COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

v.

EUGENE MACHOTA AND MACHOTA GROUP, INC. d/b/a BIEGE SEWER AND SEPTIC SERVICE

1999 OEA 067, OEA CAUSE NO.: 98-S-E-1947

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	327 IAC 7-2-5
	Ind. R. Ev. 801(d)(2)
	Record keeping
Presiding ELJ:	Linda C. Lasley
Party Representatives:	Nancy Holloran, Esq.
	Nicholas Kile, Esq.
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:

COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Complainant,

v.

EUGENE MACHOTA AND MACHOTA GROUP, INC. d/b/a BIEGE SEWER AND SEPTIC SERVICE,

Respondent.

CAUSE NO. 98-S-E-1947

FINAL ORDER

I. Statement of the Case:

On January 20, 1998, Petitioner, Eugene Machota, by counsel, Donald Baugher appealed the issuance of a Commissioner's Order against Biege Sewer and Septic Service. Mr. Baugher withdrew his appearance on March 6, 1998. Nicholas Kile entered his appearance on behalf of Biege Sewer and Septic Service on March 12, 1998. On April 28, 1998, Petitioner filed a Motion for Partial Summary Judgment and a Motion for Expedited Response to the Motion for Partial Summary Judgment. The motion was granted on May 1, 1998. The Indiana Department of Environmental Management (IDEM), by counsel, Nancy Holloran, filed its Response to the Motion for Partial Summary Judgment on May 14, 1998. Petitioner filed a Reply on May 26, 1998. A hearing on the Motion for Partial Summary Judgment was held on May 27, 1998. At the hearing, the parties were instructed to submit a status report on the remaining issues and a proposed final hearing schedule. The parties filed a status report on June 18, 1998. The final hearing was set for November 20, 1998. After the final hearing, the parties filed post-hearing briefs and proposed findings of fact and conclusions of law on January 15, 1999.

II. Issues:

Whether Biege Sewer and Septic Service's record keeping practices met the requirements

contained in 327 IAC 7-3-2.

Whether Biege Sewer and Septic Service land applied wastewater to site 007-05 before its approval.

Whether Biege Sewer and Septic Service marked its site boundaries with flags or other obvious markers and maintained "No Trespassing" signs.

III. Findings of Fact:

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

1. Mr. Eugene Machota owns and operates Biege Sewer and Septic Service. Biege Sewer and Septic Service pumps septage from residential and business customers and land applies the wastewater to sites approved by IDEM.[1]

2. Biege Sewer and Septic Service has a valid permit to land apply wastewater to site 94-09DWW.[2]

3. On August 9, 1995, IDEM issued an approval to Biege Sewer & Septic Service for the application of wastewater to site 007-05 in LaPorte County, Indiana.[3]

4. Mr. Machota could begin land applying wastewater on site 007-05 no sooner than August 27, 1995.[4]

5. Citizens in LaPorte County appealed IDEM's approval of site 007-05.[5]

6. The Office of Environmental Adjudication held a telephonic pre-hearing conference on January 12, 1996 concerning the citizens' appeal. Mr. Paul Moore, a land application inspector for IDEM, attended the pre-hearing conference as well as Mr. Machota and his attorney, Don

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[1] Hearing Transcript; Testimony of Machota, p. 120.

[2] Hearing Transcript; Testimony of Machota, p. 122.

[3] Hearing Transcript; Testimony of Machota, p. 152.

[4] Hearing Transcript; Testimony of Machota, p. 123.

[5] Hearing Transcript; Testimony of Moore, p. 33.

Baugher.[6]

7. At the pre-hearing conference, Mr. Moore heard Mr. Machota admit that he applied seven to nine loads of wastewater to site 007-05 before August 9, 1995.[7]

8. In his deposition on May 19, 1997, Mr. Machota stated that he could not remember what was discussed at the pre-hearing conference.[8]

9. During the hearing, however, Mr. Machota stated that he remembered land applying wastewater from two residences owned by Mr. Nelson to land owned by Mr. Nelson, which later became approved land application sites (007-03 and 007-04).[9]

10. Mr. Machota did not offer customer receipts or signed statements by the homeowner for the activities on Mr. Nelson's land.[10]

11. Mr. Machota later received approval to apply wastewater to sites 007-03 and 007-04, also in LaPorte County.[11]

12. On September 27, 1995, Mr. Moore conducted an inspection of site 007-03. Mr. Moore noted that site 007-03 was not marked, that a "No Trespassing" sign was lacking, and the area did not have buffer flags in place.[12]

13. Mr. Moore inspected site 007-04 on February 21, 1996. During that inspection, Mr. Moore noted the site 007-04 was marked with dark green wooden stakes. As a result, Mr. Moore was unable to determine the boundaries of site 007-04.[13]

14. On August 30, 1996, IDEM issued a Notice of Violation to Mr. Machota alleging the

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[6] Hearing Transcript; Testimony of Moore, p. 32 and p. 39.

[7] Hearing Transcript; Testimony of Moore, p. 40.

[8] Deposition of Machota, p. 9.

[9] Hearing Transcript; Testimony of Machota, p. 126.

[10] Plaintiff's Exhibit 4 and Hearing Transcript; Testimony of Machota, p. 143

[11] Plaintiff's Exhibit 2.

[12] Plaintiff's Exhibit 2; Hearing Transcript; Testimony of Moore, p. 26.

[13] Plaintiff's Exhibit 2; Hearing Transcript; Testimony of Moore, p. 20..

above violations (327 IAC 7-6-1 and 327 IAC 7-6-4). The Notice of Violation offered Mr. Machota an opportunity to enter into an Agreed Order to resolve the violations.[14]

15. Mr. Machota admits that he immediately changed the color of the stakes at site 007-04 upon receiving IDEM's Notice of Violation.[15]

16. IDEM began a records investigation of Biege Sewer and Septic Service on or about October 17, 1996. IDEM requested Mr. Machota submit copies of customer receipts for the months of July and August 1995.[16]

17. Mr. Machota responded to IDEM's request on or about October 28, 1996 with a summary of Mr. Machota's records from August 28, 1995 to October 10, 1995. The summary was sent to IDEM through Mr. Machota's attorney, Don Baugher. The summary did not include the nature of the wastewater removed, the date the wastewater was disposed of, the method of disposal or the vehicle license number of the servicing vehicle.[17]

18. IDEM wrote Mr. Baugher on October 31, 1996 regarding the October 28, 1996 submission. The letter requested "actual copies customer receipts showing amount of waste and disposal sites utilized" for July and August 1995. The letter goes on to ask that site "H" be identified by permit number and location on a customer receipt dated July 5, 1996, and requested copies of customer receipts for June and July 1996. IDEM also requested information regarding Mr. Machota's testing methods for pH.[18]

19. On November 22, 1996, IDEM wrote Mr. Baugher again to request "actual copies of customer receipts for July and August 1995." The letter also requests him to "identify a disposal site noted as 'H' on a customer receipt dated July 5, 1996." IDEM again asked for copies customer receipts for June and July 1996. The letter also noted that the time for entering into an Agreed Order was nearing expiration but could be extended if the parties were engaging in meaningful negotiations.[19]

20. Mr. Machota did not offer evidence that he submitted June and July 1996 customer

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[14] Plaintiff's Exhibit 2.

[15] Hearing Transcript; Testimony of Machota, p. 133.

[16] Plaintiff's Exhibits 3 and 5.

[17] Plaintiff's Exhibit 3.

[18] Plaintiff's Exhibit 5.

[19] Plaintiff's Exhibit 6.

receipts or information regarding his test methods for pH.

21. In mid-December 1996, Mr. Steven Judith, the new enforcement case manager, visited Biege Sewer and Septic Service and introduced himself to Mr. Machota. Mr. Judith and Mr. Machota discussed the need for clarification of the customer receipts submitted.[20]

22. Mr. Judith wrote Mr. Baugher on December 22, 1996 to confirm receipt of copies of customer receipts for July and August 1995. Mr. Judith again requested that site "H" be identified by location and application approval number. Mr. Judith also stated that the sixty-day time period to enter into an Agreed Order had expired. He noted further that failure to resolve the matter could result in the issuance of a Commissioner's Order.[21]

23. The copies of customer receipts for July and August 1995 do not contain the date the wastewater was disposed of, the location of the disposal, the method of disposal or the vehicle license number of the servicing vehicle. In regards to the location of disposal, a letter is given but is not defined. For the receipts submitted, "H" and "TP" appear for location.[22]

24. On September 24, 1997, IDEM received a document indicating that site "H" was located on 500 West and was under approval 94-09DWW. The document also identifies site "N" with three different approval numbers (007-03, 007-04 and 007-05), two of which have the same location description. "TP" is not defined in this document.[23]

25. On December 23, 1997, IDEM issued a Commissioner's Order alleging that Mr. Machota:

a. Failed to maintain complete records of all septage pumping and disposal activities over the past 3 years and failed to properly identify the site on which wastewater pumped from Biege's customers was land applied in violation of 327 IAC 7-3-2(4);

b. Land applied waste water to site 007-05 before the effective date of the permit in violation of 327 IAC 7-6-1;

c. Failed to maintain adequate "No Trespassing" signs in violation of 327 IAC 7-6-4(2);

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[20] Hearing Transcript; Testimony of Judith, p. 77.

[21] Plaintiff's Exhibit 7.

[22] Plaintiff's Exhibit 4.

[23] Plaintiff's Exhibit 8.

d. Failed to maintain obvious boundary markers in violation of 327 IAC 7-6-4(3); and

e. Failed to meet the required separation distance of 300 feet from a public road in violation of 327 IAC 7-6-6.[24]

26. On June 18, 1998, Mr. Machota, through his new attorney, Nicholas Kile, submitted copies of customer receipts identifying disposal sites with site approval numbers.[25]

27. At the November 20, 1998 hearing, IDEM agreed to withdraw its allegations regarding land application on growing hay, land application outside approved boundaries on one site, and land application of wastewater to site 007-04 before approval effective date.[26]

28. Mr. Machota admitted to violating separation distances at the November 20, 1998 hearing.[27]

IV. Discussion:

Mr. Machota asserts that his records fully comply with IDEM's record keeping requirements. He points out that IDEM is attempting to allege an "Access Rule" violation as opposed to a "Records Rule" violation. Mr. Machota contends the Commissioner's Order alleges only a "Records Rule" violation, and Mr. Machota had no notice he would be facing an "Access Rule" violation. Since the Commissioner's Order addresses only record keeping practices, IDEM should not be allowed to bootstrap an adequacy argument to the order. Secondly, Mr. Machota argues IDEM failed to offer any evidence that he land applied wastewater to site 007-05 before its approval. Mr. Moore never heard Mr. Machota admit to waste application on site 007-05 before its approval. In fact, Mr. Machota land applied wastewater to site 007-03, which is across the street from site 007-05. And, the wastewater he applied was exempt from regulation. Finally, Mr. Machota has always maintained "No Trespassing" signs on site 007-03. Furthermore, once Mr. Machota received the Notice of Violation, Mr. Machota immediately changed the color of the stakes at site 007-04 and confirmed that the "No Trespassing" signs were in place. Consequently, Mr. Machota believes the doctrine of estoppel prevents IDEM from taking enforcement action on those issues.

IDEM counters Mr. Machota's first argument with evidence that the pre-hearing

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[24] Plaintiff's Exhibit 2.

[25] Defendant's Exhibit B.

[26] Hearing Transcript, p. 8.

[27] Hearing Transcript, p. 8.

conference was only regarding site 007-05. So, presumably, there would be no reason to discuss site 007-03 or for Mr. Moore to make a mistake. In addition, in his deposition, Mr. Machota stated he did not remember what he said during the pre-hearing conference. But now asserts, some three years later, he remembers he did not land apply to site 007-05 before its approval. Moreover, Mr. Machota's statement should be admissible because it is a statement against his own interest. In response to the second argument, IDEM does not agree Mr. Machota kept complete records. The lettering system employed by Mr. Machota had no meaning or significance in determining the location of land disposal activities. In addition, IDEM made Mr. Machota aware, on several occasions, that it believed the location information was inadequate or not provided. As a result, Mr. Machota should not be able to cure the violation now by simply complying with the request for information. Finally, the stakes marking site 007-04 were not an obvious color and IDEM's inspector was, therefore, unable to determine the boundaries of the site. Mr. Machota should have posted "No Trespassing" signs on the fence against a state highway for site 007-03.

For the reasons discussed below, the Commissioner's Order must be substantially upheld.

A. Record keeping Violation

This case represents what a person should not do when IDEM asks to review their records. It all began with a statement during a pre-hearing conference held for the appeal of site 007-05. Whether or not Mr. Machota admitted to land applying wastewater before IDEM approved site 007-05 will be discussed later. What is clear, however, is that this alleged admission began an investigation of Biege Sewer and Septic Service's records. Mr. Paul Moore probably told someone in IDEM's Office of Enforcement about the statement. IDEM then requested Mr. Machota to send it copies of customer receipts for the time period during which Mr. Machota allegedly applied wastewater without approval. Mr. Machota responded by sending IDEM a summary of wastewater disposal activities AFTER the approval for site 007-05 became effective. This is not what IDEM asked for. If it had been, IDEM would not have written Mr. Machota on three other occasions to get the requested information and clarification.[28] IDEM requested four items from Mr. Machota: (1) copies of actual customer receipts for July and August 1995; (2) clarification for what "H" means; (3) copies of customer receipts for June and July 1996; and (4) test methods for determining pH. IDEM received actual copies of

[28] Mr. Machota's argument that part of the problem in this case is that IDEM wrote to Mr. Machota's attorney instead of Mr. Machota himself, is preposterous. Donald Baugher represented himself as Mr. Machota's attorney, as such, Mr. Baugher acted as an authorized agent for Mr. Machota. If there was a breakdown in communication between Mr. Machota and his attorney, it is illogical to blame IDEM for it. IDEM simply communicated with the person who sent it information and who represented himself as an agent for Mr. Machota. To argue otherwise, undermines the legal profession and the purpose for hiring an attorney in the first place.

customer receipts on or about December 20, 1996. It received a clarification for site "H" on or about September 24, 1997.[29] IDEM never received customer receipts for June and July 1996 or pH test methods. And, while IDEM had the authority to request all four items, it abandoned asking for June and July 1996 receipts and pH test methods. Even so, the failure to provide that information is just another factor supporting the Commissioner's conclusion that Mr. Machota was not keeping complete records. Mr. Machota, on the other hand, offers a couple of arcane explanations as to why he did not comply with IDEM's records request; for obvious reasons, however, they are unavailing.

1. "Records Rule" versus "Access Rule"

Mr. Machota chooses to characterize IDEM's record keeping allegation as an "Access Rule" violation as opposed to a "Records Rule" violation. Meaning, the Commissioner's Order only cites Mr. Machota for not having complete records. But, at the hearing, IDEM apparently complained of not being able to access Mr. Machota's records.[30] The "Records Rule" states:

> Accurate records shall be maintained of activities governed by this article (327 IAC 7). Such records shall be updated weekly, be maintained for at last [sic] three (3) years, and shall include:
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> (1) the name and location of the customer or wastewater source;
> (2) the quantity and nature of wastewater removed;
> (3) the date of the service;
> (4)the date, location, and method of disposal; and
> (5) the wastewater management vehicle license number of the servicing vehicle.

327 IAC 7-3-2.

The "Access Rule" provides:

> (2) The permittee shall allow representatives of the commissioner or its agent access, at any reasonable time and place, to all equipment, vehicles, facilities, buildings, property, or records relevant to the conduct of wastewater management for the purpose of determining if such activities are being conducted in compliance with the terms and conditions of the permit.

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[29] Mr. Machota was wrong to assume that his "key" answered all of IDEM's questions (Respondent's Post Hearing Brief, p. 4). How could it? Truth be told, the key raised more questions than it answered. Yes, the key finally defined site "H." Yet, the key described site "N" with three different permit numbers and two with the exact same location (007-03 and 007-05). IDEM rightly made no further inquiries of Mr. Machota because his "key" made clear that he intended to continue shrouding his land application activities from IDEM.

[30] Respondent's Post Hearing Brief, pp. 6-7.

327 IAC 7-2-5.

Considering the above requirements, Mr. Machota has mischaracterized IDEM's complaint. Without question, IDEM asserted that it did not understand Mr. Machota's lettering system. Because it did not understand the lettering system, IDEM could not determine where the wastewater was disposed. As a consequence, Mr. Machota's records were not accurate. This would have been true even if IDEM had gone to Biege Sewer and Septic Service to view the records. "H" and "TP" are not locations. Since the key was only created on September 24, 1997, to anyone looking at the records before that time, "H" was a mystery. Even after the key, "N" is still a mystery. The Commissioner's Order reflects this lapse by citing Mr. Machota for a violation of 327 IAC 7-3-2(4): "Respondent has failed to maintain complete records of all septage pumping and disposal activities over the past 3 years." The order goes even further by citing specifically the lack of location information. So, Mr. Machota's argument that IDEM found the records to only be inadequate (an Access Rule violation) is implausible given the above statements in the Commissioner's Order. Besides, the Access Rule and Records Rule compliment each other. The Access Rule is where IDEM derives its authority to ask for records. Once received, IDEM reviews them to determine compliance with the Records Rule. The rules are not exclusive, as suggested by Mr. Machota; rather, they work in concert.

In addition to identifying wastewater disposal location, all permittees must maintain records in a way that is understandable to IDEM. To hold otherwise would defeat the purpose of IDEM's regulatory authority. If IDEM does not understand a record because of some shorthand used by the permittee, the permittee is under an absolute duty to explain the shorthand to IDEM. Mr. Machota is correct that the Records Rule does not spell that out. It is, however, a concept at the very heart of the record keeping requirement. To accept Mr. Machota's approach would mean interpreting the statutes and regulations in an illogical manner.[31] Therefore, Mr. Machota could not be more wrong when he suggests his records could be maintained in Spanish and still satisfy the Records Rule.[32] If the person from IDEM reviewing the records is not fluent in Spanish, then IDEM cannot determine compliance, which is its duty. The more appropriate analogy would be if Mr. Machota were not around, could someone looking at his records determine where the wastewater was disposed. The answer, until recently, has been a resounding NO. Likewise, Mr. Machota's refusal to explain his record keeping shorthand thwarted IDEM's ability to determine whether Mr. Machota land applied to site 007-05 before its approval. Also, Mr. Judith did discuss the records issue with Mr. Machota when he introduced himself to Mr. Machota in mid-December.[33] Mr. Judith testified that "I needed to get clarification on the

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[31] Indiana State Board of Health v. Journal Gazette Co., 608 N.E.2d 989, 992 (Ind.App. 1993).

[32] Respondent's Post Hearing Brief, p. 8.

[33] Respondent's Post Hearing Brief, p. 4.

identification of the sties because we had not yet received the records . . . I left my business card with him and told him that I was hopefully expecting to get the information we needed within a week."[34] In response to the Environmental Law Judge's question of whether Mr. Judith asked for the information, Mr. Judith testified that "he said his attorney had it and he was supposed to be sending it to us."[35] There was no testimony or evidence demonstrating that Mr. Machota offered to let Mr. Judith review the records at that meeting. To the contrary, Mr. Machota was, once again, successful in putting IDEM off from learning the truth about site 007-05.

2. The June 18, 1998 Submission

In defense of his record keeping, Mr. Machota argues that no statute or regulation required him to provide IDEM with a "translation" before the hearing date, or to provide a translation at all.[36] Stated another way, Mr. Machota believes he could respond to IDEM's request whenever he felt like it. Nothing could be further from the truth. Mr. Machota was not only under a regulatory duty to respond to IDEM's request for information, he had to respond within a reasonable amount of time.

As noted earlier, an administrative agency must be able to obtain facts in order to effectuate the purpose of the statues under which they operate.[37] The great bulk of the information needed for these purposes is obtained without compulsion by voluntary testimony and production of documents, and by the use of public records and official reports. It is the means by which an agency can secure the information needed to enable it to make rational use of its substantive powers.[38] Inherent in the ability to request and receive information, is the ability to understand the information submitted. When Mr. Machota obtained his permit for site 94-09DWW, he was agreeing to allow IDEM access to his records and agreed to keep certain information. That being so, it is comical for Mr. Machota to now argue he did not have to provide translated records at any time before the hearing on November 20, 1998. He was under a regulatory duty to do so. Furthermore, public policy dictates that permittees respond to IDEM's information requests sooner rather than later. If IDEM cannot understand records submitted to it, it cannot discern whether there is a violation of the statutes and regulations, whether there is an environmental threat, or whether there is a public health concern needing immediate investigation. The State of Indiana can ill afford permittees having the luxury of compliance on their own terms. IDEM acted reasonably when it issued a Commissioner's Order against Biege

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[34] Hearing Transcript; Testimony of Judith, p. 77.

[35] Hearing Transcript; Testimony of Judith, p. 78.

[36] Respondent's Post Hearing Brief, p. 8.

[37] BERNARD SCHWARTZ, ADMINISTRATIVE LAW 177 (4TH ED. 1994).

[38] Id.

Sewer and Septic Service after almost three years of trying to obtain and understand its records. Hence, Mr. Machota's eventual compliance does not remedy the situation, and penalties were appropriately assessed.

B. Land Application to Site 007-05

Another major issue in this case is whether Mr. Machota land applied wastewater to site 007-05 before the approval effective date of August 27, 1995. In support of their argument, IDEM offers the statement of Mr. Machota during a pre-hearing conference on January 12, 1997. During the pre-hearing conference, Mr. Paul Moore heard Mr. Machota, in response to a question about his land application activities, admit that he had applied seven to nine loads of wastewater on site 007-05. Mr. Machota counters IDEM's evidence with two arguments. First, the pre-hearing conference was in fact a settlement conference, and, therefore, any statements by Mr. Machota are inadmissable. Second, Mr. Moore misheard Mr. Machota who admitted to land applying only to site 007-03 not 007-05, and that the wastewater he applied was wastewater from the homeowner's own septic tanks.

1. Admission Was Not Hearsay

Initially, it must be noted that it is the practice of the Office of Environmental Adjudication not to have Environmental Law Judges (ELJ) present during settlement negotiations. This is true for two reasons. First, the presence of the ELJ may have a chilling effect on the negotiations between the parties. Second, if settlement negotiations are unsuccessful, there could be a question whether the ELJ remains unbiased. Thus, the meeting between the parties on January 12, 1997 could have only been a pre-hearing conference. In addition, Mr. Moore testified that he has attended several settlement conferences and this meeting was not a settlement conference.[39]

Next, Indiana Rules of Evidence, Rule 801(d)(2) states:

> Statements Which Are Not Hearsay:
> (2) Statement by a party-opponent. The statement is offered against a party and is (A) the party's own statement, in either individual or a representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth; or (C) a statement by a person authorized by the party to make a statement concerning the subject; or (D) a statement by the parties' agency or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course an in furtherance of the conspiracy.

[39] Hearing Transcript; Testimony of Moore, p. 52.

Under the above rule, Mr. Machota's statement during the pre-hearing conference is not hearsay because it is an admission by him. Therefore, Mr. Moore's testimony alone can support the finding that Mr. Machota land applied wastewater to site 007-05 before the approval effective date. All that notwithstanding, Mr. Machota's alternative explanation is dubious.

2. Wastewater from Mr. Nelson's home

Mr. Machota responds to the alleged admission with three different explanations. First, when Don Baugher was his attorney, Mr. Machota claimed that the land owner, Mr. Nelson, applied his own wastewater to site 007-05 and "I have never said that Biege land applied on this site before the effective date."[40] Second, when Nicholas Kile first became Mr. Machota's attorney, the story changed in his deposition. There he stated he did not recall the substance of the pre-hearing conference at all. The final version came at the final hearing when he stated that he was engaged in land application activities, but not at site 007-05; rather, he land applied Mr. Nelson's waste at site 007-03, which is across the street from site 007-05. Without question, Mr. Machota's testimony on this issue is not credible. On the other hand, Mr. Moore's testimony remained consistent. What is more, IDEM specifically asked Mr. Machota for customer receipts for July and August 1995. No where in his submissions are there receipts for the wastewater he pumped for Mr. Nelson and applied to Mr. Nelson's land. Mr. Machota offered no testimony or exhibits indicating that he performed this service for free. Even if he had, the regulations require Mr. Machota to retain the original statement, signed by the homeowner, giving permission to Mr. Machota to "utilize the homeowner's land for wastewater disposal . . ."[41] Mr. Machota never offered evidence supporting his version of the facts on this issue. Therefore, this new turn of events remain unsubstantiated and unbelievable.

C. Violations at Sites 007-03 and 007-04

The final issue this case presents is whether there were marking violations at sites 007-03 and 007-04. Mr. Machota essentially admits that (1) he land applied within 300 feet of a public road on site 007-03; (2) that his stakes on site 007-04 were a green color that he later changed to florescent blue; and (3) that he double checked to see if the "No Trespassing" signs were posted, which he says they were. Further, since he corrected the marker violations immediately, Mr. Machota argues IDEM is estopped from taking enforcement action on those violations.

Applying the doctrine of estoppel against a government agency is a difficult proposition. It is especially difficult when the party seeking to apply estoppel has argued reliance on misinformation. If estoppel in such cases was allowed, the government could be precluded from

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[40] Motion for Partial Summary Judgment; Affidavit of Eugene F. Machota, p.2.

[41] 327 IAC 7-6-11(d).

functioning.[42] The Supreme Court of Indiana put it this way: "When the legislature enacts procedures and timetables which act as a precedent to the exercise of some right or remedy, those procedures cannot be circumvented by the unauthorized acts and statements of officers, agents or staff of the various departments of our state government."[43] Nonetheless, in order to apply the doctrine of estoppel against the government, all five elements of estoppel must be present.[44] The basic elements of estoppel are: (1) a representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the facts; (4) the representation must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon the representation.[45] The party claiming estoppel has the burden to establish all of the facts necessary to constitute estoppel.[46]

Since Mr. Machota did not bother to cover the elements of estoppel in his argument advocating estoppel, this tribunal will not consider it. Regarding the marker violations, IDEM's contention that a dark green color is not obvious is believable. It does not require a stretch of the imagination that green markers in a field, even in autumn, would not be obvious. IDEM did not, however, present credible evidence that Mr. Machota failed to have "No Trespassing" signs posted. Mr. Machota stated that he has a supply of them because they tend to get destroyed by vandals on the weekends.[47] He also stated that once he received the notice of violation, he verified the signs were still there. Thus, IDEM did not carry its burden with respect to the "No Trespassing" signs.

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[42] National Salvage & Service Corporation v. Commissioner of Indiana Department of Environmental Management , 571 N.E.2d 548, 555 (Ind. A.P. 1991).

[43] Middleton Motors, Inc. v. Indiana Department of State Revenue, 380 N.E.2d 79, 81 (1978).

[44] National Salvage, 571 N.E.2d at 555.

[45] Advisory Board of Zoning Appeals of the City of Hammond v. The Foundation for Comprehensive Mental Health, Inc., 497 N.E.2d 1089, 1092 (Ind. A.P.. 1986).

[46] Indiana Department of Environmental Management v. Conrad, 614 N.E.2d 916, 921 (Ind. A.P.. 1993).

[47] Hearing Transcript; Testimony of Machota, p. 128.

V. Conclusions of Law:

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that:

Biege Sewer and Septic Service failed to maintain records in accordance with 327 IAC 7-3-2. Specifically, that Mr. Machota's records did not contain the date, the location, or method of disposal.

A condition for all permit holders under 327 IAC 7 is to respond to IDEM's requests for documents within a reasonable amount of time and with information that IDEM can understand, pursuant to 327 IAC 7-2-5 and 327 IAC 7-3-2.

Biege Sewer and Septic Service land applied wastewater to a site before its approval in violation of 327 IAC 7-6-1 and 327 IAC 7-6-4.

Biege Sewer and Septic Service failed to clearly delineate boundaries with flags or other obvious boundary markers on site 007-03 and 007-04, pursuant to 327 IAC 7-6-4.

Biege Sewer and Septic Service failed to maintain the required separation distances in violation of 327 IAC 7-6-4(3).

VI. Order:

The Commissioner's Order issued on December 23, 1997 is substantially **UPHELD** and this cause is remanded for reconsideration of remedies and penalties considering: (1) application of wastewater to site 007-05 before its approval; (2) failure to maintain records in accordance with 327 IAC 7-3-2; (3) failure to properly stake sites 007-03 and 007-04; (4) "No Trespassing" signs were in place; and (5) the failure to maintain separation distances.

You are further notified that pursuant to provisions of 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 12th day of February 1999.

Linda C. Lasley
Environmental Law Judge