

**OBJECTION TO THE ISSUANCE OF
CONFINED FEEDING OPERATION APPROVAL
FARM ID #6912, ANIMAL WASTE #AW-6584
PUMPS HOGS, LLC
2017 OEA 103, OEA CAUSE NO.: 16-S-J-4913**

Official Short Cite Name:	Pumps Hogs, LLC, 2017 OEA 103
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Topics/Keywords:	IC 4-21.5-3-23 IC 13-18-10 IC 13-42-2-2 327 IAC 19-11 327 IAC 2-6-1 40 CFR 122.23 40 CFR 122.42(e) Motion for Summary Judgment Ind Tr. R. 56(C)
Presiding ELJ:	Catherine Gibbs
Party Representatives:	Petitioners: Matthew T. Albaugh, Esq. Daniel F. Pulliam, Esq. IDEM: Kyle Burns, Esq.
Date of Order:	March 27 th , 2017
Index Category:	Land
Further Case Activity:	



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)

OBJECTION TO THE ISSUANCE OF CONFINED)
FEEDING OPERATION APPROVAL)
FARM ID #6912, ANIMAL WASTE #AW-6584)
PUMPS HOGS LLC)
BRINGHURST, CARROLL COUNTY, INDIANA)

CAUSE NO. 16-S-J-4913

Steve Bough, Lisa Bough, Mark Cripe, Catherine Ann)
Cripe)
Petitioners)
Pumps Hogs LLC)
Permittee/Respondent)
Indiana Department of Environmental Management)
Respondent)

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

The parties filed for summary judgment. The OEA, having read the record and examined the evidence, enters the following findings of fact and conclusions of law and order granting Pumps Hogs' motion for partial summary judgment.

Findings of Fact

1. On June 29, 2016, the Indiana Department of Environmental Management (IDEM) issued Approval with Construction (Approval) to construct and operate a confined feeding operation (CFO) to Pumps Hogs LLC (Permittee). Permittee received approval to construct a facility located at C.R. 500 S and U.S. 421, Bringhurst Indiana (Facility).
2. Permittee submitted its application for CFO Approval on May 6, 2016. James Templin signed the Application as the applicant or authorized agent. Jon Templin signed the Application as the property owner.
3. Pumps Hogs LLC and James Templin were listed as responsible parties.

4. A Notification Affidavit is required as part of the Application. James Templin signed the Notification Affidavit. The Notification Affidavit was notarized by Tamara S. Templin.
5. Under IDEM's formula for calculating the number of acres needed for land application of the manure generated by the Facility, 416.6 acres were required for land application. The Permittee entered into agreements with land owners for 441.053 acres. One of the Land Application Agreements was for 18.562 acres owned by Jon L. and Tamara S. Templin. The Agreement was signed by Jon L. Templin, as the landowner, and James Templin, as the CFO owner. Both signatures were notarized by Tamara S. Templin.
6. The Facility is not permitted to discharge under the Approval.
7. The Facility is approved to house 8,800 wean-to-finish pigs and 4,400 nursery pigs (less than 55 pounds) for a total capacity of 13,200 swine.
8. Steve Bough, Lisa Bough, Mark Cripe and Catherine Ann Cripe (the Petitioners) filed a Petition for Review on July 14, 2016.
9. Permittee filed a motion for partial summary judgment on January 5, 2017; IDEM filed its concurrence with Permittee's motion on January 13, 2017. Permittee seeks summary judgment on Petitioners' claims that (1) the Approval is void because parts of the Application were not properly notarized and (2) the Approval does not include enforceable provisions relating to nutrient management and recordkeeping as required by federal law.
10. Petitioners filed a response and cross-motion for partial summary judgment on February 3, 2017.
11. Permittee filed its reply on February 21, 2017. IDEM filed its concurrence with Permittee's reply on February 22, 2017.
12. Permittee filed its Response to Petitioners' Cross-motion for Partial Summary Judgment on March 8, 2017; IDEM filed its concurrence with Permittee's response on March 9, 2017.
13. Petitioners filed their Reply to Pumps Hogs LLC's Response to Cross-motion for Partial Summary Judgment on March 23, 2017.

Conclusions of Law

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq.* 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 office 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 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).
4. The parties have requested partial summary judgment on the following issues:
 - a. Was the application properly notarized?
 - b. Did the CFO approval comply with 40 CFR 122.42(e) regarding a site-specific nutrient management plan or the record keeping requirements?
5. The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 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).
6. Each party has requested summary judgment in this matter. "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, 703-704, (Ind. Ct. App. 1992) *see also*; *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).

Flaws in notarization do not invalidate the Approval.

7. Permittee's application for CFO Approval included 2 documents that were notarized. The first one was the Notification Affidavit in which James Templin stated that he had sent notices of the Application to various people including, but not limited to, the Petitioners. This Affidavit had to be notarized and was notarized by Tamara Templin.
8. The second document was a Land Application Agreement for approximately 18 acres. This acreage is owned by Jon and Tamara Templin. The Agreement did not have to be notarized, but Tamara notarized the document. Petitioners allege that the notarizations do not comply with I.C. § 33-42-2-2 and therefore, the Application fails to comply with statutory requirements. As a result, they allege the Approval should be revoked.

9. I.C. §33-42-2-2(a)(2) states: (a) A notary public may not do any of the following:

(1) ...

(2) Acknowledge any instrument in which the notary's name appears as a party to the transaction.

10. The first document which Petitioners allege was improperly notarized is the Notification Affidavit.¹ The initial question is whether Tamara is a party to the transaction. Tamara is neither a signatory to the Application nor designated as a responsible party. Petitioners do not allege that she should have been designated as such. They base their allegation that she is a party on the fact that she is part owner of 18 acres of land upon which manure will be land applied. "Transaction" is not defined by the statute, but is commonly defined² as (1) "an exchange of goods, services or funds" or (2) "a communicative action or activity involving two parties or things that reciprocally affect or influence each other."³ Under the common definition, both the Application and the Notification Affidavit could be considered transactions. However, because Tamara is neither the applicant nor a responsible party, she did not sign either one nor was her signature required on either document. Thus, she is not a party to a transaction. I.C. §33-42-2-2(a)(2) does not prohibit her from notarizing James' signature on the Notification Affidavit. In addition, the Petitioners cannot claim that they were harmed as they actually received the notice which James averred that was sent to all interested parties.

11. A Land Application Agreement (the Agreement) is a separate transaction from the CFO Application as it can involve parties other than those identified as the applicant or responsible parties. Tamara is part owner with Jon of 18 acres upon which land application will occur. She could be considered a party to the Agreement (the transaction). She notarized Jon's signature on the Agreement. This could be considered inappropriate under I.C. §33-42-2-2(a)(2). However, this alleged error does not invalidate the Agreement or the Approval.

12. The flaw in the notarization is insufficient to invalidate the Agreement because the Agreement did not have to be notarized.

13. Further, even if the Agreement is invalidated, this would not invalidate the Approval. If the 18 acres are taken out of the calculation for the required acreage for land application, Permittee still has sufficient acreage available to meet the requirement. IDEM could have approved the Application without considering this acreage.

14. Moreover, Petitioners' argument, that the Approval must be rescinded because of the notarization error, is not supported by statute or case law. If a notary does not comply with

¹ Petitioners do not allege any other flaw in the Notification Affidavit other than the notarization. They do not allege that notifications were not sent to the appropriate persons.

² "When construing the language of a statute, the Court of Appeals is bound to apply the plain and ordinary meaning of words and phrases." *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193, 205 (Ind. Ct. App. 1996).

³ <https://www.merriam-webster.com/dictionary/transaction>.

the law, the notary's appointment can be revoked. The statute does not state that the document will be invalidated by the flaw. The Supreme Court has stated: "We hold that if the written consent is not properly notarized, the validity of the consent may nevertheless be satisfied by evidence that the signatures are authentic and genuine in all respects . . ." *Robbins v. Baxter (In re Baxter)*, 799 N.E.2d 1057, 1058, 2003 Ind. LEXIS 1037, (Ind. 2003). In this case, Permittee has provided indisputable evidence that James Templin signed these documents.

15. There is no genuine dispute of material fact and summary judgment in Permittee's favor is appropriate on this issue.

The CFO approval complies with 40 CFR 122.42(e) regarding a site-specific nutrient management plan or the record keeping requirements.

16. Petitioners assert that the CFO approval should, but does not, require compliance with 40 CFR 122.42(e) regarding a site-specific nutrient management plan and the record keeping requirements, asserting that the Approval only mentions a guidance document. However, the Approval states "As the owner/operator, you must: meet all terms and conditions of this approval, the Confined Feeding Control Law IC 13-18-10, the Confined Feeding Operation regulations 327 IAC 19 and the Spill Rule 327 IAC 2-6.1; . . ." ⁴
17. 327 IAC 19-11-1(a) states: "All CFOs that are defined as concentrated animal feeding operations (CAFOs) in 40 CFR 122.23(b)(2) and all CAFOs with a NPDES⁵ permit must meet the storm water requirements in 40 CFR 122.23(e) and 40 CFR 122.42(e)(1) through 40 CFR 122.42(e)(2)."
18. 40 CFR 122.42 applies to specific categories of NPDES permits. Subsection (e) specifically applies to CAFOs with NPDES permits. The Facility does not have an NPDES permit as it is not permitted to discharge. Therefore, 40 CFR 122.42(e) does not apply to this Facility as a CAFO with an NPDES permit.
19. But, the Facility is approved to house 8,800 wean-to-finish pigs and 4,400 nursery pigs (less than 55 pounds) for a total capacity of 13,200 swine. Under 40 CFR 122.23(b)(4)(iv), a CAFO with more than 2,500 swine each weighing more than 55 pounds⁶ is considered a large confined animal feeding operation. So, this Facility is a large CAFO and must meet the storm water requirements in 40 CFR 122.23(e) and 40 CFR 122.42(e)(1) through 40 CFR 122.42(e)(2).
20. As the Approval requires the Facility to comply with 327 IAC 19 and therefore, 40 CFR 122.23(e) and 40 CFR 122.42(e)(1) through 40 CFR 122.42(e)(2), Petitioners' argument that the Approval does not require compliance with 40 CFR 122.42 fails. Petitioners fail to support their argument that this term is not enforceable or that some other language is

⁴ Exhibit F, Petitioners' Cross Motion for Summary Judgment, Confined Feeding Operation Approval, page 5.

⁵ National Pollutant Discharge Elimination System.

⁶ The ELJ is assuming that the 8,800 wean-to-finish pigs weigh more than 55 pounds.

necessary to make this enforceable. Summary judgment should be entered in Permittee's favor.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED partial summary judgment is entered in favor of Pumps Hogs LLC.

This is not a final order as it does not dispose of all of the issues raised by Petitioners in their Petition for Review.

You are further notified that pursuant to provisions of Ind. Code (I.C.) § 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.

A case management order was issued on November 10, 2016. The deadlines remain in effect. Any party may file for a modification or extension of the deadlines established in the Order.

IT IS SO ORDERED this 27th day of March, 2017 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge