application based upon Ind. Code § 13-9-4-5(a)(5) ("Good Character" Law) and 329 Ind. Admin. Code 10-11-1.

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14. BCRRS sought administrative review of the December 22, 1999 denial. After extensive litigation, the Indiana Court of Appeals sustained IDEM's December 22, 1999 denial of BCRRS' C/D landfill permit. *The Indiana Department of Environmental Management v. Boone County Resource Recovery Systems, Inc.*, 803 N.E.2d 267, 270 (Ind. Ct. App. 2004), *trans. denied.*
15. Concerning the instant case, on March 19, 2001, IDEM sent BCRRS a letter informing BCRRS that the Closure Plan had been denied for reasons noted in the attached Notice of Decision and the waste deposited at the site must be removed and properly disposed of within ninety (90) days. The attached Notice of Decision stated IDEM's reasons for denying BCRRS' Closure/Post-Closure Plans. Specifically, IDEM stated that in light of the (December 22, 1999) denial for a C/D landfill permit, "this disposal site is not permitted and not subject to the environmental controls necessary to properly manage this waste."
16. This case concerns BCRRS' April 1, 2001 timely-filed Petition for Administrative Review of IDEM's March 19, 2001 denial of BCRRS' Closure/Post-Closure Plan. Case scheduling orders were entered, and the parties attempted mediation, along with litigating the then-pending appeal of IDEM's December 22, 1999 denial.
17. On March 30, 2007, BCRRS filed a Motion for Summary Judgment, supporting Memorandum, Affidavit of Jonathon W. Bankert, Jr., and Designation of Materials in Support of Summary Judgment.
18. On May 24, 2007, IDEM filed its Motion for Summary Judgment, supporting Memorandum of Law, and Response to BCRRS' Motion for Summary Judgment.
19. On June 13, 2007, BCRRS filed a Consolidated Reply to IDEM's a.) Motion for Summary Judgment; b.) Memorandum of Law in Support of Motion for Summary Judgment, and c.) Response to BCRRS, Inc.'s Motion for Summary Judgment, along with briefing which moved to strike IDEM's Motion as untimely. On August 13, 2007, oral argument was heard on the pending motions.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-7-3. I.C. § 4-21.5-3, *et seq.* I.C. § 4-21.5-7 *et. seq.* allows the OEA to promulgate rules and standards in order to allow it to conduct its duties.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-23, Ind. Code § 4-21.5-3-27, and 315 Ind. Admin. Code 1-2-1(9). 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. IDEM is charged with the implementation and enforcement of Indiana's environmental laws, and rules promulgated pursuant to those laws. Ind. Code § 13-13-1-1, *et seq.*

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4. In this case, Petitioner/Applicant BCRRS moved for summary judgment as to whether any genuine issues of material fact exist as to Respondent, Indiana Department of Environmental Management's ("IDEM") denial of BCRRS' Closure/Post-closure Plan; IDEM sought summary judgment sustaining its denial as a matter of law.
5. 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." I.C. § 4-21.5-3-23; *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App 1998); Ind. Trial Rule 56(C).¹
6. The moving party bears the burden of establishing that summary judgment is appropriate. "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704 (Ind. Ct. App. 1992). "A factual issue is said to be "genuine" if a trier of fact is required to resolve the opposing parties differing versions of the underlying facts." *York v. Union Carbide Corp.*, 586 N.E.2d 861, 864 (Ind. Ct. App. 1992). A fact is "material" if it helps to prove or disprove an essential element of plaintiff's cause of action. *Weida v. Dowden*, 664 N.E.2d 742, 747 (Ind. Ct. App. 1996). 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); *State v. Livengood*, 688 N.E.2d 189, 192 (Ind. Ct. App. 1997). The moving party must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospital of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991), citing *Elkhart Community School Corp. v. Mills*, 546 N.E.2d 854 (Ind. Ct. App. 1989). A moving party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan v. Snap-On Tool Corp.*, 478 N.E.2d 116, 122 (Ind. Ct. App. 1985). Factual disputes that are irrelevant or unnecessary will not be considered. *Owen v. Vaughn*, 479 N.E.2d 83, 87 (Ind. Ct. App. 1985). Once each moving party sets out a *prima facie* case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue.
7. "The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, (Ind. Ct. App. 1992) at 703-704. In this case, each party has the burden of showing whether the denial IDEM issued either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *AquaSource Services and Technology*, 2002 OEA 41, 44. Each movant has the burden of proof, persuasion and of going forward on its motion for summary judgment. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23. In this case,

¹ Contemporaneous to the issuance of this Final Order, the OEA issued an order denying BCRRS' Motion to Strike IDEM's Motion for Summary Judgment as untimely.

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Respondent/Permittee Hall has the burden of showing whether IDEM's denial of BCRRS' Closure/Post Closure Plan either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law; IDEM bears the same burden of sustaining its denial as a matter of law.

8. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. I.C. § 4-21.5-3-27(d); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "De novo review" means that:

all issues 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).

9. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also*, I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM was authorized to deny BCRRS' Closure/Post-Closure Plans, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also*, *Blue River Valley*, 2005 OEA 1, 11-12. *Marathon Point Service and Winimac Service*, 2005 OEA 26, 41.
10. Construction and demolition waste is a regulated solid waste. 329 Ind. Admin. Code 10-2-37.
11. "[A]ny person who disposes of solid waste shall have a solid waste disposal facility permit prior to construction and disposal." 329 I.A.C. 10-11-1(a).
12. Therefore, Indiana rules and regulations require BCRRS, as a disposer of C/D waste, to have a permit.
13. Closure is defined in applicable rules as "those activities to be completed at the end of waste acceptance at a solid waste land disposal facility or units of a facility." 329 Ind. Admin. Code 10-2-30.
14. Owners or operators of C/D sites are required to have a written closure plan. 329 I.A.C. 10-37-4. The closure plan must be submitted with the permit application; its approval by IDEM is done as a part of the permit. *Id.* The closure plan then becomes a condition of the permit.

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15. Post-closure is defined as “the monitoring and maintenance activities required after final closure of a solid waste land disposal facility.” 329 Ind. Admin. Code 10-2-139.
16. Owners or operators of C/D sites are required to have a written post-closure plan. 329 I.A.C. 10-38-3. The post-closure plan must be submitted with the permit application; its approval by IDEM is done as a part of the permit. *Id.* The post-closure plan then becomes a condition of the permit.
17. Indiana rules and regulations require a permit for disposal of solid waste, a requirement which cannot be removed by this Court. A permit provides required assurances that ongoing obligations are being met to maintain solid waste disposal.
18. The 1998 Order required BCRRS “to submit a plan, for IDEM’s approval, within ninety (90) days from the date of this order for the proper closure of the C/D landfill or removal and proper disposal of the C/D waste at a permitted solid waste landfill.” The 1998 Order allows IDEM to review BCRRS’ Closure/Post-Closure Plans, an IDEM duty which OEA cannot reduce or eliminate. The 1998 Order does not restrict IDEM action only to approval of BCRRS’ Closure/Post-Closure Plans. In advocating its position in this cause, IDEM is not circumventing the terms of the 1998 Order, nor is IDEM estopped from making its determination by the 1998 Order.
19. BCRRS’ assertions to the contrary, IDEM provided substantial evidence that it did conduct a complete review of BCRRS’ closure and post-closure plans.
20. BCRRS did not submit a permit application with its closure and post-closure plans submittals. Denial of BCRRS’ effort to obtain a permit after BCRRS submitted its closure and post-closure plans was vigorously litigated, concluding with a denial of BCRRS’ permit application. Per Indiana laws and regulations, BCRRS does not have a permit to dispose of C/D waste. IDEM has presented substantial evidence that required assurances that BCRRS’ ongoing obligations are being met to maintain solid waste, as provided by a permit, are absent.
21. No time restrictions are imposed on IDEM for review of closure or post-closure plans. 329 I.A.C. 10-37, 329 I.A.C. 10-38. The timeliness of IDEM’s March 19, 2001 decision after its review is not a consideration for OEA in this case.²
22. Despite BCRRS’ invitation that OEA find that the environmental integrity of the site may support the issuance of BCRRS’ Closure/Post-Closure Plans, this Court is not authorized to ignore the other requirements applicable to solid waste disposal sites, which requirements were unsatisfied by BCCRS. The Indiana Court of Appeals 2004 decision sustaining IDEM’s denial of BCRRS’ December 22, 1999 permit application gives further support to IDEM’s March 21, 1999 Notice of Decision denying BCRRS’ Closure/Post-Closure Plans and order to remove deposited waste within ninety (90) days.
23. IDEM has presented substantial evidence of no disputed genuine issue of material fact, entitling IDEM to summary judgment as a mater of law.

² The parties’ pleadings demonstrate that the December, 1992 permit denial was vigorously litigated in the intervening time; a different decision in that case would have had a significant impact on the issues in this case.

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FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Respondent, Indiana Department of Environmental Management, provided substantial evidence required to meet its burden of showing that its March 19, 2001 determination to deny approval to Boone County Resource Recovery System, Inc.'s Closure/Post-Closure Plan and that the waste deposited at the site must be removed and properly disposed of within ninety (90) days, complied with applicable law, as a matter of law, and that no genuine issue of material facts exist to the contrary. Petitioner/Applicant, Boone County Resource Recovery Systems, Inc., did not provide substantial evidence required to meet its burden of showing the lack of genuine issue of material fact that Respondent, Indiana Department of Environmental Management's, March 19, 2001 determination to deny Boone County Resource Recovery System, Inc.'s Closure Plan and that the waste deposited at the site must be removed and properly disposed of within ninety (90) days, did not comply with applicable law, as a matter of law. Respondent, Indiana Department of Environmental Management, is entitled to judgment as a matter of law that its denial of Boone County Resource Recovery System, Inc.'s Closure Plan and its determination that the waste deposited at the site must be removed and properly disposed of within ninety (90) days, complied with applicable law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Respondent, Indiana Department of Environmental Management's, Motion for Summary Judgment is **GRANTED**; Petitioner's Motion for Summary Judgment is **DENIED**. Judgment is entered in favor of Respondent, Indiana Department of Environmental Management.

You are further notified that pursuant to provisions of Ind. 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 I.C. § 4-21.5, *et seq.* Pursuant to 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 within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 3rd day of October, 2008 in Indianapolis, Indiana.

Hon. Mary L. Davidsen
Chief Environmental Law Judge