

**COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

**v.**

**CAMP PALAWOPEC**

**2001 OEA 095, OEA CAUSE NO.: 98-S-E-2355**

Official Short Cite Name:	Camp Palawopec, 2001 OEA 095
OEA Cause No.:	98-S-E-2355
Topics/Keywords:	327 IAC 8-2-1
	327 IAC 8-2-4.1
	327 IAC 8-2-8
	327 IAC 8-2-8.1
	327 IAC 8-2-8.8
	327 IAC 8-2-14
	327 IAC 8-2-15
	Unwritten agency policies not enforceable
Presiding ELJ:	Linda Lasley
Party Representatives:	Thomas Barr, Esq.
	Nancy Holloran, Esq.
Date of Order:	March 20, 2001
Index Category:	Solid/Hazardous Waste
Further Case Activity:	



noncommunity water system.

3. The Camp does not have the option of "hooking-up" to a public water supply because there is a ban on further hook-ups to the Brown County water supply.
4. The Camp does not challenge the Commissioner's Order on the basis that the violations did not occur; rather, the Camp asserts that the violations were only "potential violations" and IDEM inappropriately assessed a civil penalty.
5. There is a correlation between high turbidity and microbial levels. Microbials such as coliform present a danger to human health.
6. IDEM presented credible evidence through its case manager, Stacy Jones, that the following violations occurred at the Camp:
  - (a) Failure to monitor turbidity and disinfection for three months in 1996, three months in 1997 and June of 1998;
  - (b) Failure to monitor and report nitrate levels in 1995 (one annual report required);
  - (c) Failure to collect three repeat samples (four required, one submitted), and four follow-up samples (five required, one submitted) following a total coliform-positive sample on July 23, 1997; and
  - (d) Failure to provide public notification of the above violations.
7. IDEM sent the Camp a Notice of Violations with the above on September 22, 1999. The Camp received the NOV on October 8, 1999, but chose not to enter into an Agreed Order.
8. On July 13, 1999, IDEM sent the Camp a Commissioner's Order which assessed a civil penalty of three thousand two hundred sixteen dollars (\$3,216.00). The Camp timely appealed.
9. IDEM case manager, Ms. Chris Sorensen, testified that IDEM has an unwritten policy of always selecting the highest amount in the civil penalty matrix.
10. She also testified that IDEM has an unwritten policy of applying a multiplier to the penalty assessed.
11. Neither policy is reflected in IDEM's non-rule Civil Penalty Policy.
12. Ms. Sorensen did consider the potential for harm and the extent of deviation in assessing the civil penalty.

13. IDEM has no statutory or regulatory obligation to inform public water systems of the drinking water rules. Therefore, the fact that one or more letters sent by IDEM to the Camp, at its last known address, and was not received by the Camp, has no impact on the citation of violations in the Commissioner's Order.
14. Furthermore, even if IDEM sent the Camp a public notice containing incorrect information, that did not obviate the Camp's duty to correct the information and provide public notice of the violations as required by law.
15. The Camp was under a regulatory duty to monitor and report turbidity, nitrates and residual disinfectant whether or not IDEM provided guidance and instruction on how to use monitoring devices.
16. Finally, the Agreed Orders submitted by the Camp in support of its argument that IDEM was arbitrary and capricious in assessing its civil penalty against the Camp is without merit because the Agreed Orders represent a settlement reached by the parties, the Camp did not offer Agreed Orders drafted by the enforcement case manager involved in this case and it did not offer Agreed Orders involving other camps with similar violations.

### **III Discussion:**

IDEM seeks enforcement of the Commissioner's Order issued on July 13, 1999. It contends that the Camp admitted to violating the public notice requirements, admitted the required number of repeat samples were not taken for the total coliform-positive sample, admitted it failed to monitor and report for turbidity and admitted no monitoring results were submitted for 1997. Given these admissions, IDEM believes there is a sufficient factual basis to support the Commissioner's Order and the imposition of the \$3,216.00 civil penalty.

In response, the Camp asserts that none of the violations cited are based on water quality. Rather, they are simply monitoring and reporting violations, which are "potential violations." As far as monitoring turbidity, the Camp argues that IDEM did not provide the necessary training for the monitoring equipment in order for the Camp to monitor turbidity. With respect to the public notice violation, the Camp claims that IDEM sent it inaccurate information in the public notice, and, therefore, it did not post it. For the remaining violations, the Camp argues that it either did not know of the requirement to report or that since the camp season had ended, it saw no reason to continue testing and reporting. Further, the Camp contends IDEM impermissibly assessed the \$3,216.00 civil penalty because its non-rule Civil Penalty Policy does not mention the use of multipliers or of always selecting the highest penalty in a the civil penalty matrix.

For the following reasons, the Commissioner's Order must be upheld with respect to the violations cited. The order is remanded to IDEM for further consideration of the assessment of civil penalties.

A. *The Camp does not refute the citations.*

In this case, IDEM bears the burden of demonstrating, by a preponderance of the evidence, that the Camp was under a regulatory duty to test and report and that it failed to do so. Indiana's water system rules provide:

(65) "Transient noncommunity water system (TWS)" means a noncommunity water system that does not regularly serve at least twenty-five (25) of the same persons over six (6) months per year.

327 IAC 8-2-1.

IDEM presented evidence, which the Camp does not dispute, that the Camp does not regularly serve twenty-five of the same persons for over six months per year. As such, the Camp is a transient noncommunity water system (TWS). Since it is a TWS, the Camp must comply with the following regulations, which were cited in the Commissioner's Order:

Public water systems must collect total coliform samples at sites which are representative of water throughout the distribution system according to a written sample siting plan approved by the commissioner.

327 IAC 8-2-8.

(a) A public water system that uses a surface water source or a ground water source under the influence of surface water and provides filtration treatment must monitor in accordance with this section beginning June 29, 1993, or when filtration is installed, whichever is later.

(b) Turbidity measurements as required by section 8.5 of this rule must be performed on representative samples of the system's filtered water every four (4) hours . . . .

327 IAC 8-2-8.8.

(a) Effective June 29, 1993, a public water system that uses a surface water source or a ground water source under the direct influence of surface water and provides filtration treatment must report monthly to the commissioner the information specified in this section.

(b) Turbidity measurements as required by section 8.8(b) of this rule must be reported within ten (10) days after the end of each month they system serves water to the public.

327 IAC 8-2-14.

(f) All public water systems (community, nontransient noncommunity, and transient noncommunity systems) shall monitor to determine compliance with the MCL for nitrate in section 4(a) of this rule under the following monitoring schedules: . . .

327 IAC 8-2-4.1.

It is plain to see that even a summer camp has a number of regulations it must comply

with. What is also true is that the regulations require certain obligations should a system fail to comply with the above requirements. Those are:

- (a) The owner or operator of a public water system which fails to comply with an applicable MCL or treatment technique established by this rule, or which fails to comply with the requirements of any schedule prescribed pursuant to a variance or exemption, shall initially notify persons served by the systems as follows . . .

327 IAC 8-2-15.

- (a) If a routine sample is total coliform-positive, the public water system must collect a set of repeat samples within twenty-four (24) hours of being notified of the positive result. A system which collects more than one (1) routine sample per month must collect no fewer than three (3) repeat samples for each total coliform-positive sample found. A system which collects one (1) routine sample per month or fewer must collect no fewer than four (4) repeat samples for each total coliform-positive sample found . . .

327 IAC 8-2-8.1.

- (e) If a system collecting fewer than five (5) routine samples per month has one (1) or more total coliform-positive samples, and the commissioner does not invalidate the samples under section 8(f) or this rule, it must collect at least five (5) routine samples during the next month the system provides water to the public . . .

327 IAC 8-2-8.1.

Interestingly, the Camp does not dispute the regulatory requirements or being cited for violating them. Instead, it offers a litany of excuses for its noncompliance. For instance, Mr. Nickels asserts that once he learned there was a requirement to monitor turbidity, he contacted IDEM to find out how. IDEM informed him he needed special equipment. Mr. Nickels ordered the equipment and then contacted IDEM again to show him how to use it. IDEM personnel trained a member of Mr. Nickels' staff on how to use the turbidity monitoring equipment. Mr. Nickels claims that person did not return the next season and he had trouble getting IDEM to come back out to train another person. What Mr. Nickels fails to understand is that it is not IDEM's responsibility to train persons on how to use turbidity monitoring equipment. What is more, the lack of a trained individual to monitor turbidity did not suspend the requirement to do so. As a person engaged in regulated activity, it is Mr. Nickels responsibility to know of, and comply with, the laws applicable to his business. See Advisory Board of Zoning Appeals of City of Hammond v. Foundation for Comprehensive Mental Health, Inc., 497 N.E.2d 1089, 1093 (Ind.Ct.App. 1986) ("persons owning property within a state are charged with the knowledge of relevant statutory provisions affecting the control or disposition of such property.") and Ellsworth v. Ludwig, 230 N.E.2d 612, 614 (Ind. 1967) ("The law will not permit voluntary or willful ignorance of a fact to excuse liability."). Thus, Mr. Nickels' other arguments regarding failing to take repeat samples because the camp was closed or not posting notice because it had incorrect information are likewise unavailing.

Moreover, IDEM presented credible evidence that it did not receive the required reports. See Exhibit 2. Besides, the regulations do not make a distinction between "potential violations" and violations. Because one of IDEM's primary missions is to monitor business activities that impact the environment and human health, a party violates a rule when it fails to submit the required reports or fails to perform the required testing. . Its main tool for doing so is to review reports submitted by the regulated business. If the Camp felt it was so overburdened, it could have requested relief by asking the Commissioner for a variance. Indeed, many of the regulations the Camp had to comply with have variance provisions. See 327 IAC 8-2-8(c)(4), 327 IAC 82-5.3, 327 IAC 8-2-8.1 and 327 IAC 8-2-8.3. But, it was the Camp's duty to take preemptive action to request a variance, which it did not do. Thus, IDEM has carried its burden of demonstrating that the Camp was under a regulatory duty to report and monitor and it failed to do so.

*B. IDEM cannot rely upon unwritten policies.*

While the Camp was under a regulatory duty to comply with the requirements of 327 IAC 8-2, IDEM also had a duty to conduct its activities according to previously stated and clearly ascertainable standards. County Department of Public Welfare of Vanderburgh County v. Deaconess Hospital, Inc., 588 N.E.2d 1322, 1327 (Ind.Ct.App. 1992) and Mugg v. Stanton, 454 N.E.2d 867, 869 (Ind.Ct.App. 1983). In this case, IDEM enforcement case manager, Christina Sorenson, stated that IDEM has a policy of always selecting the highest value in the penalty matrix and of adding a multiplier. This policy is not reflected in IDEM's non-rule Civil Penalty Policy. Therefore, members of the public have no way of knowing IDEM will always select the highest penalty in the matrix or possibly add a multiplier. See IN THE MATTER OF COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT V. TOWER SENIOR APARTMENT, SCHNIPPEL CONSTRUCTION AND DIRT BROTHERS DEMOLITION, Cause No. 98-A-J-2131, August 8, 2000, p. 3 ("IDEM cannot rely on unwritten policies because . . . first, parties are entitled to fair notice of the criteria by which their petitions will be judged and second, judicial review is hindered when agencies operate in the absence of established guidelines."). In keeping with the above holding, IDEM's assessment of a civil penalty, in this case, cannot be upheld because it was not based on previously stated standards.

**IV Conclusions of Law:**

The Environmental Law Judge finds, by a preponderance of the evidence, based on the foregoing Findings of Fact and Discussion that the Camp: (a) Failed to monitor turbidity and disinfection for three months in 1996, three months in 1997 and June of 1998 in violation of 327 IAC 8-2-8.8 and 327 IAC 8-2-14; (b) Failed to monitor and report nitrate levels in 1995 (one annual report required) in violation of 327 IAC 8-2-4.1; (c) Failed to collect three repeat samples (four required, one submitted), and four follow-up samples (five required, one submitted) following a total coliform-positive sample on July 23, 1997 in violation of 327 IAC 8-2-8, 327 IAC 8-2-8.1(a) and 327 IAC 8-2-8(e); and (d) Failed to provide public notification of the above violations in violation of 327 IAC 8-2-15.

**V. Order:**

The Commissioner's Order is hereby **UPHELD** with respect to the violations cited and is **REMANDED** to IDEM for further consideration of its penalty assessment in accordance with this decision and Cause No. 98-A-J-2131.

You are further notified that pursuant to IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of IDEM. 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 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 30<sup>th</sup> day of March 2001.

Linda C. Lasley  
Environmental Law Judge

cc: Mary Beth Touhy, Assistant Commissioner  
Office of Land Quality