

**OBJECTION TO THE ISSUANCE OF  
PERMIT APPROVAL NO. 4245  
TOP SOW, LLC  
FLORA, CARROLL COUNTY, INDIANA  
1997 OEA 036, OEA CAUSE NO.: 97-W-J-1693**

<b>Official Short Cite Name:</b>	<b>Top Sow, 1997 OEA 036</b>
<b>OEA Cause No.:</b>	97-W-J-1693
<b>Topics/Keywords:</b>	IC 13-18-10 IC 13-18-10-2 IC 13-18-3-3 IC 13-18-3-11 IC 13-18-3-7 IC 13-11-2-261 IC 13-11-2-265 IC 36-9-27-2 IC 4-22-2-44 IC 4-22-2-3(b)
<b>Presiding ELJ:</b>	Lori Kyle Endris
<b>Party Representatives:</b>	Melinda R. Shapiro, Esq. Deborah E. Albright, Esq. Daniel P. McInerny, Esq.
<b>Order Issued:</b>	October 2, 1997
<b>Index Category:</b>	Water // Solid Waste
<b>Further Case Activity:</b>	

10-2-97



# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod  
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STATE OF INDIANA     )  
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COUNTY OF MARION    )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:

OBJECTION TO THE ISSUANCE OF  
PERMIT APPROVAL NO. 4245  
TOP SOW, LLC  
FLORA, INDIANA

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CAUSE NO. 97-W-J-1693

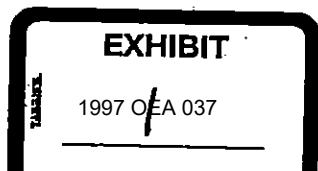
## FINAL ORDER VACATING APPROVAL

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This constitutes notice that on July 25, 1997, a hearing was held in the above-referenced cause. The Indiana Department of Environmental Management (IDEM), by counsel, Top Sow, LLC (Top Sow) by counsel, and Objectors, by counsel, entered affidavits into the record in lieu of live testimony. Thereafter, on July 30, 1997, the IDEM, by counsel, and Top Sow, by counsel filed Post Hearing Briefs. On August 1, Objectors, by counsel, filed a Brief and Submittal of



Rebuttal Affidavit.

The Environmental Law Judge considered the Affidavits<sup>1</sup> and the Briefs and hereby finds the following:

*Findings of Fact and Conclusions of Law:*

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to this controversy pursuant to Ind.Code §4-21.5-7.
2. This is a Final Order issued pursuant to Ind.Code §4-21.5-3-27. 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. On November 13, 1996, Top Sow, by counsel, submitted a "completed Confined Feeding Application with accompanying documentation" with the Office of Solid and Hazardous Management of the IDEM. (Letter from Daniel P. McInerny to Dennis Lasiter, Group Leader Land Application). Pursuant to a request by James McCurdy, Senior Environmental Manager, who "specifically requested additional information regarding the location and type of piping, and the design of lift stations, to be utilized by Top Sow in the construction of the proposed operation" (see Affidavit of Larry Trapp, p. 2, #6 admitted at Hearing as Exhibit No. 7), Top Sow, by counsel, submitted revised design drawings and supplemental information, which included revised engineering design drawings (sheets 1-4), an addendum to the design report, and a design drawing of the lift pump, on December 3, 1996. (Letter from Daniel P. McInerny to James McCurdy). On December 18, 1996, the IDEM issued its approval. On January 2, 1997, Objectors, by counsel, filed a Petition for Administrative Review.
4. On July 23, 1997, the Environmental Law Judge issued a Corrected Final Order Partially Granting IDEM's Motion for Summary Judgment, granting summary judgment as to rhetorical paragraphs (a)(4)-(14) and (b) of Objectors' Petition for Administrative Review. Three issues remained at hearing: (a)(1)-(3). Top Sow agreed to install a "staff gauge in the second stage lagoon in accordance with the design plan prepared by the United States Department of Agriculture, Natural Resources Conservation Service." (Affidavit of Larry Trapp, p.2, #9). Thus, issue (a)(1) is moot.
5. Ind.Code §13-18-10-1(a) states in pertinent part:

...An applicant must submit the completed application form to the department together with...(1) Plans for waste treatment and control facilities. (2) Supplemental information that the department requires, such as the following: (A) General features of topography. (B) Soil types. (C) Drainage course. (D)

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<sup>1</sup>All Affidavits were submitted under oath or under penalties of perjury.

## Identification of nearest receiving stream.

The IDEM utilizes a Manure Management guidance document,<sup>2</sup> "AW-1" to provide applicants with the "supplemental information that the department *requires*". (Emphasis added). Generally, a guidance document is not a rule<sup>3</sup> and thus does not have the effect of law.<sup>4</sup> Notwithstanding, Indiana courts have consistently held that a statutory amendment changing a prior statute indicates that the legislature intended to change the meaning of the prior statute. Whiteacre v. State, 619 N.E.2d 605 (Ind.App. 1993), opinion adopted, 629 N.E.2d 1236 (Ind. 1994).

The original version of Ind.Code §13-18-10-2 (previously codified at Ind.Code §13-1-5.7-3(a)) prescribed "supplemental information as the department *may* require." Because Ind.Code §13-1-5.7-3, recodified by the Indiana General Assembly by P.L. 1, 1996, §8, was specifically amended to authorize the IDEM to *require* supplemental information and the IDEM utilizes the AW-1 to prescribe the supplemental information set forth in IC §13-18-10-2(a), the IDEM's use of the AW-1 is not discretionary.<sup>5</sup> See Dible v. City of Lafayette, 678 N.E.2d 1271, 1277 .

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<sup>2</sup>A guidance document is a "policy or statement that interprets, supplements, or implements a statute or rule, has not been adopted in compliance with IC 4-22-2, is not intended by the department to have the effect of law; and is not related solely to internal department organization." Ind.Code §13-14-1-11.5 and §4-22-7-7. The IDEM is required under Ind.Code §13-14-1-11.5 to publish a copy of the policy or statement in the Indiana Register by January, 1997. To date, the AW-1 has not been published.

<sup>3</sup>Pursuant to Ind. Code §4-22-2-3(b), "rule" means the whole or any part of an agency statement of general applicability that has or is designed to have the effect of law and implements, interprets, prescribes law or policy or the organization, procedure, or practice requirements of an agency.

<sup>4</sup>Ind.Code §4-22-2-44 provides in pertinent part, "...a noncomplying rulemaking action does not have the effect of law until it is adopted in conformity with this chapter." The Indiana Court of Appeals has held that "[a] guideline, promulgated as an expression of agency opinion, with none of the procedural safeguards of the rule-making process, cannot have effect in disregard of statutes and properly promulgated rules." Indiana Dep't of Nat. Res. V. Krantz Bros. Construction, 581 N.E.2d 935, 940 (Ind.App. 1991) reh'rg denied. "[N]either will a guideline out of harmony with relevant statutes or regulations be enforced." Id.

<sup>5</sup>Further, the version of Ind. Code §4-22-2-44, regarding a noncomplying rulemaking action not having the effect of law, was enacted in 1989. Pub. L. No. 36-1989, §2. Indiana Courts have held that "when there is an irreconcilable conflict [between statutes dealing with the same subject matter], the statute which is more recent and specific will control over the statute which is older and more general." Horne v. State, 572 N.E.2d 1333, 1335 (Ind.App. 1991).

(Ind.App. 1997) (if governmental entity provides procedures to protect right deserving of due process protection, then it must follow those procedures). Allowing the IDEM to utilize the AW-1 in its approval process while allowing an applicant to omit items "required" by the AW-1 or while allowing the IDEM to waive items "required" by the AW-1, would not only be absurd but would contravene the legislature's intent. Indiana courts have held that they cannot presume the legislature intended language used in a statute was to be applied in an illogical manner or intended to do an absurd thing. Hinshaw v. Board of Comm'rs of Jay County, 611 N.E.2d 637 (Ind. 1992). Thus, the IDEM is bound by the AW-1 in issuing the Approval in this case.

6. The AW-1, on page 2, Section C, requires that "[p]lans for new and existing waste treatment/control facilities must show detailed views and necessary cross sections to define all dimensions and elevations of the treatment/control facility, diversions, terraces or any other structures which are essential to the containment or conveyance of the manure." (Emphasis original). Objectors contend that "[d]etails concerning the pipe system which conveys waste from the confinement areas to the lagoons are not provided...[and] must be provided in order to ensure that such system does not cause or contribute to water pollution." (Petition for Administrative Review, p.2).

The initial technical explanation provided by the IDEM regarding the absence of details concerning the pipe system was that

No provisions of the applicable statutes or AW-1 require that details concerning the pipe system that conveys waste from the confinement areas to the lagoons be provided as part of the CFO application. The fact that Top Sow's water pollution control proposal does not contain details regarding the pipe system that conveys waste from the confinement areas to the lagoons cannot serve as a basis for denial of their application.

The piping system to convey waste from the confinement areas to the waste treatment lagoons was not designed by NRCS. However, the piping is not crucial to the operation of the lagoons. Gravity will cause waste to flow to the lagoons without high pressure piping.

(IDEM Motion for Summary Judgment, p. 7 filed with the Office of Environmental Adjudication, May 9, 1997). Accompanying the motion was an Affidavit of Philip McLoud, in which he stated,

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Lastly, pursuant to Ind.Code §13-18-3-3, the General Assembly requires the Water Pollution Control Board to "develop operating policies governing the implementation of the water pollution control laws by the department."

The piping system to convey waste from the confinement areas to the waste treatment lagoons was not designed by NRCS. However, the piping is not crucial to the operation of the lagoons. Gravity will cause waste to flow to the lagoons without high pressure piping.

(Exhibit A, IDEM Motion for Summary Judgment, Affidavit of Philip McLoud, State Conservation Engineer for the Natural Resources Conservation Service, p.2, #8). Top Sow, by counsel, concurred in the IDEM's Motion for Summary Judgment on May 30, 1997. Clearly, plans and specifications for waste treatment/control facilities are required to secure the approval of the IDEM (IC §13-18-10-2) and details concerning the pipe system that conveys waste from the confinement areas to the lagoons are required by the AW-1 (AW-1, p. 2, Section C).

Notwithstanding its initial position, the IDEM, by counsel, in its post-hearing brief filed July 30, 1997 with the Office of Environmental Adjudication, provides a substantially different technical explanation in that it contends "details concerning the pipe system...was hand delivered to IDEM on December 3, 1996 and included, in relevant part: (1) a revised plan map detailing the type of piping to be used (SDR 21), the location of the lift stations and the piping from the building to the lagoons and (2) a design drawing of the sewage lift pump depicting SDR-21 piping, the location of piping relative to the sewage lift pump and providing information relating to the surge blocks." (IDEM post-hearing brief, p. 2). At the hearing, the IDEM presented an Affidavit of James McCurdy in which he stated,

On November 13, 1996 Top Sow, LLC submitted an application for a waste treatment/control facility to be located in Carroll County. Additional information was requested on November 22, 1996. The additional information was hand delivered to IDEM on December 3, 1996 and included: (1) a plan map<sup>6</sup> prepared by NRCS Agricultural Engineer Ron Scheffler [sic] detailing the location of all SDR-21 piping and (2) a design drawing of the sewage lift pump depicting SDR-21 piping and location of piping relative to the sewage lift pump and indicating information relating to the surge blocks. The information relating to the piping was reviewed and deemed to be sufficient to satisfy IDEM's concerns. See Plan Map prepared by Ron Scheffler [sic] and dated October, 1996 attached hereto as "Exhibit A". See design drawing of sewage lift pump attached hereto as "Exhibit B."

(Affidavit of James McCurdy, p.1, #3 admitted at the Hearing as Exhibit 8). While no reasons were proffered to explain why supplemental information was requested, it is logical to assume

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<sup>6</sup>Within this case, some individuals refer to the submissions as "maps" while others refer to them as "sheets." For the purposes of this Order, the terms are interchangeable.

that because the pipes convey waste from the confinement units to the waste lagoons, and the AW-1 requires details for such conveyances, that the information was requested to comply with the AW-1.

Similarly, no explanation was proffered detailing how the supplemental information "satisfied IDEM's concerns." The five (5) maps provided by Top Sow to the IDEM were submitted to comply with certain AW-1 requirements and were created by Ronald Sheffler. Maps 1 of 5, 3 of 5 and 4 of 5 show "revised by Ronald Sheffler 11/96." Map 2 of 5, the topographic map indicating lift station pump locations and pipe specifications added by hand, does not reflect a revision date or signature. The handwritten information added to the legend is not in the same handwriting as maps 1, 3 or 4. Moreover, it is clear from James McCurdy's affidavit that he was under the belief that Ronald Sheffler, of the NRCS, prepared the design drawing. Philip McCloud, testified, under oath, in his deposition that he and Ronald Sheffler "considered that the piping system was the responsibility of the person designing the buildings and we were not involved in the design of the buildings" and that "NRCS did not prepare [the cross sections]." (Objectors' post-hearing brief, Exhibit 4, Deposition of Philip McCloud, p. 39, pp. 80-81; *see also*, Exhibit A, IDEM Motion for Summary Judgment, Affidavit of Philip McCloud, p.2, #8). It is unclear who added the lift station pump locations and pipe specification or placed the notations regarding the alleged location of the piping system on map no. 2 of 5.

Top Sow, by counsel, in its post-hearing brief, contends "the objectors have impermissibly expanded the scope of this issue" and "the piping for the proposed operation is fully suitable and protective of the environment." (Brief, pp. 1-2). Accompanying the Brief was a Rebuttal Affidavit of Michael A. Veenhuizen, Ph.D., P.E. in which he stated,

I have been retained by Top Sow, LLC to develop the plans and specifications pertaining to the site plan for the proposed confined feeding operation, including the siting and location of the production buildings, access, gravity transfer piping system, lift station, and pressure pump and piping system for manure transfer from the buildings to the treatment lagoon system.

(Exhibit 1, Top Sow Verified Post-Hearing Brief, Rebuttal Affidavit of Michael A. Veenhuizen, p. 3, #7). Michael Veenhuizen then provided details for the proposed piping system and addressed the concerns raised by the Objectors' expert witness<sup>7</sup>. (Affidavit, pp. 3-6, #s 8-16)

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<sup>7</sup>Presented at the Hearing was an Affidavit of John Mundell, P.E., in which he sets forth details lacking in Top Sow's proposal, i.e., no elevations or cross-sections depicting how deep the pipes will be installed relative to the lagoons, the frost line, and the water table beneath the site, so that is not possible to evaluate whether the system is properly engineered to prevent leakage and/or freezing. Further, the as-built slopes of the pipes are not depicted so that its adequacy cannot be evaluated as a partial gravity-flow system. Lastly, it appears the lift stations will be installed at least 11 feet beneath the groundwater table, yet no method of water proofing

("The concerns raised by the objectors' expert witness regarding the elevation at which incoming lines will enter the lift stations appears to be purely a construction specification question as opposed to an environmental issue."). Nowhere in the affidavit does Michael Veenhuizen indicate that he was either retained by Top Sow prior to the December 3, 1996 submittal or was the person who placed the notations regarding the alleged location of the piping system on Map 2. Thus, there is no evidence that the details for the proposed piping system, described in the Veenhuizen Affidavit, were actually before the IDEM (specifically James McCurdy the Senior Environmental Manager or Dennis Lasiter, the Land Use Section Chief who issued the Approval) when it determined that the water pollution control proposal was satisfactory and the Approval was granted. In the absence of such evidence, the issuance of the Approval with respect to the details for the proposed piping system was both arbitrary and capricious.

7. The AW-1 on page 6, Section G, requires the location of "new construction for liquid storage in earthen waste treatment/control facilities to be located so as to provide the following minimum separation distance [of] 300 feet from any stream, drainage ditch or other body of water." (Emphasis original). The Objectors contend that "[t]he 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." (Petition for Administrative Review, p. 2).

The initial technical explanation provided by the IDEM regarding the 300' setback was that

Based on the United States Geological Survey map for Flora, the lagoons are over 600 feet from the nearest drainage swale.

(IDEM Motion for Summary Judgment, p. 8; *see also*, Exhibit A to the Motion, Affidavit of Philip McLoud, p. 2, #9).

In its post-hearing brief, the IDEM argued that

[t]he above-referenced set-back requirement [contained in the AW-1] relates only to surface waters. Evidence of surface waters includes a pond or lake, a stream, creek, river or ditch with flowing water, or a channel where surface waters are conveyed intermittently depending on weather events and seasonal soil conditions. There is no evidence of surface waters within 300 feet of the proposed lagoon system. Exhibit 1 attached to the affidavit of John A. Mundell, which was admitted into evidence at hearing as Exhibit 5, does not depict a 'stream, drainage ditch or other

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of the concrete sump is indicated. (Affidavit of John Mundell, pp. 2-3, # 6).



body of water' but, rather, a subsurface tile system as described in Mr. Mundell's affidavit. A subsurface tile system is not a 'stream, drainage ditch or other body of water.'" Based on IDEM's review of the proposed Top Sow, LLC operation, there is no 'stream, drainage ditch or other body of water' within 300 feet of the proposed lagoon system. See the affidavit of Dennis Lasiter which is attached hereto as 'Exhibit A.'

(IDEM Post-Hearing Brief, p.5). In the referenced Affidavit, Dennis Lasiter stated,

As part of my present duties with OSHWM, I am responsible for the supervision of all application review for the confined feeding operation ("CFO") program, which has included supervision of the review of A.W. Approval No. 4245.

I have worked in Indiana's Confined Feeding program for 13 years. AW-1 was most recently revised in 1992. I supervised the revision process and am familiar with the intent of the language.

The [AW-1] referenced set-back requirement relates only to surface waters. Evidence of surface waters includes a pond or lake, a stream, creek, river or ditch with flowing water, or a channel where surface waters are conveyed intermittently depending on weather events and seasonal soil conditions. There is no evidence of surface waters within 300 feet of the proposed lagoon system. Exhibit 1 attached to the affidavit of John A. Mundell, which was admitted into evidence at hearing as Exhibit 5, does not depict a 'stream, drainage ditch or other body of water' but, rather, a subsurface tile system as described in Mr. Mundell's affidavit. A subsurface tile system is not a 'stream, drainage ditch or other body of water.' Based on my review of the proposed Top Sow, LLC operation, there is no "stream, drainage ditch or other body of water' within 300 feet of the proposed lagoon system.

(IDEM Post-Hearing Brief Exhibit, Affidavit of Dennis Lasiter, pp. 1-2, #s 3, 4, and 6).

It is important to note that the AW-1 does not state that the set-back requirement relates only to surface waters. (See AW-1, p. 6, G referencing "other body of water"). Further, the General Assembly did not limit the IDEM's duty to ascertain whether an applicant's construction or operation of a confined feeding operation has a satisfactory *surface* water pollution control proposal (See IC §13-18-10-2(b)), and it is clear that the Indiana General Assembly did not intend to limit the IDEM's duty with respect to water pollution control laws to the protection of surface waters. Instead, within the same statutory article as the confined feeding control laws,

the Indiana General Assembly charged,

Since the water pollution control laws are necessary for the public health, safety, and welfare, the water pollution control laws shall be liberally construed to effectuate the purposes of the water pollution control laws.

(Ind.Code §13-18-3-11)<sup>8</sup>. In defining<sup>9</sup> "water pollution control laws", the General Assembly specifically included IC 13-18<sup>10</sup> (Ind.Code §13-11-2-261) and defined "waters" for purposes of water pollution control laws and environmental management laws, to include:

- (1) the accumulations of water, surface and underground, natural and artificial, public and private; or
- (2) a part of the accumulations of water; that are wholly or partially within, flow through or border upon Indiana.

(Ind.Code §13-11-2-265). Thus, "other body of water" is not limited to surface water.

Top Sow, contends that there is no stream, drainage ditch or other body of water within 300' of the proposed lagoon. (Top Sow Verified Post Hearing Brief, p.5.) At the time of the hearing, Top Sow admitted into evidence two (2) affidavits, Philip McLoud's and Larry Trapp's. In Philip McLoud's hearing affidavit, he stated,

In the process of designing the lagoon system, the NRCS performed a topographic survey and produced a topographic map from this survey. This survey was conducted on August 7 and 13, 1996. The topographic map is identified as "sheet no. 2 of 5" of the design plans submitted to IDEM.

In the process of performing this survey, NRCS personnel walked over and observed the entire site of the proposed Top Sow

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<sup>8</sup> Article 18 is replete with references to "waters of Indiana." *See e.g.*, Ind.Code §13-18-3-7 (commissioner may order actions to abate pollution to waters of Indiana); Ind.Code §13-18-3-8 (commissioner may order sealing of mines and wells that cause or contribute to a polluted condition of the waters of Indiana); Ind.Code §13-18-3-9 (IDEM may enter upon private or public property for inspecting/investigating conditions relating to the pollution of any water of Indiana).

<sup>9</sup>Article 11 of Title 13 contains the definitions that "apply throughout this title." (Ind.Code §13-11-1-1).

<sup>10</sup>except for IC 13-18-2 and 13-18-9 through 13-18-20. (Ind.Code §13-11-2-261).

operation.

This field review did not reveal any area which constitutes a "stream, drainage ditch, or other body of water" within 300 feet of the proposed location of the lagoons.

The topographic map produced by the NRCS does not depict any area which constitutes a "stream, drainage ditch, or other body of water" as referenced in Manure Management AW-1. My review of the topographic map produced by the NRCS shows only that the contour of the land is lower in the southwest corner of the site than the rest of the site.

(Affidavit of Philip McLoud, p. 2, #6 - 9 admitted at the Hearing as Exhibit 6). Philip McLoud neither states that he took any measurements nor that he prepared the revised "sheet no. 2 of 5" submitted to the IDEM on December 3, 1996, which reflects a difference in the location and length of the field tile. In Philip McLoud's Rebuttal Affidavit, he stated,

In the process of making a field review and topographic survey of the site for the proposed Top Sow, Inc. anaerobic lagoon system, NRCS personnel located a subsurface drain in the southwestern quadrant of the site.

This subsurface drain extends from the southwestern corner of the site eastward as generally depicted on the plans for the anaerobic lagoon system.

During the course of the topographic survey, the subsurface drain was excavated at the western edge of the site. An elevation reading was taken on the drain at this location. At this location, the drain is 4.6 feet below the surface of the ground.

The subsurface drain has no direct surface inlets. Its purpose is to lower the water table in the immediate area around the drain.

(Rebuttal Affidavit, pp. 1-2, #s 5-10). Again, Philip McLoud does not mention that he took any distance measurements from the subsurface drain to the lagoon. Further, it is unclear what professional qualifications Philip McLoud has, as an employee of NRCS, that would qualify him to determine, "this subsurface drain is not a stream, drainage ditch or other body of water, and would not be considered such by the Indiana Department of Environmental Management, for purposes of compliance with Manure Management AW-1." (Rebuttal Affidavit, p. 2, # 9).

In his Hearing Affidavit, Larry Trapp stated with respect to this issue:

The entire field depicted on sheet no. 2 of 5 of the Top Sow application, including the southwest portion of the site, is currently planted in corn, and is thriving.

(Affidavit of Larry Trapp, p. 3, #10 admitted at the Hearing as Exhibit 7). In his Rebuttal Affidavit, Larry Trapp stated,

I have reviewed aerial photographs of the proposed Top Sow, Inc. Confined feeding operation site dating back to 1939. These photographs do not depict any stream, drainage ditch or other body of water within 300 feet of the proposed Top Sow lagoons. Therefore, Mr. Mundell's speculation in his Affidavit that the drain tile on the Top Sow property represents the historical extent of a stream is in error.

To the best of my knowledge, there has never been a stream, drainage ditch or other body of water within 300 feet of the proposed Top Sow lagoons.

(Rebuttal Affidavit, p. 1, #s 4-5). Like Philip McLoud, Larry Trapp failed to state that he had taken any measurements. Moreover, it is unknown how long Larry Trapp has owned this property, which would have clarified his statement #5.

The Affidavit of James McCurdy entered into the record at the hearing was not cited by the IDEM in its post-hearing brief in support of its argument on this issue, but was cited by Top Sow; James McCurdy stated that a "visual inspection revealed that no stream, drainage ditch or other body of water is located within 300 feet of the proposed lagoons." (Hearing Exhibit No. 8, Affidavit of James McCurdy, p. 2, #5). James McCurdy did not indicate that he took any measurements.

Both the original and the revised map no. 2 of 5 depict the siting of the operation superimposed upon a topographic map. The topographic maps indicate the presence of an intermittent stream crossing the site from east to west, extending from the west property line across the site to the east near a wooded area. On both the original submission (November 13, 1996) and the revised submission (December 3, 1996), the intermittent stream is shown to be in the approximate location as a dashed line, which is labeled as a field tile<sup>11</sup>.

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<sup>11</sup>As the IDEM erroneously assumed that the AW-1 only applied to the protection of surface water, and the AW-1 is silent on what constitutes "other body of water", it is important to note the purpose of a field tile drain. Ind.Code §36-9-27-2 defines a "tiled drain" as a tiled channel that: (1) carries surplus water, and (2) was established under or made subject to any drainage statute. While the existing field tile, designated on both maps 2 of 5, is not a regulated tiled drain, for purposes of function, they are the same --- removal of surplus water. It is

At the hearing, Objectors entered into the record an Affidavit of John A. Mundell, P.E., in which he stated,

Affiant had indicated in his previous affidavit that the plans and specifications indicate that there is a drainage swale at the site of the proposed facility which is less than 300 feet from the corner of the primary waste lagoon. The U.S. Geological Survey topographic map of this area submitted by Top Sow indicates the presence of an intermittent stream where the plans and specifications show the location of the swale. According to the USGS map, the primary lagoon is more than 300 feet from the headwaters of the intermittent stream; however, the site-specific information provided by Top Sow indicates that in fact the swale/intermittent stream extends across the site from west to east to within 300 feet of the primary waste lagoon. The information contained on USGS maps is by its nature much more general and less detailed and accurate than that obtained by the on-site survey and inspection; therefore in the event of an inconsistency or question as to the location of a physical feature, the inconsistency should be resolved by reference to site-specific data.

...[S]ite-specific data is shown...from Top Sow's design drawings, showing the location of the field tile and elevation contour lines relative to the primary lagoon. Affiant has drawn points along the eastern portion of the tile and illustrated a 300-foot measurement relative to such points. The point on the left-hand site (farthest west) is the point at which the USGS topographic map of this site indicates that the intermittent stream commences. However, the tile continues eastward past that point, and a 300-foot measurement from any other location along that tile line is within 300 feet from the primary lagoon, as shown by the measurements from the other three points. 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.

(Affidavit of John Mundell at pp. 2-3, #7 admitted at Hearing as Exhibit 5). Accompanying Objectors' post-hearing brief, was a Rebuttal Affidavit of Andrew L. Lavy, in which he stated,

I own property located at 1356 W. 350 N. Camden, Indiana, which

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interesting to note that the NRCS noted a "wetland" on the property. See either map/sheet no. 2 of 5. Lastly, It is interesting to note that tile systems often have "laterals" at random locations and none appear on either map/sheet no. 2 of 5.

is in close proximity to the property which Top Sow has proposed for a construction of a swine confined feeding control facility.

I have been familiar with the property proposed for use by Top Sow since 1947. My father-in-law owned this land, and I farmed it in 1951.

I am aware there is a field tile running from east to west across the Top Sow location. The tile commences at the western property line and extends east to a wooded area. The tile follows the location of an intermittent stream at the site. The intermittent stream commences at the western property line and extends east across the site at least as far as a location due south of the southwest corner of Top Sow's proposed primary lagoon.

(Objectors' post-hearing brief, Rebuttal Exhibit 1, #s 2-4). The question here then is whether a minimum of 300 feet separates the lagoon system and the identified swale/intermittent stream and the field or drain tile.

On the original Top Sow map no. 2 of 5 topographic map, the outer embankment of the lagoons appears to be a minimum of 300' from the identified swale/intermittent stream and field tile. On the revised map no. 2 of 5, however, the location of the tile system has been moved northward and does not extend as far east; the embankment is less than 275 feet from the center line of the field tile. Similarly, if one considers the "lift station" a part of the "earthen treatment/control facility", the LS-1 lift station is only 175 feet from the existing field tile<sup>12</sup>. Again, it is important to note it is unknown who made either the changes or the notations to map no. 2 of 5 in terms of the question, "which map no. 2 of 5 accurately reflects the position of the field or drain tile?"<sup>13</sup>. Notwithstanding, it is clear that the revised map no. 2 of 5 was intended by Top Sow to replace the original, and the correct length of the drainage tile system cannot be confirmed by a visual inspection of the map. Therefore, in the absence of credible site-specific data, the IDEM determination that "no stream, drainage ditch or other body of water is located within 300 feet of the proposed lagoons" was both arbitrary and capricious.

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<sup>12</sup>Consistency between the IDEM's characterization of Top Sow's "lagoon system" and the AW-1's "earthen treatment/control facility" would suggest that LS-1 should be considered, at the very least, part of the waste treatment facility.

<sup>13</sup>In Top Sow's Design Report, 11/21/96, entered into evidence at the Hearing as part of Exhibit No. 1, states, "[t]he only ground water table found at the immediate site was at the SW corner of the first stage lagoon. Since it is more than two feet below the clay lined lagoon bottom, a tile around the lagoon is not necessary." (Report at p. 2). Thus, one could argue that the swale/intermittent stream is more accurately depicted in map no. 2 of 5.

***Final Order***

It is THEREFORE ORDERED that Objectors' have carried their burden of proof with respect to issues 3.a.(2) and 3.a.(3) of their Petition for Administrative Review are entitled to relief, and therefore, Approval AW #4245 is hereby VACATED.

You are further notified that pursuant to the provisions of P.L. §41-1995, amending Ind.Code §4-21.5-7, which became effective July 1, 1995, 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 the applicable provisions of Ind.Code §4-21.5-5, 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 30th day of September, 1997.

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Lori Kyle Endris  
Environmental Law Judge

cc: Bruce Palin, Acting, Assistant Commissioner  
Office of Solid and Hazardous Waste Management

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