

**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

OFFICIAL SHORT CITATION NAME: When referring to 1999 OEA 57, cite this case as
Top Sow, LLC, 1999 OEA 57.

TOPICS:

confined feeding
permit
testing
manure
manure management plan
tile
distances
containment
drain
stream
soil
intermittent
concrete
swale
recommendations
setback

PRESIDING JUDGES:

Penrod, Lasley

PARTY REPRESENTATIVES:

Petitioner: Deborah Albright, Esq.
Respondent: Daniel McNerny, Esq.
IDEM: Janice Lengel, Esq.

ORDER ISSUED:

December 14, 1999

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

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**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

STATE OF INDIANA) BEFORE THE INDIANA OFFICE OF
) SS: ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
APPROVAL NO. AW 4658) CAUSE NO. 98-W-J-2151
TOP SOW, LLC)

FINAL ORDER AFFIRMING RECOMMENDED ORDER

This constitutes notice that on October 20, 1999, the Administrative Law Judge (ALJ) issued a Recommended Order in the above-captioned matter. Petitioner, by counsel, filed objections to the Recommended Order on November 8, 1999. The Chief Administrative Law Judge, as the ultimate authority for final decisions by the Indiana Department of Environmental Management (IDEM), hereby finds the following:

1. Petitioner objects to the ALJ's finding that Top Sow did not violate required separation distances. In support of its objection, Petitioner contends that it provided evidence that a tile is within 100 feet of Top Sow's manure containment structures. Petitioner, however, cited no statutory or regulatory authority indicating that the existence of a tile within 100 feet of manure containment structures mandates vacation of Top Sow's permit. It was satisfactory to IDEM, and to this office, that Top Sow pledged to destroy any tiles within 100 feet encountered during construction.

2. Petitioner's next objection concerns Top Sow's manure management plan. Petitioner objects to Top Sow's calculation of available acreage. The ALJ found that Top Sow could not be held to the separation distances because they were recommendations only and not requirements. On review, this issue appears to be an enforcement issue. If Top Sow causes a problem because it does not immediately incorporate the manure, then that matter should be addressed by IDEM's Office of Enforcement.

3. Petitioner's final objection concerns Top Sow's testing procedures. The ALJ found that Top Sow had provided the bare minimum information regarding testing procedures. Petitioner's criticism of that finding is twofold. First, Petitioner contends that IDEM employee, Dennis Lassiter, admitted no testing procedures were included in Top Sow application. But, upon redirect examination, Mr. Lassiter admitted that Top Sow's statement that samples would be analyzed by a local cooperative or a private analytical laboratory does address testing procedures. Transcript at page 126, lines 22-24. Second, Petitioner argues that in Objection to the Issuance of Permit Approval No. AW 4553, Russell Bellar, Miami County, Cause No. 98-S-J-1999, this office concluded that the statement "A sample of a representative mixture will be take and analyzed for N, P, K, and PH" did not provide statutorily required information. Petitioner is wholly incorrect in this assertion. While it is unclear which case the above statement came from, it is clear that in Cause No. 98-S-J-1999 no such statement appears. *See* Exhibit 4, page 36 of Cause No. 98-S-J-1999.

**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

The Chief Administrative Law Judge therefore finds that the Recommended Order shall be and hereby is **AFFIRMED** and is incorporated herein by reference. Permit 4658 is hereby **UPHELD**.

You are further notified that pursuant to Indiana 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 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 in Indianapolis, Indiana this 14th day of December 1999.

Wayne E. Penrod,
Chief Administrative Law Judge

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1999 OEA 57 (98-W-J-2151)**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. Statement of the Case

On November 9, 1998, Petitioners filed a Petition for Administrative Review. Petitioners later amended their petition on December 8, 1998. A pre-hearing conference was held on March 12, 1999 wherein a briefing and hearing schedule was established. Petitioner appeared by counsel, Deborah Albright, the Indiana Department of Environmental Management (IDEM) appeared by counsel, Janice Lengel and the Respondent appeared by counsel, Daniel McInerny. A final hearing in the matter was held on July 20, 1999. The parties submitted post hearing briefs and proposed findings of fact and conclusions of law on August 27, 1999.

II. Issue

The issue in this case is whether IDEM properly issued a confined feeding permit to Top Sow, LLC.

III. Findings of Fact

The Administrative Law Judge finds, by a preponderance of the evidence, the following facts:

1. On June 24, 1998, Top Sow, LLC (Top Sow) submitted an application to the Indiana Department of Environmental Management (IDEM) for the construction and operation of a confined feeding operation.
2. IDEM relies upon two documents in determining the sufficiency of a confined feeding application; the Confined Feeding Control Law (IC 13-18-10) and a guidance document known as Manure Management AW-1 (AW-1).¹
3. AW-1 requires an applicant to submit a farmstead plan as part of a confined feeding operation application. The farmstead plan must depict features of concern within three hundred feet of the proposed manure storage structures, including intermittent or continuously flowing ditches and known drain tile lines.²
4. In its 1998 confined feeding application, Top Sow depicted any "drainage swale/intermittent stream" within three hundred feet of a proposed manure storage structure as required by AW-1.³ The drainage swale/intermittent stream is within one hundred eighty-eight feet of the Farrowing Building and one hundred fifty-feet of the Breeding/Gestation Building.

¹ Hearing Transcript pp. 12-14.

² Hearing Transcript p. 15.

³ See Stipulated Exhibit 1.

**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

5. Previously, in 1996, Top Sow submitted a confined feeding application that depicted a drain tile within less than three hundred feet of a proposed manure storage lagoon.⁴
6. The Environmental Law Judge (ELJ) reviewing the 1996 case concluded that the drain tile was also an intermittent stream.⁵
7. Indiana Code § 13-18-10-2 also requires a confined feeding application to contain soil and manure testing procedures.
8. In their manure management plan, Top Sow states the following with respect to manure testing procedures:

A composite sample from each below-building concrete manure storage will be collected during agitation and pumping at the time of land application. Multiple samples during pumping (5-10) from the concrete manure storage will be collected and combined into a composite sample. The composite sample will be analyzed by the local cooperative or a private analytical laboratory.⁶

With respect to soil testing procedures the manure management plan states the following:

Each field used for manure application will be sampled by soil type to determine soil fertility levels.⁷

9. Indiana Code § 13-18-10-2 and § 13-18-10-2.3 require that land application areas be located and identified by mapping. AW-1 requires a confined feeding operation application to contain "maps of manure application areas."⁸
10. IDEM utilized a computer program to determine that Top Sow needed two hundred and nine acres of land for application of manure.⁹
11. Top Sow's Application and manure management plan states that it has two hundred and fifty-nine acres of land available for application of manure.¹⁰

⁴ See Exhibits 14 and 15.

⁵ In the Matter of: Objection to the Issuance of Permit Approval No. 4245, Top Sow, LLC, Flora, Indiana, Cause No. 97-W-J-1693, September 30, 1997, p. 13. In addition, Indiana Code § 4-21.5-3-26(f)(2) allows for official notice of the record of other proceedings before this office.

⁶ See Stipulated Exhibit 1, p. 67.

⁷ See Stipulated Exhibit 1, p. 67.

⁸ See Stipulated Exhibit 3, p. 6

⁹ See Stipulated Exhibit 12; and Hearing Transcript pp. 78-89.

¹⁰ See Stipulated Exhibit 1, pp. 17 & 70

**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

12. IDEM approved Top Sow's confined feeding application on October 22, 1998 and issued permit approval no. AW 4658.

IV. Discussion

Petitioners argue that IDEM should not have approved Top Sow's application because it failed to identify an existing drain tile. In addition, IDEM could not have properly determined whether the acreage available for land application activities was sufficient because Top Sow did not take into account set back requirements. Further, the application also does not include information on testing procedures for soil and manure. Rather, the application only gives information that the soil and manure will be tested by a laboratory.

Top Sow counters Petitioners arguments with the fact that it renamed the drain tile an intermittent stream based on a decision by OEA, which concluded that the drain tile was an intermittent stream. Thus, Top Sow properly depicted the intermittent stream within three Also, Petitioners are incorrect that Top Sow does not have sufficient acreage for its land application activities. The set back distances are only "recommendations." Even so, Top Sow intends to incorporate the manure immediately, which means the set back distances do not apply at all. Finally, Top Sow did provide a statement regarding its soil and manure testing procedures. IDEM concurred in all respects with Top Sow's arguments.

For the following reasons, Top Sow's permit must be upheld.

A. AW-1 Requirements

Petitioners' main complaint is that Top Sow did not identify an existing drain tile in its permit application. The AW-1 requires an applicant to include in its application:

A farmstead plan must show all existing and proposed confinement units and the associated manure storage structures and all features of concern within three hundred (300) feet of the confinement units and manure storage structures.

Features of concern include the following: . . .

2. Lakes, ponds, rivers, streams, and drainage ditches (intermittent and continuously flowing) . . .
5. Drainage patterns . . .
7. Known drainage tile lines. For the purpose of this guidance document, drainage tiles are not considered streams or intermittent or continuously flowing drainage ditches . . .

Exhibit 3, pages 2-3.

**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

Thus, if a drain tile exists on Top Sow property, then it should have been depicted in its 1998 application. Top Sow believes it met the above requirement when it renamed the drain tile to drainage ditch based on the September 30, 1997 decision by this office. In that decision, the ELJ vacated Top Sow's permit because (1) the application did not contain detailed views and necessary cross-sections of the confinement facilities and (2) the application depicted a feature of concern within less than three hundred feet of the confinement facilities. In that case, the same Petitioners argued the drain tile was actually a drainage swale and **the lagoons are within less than 300 feet from a drainage swale to the south of the property as measured from the base of the embankment to the edge of the swale, which is less than minimum setback requirements.**¹¹ IDEM stated that since a drain tile is not a body of water, the setback did not apply. The ELJ, however, questioned **whether a minimum of 300 feet separates the lagoon system and the identified swale/intermittent stream and the field or drain tile.**¹² (Emphasis added). Thus, the ELJ recognized that both a drain tile and an intermittent stream existed on this site and was within less than 300 feet of the proposed lagoons.

In the present case, Top Sow has redesigned its proposed facility and does not include earthen lagoons in its plans. According to the AW-1 in effect now:

New construction for dry storage or liquid storage in beneath-the-building concrete, exterior covered or uncovered concrete pits and open steel tank manure storage structures and earthen or concrete confinement lots must be located so as to provide the following minimum separation distances:

- a. fifty (50) feet from any public or private road;
- b. one hundred (100) feet from any well; and
- c. one hundred (100) feet from any lake, pond, river, stream, or drainage ditch (intermittent or continuously flowing).

Exhibit 3, page 6.

Under the above requirement, Top Sow must provide a minimum setback of one hundred feet from its concrete manure storage pits. Its maps depict the Breeding/Gestation building as being within one hundred fifty feet of the drainage ditch and the Farrowing building as being within one hundred eighty-eight feet of the drainage ditch. Petitioners, however, contend that Respondent's expert admitted that if the drain tile follows the path of the intermittent stream "the tile would go within 100 feet of one of the confinement units."¹³ If it is within one hundred feet,

¹¹ September 30, 1997 decision, p. 2. *See also*, Affidavit of John Mundell wherein he states "it is reasonable to assume, from this site specific data, that the intermittent stream has in the past been tiled and that the tiled area represents the historical extent of the stream." Exhibit 5, the past been tiled and that the tiled area represents the historical extent of the stream." Exhibit 5, pages 2-3.

¹² September 30, 1997 decision, p. 13.

¹³ Hearing Transcript, pp. 82-83.

**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

then it meets the separation distances. Petitioners did not offer evidence that the drain tile was less than one hundred feet from the concrete confinement structures. Since Petitioners carry the burden in this case, they failed to prove, by a preponderance of the evidence, that Top Sow violated the required separation distances.

That being said, it is also clear that Top Sow misinterpreted the September 30, 1997 decision. The decision does not conclude that an applicant must depict either a drain tile or a drainage ditch. If such a feature can properly be characterized as both, then it should be. Future permit applicants are cautioned to avoid Top Sow's approach. In any event, Top Sow's case is unique because of the previous litigation and it is believable that it attempted to comply with the September 30, 1997 decision by changing the name of the drain tile to drainage ditch. The failure to depict a drain tile, in this case, was harmless error.

B. Statute only requires maps of available land application areas

Petitioners next contend that Top Sow's application should not have been approved because it does not have sufficient acreage for its land application activities. The statute requires an applicant to submit:

- (2) A manure management plan that outlines procedures for the following:
 - (A) Soil testing.
 - (B) Manure testing
 - (C) Maps for manure application areas

The AW-1 also contains "Application Recommendations." Those recommendations set forth setback requirements when applying manure to land so as to prevent runoff and soil erosion, which could result in a negative impact to surface waters. It is clear from reading these recommendations that they are practices an applicant "should" adhere to but are not required. Furthermore, if Top Sow does not have sufficient acreage and it over-applies or causes a negative impact to surface waters, then IDEM has the authority to take enforcement action against Top Sow.

C. Testing procedures

Finally, Petitioners argue that Top Sow did not include testing procedures for soil and manure. Top Sow's application indicates that soil and manure will be tested by the local cooperative or private analytical laboratory. In addition, Top Sow states that the soil will be tested to determine soil fertility levels. Petitioners assert that those statements do not satisfy the "procedure" requirement set out in statute. The dictionary definition of procedure is "a particular way of accomplishing something or of acting . . . a traditional or established way of doing things."¹⁴ It could be argued that a procedure should contain more details such as what will the lab test for and at what levels. But, it is clear that Top Sow has stated a particular way of accomplishing soil and manure testing; namely, to send composite samples to the local cooperative or a private analytical laboratory for testing. This statement provides the bare minimum information for testing procedures.

¹⁴ MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 929 (10th ed. 1996).

**In the Matter of: Objection to the Issuance of Approval No. AW 4658 Top Sow, LLC.
1999 OEA 57 (98-W-J-2151)**

V. Conclusions of Law

The Administrative Law Judge concludes as a matter of law, based on the foregoing Findings of Fact and Discussion, that (1) Top Sow's application depicts a drainage ditch within three hundred feet of its proposed facilities and within at least one hundred feet of its concrete confinement units in accordance with AW-1's requirements. Top Sow's failure to depict an existing drain tile in close proximity to the drainage ditch was harmless error given that Top Sow was attempting to respond to a previous decision by this office; (2) Top Sow provided maps of its manure application areas in accordance with Ind. Code § 13-18-10-2. The AW-1 provides recommendations for application and IDEM concluded that Top Sow had sufficient acreage; and (3) Top Sow provided the bare minimum information necessary for soil and manure testing procedures in accordance with Ind. Code § 13-18-10-2.

VI. Recommended Order

The Administrative Law Judge recommends that permit approval AW 4658 be **UPHELD**.

Appeal Rights:

You are hereby notified that pursuant to § 4-21.5-3-29, you have the right to appeal the Recommended Order of the Administrative Law Judge. In order to do so, you must object in a writing that does the following:

- (1) specifies which portions of the Recommended Order you object to;
- (2) specifies which portions of the administrative record supports the objection(s); and
- (3) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days.

Objections should be sent to:

Wayne E. Penrod, Chief Administrative Law Judge
Office of Environmental Adjudication
150 West Market Street, Suite 618
Indianapolis, IN 46204

A final order disposing of the case or an order remanding the case to the administrative law judge for further proceedings shall be issued within sixty (60) days after the latter of:

- (1) the date that the order was issued under § 4-21.5-3-27;
- (2) the receipt of briefs; or
- (3) the close of oral argument;

unless the period is waived or extended with the written consent of all parties or for good cause shown.

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1999 OEA 57 (98-W-J-2151)**

IT IS SO ORDERED in Indianapolis, Indiana this 20th day of October 1999.

Linda C. Lasley,
Administrative Law Judge