

**OBJECTION TO THE ISSUANCE OF  
LAND APPLICATION PERMIT  
PERMIT NO.: IN LA000795  
BIO TOWN AG, INC.  
2024 OEA 022, OEA CAUSE NO.: 23-S-J-5256**

Official Short Cite Name:	<b>Bio Town Ag, 2024 OEA 022</b>
OEA Cause No.:	23-S-J-5256
Topics/Keywords:	Modified Hybrid Land Application permit (biosolids) Ind. Tr. R. 12(B)(6) IC 13-30-2 IC 13-15-6- 1 IC 13-15-6-2(6) IC 13-14-2-6 IC 4-21.5-3-7 327 IAC 6.1 327 IAC 6.1-7-5 327 IAC 6.1-4.9 327 IAC 6.1-4 through 7 315 IAC 1-3-2(b)(4)(A) waiver
Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Arie J. Lipinski – Petitioner Freedom S.N. Smith – Permittee/Respondent Lauren D. Baldwin – Permittee/Respondent Susanna A. Bingman – IDEM/Respondent Brooke Werstler – IDEM/Respondent
Date of Order:	February 8, 2024
Index Category:	Land
Further Case Activity:	



# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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STATE OF INDIANA )  
 )  
 COUNTY OF MARION )  
 )  
 IN THE MATTER OF: )

BEFORE THE INDIANA OFFICE OF  
 ENVIRONMENTAL ADJUDICATION

CAUSE NO. 23-S-J-5256  
 INCITE NO. IDEM-2306-002931

OBJECTION TO THE ISSUANCE OF )  
 LAND APPLICATION PERMIT )  
 PERMIT NO.: IN LA000795 )  
 BIO TOWN AG, INC. )  
 REYNOLDS, WHITE COUNTY, INDIANA. )

Grant & Rhonda Miller, )  
 Petitioners, )  
 BioTown Ag, Inc. )  
 Permittee/Respondent, )  
 Indiana Dept of Environmental Management, )  
 Respondent. )

## FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Office of Environmental Adjudication (OEA or Court) on the Indiana Department of Environmental Management's (IDEM) Motion to Dismiss. The Court, having read the Motion, Petitioners Grant and Rhonda Miller (Petitioners) Response, IDEM's Reply, Petitioners' Sur Reply and IDEM's Response now enters the following Findings of Fact, Conclusions of Law and Final Order.

### Findings of Fact

1. On June 7, 2023, IDEM issued a modification to Biosolids and Industrial Waste Product Composting, Marketing and Distribution and Modified Hybrid Land Application Permit No. IN LA 000795 (Permit) to Bio Town Ag, Inc. (Permittee)<sup>1</sup> pursuant to 327 IAC 6.1.

2. Under the Permit, Permittee may

- accept industrial waste products for composting;
- compost anaerobically digested biosolids and industrial waste products;
- Accept biosolids for composting, market and/or distribute the compost for agricultural and landscaping purposes;

<sup>1</sup> Permit, p. 1.

- Market and/or distribute anaerobically digested industrial waste products; and
- Land apply biosolids and/or industrial waste products for agricultural purposes.<sup>2</sup>

3. The modified Permit approved thirteen (13) additional site-specific land application sites in White and Jasper counties which included a site adjacent to Amended Petitioner's property.<sup>3</sup>

4. On June 22, 2023, Petitioners filed a timely Petition for Administrative Review (Petition).

5. On June 28, 2023, this Court issued a Notice of Incomplete Filing, Order to Supplement the Amended Petition and Notice of Proposed Order of Default (Notice of Incomplete Filing) ordering Petitioners supplement their Amended Petition, attaching a complete copy of IDEM's action and identifying which portions of the Permit to which the Petitioners object.

6. On July 24, 2023, Petitioners filed an amended Petition (Amended Petition) to comply with the Court's June 28, 2023 Order.

7. On September 29, 2023, IDEM filed a Motion to Dismiss Petitioners' Amended Petition (Motion to Dismiss).

8. On October 30, 2023, Petitioners filed a Response to IDEM's Motion.

9. On November 14, 2023, IDEM filed its Reply in support of its Motion.

10. On November 15, 2023,<sup>4</sup> Petitioners filed a Sur-Reply in Opposition to IDEM's Motion.

### **Conclusions of Law**

1. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-23 (IC). 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.

2. 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.

3. The OEA and IDEM, as state agencies, only have authority to take those actions that are granted by the law. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations. If IDEM does not have the regulatory authority to address certain issues, OEA does not have the authority to revoke a permit on the basis that IDEM failed to consider these issues. *Rippy Farms*, 2018 OEA 31, 34.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, pp. 19 – 27.

<sup>4</sup> The September 13, 2023 Case Management Order required the parties to file any Reply by November 14, 2023. Petitioners did not seek leave from the Court to file their Reply on the 15<sup>th</sup>.

4. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding whether to issue the permit. *Page Road*, 2022 OEA 150, 152; *Wolf Lake*, 2023 OEA 001, 006; *American Suburban Utilities*, 2019 OEA 48, 53. OEA's review is limited to determining whether IDEM complied with applicable statutes and regulations pertaining to permits when it issued the Permit. *Berkshire Pointe WWTP*, 2023 OEA 105, 110; *Blue River Valley*, 2005 OEA 1, 11

5. Indiana Trial Rule 12(B)(6) permits a Respondent to move for dismissal of an Amended Petition that "fail[s] to state a claim upon which relief can be granted." Motions to dismiss generally test the legal sufficiency of a claim, not the facts supporting it. *Greentree Enterprises, LLC*, 2014 OEA 8, 11 (citing *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind. 2003)). Well-pled material facts must be taken as admitted, and those facts must be "the operative facts necessary to set forth an actionable claim." *Trail v. Boys and Girls Club of Nw. Ind.*, 845 N.E.2d 130, 135 (Ind. 2006).

Courts should grant a Motion to Dismiss if the facts, even if true, do not support the relief requested. *Minks v. Pina*, 709 N.E.2d 379, 381 (Ind. Ct. App. 1999). A complaint may not be dismissed under Ind. Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief. *McQueen v. Fayette Cnty. Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied*.

6. IC § 4-21.5-3-7 sets forth the requirements to initiate a proceeding before OEA. Both IC § 13-15-6-2(6) and 315 IAC 1-3-2(b)(4)(A) set forth additional requirements that a Petitioner must include in a Petition for Administrative Review when appealing IDEM's issuance of a permit. IC § 13-15-6-2(6) requires a Petitioner to

Identify the permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.

315 IAC 1-3-2(b)(4)(A) requires a Petitioner in a case involving an appeal of a permit to identify the following:

(i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the Amended Petition.

(ii) Permit terms and conditions that the Amended Petitioner contends would be appropriate to comply with the law applicable to the contested permit.

7. Petitioners allege the "Permit will result in the contamination of drinking water, surface water, groundwater and soil near approximately twenty nearby residential structures, playgrounds and roads"<sup>5</sup> but do not substantiate their allegation with evidence in support.

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<sup>5</sup> Amended Petition, p. 2.

Thus, Petitioners' allegation is speculative and insufficient to prove the Permit will result in contamination.

8. Petitioners allege Permittee has violated and continues to violate certain Indiana Administrative Codes and Permit sections. Specifically, Petitioners allege the Permittee has

- a. violated and continues to violate 327 IAC 6.1-7-5 and Land Application Site Restriction Part 2, Section B.1. of its Permit which prohibit [Permittee] from land applying biosolids and/or industrial waste products within 200 feet of a potable well [and] applied biosolids and/or industrial waste products inside the 200-foot setback requirement for potable wells prior to the approval of its Permit modification.<sup>6</sup>
- b. on May 30, 2023, . . . [applied] biosolids and/or industrial waste products at the corner of West Schafer Dr., Goden Acre Ct. and Mojave Dr. within 200 feet of a potable well.<sup>7</sup>
- c. failed to conduct management practices in compliance with 327 IAC 6.1-4-7 and Land Application Site Restrictions, Part 1, Section H and Part 2, Section H.<sup>8</sup>
- d. exceeded ceiling concentrations of metal pollutants for biosolid and/or industrial waste products that are land applied in violation of 327 IAC 6.1-4-9 and Land Application Site Restrictions Part 1, Section C and Part 2, Section D.<sup>9</sup>

None of these allegations comply with IC § 13-15-6-2(6) and 315 IAC 1-3-2(b)(4)(A). Moreover, allegations without supporting documentation are speculative and insufficient to prove IDEM improperly issued the Permit. See *John A. and Becky S. Stuber*, 2009 OEA 96, 107. Even assuming *arguendo* Permittee did not in the past or will not in the future comply with statutes, rules or permit conditions, its past or potential future non-compliance would not determine whether IDEM properly issued the Permit here. IDEM addresses non-compliance with a permit through enforcement. IC § 13-30-3; IC § 13-14-2-6; 327 IAC 6.1-1-4.

9. Petitioners contend that due to the alleged past and potential future violations, Petitioners and all other affected landowners "should be entitled to compensation for any decrease in the value of their properties, injuries and/or medical expenses incurred and any other personal or property damages caused by Permittee's violations . . ."<sup>10</sup>

IDEM does not have authority to compensate landowners for a permittee's past or future violations. Thus, OEA cannot order Permittee to compensate landowners. "An agency . . . may not by its rules and regulations add to or detract from the law as enacted, nor may it by

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; Amended Petitioners uploaded a blurred photograph in their Amended Petition, but the equipment did not appear to be at a corner and no street signs were visible.

<sup>8</sup> Amended Petition, p. 3.

<sup>9</sup> *Id.*

<sup>10</sup>*Id.*

rule extend its powers beyond those conferred upon it by law." *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003).

10. Petitioners assert and request IDEM to compel Permittee to satisfy the requirements of 327 IAC 6.1-4-6, 7 and 9 to

- a. refrain from applying biosolids and/or industrial waste products to the land within 200 feet of any potable well;
- b. employ management practices that comply with 327 IAC 6.1-4-7;
- c. comply with ceiling concentration pollutant limits;
- d. be subject to random inspections.
- e. conduct quarterly groundwater, surface water, drinking water and other monitoring to ensure compliance with the aforementioned regulation and Permit;
- f. submit quarterly reports to IDEM;
- g. provide information, training documents and surveys detailing the setback requirements to its employees and owners of adjacent landowners; and
- h. compensate landowners for any decrease in their property values or for injuries and/or medical expenses incurred because of any violations committed by permittee.

Amended Petition, pp. 2 – 3. With respect to these assertions

- a. Part 2, Section B.1 of the Permit requires Permittee to comply with 327 IAC 6.1-4-5(d) and 6(a) which address the setbacks the Permittee must follow including a 200 feet setback for land applying biosolids and/or industrial waste products from any potable well through surface application, subsurface application, and incorporation. This setback applies to both site-specific and nonsite-specific application sites. Permit, p. 28.
- b. Part 2, Section B.2 of the Permit requires Permittee to comply with the management practices prescribed by 327 IAC 6.1-4-7. *Id.* at pp. 29 – 30.
- c. Part 1, Section C.1 of the Permit lists pollutant concentration limits for heavy metals regarding biosolids and industrial waste products that Permittee can accept. *Id.* at pp. 11 – 12. Part 2, Section D.1 lists heavy metal concentrations regarding biosolids that Permittee can land apply. *Id.* at p. 33.
- d. Permittee is subject to random inspections under 327 IAC 6.1-1-6(b) which states,

The commissioner, or the commissioner's authorized representative, upon presentation of proper credentials

(1) shall have a right of entry to, upon, or through any premises, public or private, in which records, reports, monitoring or treatment equipment or methods, samples, or other information required to be maintained or provided under subsection (a) are located; and

(2) shall, during normal business hours inspect for purposes of assessing compliance with this article, have access to:

(A) view or copy any records;

(B) inspect any equipment or method; and

(C) sample any effluent or other material required under subsection (a).

e. and f. With respect to monitoring and the submission of reports, IDEM cannot compel Permittee to “conduct *quarterly* groundwater, surface water, drinking water and other monitoring or to submit quarterly reports” as these are not required by either statute or regulation. (emphasis added). “Neither IDEM nor the OEA may require an applicant to . . . perform action in excess of that required by law.” *Union-Go Dairy, LLC*, 2016 OEA 1, 8.

Monitoring and reports are required under 227 IAC 6.1-1-6(a) which states, [i]n accordance with this article, any person who is required to comply with such regulatory provisions shall:

(1) establish and maintain records;

(2) make reports;

(3) install, use, and maintain monitoring equipment or methods;

(4) sample effluents or other material; and

(5) provide other information applicable to this article.

Specifically, Part 1, Sections E.1 - E.2,<sup>11</sup> Part 1, Section G,<sup>12</sup> Part 2, and Section G.1 – G.6<sup>13</sup> of the Permit requires Permittee to comply with the monitoring and analysis prescribed by 327 IAC 6.1-5-4(b). Part 1, Section H.1 - H.2 requires Permittee to comply with record keeping and report requirements prescribed by 327 IAC 6.1-4-17.<sup>14</sup>

g. and h. IDEM cannot compel Permittee to provide information, training documents and surveys detail the setback requirements to its employees and owners of adjacent landowners

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<sup>11</sup> Permit, pp. 13 – 15.

<sup>12</sup> *Id.* at p. 16

<sup>13</sup> *Id.* at pp. 37 – 39.

<sup>14</sup> *Id.* at pp. 39 – 46.

or compensate landowners for any decrease in their property values or for injuries/medical expenses due to potential violations as these are not required by either statute or regulation. *See Union-Go, supra.*

Because Petitioners' assertions and requests are already required by the Permit, this Court can provide no additional relief to Petitioners.

11. In their Response and Sur-Reply to IDEM's Motion to Dismiss, Petitioners contend that because the then presiding Environmental Law Judge scheduled and held the Initial Prehearing Conference, she determined that Petitioners' Amended Petition complied with IC § 4-21.5-3, IC § 13-15-6 and 315 IAC 1-3-2. Petitioners' Response, pp. 3 – 4. Petitioners also contend because these statutes and rule "are more stringent than Indiana's liberal pleading standard . . . Petitioners satisfied their burden of pleading facts sufficient to state a claim of relief and survive a Trial Rule 12(B)(6) motion to dismiss." Petitioners' Response, p. 4. Petitioners cite no legal authority to substantiate their contention.

This Court's Notice of Incomplete Filing contained an enclosure, *OEA Initial Prehearing Conference Overview*, which informed Petitioners that one of the purposes of the conference was to set dates for filing dispositive motions, e.g., a Motion to Dismiss. Nothing in the document or in OEA's subsequent Report of Prehearing Conference states or suggests that Petitioners' statement of facts in their Amended Petition would survive a Motion to Dismiss as at the time of the Conference, no discussion was held detailing what, if any, dispositive motions were going to be filed by the parties.

IC § 4-21.5-3-7 and 315 IAC 1-3-2 set forth the requirements to initiate a proceeding before OEA, and these requirements are separate from a 12(B)(6) motion which "tests the legal sufficiency of a complaint." *Valley Fed. Sav. Bank v. Anderson*, 612 N.E.2d 1099, 1101 (Ind. Ct. App. 1993). Neither IC § 4-21.5-3-7 nor 315 IAC 1-3-2 addresses a person's burden of pleading facts sufficient to state a claim of relief to survive a motion to dismiss. With respect to prehearing conferences, nothing in IC § 4-21.5-3-19 states or intimates that holding a prehearing conference, in and of itself, deems a petitioner having stated a sufficient claim of relief in its Amended Petition to survive a motion to dismiss.

12. In their Response, Petitioners contends IDEM turned a "blind eye to an applicant's violation of permit conditions and environmental laws." Amended Petition, p. 5. Even if Petitioners had proffered documentary evidence in support of their contention, a violation of a prior permit or future non-compliance with this Permit would not address whether IDEM properly issued the Permit. *See Berkshire Pointe WWTP*, 2023 OEA 105, 110; *Blue River Valley*, 2005 OEA 1, 11.

Petitioners state, "IDEM's position undermines the purpose and policy of Indiana's environmental laws and the purpose for which IDEM was established." Amended Petition, p. 5. Petitioners' unsubstantiated statements and failure to identify the



- permit terms and conditions that, in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action;
- environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the Amended Petition; and
- Permit terms and conditions that the Amended Petitioner contends would be appropriate to comply with the law applicable to the contested permit<sup>15</sup>

are insufficient to support their belief that IDEM improperly issued the Permit.

13. In their Response, Petitioners state they “have sufficiently alleged that Bio Town made a mistake in approving Bio Town’s application for the modification to its Permit by failing to consider its past violations of the conditions of the Permit” and cite to their submitted “photographic evidence.”<sup>16</sup> Petitioners do not cite any IDEM record documenting a violation. IDEM’s Virtual File Cabinet does not contain any violation letters, notices of violations or commissioner’s orders issued to the Permittee; the unclear photograph which Petitioners allege reflect repeated violations is not credible.

Petitioners contend, “IDEM displays a total disregard for integrity by relying on the absence of the good character disclosure requirements for land application permits” and cite 327 IAC 6.1-3-1(f)(3) – (5) in support.

First, Petitioners did not raise 327 IAC 6.1-3-1 in its Amended Petition; thus, this issue is waived. *Christners*, 2020 OEA 16, 25; *Troyers*, 2021 OEA 10, 21. Even assuming this issue was not waived, nothing in 327 IAC 6.1-3-1 requires an applicant to submit past violations in its application. 327 IAC 6.1-3-1(f) states that IDEM *may* deny an application if the applicant has a history of one or more violations of IC § 13 (emphasis added). Given the lack of documentary evidence that would prove Permittee has a history of violations, Petitioners’ contention is without merit.

14. In their Sur-Reply, Petitioners argue that “they should have the opportunity to conduct discovery to review the information and materials that IDEM considered when granting the Permit modification.” Sur-Reply, p. 4. Statutes IC § 13-15-6-1 and IC § 4-21.5-3-7 give aggrieved parties 15 days to review IDEM agency actions to determine whether they want to seek administration review and if yes, on what grounds. Petitioners’ claims related to alleged past violations, speculative future violations, property values and medical expenses all fail to state a claim upon which relief can be granted.

It is hereby **ORDERED, ADJUDGED and DECREED** that the Indiana Department of Environmental Management’s Motion to Dismiss is **GRANTED**. The Petition for Administrative Review is **DISMISSED**. All further proceedings are **VACATED**.

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<sup>15</sup> IC § 13-15-6-2; 315 IAC 1-3-2(b)(4)(A).

<sup>16</sup> Petitioners’ Response, pp. 6 - 7.

You are hereby further notified that pursuant to provisions of IC § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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 IC § 4-21.5. Pursuant to IC § 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 8<sup>th</sup> day of February, 2024 in Indianapolis, IN.

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Hon. Lori Kyle Endris  
Environmental Law Judge