

Objection to No Further Action Approval
LUST #201703502 / FID #10800
Former Helm's Mara Mart, Mahik Petroleum Inc.
2018 OEA 49 (Cause No. 18-F-J-4991)

OFFICIAL SHORT CITATION NAME: When referring to 2018 OEA 49, cite this case as *Former Helm's Mara Mart, 2018 OEA 49*

Topics:

Underground storage tanks
USTs
leaking underground storage tanks
LUST
free product
no further action
NFA
RISC
risk integrated system of closure
RCG
remediation closure guide,

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:	Julie Lang
Petitioner:	David Dearing

Order issued: November 1, 2018

Index category: Land

Further case activity: None

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE NO FURTHER ACTION)
APPROVAL) CAUSE NO. 18-F-J-4991
LUST #201703502 / FID #10800)
FORMER HELM’S MARA MART)
MAHIK PETROLEUM INC.)
KOKOMO, HOWARD COUNTY, INDIANA)

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER**

This matter came before the Office of Environmental Adjudication (the OEA) on Mahik Petroleum, Inc.’s Petition for Administrative Review and Adjudicatory Hearing on September 21, 2018. The presiding Environmental Law Judge (ELJ), having heard the testimony and reviewed the record and evidence, enters the following findings of fact, conclusions of law and final order.

Findings of Fact

1. The Petitioner, Mahik Petroleum Inc. owns and operates the underground storage tanks (USTs) at the Former Helm’s Mara Mart, located at 804 East Markland Avenue, Kokomo, Howard County, Indiana (the Site). Two releases have been reported to the Indiana Department of Environmental Management (IDEM). The first release was reported in January of 2005 and was assigned Incident number 200501504¹. Corrective action, in the form of a dual-phase extraction system, for this release continues on the Site². A second release was reported in March of 2017 and was assigned incident number 201703502 (the “Release”). This matter revolves around whether IDEM properly determined whether no further action is necessary for the second release, Incident number 201703502 (the “Release”).

¹ All references to the “Release” refer to the 201703502 release, unless specifically noted otherwise.
² The system is not operating currently. Neither of the parties provided an explanation for why the system wasn’t operating.

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2. In response to the Release, IDEM requested an Initial Site Characterization (ISC). The Petitioner submitted the ISC report to IDEM on April 27, 2017.
3. On December 29, 2017, IDEM notified the Petitioner that the Initial Site Characterization (ISC) report was approved and that no further action was required for Incident #201703502 (the NFA Letter).
4. The Petitioner filed its Petition for Administrative Review and Adjudicatory Hearing of the determination that no further action was necessary for Incident #201703502 on January 17, 2018.
5. A hearing was held on September 21, 2018.
6. Petitioner based the decision to report the Release on an analysis of ground water monitoring data which Petitioner claims shows an upward trend in benzene.
7. IDEM requested that Petitioner perform an ISC as a result of the release. The NFA Letter approved the work done on the ISC and specified that any claims for reimbursement of the costs associated with the ISC must be submitted by September 29, 2018.
8. In the NFA Letter, IDEM noted that subsurface soil samples indicated that volatile organic compound concentrations were below Residential Direct Contact screening levels.³ The letter specifies that the determination was made pursuant to the Remediation Closure Guide. The Petitioner presented testimony from Ms. Karla McDonald that this was not the case based on her belief that IDEM had analyzed the data using Risk Integrated System of Closure (RISC)⁴ guidance rather than the Remediation Closure Guide (RCG)⁵.
9. IDEM commented in the NFA Letter, that "Increasing benzene trends during 2014 and 2015 in several wells as the primary evidence of a new release were presented. Previous groundwater sampling reports document the presence of free produce prior to 2010. Free product was present in one or more on-site wells from mid-2011 through the end of 2013 and one in the second quarter of 2014. Since free product has been present for many years prior to and during system operation, a new release is not readily apparent."⁶

³ Petitioner's Exhibit 3, page 1 of 3.

⁴ Risk Integrated System of Closure, Non-rule Policy Document # W-0046;
http://www.in.gov/idem/files/nrpd_waste-0046.pdf

⁵ Remediation Closure Guide, Non-Rule Policy Document # WASTE-0046-R1-NPD, effective March 22, 2012,
http://www.in.gov/idem/files/nrpd_waste-0046-r1.pdf

⁶ Petitioner's Exhibit 3, page 2 of 3, Comment 1.

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10. IDEM noted⁷ that repairs to the UST system were performed from April to August 2013, but that no details regarding these repairs had been provided.
11. Three monitoring wells (referred to as NW-1, NW-2 and NW-3) were installed as part of the ISC. Petitioner points to the discovery of free product in NW-1 as further proof that a release had occurred. IDEM stated in the NFA Letter that, "Considering the fractured bedrock at the site, the potential dewatering effects of the system operation (associated with the 2005 incident), and the influence of other factors on groundwater elevation and flow, free product could easily be trapped for periods of time within the bedrock and released at other times with consequent changes in groundwater contaminant levels."⁸
12. Petitioner further alleges that IDEM's decision is inconsistent with other underground storage tank sites with similar characteristics. Petitioner points to the Former Bulk Petroleum Store in Rossville Indiana (the Rossville Site). The Rossville Site had an approved Corrective Action Plan (CAP) for a release reported in 2008. The owner/operator reported a second release in 2017. Ms. McDonald pointed out that, even though free product was discovered on the Rossville Site and prompted the responsible party to report the 2017 release, IDEM assigned an incident number and directed that work would be conducted under the second release number and the approved CAP was suspended.

Conclusions of Law

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
2. 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. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and

⁷ Petitioner's Exhibit 3, page 2 of 3, Comment 2.

⁸ Petitioner's Exhibit 3, page 2 of 3, Comment 3.

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independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. The Petitioner argues that IDEM incorrectly determined that no release had occurred. However, the ELJ, upon a careful reading of the NFA Letter, concludes that IDEM acknowledges that a release had occurred. This is based on the following facts: (1) upon reporting the release as a confirmed release, an incident number was assigned⁹; (2) IDEM requested an ISC; (3) IDEM did not deactivate the release number upon determining that the ISC could be approved; (4) IDEM concluded that no further response actions were required for this incident number¹⁰; and (5) IDEM acknowledged that the Petitioner could submit the costs associated with the ISC for reimbursement from the Excess Liability Trust Fund (ELTF).¹¹ While IDEM stated in Comment #1, that “a new release is not readily apparent”¹², the balance of the evidence supports a conclusion that a release had occurred.
5. The primary issue before the OEA is whether IDEM correctly determined that no further action was necessary. As the evidence presented is relevant to a determination of whether a release occurred, as discussed in the previous paragraph and this issue, the ELJ will address whether IDEM correctly determined that no further action is necessary for this incident.
6. “It is the fact-finder's province to assess the credibility of witnesses.” *L.G. v. S.L.*, 2018 Ind. LEXIS 29, *10-11, 88 N.E.3d 1069, 1073, 2018 WL 476453. The ELJ finds that all of the witnesses are credible based on their academic credentials and years of experience. However, IDEM's witness, Aaron Aldred, has a master's degree in geology. Because of his academic credentials, the ELJ finds that Mr. Aldred's testimony should receive greater weight than Ms. McDonald's¹³. Each of the witnesses' testimony is based on an evaluation of the data presented to the ELJ. None of the witnesses had any advantage in terms of more personal knowledge than any other. However, even though the witnesses evaluated the same data, they came to different conclusions. In this case, the ELJ concludes that IDEM's witnesses are more credible, in Mr. Aldred's case because of his education and because IDEM's witnesses lack any economic motive that might influence their testimony. Under I.C. §13-23-8-8(a), ELTF reimbursement is capped at 2.5 million dollars for each release.¹⁴ The ELJ believes, relying on her experience and specialized

⁹ IDEM's Exhibit 2.

¹⁰ Petitioner's Exhibit 3, page 2 of 3, Conclusion.

¹¹ Petitioner's Exhibit 3, page 3 of 3.

¹² Petitioner's Exhibit 3, page 2 of 3.

¹³ Ms. McDonald has a bachelor's degree in Environmental Health Science.

¹⁴ Under I.C. §13-23-8, a deductible must be paid for each release. However, the deductible does not exceed \$35,000.

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knowledge¹⁵ that it is reasonable to infer that Petitioner may benefit in reporting a new release in order to get additional reimbursement from the ELTF.

7. An examination of the evidence supports the conclusions reached by IDEM's witnesses on each of the points raised in the NFA Letter.
8. The Petitioner argues that IDEM's comment that the soil was below Residential Exposure Levels was incorrect based on Ms. McDonald's belief that IDEM incorrectly used the RISC guidance instead of the RCG. As the NFA Letter explicitly references the Remediation Closure Guide, there is insufficient evidence to conclude that IDEM used any guidance other than the RCG.
9. The Petitioner argues that IDEM was inconsistent in its approach to sites with free product and points to the Rossville Site. However, the only commonality between the 2 sites was the discovery of free product. Even then, although free product was found on both sites, one particular difference was that free product had been found on several occasions on this Site whereas it had not previously been detected on the Rossville Site. Considering the emphasis placed on the detection of free product by both parties during the hearing, this is a significant difference between the Rossville Site and this Site. There was no evidence presented regarding the geology of the Rossville Site - for example whether the bedrock was fractured or otherwise similar in depth and/or composition. Nor was any evidence produced of any other similarity that would require IDEM to treat the 2 sites the same. Therefore, there is no evidence that IDEM treated similar sites differently or applied its guidance inconsistently.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED judgment is entered in favor of the Indiana Department of Environmental Management. The Petition for Review is dismissed.

You are further notified that pursuant to provisions of Ind. Code (I.C.) § 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 I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 2nd day of November, 2018 in Indianapolis, IN.

¹⁵ I.C. §4-21.5-3-27(c).

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Hon. Catherine Gibbs
Environmental Law Judge