

**Indiana Department of Environmental Management v.  
Carson Stripping, Inc. and Carson Laser, Inc.  
2004 OEA 14 (03-S-E-3094)**

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**TOPICS:**

notice of violation  
order of the Commissioner  
civil penalty policy  
base penalty  
penalty adjustment  
economic benefit  
summary judgment  
not appear at oral argument  
hazardous waste  
solid waste  
walnut shell dust  
paint chips  
waste materials  
improper management  
improper disposal  
site assessment  
site closure

**PRESIDING JUDGE:**

Davidsen

**PARTY REPRESENTATIVES:**

Respondent: pro se  
IDEM: Joseph Merrick

**ORDER ISSUED:**

April 29, 2004

**INDEX CATEGORY:**

Enforcement

**FURTHER CASE ACTIVITY:**

[none]

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

IN THE MATTER OF:                    )  
  )  
COMMISSIONER, INDIANA DEPARTMENT    )        CAUSE NO. 03-S-E-3094  
OF ENVIRONMENTAL MANAGEMENT        )  
  )  
      Complainant,                    )  
  )  
              vs.                         )  
  )  
CARSON STRIPPING INC. and CARSON        )  
LASER, INC.,                                )  
  )  
      Respondents.                    )

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL  
ORDER ON PENALTY ISSUES**

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) pursuant to a timely Petition for Administrative Review (“Petition”) and Amended Petition for Administrative Review (“Amended Petition”) filed by Respondents Carson Stripping Inc. and Carson Laser Inc. regarding the Notice and Order of the Commissioner (“CO”) of the Indiana Department of Environmental Management (“IDEM”).

On March 26, 2004, an evidentiary hearing was held on the civil penalty set forth in the CO. The Respondents did not attend the hearing, and in their absence the Commissioner submitted evidence in support of the civil penalty.

The Chief Environmental Law Judge (“Chief ELJ”), having read and considered the CO, the Respondent’s Petitions, the record of proceeding, and evidence, now finds that the Commissioner has met her required burden of proof by a preponderance of the evidence to support the civil penalty imposed on Carson Stripping Inc. and Carson Laser Inc. in the CO.

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Judgment may be made on the record. The Chief ELJ now makes the following findings of fact and conclusions of law, and enters the following Order with respect to the Petition and Amended Petition of the Respondents:

**Statement of the Procedural Findings of Fact**

1. On March 25, 2002, IDEM issued a Notice of Violation (“NOV”) to Carson Stripping Inc. citing the Respondent for, among other violations, failing to make hazardous waste determinations for waste materials generated at the Respondents’ facility, improper management of hazardous wastes, and improper disposal of hazardous wastes, in violation of Indiana hazardous waste statutes and rules. On September 17, 2002, IDEM issued an Amended NOV to name both Carson Stripping Inc. and Carson Laser Inc. as Respondents.
2. Respondents and IDEM failed to settle the violations stated in the Amended NOV. On May 19, 2003, the Commissioner of IDEM issued the CO to Carson Stripping Inc. and Carson Laser Inc., specifying violations of Indiana’s solid and hazardous waste statutes and rules, requiring Respondents to perform site assessment and site closure, and assessing a civil penalty.
3. More than sixty (60) days passed between the issuance of the Amended NOV and the issuance of the CO.
4. On or about June 9, 2003, Respondents timely filed a Petition for Administrative Review of the Commissioner’s CO; Respondents’ Petition was assigned OEA Cause No. 03-S-E-3094.
5. On or about August 11, 2003, per the Court’s directive, Carson Stripping Inc. and Carson Laser Inc. filed an Amended Petition for Administrative Review with the Court.

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6. Pursuant to the Case Management Order of July 18, 2003, the parties were to conduct discovery and submit dispositive motions. The parties exchanged written discovery.
7. On December 19, 2003, the Commissioner filed a Motion for Partial Summary Judgment. Carson Stripping Inc. and Carson Laser Inc. did not file a responsive pleading or designate evidence in opposition to the motion.
8. Pursuant to the Court's scheduling order of December 31, 2003, which was sent to the Respondents at the mailing address they provided to the Court, oral argument on the Commissioner's Motion for Partial Summary Judgment was held on February 5, 2004 at 10:30 a.m. at the Office of Environmental Adjudication. The Respondents did not appear at the scheduled time for oral argument. The Respondents did not contact the Court or counsel for the Commissioner in advance of the scheduled oral argument to request a continuance, nor did they contact the Court after February 5, 2004.
9. On February 9, 2004, the Court issued Findings of Fact, Conclusions of Law, and a Final Order granting the Commissioner's Motion for Partial Summary Judgment as to all issues raised in the Commissioner's motion. Specifically, the Court found, among other points, that: 1) the walnut shell dust and paint chips found on the ground and in trailers and dumpsters at the site were hazardous wastes because they were solid wastes that had been mixed with a hazardous waste; and 2) Respondents violated numerous Indiana hazardous waste statutes and rules regarding identification, management, and disposal of hazardous waste, as set forth in the Findings of Violation in the CO.
10. The February 9, 2004 Final Order scheduled an evidentiary hearing for March 26, 2004 to adjudicate the Respondents' challenge to the civil penalty set forth in the CO. The February 9, 2004 Final Order also set a deadline of March 8, 2004 to file final witness

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and exhibit lists with the Court. The Court sent the February 9, 2004 Final Order to the Respondents at the mailing address they had provided to the Court.

11. The Respondents did not seek judicial review of the February 9, 2004 Findings of Fact, Conclusions of Law, and Final Order.
12. Carson Stripping Inc. and Carson Laser Inc. did not submit final witness and exhibit lists with the Court by the March 8, 2004 deadline.
13. On March 26, 2004, an evidentiary hearing was held at 10:00 a.m. at the Office of Environmental Adjudication on civil penalty issues. The Respondents did not appear at the scheduled time for the hearing. The Respondents did not contact the Court or counsel for the Commissioner in advance of the scheduled evidentiary hearing to request a continuance, nor did they contact the Court at any time during or after the evidentiary hearing (which was commenced approximately twenty minutes after its scheduled time in case Respondents had unavoidable transportation delays.) The Commissioner presented evidence in support of her penalty calculations.

**Findings of Fact**

1. At all times relevant to this case, Carson Stripping Inc. was in the business of stripping paint from metal and plastic parts.
2. At all times relevant to this case, Carson Laser Incorporated's business included maintaining instruments for the medical industry.
3. Both Respondents operated out of a facility at 2785 East State Road 32, Winchester, in Randolph County, Indiana ("the Site").
4. The Court hereby incorporates Findings of Fact four (4) through fifty-four (54) from the Court's February 9, 2004 Findings of Fact, Conclusions of Law, and Final Order

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Granting the Commissioner's Motion for Partial Summary Judgment and Scheduling a Final Hearing.

5. At the March 26, 2004 evidentiary hearing, the Court heard testimony from Richard Milton, an Environmental Manager employed by IDEM's Office of Enforcement, Hazardous Waste Section.
6. Mr. Milton, in the course of his duties, reviewed the information gathered by IDEM staff concerning Respondents and calculated the penalty set forth in the Commissioner's Order.
7. In addition to abiding by statutory maximums for civil penalty calculation, IDEM, in its discretion, may choose for purposes of settlement or commissioner's order assessments to calculate penalties using a Civil Penalty Policy ("the Policy"). The Policy was admitted into evidence at the hearing as Exhibit 3.
8. The Policy is a non-rule policy document published at 22 Ind. Reg. 2710 (May 1, 1999) in accordance with Ind. Code § 4-22-7-7, meaning that it does not have the force of law, and IDEM uses the Policy as a guidance document to ensure that penalty calculations are consistent and reasonable.
9. The Policy is available to the public on IDEM's website, and the public can also contact the Office of Enforcement to request a copy.
10. Pursuant to the policy, when a case presents violations of several statutory and rule requirements, IDEM may group together violations that do not result from independent acts or compliance problems and/or are indistinguishable from each other.

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11. In every case in which the Policy is used to calculate a penalty, a case manager in IDEM's Office of Enforcement begins by establishing a base civil penalty, which is dependent upon two factors: 1) the degree to which the respondent deviated from statutory or rule requirements; and 2) potential for harm caused by the violation.
12. The case manager assigns a degree of minor, moderate, or major to both the extent of deviation and to the potential for harm, based upon the guidelines set forth in pages 3-4 in the Policy.
13. Once the degree has been established for both factors, the case manager turns to a matrix on pages 4-5 in the policy, which provides a range of penalty amounts in individual cells depending upon how the degrees for extent of deviation and potential for harm intersect on the matrix.
14. The case manager must select the base penalty from the cell where the degrees for extent of deviation and potential from harm intersect, but has discretion in choosing a number from within the cell.
15. In choosing a penalty amount from within a matrix cell, the case manager may only consider the seriousness of the violation and the extent of deviation, based upon the individual circumstances of each case.
16. After calculating a base penalty, the case manager considers the number of days during which the violations continued, and may impose the same base penalty for each day of violation.
17. After the base penalty has been calculated, the case manager considers adjustment factors or circumstances that may raise or lower the penalty. These circumstances include, but are not limited to, activity by the respondent before the violation, activity

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- by the respondent after the violation, whether the respondent has a history of noncompliance, whether the respondent is able to pay the penalty, and whether IDEM has incurred enforcement costs.
18. Pursuant to the Policy, IDEM can only consider whether a respondent is unable to pay a calculated penalty if the respondent provides sufficient documentation demonstrating the existence and extent of its inability to pay the assessed civil penalty.
  19. In addition to considering penalty adjustment factors, the case manager determines whether the respondent received an economic benefit from noncompliance. A respondent may obtain an economic benefit by, for example, delaying required expenditures or by avoiding costs that would have been incurred if the respondent had complied with the statute or rule at issue.
  20. In this case, IDEM calculated a civil penalty for the statutory and rule violations set forth in paragraphs fifteen (15) through twenty-four (24) of the Findings of Violation in the CO.
  21. IDEM grouped together the Respondents' violations of 40 CFR 262.20, Ind. Code § 13-30-2-1(12), 40 CFR 262.12(c), and 40 CFR 268.7(a) for the purpose of penalty calculation, thereby treating them as one violation. These violations are set forth in paragraphs sixteen (16) through eighteen (18) of the CO's Findings of Violation. Mr. Milton testified that these violations were not independent of one another, and consequently he grouped them together in keeping with the Policy. The grouping together of these violations was consistent with IDEM's practices in similar cases.



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22. IDEM also grouped together the Respondents' violations of 40 CFR 262.34 and 40 CFR 264.1 for the purpose of penalty calculation, thereby treating them as one violation. These violations are set forth in paragraphs nineteen (19) and twenty (20) of the CO's Findings of Violation. Mr. Milton testified that these violations were not independent of one another, and consequently he grouped them together in keeping with the Policy. The grouping together of these violations was consistent with IDEM's practices in similar cases.
23. IDEM also grouped together the Respondents' violations of Ind. Code § 13-30-2-1(10), 40 CFR 270.1, and 329 IAC 3.1-1-10 for the purpose of penalty calculation, thereby treating them as one violation. These violations are set forth in paragraphs twenty-one (21) and twenty-two (22) of the CO's Findings of Violation. Mr. Milton testified that these violations were not independent of one another, and consequently he grouped them together in keeping with the Policy. The grouping together of these violations was consistent with IDEM's practices in similar cases.
24. IDEM also grouped together the Respondents' violations of 40 CFR 262.34(a)(4) and Ind. Code § 13-30-2-1 for the purpose of penalty calculation, thereby treating them as one violation. These violations are set forth in paragraphs twenty-three (23) and twenty-four (24) of the CO's Findings of Violation. Mr. Milton testified that these violations were not independent of one another, and consequently he grouped them together in keeping with the Policy.
25. For the violation of 40 CFR 262.11 (paragraph 15 of the CO's Findings of Violation), and for all of the penalties to which Mr. Milton testified and which are stated in this Order, Mr. Milton reviewed the Respondents' operating practices and information

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- gathered by IDEM's staff during inspections and thus determined that the extent of deviation from the rule and potential for harm were both major. He chose \$25,000 as the base civil penalty for the violation from the appropriate matrix cell. Mr. Milton chose the high end of the range in the cell based on the individual circumstances of the case. He considered the seriousness of the violation and the extent of deviation in determining that a higher base penalty was appropriate.
26. For the violations of 40 CFR 262.20, Ind. Code § 13-30-2-1(12), 40 CFR 262.12(c), and 40 CFR 268.7(a) (paragraphs 16-18 of the CO's Findings of Violation), Mr. Milton determined that the extent of deviation from the rule and potential for harm were both major. He selected \$22,500 as the base civil penalty for the violation in the appropriate matrix cell. Mr. Milton chose the midpoint of the range in the cell based on the individual circumstances of the case. He considered the seriousness of the violation and the extent of deviation in determining that penalty was appropriate.
27. For the violations of 40 CFR 262.34 and 40 CFR 264.1(b) (paragraphs 19 and 20 of the CO's Findings of Violation), Mr. Milton determined that extent of deviation from the rule and potential for harm were both major. He chose \$25,000 as the base civil penalty for the violation from the appropriate matrix cell. Mr. Milton chose the high end of the range in the cell based on the individual circumstances of the case. He considered the seriousness of the violation and the extent of deviation in determining that a higher base penalty was appropriate.
28. For the violations of Ind. Code § 13-30-2-1(10), 40 CFR 270.1(c), and 329 IAC 3.1 - 1-10 (paragraphs 21 and 22 in the CO's Findings of Violation), Mr. Milton determined that the potential for harm was minor and the extent of deviation was

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- major. He selected \$4,250 as the base civil penalty for the violation in the appropriate matrix cell. Mr. Milton chose the midpoint of the range in the cell based on the individual circumstances of the case. He considered the seriousness of the violation and the extent of deviation in determining that penalty was appropriate.
29. For the violations of 40 CFR 262.34(a)(4) referencing 40 CFR 265.31 and Ind. Code § 13-30-2-1(1) (paragraphs 23 and 24 in the CO's Findings of Violation), Mr. Milton determined that extent of deviation from the rule and potential for harm were both major. He chose \$25,000 as the base civil penalty for the violation from the appropriate matrix cell. Mr. Milton chose the high end of the range in the cell based on the individual circumstances of the case. He considered the seriousness of the violation and the extent of deviation in determining that a higher base penalty was appropriate.
30. For each violation or group of violations, the case manager's selection of the degree of extent of deviation and potential for harm was consistent with determinations in other similarly situated hazardous waste cases.
31. For each violation, Mr. Milton calculated the penalty based on one violation day. Because each violation occurred repeatedly over the course of a year and a half, he could have repeated the base penalties across hundreds of violation days, thereby increasing the base penalty exponentially. Mr. Milton chose only one violation day for each violation because otherwise the penalty would have been unreasonably high.
32. For each violation, Mr. Milton considered the adjustment factors set forth in paragraph seventeen (17) above. None of those factors warranted an upward or downward adjustment of the base penalty for any of the violations.

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33. The sum total of all of the base penalties for the violations is \$101,750.
34. Mr. Milton calculated that the Respondents had obtained an economic benefit by sending their hazardous waste to a solid waste landfill rather than to a more-expensive hazardous waste landfill (the violation of 40 CFR 262.12(c)). Mr. Milton calculated the economic benefit by estimating how much hazardous waste was illegally disposed of at a solid waste landfill, calculating how much it would have cost to dispose of that hazardous waste at a properly-permitted hazardous waste landfill, and subtracting from that figure the Respondent's actual expenditures to inappropriately dispose of the hazardous waste. The calculation is attached to this document as Attachment A, which is consisted with the calculation Mr. Milton demonstrated on Ex. 6 at the hearing, and is incorporated into this Order.
35. The amount of the Respondents' economic benefit was \$104,856.
36. IDEM is not claiming economic benefit for any other violation cited in the Commissioner's Order.
37. When the base penalty amount is added to the economic benefit calculation, the total civil penalty imposed by IDEM upon the Respondents is \$206,606.
38. IDEM was unable to determine whether the Respondents are unable to pay the civil penalties for the violations because the Respondents did not submit any documents demonstrating the existence and extent of their inability to pay the assessed penalty. The Court further reviewed Respondents' assertions in documents that the NOV was going to drive Respondents out of business, but finds that there were insufficient facts provided by Respondents and by IDEM to support a finding that Respondents are unable to pay the civil penalties for the violations.

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39. 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.

**Conclusions of Law**

Based on the foregoing Findings of Fact and Statement of the Case, the Court concludes, as a matter of law:

1. The Indiana Office of Environmental Adjudication has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-3-23.
2. The Court hereby incorporates Conclusions of Law three (3) through forty-two (42) from the Court's February 9, 2004 Findings of Fact, Conclusions of Law, and Final Order Granting the Commissioner's Motion for Partial Summary Judgment and Scheduling a Final Hearing.
3. Pursuant to Ind. Code § 13-30-4-1, the Commissioner of IDEM may assess penalties for any violations of any environmental management laws, or a rule or standard adopted by one of the boards, so long as the penalty does not exceed \$25,000 per day per violation.
4. IDEM's penalty calculation is in compliance with Ind. Code § 13-30-4-1 because the calculation did not exceed the limits contained therein.
5. IDEM's civil penalty policy is a reasonable means of determining the civil penalty because it allows for predictable, consistent and fair calculation of penalties. Cf. Ind. Dep't of Env'tl Mgmt. v. Schnippel Construction, Inc., 778 N.E.2d 407, 416 (Ind. Ct. App. 2002), trans. den. (affirming an administrative law judge's penalty calculation because the calculation was based on IDEM's written penalty policy).

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6. The penalties imposed in this case for each violation were calculated in accordance with the Policy and were supported by the evidence presented by IDEM.
7. The base penalty calculations were not arbitrary and capricious, but were instead in compliance with the Policy, thereby ensuring that IDEM's penalty calculation was consistent with similar cases.
8. The case manager used a reasonable method to calculate the Respondent's economic benefit from noncompliance, and the amount of the economic benefit calculation is not arbitrary and capricious.
9. Consequently, the total penalty amount of \$206,606 is not arbitrary and capricious.
10. The CO contains site assessment and site closure requirements. The Respondents did not challenge those requirements in their original Petition for Review or Amended Petition for Review. Consequently, those issues were not raised before this Court for adjudication. See 315 IAC 1-3-2(b)(4) (requiring a petition for review to state "with particularity the legal issues proposed for consideration in the proceedings").

**ORDER**

AND THE COURT, being duly advised, hereby ORDERS, ADJUDGES AND DECREES that Respondents Carson Stripping Incorporated and Carson Laser Incorporated shall pay a civil penalty in the amount of \$206,606, to be remitted to the Indiana Department of Environmental Management within thirty (30) days of the effective date of this Order. Checks shall be made payable to the Environmental Management Special Fund, with the Case Number indicated on the check and mailed to: Cashier, IDEM, 100 North Senate Avenue, P.O. Box 6015, Indianapolis, IN 46206-6015.

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It is further ORDERED that the Respondents comply with the other requirements set forth in the "ORDER" portion of the CO. All deadlines in the CO that were effective thirty (30) days after the effective date of the CO will now take effect thirty (30) days after the effective date of this Order.

You are advised that, pursuant to Indiana Code § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana 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 HEREBY ORDERED this 29th day of April, 2004 in Indianapolis, Indiana.

Hon. Mary L. Davidsen  
Chief Environmental Law Judge  
Office of Environmental Adjudication

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**Attachment A**  
Economic Benefit Calculation

1. Weight of Hazardous Waste Generated per Week

According to Gary Fine of Bestway (waste hauler for Carson Stripping and Carson Laser), Bestway picked up three (3) 6-cubic yard containers of mixed office waste and paint chips each week. This container was usually 1/2 to 3/4 full and was estimated to weigh 250lbs.  
(250lbs.x3= 750lbs/week)

Bestway also picked up two (2) 2-cubic yard containers of waste walnut shell dust each week. This container was estimated to weigh 500lbs.  
(500lbs.x2=1000lbs/wk)

Thus, one week's worth of hazardous waste weighed approximately 1,750lbs.

2. Number of Weeks of Improper Disposal of Hazardous Waste

The last properly manifested shipment of hazardous waste from Carson Stripping and Carson Laser was on 1/25/99. Carson Stripping and Carson resumed hazardous waste manifesting after October 2001. The record contains two (2) hazardous waste manifests from Carson Stripping and Carson Laser after 10/1/2002. They are for 75,523 lbs. of F002-listed hazardous waste.

Estimated time of improper waste hauling:

2/1/1999 to 2/1/2000 = 52 weeks

2/1/2000 to 2/1/2001 = 52 weeks

2/1/2001 to 10/1/2001 = 32 weeks

Total                            136 weeks x 1,750 lbs. of hazardous waste per week = 238,000 lbs. HzW

3. Cost of Proper Disposal of Hazardous Waste

Estimated cost of HzW disposal = \$0.50/lb

238,000 x .50 = \$119,000

4. Disposal Costs Actually Paid by Respondents

During the time when Carson Stripping and Carson Laser were not properly manifesting the hazardous waste, they paid a solid waste hauling fee of \$104/week to Bestway  
\$104/week x 136 weeks = \$14,144 in solid waste disposal costs

5. Total

\$119,000 (amount the Respondents should have paid)

- \$14,144 (amount the Respondents actually paid)

\$104,856 = economic benefit to Carson for improper hazardous waste disposal.